McCLAIN'S

ANNOTATED CODE AND STATUTES

OF THE

STATE OF IOWA,

SHOWING THE

GENERAL STATUTES IN FORCE JULY 4, 1888,

EMBRACING

THE CODE OF 1873 AS AMENDED, AND ALL PERMANENT, GENERAL AND PUBLIC ACTS OF THE GENERAL ASSEMBLY PASSED SINCE THE ADOPTION OF THAT CODE, WITH A DIGEST UNDER EACH SECTION, OF THE DECISIONS RELATING THERETO.

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VOLUME I.

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PREFACE.

The aim of this work is to present the general statutory law of Iowa, consisting of the Code of 1873, as amended, and all subsequent acts of a general, public and permanent nature, so as to show the whole body of the general statutory law of Iowa as it now exists, together with a digest under each section of the decisions of the courts construing or applying it. The work as now published is substantially a new edition of "McClain's Annotated Statutes" of 1880, the change in title being made to plainly indicate the fact that the Code now in force is the basis of the compilation, the various statutes being incorporated with it in a uniform and methodical arrangement. The form and appearance of the page have been changed by transferring the marginal notes, as they are found in the Code and in the first edition of this work, to the beginning of the sections, and abbreviating them when necessary, so that they appear as catch-words, being printed in bold-faced type. This change, together with the use of larger type for the text of the statutory matter, renders the page plainer and more pleasant to the eye.

The large addition of new matter in some parts from the insertion of statutes passed since the enactment of the Code has rendered references by the original Code sections quite inadequate. Therefore, all the sections in this work, both of the Code and of the statutes, are numbered consecutively from first to last in bold-faced figures preceding the catch-words. All cross-references in the small type notes are to these sections, and when in the text a reference is made to a section of the Code or of a statute, it is followed, in brackets, with the number of the section in this compilation.

At the beginning of the section proper, after the catch-word, is given in ordinary figures the number of the section if it is a part of the Code, or a reference to the General Assembly, chapter and section, if it is a part of a subsequent statute. Where the section has been changed by subsequent enactments, the statutes by which such changes are made are referred to in their order, and the section is printed as thus changed.

In order, however, to make it easy to find sections of the Code from reference to their original numbers, such numbers are given at the top of each page, showing the sections of the Code on that page, and as these sections are retained in their order, it is easy to find any section referred to by its Code number.

The marginal references in the former edition to corresponding sections of the Revision and the Code of 1851 and the statutes prior to the present Code are in this edition printed at the end of the section in brackets. These references are of no importance in determining what the law now is, but are of value as showing what previous legislation there has been of the same character and when similar provisions were first enacted.

When the first edition of this work was published in 1880, a careful comparison was made between the Code as printed by the authority of the state and the original rolls thereof, duly authenticated and preserved in the office of the secretary of state. As a result of this examination a considerable number of discrepancies were found. Where these are material, and not merely such verbal changes as the editor under whose direction the Code was published was authorized to make, the text of the Code has been changed in this work to correspond with the rolls in the secretary's office; but no changes of this kind have been made without attention being called thereto by a note in brackets immediately following the section changed.

All amendments of sections of the Code or statutes are incorporated into the text, and the Code and statutes as thus given in this work represent the body of the statutory law as it stood July 4, 1888, when the acts of the last General Assembly which had not previously gone into effect by reason of special publication clauses came in force, and as it will remain until changed by subsequent legislation.

The statute abolishing the circuit court and conferring all the jurisdiction and powers of that court and of the judges thereof upon the district court and judges, in addition to the jurisdiction and powers already possessed by the latter, rendered necessary quite extensive changes in the phraseology of existing statutes; but as such changes were not provided for by direct amendment it has not been deemed wise to make them arbitrarily. Such changes have been indicated by inserting in brackets the words which should be substituted or omitted in order to make the statute conform to the present system of courts. In the same way the general and uniform change from district to county attorney is indicated by inserting in brackets the word which should be substituted to carry out the change intended.

In the insertion of statutes the merely formal parts, such as the title and the enacting clause, are omitted. Publication clauses are also omitted; but a table is given at the end of the work, preceding the index, showing where each act of a public nature passed since the enactment of the Code is inserted in this work, and in this table the title of each act and the date of its taking effect, whether by publication or otherwise, is given, so that these matters are made readily accessible in such few cases as they may be of importance, without cumbering the body of the book with them.

The notes of decisions are much more extensive than in the former edition. This is mainly due to the great number of cases decided in the eight years since the first edition which relate to statutes. But the increase is partially due also to the fact that the notes are given a somewhat wider scope so as to include all cases upon questions which are regulated by statute. The recent preparation, by the author, of a complete Iowa digest has enabled him to bring together all the cases on such questions more completely than was practicable from an examination of the opinions of the court for the sole purpose of these annotations.

All decisions of the supreme court of Iowa prior to July, 1888, and all decisions of the federal courts in Iowa, or appealed from Iowa, have been examined in compiling these annotations. The plan has been, first, to collect under each section all the cases pertinent thereto, and, secondly, to state clearly the very point, or points, decided in each case. The notes are, as far as possible,

so arranged as to form a connected, consistent and distinct enunciation of the principles embodied in the decisions, and when the cases are numerous and relate to different subjects they are arranged under appropriate headings.

It is desirable that the purpose of these notes of decision shall not be misunderstood. They are intended as a guide to the cases, not a substitute for them. They are made full in their statements so that they shall show what cases of many which may be cited under any particular section relate to the point under investigation, but when a case is found in point the opinion itself should be read to understand its full meaning. The aim has been to make the notes accurate and reliable, but it is not possible in any brief note to state fully the opinion of the court in a case with all its limitations and bearings.

Among other preliminary matter at the beginning of the work are given tables of corresponding sections, showing where each section of the Code of 1851, the Revision, and the session laws subsequent to the Revision and prior to the Code of 1873, if still retained, or if not, then where the corresponding provision, if any, is to be found in the Code of 1873. This table, making it possible to trace any prior statutory provision to its present form, and the corresponding references at the end of each section of the Code to the previous statutes, will be found to greatly facilitate the investigation of the history of the legislation on any particular question.

At the end of the work will be found a comprehensive index to the text, including Code, subsequent acts, and State Constitution, in which are also given full references to points stated in the notes, so far as they are not covered by the references to the sections under which they are placed. This index has been prepared with great care, in view of the well known importance of such a feature in a work of this kind, and upon a different plan from that adopted in the state edition; and it is hoped that by greatly increasing the number of cross-references, and by combining in one index the references to statutes and notes, all parts of the work have been rendered readily accessible.

In the preparation of this edition and revision, involving the incorporation of a far larger body of new matter than was necessary in preparing the first edition from the Code, the author has labored earnestly and carefully to make the work accurate and complete. If it meets with as cordial recognition as has been accorded to the first edition, and proves in some respects an improvement over that, he will feel that he is amply rewarded.

STATE UNIVERSITY OF IOWA,
Iowa City, October, 1888.

TABLES OF CORRESPONDING SECTIONS.

[In these tables an asterisk (*) indicates that the section or sections following it take the place of, but do not properly correspond to, the ones opposite which they are placed.]

CODE OF 1851.

The following table gives, in the first column, consecutively, the numbers of the sections of the Code of 1851, and in the second, the corresponding sections of the Code of 1873:

CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.
1-3	1-3	88-92	Omitted.	245	603	356	704, 706
4-6	5-7	93	279	246-256	606-616	357	707
7, 8	8, 9	94	Omitted.	257	617, 605	358	702
9	11	95	280	258-262	619-623	359, 360	708 709
10	10	96	589	263	627	361	702, 705
11	12	97	Omitted.	264-266	624-626	362	714
12	14	98-102	Omitted.	267-269	628-630	363-365	710-712
13	16	103-140	Omitted.	270-273	634-638	366	Omitted.
14	15	141, 142	193, 194	274	Omitted	367	713
15	16	143	Omitted	275-278	639-642	368-394	718-744
16-22	28-34	144, 145	196, 197	279	Omitted.	395	Omitt d.
23-25	Omitted.	146, 147	Omitted.	280	*641	396	745
26	45	148	203	281, 282	643, 644	397-401	746-750
27-33	46-52	149	Omitted.	283, 284	645	402	Omitted.
34	Omitted.	150	235	285-294	649-658	403, 404	751, 752
35, 36	53, 54	151	Omitted.	295	3827	405, 406	754, 755
37	3755	152-156	327-331	296 300	T. 5, ch. 3	407	753
38, 39	See Const.	157, 158	*913	301-312	659-669	408-410	756-758
40, 41	59, 60	159-161	332-334	313-315	Omitted.	411-413	766-768
42	3756	162	Omitted.	316	632	414	766
43, 44	61, 62	163-169	*205-207	317	*633	415-417	769-771
45	*121	170-178	337-345	318	Omitted.	418, 419	773
46	35, 36	179	347	319-322	670-673	420-422	774-776
47	35	180-182	Omitted.	323, 224	674	423	Omitted.
48	63	183-202	349-368	325	677	424-427	777-780
49	3757	203-206	369-372	326, 327	678	428	Omitted.
50-58	66-74	207-210	374-377	328, 329	679	429, 430	781, 782
59	*132	211-218	Omitted.	330	680	431-435	789
60	*121	219	379	331	675	436	783
61	3758	220	381	332	*676	437, 438	Omitted.
62-68	75-81	221	389	333	682	439-441	785-787
69	*132	222	*391	334	685, 686	442, 443	Omitted.
70	Omitted.	223-230	392-399	335-338	687-690	444	788
71-77	T. 3, ch. 13	231-233	385-387	339, 340	692, 693	445-453	*1885-1889
78	258	234	Omitted.	341	692	454, 455	796, 797
79	262	235	388	342-346	694-698	456-459	801-804
80	259	236	Omitted.	347	699, 700	460	812
81	263	237-240	*573-591	348	700	461	805
82	3668	241	784	349, 350	699	462	808-810
83	259	242	Omitted.	351, 352	703, 704	463, 464	806, 807
84	*277, *1955	243	595	353, 354	701, 702	465-469	812-816
85-87	264-266	244	Omitted.	355	705	470	Omitted.

CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.	CODE OF '51.	CODE OF '73.
471	*821, 822	580	*987	842	1380	1088	1583
472	Omitted.	581	Omitted.	843	Omitted.	1089–1107	Omitted.
473	*821	582, 583	990, 991	844	1381	1108	1716
474, 475	*824	584	Omitted.	845, 846	Omitted.	1109, 1110	Omitted.
476, 477	Omitted.	585	992	847	1382	1111	1719
478	825	586	991	848–850	4715–4717	1112	*1720
479	Omitted.	587	989	851	4720	1113	1752
480	*833	588	*984	852	*4721	1114, 1115	1717
481, 482	*834	589–593	Omitted.	853	Omitted.	1116	Omitted.
483	*836	594	993	854	4720	1117	*1724
484	*832	595–612	Omitted.	855, 856	4521	1118	Omitted.
485	839	613–620	*111–119	857–875	*2272–2279	1119	*1731
486	837	621–631	*1038–1057	876–893	T. 11, ch. 5	1120	*1752
487	843	632–634	*559	894	*1447	1121	1722
488	845	635, 636	*560	895–912	1489–1506	1122, 1123	1739
489	854	637	561	913, 914	1448, 1449	1124	*1753
490	*329	638–642	*426–429	915–919	Omitted.	1125, 1126	1740, 1741
491	851	643–647	*440–446	920–922	1479–1481	1127	1745
492, 493	857, 858	648	Omitted.	923	3809	1128	1743
494	860	649–672	T. 4, ch. 10	924–928	T. 11, ch. 6	1129	1742
495	865	673–680	1058–1065	929	1554	1130–1135	*1777–1780
496	871	681	1069	930, 931	1540	1136–1140	1745–1749
497	866	682, 683	1066, 1067	932	Omitted.	1141	1751
498	872	684, 685	1076, 1077	933	1543	1142	1753
499	*875, 877	686–688	1071–1073	934	Omitted.	1143	1793
500	881	689	1068	935	1543	1144	1731
501	876	690, 691	1074, 1075	936	Omitted.	1145	Omitted.
502	878	692–694	1078–1080	937	*2037–2048	1146, 1147	1732, 1733
503	*887, 895–897	695–698	1082–1085	938	2043	1148	1766
504	895	699	1081	939	2050	1149	1733
505	890	700–702	1086–1088	940	2048, 2049	1150	*1722
506–508	Omitted.	703	Omitted.	941	*2053	1151	Omitted.
509	899	704	1089	942	*2060	1152–1154	*1777–1780
510	906	705–707	Omitted.	943, 944	2075, 2076	1155–1157	Omitted.
511, 512	907	708–711	1091–1094	945, 946	2077, 2078	1158	3370
513	*914	712–717	1011–1016	947–952	2082–2087	1159–1178	Omitted.
514, 515	920, 921	718	1032	953–955	2089–2091	1179–1185	Omitted.
516	921	719	1017	956	2088	1186–1189	Omitted.
517, 518	1001–1002	720	1019	957	2093	1190	Omitted.
519, 520	Omitted.	721	1018	958	2103	1191	1920
521	923	722, 723	1020–1021	959–964	2097–2102	1192	Omitted.
522	Omitted.	724	1009	965	2096	1193–1196	1923–1926
523	924	725	Omitted.	966–969	2104–2107	1197, 1198	Omitted.
524	935	726	1003	970–973	2108–2111	1199–1205	1928–1934
525–533	925–933	727	Omitted.	974–976	2112–2114	1206	1939
534	*3824	728–730	1006–1008	977, 978	2115, 2116	1207	1935
535, 536	934	731	1022	879, 980	277, 278	1208	2014
537	941	732	1020–1021	981	2130, 2139	1209	2015
538	940	733	Om. *1026	982	2144	1210	1927, 1938
539	942	734	1010	983	Omitted.	1211–1216	1941–1946
540, 541	943	735–747	Omitted.	984	*2529, ¶ 2	1217	1955
542	940	748–753	1023–1028	985, 986	*2510	1218	1956
543	944	754–756	Omitted.	987–1004	Omitted.	1219	1958
544	3824	757, 758	1029–1030	1005–1007	*2133	1220, 1221	1959
545–547	945–947	759–769	1269	1008	Omitted.	1222, 1223	1960, 1961
548, 549	Omitted.	770–779	Omitted.	1009	2129	1224, 1225	1964, 1965
550	947	780–785	1324–1329	1010	*2130	1226	1969
551, 552	950	786	Omitted.	1011–1025	T. 12, ch. 2	1227–1230	3659–3662
553, 554	957, 958	787, 788	1330, 1331	1026–1043	Omitted.	1231	Omitted.
555	951	789–809	1333–1353	1044–1075	T. 12, ch. 12	1232	1970
556	955	810	Omitted.	1076	*580	1233–1236	1976–1979
557–566	Om. *958	811–817	1354–1360	1077	*674, 675, 678	1237, 1238	1980, 1981
567–569	*969	818	Omitted.	1078	1578	1239, 1240	1982, 1983
570	*975	819–823	1364–1368	1079, 1080	Omitted.	1241	1985
571, 572	Omitted.	824	Omitted.	1081	1577	1242	2772
573, 574	*972	825–828	1369–1372	1082	Omitted.	1243	1986
575	Omitted.	829–832	Omitted.	1083	1579	1244	Omitted.
576	*970	833–837	1373–1377	1084	Omitted.	1245–1248	1988–1991
577	994	838	*1363, 1365	1085	1579	1249	1992, 1993
578	*982	839, 840	1378, 1379	1086	1583	1250–1266	1994–2010
579	Omitted.	841	*1361, 1363	1087	3760	1267–1269	2011–2013

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1270-1271	2017, 2018	1447-1452	Omitted.	1638	238	1737	2635
1272, 1273	*2312	1453-1455	2212-2214	1639-1641	239-241	1738	2651
1274	2318	1456-1461	Omitted.	1642	231	1739	Omitted.
1275	2320	1462	2215	1643, 1644	241, 242	1740	2659
1276	*2321	1463-1470	2185-2192	1645	230	1741	2665
1277-1283	2322-2328	1471	*3787	1646	243	1742	*2712
1284-1287	2334-2337	1472-1479	2193-2200	1647	*232	1743	Omitted.
1288-1290	2329-2331	1480	2220	1648	Omitted.	1744-1748	*2669-2680
1291-1294	2338-2341	1481	2221, 2222	1649	245	1749	2731
1295	2343	1482	2223	1650	*2815	1750	2648
1296	2351	1483	2224	1651	*2824	1751	2631
1297	2353	1484	*2869, 2873	1652, 1653	2817, 2818	1752	Omitted.
1298	2344	1485, 1486	2229, 2230	1654	2829	1753	2719
1299	2333	1487-1490	2237-2240	1655	*3864	1754	*2649
1300	2342	1491, 1492	2241, 2242	1656-1658	2903-2905	1755	*2653
1301	45, ¶ 21	1493, 1494	2243	1659, 1660	2529, 2530	1756	2691
1302	Omitted.	1495	2244	1661	Omitted.	1757	2687
1303	*2347	1496	2246	1662-1670	2531-2539	1758	2686
1304, 1305	2345, 2346	1497	2248	1671-1674	Omitted.	1759	2689
1306	*2496	1498, 1499	2249, 2250	1675	Omitted.	1760	2735
1307, 1308	2348, 2349	1500-1508	2257-2265	1676	2543, 2544	1761, 1762	2747
1309, 1310	2368, 2369	1509	2251	1677	Omitted.	1763	2744
1311-1313	2351-2356	1510	2247	1678	2545	1764, 1767	2748, 2751
1314, 1315	Omitted.	1511	2252	1679, 1680	2548, 2549	1768	2746
1316-1319	2362-2365	1512-1514	2266-2268	1681, 1682	*2550	1769	Omitted.
1320-1324	2357-2361	1515	2256	1683	*2551	1770	2739
1325	2367	1516-1542	2280-2306	1684	*3228	1771	2654
1326, 1327	2406, 2407	1543	133-135	1685, 1686	*2572	1772	2740
1328-1331	2370-2376	1544	134	1687	2563	1773	2761
1332	2378	1545	Omitted.	1688, 1689	*2565, 2566	1774, 1775	2771, 2772
1333	2376	1546	149	1690, 1691	2553	1776	2778
1334	2379	1547	137	1692	2558	1777	2775
1335	2380	1548	138	1693	2552	1778	2799
1336, 1337	2382, 2383	1549	135	1694	2557	1779	2790
1338	Omitted.	1550	3206	1695-1697	2554-2556	1780	2792
1339-1356	2384-2401	1551	139	1698	*2561, 2525	1781	2791
1357, 1358	2366	1552	140	1699	2527	1782	2793
1359	2408	1553	141	1700	Omitted.	1783, 1784	2797, 2798
1360	*2411	1554	142	1701	2586	1785	2805
1361	*2408	1555	3163	1702	2589	1786, 1787	2808
1362	*2411	1556	3164	1703	{ *2580,	1788	2810
1363	Omitted.	1557	3166		{ 2576, 3225	1789	*2803, 2813
1364-1366	2413-2415	1558	3172	1704	2581	1790	2815
1367	Omitted.	1559	T. 3, ch. 4	1705	2585, 2613	1791, 1792	*2784-2789
1368-1386	2416-2434	1560, 1561	143	1706	2590	1793	2743
1387-1389	2435	1562	144	1707	2592	1794	2815
1390-1393	2436-2439	1563	Omitted.	1708	2591	1795	2824
1394	2440	1564	146, *583	1709-1712	2593-2596	1796	2819
1395	2441	1565	*146-149	1713	Omitted.	1797	Omitted.
1396-1403	2443-2450	1566	163	1714, 1715	2599	1798	2860
1404-1406	2451	1567, 1568	*165	1716	2600	1799, 1800	Omitted.
1407-1409	2452-2454	1569-1571	166	1717	2605	1801, 1802	2846, 2847
1410, 1411	2455-2457	1572	Omitted.	1718	2601	1803, 1804	2844
1412	Omitted.	1573-1575	173-175	1719	Omitted.	1805	*2831
1413	2458	1576	161	1720	*2602	1806, 1807	*2835
1414	2460	1577	176, *194	1721	2603	1808	2838
1415-1418	2465-2468	1578-1580	177-179	1722	Omitted.	1809	Omitted.
1419, 1420	2459	1581-1586	167-172	1723	2604	1810	2838
1421	2440	1587	187	1724	2608	1811	2933
1422, 1423	2469	1588	Omitted.	1725	2611	1812	Omitted.
1424-1427	2470-2473	1589-1591	*180	1726	2610, 2612	1813	2944
1428	2482	1592, 1593	188, 189	1727	2612	1814, 1815	2849
1429, 1430	2494, 2495	1594	*277	1728	Omitted.	1816	2853
1431	2475	1595-1597	190-192	1729	2614, 2615	1817	2866
1432	2474	1598-1608	3491-3501	1730, 1731	Omitted.	1818	2728
1433	2477	1609-1611	208	1732	{ *2603,	1819	2865
1434	2476	1612	210		{ 2609, 2620	1820	2855
1435-1437	2487-2489	1613	*208	1733	2644	1821, 1822	2861, *2818
1438-1441	2483-2486	1614-1629	211-226	1734	Omitted.	1823	2863
1442	2478	1630-1632	227-229	1735	*2648, 2720	1824	2869
1443-1446	2461-2464	1633-1637	234-238	1736	2646	1825	Omitted.

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1826, 1827	2870, 2871	1984, 1985	3190, 3191	2122	3435	2421–2426	3683–3688
1828–1830	2872	1986	3195	2123–2130	3437–3444	2427–2432	3697–3702
1831	2873	1987–1989	3192–3194	2131–2133	3331	2433	3706
1832	2872	1990–1993	3196–3199	2134–2144	3332–3342	2434, 2435	3708, 3709
1833	2874	1994–2001	*3225–3244	2145–2150	3368–3373	2436–2444	3711–3719
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	2				1287
	3, 4				1273
46		13	152		3788, 3789
49					Omitted.
51		14	115		Omitted.
52	2				580
	3				678
	4				1578
	5	12	162	2	1577
	6				Omitted.
	7				1581
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	12				3760
53					4047
54	1				*1675, 1693
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56	1				2065
	2	14	129		2066
56	3	14	129		2068
57		14	133		1807
59	1				*1585
	2				*1589
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	5				*1602
	6				*1586
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	12				*1592
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	15				*1588-1590
	16				*1594
	17				*1599
	18				*1601
60					303, ¶ 19
65					1447
66					82
68					3784
69					782
72					Omitted.
75					T. 25, ch. 56
76		12	100		
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	2				*983
79					797
84	1				1038
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	25				1057
	27				Omitted.
85	1-3				55-57
	4				*3752
86	1				1298
	2	14	59		1299
	3				1301
	4				1300
88					3782
91		11	66		1228
92					3811
93					3343
95					Omitted.
98	18				585
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102	1				Omitted.
	2				1738
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	4				1774
103	1				86
109	1				Om. *1112
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110					4038
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115	1				3832

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120	.....	.....	...	.....	2171
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5	.....	.....	...	.....	277
6	.....	.....	...	.....	915
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....	4	.....	...	.....	Omitted.
....	5	.....	...	.....	4057
12	.....	....	...	.....	4599
20	.....	.....	...	.....	Omitted.
24	.....	.....	...	...	Omitted. *2202–2211
27	.....	.....	...	.....	Omitted.
28	.....	.....	...	.....	3983
30	.....	.....	...	.....	89
33	.....	.....	...	.....	1716
34	.....	.....	...	.....	492
43	1	.....	...	.....	Omitted.
....	2, 3	.....	...	....	*1669
....	4	.....	...	.....	1671
....	5–8	... .	...	.....	1676–1679
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48	.....	.....	...	.....	1054
49	.....	.....	...	.....	3169, 3170
53	.....	.....	...	.....	3635
57	1	.....	...	.....	*3774
....	2	.....	...	.....	*3769
61	.....	12	160	3	.....
....	1–4	.....	...	.....	1948–1951
....	5	.....	...	.....	Omitted.
....	6	.....	...	.....	1952
....	7	.....	...	.....	Omitted.
....	8	.....	...	.....	1954
....	9	....	...	.....	Omitted.
....	10	.....	...	.....	*825
....	11	.....	...	.....	*828
66	.....	.....	...	.....	1226
67	.....	.....	...	.....	3770
69	.....	.....	...	.....	431
75	.....	.....	...	.....	3793
81	.....	.....	...	.....	64
87	1	.....	...	.....	796
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88	.....	.....	...	.....	583, 783
89	.....	.....	...	.....	583
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92	2	14	75	.....	*1623
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102	.....	.....	...	.....	1286
103	.....	.....	...	.....	873
104	.....	.....	...	.....	851
106	.....	.....	...	.....	Omitted.
107	1	.....	...	.....	415, 525
...	2, 3	.....	...	.....	415, 416
....	4	....	...	.....	Omitted.
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109	.....	.....	...	.....	3800
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....	1	.....	...	.....	307
....	2	.....	...	....	Omitted.
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....	4	.....	...	.....	44
119	1	.....	...	.....	1192
....	2	.....	...	.....	1193–1197
120	.....	....	...	.....	2493
122	.....	.....	...	....	1040
124	.....	.....	...	.....	893
125	.....	.....	...	.....	2253–2266
127	.....	Rep. 13	147	.....	Omitted.
128	1	.....	...	.....	1111
....	2	.....	...	.....	1113
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136	1	.....	...	.....	1685

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139	1, 2				2352
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	12				Omitted.
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	5				3769, 3771
28	1	13	8	1	1800
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39					4183, 4184
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47					925
48		Rep. 14	50		Omitted.
52					Omitted.
53	1				3770
	2				Omitted.
56	1				1908
	2				2442
	3				1909
	4				Omitted.
59	1				1643
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61	1				Omitted. See Const.
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75	1				842
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76					975
78	1				1881-1884
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79					1378
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94	23				Omitted.
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92	1-3				798
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	5				799
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93					130
94	1				Omitted.
	2				1669
95	1-3				1361-1363
96					3767
98	1-4				1821-1824
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190	1–4				861–864
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29	1–3				1847–1849
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31					1775
34		14	23	2	Omitted
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42					135
43		14	87		3049
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59					497
62					1247–1249
65		14	45		*465–468
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77					*560
79					1681–1683
80					470–476
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83					2269–2271
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87					1585–1602
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129	1				1675
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70					135
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A TABLE showing where the acts of a public nature, passed since the Code of 1873, may be found in this work, is inserted at the end of the book immediately preceding the index.

STATUTES AND RULES

REGULATING THE

PRACTICE OF THE SUPREME COURT

OF THE

STATE OF IOWA.

REVISED AND ADOPTED AT THE JUNE TERM, 1886, WITH AN ADDITIONAL RULE ADOPTED DECEMBER 16, 1886; BEING THE RULES IN FORCE AT THE OCTOBER TERM, 1888.

I.—OF THE ORGANIZATION OF THE COURT.

Section 1. Judges of supreme court. The supreme court consists of five judges elected in the manner prescribed by law, the senior judge being chief justice.

Sec. 2. Quorum. The presence of three judges is necessary to constitute a quorum for the transaction of business, but one alone may adjourn from day to day, or to any particular day, or until the next term. [Code, § 139.]

Sec. 3. Officers of court. The officers of the court are the attorney-general,[1] the clerk[2] and the reporter,[3] who are elected in the manner prescribed by law; the bailiffs[4] appointed by the court, and the attorneys and counselors-at-law admitted to practice therein.[5]

II.—OF THE JURISDICTION OF THE SUPREME COURT.

Sec. 4. Jurisdiction. The supreme court has an appellate jurisdiction over all judgments and decisions of the superior, the circuit and district courts from which appeals are allowed by law, as well in cases of civil actions, properly so called, as in proceedings of a special or independent character and in criminal cases. [Code, §§ 3163, 4520; 16 G. A., ch. 143, § 17; 19 G. A., ch. 24, § 7.]

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[1] Const. 1857, art. 5, § 12; Rev. 1860, ch. 11; 9 G. A., ch. 156; 10 G. A., ch. 133; 12 G. A., ch. 138, §§ 1 and 28; Id., ch. 173, § 12; Joint Res. 1868, No. 21; 16 G. A., ch. 7.

[2] Rev. 1860, ch. 110; 11 G. A., ch. 88.

[3] 10 G. A., ch. 22; 11 G. A., ch. 89.

[4] 11 G. A., ch. 59, § 2.

[5] Sections 103-112 hereof.

Sec. 5. What orders reviewable. The supreme court may also review the following orders made by the circuit or district court, or the superior court of a city:

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

2. A final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment.

3. When an order grants or refuses, continues or modifies a provisional remedy, or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment, when it grants or refuses a new trial, or when it sustains or overrules a demurrer.

4. An intermediate order involving the merits and materially affecting the final decision.

5. An order or judgment on *habeas corpus*.

If any of the above orders are made by a judge of the district, circuit or superior court, they are in that case reviewable in the same way as if made by the court. [Code, § 3165; 16 G. A., ch. 143, § 117.]

Sec. 6. Appeals from other orders. The supreme court may also, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as they may think expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the trial in chief in the court below. [Code, § 3166.]

Sec. 7. Supervisory powers. The supreme court has a general supervision over the district, superior and circuit courts, and all other inferior judicial tribunals, to prevent and correct abuses, where no other remedy is provided by law. [Constitution, art. 5, § 4.]

Sec. 8. Mandates. The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until the mandates are obeyed. [Code, § 3200.]

Sec. 9. Writs. The supreme court may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction. [Code, § 3172.]

III.— OF THE TERMS OF THE SUPREME COURT.

Sec. 10. When and where held. The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes, and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session, so far as practicable, until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court. [21 G. A., ch. 59, § 1; 22 G. A., ch. 34.]

[The foregoing rule is changed in accordance with 22 G. A., ch. 34, passed since these rules were adopted. See § 173, page 37.]

IV.— OF APPEALS TO THE SUPREME COURT.

1. In Civil Cases.

Sec. 11. Time for appeal. No appeal to the supreme court shall be taken except within six months from the rendition of the judgment or order ap-

pealed from. Unless the case involves an interest in real estate, no appeal, where the amount in controversy, as shown by the pleadings, does not exceed one hundred dollars, will be considered, except to dismiss the same, unless the trial judge certifies the question of law upon which the decision of this court is desired. And no other question, except the one so certified, shall be considered. [Code, § 3173.]

Sec. 12. Appeals; when perfected. An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk, at the written request of either party, shall prepare a transcript of the record in the case, or as much thereof as the appellant in writing has directed, to which shall be appended copies of the notices of appeal and of the supersedeas bond, if any, and shall before the day the cause is set for hearing, transmit the same by mail or express to the clerk of the supreme court. But causes shall be submitted upon the abstracts of the parties, except where a controversy arises as to the record. In such case the controversy shall be determined by reference to the transcript; but the appellant shall have a reasonable time after the necessity for a transcript appears to file a transcript, where one has not already been filed.

Sec. 13. How taken; notice. An appeal is taken by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from the specific part thereof, defining such part. [Code, § 3178.]

Sec. 14. From part of an order. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment or part of a judgment, or order, not appealed from, but the same shall proceed as if no such appeal had been taken. [Code, § 3177.]

Sec. 15. Time of service. The notices of appeal must be served thirty days, and the cause filed and docketed at least fifteen days, before the first day of the next term of the supreme court, or the same shall not then be tried, unless by consent of parties. If the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term. [Code, § 3180.]

Sec. 16. Party in default; non-resident. In cases in which there was a default in the court below, and no personal service on defendant, and no appearance by him, the plaintiff may appeal, and make service of the notice of appeal in the same manner that service of original notice is made on non-resident defendants. If the appellee is a non-resident, but has an agent residing in the state, the notice may be served upon such agent, and such service shall take the place of publication in a newspaper. The proof of such service shall be made in the manner prescribed for proof of service of original notice on non-resident defendants. [*McClellan v. McClellan*, 2 Iowa, 312.]

Sec. 17. Docket. The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called appellant, and the other party the appellee. [Code, § 3171.]

Sec. 18. Abstract; service and filing of. At least thirty days before the day assigned for the hearing of a cause, the appellant shall serve upon the attorney for each appellee a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision (said abstract to be prepared as required by sections 97, 98 and 99). He shall also, fifteen days before the first day of the term for which the cause is to be docketed for trial, file with the clerk ten copies of said abstract, and no cause will be heard until thirty days after such service

and fifteen days after such filing with the clerk, nor shall it be docketed unless this and other rules shall be complied with. In case of cross-appeals the party first giving notice of appeal shall, under this rule, be considered the appellant.

Sec. 19. Appellee's abstract. If the appellee's counsel shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving the same, deliver to the appellant's counsel one printed copy, and to the clerk of the court ten printed copies, of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision.

Sec. 20. Records certified. In an action by ordinary proceedings, and in an action by equitable proceedings tried upon oral evidence, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein (except subpœnas, depositions and other papers which are used as mere evidence) are to be deemed part of the record. But in an action by equitable proceedings tried upon written evidence, the depositions, and all papers which were used as evidence, are to be certified up to the supreme court, and shall be so certified, not by transcript, but in their original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified, unless by direction of the appellant. If so certified, when not material to the determination of the appeal, the court may direct the person blamable therefor to pay the costs thereof. [Code, § 3184.]

Sec. 21. Failure to file transcript and abstract. If the transcript has not been sent up, or the appellant does not file the same, or does not file an abstract when the same should be filed as herein provided, the appellee may file the transcript, and may on motion have the appeal dismissed or the judgment affirmed, as the court from the circumstances of the case shall determine; but no appeal shall be dismissed or judgment of the court below affirmed because the cause was not docketed, or transcript or abstract filed, if it be made to appear that the appeal was taken in good faith and not for delay, or if, from the conduct of the appellee or his counsel, appellant was induced to believe that no motion to dismiss or affirm would be made. [Code, §§ 3181, 3182; 15 G. A., ch. 56.]

Sec. 22. Co-parties. A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court. [Code, § 3174.]

Sec. 23. Refusal to join. If the other co-parties refuse to join, they cannot, nor can any of them, take an appeal afterward; nor shall they derive any benefit from the appeal, unless from the necessity of the case. [Code, § 3175.]

Sec. 24. Presumed to have joined. Unless they appear and decline to join, they shall be deemed to have joined, and shall be liable for their due proportion of costs. [Code, § 3176.]

Sec. 25. Death of parties. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the cause may proceed. The court may also, in such case, grant a continuance, when such a course will be calculated to promote the ends of justice. [Code, § 3211.]

Sec. 26. Dismissal. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant, and filed, they must be verified by affidavit. [Code, § 3212.]

Sec. 27. Appeal improperly taken. The appellee may, by answer filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court. [Code, § 3213.]

Sec. 28. Service of notice. The service of all notices of appeal, or in any way growing out of such right, or connected therewith, and all notices in the supreme court, shall be served in the way provided for the service of like notices in the district court, and they may be served by the same person and returned in the same manner, and the original notice of appeal must be returned, immediately after service, to the office of the clerk of the court where the suit is pending. [Code, § 3214.]

Sec. 29. Perfect transcript. It shall be the duty of the appellant to file a perfect transcript, and to that end the clerk of the court below must at any time, on his suggestion of the diminution of the record and on payment of fees, certify up any omitted part of the record, according to the truth, as the same appears in his office of record; and such applicant shall not be entitled to any continuance, in order to correct the record, unless it shall clearly appear to the court that he is not in fault, subject to which requirement either party may, on motion before trial day, obtain an order on the clerk of the court below, commanding him to transmit at once to the supreme court a true copy of such imperfect or omitted part of the records as shall be in general terms described in the affidavit or order. Such motion must be supported by affidavit, unless the diminution be apparent, or admitted by the adverse party, and must not be granted unless the court be satisfied that it is not made for delay. [Code, § 3185.]

Sec. 30. Original document. Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court. [Code, § 3209.]

Sec. 31. Supersedeas. An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless a supersedeas is issued, and no appeal or supersedeas shall vacate or affect the lien of the judgment appealed from. [Code, § 3186.]

Sec. 32. Supersedeas bond. A supersedeas shall not be issued until the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also, that he will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents, or hire, or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part superseded alone. When such bond has been approved by the clerk and filed, he shall issue a written order commanding the appellee and all others to stay proceedings in such judgment or order, or on such part as is superseded, as the case may be. [Code, § 3186.]

Sec. 33. Discharge of supersedeas. If the appellee believe the supersedeas bond defective, or the sureties insufficient, he may move the supreme court, if in session, or in its vacation, on ten days' written notice to the appel-

lant, may move any judge of said court, or the judge of the court where the appeal was taken, to discharge the supersedeas; and if the court, or such judge, shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or such judge shall issue an order discharging the supersedeas, unless a good bond with sufficient sureties be executed by a day by him fixed. The order, if made by a judge, shall be in writing, and be signed by him, and upon its filing, or the filing of a certified copy of the order when made in court, in the office of the clerk of the court from which the appeal was taken, execution and other proceedings for enforcing the judgment or order may be taken, if a new and good bond is not filed and approved by the day fixed as aforesaid. [Code, § 3188.]

Sec. 34. New supersedeas. But another supersedeas may be issued by the clerk upon the execution before him of a new and lawful bond, with sufficient sureties, as hereinbefore provided. [Code, § 3189.]

Sec. 35. Amount of penalty. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs; if not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars. [Code, § 3190.]

Sec. 36. Extent of supersedeas. The taking of the appeal from a part of a judgment or order, and the filing of a bond as above directed, does not cause a stay of execution as to any part of the judgment or order not appealed from. [Code, § 3191.]

Sec. 37. Countermanding execution. If execution has issued prior to the giving of the bond above contemplated, the clerk shall countermand the same. [Code, § 3192.]

Sec. 38. Property delivered. Property levied upon and not sold at the time such countermand is received by the sheriff shall forthwith be delivered up to the judgment debtor. [Code, § 3193.]

2. In Criminal Actions.

Sec. 39. What may be appealed. The mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal cause is by appeal. [Code, § 4520.]

Sec. 40. Who may appeal. Either the defendant or the state may take an appeal. [Code, § 4521.]

Sec. 41. When appeal may be taken. No appeal can be taken until after judgment, and then only within one year thereafter. [Code, § 4522.]

Sec. 42. How taken; notice. An appeal is taken, by the party taking it, or the attorney of such party, serving on the adverse party, or on the attorney of the adverse party who acted as attorney of record in the district court at the time of the rendition of the judgment, and also on the clerk of the district court by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment. [Code, § 4523.]

Sec. 43. When perfected. The appeal is deemed to be taken when the notices thereof, required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, or annexed thereto. [Code, § 4524.]

Sec. 44. Transcript. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office (except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and the minutes of the evidence of the witnesses examined before the grand jury), and of all records

made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 4525.]

Sec. 45. Appeal by state not superseded. An appeal taken by the state in no case stays the operation of the judgment in favor of the defendant. [Code, § 4527.]

Sec. 46. Supersedeas in bailable cases. An appeal taken by the defendant does not stay the execution of the judgment unless bail be put in, except as provided in the next section. [Code, § 4528.]

Sec. 47. Imprisonment in penitentiary. Where the judgment is imprisonment in the penitentiary and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and the fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it. [Code, § 4529.]

Sec. 48. Discharge on bail. When an appeal is taken by the defendant, in a bailable case, and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal had been taken and bail put in, and the sheriff or other officer having the defendant in custody must, upon the delivery of such certificate to him, discharge the defendant from custody, where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court, who issued it, the execution or certified copy of the entry of judgment, under which he acted, with his return thereto, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal. [Code, § 4530.]

Sec. 49. Joint defendants; appeal. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterward. [Code, § 4526.]

Sec. 50. Title of action. The party taking the appeal is known as the appellant, the adverse party as the appellee, but the title of the action is not changed in consequence of the appeal; it shall be docketed in the supreme court as it was in the district court. [Code, § 4531.]

V.—OF THE TRIAL, DECISION AND EXECUTION.

1. In Civil Cases.

Sec. 51. Assignment of errors. In cases where an assignment of errors is necessary, the same should be served upon the opposite party or counsel at the time the abstract is served, and should be filed with the clerk of the court at the time the abstract is filed. If served or filed later than herein provided, the assignment may, on motion, be stricken from the files, but the court in its discretion may waive the failure, but not without the imposition of terms if it appears that the appellee has been subjected to any inconvenience by the failure. An assignment of error need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer or in a motion or instruction or rulings in an exception, it must designate which is relied upon as error; and each must be designated in a distinct assignment; and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned.

Sec. 52. Motion; notice; argument. (1) Motions made in a cause after judgment, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party.

(2) All motions must be filed with the clerk and served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or counsel, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or counsel, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract. But in such cases timely notice of such motions shall be given to the opposite attorneys.

(3) Arguments in support of motions, if any, must be filed in writing before the morning of the day set for hearing of the cause, and served by copy upon the opposite party or counsel when the motion is served, and arguments in resistance, if any, must be filed in writing before the morning of the day set for hearing of the cause, and served by copy on the opposite party or counsel when the papers in resistance are served. The above rule shall not apply to motions for continuance, as to time of service.

Sec. 53. Submission upon brief. To entitle an appellant to submit his case either orally or in print, he must serve copies of his brief of points and authorities or arguments on counsel for each of the appellees at least thirty days before the day assigned for the hearing of the case. The appellee shall serve copies of his brief or argument upon counsel for each appellant at least ten days before the hearing; and the reply, if in print, shall be served at least three days before the case is to be finally submitted. Each party shall file with the clerk ten copies of each brief or argument before the case is so submitted. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance, or to have the case submitted at his option upon the brief and argument on file when the default occurred. All briefs and arguments shall be prepared and printed as required by section 96 hereof.

Sec. 54. Service of briefs. All arguments in addition to oral ones shall be in print; proper evidence of the service upon opposing counsel of printed matter in a cause shall be filed therewith; and the clerk shall note upon the docket the date of each service. All manuscripts and printed arguments shall be filed with the clerk, and he shall not transmit to the judges any papers not served and filed in time under the rules, nor shall any argument or brief be considered which does not go through the hands of the clerk. No cause shall be entered as submitted until the arguments are finally and actually concluded.

Sec. 55. Oral argument; notice for. Written notice of intention to argue a case orally shall be served upon the counsel of the opposite party ten days before the first day of the term, and failure to serve such notice shall deprive the party of the right to argue orally.

Sec. 56. Limitation; number of counsel. Only two counsel will be heard on either side, and no oral argument shall exceed one hour in length, unless an extension of time be granted before the argument is commenced.

Sec. 57. Opening and closing. When the appeal presents to the court only questions of law upon rulings of the court below, the appellant shall open and close the argument, but when the trial in the supreme court is *de novo* of questions of fact, the party having the burden of proof shall open and close, and, as to printed briefs and arguments, shall observe the rules requiring the filing of such briefs and arguments by appellants.

Sec. 58. Calling causes. At the commencement of each term the causes will be called in their order, but no cause will be tried on the first calling.

Sec. 59. Opinions of the court. The opinions of the court on all questions reviewed on appeal, as well as such motions, collateral questions and points of practice as they may think of sufficient importance, shall be reduced to writing and filed with the clerk of the court.

All dissenting opinions must be written and filed in the same manner.

The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which, of the judges dissented from the decision. [Code, §§ 143, 144.]

Sec. 60. Opinion when reported. If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be reported in the reports, and no case shall be reported except by order of the full bench. [Code, § 145.]

Sec. 61. Judgment. The supreme court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the court below or judge should have done, according as it may think proper. [Code, § 3194.]

Sec. 62. Judgment against sureties. The supreme court, where it affirms the judgment, shall, also, if the appellee moves therefor, render judgment against the appellant and his sureties on the bond above mentioned, for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code, § 3195.]

Sec. 63. Damages on appeal. Upon the affirmance of any judgment, or order for the payment of money, the collection of which, in whole or in part, has been superseded by bond, as above contemplated, the court shall award to the appellee damages upon the amount superseded, and, if satisfied by the record that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent thereon, as shall effectually tend to prevent the taking of appeals for delay only. [Code, § 3196.]

Sec. 64. To remand cause or issue process. If the supreme court affirm the judgment or order, it may send the cause to the district court to have the same carried into effect, or it may itself issue the necessary process for this purpose, and direct such process to the sheriff of the proper county, according as the party thereto may require. [Code, § 3197.]

Sec. 65. Restoration of money or property. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property, or the value thereof. [Code, § 3198.]

Sec. 66. Execution. Executions issued from the supreme court shall be the same as those from the district court, attended with the same consequences, and shall be returnable in the same time. [Code, § 3215.]

Sec. 67. When may issue; garnishment. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if the process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, shall return a copy of the execution and his returns to the district court or circuit court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court.

Sec. 68. When and how causes heard. The court shall hear all the cases docketed, when not continued by consent, or for cause shown by the party, and the party may be heard orally or otherwise, in his discretion. [Code, § 3204.]

Sec. 69. Opinion. No cause is decided until the opinion in writing is filed with the clerk. [Code, § 3205.]

Sec. 70. Procedendo. No procedendo, except in criminal cases, and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the justices of the court, upon cause shown.

Sec. 71. Decree. Decrees to be entered in this court shall be prepared by the counsel of the parties in whose favor they are rendered. Copies shall be served on the opposite counsel and filed in the court within twenty days after counsel preparing them shall have received notice of the decision in the cause in which they are entered.

Sec. 72. Optional decree. When, by the decision of this court, a decree is to be entered in this court at the option of either party, such option shall be declared and a decree furnished under the above rule, within twenty days from the date at which counsel required to prepare the decree received notice of the decision.

Sec. 73. Cause remanded. If a cause be remanded to the inferior court to be carried into effect, such decision and the order of court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district. [Code, § 3206.]

2. In Criminal Actions.

Sec. 74. Docketing; precedence. Appeals in criminal cases shall be docketed in the supreme court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes, which is twenty days after the date of the certificate of the transcript from the clerk of the district court, and if the appellant does not file his transcript by that time with the clerk of the supreme court, the appellee may file his and have the case docketed. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term. [Code, § 4532.]

Sec. 75. Appearance. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code, § 4533.]

Sec. 76. Informality. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected within a reasonable time, and the supreme court must direct how it shall be corrected. [Code, § 4534.]

Sec. 77. Assignment of errors. No assignment of error, or joinder in error, shall be necessary. [Code, § 4535.]

Sec. 78. Close of argument. The defendant shall be entitled to close the argument. [Code, § 4536.]

Sec. 79. Opinion. The opinion of the supreme court must be in writing, filed with its clerk and recorded. [Code, § 4537.]

Sec. 80. Court must examine record. If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record and, without regard to technical errors or defects which do not affect the substantial rights of parties, render such judgment on the records as the

law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it. [Code, § 4538.]

Sec. 81. Appeals by state. If the appeal was taken by the state, the supreme court cannot reverse the judgment or modify it so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory on the court below, as the correct exposition of the law. [Code, § 4539.]

Sec. 82. Reversal. If a judgment against the defendant be reversed without ordering a new trial, the supreme court must direct, if the defendant be in custody, that he be discharged, or, if he be admitted to bail, that his bail be exonerated, or, if any money be deposited instead of bail, that it be refunded to him. [Code, § 4540.]

Sec. 83. Affirmance. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution, as the supreme court shall direct, except as hereinafter provided. [Code, § 4541.]

Sec. 84. Judgment and procedendo. When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the court below in which the judgment appealed from was rendered, with proper instructions, and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe. [Code, § 4542.]

Sec. 85. When jurisdiction ceases. After the certified copy of the entry of the judgment of the supreme court and its instructions have been remitted, as provided in the preceding section, the supreme court has no further jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the supreme court into effect must be had in the court to which it is remitted, or by the clerk thereof, except as provided in the next two sections. [Code, § 4543.]

Sec. 86. Certified judgments. Unless where some proceedings in the court below are directed by the supreme court, a copy of the certified copy of the judgment of the supreme court, with its directions, certified by the clerk of the court below, to whom the same has been transmitted, delivered to the sheriff or other proper officer, shall authorize him to execute the judgment of the supreme court, or take any steps to bring the proceedings to a conclusion, except as provided in the next section. [Code, § 4544.]

Sec 87. Deduction of imprisonment. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the court below from the period of imprisonment to be fixed on the last verdict of conviction. [Code, § 4545.]

VI.— REHEARING.

Sec. 88. Petition. No petition for rehearing shall be filed after sixty days from the filing of the opinion of this court.

Sec. 89. Notice. Written notice of intention to petition for rehearing shall be served on the opposite party and clerk of the supreme court within thirty days after the filing of the opinion, and if no such notice is served, the petition for rehearing shall not be filed after expiration of such thirty days.

Sec. 90. Argument. The petition for rehearing, if there be no oral argument, shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow. If

the petitioner desire to make an oral argument in support of his petition, he shall indorse in writing or print a notice upon his argument or brief, stating that he will ask to be heard orally, which shall be served on the opposite party and deposited with the clerk. The cause shall then be placed upon the docket for the next term, being not less than twenty days after the filing of the petition, and the petitioner shall have the right to be heard orally at the next term, or at any term to which the case may be continued. [19 G. A., ch. 144, amending Code, § 3202.]

Sec. 91. Shall be printed. All petitions for rehearing shall be printed as required by section 96 hereof, and a copy shall be delivered to the attorney of the adverse party, and, if there be more than one, to the attorney of each, and nine copies to the clerk of this court.

Sec. 92. Printing opinion. The opinions announcing the decisions of this court in cases wherein petitions for rehearing are filed, shall be printed by the petitioners, and copies thereof shall accompany the printed copies of the petitions for rehearing filed with the clerk, or served on the opposite party. [Oct. 2, 1879, Ordered, that rule 92 be suspended in its operation in all cases wherein the opinions of the court are published in the *Northwestern Reporter*, before the petitions for rehearing are filed. Counsel in such cases being required to refer to the number and page of the *Reporter*, in which the opinions are printed.]

Sec. 93. Suspends decision or procedendo. If a petition for rehearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and procedendo shall be suspended until after final arguments. [19 G. A., ch. 144, amending Code, § 3201.]

VII.— OF COSTS.

Sec. 94. Security for costs. The appellant may be required to give security for costs, under the same circumstances as those in which plaintiffs in civil actions in the court below may be so required. [Code, § 3210.]

Sec. 95. Costs; taxation of. When the parties or their attorneys shall furnish printed abstracts, briefs, arguments and petitions for rehearing, in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, tax the same to the party making them, without reference to the disposition of the case.

VIII.— OF PREPARING TRANSCRIPTS AND ABSTRACTS, AND PRINTING ABSTRACTS, BRIEFS, ARGUMENTS AND PETITIONS FOR REHEARING.

Sec. 96. Abstracts. All abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches, but the type in which abstracts are printed may be small pica solid, or brevier with leaded lines.

The first page of the abstract, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, and the names of the counsel for both the appellant and appellee.

Sec. 97. Index. The abstract must be accompanied by a complete index of its contents, and must show where the papers and entries therein mentioned may be found in the transcript as well as in the abstract.

Sec. 98. Form. Abstracts of records shall be made substantially in the following form:

IN THE SUPREME COURT OF IOWA.

DECEMBER TERM, 18—.

JOHN DOE, *Appellant*, vs. RICHARD ROE, *Appellee*. } Appellant's Abstract of Record. ("In Equity" or "At Law.")

Appeal from the Judgment of the Van Buren District Court.

J. C. K., *for the Appellant.*

H. H. S., *for the Appellee.*

On the —— day of ——, 18—, the plaintiff filed in the Van Buren district court a

PETITION

stating his cause of action as follows:

[Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage, and no question is raised as to the acknowledgment, omit the acknowledgment.

When the defendant has appeared it is useless to incumber the record with the original notice, or the return of the officer. Append to the abstract of each paper a reference to the page of the transcript on which it will be found.]

On the —— day of ——, A. D. 18—, the defendant filed a

DEMURRER

to said petition, setting up the following grounds:

[State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue:]

And on the —— day of ——, 18—, the same was submitted to the court, and the court made the following rulings thereon:

[Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case — let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract, but it should continue:]

And on the —— day of ——, 18—, the defendant filed his

ANSWER

to the petition, setting up the following defenses:

[Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition.

Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.]

On the —— day of ——, 18—, said cause was tried by a jury [or the court, as the case may be], and on trial the following proceedings were had:

[Set out so much of the bill of exceptions as is necessary to show the ruling of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS.

After the evidence and the arguments of counsel were concluded, the plaintiff [or defendant, as the case may be] asked the court to give each of the following instructions to the jury:

[Set out the instructions referred to, and continue:]

which the court refused as to each instruction; to which said several rulings the plaintiff [or defendant] excepted at the time, and thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

To the giving of those numbered [give the number] and to the giving of each thereof the plaintiff [or defendant] at the time excepted.

VERDICT.

On the —— day of ——, 18—, the jury returned into court with the following verdict:

[Set out the verdict.]

MOTION FOR NEW TRIAL.

On the —— day of ——, 18—, the plaintiff [or defendant] filed a motion praying the court to set aside the verdict and grant a new trial, upon the following grounds:

[Set out the grounds aforesaid for the new trial.]

On the —— day of ——, 18—, the court made the following ruling upon said motion:

[Set out the record of the ruling] to which the plaintiff [or defendant] at the time excepted.

JUDGMENT.

On the —— day of ——, 18—, the following judgment was entered:

[Set out the judgment entry appealed from.]

On the —— day of ——, 18—, the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

[If supersedeas bond was filed, state the fact.]

ASSIGNMENT OF ERRORS.

And the appellant herein says there is manifest error on the face of the record in this:

[Set out the errors assigned.]

[To the abstract of each paper and entry append a reference to the page of the transcript on which it will be found. This will not be necessary when the case is submitted on the printed abstract without the transcript.

This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course no formula could be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided, and omit everything else.]

Sec. 99. Brief and argument. The printed brief and argument shall state in divisions thereof, properly numbered, the several propositions of law claimed by the party making such brief or argument to be involved in the case before the supreme court, and the authorities relied upon in the support of the same. When an authority cited is an adjudicated case, the brief or argument must show the names of the parties, the volume in which it is reported, and the page or pages containing the matter to which counsel desire to call the attention of the court. When the reference is a text-book, the number or date of the edition must be stated with the number of the volume and page.

Sec. 100. Transcripts. Transcripts of record prepared for the supreme court shall be made substantially in the manner following, viz.:

STATE OF IOWA, }
County of ——. }

Pleas before the district [or circuit] court of Iowa, at a term begun and holden in the county of ——, on the —— day of ——, A. D. 18—, before the Hon. J. H. G., judge of the —— judicial district [or judge of the —— circuit, in the —— judicial district] of the state of Iowa.

N. P. }
vs. }
C. D. }

Be it remembered that heretofore, to wit, on the —— day of ——, A. D. 18—, a petition was filed in the office of the clerk of the district [or circuit] court, in and for the county of ——, in the words and figures following, to wit:

[Here insert the petition in full.]

[Proceed in the same manner in relation to whatever paper is filed, such as the original notice, or a petition for attachment, etc.

If the cause has come from another county by a change of venue begin as above, "Be it remembered," and state in like manner all that was done in the county from which the venue was changed.]

And afterwards there was filed in the office of the said clerk a notice in the words and figures following, to wit:

[Here insert the notice in full.]

[Copy all indorsements on the face of the transcript, or copy of record, and not upon the back of the leaf.]

Upon which [or attached to which] was a return as follows:

[Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.

And afterward, to wit, on the —— day of ——, A. D. 18—, there was filed in the office of the said clerk an answer in words and figures following, to wit:

[Here insert answer in full.]

[Should the clerk doubt what the paper is, let him call it a "*paper* in the words and figures following," etc.

Where a paper is filed in term time add the day of the term to the day of the month, as in the next form.

A. B. }
vs. }
C. D. }

And afterward, to wit, on the —— day of ——, A. D. 18—, it being the —— day of the —— term of said court, the said A. B. [or plaintiff] filed the following demurrer to the answer of the said C. D. [or of the said defendant] to wit:

[Here insert demurrer in full.]

[If a party files more than one pleading at the same time they should be numbered in their legal order, as, for instance, a demurrer, plea and answer, and the transcript may say —— [stating the date], —— the said C. D. [or defendant] filed his demurrer, plea and answer, which are filed *de bene esse*, or subject to the rule.]

A. B. }
vs. }
C. D. }

And now, on this —— day of ——, A. D. 18—, it being the —— day of the said term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer [copy the entry of the proceedings of the court, sustaining or overruling the demurrer].

And afterward, on the —— day of the said ——, it being the —— day of the said term, the said plaintiff filed his replication in the words and figures following, to wit:

[Here set out replication in full.]

And afterward, on the same day, the said defendant filed motion and affidavit for a continuance, as follows, to wit:

[Here set out copy of motion and affidavit.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that this cause be continued until the next term of the court [at the cost of the defendant].

In the district [or circuit] court, —— county.

A. B. }
vs. } —— Term, A. D. 18—.
C. D. }

And now, on this —— day of ——, it being the —— day of said term, this cause coming on for trial, came a jury, to wit: ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, ——, twelve good and lawful men, who were sworn well and truly to try the issue between the said parties, and a true verdict to render, according to the law and evidence given them in court. The jury retired to consider on their verdict, and afterward, on the same day, the jury returned into court and rendered their verdict, as follows:

[Here insert the full verdict as rendered.]

[Or if the jury does not return until the next day—]

A. B. }
vs. }
C. D. }

And afterward, on the —— day of ——, A. D. 18—, the jury in the foregoing cause returned into court and rendered their verdict, as follows:

[Here insert in full the verdict as rendered.]

A. B. }
vs. }
C. D. }

And afterward, on the —— day of ——, A. D. 18—, being the —— day of said term, the plaintiff [or defendant] filed his bill of exceptions in words and figures following, to wit:

[Here insert in full the bill of exceptions.]

A. B. }
vs. }
C. D. }

Now, on this —— day of ——, A. D. 18—, the plaintiff filed his motion for a new trial, to wit:

[Here insert in full the motion for a new trial.]

A. B. }
vs. }
C. D. }

And now, on this —— day of ——, A. D. 18—, this cause coming up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled [or, as the case may be].

[Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.]

NOTE.— The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate *what* is to be done, but in all cases it is to be done substantially in *like manner* with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court.

It will be understood that it is not necessary in all instances to send up the *whole* of the record, but the clerk may be guided by the directions of the appellant under section 3184 of the Code.

Sec. 101. Waiver or modifications of rules. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone.

Sec. 102. Distribution of abstracts, briefs and arguments. The clerk shall make the following distribution of all printed abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, two copies to the law department of the state university, and one shall be filed in his office.

IX.—OF THE ADMISSION OF ATTORNEYS.

Sec. 103. Examination. Examinations of applicants for admission to the bar shall be had at each term of the court.

Sec. 104. Application. Each applicant for admission shall, before the first day of the term of court at which he asks to be examined, file with the clerk of this court a written request for examination in his own handwriting and signed by himself, together with the proofs of his qualifications as to age, residence, character and time and place of study, required by section 2 of chapter 168 of the Acts of the Twentieth General Assembly, all prepared and presented in the form prescribed by these rules.

Sec. 105. Committee. The court will appoint, on the morning of the day of the examination, a committee of not less than three members of the bar, who shall assist in the examination of applicants for admission.

Sec. 106. Questions. The justices of this court will prepare not less than thirty questions to be submitted to each applicant in writing or print, which he shall answer in writing. A proper and convenient room shall be provided for the use of the applicants, wherein they may prepare their answers without interruption. While so engaged they shall have access to no books and have no communication with any one. The written or printed questions shall be varied at each term.

Sec. 107. Admission. Upon consideration of the oral and written examinations and the proofs of qualifications, the court will admit or reject the applicant.

Sec. 108. Proof of qualifications and study. The proofs of the qualifications of the applicant as to age, character, place of residence and time and place of study, shall be by affidavit made before some officer authorized to administer oaths. When made before an officer not having a seal, other than a judge of the supreme court, district or circuit courts of this state, his official character and signature shall be authenticated by a proper certificate, attested by the seal of the clerk of a court of record.

The proof of the applicant's good moral character, residence in the state and age, shall be by affidavits of at least two witnesses, and the applicant shall also make affidavit of his age and place of residence.

The proof of his term of study shall be by the affidavit of the member of the bar with whom he pursued his studies, and when he has studied at a law school, such fact and his term of study there shall be shown by the affidavit of one

or more of the professors or instructors of such school. Such affidavit shall show that the applicant has actually, and in good faith, pursued the study of the law for the time prescribed by the statute, and the fact that the affiant is a practicing lawyer, or is a professor or instructor in the law school at which the applicant studied.

Sec. 109. Admission in another state. An attorney admitted to practice in another state, before admission here, shall furnish proofs of good moral character, that he is twenty-one years of age, is a resident of this state, and has practiced law regularly for not less than one year in the state wherein he was admitted, by like affidavits provided for in the preceding rule.

When such affidavits are made before an officer not having a seal, the official character of the officer and his authority to administer oaths, as well as the genuineness of his signature, shall be shown by the certificate of the clerk of a court of record under the seal thereof.

Such attorney admitted in another state shall also file with the other proof required a copy of the record of the court showing his admission to the bar, which shall be duly proved as required by law for the authentication of the records of the courts of sister states when offered in evidence in the courts of this state.

Sec. 110. Graduates of law department. The graduates of the law department of the state university may be orally examined at Iowa City by a committee of not less than three members of the bar, appointed by the court. They shall also answer written or printed questions prepared by the justices of this court as prescribed by rule number 106, under the same restrictions and conditions as to being kept from communication with others and consultation of books. Upon the report of the committee as prescribed by the statute, and upon a certificate signed by the members thereof to the effect that the examination was fairly conducted, and the answers to the written or printed questions were prepared by the applicant without opportunity for consultation with persons or books, and upon presentation of the diploma of the applicant, together with his answers to the written or printed questions, this court shall determine upon the question of his admission to the bar, and if admitted the court may direct that the oath prescribed by the statute may be administered at Iowa City, and when done the fact shall be reported by the person administering the oath to the clerk of this court, who shall make proper record thereof.

Sec. 111. Proofs by students of law department. The proofs of qualifications as to age, good moral character, residence in the state and time and place of study, being required by the statute in cases of students of the law department of the university, must, in all instances, be presented by them upon application for admission.

Sec. 112. School year. In estimating the time of study, a school year of thirty-six weeks spent in a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in a reputable law school in this state, shall be considered equivalent to the same fraction of full year spent in an office.

X.—OF MISCELLANEOUS MATTERS.

Sec. 113. Withdrawing papers. When the original papers in a cause in which final judgment is not rendered in this court are brought into this court upon an appeal or writ of error, either party desiring to withdraw the same can have leave to do so on filing a receipt for them with the clerk, and causing a copy to be made of those papers which constitute the record under section 20 hereof, and paying the clerk's fees therefor, which costs shall be taxed to the party failing in this court, and such copy shall be filed by the

clerk and kept as a record in the cause. In cases where the costs of such withdrawal have not been charged in the first bill of costs, the clerk is authorized to charge them as costs of increase, and to issue execution therefor.

Sec. 114. Docket. The clerk shall docket the causes as the same are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and shall cause notice of the manner he has set such causes to be published and distributed in such manner as the court may direct. No cause shall be docketed unless the abstract required by the rules of the court is filed fifteen days before the first day of the term at which the cause is set down for trial.

Sec. 115. Printing docket. The clerk, immediately after the time expires during which causes may be docketed for trial at a term of court, shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the day each cause is assigned for trial, and such other matter for information of the court and attorneys as may be conveniently given. He shall forward to each justice of the court, to each attorney having causes at the term, and to the clerk of the district and circuit courts of each county, a copy of said docket.

Sec. 116. Distribution of abstracts and arguments. The clerk shall, with as little delay as possible, send to each justice of the court a copy of the abstracts, briefs and arguments, and other printed matter filed in each case docketed or set down for trial upon the docket of the term.

Sec. 117. Abstract to show name of judge. In all appeals taken in causes tried after the first day of January, 1887, the abstract therein shall be so prepared as to show the name of the judge who presided at the trial.

RULES OF PRACTICE

ADOPTED BY THE

CONVENTION OF THE DISTRICT JUDGES

OF THE

STATE OF IOWA.

BE IT REMEMBERED, that pursuant to chapter 134, Laws of the Twenty-first General Assembly of the state of Iowa, the district judges in and for the state of Iowa, in convention assembled in supreme court room in Des Moines, Iowa, on Wednesday, January 5, A. D. 1887, by a majority vote of all the district judges of the state, the following rules of practice, and the time when they should go into effect, were agreed to and adopted:

RULES OF PRACTICE.

Rule 1. Copies. Every party at the time of filing any petition, answer, reply, demurrer or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party, and on failure to do so the cause may be continued at the option of the adverse party, or the paper so filed stricken from the files. A fee of ten cents per hundred words shall be allowed for all copies and taxed with the costs. The original files shall be taken from the clerk's office only on order of the judge by leaving with the clerk a receipt for the same.

Rule 2. Trial notice. In any case once continued, where an answer is on file, either party desiring to bring such cause on for trial at any term shall, at least ten days before such term, file with the clerk a notice of trial, and no such cause shall stand for trial unless a trial notice be so filed, except by consent of parties: *Provided*, that after the commencement of the term, the court may, in its discretion, by order entered of record, permit notices of trial to be entered in the same manner, ten days prior to such date as the court may name in such order. Such order may be general, and not entered of record in each particular case. And the clerk in preparing the court calendars shall note thereon, opposite the title of each cause noticed for trial, the words "For trial," which words shall also appear on the printed calendar. This rule shall not apply to appearance or criminal cases, nor to proceedings in probate.

Rule 3. Assignments. On the first day of the term, or as soon thereafter as practicable, the court may make an assignment of the trial causes, which assignment shall fix the day of the term on which each cause will be tried, and parties will be required to conform to this order of trial. Further assignments

may be made by the court as often as the progress of the business of the term shall render the same necessary. The court may also designate particular times for the hearing of motions and demurrers.

Rule 4. Appeals. In appeals from justices' courts or other inferior tribunals in civil causes, the appellant shall cause the case to be docketed by noon of the second day of the term to which the same is returnable, and in case of his failure so to do the appellee may procure the case to be docketed, and will thereupon be entitled to have the judgment below affirmed, or to have the case set down for trial on its merits, as he may elect. But the judgment, if affirmed, may be opened at any time prior to noon of the following day of the term, by appellant's making a satisfactory showing of merits, and excuse for his default, and paying to the clerk the amount of the filing fee. If the judgment shall be opened the appellee may have the cause continued at the cost of the appellant.

Rule 5. Abstracts in equity causes. In equitable causes where the evidence is taken in the form of depositions there shall be submitted with the arguments an abstract of the pleadings and evidence substantially as required by the rules of the supreme court for abstracts in appeals in equitable causes, except that the same need not be printed.

RULES IN PROBATE.

I. Calendar. The clerk shall enter upon the court calendar and bar docket only such cases in probate as require the action of the court.

II. Reports due and not filed. On the first day of each term, the clerk shall report to the presiding judge all estates wherein an inventory or report is due under the statute or order of court, and which has not been filed.

III. Reports. Each report of an administrator, executor, guardian or trustee shall be self-explanatory, so that the clerk or court, from a perusal thereof, will fully understand the matter in hand, without verbal or other explanations, or without being compelled to examine or refer to other papers in the case. All accountings must state the debit and credit, and show the balances. Guardians' and trustees' accounts must show the amount of interest earned since appointment or last report, and how and upon what security the trust fund is invested. All reports and accounts must be verified.

IV. Reports of sale of real estate. Reports of the sale of real estate must be sworn to, and must state the term at which the order for the sale was obtained, whether the property was appraised, and if so, state the appraised value, whether sold at public or private sale, and the terms of sale, whether the additional bond required has been given and approved, and the party or parties making said report shall state their opinion as to whether the sale is an advantageous one and should be approved, or otherwise.

V. Application in writing. All applications for orders in probate must be made in writing, verified, and self-explanatory, so that the clerk or court from a perusal thereof will fully understand the relief sought without verbal or other explanations.

VI. Allowance to widows. Applications for an allowance for the widow under section 2375 of the code shall state under oath the number of children under fifteen years of age, the amount of property already set apart to the widow, the value of her deceased husband's estate, the amount of the estate's indebtedness, the value of all property owned by the widow, and what allowance, if any, has heretofore been made to the widow.

VII. Notice of final report. Unless notice be waived in writing, no administrator, executor, guardian or trustee will be discharged from further duty or responsibility, nor upon final settlement until notice of the applica-

tion shall have been given to all persons interested, as required in case of an original notice for the commencement of a civil action, unless a different notice be prescribed by the court.

Time rules go into effect. The foregoing rules adopted by this convention shall take effect July 4, 1887.

BLANK LETTERS.

The following resolution was also adopted:

Resolved, That this convention recommend that the clerks of the several courts of this state procure blank letters of administration, and in guardianship, with the rules in probate printed on the back thereof, for the information of administrators, executors and guardians.

Certified as correct and signed as required by law, this January 8, A. D. 1887.

GEO. W. RUDDICK,
President of the Convention of District Judges of Iowa.

Countersigned by

J. H. HENDERSON,
Secretary of the Convention of District Judges of Iowa.

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ABBREVIATIONS.

R. S.	Revised Statutes of 1843.
C., '51	Code of 1851.
R., or Rev	Revision of 1860.
C., '73, or Code	Code of 1873.
Const.	Constitution of 1857.
T.	Title in Code of 1873.
¶, or Par.	Paragraph, used to indicate the numbered subdivisions of sections of the Code.
G. A.	General Assembly.
Ex. S.	Extra Session.
Ch.	Chapter.
§	Section.
S. C.	Same Case.
Mor.	Morris' Report.
G. Gr.	G. Greene's Reports.
—	Indicates Iowa Reports, the number of the volume being given preceding, and that of the page following it.
Code Com'rs' Rep.	Code Commissioners' Report.

PART FIRST.

PUBLIC LAW.

TITLE I.

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

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

1. Boundaries. 1. The boundaries of the state of Iowa are defined in the preamble of the constitution. [R., § 1; C., '51, § 1.]

2. Sovereignty. 2. The state possesses sovereignty co-extensive with the boundaries referred to in the preceding section, subject to such rights as may at any time exist in the United States in relation to the public lands, or to any military or naval establishment. [R., § 2; C., '51, § 2.]

3. Concurrent jurisdiction. 3. The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state. [R., § 3; C., '51, § 3.]

This concurrent jurisdiction does not extend to the abatement of a nuisance existing in the Mississippi river on the Illinois side of the channel (*Gilbert v. Moline, etc., Co.*, 19-319): but the courts of this state have jurisdiction to abate a nuisance and punish a crime committed upon a boat in said river, even though resting upon the shore of an island beyond the middle of the stream: *State v. Mullen*, 35-199.

4. Lands of United States — Taxation — Process. 4. Exclusive jurisdiction over all lands situate in the state now or hereafter purchased by the United States on which buildings for public uses are, or shall be erected, is hereby ceded to the United States, and the same shall be exempt from taxation so long as the same are owned by the United States. Nothing in this section shall be so construed as to prevent on such lands the service of any judicial process issued from or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes committed thereon. [R., §§ 2197, 2198.]

CHAPTER 2.

OF THE GENERAL ASSEMBLY.

[See Const., art. 3.]

5. Sessions. 5. The sessions of the general assembly shall be held at the seat of government, unless the governor shall convene them at some other place in times of pestilence or public danger. [R., § 13; C., '51, § 4.]

6. Temporary organization. 6. At two o'clock in the afternoon of the day on which the general assembly shall convene, and at the time of convening of the houses respectively, the president of the senate, or in his absence, some person claiming to be a member, shall call the senate to order, and, if necessary, a temporary president shall be chosen from their own number by the persons claiming to be elected senators. And some person claiming to be elected a member of the house of representatives shall call the house to order, and the persons present claiming to be elected to the senate shall choose a secretary, and those of the house of representatives a clerk for the time being. [R., § 14; C., '51, § 5.]

7. Certificates of election. 7. Such secretary and clerk shall receive and file the certificates of election presented, each for his own house, and make a list therefrom of the persons who appear to have been elected members of the respective houses. [R., § 15; C., '51, § 6.]

8. Temporary officers. 8. The persons so appearing to be members shall proceed to elect such other officers for the time being as may be requisite; and when so temporarily organized, shall choose a committee of five, who shall examine and report upon the credentials of the persons claiming to be members. [R., § 4; C., '51, § 7.]

9. Permanent organization. 9. The members reported by the committee as holding certificates of election from the proper authority, shall proceed to the permanent organization of their respective houses by the election of officers. [R., § 5; C., '51, § 8.]

10. Oath. 10. Any member may administer oaths necessary in the course of business of the house of which he is a member, and while acting on a committee upon the business of such committee. [R., § 7; C., '51, § 10.]

11. Freedom of speech. 11. No member shall be questioned in any other place for any speech or debate in either house. [R., § 6; C., '51, § 9.]

12. Compensation. 12; 18 G. A., ch. 38, § 2; 19 G. A., ch. 52, § 2. The compensation of the members, officers, and employees of the general assembly shall be: To every member for each regular session, five hundred and fifty dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate per day of the compensation of the members of the general assembly at the preceding regular session; and for every mile by the nearest traveled route in going to and returning from the place where the general assembly is held, five cents per mile; but in no case shall the compensation for any extra session exceed six dollars per day, exclusive of mileage. To the secretary of the senate and chief clerk of the house, seven dollars per day each; to the assistant secretaries of the senate and clerks of the house, six dollars per day each; to the enrolling and engrossing clerks, five dollars per day each; to the sergeant-at-arms, door-keepers, janitors and postmasters, four dollars per day each, and mail-carrier five dollars per diem; to clerks of committees, three dollars per day each, and the necessary stationery for each of the clerks, secretaries, and their assistants aforesaid; to the paper-folders, two dollars and fifty cents per day each; to the messengers two dollars per day each. And no other or greater compensation shall be allowed such officers and employees, nor shall there be any allowance of or for stationery except as above provided, postage, newspapers or other perquisites in any form or manner or under any name or designation. And this act shall apply to the officers and employees so named of the nineteenth general assembly for their full term of office. [R., § 18; C., '51, § 11; 12 G. A., ch. 155; 14 G. A., ch. 118.]

13. Payment. 15 G. A., ch. 3, § 1. Within thirty days after the convening of the general assembly, the presiding officers of the two houses shall jointly certify to the auditor of state, the names of the members, officers, and employees of their respective houses, and the amount of mileage due each member respectively, who shall thereupon draw a warrant upon the state treasurer for the amount due each member for mileage as above certified. He shall also issue to each member of the general assembly, at the end of the said thirty days, a warrant for one-half the salary due each member for the session, and the remaining one-half at the close of the session, and at the close of any extra or adjourned session the compensation of the members shall be paid upon certificate of the presiding officers of each house, showing the number of days of allowance and the compensation as provided by law.

14. Warrants. 15 G. A., ch. 3, § 2. He shall also issue to each officer and employee of the general assembly, upon the certificate of the presiding officer of the house to which such officer or employee belongs, a warrant, from time to time, for the amount due said officer or employee for services rendered.

15. Same. 15 G. A., ch. 3, § 3. He shall also issue warrants from time to time, to the postmaster, assistant postmaster, and mail-carrier, upon certificates signed by the president of the senate and the speaker of the house, for the amount due said officers for services rendered.

16. Payment. 15 G. A., ch. 3, § 4. Said warrants shall be paid out of any moneys in the treasury not otherwise appropriated.

17. Term of office. 13. The speaker of the house of representatives shall hold his office until the first day of the meeting of a regular session next after that at which he was elected. All other officers elected by either house shall hold their offices only during the session at which they were elected. [R., § 16.]

18. Contempt. 14. Each house has authority to punish as a contempt, by fine and imprisonment, or either of them, the offense of knowingly arresting a member in violation of his privilege, of assaulting or threatening to assault a member, or threatening to do any harm to the person or property of a member for anything by him said or done in either house as a member thereof; of attempting by menace or other corrupt means to control or influence a member in giving his vote, or to prevent his giving it; of disorderly or contemptuous conduct tending to disturb its proceedings; of refusal to attend, or be sworn, or be examined as a witness before either house, or a committee when duly summoned; of assaulting or preventing any person going to either house, or its committee by order thereof, knowing the same; of rescuing or attempting to rescue any person arrested by order of either house, knowing of such arrest; or knowingly impeding any officer of either house in the discharge of his duties as such. [R., § 8; C., '51, § 12.]

19. Fines and imprisonment. 15. Fines and imprisonment for contempt shall be only by virtue of an order of the proper house entered on its journals, stating the grounds thereof. Imprisonment shall be effected by a warrant under the hand of the presiding officer for the time being of the house ordering it, countersigned by the acting secretary or clerk, running in the name of the state and directed to the sheriff or jailer of the proper county. Under such warrant, the proper officer will be authorized to commit and detain the person. Fines shall be collected by a similar warrant directed to any proper officer of any county in which the offender has property, and executed in the same manner as executions for fines issued from courts of record, and the proceeds paid into the state treasury. [R., § 10; C., '51, § 14.]

20. Extent. 16. Imprisonment for contempt shall not extend beyond the session at which it is ordered, and shall be in the jail of the county in which

the general assembly is then sitting; or if there be no such jail, then in one of the nearest county jails. Punishment for contempt shall not constitute a bar to any other proceeding, civil or criminal for the same act. [R., §§ 9, 11; C., '51, §§ 13, 15.]

21. Attendance of witnesses. 17. Whenever a committee of either house, or a joint committee of both, is charged with an investigation requiring the personal attendance of witnesses, any person may be compelled to appear before such committee as a witness by serving upon him, in the same manner a subpœna is required to be served in a civil action in the district court, an order, naming the time and place he is required to appear, signed by the presiding officer of the house appointing the committee, and attested by its acting secretary or clerk; or, in case of a joint committee, signed and attested by such officers of either house. [11 G. A., ch. 3, § 1.]

22. Compensation of witnesses. 18. Witnesses shall be entitled to the same compensation for attendance under the preceding section as before the district court, but shall not have the right to demand payment of their fees in advance. [11 G. A., ch. 3, § 2.]

23. Joint conventions. 19. Joint conventions of the general assembly shall meet in the hall of the house of representatives for such purposes as are or shall be provided by law. The president of the senate, or, in his absence, the speaker of the house of representatives shall preside, or, in the absence of both, a temporary president shall be appointed by a joint vote. [R., §§ 674, 675.]

24. Tellers. 20. After the time for the meeting of the joint convention has been designated and prior thereto, each house shall appoint one teller, and the two shall act as judges of the election. [R., § 676.]

25. Record. 21. The clerk of the house of representatives shall act as secretary of the convention, and he and the secretary of the senate shall keep a fair and correct record of the proceedings of the convention, which shall be entered on the journals of each house. [R., § 677.]

26. Vote, how taken. 22. When any officer is to be elected by joint convention, the names of the members shall be arranged in alphabetical order by the secretaries, and each member shall vote in the order in which his name stands when thus arranged. The name of the person voted for, and of the members voting, shall be entered in writing by the tellers, who, after the secretary shall have called the names of the members a second time, and the name of the person for whom each member has voted, shall report to the president of the convention the number of votes given for each candidate. [R., §§ 678, 679.]

27. Second poll. 23. If no person shall receive the votes of a majority of the members present, a second poll may be taken, and so on from time to time until some person receives such majority. [R., § 680.]

28. Adjournment. 24. If the purpose for which the joint convention assembled is not concluded, the president shall adjourn the same from time to time as the members present may determine. [R., § 681.]

29. Certificates of election. 25. When any person shall have received a majority of the votes as aforesaid, the president shall declare him to be elected, and shall, in the presence of the convention, sign two certificates of such election, attested by the tellers, one of which he shall transmit to the governor, and the other shall be preserved among the records of the convention and entered at length on the journals of each house. The governor shall issue a commission to the person so elected. [R., § 682.]

30. Election of senators and canvass of votes. 26. Joint conventions for the purpose of electing a senator in the congress of the United

States, and canvassing the votes for governor and lieutenant-governor, shall be conducted according to the foregoing provisions so far as applicable. [R., § 685.]

31. Rules. 27. In the absence of other rules, those of parliamentary practice comprised in Cushing's Manual shall govern. [R., § 686.]

CHAPTER 3.

OF THE STATUTES.

32. Approval of bills. 28. When the governor approves a bill, he shall set his name thereto with the date of his approval. [R., § 19; C., '51, § 16.]

As to how the fact of approval may be shown, see note to § 39.

As to approval by governor, see Const., art. 3, § 16.

33. Bill returned by governor. 29. When a bill, having passed the general assembly, is returned by the governor with his objections, and is afterward passed as provided in the constitution, a certificate signed by the presiding officer of each house in the following form shall be indorsed thereon or attached thereto: "This bill having been returned by the governor with his objections to the house in which it originated, and after reconsideration having again passed both houses by yeas and nays by a majority of two-thirds of the members of each house, has become a law this —— day of ——." [R., § 20; C., '51, § 17.]

See Const., art. 3, § 16.

34. Bill retained by governor. 30. When a bill has passed the general assembly, and is not returned by the governor within three days as provided in the constitution, it shall be authenticated by the secretary of state indorsing thereon: "This bill having remained with the governor three days (Sunday excepted), the general assembly being in session, has become a law this —— day of ——. Secretary of State." [R., § 21; C., '51, § 18.]

See Const., art. 3, § 16.

35. Original acts deposited. 31. The original acts of the general assembly shall be deposited with and kept by the secretary of state. [R., § 22; C., '51, § 19.]

The original act thus deposited with the secretary of state is the ultimate proof of the statute, whatever errors there may be in the printed copies thereof; and the court will inform itself and take cognizance of the true reading as thus shown: *Clare v. State*, 5-509.

The acts thus deposited are the bills which receive the signatures of the officers, etc., and behind them it is impossible for any court to go for the purpose of ascertaining what the law is: *Duncombe v. Prindle*, 12-1, 11.

Where the newspaper publication of an act corresponded with the original rolls, *held*, that the act as thus existing and published would govern as to an offense committed thereunder prior to the formal publication of the statute, although such formal publication differed from the original rolls and the newspaper publication: *State v. Donehey*, 8-396.

As the constitution requires a proposed amendment to be entered upon the journals of the respective houses of the general assembly when agreed to, such journals are higher evidence of the contents of such amendment as it was agreed to than the enrolled copy of the joint resolution proposing such amendment, signed by the presiding officers of the respective houses and by the governor: *Koehler v. Hill*, 60-543.

36. Of private nature. 32. Acts of a private nature which do not prescribe the time when they take effect, shall do so on the thirtieth day next after they have been approved by the governor, or indorsed as provided in this chapter. [R., § 23; C., '51, § 20.]

37. Of public nature; publication. 33. Acts which are to take effect by publication in newspapers, shall be published in at least two papers, one at

least of them at the seat of government, and if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. All such acts shall take effect on the twentieth day after the date of the last publication, and the secretary of state shall make and sign on the original roll of each of such acts a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act shall be presumptive evidence of the facts therein stated. [R., § 24; C., '51, § 21.]

A statute does not become a law so as to affect the rights of property or parties until the time when by publication or otherwise it is to take effect: *Charless v. Lamberson*, 1-435.

The provision that "all such acts shall take effect on the twentieth day after the date of the last publication" applies only to acts in which the time of taking effect is not specified. It does not render it incompetent for the legislature to specify in the act itself when it shall take effect. Where an act provided that it should take effect "from its publication in," etc., *held*, that it took effect from the date of such publication: *Hunt v. Murray*, 17-313.

Under a prior provision, however, to the same effect, *held*, that although the act contained a special section directing that it should take effect from and after its publication, such section should not be considered as repealing the general provision that it should take effect at the expiration of twenty days from the date of publication: *Thatcher v. Haun*, 12-303.

Certificate of secretary that act was published in one newspaper, *held* not sufficient: *Welch v. Battern*, 47-147.

The general assembly may provide that an act shall take effect by publication, and the courts have no power to prevent the injustice which may result therefrom. (Decided under old const.): *Pierson v. Baird*, 2 G. Gr., 235.

If a statute is in force, ignorance thereof from any cause on the part of those affected by it is no reason why it should not be enforced against them. They cannot require that it should be published in such manner as that it should be known to them: *Barber v. St. Louis, K. C. & N. W. R. Co.*, 43-223.

Where at the time of the commission of an offense under a statute the only publication that had been made was in a newspaper under authority of law, and the statute as thus published corresponded to the original rolls, *held*, that the form of the statute as thus appearing would prevail over a subsequent publication, although it was official, varying from the form found in the rolls and as originally published: *State v. Donehey*, 8-396.

A court will take judicial notice of the fact of publication of a statute, where such publication is necessary in order that the act shall go into effect: *Allen v. Dunham*, 1 G. Gr., 89.

The courts are bound *ex officio* to take notice of publication of statutes which take effect by publication: *Pierson v. Baird*, 2 G. Gr., 235.

While the statement appended to the printed act that it is "approved" is evidence of that fact, it is not essential to the validity of the act, and the approval may be shown from the original in the office of the secretary of state: *Dishon v. Smith*, 10-212.

38. Public nature; when in force. 34. All other acts and resolutions of a public nature passed at regular sessions of the general assembly, shall take effect on the fourth day of July following their passage. [R., § 25; C., '51, § 22.]

39. Publication of laws. 35; 16 G. A., ch. 132. Within twenty days after the adjournment of the general assembly, the secretary of state shall prepare a manuscript or printed copy of all the laws, joint resolutions, and memorials passed thereat, arranging the same in chapters, with marginal notes and index, to which he shall attach his certificate that the acts, resolutions, and memorials therein contained are truly copied from the original rolls, which shall be presumptive evidence of their correctness, and deliver them to the state printer. [R., §§ 62, 63, 144; C., '51, §§ 46, 47.]

While the statement appended to the printed act that it is "approved" is evidence of that fact, it is not essential to the validity of the act, and the approval may be shown from the original in the office of the secretary of state: *Dishon v. Smith*, 10-212.

40. How published. 36; 16 G. A., ch. 132. The acts of each general assembly shall be printed in pages of the same size, and as near as may be, of the same style, type and appearance with the edition of this code.

41. Superintending publication. 37; 16 G. A., ch. 132. The secretary of state shall superintend the printing of the laws as above directed. In the absence of any other provision the number of copies to be printed and bound, and the time within which the same shall be completed, may be fixed by reso-

lution of each general assembly, or, in case no such resolution is passed, shall be determined by the executive council.

42. References to code. 38; 16 G. A., ch. 132. Every act passed in amendment of or in addition to any chapter or section of this code, or in amendment of or in addition to any previous act of the same kind, shall contain in the title thereof a reference to the number and name of the chapter so amended or added to, and if such reference be omitted, the secretary of state shall, in preparing such act for publication, supply the omission.

The marginal notes and head-lines inserted by the secretary of state in publishing the statutes are not to be considered in construing them. They are not a part of the law: *Cook v. Federal Life Ass'n*, 35 N. W. Rep., 500.

43. Distribution. 39; 16 G. A., ch. 132; 17 G. A., ch. 123, § 1. The secretary of state shall distribute the laws aforesaid as follows: To the state library for distribution to other states and territories, and for exchange, two hundred copies; two copies to each state institution, to each judge of a court of record, and to each state officer; one copy to each member of the general assembly; ten copies to the library of the law department of the state university; one copy to the state historical society; all of the foregoing to be in law sheep; thirteen thousand copies of the laws bound in boards for distribution to county auditors upon their requisition. [Private Laws, 14 G. A., ch. 100, § 4.]

44. Officers supplied. 40; 16 G. A., ch. 132; 17 G. A., ch. 123, § 2. Each county officer, justice of the peace, township clerk and mayor of a city or incorporated town shall be supplied with a copy of the laws for the use of his office, which shall be delivered to his successor in office. Distribution shall be made upon the requisition of the county auditor upon the secretary of state, which requisition shall state the number of copies required for distribution under the provisions of this section, and also the number of copies requisite for sale in the county, and said requisition shall be made before the first day of March in each year, and thereupon the secretary of state shall forward the number so certified and file with the auditor of state a certificate thereof, which shall be charged to such county by the auditor of state. The auditor of state shall credit the county with the number of copies distributed under the provisions of the act upon the filing of the proper vouchers by the county auditors, and upon sale of such laws by the county auditor at the rate of fifty cents per copy. The said county auditor shall pay said amounts to the county treasurer of his county, for the use of the state revenue, and the treasurer shall execute duplicate receipts therefor, one of which shall be filed with the auditor of state. The county auditor shall furnish the laws in their respective counties as hereinbefore provided. [Same, § 5.]

45. Sales. 41. The secretary of state and county auditor shall sell the copies remaining in their hands at fifty cents a copy. The secretary of state shall report under oath to the auditor of state the number of copies remaining on hand after the distribution aforesaid, and the auditor of state shall charge him therewith and credit him with the proceeds of all that are sold, upon payment of the same into the state treasury. The county auditor shall pay the proceeds of all copies sold by him to the county treasurer, taking his duplicate receipts therefor, one of which he shall transmit to the auditor of state. [Same, § 6.]

46. Report. 42. The secretary of state and county auditors shall, on or before the fifteenth day of November in each year, report to the auditor of state the number of copies sold and the number remaining on hand, and the amount paid into the state or county treasury, and the auditor shall charge such state or county treasurer with such amount.

47. Copies delivered to successor. 43. When the secretary of state or county auditor goes out of office having any such copies remaining, he shall deliver them to his successor, taking his duplicate receipts therefor, one of which he shall transmit to the auditor of state, who shall thereupon give such officer the proper credit and charge his successor with the copies received by him. Every officer receiving a copy of such laws shall execute a receipt therefor, and shall deliver such copy to his successor, or to the officer from whom he received it, for the use of such successor, and upon failure to do so, shall be liable on his official bond or in his individual capacity.

48. Compensation for the publication. 44. The compensation for the publication of laws which are ordered by the general assembly to take effect by publication, unless otherwise fixed, shall be audited and paid by the state. Such compensation shall be one-third the rates of legal advertisements allowed by law. [11 G. A., ch. 188, § 4.]

49. Construction. 45. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly or repugnant to the context of the statute: [R., § 29; C., '51, § 26.]

Repeal of. 1. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed;

For similar provision as to the effect of Code upon previous legislation, see § 54 and notes.

Previous statute not revived: The repeal of a statute does not revive a statute previously repealed: *Burlington v. Kellar*, 18-59; *Negus v. Negus*, 46-487.

As to proceedings commenced: Where a statute is repealed it must be considered as if it never existed except with reference to such parts as are preserved by the repealing statute; and though the suit may have been instituted under the statute while in existence, such repeal takes away the jurisdiction over the case thus pending: *Thatcher v. Haun*, 12-303.

Where a statute relating to the remedy is changed after the bringing of an action, subsequent proceedings should so far as practicable conform to the new law: *Davidson v. Wheeler*, Mor., 238.

Where a rule of practice is changed by statute without any saving clause the new law is applicable to all cases then pending: *Meigs v. Parke*, Mor., 378.

An amendment to the statute as to granting a change of venue, *held* applicable to actions pending. Such a change does not affect vested rights: *Eikenberry v. Edwards*, 71-82.

Where the times of holding terms of court were changed by statute, *held*, that such change did not affect a cause already commenced by service of notice, and that defendant should be held to appear at the "next term," as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28-274.

Where action was commenced by service by publication before the taking effect of the Revision, and the service of notice was not sufficient under the law as it then stood, *held*, that a judgment rendered upon such service after the taking effect of the Revision was defective, although the service, if made under the provisions of the Revision, would have been sufficient: *Bristow v. Guess*, 12-404.

Statutory provisions as to the method of trial in equity cases upon appeal, *held* not applicable to an appeal taken after the act took effect from a judgment rendered before that time: *Simondson v. Simondson*, 50-110; *Trebon v. Zuraff*, 50-180.

Nor to an appeal commenced but not brought to judgment before the act took effect: *Schmeltz v. Schmeltz*, 52-512; *Bailey v. Malvin*, 53-371.

Effect upon judgments or orders: Proceedings to enforce a judgment should be governed by the law in force when they are commenced, and not by that under which the judgment is rendered: *Gray v. Iliff*, 30-195.

The law in force at the time of the rendition of a judgment should govern as to a sale made thereunder: *Fonda v. Clark*, 43-300; *Babcock v. Gurney*, 42-154.

Also as to the right to appraisement: *Holland v. Dickerson*, 41-367.

Also as to stay of execution: *Du Boise v. Bloom*, 38-512.

Also as to right of appeal: *Davenport v. Davenport & St. P. R. Co.*, 37-624; *Ingram v. Chicago, D. & M. R. R. Co.*, 38-669.

Proceedings commenced are not, under statutory provision above set out, affected by the repeal of the statute under which they are commenced: *Inskeep v. Inskeep*, 5-204, 221.

Rights accrued: The statute authorizing suit on a promissory note to be brought by an assignee thereof in his own name instead of in the name of the assignor for his benefit, *held* applicable to notes already executed: *Phillips v. Runnels*, Mor., 391.

Where an action was brought prior to the adoption of the Code of '51, but judgment therein was not rendered until after that time, *held*, that defendant's homestead exemption

should be governed by the provisions of the law under which action was commenced: *Helfenstein v. Cave*, 3–287.

Where a new revenue law was passed making no express provisions as to the enforcement of the penalties under the previous law, *held*, that the penalties already accrued could be enforced in accordance with the previous statute: *Bartruff v. Remey*, 15–257.

The general assembly cannot alter, change or repeal statutes relating to the remedy so as to substantially impair a vested right; therefore, where a mortgage and a mechanic's lien upon the same property attached under the Revision, *held*, in an action brought under the code, that the mortgagee had a right to have his lien determined and enforced, as against the holder of the mechanic's lien, in accordance with the provisions of the Revision: *Brodt v. Rohkar*, 48–36.

Accruing and accrued rights are of the same character. There is no other distinction made by the statute, except that one has accrued and the other is accruing. The statute takes effect upon both, and both are preserved to the party entitled thereto: *Woods v. Haviland*, 59–476.

The repeal of a statute with reference to widow's dower will not affect a dower interest already vested though not yet assigned: *Burke v. Barron*, 8–132.

Prior to the death of a testator his devisees have no rights which are protected against subsequent legislation: *Lorieux v. Keller*, 5–196.

The right contemplated by this provision pertains to any property right, or person, of the citizen. A permit granted under a statute is not such a right that it is not affected by the repeal of the statute: *Stale v. Mullenhoff*, 74–721.

Crimes previously committed: Where, after an indictment was found, the law prescribing the punishment for the offense therein charged was changed, so that the offense was no longer triable on indictment, but only on information, *held*, that the prosecution under the indictment was not affected by the change. (Overruling *State v. Burdick*, 9–402): *State v. Shaffer*, 21–486.

A new statute which provides a milder punishment repeals so much of the former law as concerns the punishment without any express repeal, and where one statute prescribes different degrees of punishment in different sections for the same offense, only the milder degree can be adopted: *State v. Brandt*, 41–593.

Where the repealing clause of a penal statute provided that no offense committed and no penalty incurred under the act repealed should be affected by the repeal, *held*, that a crime committed under a previous act, which was repealed with a similar saving clause to the act thus repealed, was not within the exception and could not be prosecuted: *Jones v. State*, 1–395.

Where the statute defining a crime is repealed and another provision substituted defining the same crime, but providing a different punishment, an indictment is not subject to demurrer which fails to state whether such crime was committed before or after the change in the statute: *State v. Reyelts*, 74–499.

The repeal of a penal statute without a special saving clause does not release a party who has already incurred the penalty thereunder from liability: *Kemmish v. Ball*, 30 Fed. Rep.. 759.

Illegal act not validated: The abrogation and repeal of the constitutional provision prohibiting the issuance of paper to circulate as money, *held* not to render valid scrip so issued while the law was in operation: *Dively v. Cedar Falls*, 21–565.

Taxes accrued: Taxes, and the interest and penalties thereon, are not affected by a repeal of the law under which they have accrued: *State ex rel. v. Stewart*, 11–251; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

But the repeal of the statute terminates the right to additional penalties: *Tobin v. Hartshorn*, 69–648.

Where a railway company had expended money in reliance on a tax voted in its aid, *held*, that a repeal of the statute did not deprive the company of the right to have the tax levied and collected: *Burges v. Mabin*, 70–633.

The repeal of a statute authorizing special assessments for improvements deprives a city of the power to levy such a tax for improvements not yet contracted for: *Wardens, etc., of Christ Church v. Burlington*, 39–224.

The repeal of a statute *held* not to affect the right of redemption from a tax sale existing thereunder prior to the repeal: *Adams v. Beale*, 19–61; *Myers v. Copeland*, 20–22.

A general repealing clause should be construed as referring only to laws of a general nature on the same subject. Therefore where, under the charter of an incorporated town, it was authorized to grant licenses for the sale of intoxicating liquors, *held*, that a subsequent license law, making different provisions, would not repeal the authority conferred in the charter: *State v. Neeper*, 3 G. Gr., 337.

Where provisions for the foreclosure of tax titles were made by special statutes applicable to sales for taxes levied by cities, and subsequently other provisions were made in regard to tax sales, *held*, that the original remained in force as to sale for city taxes: *Sweet v. Billings*, 14–384.

Where there is a direct conflict between two different statutes, and the latter in express terms repeals all prior acts in conflict with its provisions, the former must be held repealed: *Staples v. Plymouth County*, 62–364.

The question of the effect of a repealing clause in an unconstitutional statute is one of legislative intention and to be determined from all the circumstances of the particular case. Where the language used was, "so much of chapter 80 as comes in conflict with this act is repealed," *held*, that such previous statute was not thereby repealed: *Childs v. Shower*, 18–261.

Implied repeal: Where two laws are in conflict and cannot be reconciled the last must prevail, being the last expression of the legislative will: *McKinney v. Wood*, 35–167.

Where two statutes are in terms repugnant or inconsistent, if the latter is intended to

provide the only rule which is to govern the case, it will be considered as repealing the prior statute: *State v. Courtney*, 73-619.

In a particular case, *held*, that two sections being manifestly inconsistent, one of them must be regarded as having been repealed by implication: *State v. Delong*, 12-453.

A general statute making regulations upon a particular subject inconsistent with those in a special act of incorporation of a city repeals the provisions in such special act: *State v. Harris*, 10-441.

Where a statute to which, by subsequent legislation, an exception is made is repealed, and subsequently re-enacted without providing for the exception, the last statute being inconsistent with the one making the exception will be deemed to repeal it by implication: *State v. Bissell*, 67-616.

While the repeal of a statute by implication is not favored by the courts, yet where a statute is inconsistent in its provisions with one subsequently enacted, and is out of harmony with the spirit of later general legislation on the subject-matter, the courts will sustain the more recent statute: *Yant v. Brooks*, 19-87.

Where a statute covers an entire subject it thereby repeals prior statutes on the same subject, although they are not expressly repealed: *Ellis v. Jackson County*, 38-175.

Where one ordinance embraced and revised the whole subject-matter contained in the corresponding portion of a previous ordinance, *held*, that such previous ordinance was repealed by the subsequent one: *Decorah v. Dunstan*, 38-96.

Where a subsequent statute is passed containing provisions substantially the same as those of a previous statute, but not containing all the provisions of the previous one, there being no inconsistency between the two, and they being such that both will be enforced, the later statute will not be regarded as repealing even that portion of the previous statute not included in the later one: *Phillips v. Council Bluffs*, 63-576; *Ament v. Humphrey*, 3 G. Gr., 255.

The fact that a subsequent statute provides a new remedy for the same wrong will not necessarily show an implied repeal. The new remedy may be merely cumulative: *State v. Berry*, 12-58.

Where statutes are not in conflict, the latter cannot be held to repeal by implication authority conferred in the former: *Burlington v. Putnam Ins. Co.*, 31-102.

Change in statute upon which another statute depends will not affect the latter: *Garber v. Clayton County*, 19-29; *Kinsey v. Sherman*, 46-463; *Weir v. Allen*, 47-482.

But where a special charter refers to the general law for subjects of taxation under such charter, it seems that a change in the general law will operate equally on the charter: *Tackaberry v. Keokuk*, 32-155.

Repeals by implication not favored: The law does not favor repeals by implication, and though two acts are seemingly repugnant, yet they should, if possible, receive such construction that the latter shall not repeal the former: *Harriman v. State*, 2 G. Gr., 270; *Hummer v. Hummer*, 3 G. Gr., 42; *Casey v. Harned*, 5-1; *Cole v. Board of Supervisors*, 11-552; *Baker v. Steamboat Milwaukee*, 14-214; *Burke v. Jeffries*, 20-145; *State v. Shaw*, 28-67; *Dubuque v. Harrison*, 34-163.

If by any fair and reasonable construction a prior and later statute can be reconciled, both shall stand. If it can be avoided, no court can conclude that a statute is repealed by implication: *Casey v. Harned*, 5-1; *Baker v. Steamboat Milwaukee*, 14-214.

In order to work the repeal of an old law by a new one by implication, there must be an absolute repugnance between the two. Effect will be given, if possible, to several statutes *in pari materia*: *State v. Shaw*, 28-67.

Any reasonable construction will be adopted to avoid a repeal by implication: *State v. Brandt*, 41-593.

Repeal by implication is not to be presumed: *Risdon v. Shank*, 37-82.

Non-user: Mere failure to enforce a statute does not result in its repeal by non-user: *Pearson v. International Distillery*, 72-348.

Words and phrases. 2. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning;

Number, gender. 3. Words importing the singular number may be extended to several persons or things, and words importing the plural number may be applied to one person or thing, and words importing the masculine gender only may be extended to females;

Joint authority. 4. Words giving a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority;

Highway, road. 5. The words "highway" and "road" include public bridges and may be held equivalent to the words "county way," "county road," "common road," and "state road;"

Public bridges are a part of the highway: *Gallaher v. Head*, 72-173.

Insane. 6. The words "insane person" include idiots, lunatics, distracted persons and persons of unsound mind;

Issue. 7. The word "issue," as applied to descent of estates, includes all lawful lineal descendants;

Real property. 8. The word "land," and the phrases "real estate" and "real property," include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal;

The interest which a mortgagee has in the real property mortgaged constitutes "real estate:" *Severin v. Cole*, 38-463; and also the equitable interest which the heir of such mortgagee has in such property: *Burton v. Hintrager*, 18-348.

Real estate includes equitable as well as legal interests in real property: *Blain v. Stewart*, 2-378.

The making improvements upon land by one in possession under contract of purchase gives him an equitable interest which will pass by a conveyance: *White v. Butt*, 32-335.

A mere license to make improvements upon and use real property is not real estate: *Melhop v. Meinhart*, 70-685.

Personal property. 9. The words "personal property" include money, goods, chattels, evidences of debt, and things in action;

A promissory note is "personal property:" *Allison v. King*, 21-302; so are municipal bonds: *Callanan v. Brown*, 31-333; and so is a draft, though it be against the government, and upon which action could not, therefore, be brought, and though it has not been indorsed by the payee; so *held* in case of embezzlement: *State v. Orwig*, 24-102.

Applied: *Iowa Lumber Co. v. Foster*, 49-25.

Property. 10. The word "property" includes personal and real property;

Applied: *Briggs v. Briggs*, 69-617.

Month, year, A. D. 11. The word "month" means a calendar month, and the word "year," and the abbreviation "A. D.," are equivalent to the expression "year of our Lord;"

The designation of the year by numerical figures with A. D. prefixed, *held* sufficient in an indictment: *State v. Seamons*, 1 G. Gr., 418.

Oath, affirmation. 12. The word "oath" includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word "swear," includes "affirm;"

Person, corporation. 13. The word "person" may be extended to bodies corporate;

So *held* under the statute as to garnishment: *Wales v. Muscatine*, 4-302, 307.

The rule that the word persons may be extended to bodies corporate cannot be of universal application, especially in the construction of criminal statutes, for the reason that there are some crimes for which corporations cannot be punished. The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute: *Stewart v. Waterloo Turn Verein*, 71-226.

Seal. 14. Where the seal of a court or public office or officer may be required to be affixed to any paper, the word "seal" shall include an impression upon the paper alone as well as upon wax or a wafer affixed thereto;

State, territory. 15. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the said district and territories;

Town, cities, villages. 16. The word "town" may include cities as well as incorporated villages;

"Town" does not include unincorporated village; so *held* in constructing statute as to extent of homestead: *Truax v. Pool*, 46-256.

Will. 17. The word "will" includes codicils;

In writing. 18. The words "written" and "in writing," may include printing, engraving, lithography, or any other mode of representing words and letters, excepting those cases where the written signature or mark of any person is required;

Sheriff. 19. The term "sheriff" may be extended to any person performing the duties of the sheriff either generally or in special cases;

This does not authorize a person other than the sheriff to serve notices, levy executions, etc.: *Conway v. McGregor & M. R. R. Co.*, 43–32.

Deed, bond, indenture, undertaking. 20. The word "deed" is applied to an instrument conveying lands, but does not imply a sealed instrument; and the words "bond" and "indenture" do not necessarily imply a seal, and the word "undertaking" means a promise or security in any form;

A seal is not therefore essential to the validity of a conveyance: *Pierson v. Armstrong*, 1–282; though it formerly was so: *Switzer v. Knapps*, 10–72; *Simms v. Hervey*, 19–273, 290.

Executor. 21. The term "executor" includes administrator, where the subject-matter applies to an administrator;

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

The designation of the year by numeral figures with A. D. prefixed, *held* sufficient in an indictment: *State v. Seamons*, 1 G. Gr., 418.

Computing time. 23. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday; [R., § 4121; C., '51, § 2513.]

Calendar months are to be computed by reckoning from a given day to the day of a corresponding number where there is one: *Parkhill v. Brighton*, 61–103.

In computing the number of days that a process has been served before return day the day of service should be included and the day of return excluded: *Dilts v. Zeigler*, 1 G. Gr., 164.

In computing time the first day shall be excluded and the last included: *Richardson v. Burlington & M. R. R. Co.*, 8–260; *Teuchcr v. Hiatt*, 23–527; *Manning v. Irish*, 47–650; *Bonney v. Cocke*, 61–303.

But where, under the provision of § 3807, that notice shall be served in such time as to leave at least ten days between the day of service and the first day of the next term, both the day of service and the first day of the term should be excluded from the computation: *Robinson v. Foster*, 12–186.

In such case, where the first day of the term falls on Monday, Sunday is not to be excluded from the computation: *Ibid.*

Where it was provided that a tenancy should terminate upon ten days' notice, *held*, that notice being given on the last day of April, an action brought on the 10th day of May was premature, and that the day of service of the notice must be excluded: *Aiken v. Appleby*, Mor., 8.

The provision that the last day, if it falls on Sunday, shall be excluded in any computation, applies only where it is required that some act shall be done on the last day. Under the statutory provision that a petition shall be filed ten days before the first day of the term (§ 3805) *held*, that Sunday should be included in the computation, although it was the last day before the first day of the term: *Conklin v. Marshalltown*, 66-122.

Degrees of consanguinity. 24. Degrees of consanguinity and affinity shall be computed according to the civil law; [R., § 4124.]

Applied: *Martindale v. Kendrick*, 4 G. Gr., 307.

Clerk. 25. The word "clerk" means clerk of the court in which the action or proceeding is brought or is pending; and the words "clerk's office" mean his office. [R., § 4123.]

CHAPTER 4.

OF THE CODE AND ITS OPERATION.

50. This code. 46. In the citation of the statutes this shall not be reckoned as one of the statutes of the present political year, but it may be designated as the "Code," adding as may be necessary the title, chapter, or section. [R., § 30; C., '51, § 27.]

While each title of the Code was separately enacted, still the whole Code should, for the purpose of construction, be regarded as having been enacted at the same time, and sections in different titles relating to the same matter must be read and construed together and such construction adopted, if consistent with the language used, as will give force and effect to both sections: *Hunt v. Farmers' Ins. Co.*, 67–742.

51. Repeal of prior statutes. 47. All public and general statutes passed prior to the present session of the general assembly, and all public and special acts the subjects whereof are revised in this code or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed. [R., § 31; C., '51, § 28.]

The provisions of the Revision and session laws prior to the Code in reference to swamp lands being "public and special acts," and not revised in the Code, *held* not to be repealed thereby: *Gray v. Mount*, 45–591.

Under this provision, all public and general statutes passed prior to the enactment of the Code and not therein re-enacted are repealed: *Staples v. Plymouth County*, 62–364.

Under the corresponding provision of the Revision, *held*, that the prior act relating to the jurisdiction of counties bordering on the Mississippi river was not thereby repealed, although not embraced in the Revision: *State v. Mullen*, 35–199.

A general statute making regulations upon a particular subject inconsistent with those in special act of incorporation of a city repeals the provisions in such special act: *State v. Harris*, 10–441.

The Revision of 1860 was not, as a whole, enacted by the general assembly. Those parts not enacted in the code of civil practice and the code of criminal practice, or other acts adopted at the same session, were simply a compilation by the commissioners of the laws then in force, and, in case of an error in such compilation, the original statutes prevailed and were not to be deemed repealed: *State v. Lee*, 37–402.

52. Local statutes. 48. Local acts are not repealed unless it be herein so expressed, or unless the provisions of this code are repugnant thereto. [R., § 32; C., '51, § 29.]

53. When code takes effect. 49. This code shall take effect on the first day of September, A. D. 1873. until which time existing statutes continue in force, and nothing contained in this title in relation to the preparation and publication of the statutes shall be construed as including this code. [R., § 49; C., '51, § 30.]

54. Existing rights not affected. 50. This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this code as far as consistent. [R., § 34; C., '51, §§ 31, 2514.]

The general assembly cannot alter, change or repeal statutes relating to the remedy so as to substantially impair a vested right; therefore, where a mortgage and a mechanic's lien upon the same property attached under the Revision, *held*, in an action brought under the Code, that the mortgagee had a right to have his lien determined and enforced, as against the holder of the mechanic's lien, in accordance with the provisions of the Revision: *Brodt v. Rohkar*, 48–36.

A construction of the statute of limitations which would extend the time on debts existing before the adoption of the Code, and on which the previous statute of limitations had commenced to run, to the full period after the taking effect of the Code, was held not admissible, for the reason that it would affect a right accrued under the debt: *McDonald v. Jackson*, 55–37.

A change made by the Code in the law as to the liability of railroad companies for injuries in certain cases, *held* not to apply in a case where the injury was received before the Code took effect: *Payne v. Chicago, R. I. & P. R. Co.*, 44–236.

A judgment being rendered before the taking effect of the Code against the husband, under which certain property of the wife, being in his possession, was liable as the law then stood, *held*, that such property might still be taken upon execution issued after the taking effect of the Code, although by its provisions the property of the wife would not have been liable under similar circumstances: *Schmidt v. Holtz*, 44–446.

Where an original notice was served before the taking effect of the Code, but the second day of the next term occurred after that time, *held*, that the provisions of the Code would govern the time of pleading: *Brotherton v. Brotherton*, 41–112; *Connable v. Colvin*, 41–93.

The right of a party to a trial by jury, in an action commenced prior to the taking effect of the Code, *held* not to be affected by any change made by the Code: *Wormley v. Hamburg*, 46–144. So *held* in an action for divorce in which, under the Revision, the parties were entitled to a jury trial: *Wadsworth v. Wadsworth*, 40–448.

The provisions of the Code *held* applicable as to the admissibility of evidence in a particular case commenced before it went into effect: *Wood v. Brolliar*, 40–591.

An order being made before the Code took effect for a special term of court to be held after that time, and that fifteen jurors be called (the proper number under Revision), *held*, that such order was an "act done" so as to be valid, although the proper number under the Code was twenty-four: *Fifield v. Chick*, 39–651.

As to the effect of the Code upon penalties

or taxes delinquent before it took effect. see *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153, 190.

Under Revision, § 4172, *held*, that proceedings to enforce a judgment should be governed by the law in force when they were commenced and not by that under which the judgment was rendered; a judgment not being "an action:" *Gray v. Iliff*, 30–195.

Under a similar provision in the Code of '51, *held*, that, where an action was brought prior to its adoption, but judgment therein was not rendered until after that time, the defendant's homestead exemption should be governed by the provisions of the law under which the action was commenced: *Helfenstein v. Cave*, 3–287.

And see § 49, ¶ 1, and notes.

55. Same. 51. No offense committed, and no penalty or forfeiture incurred under any statute hereby repealed and before the repeal takes effect, shall be affected by the repeal, except that when a punishment, penalty, or forfeiture is mitigated by the provisions herein contained, such provisions shall be applied to a judgment to be pronounced after the repeal. [R., § 35; C., '51, § 32.]

See notes to § 49, ¶ 1.

56. Suits or prosecutions pending. 52. No suit or prosecution pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of this code as far as consistent. [R., § 36; C., '51, § 33.]

See notes to § 49, ¶ 1.

57. Heretofore and hereafter. 53. The terms "heretofore" and "hereafter," as used in this code, have relation to the time when this statute takes effect. [R., § 38; C., '51, § 35.]

Applied: *Bennett v. Bevard*, 6–82: *Davenport v. Davenport & St. P. R. Co.*, 37–624; *Rivers v. Cole*, 38–677; *Thatcher v. Haun*, 12–303.

The expression "prior to the passage" of an act means prior to its taking effect: *Rogers v. Vass*, 6–405; *Charless v. Lamberson*, 1–435.

It is proper to make a curative act applicable to all acts described therein, intermediate the taking effect of the act and its passage: *Shearer v. Mills*, 35–499.

58. Acts in conflict with code. 54. Whenever an act of a general nature passed at the present session of the general assembly, separate from this code, conflicts with or contravenes any of the provisions thereof, the provisions of the code shall prevail. [R., § 39; C., '51, § 36.]

CHAPTER 5.

SUBMISSION OF CONSTITUTIONAL AMENDMENTS.

59. Publication. 16 G. A., ch. 114, § 1. Whenever any proposition to amend the constitution has passed the general assembly and [been] referred to the next succeeding legislature as provided in section one, article ten, of the constitution, the secretary of state shall cause the same to be published in two newspapers of general circulation in each congressional district in the state for the time provided in section one, article ten of the constitution; and the fact of such publication having been made shall be verified by the affidavits of the publishers of such newspapers, and such affidavits, together with the certificate of the secretary of state that he had designated the newspapers in which the publication was made, shall be filed, preserved and recorded in a book kept for that purpose in the office of the secretary of state; and the secretary of state shall report his action in the premises to the next succeeding general assembly.

60. Submission; ballots; returns. 16 G. A., ch. 114, § 2; 19 G. A., ch. 7, § 1. Whenever a proposition to amend the constitution shall have passed

the general assembly and been agreed to by the next succeeding general assembly as provided in section one, article ten, of the constitution, when no other time is fixed by such general assembly for its submission to the people, the same shall be submitted to the qualified electors at the next ensuing general election; and the ballots relating to such amendment or amendments shall be separate from the ballots for officers cast at such election, and shall be deposited in boxes to be provided by the judges of election, separate from said ballots so cast for officers; and there shall be written or printed on such ballots the entire proposed amendment or amendments with the word "for" or "against"— as the elector may desire — preceding each amendment voted upon; and the election shall be conducted in the same manner as the election for state officers, except as herein otherwise provided; and the canvass shall be in the same manner, and by the same officers and like returns made thereof as of the ballots cast for the secretary of state; and the board of state canvassers shall declare the result and enter the same of record in the book mentioned in section one of this act, immediately following and in connection with the proofs of publication.

61. Proclamation. 16 G. A., ch. 114, § 3. Whenever a proposition to amend the constitution is submitted to a vote of the electors, the governor shall include such proposed amendment in his proclamation provided for in section five hundred and seventy-seven of the code [§ 1024].

62. Expenses. 16 G. A., ch. 114, § 4. Expenses incurred under the provisions of this act, shall be audited and allowed by the executive council and paid out of any money in the state treasury not otherwise appropriated.

63. Submission at special election. 19 G. A., ch. 7, § 2. The general assembly to which a proposition to amend the constitution has been referred by the last preceding general assembly, and which has agreed to such proposed amendment, may provide for its submission to the people at a special election for that purpose, at such time as the general assembly may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed in this act for submission of a constitutional amendment at a general election so far as applicable.

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

CHAPTER 1.

OF THE GOVERNOR.

64. Office of; secretary. 55. The governor shall keep his office at the seat of government, in which shall be transacted the business of the executive department of the state, and he shall keep a secretary at said office during his absence. [10 G. A., ch. 85, § 1.]

65. Journal to be kept. 56. He shall cause a journal to be kept in the executive office, in which shall be made an entry of every official act done by him at the time when done. If, in cases of emergency, acts are done elsewhere than in such office, an entry thereof shall be made in the journal as soon thereafter as possible. [10 G. A., ch. 85, § 2.]

66. Military record. 57. He shall cause a military record to be kept, in which shall be made an entry of every act done by him as commander-in-chief. [10 G. A., ch. 85, § 3.]

67. Reward for criminals. 58. Whenever the governor is satisfied that the crime of murder or arson has been committed within the state, and that the person charged therewith has not been arrested or has escaped therefrom, he may, in his discretion, offer a reward not exceeding five hundred dollars for the arrest and delivery to the proper authorities of the person so charged, which reward shall be audited upon the certificate of the governor that the same has been earned, and paid by the state. [R., § 57.]

The board of supervisors has no authority to offer a reward for the arrest of a criminal, but they may for the recovery of funds stolen from the county: *Hawk v. Hamilton County*, 48–472. Nor has a city any authority to offer such reward: *Hanger v. Des Moines*, 52–193.

68. May employ counsel. 59. Whenever the governor is satisfied that an action or proceeding has been commenced which may affect the rights or interests of the state, he may employ counsel to protect such rights or interests; and when any civil action or proceeding has been or is about to be commenced by the proper officer in behalf of the state, he may employ additional counsel to assist in the cause. [R., § 44; C., '51, § 40.]

69. How paid. 60. Expenses incurred under the preceding section and in causing the laws to be executed, may be allowed by the governor and paid from the contingent fund. [R., § 45; C., '51, § 41.]

CHAPTER 2.

OF THE SECRETARY OF STATE.

70. Office; duties. 61. The secretary of state shall keep his office at the seat of government and perform all duties which may be required of him by law; he shall have charge of and keep all the acts and resolutions of the territorial legislature, and the general assembly of the state, the enrolled copy of

the constitutions of the state, and all bonds, books, records, maps, registers, and papers which now are or may hereafter be deposited to be kept in his office. [R., § 59; C., '51, § 43.]

71. Commissions countersigned. 62. All commissions issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office. [R., § 60; C., '51, § 44.]

72. Report to general assembly. 63. He shall report to the governor, before each regular session of the general assembly, an abstract for each year of the criminal returns received from the clerks of the several district courts, embracing all the facts contained in such returns. [R., § 64; C., '51, § 48.]

73. Library of congress. 64. He shall furnish the library of congress two copies of all legislative journals and reports of state officers immediately upon the publication thereof. [11 G. A., ch. 81.]

74. Record of cities and towns to be kept. 65. The secretary of state shall receive and preserve in his office all papers transmitted to him in relation to the incorporation of cities or towns, or the annexation of territory to the same, or the consolidation or the abandonment of municipal corporations, and shall keep an alphabetical list of said cities and towns in a book provided for that purpose, in which shall be entered the name of the town or city, the character of the same, whether town or city, and if a city, whether of first or second class, the county in which situated, and the date of organization. [R., § 1046.]

CHAPTER 3.

OF THE AUDITOR OF STATE.

75. Powers; duties. 66; 22 G. A., ch. 82, § 27. The auditor shall keep his office at the seat of government. He is the general accountant of the state, and it is his duty: [R., § 71; C., '51, § 50.]

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

Make settlements. 2. To settle the accounts of all county treasurers and receivers of state revenues payable into the state treasury, for each of their official terms separately;

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

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

Claims against the state. 5. To settle all claims against the treasury, and when a claim is recognized by law for which no appropriation has been made, to give the claimant a certificate thereof and report the same to the general assembly;

Superintend payments of money. 6. To direct and superintend the payment of all money payable into the state treasury, and cause to be insti-

tuted and prosecuted the proper actions for the recovery of debts and other moneys so payable;

Superintend fiscal affairs. 7. To superintend the fiscal affairs of the state, and secure their management as required by law; to furnish proper instructions, directions, and forms to the county auditors and treasurers, in compliance with which they shall severally keep their accounts relating to the revenue of the state, and perform the duties of their several offices; also forms for the reports required to be made by said officers to such auditor, and of receipts to be given by such treasurers to the tax payers, and such officers shall conform in all respects to the form and directions thus prescribed; [9 G. A., ch. 173, § 8.]

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

The auditor is required to issue warrants without regard to the fact that there may be no money in the treasury to pay them: *State v. Sherman*, 46-415.

The court cannot, by *mandamus*, compel the auditor to allow a particular sum on the settlement of a claim, but he can be compelled to issue a warrant for whatever sum he does audit or allow: *Bryan v. Cattell*, 15-538.

Custody of books, papers, etc. 9. To have the custody of all books, papers, records, documents, vouchers, conveyances, leases, mortgages, bonds and other securities appertaining to the fiscal affairs and property of the state, which are not required to be kept in some other office;

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

Report to governor. 11. To report to the governor before each regular session of the general assembly, a complete statement of the revenue, funds, income, taxable property, and other resources and property of the state, and of the public revenues and expenditures since his last report, with a detailed statement of the expenditures to be defrayed from the treasury for the term following that covered by his report, specifying each object of expenditure, and distinguishing between such as are provided for by appropriations and such as are not, and showing the probable deficiency of any former appropriations;

Apportion school money. 12. He shall, on the first Monday of March and September of each year, apportion the interest of the permanent school fund among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last report filed with him by the superintendent of public instruction. [R., § 1967; 9 G. A., ch. 172, § 93.]

76. Divide warrants. 67. When the amount due from the state to any person exceeds twenty dollars, the auditor shall, if requested, divide the amount into parcels of not less than ten dollars and issue warrants therefor. [R., § 72; C., '51, § 51.]

77. Information as to state property. 68. The auditor may at any time require any person receiving money, securities, or property belonging to the state, or having the management, disbursement, or other disposition of the same, an account of which is kept in his office, to render statements thereof, and information in reference thereto. Any such person refusing or neglect-

ing to render such statement or information, shall forfeit twenty-five dollars, to be recovered by civil action in the name of the state. [R., § 73; C., '51, § 52.]

78. Claims against the state; claimant examined. 69. Every claim against the state shall be presented to the auditor for settlement within two years after it accrues, and if thereafter presented, the same shall not be audited. When a claim is presented, the auditor is authorized to examine the claimant and any other persons, under oath, touching such claim, or cause them to verify the same by affidavit or deposition. [R., § 74; C., '51, § 53.]

79. Neglect to account. 70. If any officer who is accountable to the treasury for any money or property, neglects to render an account to the auditor within the time prescribed by law, or if no time is so prescribed, then, within twenty days after being required so to do by the auditor, the auditor shall state an account against him from the books of the auditor's office, charging ten per cent damages on the whole sum appearing due, and interest at the rate of six per cent. per annum on the aggregate from the time when the account should have been rendered; all of which may be recovered by an action brought on such account, or on the official bond of such officer. [R., § 75; C., '51, § 54.]

80. Failure to pay. 71. If any such officer fails to pay into the treasury the amount received by him within the time prescribed by law, or, having settled with the auditor, fails to pay the amount found due, the auditor shall charge such officer with twenty per cent. damages on the amount due with interest on the aggregate from the time the same became due at the rate of six per cent. per annum, and the whole may be recovered by an action brought on such account, or on the official bond of such officer, and he shall forfeit his commission. [R., § 76; C., '51, § 55.]

81. Defense of officer. 72. The penal provisions in the two preceding sections are subject to any legal defense which the officer may have against the account as stated by the auditor, but judgment for costs shall be rendered against the officer in the action, whatever be its result, unless he rendered an account within the time named in the two preceding sections. [R., § 77; C., '51, § 56.]

82. Oath of receiver of public money. 73. When a county treasurer or other receiver of public money, seeks to obtain credit on the books of the auditor's office for payment made to the treasurer, before giving such credit the auditor shall require him to take and subscribe an oath that he has not used, loaned or appropriated any of the public money for his private benefit, nor for the benefit of any other person. [R., § 79; C., '51, § 57.]

83. Requisition to officer. 74. In those cases where the auditor is authorized to call upon persons or officers for information, or statements, or accounts, he may issue his requisition therefor in writing to the person or officer called upon, allowing reasonable time, which having been served as a notice in a civil action by the sheriff of the county in which the person or officer called upon resides, and returned to the auditor with the service indorsed thereon, shall be evidence of the making of the requisition therein expressed. [R., § 79; C., '51, § 58.]

CHAPTER 4.

OF THE TREASURER OF STATE.

84. Office; duties. 75. The treasurer shall keep his office at the seat of government, and shall keep an accurate account of the receipts and disburse-

ments at the treasury, in books kept for that purpose, in which he shall specify the names of the persons from whom money is received, and on what account, and the time thereof. [R., § 83; C., '51, § 62.]

85. Memorandum of warrants. 76. He shall enter in a book the memorandum of warrants issued as certified to him by the auditor, and receive in payment of public dues the warrants so issued in conformity with law, and redeem the same if there be money in the treasury not otherwise appropriated; and on receiving any such warrant, shall cause the person presenting it to indorse it, and shall write on the face thereof "redeemed," and enter in the book containing the auditor's memoranda in appropriate columns, the name of the person to whom paid, date of payment and amount of interest paid. [R., § 84; C., '51, § 63.]

86. Receipts. 77. When money is paid him the treasurer shall execute receipts in duplicate therefor, stating the fund to which it belongs, one of which must be delivered to the auditor in order to obtain the proper credit, and the treasurer must be charged therewith. [R., § 85; C., '51, § 64.]

87. Payments of warrants. 78. He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their issuance; or if there is no money in the treasury from which such warrant can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation, and sign it, from which time the warrant shall bear interest at the rate of six per cent. per annum, until the time directed in the next section. [R., § 86; C., '51, § 65; 10 G. A., ch. 9.]

88. Record of warrants; publication of. 79. He shall keep a record of the number and amount of the warrants so presented and indorsed for nonpayment, and when there are funds in the treasury for their payment to an amount sufficient to render it advisable, he shall give notice to what number of warrants the funds will extend, or the number which he will pay, by three insertions in a newspaper printed at the seat of government; at the expiration of thirty days from the day of the last publication, interest on the warrants so named as being payable, shall cease. [R., § 87; C., '51, § 66.]

89. Certifying and accounting to auditor. 80; 17 G. A., ch. 116. Once in each week he shall certify to the auditor the number, date, amount, and payee of each warrant taken up by him, with the date when taken up, and the amount of interest allowed; and on the first Monday of January, April and July, and on the first day of October, annually, he is directed to account with the auditor and deposit in his office all such warrants received at the treasury, and take the auditor's receipt therefor. [R., § 88; C., '51, § 67.]

90. Report to governor. 81; 22 G. A., ch. 82, § 28. As soon as practicable after the first Monday of November preceding the regular session of the general assembly, he shall report to the governor the state of the treasury up to the first day of July preceding, exhibiting the amount received and paid out by the treasurer since his last report, and the balance remaining in the treasury. [R., § 89; C., '51, § 68.]

91. Provide funds to pay interest. 82. When interest on any bonds of the state becomes due, the treasurer shall provide funds for the payment thereof on the day and at the place where payable; and persons holding such bonds are required to present the same at such place within ten days from such day. At the expiration of which time, the funds remaining unexpended and vouchers for interest paid shall be returned to the treasury. [10 G. A., ch. 66.]

RELATING TO THE ESTABLISHMENT OF A STATE DEPOSITORY.

92. How designated. 17 G. A., ch. 57, § 1. The treasurer of state, with the advice and approval of the executive council, may designate one or

more banks in the city of Des Moines as a depository for the collection of any drafts, checks, and certificates of deposit that may be received by him on account of any claims due the state.

93. Security. 17 G. A., ch. 57, § 2. The bank or banks designated as such depository shall be required to give security to the state, to be approved by the executive council, for the prompt collection of all drafts, checks, certificates of deposit, or coupons, that may be delivered to such depository by the treasurer of state for collection; and also for the safe keeping and prompt payment, on the treasurer's order, of the proceeds of all such collections; also, for the payment of all drafts that may be issued to said treasurer by such depository.

94. Collection of drafts. 17 G. A., ch. 57, § 3. The treasurer of state, on the receipt of any draft, check or certificate of deposit, on account of state dues, may place the same in such depository for collection, and it shall be the duty of such depository to collect the same without delay and shall charge no greater per cent. for such collection than the minimum per cent. charged to other parties and notify the treasurer when collected. On the receipt of such notice, the treasurer shall issue his receipt to the party entitled thereto, as now required by law.

95. Liability of officers not affected. 17 G. A., ch. 57, § 4. The provisions of this act shall in no way release the treasurer of state or his bondsmen, or any county treasurer or his bondsmen, from any liabilities now imposed by law.

96. 17 G. A., ch. 57, § 5. All acts and parts of acts inconsistent with this act are hereby repealed.

CHAPTER 5.

OF THE STATE LAND OFFICE AND REGISTER THEREOF.

97. Office; duties. 83. The register of the state land office shall keep his office at the seat of government. The books and records of such office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest subdivision of land; to preserve a permanent record in books suitably indexed of all correspondence with any of the departments of the general government in relation to state lands; to preserve by proper records copies of the original lists furnished by the selecting agents of the state, and of all other papers in relation to such lands which are of permanent interest. [R., §§ 92, 95.]

98. Tract books. 84. Separate tract books shall be kept for the university lands, the saline lands, the half-million acre grant, the sixteenth sections, the swamp lands, and such other lands as the state now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate. [R., § 94.]

99. Show what. 85. Said tract books shall be ruled in a manner similar to those used in the United States land offices, so as to record each tract by its smallest legal subdivisions, its section, township, and range, to whom sold, and when, the price per acre, to whom patented, and when. [R., § 92.]

100. Records; copies. 86. The state land office shall be kept open during business hours, and shall have the personal supervision of the register; the documents and records therein shall be subject to inspection, in the presence of the register, by parties having an interest therein, and certified copies

thereof, signed by said register with the seal of said office attached, shall be deemed presumptive evidence of the fact to which they relate, and on request they shall be furnished by the register for a reasonable compensation. [10 G. A., ch. 103, § 1.]

101. Patents. 87. Patents for lands shall issue from the state land office, shall be signed by the governor and recorded by the register; and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificate shall be signed by the register, and all patents shall be delivered free of charge. [R., § 97.]

102. Certificate. 88. No patent shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of the person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and of person who is entitled to the patent, and if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office. [R., §§ 98, 99.]

103. Errors corrected. 89. The register is authorized and required to correct all clerical errors of his office, in name of grantee, and description of tract of land conveyed by the state found upon the records of such office; he shall attach his official certificate to each conveyance so corrected, and the reasons therefor; record the same with the record of the original conveyance, and make the necessary correction in the tract and plat books of his office. Such corrections, when made in accordance with the foregoing provisions, shall have the force and effect of a deed originally correct, subject to prior rights accrued without notice. [9 G. A., ch. 56; 11 G. A., ch. 30.]

104. Records, and maps of public surveys. 90. The register shall receive any field-notes, maps, records, or other papers relating to the public survey of this state, whenever the same shall be turned over to the state in pursuance of an act of congress, entitled "An act for the discontinuance of the office of surveyor-general in the several districts as soon as the surveys therein can be completed for abolishing land offices under certain circumstances, and for other purposes," approved June 12, 1840, and any act amendatory thereof, and shall provide for their safe keeping and proper arrangement as public records; and free access to the same by the lawful authority of the United States, for the purpose of taking extracts therefrom, or making copies thereof, shall always be granted. [12 G. A., ch. 3.]

105. Relinquishing claims. 91. Whenever the governor is satisfied by the commissioner of the general land office that the title to any lands which may have been certified to the state under any of the several grants, is inferior to the rights of any valid interfering pre-emptor or claimant, he is authorized and required to release by deed of relinquishment such color of title to the United States, to the end that the requirements of the interior department may be complied with, and that such tract or tracts of land may be patented by the general government to the legal claimants. [12 G. A., ch. 10, § 1.]

106. Quitclaim to correct mistake. 92. Whenever the governor is satisfied by proper record evidence that any tract of land which may have been deeded by virtue of any donation or sale to the state, is not the land intended to have been described, and that an error has been committed in making out the transfers, in order that such error may be corrected, he is authorized to quitclaim the same to the proper owner thereof, and to receive a deed or deeds for the lands intended to have been deeded to the state originally. [12 G. A., ch. 10, § 2.]

107. Lists of lands inuring to grantee. 93; 18 G. A., ch. 167; 19 G. A., ch. 123. In cases where lands have been granted to the state of Iowa by act of congress and certified lists of lands inuring under the grant have been made to the state by the commissioner of the general land office as required by act of congress, and such lands have been granted by act of the general assembly to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the register of the state land office is hereby authorized to prepare, on the application of such person or company, or on the application of a party claiming title to any land through such person or company, a list or lists of lands situated in each county inuring to such applicant, from the lists certified by the commissioner of the general land office, as aforesaid, which shall be signed by the governor of the state and attested by the secretary of state with the state seal, and then be certified to by the register to be true and correct copies of the lists made to this state, and deliver them to such applicant, who is hereby authorized to have them recorded in the proper county, and when so recorded they shall be notice to all persons the same as deeds now are, and shall be evidence of title in such grantee or his or its assigns to the lands therein described under the grant of congress by which the lands were certified to the state, so far as the certified lists made by the commissioner aforesaid conferred title to the state; but where lands embraced in such lists are not of the character embraced by such acts of congress or the acts of the general assembly of the state, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and of no force or effect whatever; *provided* that no lands now in suit shall be included in such lists until said suits are determined and such lands adjudged to be the property of the company; *provided*, further, that the register shall not include in any of the lists so certified to the state, which have been adjudicated by the proper courts to belong to any other grant, or adjudicated to belong to any county or individual under the swamp land grant, or any homestead or pre-emption settlement. Nor shall said certificate so issued confer any right or title as against any person or company having any vested right, either legal or equitable, to any of the lands so certified. [14 G. A., ch. 83.]

If the certificate provided for in this section is introduced it dispenses with all other proof, and makes at least a *prima facie* case. In the absence of such certificate the party must prove the selection of the lands, that they are within the grant, and the construction of the road, so as to entitle the grantee to the lands under the act. But whilst the certificate establishes the title of the grantee, it is not essential to such title: *Chicago, B. & Q. R. Co. v. Lewis*, 53–101.

As to recording railway land grant titles, see §§ 3119, 3120.

108. Patents to university lands. 21 G. A., ch. 178, § 1. The secretary of state is hereby authorized to issue patents for lands, the legal title to which is vested in the state university of Iowa, in cases wherein it is shown to the satisfaction of the governor, and attorney-general that such lands have been in fact sold by the authority of the state and paid for and that the certificates of purchase have been lost or destroyed.

109. Inures to whom. 21 G. A., ch. 178, § 2. The patents thus issued shall inure to the benefit of the original purchaser and his grant*ers* [grantees] only and a clause to this effect shall be inserted in the patent.

TRANSFER OF STATE LAND OFFICE TO OFFICE OF SECRETARY OF STATE.

110. Office transferred. 18 G. A., ch. 206, § 1. On and after the first Monday in January in the year 1883, the office of register of the state land office shall be transferred to the custody of the secretary of state and the present incumbent of the office of register of the state land office shall then

turn over and deliver to the secretary all books, papers, maps, furniture and property of every description held by him as belonging to his office.

111. Duties of secretary. 18 G. A., ch. 206, § 2. From and after the first Monday of January in the year 1883, all business pertaining to the office of register of the state land office as provided by law, and all duties now required to be performed by the said register, shall thereafter be performed by the secretary of state, and he shall have and hold possession and control of all the property turned over to him, as specified in section one [§ 105] of this act.

112. Clerk. 18 G. A., ch. 206, § 3. In addition to the clerical force now allowed by law to the secretary of state for the performance of the duties of his office, he shall be allowed one additional clerk, whose duty it shall be to perform the clerical work pertaining to the land department, as directed by the secretary, and he shall also perform such other duties as the secretary may direct.

113. Compensation. 18 G. A., ch. 206, § 4. The salary of the clerk provided for in this act shall be twelve hundred dollars per annum, to be paid at the end of each month, and the auditor of state shall draw a warrant on the state treasury in favor of said clerk on the certificate of the secretary of state, stating the amount that may be due.

114. Register abolished. 18 G. A., ch. 206, § 5. The office of register of the state land office is hereby abolished from and after the first Monday in January in the year 1883.

CHAPTERS 6 AND 7.

PUBLIC PRINTING AND BINDING.

[Chapters 6 and 7 of the Code, being §§ 94 to 110, inclusive, are repealed by 22 G. A., ch. 82, and the following sections substituted.]

115. Election of printer and binder; term. 22 G. A., ch. 82, § 1. The state printer and the state binder shall be elected at each regular session of the general assembly, and shall hold their offices for two years from the time they enter upon the duties of such offices, which time shall be on the first day of May in the year following that in which they are elected; but from and after the year 1893 the term of each of the officers named shall begin on the first day of January in the odd-numbered year.

116. Offices. 22 G. A., ch. 82, § 2. They shall keep their respective offices at the seat of government sufficiently equipped to enable them promptly to print and bind the laws, journals, reports, and to do all other printing and binding required for the state officers, or by or for the general assembly, or either branch thereof; *provided*, that nothing in this section shall be construed as including letter-heads, envelopes, or postal-cards, nor as interfering with the authority of the executive council to apportion so much of the public printing and binding as it may deem advisable to have done at the institution for the deaf and dumb.

117. Method of doing work. 22 G. A., ch. 82, § 3. All such work shall be done in a neat, substantial, and workmanlike manner and promptly delivered to the proper officer, so that the public business shall not be delayed or suffer from any failure to have the work done in a reasonable and proper time.

118. Duties of officers. 22 G. A., ch. 82, § 4. The state printer shall promptly deliver to the state binder the printed sheets of laws, journals, and

other publications as the work progresses, as well as all other work requiring stitching or binding and the state binder shall, upon completion of the work as required, deliver the same to the secretary of state, taking his receipt therefor; and it is the duty of the secretary of state to see that the proper number of copies is so delivered. All printing which does not require binding shall be promptly delivered by the state printer to the secretary of state, or the officer ordering the work.

119. Order. 22 G. A., ch. 82, § 5. No work shall be ordered of the state printer except upon a regular form of blank furnished by the secretary of state, and kept in his office. Whenever printing is ordered by either house of the general assembly the secretary or clerk thereof shall immediately notify the secretary of state of such order, and when such printing is done the same shall be delivered to the secretary of state for distribution subject to the instructions of the house ordering the printing.

120. Certificate. 22 G. A., ch. 82, § 6. The secretary of state, upon the completion of any printing or binding for the state, or the presentation of any bill for such printing or binding, shall make examination of the work done and ascertain whether it has been done in accordance with the provisions of this chapter. If he find there has been a compliance herewith, he shall certify the same, stating the amount to which the officer presenting the bill, is entitled. In case such work has not been properly done, or any item in said bill has not in his judgment been earned, he shall refuse to certify as to such item, or shall state what reduced amount, if any, the officer is entitled to, as compensation for such defective work.

121. Warrant for work done. 22 G. A., ch. 82, § 7. The auditor of state, upon presentation to him of the foregoing certificate, shall draw his warrant upon the treasurer of state, for the amount therein stated to be due.

122. Biennial reports. 22 G. A., ch. 82, § 8. The regular biennial reports of the various officers, institutions, commissions, etc., required to be made by law, shall be laid before the governor of the state, in the odd-numbered years, at the times following:

(*a*) On or before August 15. Those of all boards of trustees of state institutions except the agricultural college.

(*b*) On or before September 15. Those of the fish commissioner, the board of health, the commission of pharmacy, the oil inspector, the mine inspectors, the visiting committee to the hospitals for the insane, the wardens of the penitentiaries, and the board of curators of the state historical society.

(*c*) On or before October 1. Those of the state librarian, and the commissioner of labor statistics, and that of the secretary of state pertaining to the state land office.

(*d*) On or before November 1. Those of the auditor of state, the treasurer of state, the superintendent of public instruction, the state university and the state normal school.

(*e*) On or before December 1. That of the board of trustees of the agricultural college, that of the adjutant-general and that of the secretary of state pertaining to criminal convictions.

123. Fiscal term. 22 G. A., ch. 82, § 9. The biennial fiscal term of the state ends on the thirtieth day of June in each odd-numbered year, and the succeeding fiscal term begins on the day following; and the reports of officers and institutions shall cover the period thus indicated, and shall show the condition of their offices and institutions respectively on that day: *Provided*, however, that the period to be covered by the report of the superintendent of public instruction and the adjutant-general shall extend to the thirtieth day of September inclusive; and *provided*, further, that this section shall not apply to the agricultural college.

124. Printing reports. 22 G. A., ch. 82, § 10. The governor shall cause the foregoing reports, and all others required by law to be made, to be printed. He shall however cause to be omitted from the printed copy all matters he may deem not of sufficient importance to warrant publication thereof at the state's expense. Such parts of the reports as emanate from boards or officers directly required by law to report, may be leaded with six to pica leads. All extracts copied therein as well as reports and papers submitted therewith shall be set solid. No tables of any character shall be leaded and all tables shall be set *is* (in) as compact a form as practicable. Itemized accounts of receipts and disbursements together with inventories, accompanying the reports, shall be omitted from the printed report, unless the governor deem the same of sufficient importance to warrant their publication. *Provided*, that this section shall apply to the reports of the state agricultural and state horticultural societies, and the stock breeders' association, and all officers and bodies required by law to make annual reports. *Provided*, further, that no banquet speeches or advertising shall be included in the printed proceedings of any report.

125. Number of reports. 22 G. A., ch. 82, § 11. There shall be printed of the various public documents the number of copies hereinafter designated, to wit: Of the biennial message, twelve thousand copies; of the inaugural address, six thousand copies; of the biennial report of the auditor of state, six thousand copies; of the annual report of the auditor upon insurance, four thousand copies; of the report of the superintendent of public instruction, six thousand copies; of the report of the agricultural college, six thousand copies; of the report of the state board of health, five thousand five hundred copies; of the report of the commissioners of pharmacy, five thousand copies; and that of the secretary of state pertaining to lands, three thousand copies; of the reports of the state visiting committee to the hospitals for the insane, the state inspector of oils and the examiners in dentistry, three thousand copies each; of the reports of joint committees of the general assembly to visit state institutions, three thousand copies; and of all other reports, three thousand copies. *Provided* that of the reports which may be required by virtue of statutes hereafter enacted, the number of copies to be printed thereof shall, where not provided for by law, be fixed by the executive council at any number not exceeding five thousand. Of said reports, five hundred copies each shall be bound in cloth and the remainder in double thick paper covers. Reports of legislative visiting and special committees shall be printed and stitched without covers.

126. Distribution — Binding. 22 G. A., ch. 82, § 12. The secretary of state shall make distribution of the various public documents turned over to him, as follows:

(*a*) To the members of the general assembly six thousand copies of the message, fifteen hundred copies of the report of the auditor of state, superintendent of public instruction and agricultural college respectively, two thousand copies of the report of the commissioners of pharmacy, and of the secretary of state pertaining to lands; seven hundred copies of the reports of the joint visiting committee of the general assembly to the several state institutions; five hundred copies of the reports respectively of the state visiting committee to the hospitals for the insane, the state inspector of oils, and the examiners in dentistry; of the report of the state board of health, two thousand copies; of all other reports, fifteen hundred copies.

(*b*) Six hundred copies of the message; two hundred copies of each of the reports of the joint visiting committees, and five hundred copies of each of the other documents to remain with the state for the use of future general assemblies and special calls therefor.

(*c*) Fifteen hundred copies of each report shall be stitched and bound in half sheep containing a copy of each report, to be arranged as follows: The message, the inaugural address, the reports of the auditor, the treasurer, the secretary pertaining to lands and other reports of officers and commissions not herein otherwise provided for, in the first volume; in the second volume, the report of the superintendent of public instruction to be followed by those of the university, the normal school, the agricultural college, the soldiers' orphans' home, the soldiers' home, the institution for the deaf and dumb, the college for the blind, the institution for the feeble-minded, the hospitals for the insane, the state visiting committee to the hospitals and the state historical society; in the third volume the message of the governor concerning pardons, the secretary's reports of convictions, and the reports of the industrial schools and the penitentiaries; in the fourth volume the reports of the commissioner of labor statistics and the mine inspectors; in the fifth volume the reports of the board of health, the veterinary surgeon, the commissioners of pharmacy, the oil inspector, the dental examiners and the weather service; in the sixth volume the reports of the railway commissioners and those of the executive council concerning the valuation of railroads. Other reports shall be placed with those of a kindred character, and all reports of joint legislative visiting committees to public institutions, etc., must follow those of such institutions respectively. *Provided* that any two volumes may be bound together at the discretion of the secretary of state. Some distinctive mark shall be put on the even-numbered pages of each document to indicate its place in the bound document, with the year of the report on each odd-numbered page after the manner of the Iowa documents of 1882, and in each volume shall be placed a table of contents of all the volumes. These fifteen hundred copies shall be distributed as follows: One copy to the lieutenant-governor, to the speaker, to each member of the general assembly, to the secretary of the senate, and the clerk of the house of representatives; one copy each to the governor of the state and his private secretary, the secretary of state, the auditor of state, the treasurer of state, the attorney-general, the superintendent of public instruction and the clerk and reporter of the supreme court and each of their deputies, the commissioner of labor statistics, the adjutant-general, the custodian of the capitol, the fish commissioner and the director of the weather service, and one copy to each of their several offices to remain therein; one copy to each judge of the supreme and district and superior courts; one copy to the offices of the board of health, the mine inspectors, the commission of pharmacy and the railroad commissioners to remain therein; one copy to each railroad commissioner, mine inspector and commissioner of pharmacy; one copy to the state librarian and the secretary of the state board of health respectively; one copy to each officer or board hereinbefore enumerated required by law to make annual or biennial reports; one copy to each member of the boards required to make annual or biennial reports; one copy to each state institution to remain therein; one copy to the office of each county auditor to remain therein; eighty copies to the state historical society; one copy to each college and incorporated institution; one copy to each public library and literary institution having a number of books for circulation not less than five hundred; one copy to each ex governor of the state; one copy to each senator and representative in congress from this state during his term of office; one copy to each of the other states and each territory reciprocating the same, and to each foreign nation or province desiring to exchange like reports; twenty-five copies to the state library. The remaining copies to be placed under the control of the executive council, to be disposed of as that body may see fit, the persons so receiving them to pay express charges thereon.

(*d*) The remaining copies to be distributed to the officers, institutions and committees making report.

127. Journals. 22 G. A., ch. 82, § 13. The state printer shall be furnished daily, during the sessions of the general assembly, with a copy of the journal of each house thereof, at such hours and by such officers as may be directed by the houses respectively. The state printer shall thereupon print and after the same are properly stitched at the state bindery deliver for the use of the senate and house respectively on the following legislative day, at such hours as may be prescribed by the proper officer, two hundred copies of the proceedings of the senate and three hundred copies of those of the house of representatives. *Provided* that when session is held after seven o'clock P. M. the proceedings thereof shall be furnished the printer as soon after the close of such session as practicable.

128. Correction. 22 G. A., ch. 82, § 14. Upon the return to the printer by the proper officer of each body of the daily proceedings corrected as shall be directed by the house to which they pertain, the printer shall correct the same, the secretary and clerk correcting the written journal when necessary to correspond.

129. Printing. 22 G. A., ch. 82, § 15. The state printer shall forthwith make the corrections indicated, print three hundred copies of the senate proceedings and five hundred copies of the house proceedings, and deliver them to the state binder sufficiently early to permit the latter to fold, stitch and deliver them to the secretary of the senate and clerk of the house, respectively, not later than noon of the third day following that to which the proceedings pertain. Of the printed proceedings of the senate, one hundred and twenty-five copies shall be delivered to the sergeant-at-arms of the house for distribution therein, and seventy-five copies of the proceedings of the house shall be delivered to the sergeant-at-arms of the senate for distribution therein. The remaining copies shall be under the control of the respective houses for distribution.

130. For future use. 22 G. A., ch. 82, § 16. The state printer shall thereupon proceed to print twenty-five hundred copies each of the journals for distribution as hereinafter provided. Within fifteen days after the adjournment of the general assembly, a complete and thorough index of each journal shall be delivered to the state printer, who shall forthwith print the same, and within fifteen days thereafter deliver the sheets complete to the state binder, who shall within thirty days thereafter bind one thousand copies of each journal in half sheep and fifteen hundred in paper covers, and deliver the same to the secretary of state.

131. How distributed. 22 G. A., ch. 82, § 17. The secretary of state shall make distribution of the journals of the respective houses as follows:

(*a*) Of the bound journals of the respective houses five copies of each shall be distributed to each member thereof, five copies each to the secretary of the senate and clerk of the house respectively; and one copy to each officer, employee and reporter of the respective houses.

(*b*) The remaining copies shall be distributed as follows; one copy each to the governor, lieutenant-governor, the state officers and deputies as provided in section twelve, [§ 121] for the distribution of the documents. Also one copy of each journal to each newspaper of general circulation in the state.

(*c*) The undistributed number shall be under the control of the executive council.

132. Index to journals. 22 G. A., ch. 82, § 18. The officers making the index shall receive therefor such pay as may be allowed by the general assembly; but in the absence of such provision each shall receive such compensation as may be allowed by the executive council, the auditor drawing his warrant therefor upon certificate of the secretary of state that the work is done.

133. **Original journals.** 22 G. A., ch. 82, § 19. The original journals of the senate and house shall be filed with the secretary of state by the secretary and clerk respectively.

The journals of the respective houses are competent evidence to show the proceedings of either or both of such houses: *Koehler v. Hill*, 60-543.

134. **Printing session laws.** 22 G. A., ch. 82, § 20. Within fifty days after the secretary of state shall deliver to the state printer a copy of the laws, joint resolutions and memorials, passed at any session of the general assembly he shall print all the copies thereof that may be by law required and the secretary of state shall within five days after the same are printed make out and deliver to such printer an index of the same who shall within ten days after receiving such index, print the same, and deliver to the state binder such copies in sheets as are required for binding; but this section shall not apply to any revised code adopted by the general assembly.

135. **Specifications for laws and journals.** 22 G. A., ch. 82, § 21. The laws, journals, and all other printing in book form shall be set in long primer, brevier, or nonpareil type: The titles to the laws and resolutions, all indexes, and all messages, reports, and resolutions copied in the journals, to be in brevier; rule and figure work in either brevier or nonpareil as may be directed by the officer ordering the work; all other matter to be in long primer. The pages shall measure not less than seventeen hundred and fifty ems. Whenever a subject is begun, whether it be the name of member or otherwise, the subject-matter shall follow in the same line, unless such line is filled by such word. The report of each motion or resolution shall be embraced in one paragraph and where the yeas and nays are given each division list shall be in one paragraph, with the names set in alphabetical order and the result in the last line.

136. **Paper receipt book.** 22 G. A., ch. 82, § 22. The secretary of state shall provide a "state" paper receipt book, and whenever he shall deliver to the state printer paper for any kind of printing, a receipt therefor shall be entered in said book, which receipt shall describe the kind and quality of paper so delivered.

136a. 22 G. A., ch. 82, § 41. The following named statutes and parts of statutes are hereby repealed: Chapters six and seven, title two of the code; also sections three thousand seven hundred and sixty-four, three thousand seven hundred and sixty-five, three thousand seven hundred and sixty-six, three thousand seven hundred and sixty-seven, and three thousand seven hundred and sixty-eight of the code; chapter one hundred and fifty-nine of the acts of the sixteenth general assembly; chapter twenty-seven and chapter one hundred and seventy-five of the acts of the nineteenth general assembly.

[The provisions of this act as to compensation of printer and binder are to be found with other provisions as to compensation of state officers in chapter one, title twenty-three.]

CHAPTER 7*a*.

CUSTODIAN OF PUBLIC BUILDINGS.

137. Governor shall appoint; qualification; bond. 21 G. A., ch. 148, § 1. The governor with the advice of and consent of the senate shall appoint a custodian of public buildings and property, who shall have the care of the capitol, together with all the grounds and premises appurtenant thereto belonging to the state, and such custodian shall before entering upon the discharge of his duties, qualify as provided by law, and execute and file with the secretary of state a bond in the penal sum of one thousand dollars, conditioned for the faithful discharge of his duties, with sureties thereto, to be approved by the governor.

138. Term of office. 21 G. A., ch. 148, § 2. His term of office shall be for two years, which shall expire on the thirty-first day of March in each even-numbered year: *Provided*, that he may be removed at any time for cause by the governor; and *provided further*, that if a vacancy should occur in said office when the general assembly is not in session it shall be filled by appointment by the governor, but the person so appointed shall hold his office only until the next general assembly shall have been permanently organized, when the vacancy shall be filled by appointment of the governor by and with the advice and consent of the senate, which appointment shall be for the unexpired portion of the term for which the appointment had been made.

139. Salary. 21 G. A., ch. 148, § 3. He shall be paid a salary of fifteen hundred dollars a year, which shall be paid on proper vouchers as the salaries of other state officers are paid.

140. Duties. 21 G. A., ch. 148, § 4. It shall be the duty of the custodian to take charge of and protect the capitol building and all furniture and other property connected therewith; to preserve the same from injury; at all proper times to open and ventilate the several apartments and constantly to keep every part thereof cleansed and in proper order, and at all suitable hours, to personally or by proper escort, attend visitors who may wish to view the same, or any part thereof intrusted to his care free of expense; to control and take care of the capitol grounds, walks, fences, trees, shrubbery, statuary, and other property of the state on or about the capitol grounds, or premises, and to keep the same clean and in good order; to have charge of, control and care for all public buildings and grounds, belonging to the state, at the seat of government, not by law placed in charge of some other person, and to protect and care for the same.

141. Purchases. 21 G. A., ch. 148, § 5. The custodian is hereby empowered and it shall be his duty to purchase from time to time under the orders of the executive council such furniture and stores as may be required for his use in carrying out the provision of this act in the capitol or other buildings belonging to the state, at the seat of government, and under like orders to superintend and cause such repairs to be made to the capitol or other property in his care, as shall be deemed necessary to its protection.

142. Contract, control and protection of building. 21 G. A., ch. 148, § 6. He is hereby authorized and empowered to contract for and have supplied all fuel, lights, water, ice, telegraph and telephone service required in the convenient and efficient discharge of the duties of the legislative, executive and judicial and other officers of the state at the capitol, or of the state boards or other official boards or representatives of the state at the seat of government, but all contracts and expenditures made by him for any of the purposes enumerated, or for any other purpose must be approved by the executive council. And to employ such labor as shall be required in carrying out the

duties imposed by this act, to have charge of the janitor and police force in and about the capitol at all times and employ and discharge the same or any part thereof as the public interest may demand, but nothing in this act shall deprive either house of the general assembly from employing and controlling such officers and janitors as it shall deem necessary for the personal convenience and comfort of its members; also to assign with the advice and consent of the executive council, official apartments in the capitol and state buildings at the seat of government to such state officials, boards, or bodies, as shall be entitled thereto and have not already had apartments assigned to them; and to institute the proper civil or criminal proceedings in the name of the state, with the advice and consent of the attorney-general, against any person for any injury which may be committed on or to the public property in his care or which shall be necessary to protect the same from any injury or threatened injury.

143. Records; report. 21 G. A., ch. 148, § 7. He shall keep in his office a complete record and lists of all lands and other property of the state in his care at the seat of government, together with accurate plans and surveys of the public grounds thereat; and make a report to the governor on the last days of March, June and September, and an annual report on the last day of December, and the report for the two years preceding the meeting of the general assembly shall be consolidated for the use of the general assembly, and shall show in detail the manner in which all appropriations were applied and expenditures made upon the public grounds and buildings in his charge, the condition of the public buildings, grounds and property in his charge, and the measures necessary to be taken for the care and preservation of such public property, and likewise to report any casualties happening to or upon the property under his care, and the causes of the same, and render an itemized account of the expenditures made by him during such period, with recommendations as to the manner in which the service under his management could be made more efficient or economical to the state; and he shall perform such other duties as may be imposed upon him by law or by order of the executive council.

144. Control of offices. 21 G. A., ch. 148, § 8. Nothing in this act shall deprive any officer, board, court or commission to whom official apartments are or may be assigned in the capitol from controlling the same.

145. Monthly pay-roll. 21 G. A., ch. 148, § 9. At the end of each month he shall under oath make out a list of the expenses incurred under this act itemizing the same with the names of the persons entitled to payment thereunder and the amounts thereof, on which, when approved by the governor, the auditor shall issue warrants in the amounts and to the persons entitled thereto.

146. No interest in contracts. 21 G. A., ch. 148, § 10. It shall be unlawful for the custodian to have any pecuniary interest, directly or indirectly, in any contract for supplies or labor provided for by this act or any business enterprise involving any expenditure by the state, and a violation of the provisions of this section shall be deemed a misdemeanor, and on conviction thereof he shall be fined in any sum not exceeding one thousand dollars and be removed from office.

[The provisions of prior acts with reference to the custody of the capitol building by the board of capitol commissioners during its erection are evidently superseded by the foregoing, unless perhaps it be that the provision of the following section as to use of the legislative chambers is still in force.]

146a. Use of senate and house chambers. 20 G. A., ch. 140, § 2. The said board of commissioners shall make all suitable provisions for the heating, lighting, ventilating, cleaning and care of said building; shall cause the rooms that are furnished to be kept cleaned and in proper order for use at all

times and see that all parts of the building are kept in good repair; shall make all necessary provisions for the admittance of visitors to all furnished parts of the building during business hours by furnishing the proper escort therefor. *Provided* the senate chamber and the hall of the house of representatives shall not be used for any purposes whatever except for legislature purposes.

CHAPTER 8.

OF THE EXECUTIVE COUNCIL AND THE CENSUS.

147. Who compose council. 111. The governor, auditor, secretary, and treasurer of state, or any three of them, shall constitute the executive council. [R., § 993.]

148. Duties in relation to census. 112. The executive council must prepare and cause to be printed suitable blank forms for the purpose of taking the census, which, together with such printed directions as will be calculated to secure uniformity in the returns, must be furnished to the respective county auditors, and by them to the township assessors, on or before the first Monday in January of the year in which the census is to be taken. [R., § 995.]

149. Census, how taken. 113. The township assessor of each township shall, at the time of assessing property in the year 1875, and every ten years thereafter, take an enumeration of the inhabitants in his township. [R., § 991.]

150. Duty of assessor. 114. Said assessor shall make a return on or before the first day of June of such enumeration to the auditor of the county, who shall make and forward to the secretary of state on or before the first day of September in the current year, an abstract of said census return showing:

The total number of males;
The total number of females;
The number of persons entitled to vote;
The number of militia;
The number of foreigners not naturalized;
The total number of children between five and twenty-one years of age;
The number of families and the number of dwelling-houses;
The number of acres of improved and unimproved lands;
An enumeration of agriculture, mining and manufacturing statistics, including the value of the products of the farm, herd, orchard, and dairy, each, and the value of manufactured articles, and of minerals sold, the year preceding the census;
The number of miles of railway finished and unfinished;
The number of colleges and universities, with the number of pupils therein. [R., § 992.]

151. Other matters. 115. The executive council may require such other matters to be ascertained and returned as they deem expedient. [R., § 994.]

152. Record and publication of. 116. The secretary of state shall file and preserve in his office the abstracts received from the county auditors, and cause an abstract thereof to be recorded in a book to be by him prepared for that purpose, and published in such manner as the executive council may direct. [R., § 996.]

153. Failure of assessor. 117. When any township assessor fails to make an accurate return of the census as herein provided, the county auditor may appoint some suitable person to take the census according to the provisions of this chapter, at as early a day as practicable; which shall be done at the expense of the county in which the service is performed. [R., § 997.]

154. Returns. 118. The executive council may require any auditor failing to make returns as herein provided, to send up the returns as soon as practicable at the expense of the delinquent county. [R., § 998.]

155. Journal of council. 119. The secretary of state shall keep a journal in which shall be entered all acts of the executive council. [R., § 999.]

156. Custody of state property. 120; 16 G. A., ch. 142 § 8; 20 G. A., ch. 119. The executive council shall have the charge, care, and custody of the property of the state, when no other provision is made, and shall procure for the several offices of the governor, secretary of state, auditor and treasurer of state, register of state land office, superintendent of public instruction, attorney-general and state librarian, and clerk and reporter of the supreme court, fuel, lights, blank books, postage, furniture, and any other thing necessary to enable such officers to promptly and efficiently perform the duties of their several offices; the accounts for any expenditures under this section, including repairs of the state house and such other necessary and lawful expenses as are not otherwise provided for shall be audited upon the certificate of such council and the warrants drawn therefor paid by the treasurer of state. The executive council shall report to each regular session of the general assembly the amounts expended, and in general terms what for and how much for each office.

CHAPTER 9.

OF DUTIES ASSIGNED TO TWO OR MORE OFFICERS JOINTLY; AND GENERAL REGULATIONS.

157. Supplies of paper and stationery. 121. The executive council shall make estimates of all the paper needed for the public printing, and of all the stationery necessary for the general assembly, the public offices, and the supreme court; and the auditor shall advertise for sealed proposals of the quantity, quality, and kinds thereof which may be needed, in two newspapers at the seat of government, and in such other newspapers as they may deem expedient, requiring a delivery of the articles at least ninety days before the same will be wanted, and bids for the same shall be opened by said executive council, at such time as may be fixed by said advertisement; and they shall award the contracts for furnishing such stationery, paper, etc., to the lowest responsible bidders therefor, who shall give security, to be approved by them, for the performance of their contracts; and upon the delivery of the articles contracted for at the office of the secretary of state, in compliance with the terms of said contracts, and presenting receipts therefor, signed by the secretary to the auditor of state, he shall issue to the contractors his warrants on the treasurer for the amount due, which shall be paid out of any money in the treasury not otherwise appropriated. [R., §§ 61, 81, 2169; C., '51, §§ 45, 60.]

158. Custody of. 122. The secretary of state shall take charge of said articles, and furnish the public printer all the paper required for the various kinds of public printing in such quantities as may be needed for the prompt discharge of his duties; and he shall supply the governor, secretary of state, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, register of the state land office, general assembly and clerks or secretaries thereof, such quantities as may be required for the public use and necessary to enable them to perform their several duties as required by law, taking receipts of the proper officers therefor. [R., § 2170; 10 G. A., ch. 22, § 12.]

159. Stationery for committees. 15 G. A., ch. 1, § 1. It is hereby made the duty of the secretary of state to furnish to and supply the standing committees of the senate and house of representatives, and any select or special committees that are or may be raised or appointed by the general assembly, or either branch thereof, with all the stationery necessary for the use of such committees.

160. Mode of drawing. 15 G. A., ch. 1, § 2. In order to draw such stationery, the chairman of each of said committees shall from time to time, as he may deem necessary, make out his requisition on the secretary of state for the amount and kind that is deemed necessary, and upon presentation thereof, to said secretary, he shall deliver the same to said chairman and take a receipt therefor, which requisition and receipt shall be filed in the office of said secretary, and shall be a sufficient voucher to him for such stationery.

161. Contingent fund. 123. Where an appropriation shall be made as a contingent fund for any office or officer, or for any other purpose to be expended for the state, the officer or person having charge of such fund shall keep an account therewith, showing when, to whom, and for what, any portion of said fund has been expended, and to take and preserve receipts for all amounts expended. [R., §§ 2172, 2173.]

162. Report of contingent fund. 124. Such officer or person shall, on or before the first day of November preceding each regular session of the general assembly, report to the auditor of state, stating in detail in what manner such funds have been expended, and shall not be credited with any expenditure unless the same has been done in the manner contemplated by the law making the appropriation, nor unless he has preserved and filed with such auditor proper receipts and vouchers for each sum expended. All funds not properly accounted for may be recovered by the state from the person or officer charged therewith, with fifty per cent. damages on the same. The auditor shall, in his report to the governor, state the condition in detail of each of the appropriations referred to in this and the preceding section. [R., §§ 2174, 2175, 2176.]

[Sec. 125 repealed by 16 G. A., ch. 159, § 9.]

163. Oath of regents, trustees, etc. 126. Every person appointed or elected a regent, trustee, manager, commissioner, or inspector, or a member of any board of regents, trustees, managers, commissioners, or inspectors, now or hereafter created or provided by law for the government, control, management, or inspection of any public building, improvement, or institution whatever, owned, controlled, or managed, in whole or in part, by or under the authority or direction of this state, shall, before entering upon the discharge of his duties as such regent, trustee, manager, commissioner, or inspector, take and subscribe an oath, in substance and form as follows: "I (here insert affiant's name) do solemnly swear that I will support the constitution of the United States, and of the state of Iowa; that I will honestly and faithfully discharge the duties of (here describe the nature of the office, trust, or position as regent, trustee, manager, commissioner, or inspector, as the case may be), according to the laws that now are, or that may hereafter be in force regulating said institution, and prescribing the duties of regents, trustees, managers, commissioners or inspectors thereof (as the case may be); that I will, in all things, conform to the directions contained in said law or laws, and that I will not, directly or indirectly, as such regent, trustee, manager, commissioner, or inspector (as the case may be), make, or enter into, or consent to any contract or agreement, expressed or implied, whereby any greater sum of money shall be expended or agreed to be expended than is expressly authorized by law at the date of such contract or agreement. [R., § 2180.]

164. Not to contract beyond appropriation. 127. Any officer who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection of any building, or any other purpose, which shall contemplate any excess of expenditures, beyond the terms of the law under which said officer was appointed. [R., § 2181.]

165. Oaths filed. 128. Oaths required by this chapter shall be filed in the office of the auditor of state, and he shall not draw any warrant on the state treasury for the purposes for which said officers are appointed, until such oaths are so filed. [R., § 2183.]

[Secs. 129 and 130 repealed by 16 G. A., ch. 159, § 9.]

166. Distribution of documents. 131. Whenever any public documents are in the hands of the secretary of state, the distribution of which is not otherwise provided for, he shall transmit one copy of each to every public library in the state which shall be regularly incorporated, and which shall also have filed with the secretary of state an affidavit of its president and secretary, stating that it is in actual operation as a public library within this state, and contains more than two hundred volumes. [10 G. A., ch. 30, §§ 1, 3.]

167. Books and accounts subject to inspection. 132. The books, accounts, vouchers, and funds belonging to, or kept in any state office or institution, or in the charge or under the control of any state officer or person having charge of any state funds or property, shall, at all times, be open or subject to the inspection of the governor or any committee appointed by him, or by the general assembly or either house thereof, and the governor shall see that such inspection of the office of state treasurer is made at least four times in every twelve months. [R., §§ 80, 90; C., '51, §§ 59, 69.]

OFFICERS OF STATE INSTITUTIONS.

168. Contracting debts. 17 G. A., ch. 67, § 1. It shall be unlawful for any trustee, superintendent, warden, or other officer, of any of the educational, penal, or charitable institutions of this state to contract any indebtedness against said institutions, or the state, in excess of the appropriation made for said institution; *provided*, that nothing herein contained shall prevent the incurring of an indebtedness on account of support funds for state institutions upon the prior written direction of the executive council specifying the items and amount of such indebtedness to be increased and the necessity therefor.

169. Diversion of funds. 17 G. A., ch. 67, § 2. It shall be unlawful for any superintendent, warden, trustee, or other officer of any of the institutions mentioned in section one of this act [§ 168] to divert any money that has been or may be appropriated for the use of said institutions to any other purpose than the specific purpose named therefor in the act appropriating the same.

170. Penalty. 17 G. A., ch. 67, § 3. Any person violating any of the provisions of sections one and two of this act [§§ 168, 169] shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

171. Officer not to be interested. 17 G. A., ch. 144, § 1. It shall be unlawful for any trustee, warden, superintendent, steward, or any other officer of any educational, penal, charitable, or reformatory institution, supported in whole or in part by the state, to be interested directly or indirectly in any contract to furnish or in furnishing provisions, material, or supplies of any kind, to or for the institution of which he is an officer; and it shall be unlawful for any

such trustee, warden, superintendent, steward, or other officer, directly or indirectly, to receive in money or other valuable thing any commission, percentage, discount, or rebate on any provision, material, or supplies furnished for or to any institution of which he is an officer. And it shall be unlawful for any such trustee, warden, superintendent, steward, or other officer of any state institution to be directly or indirectly interested in any contract with the state to build, repair, or furnish any institution of which he may be an officer.

172. Penalty. 17 G. A., ch. 144, § 2. Any person violating the provisions of section one of this act [§ 171] shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or both, such fine and imprisonment in the discretion of the court.

TITLE III.

OF THE JUDICIAL DEPARTMENT.

CHAPTER 1.

OF THE ORGANIZATION OF THE SUPREME COURT.

[See Const., art. 5.]

173. Terms. 21 G. A., ch. 59, § 1; 22 G. A., ch. 34. The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session so far as practicable until it is determined what the opinion of the court shall be in all causes submitted to it except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court.

174. Bailiff. 21 G. A., ch. 59, § 2. The court is hereby authorized to appoint the necessary bailiffs to attend the court and to perform such other duties and execute such orders as may be directed or ordered by the court. Each bailiff shall receive two dollars and fifty cents for a day's service to be paid out of the contingent fund on the order of the chief justice. The court may also at any time require the attendance and services of the sheriff of Polk county.

175. 21 G. A., ch. 59, § 4. Sections numbered 133, 134, 135, 136, and 137 of the code, and all acts and parts of acts in conflict with this act are hereby repealed.

176. Expenses. 138. All bills for contingent expenses shall contain the items thereof, and shall be certified to as correct by the chief justice before being audited. [C., '51, § 1548; 13 G. A., ch. 122, § 9.]

177. Number of judges. 16 G. A., ch. 7, § 1. The supreme court shall consist of five judges, three of whom shall constitute a quorum to hold court.

178. Quorum. 139. The presence of three judges is necessary for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term. [C., '51, § 1551; 10 G. A., ch. 23, § 4.]

179. Divided court. 140. When the court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision is of no further force or authority. [R., § 2628; C., '51, § 1552; 10 G. A., ch. 23, § 5.]

The court has, however, the same power in such case as in any other to grant a rehearing: *Zeigler v. Vance*, 3–528.

If, upon rehearing, the court is equally divided as to whether its first opinion should stand, judgment will be affirmed as if such division had occurred on first hearing: *Richards v. Burden*, 59–723, 754.

180. Failure to attend. 141. If all the judges fail to attend on the first day of the term, the clerk must enter the fact on record, and the court shall

stand adjourned until the next day, and so on until the fourth day; then, if none of the judges appear, the court shall stand adjourned until the next term. [R., § 2629; C., '51, § 1553.]

181. Stand continued. 142. No process or proceeding shall in any manner be affected by an adjournment or failure to hold court, but all shall stand continued to the next term, without any special order to that effect. [R., § 2630; C., '51, § 1554.]

182. Opinions filed. 143. The opinions of the court, and those of any judge dissenting therefrom, on all questions reviewed on appeal, as well as such motions, collateral questions, and points of practice as such court may think of sufficient importance, shall be reduced to writing and filed with the clerk. [R., §§ 2636, 2737; C., '51, §§ 1560-1.]

Construed: *Baker v. Kerr*, 13-384.

183. Dissents. 144. The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which of the judges dissented from the decision. [R., § 2638; C., '51, § 1562.]

184. What cases reported. 145. If the decision, in the judgment of the court, is not of sufficient general importance to be published, it shall be so designated, in which case it shall not be included in the reports, and no case shall be reported except by order of the full bench.

CHAPTER 2.

OF THE CLERK OF THE SUPREME COURT.

185. Office; duty. 146. The office of the clerk of the supreme court shall be kept at the seat of government, and he shall keep a complete record of all proceedings of the court. [R., §§ 2647, 2648; C., '51, § 1564.]

186. Custody of opinions. 147. He must not allow any written opinion of the court to be removed from his office except by the reporter, but shall permit any one to examine or copy the same, and shall, when required, make a copy and certify to the same. [R., § 2649; C., '51, § 1565.]

187. Announce decision. 148. He shall promptly announce by letter any decision rendered to one of the attorneys of each side, when such attorneys are not in attendance at the place of court. [R., § 2650; C., '51, § 1565.]

188. Make record. 149. He shall record every opinion rendered by the court as soon as filed, and shall perform all the duties pertaining to his office. [R., § 2651; C., '51, § 1565.]

CHAPTER 3.

OF THE ATTORNEY-GENERAL.

189. Appear for the state. 150. The attorney-general shall attend in person at the seat of government during the session of the general assembly and supreme court, and appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state shall be a party or interested, when requested to do so by the governor, executive council, or gen-

eral assembly, and shall prosecute and defend for the state all causes in the supreme court in which the state is a party or interested. [R., § 124.]

When a criminal case is appealed to the supreme court, the attorney-general obtains control of it, but any agreements made by the district attorney while the case is in the lower court are binding as against the attorney-general: *State v. Fleming*, 13-443.

190. Written opinions. 151. When requested, he shall give his opinion in writing upon all questions of law submitted to him by the general assembly or either house thereof, governor, lieutenant-governor, auditor, secretary of state, treasurer, superintendent of public instruction, register of the state land office, executive council, and district [county] attorneys. He shall, when required, prepare drafts for contracts, forms, and other writings, which may be required for the use of the state, and shall report to the general assembly, when requested, upon any business pertaining to his office. [R., § 125.]

191. Pay over money. 152. All moneys received by him belonging to the people of the state, or received in his official capacity, shall be paid into the state treasury. [R., § 126.]

192. Office; keep record. 153. The executive council shall furnish him a suitable office at the seat of government. He shall keep in proper books, a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor. [R., §§ 127, 130, 131.]

CHAPTER 4.

OF THE SUPREME COURT REPORTER.

193. May take opinion. 154. When the opinions filed at any term of the supreme court are recorded by the clerk, the reporter may take and retain the same for a period not exceeding four months to prepare a report therefrom, but within such time they shall be returned to and remain in the office of such clerk. [10 G. A., ch. 22, § 3.]

[Secs. 155, 156 and 157 repealed by § 205.]

194. Copyright of reports. 158. The copyright of all reports prepared or published after the first day of January, A. D. 1875, shall be the property of the state. But the reporter shall own the copyright of all reports published before that time, and the supreme court may order the publication of a new edition of any volume of which the copyright is owned by the reporter when the public interest requires it, and may require compliance therewith within six months by an order entered of record; and if the reporter neglects or refuses to comply with such order, then such copyright shall be forfeited to the state. [Same, § 9.]

195. Disposition of reports. 159; 22 G. A., ch. 33. The copies received by the secretary of state shall be disposed of by him as follows: Two copies of each volume to the library of congress and the library of the supreme court of the United States; one copy to the library of each state and territory in the United States, to each judge of the supreme, district, and superior courts, to the clerk of the supreme court and attorney-general; fifty copies to the state library, to be and remain therein as a part thereof, and one copy to each county in the state, and two copies to each county where the district court is held in more than one place, one copy to be given to each place where court is held, and one copy to the supreme court reporter, and twenty copies to the law department of the state university, and twenty copies to the state

historical society for exchange in such manner as the proper officers thereof think advisable, and the remaining copies, together with all reports now in the office of governor, secretary, auditor, treasurer of state, and register of the land office, and superintendent of public instruction, shall be used by the trustees of the state library in exchange for such books on law or equity, or reports of other states as they may select. All books received by such exchange shall be deposited in and become a part of the state library. [Same, § 10; 14 G. A., ch. 109, § 8.]

PUBLICATION OF SUPREME COURT REPORTS.

196. Preparing; publishing. 18 G. A., ch. 60, § 1; 20 G. A., ch. 125. As soon as practicable after sufficient opinions are announced to make a volume, as herein provided, the supreme court reporter shall furnish and deliver at his office at Des Moines, Iowa, to the person, persons or corporation having the contract with the state for publishing the same, copies of such opinions, and with each opinion a syllabus, a brief statement of the facts involved, and, in all cases where he may deem it of sufficient importance, the legal propositions made by counsel in the argument, with the authorities cited, when the same have been prepared and furnished by counsel in a brief form and in a manner suitable for publication, but the argument shall not be reported at length; and within twenty days after the proof sheets for a volume have been furnished to him by the publishers at his office in Des Moines, Iowa, he shall furnish to such publishers an index and table of cases to such volume. The publishers shall furnish to the reporter without delay, as soon as they shall be issued, two copies of the revised proof sheets of the opinions, headnotes, index and table of cases of each volume, for correction and approval by the reporter and judges of the supreme court, and shall cause such corrections to be made therein as shall be indicated by the reporter or said judges. Each of said volumes shall contain not less than seven hundred and fifty, nor more than eight hundred pages, exclusive of the table of cases and index, and the workmanship and quality of material shall in every particular be equal to the first issue of volume forty of the Iowa supreme court reports, and shall be approved and accepted by a majority of the judges of the supreme court.

197. Copyright. 18 G. A., ch. 60, § 2. The copyrights of all the supreme court reports hereafter published shall vest in the secretary of state for the benefit of the people of this state, but this shall not be construed to prevent the contractor, by whom any volume is published, his representatives or assigns, from continuing the exclusive publication and sale of such volume so long as he or they shall, in all respects, comply with the requirements of this act in respect to the character, sale and price of such volume.

198. Contract for publication; price per volume. 18 G. A., ch. 60, § 3. The supreme court reporter shall have no pecuniary interest in such reports, but the same shall be published under the contract, to be entered into by the executive council with the person, persons or corporation, who shall agree to publish and sell the same on the terms most advantageous to the people of this state, at a price not to exceed two dollars per volume, of the size and quality as provided for in this act. And if any such volume shall, in any way, or from any cause, contain more than eight hundred pages, no increased or additional price shall be charged therefor.

199. Proposal. 18 G. A., ch. 60, § 4. The executive council shall, commencing in the first week in April, A. D. 1880, and every eight years thereafter, advertise weekly in six different newspapers in different localities in this state, for the term of six weeks, that sealed proposals will be received at the office of the secretary of state for printing, publishing and selling the said reports for the term of eight years next after the first day of June of said year,

at a certain rate per volume, to be stated in said proposal, not exceeding the maximum price fixed by this act, and in accordance with the provisions of this act.

200. Deposit. 18 G. A., ch. 60, § 5. Each bidder shall deposit with the state treasurer the sum of one thousand dollars before making his proposal, to be forfeited to the state in case he shall not make a contract according to his proposal if accepted, and according to the requirements of this act, and shall take a receipt from said treasurer and deposit the same with his proposal, and upon entering into the contract herein provided, or upon the proposal being rejected, the said sum shall be returned.

201. Terms of contract with publisher. 18 G. A., ch. 60, § 6. The successful bidder shall enter into a contract that he will publish the supreme court reports of the state, of the quality, style and character, in all respects, as set out in section one [§ 196] of this act; that he will publish and deliver to the secretary of state, at the capitol in Des Moines, two hundred and fifty copies, free of cost for publication or delivery, at the earliest practicable time and within sixty days after the delivery of the manuscripts for any one copy of such reports to the publishers; that he will stereotype the same, and at all times keep the same on sale in the state of Iowa, to residents of this state, for actual use, at the contract price, in suitable quantities, in the city of Des Moines; that he will furnish the state any number of additional copies that may be required for its own use at the contract price, and procure new stereotype plates whenever the original plates shall become defaced or destroyed; and the said contract shall fully provide for the carrying into effect of all the provisions of this act, and shall be made within thirty days after he is notified of the acceptance of his proposal.

202. Bond. 18 G. A., ch. 60, § 7. The successful bidder shall, at the time of making his contract, execute and file with the treasurer of state a bond, in the penal sum of ten thousand dollars, conditioned to fulfill such contract in all particulars, with at least two sufficient sureties, residents of this state, to be approved by the executive council of the state. Such bond shall, by its terms, be the joint and several obligations of the persons executing it. If the successful bidder shall fail to complete his contract, or shall forfeit the same for any cause, the executive council shall relet the contract as soon thereafter as practicable, in the manner provided in this act; *provided, however*, that such bidder, in lieu of sureties to such bond, may deposit therewith bonds of the United States, payable to the bearer, amounting to not less than ten thousand dollars.

203. Contract. 18 G. A., ch. 60, § 8. The contract of the successful bidder required by this act shall contain, among others, the following covenants on his part:

FIRST.—That he will not take out in his own name, nor procure to be taken out in the name of any person other than the secretary of state of this state, a copyright upon any volume of the supreme court reports published under such contract; and that upon any breach of this covenant he will pay to the treasurer of this state the sum of two thousand dollars as liquidated damages.

SECOND.—That in case it shall be determined in any action upon the bond of such contractor that he has failed in any respect to comply with the provisions of this act or his contract, the executive council may declare the contract forfeited; and that, upon such forfeiture so declared, such contractor will, upon demand, transfer to the secretary of state of this state, for the use of the state, the stereotyped plates of each volume of such reports published under such contract, or in default thereof will pay to the treasurer of this state two thousand dollars for each such volume as liquidated damages for a failure to make such transfer, and such failure shall be deemed a breach of the conditions of such bond, and such liquidated damages may be recovered by action on such bond.

204. Compensation of reporter. 18 G. A., ch. 60, § 9. The supreme court reporter shall receive as his compensation for all services up to the first day of July, 1880, such sums as shall be paid to him by the state under existing laws for the publication of the supreme court reports, up to and including volume fifty-one. After the first day of July, 1880, the supreme court reporter shall receive an annual salary of two thousand dollars, payable quarterly upon the certificate of the judges of said court that he has properly performed the duties of reporter as required by this act.

205. 18 G. A., ch. 60, § 10. Sections 155, 156, 157 and 160, of chapter 4, title III, of the code, and all acts and parts of acts conflicting with the provisions of this act are hereby repealed; *provided*, that the passage of this act shall not be construed to affect the publication of the supreme court reports up to and including volume fifty-one; but in all other respects the provisions of this act shall be in force from the time it takes effect as hereinafter provided.

CHAPTER 5.

OF THE DISTRICT COURT AND JUDGES THEREOF.

206. Jurisdiction. 161. The district court shall have and exercise general original jurisdiction, both civil and criminal, where not otherwise provided, and appellate jurisdiction in all criminal matters. Such court shall have a general supervision over all inferior courts and officers in all criminal matters, to prevent and correct abuses where no other remedy is provided. [R., § 2663; C., '51, § 1576; 13 G. A., ch. 153, § 2.]

[Further as to the jurisdiction of the district court, see §§ 239, 240.

Jurisdiction: The district court is a court of general jurisdiction. It may have jurisdiction over any case brought within its district, except so far as the exercise of its jurisdiction is prescribed by statute. The general and unlimited scope of its jurisdiction is illustrated by the fact that it is styled the district court for the state, held in and for a particular county, and its judges are judges of the state with authority to grant writs running into every part of the state. The legislature cannot deprive it of its jurisdiction or limit such jurisdiction, but the manner of its exercise may be prescribed by law: *Laird v. Dickerson*, 40–665.

The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that Revision, § 2395, which prohibited the bringing of an action in that court on claims against an estate for a mere money demand, except with the approbation of the county court, was not intended to do away with the jurisdiction of the district court, but merely as a restraint upon the plaintiff: *Sterrett v. Robinson*, 17–61; and that the failure on the part of the plaintiff to obtain such leave must be set up as a defense in the district court, and could not be made a ground of collateral attack on the judgment: *Cooley v. Smith*, 17–99.

The statutes conferring jurisdiction upon the probate court did not defeat or oust the general jurisdiction of the district court: *Harlin v. Stevenson*, 30–371.

As the district court is one of general jurisdiction, its powers are such as to give it cognizance of proceedings by creditors to compel an administrator to sell real estate for debts, and of all other proceedings except where jurisdiction is denied or taken away by express language or necessary implication: *Waples v. Marsh*, 19–381.

At law and in equity: The district court is invested with all the powers of a court of law and those of a court of equity, and the distinction between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Under statutes different from those now in force, *held*, that in a proceeding in equity the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7–110.

Supervisory powers: As to the distinction between the jurisdiction of the district court and that of the circuit court in *certiorari* under former statutes, see *Keniston v. Hewitt*, 48–679; *Groves v. Richmond*, 53–570.

Judge; unauthorized person cannot act as: A person not duly authorized and qualified by law cannot, by consent of parties or by direction of the duly qualified judge, act as judge in the trial of a cause: *Michales v. Hine*, 3 G. Gr., 470; *Winchester v. Ayres*, 4

G. Gr., 104; *Petty v. Durall*, 4 G. Gr., 120; *Smith v. Frisbie*, 7-486.

It is not proper for a judge of the court to have an attorney substituted temporarily in his place, even by consent of parties, and himself act as attorney for one of the parties to the case: *Wright v. Boon*, 2 G. Gr., 458.

The judge may, during the argument of the case to the jury, properly be absent from the court room for the purpose of hearing another case, or otherwise: *Hall v. Wolff*, 61-559; especially if it does not appear but that such absence was necessary, or that prejudice resulted or might be inferred therefrom: *Baxter v. Ray*, 62-336.

Substitute: Where a statute provides that, in case of the absence or disability of the judge, a certain other officer designated shall act in his place, it must appear, in order to support an action of the person thus designated in sitting as judge, that the contingency upon which he was authorized to act had occurred: *Burlington University v. Stewart's Ex'rs*, 12-442; *State v. Chicago, R. I. & P. R. Co.*, 50-692.

Change of judge: Where, after the submission of a cause on deposition to the judge of the circuit court, the circuit was so changed that another judge became judge of such court, *held*, that a decision of the cause by the new judge was proper: *Manning v. Mathews*, 66-675.

Where at one term of court a judge signs or makes a memorandum of a decree which is not entered at that term on the record, and before the next term the judge goes out of office, his successor should cause the record to be made up from the previous decree or memorandum, and cannot regard the cause as open for trial: *Tracy v. Beeson*, 47-155.

Where the judgment rendered by one judge, upon the report of a referee, was set aside by his successor as having been improperly entered in vacation, and a new judgment to the same effect was rendered, *held*, that the unsuccessful party had no right to have his exceptions to the referee's report passed upon anew by the incoming judge: *Mellinger v. Von Behren*, 53-374.

Powers may be conferred upon the judge which cannot be exercised by the court of which he is judge: *Cummings v. Des Moines, W. & S. W. R. Co.*, 36-173.

207. Same; circuit court. 162. The circuit court shall have and exercise general original jurisdiction concurrent with the district court in all civil actions and special proceedings, and exclusive jurisdiction in all appeals and writs of error from inferior courts, tribunals or officers, and a general supervision thereof in all civil matters, to prevent and correct abuses where no other remedy is provided. [12 G. A., ch. 86, §§ 4, 5; 14 G. A., ch. 22, § 3.]

[By sections 233 and 240 the circuit court is abolished and its jurisdiction conferred upon the district court.]

The general supervision of the circuit court over inferior courts, etc., in civil matters was exclusive, and so was that of the district court under the preceding section in criminal matters. By Code, § 3217, it was not intended to give jurisdiction in proceedings by *certiorari* indiscriminately to both courts, but to give each court jurisdiction in such proceedings in that class of cases under its supervision as here contemplated: *Kenston v. Hewitt*, 48-679.

The circuit court had exclusive jurisdiction over appeals from the judgment of a court for the trial of contested county elections, under § 1182: *McKinney v. Wood*, 35-167.

This section did not permit appeals in cases where there was no statute authorizing them; as, for instance, in the case of action of fence viewers: *McKeever v. Jenks*, 59-350.

Where a circuit court had, under this section, exclusive jurisdiction and a change of place of trial was granted, the case was to be sent to some other circuit court and not to the district court: *Schuchart v. Lammey*, 62-197.

Although an appeal to the circuit court from a justice of the peace in a civil case could not be changed to the district court, yet, if such appeal was consolidated by consent of the parties with an original action already pending in the circuit court, the consolidated action might be changed as in any other case: *Broune v. Hickie*, 68-336.

Since the circuit court has been abolished the district court has the same power with reference to its records that the circuit court might have exercised: *De Wolfe v. Taylor*, 71-648.

208. Terms. 163. The judicial districts and circuits, and the terms and places of holding the district and circuit courts therein, shall remain as at present fixed until changed in accordance with law. Where such terms are held in any city or incorporated town not the county seat of a county, such city or town shall provide and furnish the necessary rooms and places for such terms free of charge to the county. [R., § 2653; C., '51, § 1566; 12 G. A., ch. 123; 14 G. A., ch. 22, § 6.]

[As to the judicial districts, and places of holding court, see now §§ 235-237.]

Notwithstanding the statutory provision that courts must be held at the places provided by law, probate courts are expressly authorized (§ 3510) to appoint the time and place for the hearing of matters requiring notice: *Casey v. Stewart*, 60-160.

But such provision as to probate courts does not authorize a probate court to sit outside the

county, unless, perhaps, by consent of parties, and any order made by the court outside the county in which the case is pending is void: *Capper v. Sibley*, 65–754.

A trial at a place not within the county where the suit was pending, had by agreement of parties during vacation, *held* binding: *O'Hagen v. O'Hagen*, 14–264.

Where it is agreed that a case shall be heard in vacation at a particular place, and it is heard, but at another place, the record showing that counsel on both sides were present at the argument and made no objection to the place of hearing, it will be presumed that objection to the place was waived: *Johnson v. Mantz*, 69–710.

A party is bound to take notice of the place of sitting of the court, where, by reasonable effort, he might have ascertained such fact: *Jordan v. Circuit Court*, 69–177.

Where it appears that a court was sitting at some place other than the court-house, it will be presumed, in the absence of a showing to the contrary, that it was at a place properly provided for the purpose, if any reason appears why the court-house might not be a proper place: *State v. Shelledy*, 8–477, 509.

The legislature may, by special act, authorize the holding of court at a place other than the county seat: *Cooper v. Mills County*, 69–350.

209. Probate terms. 164. The circuit [district] judge having jurisdiction in counties having two county seats, shall hold terms for probate business at each of said county seats. [12 G. A., ch. 123.]

210. Judges fix terms. 165; 15 G. A., ch. 12, § 1. At least two terms of each court shall be held in every organized county in each year, and the district [and circuit] judges of each judicial district shall, on or before the first Monday in December, A. D. 1873, and in each alternate year thereafter, designate and fix by an order under their hands, the times of holding the terms of such courts in each county in their districts for the two years next ensuing the first day of January thereafter, which order shall be forthwith forwarded by the district judge to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of each court, and cause such order to be published for four weeks in some weekly newspaper published in such county, if there be any such published. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in January after said orders are made, prepare a tabular statement of the times of holding the several courts as fixed by the several orders in his office, and have printed one thousand copies thereof, which shall be distributed as follows: One copy to each state officer, state library, library of the law department of the state university, each clerk of the district court, and sheriff, and the residue to the county auditors in proportion to the population of each county, for gratuitous distribution among the attorneys of the county. [R., §§ 2654–5; C., '51, §§ 1567–8; 12 G. A., ch. 86, § 24; 13 G. A., ch. 41, § 3; 14 G. A., ch. 22, § 4; ch. 113.]

[Further, as to terms of court, see §§ 237, 238.]

211. Special term. 166; 17 G. A., ch. 89. A special term may be ordered in any county at any regular term of court in that county, or at any other time, by the judge, for the trial of all causes pending at the last regular term of said court held prior to said special term, in which either party shall have served upon the opposite party or his attorney in the manner provided for service of original notice, at least twenty days prior to said special term, a notice in writing that such cause will be brought on for trial. When ordering a special term, the court or judge shall direct whether a grand or trial jury or both shall be summoned. [R., §§ 2656–8; C., '51, §§ 1569–71.]

The authority to hold special terms should never be withheld from a court. It may be regarded as a right which a court of general jurisdicton should exercise *ex officio: Harriman v. State*, 2 G. Gr., 270.

Where a special term of court was provided for the trial of criminal cases only, *held*, that the jurisdiction of the court at such term was that provided for the trial of criminal cases in general, and was not limited merely to the trial of those in which there was consent: *State v. Smith*, 7–244.

And *held*, that at such special term an indictment might be found: *State v. Nash*, 7–347.

The court may call a grand jury together at a special term: *State v. Reid*, 20–413, 424.

Whether a judge may, for the purpose of concluding a trial begun during a regular term of court, appoint a special term at a day

fixed by law for the regular term in another county, *quœre: State v. Knight*, 19-94.

Under Revision, §§ 2656-8, *held*, that a special term which was ordered for the same day fixed for the general term of the same court in another county, but was afterwards adjourned to a later date, was not illegal: *State v. Clark*, 30-168.

A special term is not a continuance of the regular term after an adjournment, but is a new term: *Dryden v. Wyllis*, 54-667.

212. Failure of judge. 167. If the judge does not appear on the day appointed for holding the court, the clerk shall make an entry thereof in his record, and adjourn the court till the next day, and so on until the third day, unless the judge appears, provided three days are allowed for such term. [R., § 2668; C., '51, § 1581.]

213. Stand adjourned. 168. If the judge does not appear by five o'clock of the third day, and before the expiration of the time allotted to the term of the court, it shall stand adjourned till the next regular term. [R., § 2669; C. '51, § 1582.]

214. Judge may order adjournment. 169. If the judge is sick, or for any other sufficient cause is unable to attend court at the regularly appointed time, he may, by a written order, direct an adjournment to a particular day therein specified, and the clerk shall, on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed. [R., § 2670; C., '51, § 1583.]

The judge is clothed with full power over the adjournments of his court: *State v. Clark*, 30-168.

Where the judge, being absent from the state, wrote and telegraphed to the clerk to adjourn the approaching term of court to a further date, and the clerk, in accordance with the telegram, published a notice of the adjournment, and notified parties, jurors and witnesses, but no proclamation of the adjournment was made at the day for opening the term, and the written order was not filed nor entry thereof upon the record made until after the opening of the term at the time to which it was so adjourned, nor until after defendant, who was held for trial at the regular term under a continuance from a previous term, had filed his protest against being tried at such adjourned term, *held*, that a *nunc pro tunc* record of the order was sufficient, and the trial of defendant was properly held at the adjourned term, no prejudice being shown: *State v. McGuire*, 53-165.

A telegram from the judge to the clerk, making the proper direction as to adjournment, is a sufficient written order within the requirements of this section: *State v. Holmes*, 56-588.

215. No proceeding invalid. 170. No recognizance, or other instrument or proceeding shall be rendered invalid by reason of there being a failure of the term; but all proceedings pending in court shall be continued to the next regular term, unless an adjournment be made as authorized in the last preceding section. [R., § 2671; C., '51, § 1584.]

216. Parties; when to appear. 171. In cases of such continuances or adjournments, persons recognized or bound to appear at the regular term which has failed as aforesaid, shall be held bound in like manner to appear at the time so fixed, and their sureties, if any, shall be liable in case of their non-appearance, in the same manner as though the term had been held at the regular time and they had failed to make their appearance thereat. [R., § 2672; C., '51, § 1585.]

217. Continued. 172. Upon any final adjournment of the court, all business not otherwise disposed of, will stand continued generally. [R., § 2673; C., '51, § 1586.]

218. When no court-house. 173. When a county is not provided with a regular court-house at the place where the courts are to be held, they shall be held at such place as the board of supervisors provide. [R., § 2660; C., '51, § 1573.]

219. Same. 174. If no suitable place be thus provided, the court may direct the sheriff to procure one. [R., § 2661; C., '51, § 1574.]

220. Judges interchanged. 175. The district judges may interchange and hold each other's courts [and so may the circuit judges]. [R., § 2662; C., '51, § 1575; 12 G. A., ch. 86, § 25.]

This section is not in conflict with Constitution, art. 5, § 5, and a judge holding court out of his district, in exchange with another judge, is not acting without authority: *State v. Stingley*, 10-488.

An unauthorized person cannot by consent of parties, or by direction of the court, act as judge. See notes to § 206.

221. Apportionment of business. 21 G. A., ch. 128, § 1. In districts in which the district court is composed of more than one judge, the judges shall not sit together in the trial of causes nor upon the hearing of motions for new trial; but may together hold the same term making an apportionment of the business between them; and in districts composed of more than one county they may hold terms in different counties at the same time.

The statutory provisions by which in the same case two or more district judges are authorized to hold court in the same county at the same time are not unconstitutional. This statute is not unconstitutional on the ground that it covers more than one subject-matter, or that it embraces any subject not expressed in the title, or that it is not of uniform operation throughout the state: *State v. Emmons*, 72-265.

222. Records read. 176. The clerk shall, from time to time, read over all the entries made of record in open court; which, when correct, shall be signed by the judge. [R., § 2664.]

Signing and approval of record: The provisions of this and the following sections as to signing the record are directory only, and a failure to comply therewith does not render a judgment void: *Vanfleet v. Phillips*, 11-558; *O'Hara v. Leonard*, 19-515; *Childs v. McChesney*, 20-431; *Hamilton v. Barton*, 20-505.

An approval of the entries at any succeeding term relates back to the time of the entry, and is as effectual as if given at that time: *Vanfleet v. Phillips*, 11-558.

The expiration of the term of a judge before the approval and signing of the record does not make judgments rendered by him void: *Tracy v. Beeson*, 47-155.

A judgment is valid though the record be not signed by the judge; so *held* as to a decree signed by the judge in vacation, filed with the clerk, and entered by him without the record being signed: *Traer v. Whitman*, 56-443.

Although the practice of procuring the signature of the judge to a form of decree is to be commended as tending to secure accurate records, such signature is not the signature of the record contemplated by the statute: *Bosch v. Kassing*, 64-312.

Entry by clerk without authority: The clerk has no authority to enter up a decree not warranted by the entry on the judge's calendar: *Smith v. Cumins*, 52-143.

Notice of its own records: The court is supposed to know the genuineness of its own records and signature of its officers: *State v. Postlewait*, 14-446.

A court will not in one case take judicial notice of what has transpired in another case between different parties: *Baker v. Mygatt*, 14-131.

A court cannot take judicial notice in one case of its records in a different case. So *held* where it appeared that the opinion of the supreme court in a different case was introduced in evidence on the trial in the court below, but was not set out in the abstract on appeal: *Enix v. Miller*, 54-551.

The court will, in a proceeding for contempt, take judicial notice of its own orders in the matter out of which the alleged contempt grew: *Jordan v. Circuit Court*, 69-177.

223. At succeeding term. 177. When it is not practicable to have all the records prepared and thus approved during the term, they may be read, corrected and approved at the next succeeding term; but such delay shall not prevent an execution from issuing in the meantime; and all other proceedings may take place in the same manner as though the record had been approved and signed. Entries authorized to be made in vacation shall be read, approved, and signed at the next term of the court. [R., § 2665; C., '51, § 1578.]

Approval at subsequent term: This section is directory, and the failure to have such entries read and approved at the next term will not render void a judgment so entered. An approval of the entries at any succeeding term relates back to the time of the entry, and is as effectual as if given at that time: *Vanfleet v. Phillips*, 11-558.

Though the record of the judgment is not read and approved until the term after it is made, nevertheless exceptions thereto must be taken, under § 4038, at the term when the judgment is entered: *State v. Orwig*, 34-112.

The expiration of the term of a judge, before the approval and signing of the record,

does not make judgments rendered by him void: *Tracy v. Beeson*, 47–155.

Since the abolition of the circuit court, the district court has the same power and jurisdiction over the circuit court records as the circuit court had, and an application for correction of the record of the circuit court should be made to the district court: *De Wolfe v. Taylor*, 71–648.

Entries in vacation: The reading, approval and signing of a judgment entry made in vacation at the next term of court does not make it valid where there is no authority to enter a judgment in vacation. Approval at the subsequent term is only allowable as to entries authorized to be made in vacation: *Townsley v. Morehead*, 9–565; *McClure v. Owens*, 21–133.

Where a judgment is entered in vacation it is under the control of the court and subject to modification or correction until finally approved: *Porter v. McBride*, 44–479.

The court may, at the next term after the making of an entry in vacation, proceed to correct or expunge it without notice to the party at whose instance it has been made: *Carpenter v. Zuver*, 56–390.

Further as to entry of judgment in vacation, see § 229 and notes.

As to what constitutes the record, see notes to § 258.

224. Amendment of record. 178. The record aforesaid is under the control of the court, and may be amended, or any entry therein expunged, at any time during the term at which it is made, or before it is signed by the judge. [R., § 2606; C., '51, § 1579.]

Correction of records: During all the term the record is under the control of the court, and at any time before adjournment an order of nonsuit or a judgment by default may be set aside on proper showing: *Taylor v. Lusk*, 9–444.

Until the record is signed it is not conclusive upon the court as against a bill of exceptions subsequently signed: *Shepherd v. Brenton*, 15–84.

The discovery by the court of an error or mistake in its ruling is good cause for amending or expunging the record thereof as herein provided: *Bruce v. Grady*, 36–352; and this may be done of its own motion: *Wolmenstadt v. Jacobs*, 61–372; so a default, improperly entered, may thus be set aside without following the provisions of § 4078 as to setting aside defaults: *Boals v. Shules*, 29–507.

The court has the power at any time during the term to have the record corrected so as to conform to its rulings: *Robbins v. Neal*, 10–560.

The court has discretionary power to modify or reverse any order during the term at which it is made: *Chapman v. Allen*, Mor., 23.

The power of the courts to revise, correct and change their sentences, at the term at which they were pronounced and before anything has been done under them, has long been recognized both in this country and in England, and any doubt as to the existence of the power is removed by this section: *State v. Dougherty*, 70–439.

A formal decree which has been signed by the judge, and copied into the records by the clerk, may be amended before the record has been signed. Such signature is not that contemplated by § 222: *Bosch v. Kassing*, 64–312.

The court may, before a decree is read and approved, correct it on motion to make it conform to the pleadings: *Deer v. Nelson*, 73–186.

The court may, for a good reason shown, set aside at the same term a previous order: *Kirby v. Gates*, 71–100.

The court may, for good cause shown, change an order made during the term. If the motion for such change is made, the party adversely interested should have notice; but if counsel appear for him and are heard, and no prejudice results from want of formal notice, failure to give it will not constitute error: *Chicago, I. & D. R. v. Estes*, 71–603.

Where final judgment has been entered of record, approved and signed, the court cannot, even during the same term, set it aside in the absence of and without due notice to the party interested, and an order thus made is void and may be corrected by *certiorari*: *Hawkeye Ins. Co. v. Duffie*, 67–175.

It is doubtful whether a court should correct its record after the term and before it is signed upon affidavits uncorroborated by anything in the record or within the recollection of the judge. And a refusal to make such correction upon parol evidence will not be interfered with on appeal where the evidence is conflicting. *State v. Crosby*, 67–352.

This section refers to a record made in a cause, and not to a total omission to make a record, which can be supplied at the succeeding term: *Tracy v. Beeson*, 47–155, 158.

Further as to the record, see notes to § 258.

225. Evident mistake. 179. Entries made, approved, and signed at a previous term, can be altered only to correct an evident mistake. [R., § 2667; C., '51, § 1580.]

Correction of evident mistake: The power to change entries on account of evident mistake is not necessarily limited to the term next succeeding the one at which they were made. A correction in a particular case *held* proper under peculiar circumstances: *Hurley v. Dubuque Gas, etc., Co.*, 8–274.

Entries made at a previous term may be altered and corrected for mistake when it is clearly made to appear: *State v. McComb*, 18–43, 48.

Where a verdict is returned but no judgment rendered thereon at that term, it is not error to render such judgment at the next term: *Shephard v. Brenton*, 20–41.

This section does not deprive the court of the power to make a *nunc pro tunc* entry at a subsequent term of a fact such as consent of

parties to trial by a certain method, etc.: *Buckwalter v. Craig*, 24-215; and a *nunc pro tunc* order showing certain facts in regard to the impaneling of a grand jury at a previous term *held* allowable: *State v. Munzenmaier*, 24-87.

By analogy, the provisions of this section will be followed in the supreme court: *Roberts v. Corbin*, 26-315, 331.

This section provides for the correction of entries made, approved and signed at a (not the) previous term: *Goldsmith v. Clausen*, 14-278.

The proceeding by motion to correct a judgment entry reciting a judgment against a party, where it appears that no judgment was in fact rendered, is not limited to one year: *Shelley v. Smith*, 50-553.

A mistake which may be corrected under this section is a mistake of fact, and not a mistake of law: *Knox v. Moser*, 72-154.

Where a judge at a term of court signs a decree, which is filed with the papers but not recorded at that term, and before the next term of court goes out of office, the court, at the succeeding term, cannot consider the cause as still open, but should enter the decree previously signed: *Tracy v. Beeson*, 47-155.

Action of the judge in ruling upon a motion for supplying an omission in the records will not be overruled on appeal where it appears that the facts which it is sought to make of record transpired in the trial before him, and that the evidence upon which he acted in correcting the record was conflicting: *Stockdale v. Johnson*, 14-178.

An amendment of the record upon motion of one of the parties, supported by an affidavit setting forth an agreement as to what should be submitted to the court, cannot be made under the authority to correct an evident mistake: *Eno v. Hunt*, 8-346.

The statement of a decree as to the time of its rendition cannot be overcome by the certificate of the clerk as to the time when the decree was filed with him: *Buck v. Holt*, 74-294.

As to manner of correcting mistakes of the clerk or irregularities in obtaining judgment, see § 4385.

Notice of correction: A motion at a subsequent term to modify the decree in a matter affecting another party should not be sustained, no notice of such motion having been given to the party adversely interested: *Wetmore v. Harper*, 70-346.

The court cannot, after a judgment, execution and sale, so amend its record as to show proper service of notice which did not before appear, without notice of the proceeding for such amendment having been given to the opposite party: *McGlaughlin v. O'Rourke*, 12-459.

226. Judges make rules. 180. The judges of the district [and circuit] court in any district, may provide by general rule:

1. That the time of filing pleadings or motions shall be other than provided in this code;

2. That issues in all, or a part of the counties in such district, shall be made up in vacation;

3. Prescribing penalties that shall follow the overruling or sustaining a motion or demurrer;

4. Adopting such other rules as they may deem expedient, not inconsistent with this code. Such rules shall be signed by said judges, and such number published as they deem expedient, and shall be distributed by the district judge as follows: To the secretary of state, to each of the judges of the supreme court, attorney-general, clerk of the supreme court, state library, and law department of the state university, one copy each, to be filed and preserved in the said several offices or departments; and the residue to the clerks of the district court in each county composing such district, in such proportion as such judge deems proper. The expense of publishing and distributing such rules shall be paid by the counties composing the district, as the judges may direct. Such rules may be revised and changed as often as the judges deem proper, and shall be published and distributed in the same manner, but shall not take effect until ninety days after their entry of record. [R., §§ 2679-81; C., '51, §§ 1589-91.]

[Further provisions as to rules are found in § 243.]

As to power to make rules, method of adoption, publication, etc., see *State v. Ensley*, 10-149.

A rule of the circuit court in regard to filing transcripts on appeals from justices upheld: *Pinders v. Yager*, 29-468.

It may be provided by rules of the court that defendant shall be required to appear and answer by noon of the first day instead of the second day of the term: *McGrew v. Downs*, 67-687.

Rules of court properly adopted, until repealed or changed, have the force and effect of law as applied to the rights of parties, and in their construction the same rules should be applied: *David v. Ætna Ins. Co.*, 9-45.

A rule of court providing that witnesses subpœnaed in different cases between different

parties should draw but one *per diem* upheld: *Meffert v. Dubuque, B. & M. R. Co.*, 34-430.

A rule of court must be abrogated in the same manner and under the same authority by which it is made. It cannot be abolished by an order of the judge resting only in parol: *Burlington & M. R. R. Co. v. Marchand*, 5-468.

Under § 3915, all courts must take judicial notice of rules of other courts. Formerly it was held that rules of lower court would not be noticed on appeal unless embodied in the record: *Lyon v. Byington*, 7-422; *Horseman v. Todhunter*, 12-230.

227. Short-hand reporter. 181; 18 G. A., ch. 195, § 1. The judge of the district [or circuit] court may appoint, whenever in the judgment of either of them it will expedite the public business, a short-hand reporter, who shall be well skilled in the art and competent to discharge the duties required, for the purpose of recording the oral testimony of witnesses in civil cases upon the request of either party thereto, and in all criminal cases which are tried upon indictment, and in other criminal cases and such other matters as the judge may direct; but the judge shall not so direct in any criminal case unless it shall satisfactorily appear to him that the interests of the state or defendant require the *separating* [reporting] of the testimony in said case; *provided*, the defendant in any criminal case may have the testimony therein reported without an order of the judge by first paying or securing to said reporter his fees for reporting therein. [14 G. A., chs. 99, 100.]

[Further provisions as to short-hand reporter are found in § 5029.]

228. Oath; removal; same. 182. Such reporter shall take an oath faithfully to perform the duties of his office, which shall be filed in the office of the clerk. He shall attend such sessions of the court as the judge may direct, and may be removed by the judge making the appointment for misconduct, incapacity, or inattention to duty. [14 G. A., ch. 100, §§ 2, 4.]

229. Judgment in vacation. 183. With consent of parties, actions, special proceedings, and other matters pending in the courts named in this chapter, may be taken under advisement by the judges, decided and entered of record in vacation, or at the next term; if so entered in vacation, they shall have the same force and effect from the time of such entry as if done in term time.

A judgment rendered and entered in vacation, without consent of the parties or any order of court made during term therefor, is void: *Spear v. Fitchpatrick*, 37-127; *Balm v. Nunn*, 63-641.

A judge has no authority, without consent of parties, to render a decision in vacation discharging a garnishee: *Laughlin v. Peckham*, 66-121.

It is only where authority is specially conferred by statute that the judge is authorized to make orders and exercise judicial functions in vacation: *Prosser v. Prosser*, 64-378.

Where, by agreement of parties, either party was to have a certain time to file a motion for a new trial to be decided in vacation, and thereafter a motion for a new trial was filed and so decided, *held*, that a motion in arrest of judgment could not be filed and decided in vacation under the same agreement, it not being expressly provided for therein: *Scribner v. Rutherford*, 65-551.

Although a judgment be entered after the close of the term and without special direction of the court, yet if not contrary to the pleadings and verdict, and its entry was a matter of course, it is not void, but at most irregular, and such irregularity must be taken advantage of on motion: *Collins v. Chantland*, 48-241.

The entry of a judgment in vacation, except in cases authorized by statute, is irregular, and whether it is void, *quære: Carmichael v. Vandebur*, 50-651.

Whether a decree entered in vacation is void or merely irregular, the parties seeking to have it set aside in equity must offer to pay the amount appearing to be justly due, or allow judgment to be rendered for that amount: *Byers v. Odell*, 56-618.

Where, upon the appearance of defendant at a subsequent term, the judgment in vacation was set aside and a new judgment entered of that term, *held*, that the new judgment was not void: *First Nat. Bank v. Hostetter*, 61-395.

The court may hear a case and render judgment during vacation if the parties consent thereto: *O'Hagen v. O'Hagen*, 14-264.

Where parties in open court agreed that judgment should be entered upon the disposition of a motion for a new trial, and that such motion might be decided in vacation, *held*, that a judgment entered in vacation in pursuance of such arrangement was proper: *Hattenback v. Hoskins*, 12-109.

An order of the judge may issue in vacation directing the sheriff as to publication of notice of sale under execution: *Herriman v. Moore*, 49-171.

Under the circumstances of a particular case, *held*, that consent to judgment in vacation appeared: *Guthrie v. Guthrie*, 71-744.

The consent of a party to a cause being determined in vacation, implied from the conduct of his attorney in not objecting thereto, *held* sufficient to authorize such decision: *Myers v. Funk*, 51-92; *Babcock v. Wolf*, 70-676.

An agreement for a decision in vacation implies that the judge will decide the case at his chambers or wherever he may be when he finally considers it: *Johnson v. Mantz*, 69-710.

Where a decree was signed by the judge before the expiration of his term of office, and delivered to the attorney of one of the parties to be filed in the clerk's office, but was not so filed until the day after the expiration of the judge's term of office, *held*, that the decree was not therefore rendered invalid: *Babcock v. Wolf*, 70-676; *Guthrie v. Guthrie*, 71-744.

A decree signed by the judge and entered in vacation is valid, and not void, though it contain provisions not contained in the memorandum made in the judge's calendar at the trial; nor does the fact that it improperly provides for a sale of real property without redemption render a sale thereunder absolutely void: *Traer v. Whitman*, 56-443.

Entry of judgment in vacation, when it is not practicable to prepare and enter it in term time, is valid: *Ibid.*

This section does not prevent the determination of a cause which has been taken under advisement and the entry of judgment at a later term than that next following its submission: *Trulock v. Merte*, 72-510.

Entry of judgment on confession, as contemplated in § 4107, may be made by the clerk in vacation and approved, under this section, at the next term: *Kendig v. Marble*, 58-529.

As to what constitutes the record, see notes to § 258.

230. Circuit court a court of record. 184. The circuit court shall be held by the circuit judge, and be a court of record; shall have and use its own seal, having on the face thereof the words "circuit court" and the name of the county and state. [12 G. A., ch. 86, §§ 9, 11.]

[The circuit court is now abolished. See § 233.]

231. Verdict after opening of court in another county. 185. In all judicial proceedings in any of the courts of this state where a jury trial has been commenced in any case during any term of court, and where such jury may agree upon a verdict, but not until after the time for holding court in some other county in the same district, and where the jury has agreed upon a verdict and reported the same after the opening of court in another county and judgment has been rendered thereon, then and in that case such judgment shall not be deemed invalid by reason of the time of receiving such verdict and the rendition of such judgment. [Ad. Sess., 14 G. A., ch. 12, § 1.]

It not being specified to whom the jury are to return their verdict, *held*, that it would be good if received by the judge in person. It is not contemplated that such verdict must be received by him sitting as a court: *Tilton v. Swift*, 40-78.

The fact that the trial is had and completed during the time fixed for the court to be held in another county, the term of such other county having, however, been previously adjourned, will not constitute error: *State v. Stevens*, 67-557; *State v. Peterson*, 67-564.

Where it appeared that a judgment was rendered in the court of one county three days after the term of the same court should have commenced in another county, *held*, not sufficient to render such judgment void, even though it did not appear affirmatively of record that the term of court fixed for the other county had been adjourned: *Weaver v. Cooledge*, 15-244.

Where a trial is commenced in the midst of a term, under the *bona fide* expectation and belief that it can be concluded before the day shall arrive when the judge is by law directed, but not imperatively required, to hold court in another county, he may remain and conclude that case, receive the verdict and pass judgment, even though this may happen to be done on a day when regularly he would be opening or holding court in another county: *State v. Knight*, 19-94.

A term of court in one county may legally be extended beyond the time at which the same court, by the terms fixed by statute, should be in session in another county. At least a judge may, if he sees proper, extend the term in one county during the first three days in another county: *Cook v. Smith*, 54-636.

Before enactment of above section the rule was *aliter: Davis v. Fish*, 1 G. Gr., 406; *Grable v. State*, 2 G. Gr., 559; *Sheppard v. Wilson*, Mor., 448.

232. In such cases judgment may be rendered at next term. 186. In cases provided for in the preceding section, where the verdict has been so received and judgment has not been rendered thereon, as provided for in said section, then the time of the coming in of such verdict shall be no legal objection to the rendition of judgment thereon at the next term of the court in the county where such trial was had, but judgment shall then be rendered thereon; *provided*, there be no other good and sufficient reason why such

judgment shall not then be rendered; then the time of the report of the verdict and the provisions of this section shall in all respects have a retrospective effect and operation. [Same, § 2.]

The provision that the section is to be retrospective is constitutional: *Tilton v. Swift*, 40–78.

ABOLITION OF CIRCUIT COURT AND RE-ORGANIZATION OF JUDICIAL DISTRICTS.

233. Circuit court abolished. 21 G. A., ch. 134, § 1. On and after the first day of January, A. D. 1887, the circuit court of the state of Iowa shall be abolished.

The office of circuit judge was abolished by the abolition of the circuit court: *Crozier v. Lyons*, 72–401.

234. District court re-organized. 21 G. A., ch. 134, § 2. On and after said first day of January, A. D. 1887, the district court shall be constituted and organized as hereinafter set forth.

235. Judicial districts; number of judges. 21 G. A., ch. 134, § 3. For judicial purposes the state is hereby divided into eighteen judicial districts, as follows:

First. The first district shall consist of the counties of Lee and Des Moines, and shall have two judges.

Second. The second district shall consist of the counties of Lucas, Monroe, Wapello, Jefferson, Henry, Davis, Van Buren and Appanoose, and shall have three judges.

Third. The third district shall consist of the counties of Wayne, Decatur, Clarke, Union, Ringgold, Taylor and Adams, and shall have two judges.

Fourth. The fourth district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux, Plymouth, Woodbury, Harrison and Monona, and shall have three judges.

Fifth. The fifth district shall consist of the counties of Dallas, Guthrie, Adair, Madison, Warren and Marion, and shall have three judges.

Sixth. The sixth district shall consist of the counties of Jasper, Poweshiek, Mahaska, Keokuk, Washington and Louisa, and shall have three judges.

Seventh. The seventh district shall consist of the counties of Muscatine, Scott, Clinton and Jackson, and shall have three judges.

Eighth. The eighth district shall consist of the counties of Johnson and Iowa, and shall have one judge.

Ninth. The county of Polk shall constitute the ninth district and shall have three judges.

Tenth. The tenth district shall consist of the counties of Dubuque, Delaware, Buchanan, Black Hawk and Grundy, and shall have three judges.

Eleventh. The eleventh district shall consist of the counties of Marshall, Story, Boone, Webster, Hamilton, Hardin, Franklin and Wright, and shall have three judges.

Twelfth. The twelfth district shall consist of the counties of Bremer, Butler, Floyd, Mitchell, Worth, Cerro Gordo, Hancock and Winnebago, and shall have two judges.

Thirteenth. The thirteenth district shall consist of the counties of Clayton, Allamakee, Fayette, Winneshiek, Howard and Chickasaw, and shall have two judges.

Fourteenth. The fourteenth district shall consist of the counties of Buena Vista, Clay, Palo Alto, Kossuth, Emmet, Dickinson, Humboldt and Pocahontas, and shall have two judges.

Fifteenth. The fifteenth district shall consist of the counties of Pottawattamie, Cass, Shelby, Audubon, Montgomery, Mills, Page and Fremont, and shall have four judges.

Sixteenth. The sixteenth district shall consist of the counties of Ida, Sac, Calhoun, Crawford, Carroll and Green, and shall have two judges.

Seventeenth. The seventeenth district shall consist of the counties of Tama and Benton, and shall have one judge.

Eighteenth. The eighteenth district shall consist of the counties of Linn, Jones and Cedar, and shall have two judges.

Excepting for the purpose of electing judges the provisions of this section shall not take effect until the first day of January, A. D. 1887.

236. Election and term. 21 G. A., ch. 134, § 4. The district judge shall be a resident of the district in which he is elected, and shall hold his office for a term of four years. The first election under the provisions of this act shall be at the general election in the year 1886: *Provided however*, that the present acting judges of the district courts whose terms of office shall not have expired on or before said first day of January, 1887, shall be by virtue of their said office judges of the district court in and for the districts created by this act in which they may severally reside; and until the terms for which said judges were elected shall expire, only so many additional judges shall be chosen under the provisions of this act, as shall be required (if any) to make the number of judges to which such district is entitled, under the provisions of this act.

237. Terms of court. 21 G. A., ch. 134, § 5; 22 G. A., ch. 37. The judges shall hold the district courts in the several counties of their districts at all the places where district courts or circuit courts are held at the time this act takes effect; and grand jurors and petit jurors shall be drawn and summoned for the terms at all such places, according to law from the territory from which petit jurors have heretofore been chosen; and the district court shall hold not less than two terms at other places than county seats where the circuit court is authorized to be held, at the time this act takes effect; and the district court shall hear and determine all causes, including civil, probate and criminal within the territory over which the circuit court has heretofore had jurisdiction; and grand and petit jurors shall be drawn thereat, as heretofore provided therefor, and *provided further*, that transcripts of all judgments, decrees, and the levy of writs of attachment on real estate, mechanics' liens, *lis pendens*, sales of real estate, redemptions, satisfaction of judgments, mechanics' liens, dismissal or decrees in *lis pendens*, together with all other matters affecting titles to real estate, shall be certified by the deputy clerk at such places other than county seats, forthwith, to the clerk of the district court at the county seats, who shall enter the same upon the records in his office in all respects as if originating and originally filed, begun or entered at the county seat of such counties, and *provided further*, that the provisions of section one hundred and sixty-three of the code, [§ 208] shall be and remain in full force and effect under the provisions of this act. They shall hold their courts at such times, and in such order as shall best dispose of the business thereof, and as they may arrange among themselves; *provided*, however, there shall be held not less than four terms a year in each county. In case the judges of any district are unable to agree, as to the manner of holding their courts, or as to the counties in which they are severally to preside, they shall refer the matter to the chief justice of the supreme court, who shall assign said judges to such counties as he may determine; and the chief justice of the supreme court shall also have power to assign any district judge when not occupied in holding court in his own district, to hold court in any other district, in the state, where any judge may be incapacitated from holding court, or there may arise a necessity therefor. But this section shall not be held to affect the right of the judges to interchange holding their terms of court, as now provided by law.

The failure of the deputy clerk to certify to the clerk of the district court the levy of a writ of attachment in proceedings at a place where court is held other than the county seat will operate to defeat notice of the attachment which would have been imparted by a record properly made: *Benjamin v. Davis*, 73–715.

238. Order as to times and places. 21 G. A., ch. 134, § 6. On or before the first day of October in each odd-numbered year, the judges shall meet in their respective districts, and determine the times and places of holding their courts during the two succeeding calendar years. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court, when they cannot agree, shall before going into effect be published as now required by law for similar orders of the judges of the district and circuit courts. In preparing said plan or schedule they shall so arrange if practicable that each judge shall hold at least one term of court during the year in each of the several counties of his district. The terms of the circuit court which have been set down or assigned for the year 1887 in the several counties of the state shall be held as terms of the district court, and the judges may determine anew the times and places for holding their courts during the year 1887.

239. Jurisdiction. 21 G. A., ch. 134, § 7. The district court when organized and constituted as contemplated in this chapter shall have original and exclusive jurisdiction of all actions, proceedings and remedies both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record.

240. Powers of circuit court transferred to district court. 21 G. A., ch. 134, § 8. All the rights, duties, powers and jurisdiction now by law belonging to or vested in, or exercised by the circuit court shall upon and after the first day of January, 1887, be transferred to, conferred upon and exercised by the district court; and all causes, proceedings, and remedies of every kind pending or undetermined in the circuit court at said date shall stand for trial or other disposition in the district court as if originally brought therein.

241. Records of circuit court. 21 G. A., ch. 134, § 9. Upon the abolition of the circuit court, as in this act provided, the district court shall succeed to, and exercise full authority and jurisdiction over the records of the circuit court, and may enforce all judgments, decrees and orders thereof in the same manner and to the same extent as it may exercise like jurisdiction and authority over its own records, and for the purpose of the issuance of process, and of any and all other acts necessary to the due and efficient enforcement of the orders, judgments and decrees of the circuit court, the records thereof shall be deemed records of the district court. Transcripts and process from the judgments, decrees and records of the circuit court, shall be issued by the clerk of the district court, and under the seal of his office.

242. Change of venue. 21 G. A., ch. 134, § 10. When a change of venue is granted on the ground of objection made to the judge, such judge may in his discretion, if there be a judge or judges of the same district, against whom there is no objection, assign the cause to such judge. Or if more than one, to one of them for trial. And if there be no other judge of his district against whom there is no objection, then he may in his discretion, send the cause for trial to the nearest and most convenient county of another district for trial before a judge of such other district; or he may procure another judge of another district to interchange with him for the trial of such cause.

243. Rules of practice. 21 G. A., ch. 134, § 11. The judges of the district court shall have power to prescribe uniform rules of practice for the government of the district courts of the state, and to prescribe rules for making

up issues in vacation, and entering in vacation, judgment in default of appearance or pleading. For that purpose, said judges shall meet in convention in the supreme court room in the capitol at the state capital, on the first Wednesday in January, A. D. 1887, and at such time thereafter as may be designated by the chief justice on the request of a majority of the district judges of the state, and shall organize by selecting a president, vice-president and secretary from their number, and the secretary of state shall upon requisition of the presiding officer supply the convention with such stationery as shall be deemed necessary for the dispatch of the business of the convention. When a majority of the convention shall have agreed upon such rules, and the time when they shall go into effect, the same shall be signed by the president and countersigned by the secretary of the convention, and filed with the secretary of state, and the secretary of state shall cause such rules to be printed, and when so printed he shall forward a certified copy thereof to the clerk of the district court in each county of the state. And the clerk shall immediately upon the receipt of such copy of the rules so adopted, spread the same upon the records of said court, and such rules shall continue in force until altered or amended in convention as provided in this act.

244. Salary of judges. 21 G. A., ch. 134, § 12. The salary of district judges elected or holding office under the provisions of the constitution of the state and this act, shall be two thousand five hundred dollars per year, to be paid from the state treasury in manner now provided by law for the payment of judges of the district and circuit court.

245. Powers of clerks. 21 G. A., ch. 134, § 13. On and after the first day of January, 1887, the clerk of the district court shall have and exercise within his county all the powers and jurisdiction of the court and of the judge thereof in the following matters:

First. The appointment when not contested of resident administrators, executors and guardians of minors and the approval of any and all bonds given by administrators, executors, trustees, and guardians in the discharge of their several trusts.

Second. The examination and approval of all intermediate or interlocutory accounts or reports of administrators, executors and guardians, but such approval may be disaffirmed or set aside by the court within the time and manner as now provided by law.

Third. The making of all necessary orders in relation to the personal effects of a deceased person as contemplated in section two thousand three hundred and eighty-six [§ 3590] of the code, where no objection is filed and to do and perform all other acts and duties which are now required by law of clerks of the circuit court and not inconsistent with the provisions of this act.

246. Review by court. 21 G. A., ch. 134, § 14. Any person deeming himself aggrieved by any order made or entered by the clerk under the powers herein conferred in the last preceding section may have the same reviewed in court at the next term thereafter upon motion, and upon such notice as the court may prescribe. Upon the filing of such motion the clerk shall place the cause or proceeding on the docket without additional docket fee and the matter shall stand for hearing on trial *de novo* in open court.

247. Orders by clerk. 21 G. A., ch. 134, § 15. The records, orders and judgments made and entered by the clerk as hereinbefore provided, and not reversed, set aside or modified by the court, shall stand and be of the same force, validity and effect, and shall be entitled to the same faith and credit as if made by the court, or by the judge thereof.

248. Compensation of clerk. 21 G. A., ch. 134, § 16. From and after the first day of January, 1887, the clerk of the district court in each county,

in addition to the compensation now provided by law shall be allowed to retain from fees collected by him in matters of probate and guardianship, such sum as may be fixed by the board of supervisors, not exceeding the sum of three hundred dollars per year; but such additional compensation shall in no case be allowed to be paid out of the county treasury.

249. 21 G. A., ch. 134, § 17. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

CHAPTER 6.

GENERAL PROVISIONS.

250. Judges cannot practice. 187. No judge of any court of record shall practice as an attorney or counselor at law, or give advice in relation to any action pending, or about to be brought in any of the courts of this state. [R., 2674; C., '51, § 1587; 12 G. A., ch. 86, § 14.]

251. Process. 188. All process issued by the clerk of the court shall bear date the day it is issued, to be attested in the name of the clerk who issued the same, and be under the seal of the court. [R., § 2682; C., '51, § 1592.]

252. Proceedings public. 189. All judicial proceedings must be public, unless otherwise specially provided by statute, or agreed upon by the parties. [R., § 2683; C., '51, § 1953.]

To give existence to a court, its officers and the time and place of holding it must be such as are prescribed by law. The term "open court" as used in the statutes is to be understood as conveying the idea that the court must be in session, organized for the transaction of judicial business. Hence, a trial before a referee cannot be considered a trial in open court: *Hobart v. Hobart*, 45-501.

While witnesses may be separated and excluded from the place of trial, in the discretion of the court, upon the application of a party, an exception arises in the case of a party to the action, who has the right to be present during the trial: *Jemmison v. Gray*, 29-537.

That there may be a separate examination of witnesses, see *Hubbell v. Ream*, 31-289.

253. Disqualification. 190. A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding. But this section does not prevent them from disposing of any preliminary matter not affecting the merits of the case. [R., § 2685; C., '51, § 1595.

A judgment rendered by a judge who has previously been an attorney in the case is not to be deemed absolutely void, where it does not appear that the judgment has ever been questioned or objected to by the party interested: *Floyd County v. Cheney*, 57-160.

254. Sunday. 191. No court can be opened, nor any judicial business transacted on Sunday, except:

1. To give instructions to a jury then deliberating on their verdict;
2. To receive a verdict, or discharge a jury;
3. To exercise the powers of a single magistrate in a criminal proceeding;
4. And such other acts as are provided by law. [R., § 2686; C., '51, § 1596.]

To avoid a judgment, regular on its face, on the ground that it was rendered on Sunday, the fact that it was so rendered should be clearly established, beyond the reasonable doubt naturally arising from the difficulty of establishing the precise time of a transaction: *Bishop v. Carter*, 29-165.

Before enactment of this section a verdict received, or a judgment entered, on Sunday was void: *Davis v. Fish*, 1 G. Gr., 406.

255. Where held. 192. Courts must be held at the places provided by law, except for the determination of actions, special proceedings, and other

matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place. [R., § 2687; C., '51, § 1597.]

A trial at a place not within the county where the suit was pending, had by agreement of parties during vacation, *held* binding: *O'Hagan v. O'Hagan*, 14–264.

Where it appears that a court was sitting at some place, other than the court-house, it will be presumed, in the absence of a showing to the contrary, that it was at a place properly provided for the purpose, if any reason appears why the court-house might not be a proper place: *State v. Shelledy*, 8–477, 509.

This section must be construed as applying to courts other than those of probate, which are expressly authorized by § 3510 to appoint the time and place for the hearing of matters requiring notice: *Casey v. Stewart*, 60–160.

But such provision as to probate courts does not authorize such a court to sit outside of the county, unless perhaps by consent of parties, and any order made by the court outside the county in which the case is pending is void: *Capper v. Sibley*, 65–754.

CHAPTER 7.

OF THE CLERK OF THE DISTRICT COURT.

[Sec. 193 is in effect repealed by § 233.]

256. Official duty. 194. He shall keep his office at the county seat; shall attend the sessions of the district [and circuit] courts himself, or by deputy; keep the records, papers, and seals of both courts, and record their proceedings as hereinafter directed under the direction of the judges of each court respectively. [R., §§ 343, 2664; C., '51, § 1577.]

As the court knows its own clerk and his deputy, it is not necessary that the signature of either one of them to a jurat should be authenticated by an official seal: *Finn v. Rose*, 12–565.

[Sec. 195 is in effect repealed by § 233.]

257. Records consist of. 196. The records of each court consist of the original papers constituting the causes adjudicated or pending in that court, and the books prescribed in the next section. [R., § 345.]

What constitutes the record: All the papers of the case constitute the record, and the decree assumes them and their contents: *Campbell v. Ayres*, 6–339.

What deemed part of: An affidavit for publication, when filed, becomes part of the record: *Bradley v. Jamison*, 46–68, 73.

As to supplying lost records, as, for instance, written testimony, by substitution, see *Loomis v. McKenzie*, 48–416.

Where an indictment is lost the court may, upon motion, substitute a copy, and proceed thereon as upon the original: *State v. Rivers*, 58–102; *State v. Stevisiger*, 61–623.

Construction: It is always proper, and in cases where the entry is obscure or not clear it is necessary, to read the record entry of the judgment in the light of the pleadings and the entire record: *Fowler v. Doyle*, 16–534; *Mayfield v. Bennett*, 48–194.

Where the entry recited that "service of notice had been made upon" defendant, and the record showed a service by publication, *held*, that it would not be presumed that there was personal service: *Mayfield v. Bennett*, 48–194.

Where the proof of a judgment is involved, the entire pleadings and records of the case are receivable in evidence: *Smith v. Smith*, 22–516.

The pleadings in the case constitute a part of the record, and the judgment may be established and construed with the aid of the light which they reflect upon it. If from an examination of the whole record such a construction may be fairly placed upon a judgment as to relieve it from error, the court should give it that construction: *Tyler v. Langworthy*, 37–555.

Judge's calendar not part of record: The judge's calendar or docket is not a record of the court: *Rogers v. Morton*, 51–709; *Traer v. Whitman*, 56–443; *Case v. Plato*, 54–64.

Where a decree was entered in vacation containing provisions not found in the memorandum on the judge's docket, *held*, that such provisions would not therefore be void: *Traer v. Whitman*, 56–443.

The judge's minutes kept by him in his calendar are not sufficient to make matter of record exceptions taken by a party to the ruling of the court: *Lewis v. May*, 22–599.

The judge's calendar is not a record provided for by law, and the entries made therein constitute the mere announcement of the judge's mental conclusion, and not the court's action: *Miller v. Wolf*, 63–233; *State v. Manley*, 63–344.

The judge's minutes upon his calendar do not constitute a judgment. Where it was

sought, in an action on an injunction bond, to prove the dismissal of the action for injunction by proof of the entry on the judge's calendar "dismissed as per stipulation," and a stipulation was not shown, the evidence was held not sufficient: *Towle v. Leacox*, 59–42.

The entry in a judge's calendar is for the guidance of the clerk, and such entry is evidence tending to show a decree was ordered: *In re Estate of Edwards*, 58–431.

The minutes of the judge are intended as a direction to the clerk and are in the most general form: *Burroughs v. Ellis*, 76–649.

While the judge's notes will not control or vary the formal judgment entered, yet, in the absence of higher proof, they are entitled to their due weight as to what transpired or was done in the case: *Keller v. Killion*, 9–329.

The bar docket constitutes no part of the records of the court, and can only become a part of the record in a particular case by being incorporated into or sufficiently identified by a bill of exceptions: *Gifford v. Cole*, 57–272.

258. Books kept. 197. The clerk is required to keep the following books for the business of the district [and circuit] courts severally:

1. A book containing the entries of the proceedings of the court, which may be known as the "record book," and which is to have an index referring to each proceeding in each cause under the name of the parties, both plaintiff and defendant, and under the name of each person named in either party;

2. A book containing an abstract of the judgments, having in separate and appropriate columns the names of the parties, the date of the judgment, the damages recovered, costs, the date of the issuance and return of executions, with the entry of satisfaction and other memoranda; which book may be known as the "judgment docket," and is to have an index like that required for the record book;

3. A book in which to enter in detail the costs and fees in each action or proceeding under the title of the same, with an index like that required above, and which may be known as the "fee book;"

4. A book in which to enter the following matters in relation to any judgment under which real property is sold, entering them after the execution is returned — the title of the action, the date of the judgment, the amount of damages recovered, the total amount of costs, and the officer's return in full — which book may be known as the "sale book," and is to have an index like those required above;

5. A book in which to make a complete record when required by law;

6. A book to be called the "incumbrance book," in which the sheriff shall enter a statement of the levy of every attachment on real estate, as required by Part III of this code;

7. A book to be known as the "appearance docket," with an index to the same, in which all actions entered in said docket shall be indexed directly in the name of each plaintiff; and reversely in the name of each defendant therein;

8. A book in which an index of all liens in district [or circuit] courts shall be kept. [R., §§ 346, 3243; 9 G. A., ch. 26, §§ 1, 6.]

Par. 1. Record book: This section so far as it requires the clerk to keep one book known as the record book is directory merely, and is not violated by keeping separate book for foreclosure decrees. *Carr v. Bosworth*, 72–530.

Record necessary: There can be no judgment until it is entered in the proper records of the court. It cannot exist in the memory of the officers of the court or in memoranda entered in books not intended to preserve the records of judgments: *Balm v. Nunn*, 63–641.

Parol evidence is not admissible to show that judgment was rendered, it not being claimed that any record was ever made thereof: *Cadwell v. Dullaghan*, 74–239.

A judgment cannot be proven by a memorandum on the judge's calendar: *Miller v. Wolf*, 63–233.

So where the entry of the judgment was blank as to the amount of damages and specified only the amount of costs, *held*, that it was valid only as to the costs, although the judge's calendar contained an entry directing the clerk to assess the damages, and the judgment docket contained an entry of the judgment for the amount of damages thus assessed: *Case v. Plato*, 54–64.

A judgment is valid as to costs although the amount thereof is not filled into the record: *Lind v. Adams*, 10–398; *Frankel v. Chicago, B. & Q. R. Co.*, 70–424.

Presumptions: The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome: *Wheeler v. Cox*, 56–36.

Where the record of the court states an act of the court, it will be presumed to have oc-

curred in open court: *State v. Hirronemus*, 50-545.

Where a decree recited that the cause came on for hearing in the presence of counsel for plaintiff and defendants, *held*, that it was sufficiently shown that there was an appearance by all of the defendants: *Cooper v. Miller*, 10-532.

Where it was recited in a decree that it was made upon proof read in evidence to the court, *held*, that it would be presumed that evidence to support the plea was introduced: *Wahl v. Phillips*, 15-478.

The presumption is strong in favor of the verity and truth of judicial records, and they can only be impeached by evidence clear and satisfactory. Evidence that the draft of a decree was filed and entered in vacation is not sufficient without a showing that the court never ordered the decree in term time: *Parker v. Slaughter*, 23-125.

The presumptions of law are all in support of a judgment, and when it is sought to avoid it because rendered on Sunday, the evidence must clearly establish the fact in order to overcome the presumption of regularity: *Bishop v. Carter*, 29-165.

The cancellation of a portion of the record of a judgment entry being shown, *held*, that the presumption would be that such cancellation was made at the time of the approval of the judgment, and was authorized, rather than that it was subsequently made without authority: *Lutz v. Kelly*, 47-307.

Further as to the record, see notes to § 224.

Impeachment of record: The record of the judgment must be taken as absolute verity. On appeal the supreme court will not consider affidavits presented to the court below for the purpose of impeaching it: *Mornyer v. Cooper*, 35-257.

A writ of execution upon a judgment is as to third persons only secondary evidence of the amount due upon such judgment, the judgment itself being the first and best evidence: *Parsons v. Hedges*, 15-119.

Where the record is blank as to the name of the party against whom judgment is rendered, such judgment will be reversed on appeal: *Riggleswerth v. Reed*, Mor., 19.

Correction of record: Where the judgment, erroneous when entered, is corrected in the proper manner before the rights of third persons have been acquired against it, such correction will be valid as against such subsequent rights: *Monroe v. West*, 12-119.

As to correction of records in general, see notes to §§ 222-225.

Entry nunc pro tunc: Courts possess the inherent authority to enter judgment *nunc pro tunc*, and lapse of time will not bar its exercise. Such power is not taken away, nor the time within which it may be exercised affected, by the provisions of the statute with regard to proceedings to correct mistakes in the entries of the clerk. Therefore, *held*, that where the judgment had in fact been rendered by the court, as shown by the minutes in the judge's calendar, but had not been entered up by the clerk, a motion three years and six months afterwards for the entry of judgment *nunc pro tunc* was proper: *Fuller v. Stebbins*, 49-376.

A judgment *nunc pro tunc*, entered while an appeal from the ruling upon a demurrer was pending in the supreme court, and without the appellee having elected to stand upon his demurrer, and entered without notice to him, *held* unauthorized and void: *Turner v. First Nat. Bank*, 30-191.

Where the court has failed to make record entry of an essential act, such omission may be supplied upon motion *nunc pro tunc*, but such entries are limited to supplying omissions occurring through oversight or negligence, and cannot be made to alter or expunge a record: *Goodrich v. Conrad*, 28-298.

Held not error, in an action on a bail bond, to admit in evidence the entry of the court ordering the bond filed *nunc pro tunc*, it appearing that the bond had been in fact deposited in the clerk's office at and ever since the date upon which it was so marked as filed: *State v. Guisenhause*, 20-227; *State v. Patterson*, 23-575.

Lost records: Courts of record have inherent power, independent of statute, to restore judgments the records of which have been lost or destroyed, as fully as other records; and such power is not taken away by the statute permitting action to be brought on such judgments: *Gammon v. Knudson*, 46-455.

In a proceeding to restore the record of a judgment which had been destroyed, *held*, that the prior existence of the record and its destruction were the only matters in issue and its original validity could not be inquired into: *Kanke v. Herrum*, 48-276.

In a proceeding to supply lost records it is error to make the substitution in such form as to bind a party holding under the original party to the proceeding without proof that the record as it originally existed was such as to be binding upon the new party: *McDonald v. Des Moines Valley R. Co.*, 61-192.

Where an indictment is lost the court may, upon motion, substitute a copy, and proceed thereon as upon the original: *State v. Rivers*, 58-102; *State v. Stevisiger*, 61-623.

Evidence as to the contents of records of the court destroyed by fire *held* sufficient in a particular case to establish a decree of divorce rendered therein: *In re Estate of Edwards*, 58-431.

Where a pleading supposed to be lost is supplied by a copy, and afterward the original is found, the substitute should be, on motion, stricken from the files: *Sweet v. Brown*, 61-669.

After the taking of an appeal the lower court may correct its record: *Maxon v. Chicago, M. & St. P. R. R. Co.*, 67-226; *Mahaffy v. Mahaffy*, 63-55.

The power to supply lost records may be exercised whenever the protection of the rights of parties demands it. Therefore, *held*, that where, after the perfection of an appeal, the evidence in the case was lost, so that the appeal could not be prosecuted, the proper remedy was to apply to the lower court to supply such record by substitution, and that the loss of the record was not a ground for a new trial. *Loomis v. McKenzie*, 48-416; *Steiner v. Steiner*, 49-70.

If the record of the lower court does not correctly state the facts a party desiring to appeal should prosecute the correction of the

record there; it cannot be changed or corrected on appeal: *Duffees v. Sherman*, 48–287.

In a certain sense the court below retains jurisdiction so long as anything remains to be done by it. It may order a lost record to be substituted, and do whatever else is proper to be done to enable the supreme court to review the alleged errors: *Becker v. Becker*, 50–139; *State v. Dillard*, 53–749.

Par. 2. Judgment docket: Where the judgment docket is introduced in evidence, without objection, to prove a judgment, it should be received without proof of the loss or destruction of the original: *Moore v. McKinley*, 60–637.

Where it appeared that there was a mistake in the entry in the judgment docket, it not appearing whether or not there was such mistake in the record, *held*, that it would be presumed, in order to support other proceedings, that the judgment was correctly entered in the record: *Preston v. Wright*, 60–351.

The judgment docket is intended to show merely an abstract of the judgment, and it is contemplated that it shall be made up from a judgment previously entered in the record book. Therefore, *held*, that entry of amount of judgment in the judgment docket did not supply an omission in the record: *Case v. Plato*, 54–64.

Indexing judgment docket: If a party is not charged with constructive notice of a judgment by what appears in the index book, he is not bound to look further, and is therefore not bound by what appears of record; so *held* where there was a mistake in the first name of the party against whom judgment was rendered: *Thomas v. Desney*, 57–58.

The entry and indexing of a judgment as A. B. v. C. D. *et al.* does not operate as notice to strangers of such judgment as against co-defendants of C. D., whose names do not appear: *Cummings v. Long*, 16–41.

A judgment not indexed is not notice to the purchaser at foreclosure sale of premises upon which such judgment would be a lien, and the holder of such judgment cannot therefore redeem in equity from such sale: *Sterling Mfg. Co. v. Early*, 69–94.

Even though a judgment is not properly indexed, a sheriff's deed thereunder duly recorded imparts notice of all prior proceedings: *Cushing v. Edwards*, 68–145.

As to sufficiency of indexing in general to impart notice, see notes to § 3115.

Notice of judgment or order: A party is bound to know and take notice of any judgment or order that is entered in an action to which he is properly made a party, whether the records of the court are read from time to time as required by statute, or not: *Finch v. Hollinger*, 47–173.

After judgment a party is not bound to take notice of further proceedings: *Wright v. Leclaire*, 3–221.

Par. 5. Complete record: The provision of the statute as to making a complete record in cases where title to land is involved applies only to cases where plaintiff on one side claims title, legal or equitable, and the defendant disputes the plaintiff's title, claiming title in himself or another: *Smith v. Cumins*, 52–143.

In a proper case for making a complete record all that should be recorded is the original notice and return, the pleadings and the judgment or decree. Depositions and matters of evidence should not be recorded: *Ibid.*

Par. 6. Incumbrance book: Where the entry of attachment in the incumbrance book is not made until after the execution of a mortgage upon the property, without actual notice of such attachment, the mortgagee acquires priority over the levy: *First Nat. Bank v. Jasper County Bank*, 71–486.

An entry by the sheriff in the incumbrance book of a levy of attachment becomes notice, though not indexed: *Blodgett v. Huiscamp*, 64–548.

If the lien index shows date of satisfaction of judgment, but does not show method of satisfaction, a purchaser is put on inquiry as to whether such satisfaction was by reason of the sale of the premises under execution: *Mather v. Jenswold*, 72–550.

259. Appearance docket. 198. The clerk shall enter in said appearance docket, each suit that shall be brought in the court, numbering them consecutively in the order in which they shall have been commenced, which number shall not be changed during the further progress of the suit. In entering the suits, the clerk shall set out the full name of all the parties, plaintiffs and defendants, as contained in the petition, or as subsequently made parties by any pleading, proceeding, or order, and shall give the date of the filing of the petition. [9 G. A., ch. 26, § 2.]

Name of defendant: The omission of the name of a defendant will not affect the jurisdiction of the court over such defendant, if he is in fact made defendant and served with notice: *Toliver v. Morgan*, 74–619.

Notice of filing of pleadings: After completed service or voluntary appearance a party is deemed in court and must take notice of what is done therein up to the time of final judgment, but after judgment he is not bound to take notice of further proceedings: *Wright v. Leclaire*, 3–221.

Notice of filing of motions: Under § 4124 a party must take notice of motions filed during the term. No other notice is necessary: *Wagner v. Tice*, 36–599.

Notice of a motion for change of venue, made in vacation, should be given as required by that section: *Preston v. Winter*, 20–264; *Loomis v. McKenzie*, 31–425.

A motion to set aside a judgment rendered at a prior term should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21–277.

260. Return of service. 199. When the original notice shall be returned to the office of the clerk, he shall enter in said docket so much of the return

thereon as to show who of the parties have been served therewith, and the manner and time of service. [9 G. A., ch. 26, § 3.]

261. Memorandum of filing. 200. The clerk shall, immediately upon the filing thereof, make in the appearance docket a memorandum of the date of the filing of all petitions, demurrers, answers, motions, or paper of any other description in the cause; and no pleading of any description shall be considered as filed in the cause, or be taken from the clerk's office until the said memorandum is made. [9 G. A., ch. 26, § 4.]

Filing of pleadings: Where a pleading is marked filed by the clerk, but no entry of such filing is made on the appearance docket, it cannot be considered as having been filed: *Padden v. Moore*, 58–703. And where the petition in an attachment proceeding was marked "filed" by the clerk, but not entered on the appearance docket, *held*, that the action was properly dismissed upon motion, as the court was bound to consider the petition as not filed: *Nickson v. Bair*, 59–531.

This section does not apply in respect to the filing of depositions: *Byington v. Moore*, 62–470. Nor to the filing of bills of exceptions: *Royer v. Foster*, 62–321. Nor to the filing of a justice's transcript on an appeal from him to the district court. In such cases the return of the justice may be regarded filed, if deposited with the clerk, although no entry in the appearance docket is made: *Harrison v. Clifton*, 74–736

The filing consists in the delivery of the paper to the clerk and his receiving it to be kept on file in his office. It is not essential that it shall be indorsed as filed, although that would be the better practice. The indorsement is simply evidence of the filing: *State v. Briggs*, 68–416; and see *State v. Patterson*, 23–575.

Where the appearance docket contains a memorandum of the filing of the petition, the fact that the clerk fails to enter the name of one of the parties defendant will not deprive the court of jurisdiction as to such defendant, if he is properly served with notice: *Toliver v. Morgan*, 74–619

Return of papers taken from the files: A court has the power to enter an order for the return of papers withdrawn from the records without previous notice to the party required to return them: *Wisconsin I. & N. R. Co. v. Given*, 69–581.

262. Memorandum of rulings. 201. Immediately upon the sustaining or overruling of any demurrer or motion; the striking out or amendment of any pleading; trial of the cause; rendition of the verdict; entry of judgment; issuing of execution, or any other act or thing done in the progress of the cause, the like memorandum thereof shall be made in said docket, giving the date thereof, and the number of the book and page of the record where the entry thereof shall have been made, it being intended that the appearance docket shall be an index from the commencement to the end of a suit. [9 G. A., ch. 26, § 5.]

263. Records of both courts. 202. The district [and circuit] judges of any county, may, by a joint order under their hands, direct that the records and minutes of both courts be kept in one set of books. But all matters touching decedents' estates, wills, administrations, guardians and heirs, and all business relating thereto transacted in the circuit [district] court, and also the record of marriage licenses, shall be kept separate, in proper books prepared for that purpose, as heretofore. [12 G. A., ch. 86, § 10.]

264. Report of criminal returns. 203; 22 G. A., ch. 82, § 40. The clerk of the district court is required to report to the secretary of state, on or before the first Monday in August of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year preceding; and such report shall show the character of the offense and the sentence of punishment; the occupation of the convict, whether he can read and write, his general habits, and also the expenses of the county for criminal prosecutions during the year, including, but distinguishing, the compensation of the district [county] attorney. [R., § 349; C., '51, § 148.]

265. Report of the clerk of the district court. 18 G. A., ch. 22, § 3. It is hereby made the duty of the clerk of the district court, in preparing the report required by section two hundred and three of the code, [§ 264] to make such report for the year ending the thirtieth day of September preceding.

[The penalty for violating this section is provided by § 515, which is a part of the same act as the foregoing. For further provisions as to the report here required, see § 455.]

266. Not act as attorney. 204. The clerk, or deputy clerk of the district court is prohibited from holding the office of justice of the peace; or practicing, directly or indirectly, as an attorney or solicitor in the district [or circuit] court. [14 G. A., ch. 29.]

[As to additional powers of clerk, see § 245.]

CHAPTER 8.

OF THE COUNTY ATTORNEY.

[Sections 205, 206 and 207 of the Code are repealed by § 279.]

267. Election, term, bond. 21 G. A., ch. 73, § 1. At the general election in 1886, and every two years thereafter, a county attorney shall be elected in each county, who shall hold his office for the term of two years from the first Monday in January next following his election, and until his successor is elected and qualified, who shall before he enters upon the duties of his office execute a bond to the state of Iowa, with two or more sureties, in a sum of not less than five thousand dollars, to be approved by the board of supervisors, which bond shall be conditioned for the faithful performance of the duties of the office and the payment to the county treasurer of all moneys which shall come to the hands of such officer by virtue of his office. The bond shall be filed in the office of the county auditor and be recorded as other official bonds.

268. Duties. 21 G. A., ch. 73, § 2. The county attorney shall appear for the state and county in all cases and proceedings in the courts of his county to which the state or county is a party, and in the supreme court in all cases in which the county is a party, and shall collect and pay over to the person or officer entitled thereto, all money due the state or county, so far as he is able to collect the same; *provided*, that in criminal cases less than a felony elsewhere than in the district court it shall be his duty to appear unless otherwise engaged in the performance of his official duties. In every criminal case appealed from his county to the supreme court he shall, at least thirty days prior to the term at which the case is to be heard, prepare and deliver to the attorney-general, a properly prepared abstract of the case.

County prosecutor: The duties of the office of county prosecutor, as existing prior to the new constitution, devolved, subsequently to its adoption, upon the district attorney therein provided for, and the office of county prosecutor was thereby abolished. *State v. Moran*, 8-399.

District attorney under former statutes: It was the duty of the district attorney to appear for the county, and it was his right to do so: *Clark v. Lyon County*, 37-469; *Tatlock v. Louisa County*, 46-138.

The district attorney was required to appear for the state in *habeas corpus* proceedings, and it was provided that notice of such proceedings shall be served upon him. In such cases the district attorney was the representative of the state, and, as such, might control them within the limits of his authority and duty: *Miller v. Buena Vista County*, 68-711.

Authority: The prosecuting attorney had authority to follow and prosecute a case commenced in his county in any other county to which the venue might be changed: *State v. Chambers*, 1 G. Gr., 464.

A case in the district court was under the control of the district attorney, and any agreement he might make with reference to the disposition thereof was binding as against the attorney-general, who controlled the case in the supreme court: *State v. Fleming*, 13-443.

Additional counsel: The district attorney could not bind the county to pay fees of additional counsel employed by him: *Tatlock v. Louisa County*, 46-138; *Foster v. Clinton County*, 51-541.

But the board of supervisors might employ additional counsel to prosecute criminal cases: *Hopkins v. Clayton County*, 32-15.

The board would be bound by a contract for that purpose, although not entered upon the records. Such contract might be proven by parol evidence: *Jordan v. Osceola County*, 59-388.

The court might, in the absence of the district attorney, appoint a special prosecutor: *White v. Polk County*, 17-413.

But the court could not, unless perhaps in the absence of the district attorney and to prevent failure of justice, bind the county for the payment of additional counsel for prosecution. The county is liable to pay for additional counsel only as the board of supervisors may

have determined such counsel to be necessary: *Seaton v. Polk County*, 59–626.

Vacancy: The acceptance, by one holding the office of district attorney, of an office in the volunteer military forces of the United States, *held* not to create a vacancy in the former office. (But see now, § 1253, ¶ 9): *Bryan v. Cattell*, 15–538.

269. Opinions. 21 G. A., ch. 73, § 3. The county attorney shall, without compensation, give opinions and advice to the board of supervisors, and other civil officers of their respective counties, when requested so to do by such board or officers, upon all matters in which the state or county is interested or relating to the duty of the board or officers, in which the state or county may have an interest, but shall not appear before the board of supervisors in the trial of any cause in which the state or county is not interested, or in applications to establish, vacate or alter highways.

270. Deputies. 21 G. A., ch. 73, § 4. The county attorney may appoint deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties. With the approval of the district court he may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors. But nothing in this section shall be construed to prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested.

271. Substitute. 21 G. A., ch. 73, § 5. In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear and in which there may be business for him to attend, may appoint an attorney to act as county attorney by order to be entered upon the minutes of the court, and he shall receive out of the compensation allowed to the county attorney when such appearance is before a justice of the peace, such sum as the board of supervisors shall determine to be reasonable for the services rendered, and when it is before a court of record such sum as the judge shall determine to be a reasonable compensation, and while acting under said appointment he shall have all the authority and be subject to all the responsibilities herein conferred on county attorneys. But in criminal cases less than a felony, a justice of the peace or magistrate cannot appoint an attorney at the expense of the county or county attorney; *provided*, that a justice of the peace shall not appoint an attorney to act as county attorney in any case unless reasonable notice in writing has been given the county attorney that his services will be required before such justice at a time therein named.

272. No other compensation. 21 G. A., ch. 73, § 6. No county attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution or business to which it shall be his official duty to attend, nor be concerned as an attorney or *council* [sel] for a party other than for the state or county, in any civil or criminal action pending or arising in his county upon the same facts upon which any criminal action or civil action wherein the state or county was a party, has been by such attorney commenced or prosecuted.

273. Receipts for moneys received. 21 G. A., ch. 73, § 7. It shall be the duty of the county attorney whenever he shall receive any money in his official capacity, to give the person paying the same a receipt and file a duplicate with the county auditor.

274. Shall attend the grand jury. 21 G. A., ch. 73, § 8. Whenever required by the grand jury the county attorney shall attend them for the purpose of examining witnesses in their presence, or of giving them advice in any

legal matter, and to cause subpœnas or other writs of process to issue to bring witnesses and draw up bills of indictment, but he shall not be present with the grand jury when an indictment is considered and found.

275. Vacancy. 21 G. A., ch. 73, § 9. In case of vacancy in the office of county attorney by death, resignation or otherwise, the board of supervisors shall appoint a county attorney, who shall give bond and take the same oath, and perform the same duties as the regular county attorney and shall hold said office until his successor is elected and qualified.

276. District attorney. 21 G. A., ch. 73, § 10. Wherever the term district attorney appears in the laws of Iowa, it shall hereafter mean county attorney, and all laws now in force regulating the duties of district attorneys in criminal matters and proceedings, shall apply to county attorneys within their respective counties.

277. Compensation. 21 G. A., ch. 73, § 11. The county attorneys of the several counties in this state shall be allowed an annual salary to be fixed by the board of supervisors of their respective counties at their June meeting of each even-numbered year as follows: In counties of not more than five thousand inhabitants not to exceed five hundred dollars. In counties of over five thousand and under ten thousand, not exceeding six hundred dolllars. In counties of over ten thousand and under fifteen thousand not exceeding seven hundred and fifty dollars. In counties of over fifteen thousand and under twenty thousand, not exceeding nine hundred dollars. In counties of over twenty thousand and under thirty thousand, not exceeding one thousand dollars. In all counties of over thirty thousand not exceeding fifteen hundred dollars; said salary to be paid quarterly at the first meeting of the board of supervisors after it shall become due and in addition thereto for all fines collected (and school fund mortgages foreclosed) the same fees as are now allowed to attorneys for suits on written instruments where judgment is obtained and shall be entitled to his necessary and actual expenses incurred attending the discharge of his duty at a place other than his place of residence and the county seat which shall be audited and allowed by the board of supervisors of the county. Population shall be determined by the last preceding national or state census. *Providing* that in no county shall the salary be less than three hundred [dollars] and fees as herein specified.

278. 21 G. A., ch. 73, § 12. The term of office of all district attorneys in the state shall end on the first day of January, A. D. 1887.

279. 21 G. A., ch. 73, § 13. Chapter 8 of title 3 and section 3775 of the code of 1873 together with all acts and parts of acts inconsistent herewith are hereby repealed.

CHAPTER 9.

OF ATTORNEYS AND COUNSELORS.

280. Admission. 20 G. A., ch. 168, § 1. The power to admit persons to practice as attorneys and counselors in the courts of this state, or any of them, is hereby vested exclusively in the supreme court.

281. Qualification. 20 G. A., ch. 168, § 2. Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least two full years, either in the office of a member of the bar of this state, residing therein, and in regular practice, or in some reputable law school in the United States, or partly in

such office and partly in such law school: *provided* that in reckoning such period of study, the school year of any such law school consisting of not less than thirty-six weeks, exclusive of vacations, shall be considered equivalent to a full year.

282. Examination. 20 G. A., ch. 168, § 3. Every such applicant shall also be examined by the court, or by a committee of not less than three members of the bar, appointed by the court, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein.

283. Graduates of state university. 20 G. A., ch. 168, § 4. Such examination shall be held in open court: *provided*, that the graduates of the law department of the state university may be examined at the university, in Iowa City, by a committee of not less than three members of the bar, appointed by the supreme court for that purpose; and on production of his diploma from said law department, and a certificate by such committee that they have examined such applicant, and are of opinion that he possesses the learning and skill requisite for practice of the law, any such graduate may be exempted by the court from any further examination.

284. Attorneys from other states. 20 G. A., ch. 168, § 5. Any person becoming a resident of this state, after having been admitted to the bar of any other of the United States, in which he has previously resided, may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study as hereinbefore provided, on proof of the other qualifications by this act required, and on satisfactory proof that he has practiced law regularly for not less than one year, in the state from which he comes, after having been duly admitted to the bar according to the laws of such state.

285. Oath. 20 G. A., ch. 168, § 6. All persons on being admitted to the bar, shall take an oath, or affirmation, to support the constitution of the United States and of the state of Iowa, and to faithfully discharge the duties of an attorney and counselor of this state, according to the best of their ability.

286. Rules. 20 G. A., ch. 168, § 7. The supreme court may, by general rules, prescribe the mode in which examinations under this act shall be conducted, and in which the qualifications required as to age, residence, character, and term of study shall be proved, and may make any further rules, not inconsistent with this act, for the purpose of carrying out its object and intent.

[See Rules, §§ 103-112.]

287. Appearance by attorneys from other states. 20 G. A., ch. 168, § 8. Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this act.

288. Repealing clause. 20 G. A., ch. 168, § 9. Sections 208, 209, and 210, of the code, are hereby repealed, but nothing herein contained shall affect or impair the right of any person heretofore admitted to practice in any of the courts of this state to continue so to practice.

289. Duties. 211. It is the duty of an attorney and counselor:

1. To maintain the respect due to the courts of justice and judicial officers;

2. To counsel or maintain no other actions, proceedings, or defenses than those which appear to him legal and just, except the defense of a person charged with a public offense;

3. To employ, for the purpose of maintaining the causes confided to him,

such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

4. To maintain inviolate the confidence, and, at any peril to himself, to preserve the secret of his client;

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest;

7. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed. [R., § 2704; C., '51, § 1614.]

I. DUTIES AND LIABILITIES.

Retainer against opinion: While an attorney ought not to accept a retainer in a case where he feels that the law is against his client, yet the fact that he has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his cause, or has officially, as a judge or officer of the government, held a different view of the rights of the parties, will not, of itself, disqualify him to accept a retainer; and it will not constitute fraud on his part not to reveal to his client the fact of such prior opinion: *Smith v. Chicago & N.W. R. Co.*, 60-515.

Purchase of property: An attorney who procures in himself legal title to property of which his client is owner holds the property in trust for his client: *Byington v. Moore*, 62-470. The same rule applies to property purchased by an attorney in the course of the litigation in which he is employed: *Harper v. Perry*, 28-57; *Reickhoff v. Brecht*, 51-633.

Estopped by fraud or negligence: An attorney who obtains a judgment for his client which is void for want of service of notice, due to his own culpable negligence or fraudulent intention, and allows the client, in ignorance of the defect, to purchase property at execution sale under such judgment, is estopped as against the client from asserting title to the same property acquired from the execution defendant, even after the relation of attorney and client has ceased. In such case whatever title is acquired by the attorney inures to the benefit of his former client: *Phillips v. Blair*, 38-649.

Conveyance to attorney: A conveyance from client to attorney will be set aside whenever advantage has been taken of the client through the influence or knowledge of the attorney possessed by reason of their peculiar relations: *Polson v. Young*, 37-196.

Tax title on client's property; trustee: An attorney who is acting as agent of the owner with respect to property, and has money in his hands derived from the property, buying in the property at tax sale, will be held to have acquired the same in trust for such owner, and cannot take and hold, as against his principal, a tax deed, although the principal is negligent in reimbursing him for his expenses in acquiring such title, unless he has first made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him: *Continental L. Ins. Co. v. Perry*, 65-709.

Attorney not held as trustee; bad faith of client: Good faith and fairness is also required of the client in his relations with the attorney, and an attempt of the former to defraud the latter will authorize the latter to sever the relation and act for the protection of his own interests: *Eckrote v. Myers*, 41-324.

Where the attorney, having procured a decree of foreclosure for his client, and demanded the payment of his fees and advances without avail, bought in at tax sale the property covered by the decree and notified his client of that fact, still urging payment, which was not made, *held*, that a tax deed, subsequently taken by him in pursuance of the sale, could not be set aside seven years afterward at the suit of the client: *Ibid.*

The fact that an attorney retains in his possession papers relating to a transaction affecting land, under a claim of a lien on such papers for services, does not continue his relation as attorney of the owner in such sense as to defeat a tax title acquired thereon by him after the performance of his duties with reference to the matter is entirely completed: *Baker v. Davis*, 35-184.

Where the attorney, after in vain requesting payment of his fees by his client, by consent of the client caused property to be sold under his client's judgment, and bought the same at the sale, *held*, that such purchase was not fraudulent: *Page v. Stubbs*, 39-537.

Liability for interest and rents; demand: An attorney is not ordinarily liable for interest on money collected by him until demand therefor is made; nor is he liable for rent of property bought in by him in his own name at execution sale under a judgment in behalf of his client, where such purchase is not in fraud of his client's rights: *Johnson v. Semple*, 31-49.

But the commencement of suit to recover money in the attorney's hands constitutes sufficient demand to authorize the allowance of interest from that time: *Hollenbeck v. Stanberry*, 38-325.

The attorney is not liable for interest on money if kept on hand for his client or deposited in bank to the client's credit, but if used by the attorney he is liable for interest: *Mansfield v. Wilkerson*, 26-482.

Improper conduct: A court should never hesitate to stop counsel in attempts to drag improper matters before a jury, and should visit merited punishment when such unprofessional conduct is indulged in. But it does not follow that in such cases a verdict will not

stand. To require setting aside of the verdict prejudice must be shown: *Hammond v. Sioux City & P. R. Co.*, 49–450.

Where an attorney, in an excited manner, directly contradicted the statements of the court in ruling upon an objection to evidence, alleging that the facts upon which such ruling was based, as stated by the court, were not true, *held*, that he was guilty of contempt: *Russell v. French*, 67–102.

An attorney who has acted for defendant in a preliminary examination cannot afterwards act for the state in a prosecution against the same defendant for a crime substantially the same though not identical with that for which he was first examined. Attorneys are not bound to serve those who will not compensate them, and may withdraw from the service of such, but they cannot take employment on the other side: *State v. Halstead*, 73–376.

Not liable for exercise of discretion: Where an attorney was employed with the understanding that he was to use his best judgment as to the steps necessary to be taken in the case, *held*, that he was not liable in an action for damages, in view of the care taken in the particular case: *Bennett v. Phillips*, 57–174.

Liability for trespass: An attorney cannot be held liable for the wrongful seizure of property in the suit in which he acts, unless his acts or directions are shown to have in some way caused the seizure: *Rice v. Melendy*, 41–395.

An attorney who simply obeys the instructions of his client in directing the seizure of property under attachment is not liable therefor. It is immaterial that he has neither belief nor suspicion as to the ownership of the property and seeks no information with respect thereto: *Dawson v. Buford*, 70–127.

Not jointly liable with client: An attorney who has acted as a mere agent for his client should not be made a party to a suit against his client in regard to acts so done, unless he is charged with fraud: *Lyon v. Tevis*, 8–79.

If the attorney is thus improperly made a party defendant, he is entitled to be dismissed with costs: *Paton v. Lancaster*, 38–494.

II. COMPENSATION.

Evidence as to value of services: In an action to recover the value of professional services, evidence as to the success attending the rendition of such services is admissible: *Berry v. Davis*, 34–594.

Under the general custom of the profession, the values in controversy control charges for services. Therefore, in an action by an attorney to recover for services rendered, *held* error to instruct the jury that the magnitude of the controversy and the great value of the property involved should not be considered in determining the amount of recovery: *Smith v. Chicago & N. W. R. Co.*, 60–515.

Contract for services in another state: Where an attorney is employed in this state to render services in another state, the rate of compensation is to be determined according to the value of the services at the place where the contract is made: *Stanberry v. Dickerson*, 35–493.

Contract for excessive fees: Nothing but the best of reasons will justify an attorney in exacting from his client, after the work is partially completed, an agreement to pay more than an ordinary fee under a threat of withdrawing from the case if such agreement is not made: *Bolton v. Daily*, 48–348.

Additional attorney: Where an attorney contracted to prosecute the case for a given sum, and afterwards turned the case over to another attorney, stating to the client that he had taken the second attorney into the case with him, *held*, that in the absence of any other knowledge on the part of the client as to the relation of the second attorney to the case, the latter could not recover more than the contract price: *Ennis v. Hultz*, 46–76.

Where the client employs an attorney and authorizes him to employ such legal assistance as he may require, any attorney employed by him reasonably necessary in the prosecution of the case may recover compensation from the client: *Clyde v. Peavy*, 74–47.

Implied contract: Where an attorney was employed by one of several defendants, and rendered services in the case for all, with the knowledge and implied consent of the others, *held*, that a recovery for services rendered might be had by such attorney as against all the defendants, although by contract between them, not known to the attorney, the one employing him was to bear the entire expense of attorney fees: *McCrary v. Ruddick*, 33–521.

Surety not liable to principal's attorney: One who is a party to an action and interested in the result, as a surety in an action to which his principal is party, will not, for that reason alone, be liable for the compensation of an attorney rendering services for the principal, but his liability must be proven by evidence of retainer or recognition as attorney of the party sought to be charged: *Turner v. Myers*, 23–391.

Liability of husband for fee of wife's attorney in divorce suit; necessaries: The husband is liable for services rendered by attorney for the wife for establishing the innocence of the latter on a charge of adultery made by the husband in an action for divorce. Such services are deemed necessaries: *Porter v. Briggs*, 38–166. And the allowance of suit money to the wife in the divorce proceeding will not preclude the recovery of additional compensation from the husband: *Clyde v. Peavy*, 74–47.

But the husband is not liable for wife's attorneys' fees in a suit brought by the wife for divorce where it is not shown that such services come within the scope of necessaries: *Johnson v. Williams*, 3 G. Gr., 97.

III. CONTINGENT FEE; CHAMPERTY.

Good faith: If the attorney visits the client for the purpose of entering into a contract of employment, it is his duty, before making the contract, to distinctly and clearly advise the client as to all the facts and circumstances within his knowledge relating to the case. So *held* in regard to the contract for a share of the amount to be recovered as a contingent fee: *Ryan v. Ashton*, 42–365.

Construction: A construction of a contract between attorney and client which

would operate to prevent the client from settling his suit will not be favored by the courts: *Ellwood v. Wilson*, 21–523.

Champerty and maintenance: There being no statute in this state against champerty or maintenance, and there being no necessity for enforcing the English doctrine on the subject, that doctrine is not deemed in force here: *Wright v. Meek*, 3 G. Gr., 472.

Contingent fee; against public policy: A contract by which the attorney was to receive a per cent. of the amount recovered by the client in the suit or on settlement, the attorney to advance costs and expenses, to be paid out of the recovery, and the client agreeing not to settle without the attorney's consent, *held* void as against public policy. Preceding case doubted: *Boardman v. Thompson*, 25–487. See, also, *Hyatt v. Burlington, C. R. & N. R. Co.*, 68–662.

Contract of attorney to hold client harmless: A contract between attorney and client, that the former will hold the latter harmless from any judgment to be recovered against him provided he will appeal the case, is against public policy and void: *Adye v. Hanna*, 47–264.

Contracts not champertous: A mere contract for a contingent fee, without stipulation against settlement by client or for advancement of costs by attorney, is valid: *McDonald v. Chicago & N. W. R. Co.*, 29–170; *Winslow v. Central Iowa R. Co.*, 71–197.

The assignment of a note or open account and action thereon is not champertous, although the assignee gives, as the only consideration therefor, his obligation to pay the net proceeds of the action to the assignor: *Knadler v. Sharp*, 36–232.

An agreement by a mortgagee, in consideration of his release from a note upon which he was surety and the repayment to him of money paid on the note, that he would foreclose a mortgage held by him as such surety, and procure the execution of the sheriff's deed to the payee of the note, *held* not champertous: *Cooley v. Osborne*, 50–526.

Expense; share of recovery: The mere agreement for a contingent fee is not champertous. To constitute champerty the agreement on the part of the champertor must be to carry on the suit at his own expense, as well as for a share of the recovery: *Jewel v. Neidy*, 61–299.

Neither is it champertous for a person who is a party in interest, and not an officious promoter of another's strife, to agree to bear the expenses of litigation; and an attorney agreeing to carry on the litigation for a proportion of the recovery, knowing that the costs are thus to be paid by a party in interest, is not guilty of champerty: *Ibid.*

Champerty not a defense: The fact that an action is being prosecuted under a champertous contract cannot be set up as a defense therein: *Allison v. Chicago & N. W. R. Co.*, 42–274; *Small v. Chicago, R. I. & P. R. Co.*, 55–582.

The defense that a contract by which a cause of action is assigned is champertous can be only pleaded in an action between the parties to such contract, and if not pleaded therein the contract can be enforced as valid between them: *Vimont v. Chicago & N. W. R. Co.*, 69–296.

290. Disbarment. 212. An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action. [R., § 2705; C., '51, § 1615.]

The office of an attorney is one of great confidence, and it ought to be one of the strictest integrity. Certain facts *held* sufficient to justify the suspension of an attorney for fraud and deceit towards his clients: *Slemmer v. Wright*, 54–164.

See §§ 295, 296, and notes.

291. Power; authority. 213. An attorney and counselor has power:

1. To execute in the name of his client a bond, or other written instrument, necessary and proper for the prosecution of an action or proceeding about to be or already commenced; or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein;

2. To bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court;

3. To receive money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. [R., § 2706; C., '51, § 1616.]

Authority to sign bond: Where the lower court upheld an attachment bond signed by the attorney for his client, *held*, that on appeal it would be presumed that it appeared to the lower court that the attorney had such authority, in the absence of any showing to

the contrary: *Goddard v. Cunningham*, 6–100.

Affidavits, verifications of pleadings, etc.: An attorney may make affidavit on an application of his client for a change of venue: *State v. Mooney*, 10–506; or for continuance: *Widner v. Hunt*, 4–355.

The attorney may verify a petition where he shows a knowledge of the facts: *Chittenden v. Hobbs*, 9–417; *Bates v. Robinson*, 8–518.

But if the knowledge of the attorney is not shown the verification is insufficient: *Clute v. Hazleton*, 51–355.

Professional statement: Where the professional statement of an attorney is received it is to be regarded as an affidavit: *Rice v. Griffith*, 9–539.

Witness for his client: An attorney is a competent witness for his client: *Walsh v. Murphy*, 2 G. Gr., 227.

But no attorney having a just conception of his true and proper position will willingly unite the character of counsel and witness in the same case: *Alger v. Merritt*, 16–121.

As to privileged communications between attorney and client, see § 4893.

Before bringing suit: An attorney may be employed in contemplation of a suit to be brought, and his client will be bound by his stipulations with reference thereto, to the same extent as if such stipulations had been made after the bringing of suit: *Hefferman v. Burt*, 7–320.

Employment of another attorney: An attorney intrusted with the business of his principal has no authority to employ another attorney to represent his principal, and the latter will not be liable for costs incurred by the attorney thus employed: *Antrobus v. Sherman*, 65–250.

But where by reason of reliance on an agreement with such second attorney the adverse attorney was not present when the case was called, and a judgment was recovered by default, *held*, there was sufficient surprise to warrant a new trial: *Chicago & N. W. R. Co. v. Gillett*, 38–434.

When an attorney for any cause is unable to give attention to the business of his client which has been intrusted to him, he may lawfully place it in the hands of other attorneys, and his client will not be chargeable with negligence in regard to the case if the counsel thus selected acts with ordinary prudence in attempting to appear at the proper time: *First National Bank v. Harwick*, 74–227.

Contract to turn over business: An attorney to whom notes have been intrusted for collection has no authority to turn them over to another for that purpose, and a contract to do so is illegal, so that damages cannot be recovered for its breach: *Smalley v. Greene*, 52–241.

Stipulations of attorney: Stipulations made in open court by an attorney of record in the case, and while the case is pending, if free from fraud and mistake and clearly established, will be enforced by the court: *Lockwood v. Black Hawk County*, 34–235.

It is competent for attorneys to agree for an extension of time for filing a bill of exceptions, and when such agreement is reduced to writing and filed it becomes a part of the record in the case without being embodied in a bill of exceptions: *State ex rel. v. Chamberlin*, 74–266.

Granting extension: Where the attorney was directed to "secure or collect" the claim, *held*, that he had authority to extend the time of payment on receiving additional security: *Crawford v. Nolan*, 70–97.

Agreement for judgment and stay: An attorney appearing for a party may make an agreement in writing for judgment and an extension of time of payment: *Potter v. Parsons*, 14–286.

Compromise: An attorney cannot, without express authority, make a compromise which will operate injuriously upon his client: *De Louis v. Meek*, 2 G. Gr., 55; *Powell v. Spaulding*, 3 G. Gr., 443.

Where an attorney, retained in an action to recover possession of real property, entered into a contract that his client should pay defendant a specified sum, whereupon defendant should surrender possession, *held*, that such agreement was not binding upon the client and that he could recover without payment of the sum stipulated: *Stuck v. Reese*, 15–122.

When an attorney has, in good faith, compromised the suit and consents to judgment against his client, the latter cannot, afterward, in an action in another state on such judgment, defend on the ground of want of authority in the attorney to make the compromise: *Crawford v. White*, 17–560.

Agreement of client not to compromise: A construction of a contract between an attorney and client which would prevent settlement of the suit by the client will not be favored by the courts: *Ellwood v. Wilson*, 21–523.

Agreement as to judgment: An attorney cannot consent to a judgment against his client or waive any cause of defense in the case; neither can he settle or compromise it without special authority; but he is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial and the like are all in the sphere of his general authority, and as to these matters his client is bound by his action. Therefore, *held*, that the attorney, representing his client in two suits involving substantially the same questions might bind his client by an agreement that the judgment resulting in the trial of one of the cases should determine the kind of judgment to be entered in the other: *Ohlquest v. Farwell*, 71–231.

Agreement to convey land: An agreement by attorney for plaintiff in an action of right, for conveyance of a portion of the premises, *held* not binding on the client: *Rayburn v. Kuhl*, 10–92.

On appeal: An attorney retained to attend to a suit in a particular court is not thereby authorized without further authority to appeal the case, and cannot recover, under such circumstances, for services rendered in the appellate court: *Hopkins v. Mallard*, 1 G. Gr., 117.

Agreement of record: A *nunc pro tunc* record of an agreement by an attorney made

a year after the agreement was entered into, and upon affidavits, after a dispute had arisen with reference to the agreement, *held* not sufficient: *Hiller v. Landis*, 44–223.

Where a new trial was asked on the ground of an agreement of the opposite attorney that the cause should not be tried that week, *held*, that as the agreement was denied by the attorney and did not appear to have been made of record and signed by the attorney, or made in open court and entered of record, the motion could not be granted: *Barnes v. Ennenga*, 53–497.

Agreement of attorney for the state in a criminal prosecution that judgment be arrested until a future time, *held* invalid, because not in writing and recorded: *State v. Stewart*, 74–336.

The facts appearing from an affidavit of the attorney of a party, *held* sufficient to establish implied consent to the determination of a cause in vacation under § 229: *Myers v. Funk*, 51–92.

While the client might bind himself by a stipulation in the case, his affidavit is not receivable as evidence of an agreement by his attorney binding him: *Sapp v. Aiken*, 68–699

An agreement of the attorney that a case should be presented to the supreme court upon an abstract, waiving a transcript of the evidence, cannot be enforced, if denied, unless in writing or of record: *Preston v. Hale*, 65–409.

Fraud of attorney: An attorney, when acting in court procedure for his client, acts in his stead, and a judgment recovered may be set aside for fraudulent representations made by the attorney in procuring it, when such representations would have been a ground for setting it aside if made by the party himself: *De Louis v. Meek*, 2 G. Gr., 55.

The malfeasance of an attorney in accepting a retainer for one party, after having previously been employed by the other, the fact being known to the first client from the time of the wrongful act, will not constitute fraud, vitiating the judgment recovered for the second client against the first: *Humphrey v. Darlington*, 15–207.

Negligence of attorney: The law regards the negligence of an attorney as the client's own neglect, and will give no relief from the consequences thereof: *Jones v. Leech*, 46–186.

Negligence of the clerk of the attorney, in filing pleadings, must be imputed to the client himself: *Hayward v. Goldsbury*, 63–436.

The negligence of the attorney is imputed to the client, when it is sought to set aside default where verdicts or judgments binding upon the parties have been entered, but not where the action has merely been dismissed for want of prosecution: *Byington v. Quincy*, 61–480.

Mistake of attorney: While the law exacts of attorneys diligence in their business, and will not relieve against their negligence, yet relief may be granted where mistake has occurred without fault. Attorneys are not required to be diligent and careful beyond the capacities of human nature: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

Collection of claim or judgment: The authority of an attorney with respect to a claim does not terminate with the rendition of judgment, but he may control the judgment until its collection: *Death v. Bank of Pittsburg*, 1–332; and he has authority to receive payment and enter satisfaction of the judgment: *McCarver v. Nealey*, 1 G. Gr., 360.

As the attorney has the authority to receive money claimed in the action, he may receive it from any person from whom it may be collected in the action, or who, for the protection of any interest of his own, has the right to pay it. Therefore *held*, that an attorney prosecuting an action to foreclose a mortgage might accept from a junior mortgagee who was a party to the suit the money necessary to entitle the junior mortgagee to an assignment of the mortgage under § 4559, with the agreement that the action should afterwards be prosecuted for the interest of the junior mortgagee: *Harbach v. Colvin*, 73–638.

May receive money only in payment: An attorney has no authority to receive anything but money in payment of a claim left with him for collection, unless specially so authorized: *Drain v. Doggett*, 41–682; *McCarver v. Nealey*, 1 G. Gr., 360. But if the attorney accepts a check in payment and realizes the money thereon the client is bound: *Harbach v. Colvin*, 73–638.

He cannot without special power accept as payment a less amount than the whole sum due, and such special authority must be established in the same way that the authority of other agents must be shown, and not by the attorney's declarations: *Bigler v. Toy*, 68–687.

Action by attorney in his own name: It seems that it is not unusual nor improper for an attorney to whom a claim has been sent for collection to bring action thereon in his own name: *Seevers v. Hamilton*, 6–199.

Recovery back of money paid over: In such a case, the money collected on the judgment thus recovered having been paid to the client, *held*, that the attorney could not recover back from the client the amount thus paid over, upon being compelled to refund the sum collected on account of irregularities in the proceeding in which the judgment was recovered, unless he could put the client *in statu quo* as to the original claim: *Ibid.*

Ratification: Unauthorized acts of an attorney in the name of his client may be ratified by the client, who cannot retain the benefits of an unauthorized act and repudiate the portions of the transaction which are injurious to him: *Brown v. Kiene*, 72–342.

As to unauthorized appearance, see notes to next section.

292. Proof of authority. 214. The court may, on motion, for either party and on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of the several adverse parties, to produce, or prove by his own oath or otherwise, the authority under which he appears, and, until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear. [R., § 2707; C., '51, § 1617.]

Want of authority; how raised: Absence of authority on the part of plaintiff's attorney to bring a suit may be a ground for dismissing it, or, if the attorney wants time in order to make a showing of authority, for continuance, but it cannot be taken advantage of as a ground to defeat recovery: *Savary v. Savary*, 3-271.

The showing to require an attorney to prove his authority, *held* insufficient in a particular case: *Savery v. Savery*, 8-217.

A judgment by default entered against a defendant upon an appearance for him by attorney, which is made without authority and by mistake, should be set aside: *Rice v. Griffith*, 9-539.

Where a demurrer is filed without authority and a valid appearance is afterward made, a new demurrer may be filed: *Winterstien v. Walker*, 10-198.

Authority; evidence of: Authority to appear, *held* sufficiently established by the attorney's own testimony and a written receipt signed by the party for whom appearance was made, acknowledging receipt of money collected by the litigation, although the party himself testified that no such authority was given: *Ellis v. White*, 61-644.

Where the statement of the attorney in showing his authority discloses the fact that he is acting on written authority, he may properly be required to produce it: *State ex rel. v. Tilghman*, 6-496.

An affidavit of an attorney, that he appeared in the lower court for defendant, cannot be received on appeal to show that the lower court had jurisdiction: *Stout v. Fortner*, 7-183.

Notice to attorney: Knowledge of the attorney is, in general, considered notice to the client: *De Louis v. Meek*, 2 G. Gr., 55.

Service upon attorney: In ordinary actions service upon an attorney is not sufficient to give a court jurisdiction: *Death v. Bank of Pittsburg*, 1-382.

Under the English chancery practice, where the judgment plaintiff was a non-resident, service in an action in equity to enjoin the collection of the judgment might be made upon a resident attorney having charge of such collection; but under our procedure such an action might be brought to enjoin the sheriff from levying execution under the judgment: *Ibid.*

Appearance of authorized attorney cures any defect by reason of want of authority in such attorney to accept service of the notice: *Fanning v. Minnesota R. Co.*, 37-379.

Defense should be shown: A party seeking to have a judgment set aside on the ground that it was rendered on appearance by an attorney without authority should allege and show a defense to the claim: *Russell v. Pottawattamie County*, 29-256.

Authority not questioned on appeal: Where the record, without setting out the evidence, shows that the lower court was satisfied by affidavit of the authority of the attorney to appear, the ruling will not be disturbed on appeal: *Huston v. Stringham*, 21-36.

The authority of the attorney cannot be first questioned by his client on appeal, when he has acquiesced in his action in the court below: *Hefferman v. Burt*, 7-320.

Presumption as to attorney's authority: A regular attorney has authority to bring a suit and continue it to its final determination. He cannot be called upon to prove his authority, but the want of it must be shown by the objecting party: *State v. Carothers*, 1 G. Gr., 464.

Where the record shows appearance by attorney, a party attacking the judgment, on the ground of want of authority of the attorney to appear, must overcome such presumption: *Potter v. Parsons*, 14-286; and must do so by clear and satisfactory evidence: *Wheeler v. Cox*, 56-36; *Russell v. Pottawattamie County*, 29-256.

Although the attorney cannot, without special authority, admit service of jurisdictional process upon his client, yet it will be presumed in all collateral attacks, and perhaps on appeal or writ of error, that a regular attorney who appeared for a defendant, though not served, had authority to do so: *Harshey v. Blackmarr*, 20-161.

The appearance of an attorney for a party is *prima facie* evidence of authority, and, before his act can be avoided, injury resulting from the unauthorized appearance must be shown: *Piggott v. Addicks*, 3 G. Gr., 427.

Where the record recites an acceptance of service by attorney, it will be presumed, in favor of the judgment, that authority to accept service existed, or that some other form of service was shown: *Prince v. Griffin*, 16-552.

The fact of appearance by attorney being established, it is for the party insisting that the appearance was unauthorized and the judgment void to show that fact: *Bond v. Epley*, 48-600.

Absence of authority; foreign judgment: The defendant in an action upon a foreign judgment may deny the authority of the attorney who appeared for him: *Baltzell v. Nosler*, 1-589; *Harshey v. Blackmarr*, 20-161.

When want of authority of attorney to enter appearance is made the ground of an equitable defense in an action on a foreign judgment, it should be alleged also that defendant is not indebted to plaintiff on the claim on which the judgment was based: *Crawford v. White*, 17-560.

In a suit on a foreign judgment the fact that the attorneys who appeared for defendant were not authorized to do so is immaterial, if it appears that defendant was duly served with notice, and would have been concluded without an appearance: *Woodward v. Willard*, 33-542.

In action on domestic judgments: In case of a domestic judgment rendered upon an unauthorized appearance and without service, the party against whom the judgment is thus improperly rendered is entitled to relief if the judgment is unjust, and relief is sought by bill or motion, without laches; but the party must promptly disavow the action of the attorney upon receiving knowledge thereof: *Harshey v. Blackmarr*, 20-161.

A judgment rendered without service of notice and upon appearance by attorney with-

out authority is void: *Macomber v. Peck*, 39–351.

If an attorney is in fact not authorized to appear for a party, the latter may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21–329.

A junior lienholder may, for the purpose of establishing his right to redeem from the foreclosure under a senior mortgage, show that an agent or attorney who entered appearance for him, or accepted service, did so without authority, and this may be shown as against third persons purchasing at the sale: *Newcomb v. Dewey*, 27–381.

Attorney exceeding authority: The right to contest a judgment, on account of want of authority of the attorney appearing for a defendant not served, exists only when the want of authority is total, and not where an attorney, regularly employed, has merely exceeded his authority: *Harshey v. Blackmarr*, 20–161.

Ratification: A party claiming the benefit of a plea put in by an attorney cannot deny the authority of such attorney to act in the case: *Oltrogge v. Schutte*, 51–279.

Where an attorney accepted part payment in full satisfaction of a judgment procured for his client, and no further steps were taken for the enforcement of said judgment for eleven years, *held*, that it would be inferred that the attorney had authority to make such settlement or that the client was informed of his action, if without authority, and had by long silence ratified it: *Ried v. Dickinson*, 37–56.

The client, having ratified the act of the attorney appearing for him by paying him for his services, is bound by the judgment: *Ryan v. Doyle*, 31–53.

293. Lien. 215. An attorney has a lien for a general balance of compensation upon:

1. Any papers belonging to his client, which have come into his hands in the course of his professional employment;

2. Money in his hands belonging to his client;

3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services.

4. After judgment in any court of record, such notice may be given and the lien made effective against the judgment debtor, by entering the same in the judgment docket opposite the entry of the judgment. [R., § 2708; C., '51, § 1618; 13 G. A., ch. 167, § 2.]

Securities; assignment of: Where an attorney transfers to another securities on which he claims a lien, his assignee can only hold them for the reasonable value of the services rendered: *Collins v. Jennings*, 42–447.

Subject to rights under trust deed: Where a suit was commenced to subject the property and income of a corporation to the payment of bonds secured by deed of trust, and a receiver was appointed, *held*, that the attorney of the corporation had no lien on its funds for services rendered after commencement of suit which would have priority over the claims of the bondholders: *Des Moines Gas Co. v. West*, 50–16.

Burden of proof: Where money collected by an attorney was retained by him under the claim of a lien, *held*, that it was for him to aver and prove the services and their value: *Stanton v. Clinton*, 52–109.

Lien prior to garnishment: The lien of an attorney upon money due his client, in the hands of the adverse party, attaches from the time of giving notice to such party, and his lien will not be postponed to a subsequent garnishment: *Myers v. McHugh*, 16–335.

Notice in writing: The notice of the lien to bind the adverse party must be in writing: *Phillips v. Germon*, 43–101.

Notice at commencement of suit: A notice of a claim for a lien is sufficient if inserted in the original notice of the action (at least if signed by the attorney in his individual capacity as well as in his capacity as attorney for his client): *Smith v. Chicago, R. I. & P. R. Co.*, 56–720.

Service of notice upon agent of corporation: While service of notice of attorney's lien, in an action against a corporation, might *not* be sufficient if made upon one of the class of agents upon whom service of original notice is authorized, yet if such service of notice of lien is upon one of such agents in connection with the service of the original notice, such service of notice of lien is sufficient, the service of the original notice being sufficient to charge such agent with a duty in relation to the matter: *Ibid.*

In action on tort: An attorney's lien may properly be claimed, not only in all actions on contract, but also in actions for damages arising from tort: *Ibid.*

For future services: The lien attaches, after proper notice, not only for services then rendered, but for those thereafter rendered: *Ibid.*

Settlement: The parties may settle without the consent of the attorneys, and without first paying their fees, unless notice of an attorney's lien has been given: *Casar v. Sargeant*, 7–317.

But if notice is given the lien will not be

defeated by the fact that the case is settled without judgment having been rendered: *Smith v. Chicago, R. I. & P. R. Co.*, 56–720.

Notice; set-off: An attorney's lien does not attach upon money due his client in the hands of the adverse party until notice is given to such party; therefore, *held*, that the right to set off a judgment existing in favor of the adverse party against the client *before* notice of the attorney's lien was not subject to such lien. Whether such right of set-off may be taken advantage of as against the attorney's lien, where it does not arise until *after* notice of such lien, *quære: Hurst v. Sheets*, 21–501. (This case was under Rev., § 2708, which did not contain a provision similar to ¶ 4 of this section.)

The lien of an attorney is upon the interest of his client in the judgment, and it is subject to an existing right of set-off in the other party: *National Bank v. Eyre*, 3 McCrary, 175.

Subject to costs: An attorney cannot have a lien upon any greater amount than shall actually be found to be owing by the opposite party to his client. And where an attorney took an assignment of a judgment to secure his fees, *held*, that he stood in the shoes of his client, and must take the judgment with all the burdens, such as costs taxed in favor of the opposite party, etc., attaching by the course of the litigation: *Tiffany v. Stewart*, 60–207; *Watson v. Smith*, 63–328.

The supreme court cannot grant an attorney's lien on a judgment when such lien is not secured in the proceedings in the court below, as such relief would be the exercise of original jurisdiction: *Preston v. Daniels*, 2 G. Gr., 536.

Settlement; notice of lien: The adverse party is charged with notice by the entry on the judgment docket, and from the time of such entry he cannot prejudice the rights of the attorney claiming a lien by settlement with his client. As the law does not give the lien on the judgment, but on the claim of the adverse party, or the money in the hands of such party, the lien will continue, although the judgment itself may be reversed on appeal. Also, *held*, that the fact that the entry on the judgment docket claimed the lien on the judgment and not on the money in the hands of the adverse party was immaterial: *Winslow v. Central Iowa R. Co.*, 71–197.

Satisfaction of judgment; discharge of lien: After the entry of the notice in the judgment docket the attorney acquires an interest in the judgment, and may, by proper proceedings, have the same enforced to the extent of such interest. His interest cannot be divested by a discharge of the judgment by the parties, or by their consenting that it be set aside: *Brainard v. Elwood*, 53–30.

Where the attorney perfected the title of his client in real property attached in the action, and thereby satisfied the judgment as against the adverse party, *held*, that the entry of his lien in the judgment docket did not preserve it upon such property in the hands of a purchaser from his client: *Cowen v. Boone*, 48–350.

Where the attorney, by authority of his client, releases of record the lien of the judgment in behalf of the client, the attorney cannot afterwards assert, as against a subsequent purchaser, any lien or interest in himself under such judgment: *Wishard v. Biddle*, 64–526.

Payment of money to clerk: A party cannot avoid the lien by unconditionally paying the money to the clerk; but he may pay it to the clerk to be held by him subject to such lien: *Fisher v. Oskaloosa*, 28–381.

294. How released. 216. Any person interested may release such lien, by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by a judge, payable to the attorney, with security to be approved by the clerk of the supreme or district court, conditioned to pay any amount finally found due the attorney for his services, which amount may be ascertained by suit on the bond. Such lien will be released, unless the attorney, within ten days after demand therefor, files with the clerk a full and complete bill of particulars of the services and amount claimed for each item, or written contract with the party for whom the services were rendered. [R., § 2709; C., '51, § 1619.]

[The words "files with the clerk" in the seventh line are omitted in the printed Code, and the words "furnishes any party interested" are in their place. But the original rolls in the secretary of state's office give the section as here printed.]

The filing of the bond discharges, not only the lien of the attorney on the judgment, but any lien which he may have under the preceding section. The provisions of § 304 do not apply to a case of this kind, and after the filing of the bond provided in this section and release of the attorney's lien, he cannot retain such lien by filing a bond as there provided: *Cross v. Ackley*, 40–493.

In an action by the client against the attorney to recover moneys collected by the attorney, the fact that the attorney is entitled to a portion of the money collected in payment for services will not render the proceeding one to discharge an attorney's lien in such sense as to make it necessary to tender a bond in order to obtain a release of the property: *Armitage v. Sullivan*, 69–426.

295. License revoked. 217. Any court of record may revoke or suspend the license of an attorney or counselor at law to practice therein, and a

revocation or suspension in one county operates to the same extent in the courts of all other counties. [R., § 2710; C., '51, § 1620.]

The court cannot revoke or suspend the license of an attorney except after proceedings are commenced for that purpose as hereinafter provided, and the party has had his day in court. It cannot be done summarily as a punishment for contempt: *State v. Start*, 7-499.

296. Causes for revocation or suspension. 218. The following are sufficient causes for revocation or suspension:

1. When he has been convicted of a felony, or of a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence;

2. When he is guilty of a wilful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with, or in the course of his profession;

3. For a wilful violation of any of the duties of an attorney or counselor as hereinbefore prescribed;

4. For doing any other act to which such a consequence is, by law, attached. [R., § 2711; C., '51, § 1621.]

An attorney may be punished under ¶ 2 for disobedience to an order of court to pay over money to his client as provided in § 4116: *Cross v. Ackley*, 40-493, 498.

Charges in a particular case against an attorney for making false representations to clients for the purpose of retaining money collected and defrauding them; also for collecting and refusing to pay over money, to which the attorney pleaded guilty, *held* sufficient to justify an order suspending the attorney and providing in a certain contingency for his final disbarment: *Slemmer v. Wright*, 54-164.

297. Proceedings. 219. The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. [R., § 2712; C., '51, § 1622.]

Proceedings to disbar an attorney are special proceedings in which the provisions for change of venue in civil actions are applicable: *State v. Clarke*, 46-155.

It is probable that the court could, in the exercise of its inherent authority, require a member of the bar to discharge the duty of conducting the prosecution of a proceeding for disbarment. But the exercise of such authority rests in the sound discretion of the judge, and the persons commencing the disbarment proceeding could not object to the action of the court in refusing to make such appointment: *Byington v. Moore*, 70-206.

In proceeding against an attorney for contempt the accusation should specify the manner in which the contempt was committed; if by words, the words used should be set out; if by acts, they should be described: *Perry v. State*, 3 G. Gr., 550.

298. Order; notice. 220. If the court deem the accusation sufficient to justify farther action, it shall cause an order to be entered requiring the accused to appear and answer on a day therein fixed, either at the same or a subsequent term, and shall cause a copy of the accusation and order to be served upon him personally. [R., § 2713; C., '51, § 1623.]

299. Trial. 221. To the accusation he may plead or demur, and the issues joined thereon shall, in all cases, be tried by the court, all the evidence being reduced to writing, filed and preserved. [R., § 2714; C., '51, § 1624.]

300. Judgment. 222. If the accused plead guilty, or fail to answer, the court shall proceed to render such judgment as the case requires. [R., § 2715; C., '51, § 1625.]

301. Appeal. 223. In case of a removal or suspension being ordered by a district [or circuit] court, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the record, shall thereupon be transferred to the supreme court, to be there considered and finally acted upon. A judgment of acquittal by the district [or circuit] court is final. [R., § 2716; C., '51, § 1626.]

302. Failure to account. 224. An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time after demand, is guilty of a misdemeanor. [R., § 2717; C., '51, § 1627.]

303. Exception. 225. When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of the preceding section, until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim when it is legally ascertained. [R., § 2718; C., '51, § 1628.]

304. Security. 226. Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole, or any portion thereof, to the claimant when he is found entitled thereto. [R., § 2719; C., '51, § 1629.]

The bond here provided is only to exempt an attorney from proceedings against him under § 302, and is not designed to enable him to retain a lien which is discharged by the bond referred to in § 294: *Cross v. Ackley*, 40-493.

CHAPTER 10.

OF JURORS.

305. Who competent. 227. All qualified electors of the state of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, are competent jurors in their respective counties. [R., § 2720; C., '51, § 1630.]

Under certain facts, *held*, that a juror was incompetent as not being a qualified elector; also *held* that an objection to the competency of a juror should be interposed when he is sworn, but, if not then known, may be interposed after verdict: *The State v. Groome*, 10-308.

As to who are electors, see Const., art. II, § 1.

A judgment rendered upon a verdict by a jury, some members of which are disqualified, is erroneous, but not void; it might be reversed upon appeal, but it cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

The requirement that jurors shall be chosen from the body of the county is intended to prevent the selection of jurors resident out of the county, and does not require that jurors shall be taken from all parts of the county; therefore, *held*, that a statute authorizing the holding of the district court in two places in a county, and providing that when held at one of these places the jurisdiction should be limited to certain townships, and the jurors should be selected from only these townships, did not interfere with the right of trial by jury: *Trimble v. State*, 2 G. Gr., 404.

306. Who exempt. 228. The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or of this state; all practicing attorneys, physicians, and clergymen; all acting professors or teachers of any college, school, or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age. [R., § 2721; C., '51, § 1631.]

The exemption is a personal privilege, which may be waived, and is not a ground for challenge: *State v. Adams*, 20-486. See § 3984.

307. When excused. 229. Any person may also be excused from serving on a jury when his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death, or the sickness of a member of his family, requires his absence. [R., § 2722; C., '51, § 1632.]

That jurors have been excused on their own statements, not under oath, is not ground of objection by the defendant, in a criminal case, and he cannot have an attachment issued to compel the attendance of those so excused: *State v. Ostrander*, 18-435, 448.

308. When to attend; penalty. 230. Unless the judge otherwise orders, jurors shall be summoned to appear at ten o'clock A. M. of the second day of the term, at which time they shall be called and all excuses heard and determined by the court. If any person summoned fail to appear without sending a sufficient excuse, the court shall issue a rule returnable at that or the succeeding term, requiring him to appear, and show cause why he should not be fined for contempt, and unless he renders a sufficient excuse for such failure, the court may fine him in any amount not exceeding ten dollars, and shall require him to pay the costs, and stand committed until the fine and costs are paid. [R., § 2735; C., '51, § 1645.]

309. Number. 231; 21 G. A., ch. 42, § 1; 21 G. A., ch. 128, § 2. From and after the first day of January, A. D. 1887, the grand jury shall be composed as follows: In counties having a population of sixteen thousand inhabitants or less, the grand jury shall be composed of five members; and in counties having a population of more than sixteen thousand inhabitants the grand jury shall be composed of seven members. The trial jurors in the counties containing less than fifteen thousand inhabitants shall consist of fifteen, unless the judge otherwise orders, but in counties containing fifteen thousand inhabitants or over, the number of trial jurors shall be twenty four. Such population shall in each case be determined by the last preceding national or state census: *Provided*, that where a single county constitutes a district the court may increase the number of such trial jurors not to exceed seventy-two. [R., § 2732; C., '51, § 1642; 13 G. A., ch., 167, § 7.]

310. Failure of trial jurors to attend. 232. Should there not be the number of trial jurors in attendance, as provided in the preceding section, by reason of a failure of the persons summoned to attend, or because excused as provided in section two hundred and thirty of this chapter [§ 308], the requisite number of persons to supply the deficiency shall be drawn in the same manner as provided in sections two hundred and forty and two hundred and forty-one of this chapter [§§ 318, 319]. The persons so drawn shall be forthwith summoned to appear, and serve as trial jurors during the term. [R., § 2737; C., '51, § 1647.]

The fact that vacancies in the jury panel are filled by talesmen instead of by the additional drawing herein provided for is not a ground of challenge to the panel under § 3971, and can be raised, if at all, only by challenge to such talesmen when drawn: *Buford v. McGeichie*, 60–298.

No penalty is attached for a failure to comply with the provisions of this section. It must be regarded as directory; and a simple disregard of its provisions, where error does not affirmatively appear, is not sufficient to authorize reversal of the judgment: *State v. Harris*, 64–287; *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

The provisions of this and the following sections relate to obtaining jurors for the term, and for the trial of all cases where the panel is not full, and have no reference to the manner of obtaining a jury for the trial of a criminal action when the panel is exhausted: *State v. Ryan*, 70–154.

311. Discharge of. 233. If, in the judgment of the court, the business of the term does not require the attendance of all, or a portion of the trial jurors, they, or such portion as the court deems proper, may be discharged. Should it afterward appear that a jury is required, the court may direct them to be resummoned, or impanel a jury from the by-standers.

Where the court discharged all but eighteen of the jury, and afterwards a larger number becoming necessary caused additional jurors to be summoned from the by-standers, *held*, that the proceeding was not erroneous: *State v. McCahill*, 72–111.

312. Lists. 234. Two jury lists, one consisting of seventy-five persons to serve as grand jurors, and one consisting of one hundred and fifty persons or, in counties containing more than twenty thousand inhabitants, of two hundred and fifty persons, to serve as trial jurors, and composed of persons competent and liable to serve as jurors, shall annually be made in each county

from which to select jurors for the year commencing on the first day of January. [R., § 2723; C., '51, § 1633.]

But one jury list of petit jurors is contemplated, from which the juries for both the district and circuit courts are to be drawn: *State v. Lawrence*, 38–51.

That eighty-five instead of seventy-five names were returned from which to select the grand jury, and the extra names were stricken off before the grand jury was drawn, *held* not an irregularity: *State v. Knight*, 19–94.

313. Same. 235. Should there be less than the required number of such persons in any county, the list shall comprise all those who answer the above description in the same proportion. [R., § 2724; C., '51, § 1634; 13 G. A., ch. 167, § 3.]

314. How selected. 236. On or before the first Monday in September in each year, the county auditor shall apportion the number to be selected from each election precinct, as nearly as practicable in proportion to the number of votes polled therein at the last general election, and shall deliver a statement thereof to the sheriff. [R., § 2725; C., '51, § 1635.]

315. Sheriff to serve notice. 237. The sheriff shall cause a written notice to be delivered to one of the judges of election in each precinct of the county, on or before the day of the general election in each year, informing them of the number of jurors apportioned for the ensuing year to their respective precincts. [R., § 2726; C., '51, § 1636.]

316. Duty of judge of election. 238. The judges shall thereupon make the requisite selection, and return lists of names as selected to the auditor with the returns of the election, and in case the judges of election shall fail to make a d return said lists as herein required, the county canvassers shall, at the meeting to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file said lists in his office and cause a copy thereof to be recorded in the election book. [R., §§ 2727–8; C., '51, §§ 1637–8; 13 G. A., ch. 3; ch. 167, § 4.]

A failure to record the names returned on the grand jury list does not invalidate proceedings of the grand jury drawn therefrom: *State v. Knight*, 19–94; *State v. Howard*, 19–101.

Where the judges of election and county canvassers each failed to make out and return names of jurors for one election precinct, but two names were supplied by the board of supervisors, which two jurors, however, were not drawn upon the grand jury, *held*, that the irregularity did not vitiate an indictment: *State v. Brandt*, 41–593.

No formal certificate of the judges to the lists so returned is necessary, though it would be proper. Where the record in the record book shows due and proper selection, the presumption is that such record was the result of the list duly made. When the law has been substantially complied with, an indictment should not be set aside for slight irregularities in such matters. *State v. Ansaleme*, 15–44.

It is not required that the records of the board of canvassers shall show that the selection of jurymen was made for precincts from which no returns were sent in: *State v. Carney*. 20–82.

A substantial compliance with the provisions of the law relating to the selection of jurymen is all that is required: *Ibid.*

317. Term of service. 239. Grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the first day of January in each year, and shall serve for one year. Trial jurors shall be selected for each term wherein they are required; but no person shall be required to attend as a trial juror more than two terms in the same year, and in counties containing a population of more than five thousand inhabitants, it shall be a cause of challenge that the person has served on a jury in a court of record within one year, unless he be a member of the regular panel. [R., 2729; C., '51, § 1639; Ex. S., 8 G. A., ch. 6, § 1; 13 G. A., ch. 167, § 5.]

Where a term of the district court began on December 8, 1884, grand jurors impaneled for 1884 were *held* competent to return an indictment after January 1, 1885, but during the same term: *State v. Winebrenner*, 67–230.

That a juror not on the regular panel has served on the jury within one year is cause for challenge: *Barnes v. Newton*, 46–567.

318. Auditor write names. 240; 17 G. A., ch. 184. At least twenty days prior to the first day of any term at which a jury is to be selected, the

auditor, or his deputy, must write out the names on the lists aforesaid which have not been previously drawn as jurors during the year, on separate ballots, and the clerk of the district court, or his deputy, and sheriff, or his deputy, having compared said ballots with the lists, and corrected the same if necessary, shall place the ballots in a box provided for that purpose. [R., § 2730; C., '51, § 1640; 9 G. A., ch. 5; 13 G. A., ch. 3; 13 G. A., ch. 167, § 6.]

Before the section was amended, *held*, that it not being provided that the deputy sheriff might act in place of the sheriff, a drawing in which he so acted, would be invalid: *Dutell v. State*, 4 G. Gr., 125; *State v. Brandt*, 41–593, 602.

319. Drawing. 241; 21 G. A., ch. 42, § 2. After thoroughly mixing the same, the clerk or his deputy shall draw therefrom the requisite number of jurors to serve as aforesaid, and shall, within three days thereafter, issue a precept to the sheriff commanding him to summon the said jurors to appear before the court as provided in section two hundred and thirty of the code [§ 308]. When the grand jury shall be composed of five members only, the number drawn shall be eight, and when the grand jury shall be composed of seven members the number of grand jurors to be drawn shall be twelve; *provided*, that in drawing such grand jury not more than one person shall be drawn as a grand juror from any civil township, excepting where the grand jury is by law required to be drawn from a district containing fewer civil townships than the number of grand jurors required to be summoned; in which case, if the number of civil townships in such district be not less than one-half of the number of jurors required, not more than two persons shall be drawn as grand jurors from any such township; and if the number of civil townships be less than one-half of the number of jurors required not more than three persons shall be drawn as grand jurors from any such township. If more persons shall be drawn from any civil township than are hereby authorized it shall be the duty of the officer drawing such grand jury to reject all superfluous names so drawn, and to proceed with the drawing until the required number of jurors shall be secured. No person shall serve as grand juror for two consecutive years. [R., §§ 2731, 2733; C., '51, §§ 1641, 1643; 9 G. A., ch. 5; 13 G. A., ch. 167, § 8.]

320. Precept. 242. The sheriff shall immediately obey such precept, and, on or before the day for the appearance of said jurors, must make return thereof, and on failure to do so, without sufficient cause, is liable to be fined for a contempt in any amount not exceeding fifty dollars. [R., § 2734; C., '51, § 1644.]

Service of precept may be made by deputy sheriff and special bailiffs appointed under § 476: *State v. Arthur*, 39–631.

321. Grand jurors to attend. 243. Except when required at a special term which has been called in vacation, the grand jury need not be summoned after the first term, but must appear at the next term without summons, under the same penalty as though they had been regularly summoned. [R., § 2736; C., '51, § 1646.]

322. Precept set aside. 244. Where, from any cause, the persons summoned to serve as grand or trial jurors fail to appear, or when from any cause the court shall decide that the grand or trial jurors have been illegally elected or drawn, the court may set aside the precept under which the jurors were summoned, and cause a precept to be issued to the sheriff commanding him to summon a sufficient number of persons from the body of the county, to serve as jurors at the term of court then being holden, which precept may be made returnable forthwith, or at some subsequent day of the term, in the discretion of the court. [R., § 2738.]

This section does not apply to cases where a sufficient number of grand jurors fail to appear: *State v. Pierce*, 8–231.

Where the list of jurors was accidentally destroyed, it was held proper for the court to order a new precept. Under such precept, commanding the sheriff to summon a new jury from the body of the county, *held*, that a jury taken from ten out of twenty townships in the county was sufficient: *State v. Arthur*, 39-631.

The fact that the jury is filled up by persons specially summoned is not a valid ground of objection when no abuse of discretion on the part of the court is shown: *Emerick v. Sloan*, 18-139.

The correctness of the action of the court in discharging a grand jury as having been illegally drawn cannot be raised by motion to set aside an indictment found by another jury summoned in its place, especially where no prejudice has resulted: *State v. Hart*, 67-142.

323. Payment. 245; 15 G. A., ch. 16. At the close of each term the clerk of the court must make out a certificate to each juror of the amount to which he is entitled for his services, which certificate shall authorize the county auditor to issue a warrant to each juror for the said amount on the county treasurer without the same being audited by the board of supervisors. [R., § 2739; C., '51, § 1649.]

CHAPTER 11.

OF SECURITIES AND INVESTMENTS.

324. Form of. 246. Whenever security is required to be given by law, or by order on judgment of a court, and no particular mode is prescribed, it shall be by bond. [R., § 4113; C., '51, § 2505.]

325. For whose benefit. 247. Such security, when not otherwise directed, may, if for the benefit of individuals, be given to the party intended to be thereby secured. If in relation to the public matters concerning the inhabitants of one county or part of a county, it may be made payable to the county; if concerning the inhabitants of more than one county, it may be made payable to the state. But a mere mistake in these respects will not vitiate the security. [R., § 4114; C., '51, § 2506.]

The giving of a bond to the "people of Woodbury county," instead of to the county, *held* not such a mistake as to vitiate the security: *Charles v. Haskins*, 11-329.

326. Remedy when defective. 248. No defective bond or other security, or affidavit, in any case, shall prejudice the party giving or making it, provided it be so rectified within a reasonable time after the defect is discovered, as not to cause essential injury to the other party. [R., § 4119; C., '51, § 2511.]

So *held* in case of appeal bond on appeal from the county court: *Mitchell v. Goff*, 18-421; and *held* applicable to a bond on appeal from a justice of the peace: *Brock v. Manatt*, 1-128.

As to amendment in cases of bond or affidavit for attachment, see notes to § 4246.

327. Surety; qualifications. 249. The surety in every bond provided for by this code must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured. Where there are two or more sureties in the same bond, they must, in the aggregate, have the qualification prescribed in this section. [R., § 4126.]

328. Affidavit. 250. The officer whose duty it is to take a surety in any bond provided for by this code, shall require the person offered as surety to make affidavit of his qualification, which affidavit may be made before such officer or other officer, authorized to administer oaths. The taking of such an affidavit, shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security. [R., § 4125.]

Negligence in approving bond: The clerk of the courts is liable for injury resulting from his negligence in approving the sureties on a bond required to be approved by

him, if the party injured is without fault. But it will be otherwise if there is also negligence on the part of complainant: *Parks v. Davis*, 16–20.

The clerk may be liable for taking insufficient surety on a stay bond, and taking the affidavit of the surety as to his qualification does not exempt the officer approving the bond from liability in accepting insufficient security: *Hubbard v. Switzer*, 47–681.

The action of an officer approving and accepting a bond may be either judicial or ministerial, depending upon the particular thing he is required to do: and *held* that the action of a clerk in accepting and approving a stay bond after expiration of the time limited by statute was judicial: *Maynes v. Brockway*, 55–457.

An action for damages for negligence of an officer in approving a stay bond does not accrue until the expiration of the stay: *Steel v. Bryant*, 49–116; *Moore v. McKinley*, 60–367.

Where a clerk approved a stay bond upon a certificate of the clerk of another county as to the sufficiency of the surety, and indorsed a statement on the back of the bond that the surety thereon was responsible, and it afterwards appeared that the bond had not been, in fact, signed by the surety whose name appeared thereto, *held*, that the certificate being as to the responsibility of the surety and not as to the genuineness of his signature, the clerk making such certificate was not liable for loss occasioned by reason of the acceptance of the same: *Bringolf v. Burt*, 44–184.

The fact that the clerk makes inquiry of the surety as to the value of his property, and is informed that it is sufficient, does not relieve him from liability in approving a bond, nor will he be relieved by the fact that he assured the party complaining that he would disregard the bond and issue execution upon evidence showing its sufficiency, and the further fact that no motion for additional security was made in court by such party, and refused: *Haverly v. McClelland*, 57–182.

The clerk will be liable for negligence of his deputy in approving a bond with insufficient security, and will have an action over against such deputy on his bond for the damages. The fact that the principal has previously accepted the same surety on other bonds will not relieve the deputy from liability: *Moore v. McKinley*, 60–367.

The members of the board of supervisors are not liable for damages resulting from the approval of an insufficient bond, when their action results from an honest mistake or error of judgment, whether of law or fact; but they are personally liable for neglect, carelessness and official misconduct in such matters: *Wasson v. Mitchell*, 18–143.

Under a statute requiring a bond to be approved by certain officers, it was held that in a suit thereon it was unnecessary to aver and prove such approval in the first instance: *State v. Fredericks*, 8–553.

329. Fidelity company as surety. 21 G. A., ch. 157, § 1. Whenever any person who now or hereafter may be required or permitted by law to make, execute, and give a bond or undertaking with security conditioned for the faithful performance of any duty, or of the doing or not doing of anything in said bond or undertaking specified, any officer who is now or shall hereafter be required to approve the sufficiency of any such bond or undertaking may, in the discretion of such officer, in lieu of the securities now required by law, upon satisfactory evidence, accept such bond or undertaking and approve the same whenever the conditions of such bond or undertaking are guaranteed by a company or corporation duly organized or incorporated within this state, under the laws thereof, or authorized by law to do business in this state, and authorized to guarantee the fidelity of persons holding positions of public or private trusts; and which company shall have an unimpaired paid-up capital of not less than one hundred and fifty thousand dollars; *provided*, that nothing herein contained shall apply to bonds in criminal cases.

330. Release of. 21 G. A., ch. 157, § 2. Such company may be released from its liability as such surety on any bond on the same terms and conditions, and in the same manner, as is by law prescribed for the release of individual persons as such sureties, it being the true intent and meaning of this act to enable companies created, incorporated or chartered for the purpose of insuring the fidelity of persons holding places of public or private trust, to become surety on bonds required by law, subject to all the rights and liabilities of private persons.

331. Notice of suit against. 21 G. A., ch. 157, § 3. Whenever suit is required to be brought on any bond given by such company service shall be had upon any agent of such company in this state, and if there is no agent in the state, then service may be had by serving the auditor of state thirty days before the term of court in which the suit is sought to be brought;

and it shall be the duty of the auditor of state to immediately, upon service being made upon him, to mail a copy of such notice to such company at their principal place of business, and any notice so served shall be deemed to be good and sufficient service on any such company.

332. Estoppel. 21 G. A., ch. 157, § 4. Any company which shall execute any bonds as surety under the provisions of this act shall be estopped, in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability; and *provided*, that private property of stockholders shall be liable for debts of the corporation to the full amount of capital stock held by such stockholders.

333. 21 G. A., ch. 157, § 5. Section 679, of the code [§ 1144] shall not apply to bonds executed by fidelity surety companies, in accordance with the provisions of this act.

334. 21 G. A., ch. 157, § 6. All acts or parts of acts inconsistent with this act are, and the same are hereby repealed.

335. Investments, how made. 251. Where investments of money are directed to be made, and no mode of investment is pointed out by statute, they must be made in the stocks or bonds of this state, or of those of the United States, or upon bond or mortgage of real property of the clear unincumbered value of at least twice the investment. [R., § 4115; C., '51, § 2507.]

336. When surety discharged. 252. When such investment is made by order of any court, the security taken shall in no case be discharged, impaired, or transferred, without an order of the court to that effect entered on the minutes thereof. [R., § 4116; C., '51, § 2508.]

337. Re-investment. 253. The clerk or other person appointed in such cases to make the investment, must receive all moneys as they become due thereon, and apply or re-invest the same under the direction of the court, unless the court appoint some other person to do such acts. [R., § 4117; C., '51, § 2509.]

338. Account, when rendered. 254. Once in each year, and oftener if required by the court, the person so appointed must, on oath, render to the court an account in writing of all moneys so received by him, and of the application thereof. [R., § 4118; C., '51, § 2510.]

339. Delivery of property or deposit of money. 255. When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money or property capable of delivery, which is in any degree the subject of litigation, and which is held by him as trustee for another party, the court, or judge thereof, may order the same to be deposited in the office of the clerk, or delivered to such party with or without security, subject to the farther direction of the court; or may order such money to be deposited in a bank with the consent of the parties in interest, to the credit of the court in which the action is pending, and the same shall be paid out by such bank only upon the check of the clerk annexed to the certified order of the court directing such payment. [R., § 3416.]

340. Obedience compelled. 256. Whenever a court, or judge, in the exercise of its or his authority, has ordered the deposit or delivery of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or property, and deposit or deliver it in conformity with the directions of the court or judge. [R., § 3417.]

341. Sheriff; power. 257. The sheriff has the same power in such cases as when acting under an order for the delivery of personal property. [R., § 3418.]

DEPOSIT OF FUNDS BY ADMINISTRATOR, GUARDIAN, TRUSTEE OR REFEREE.

342. Final report and discharge. 22 G. A., ch. 41, § 1. Whenever any administrator, guardian, trustee or referee shall desire to make his final report as such and who shall then have in his possession or under his control in his fiduciary capacity, any funds, moneys, or securities due, or to become due to any heir, legatee, devisee, or other person, the payment of which might then be made to such heir, legatee, devisee or other person if living or present within the county where such appointment as administrator, guardian, trustee or referee was made, such funds, moneys or securities may be deposited with the clerk of the district court of the county wherein such appointment was made, and if he shall otherwise discharge all the duties imposed upon him by such appointment he may take the receipt of the clerk of the district court for such funds, moneys or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys or securities were derived, the amount thereof, and the name of the person to whom due or to become due, if known. Thereupon said administrator, guardian, trustee or referee may file such receipt with his final report, and if it shall be made to appear to the satisfaction of the court, that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge. *Provided*, that notice of such contemplated deposit, and if [of] final report shall be given for the same time and in the same manner as now required in case of final report by administrators.

343. Liability of clerk. 22 G. A., ch. 41, § 2. The clerk of the district court with whom any deposit of funds, moneys or securities shall be made as provided in the preceding section, shall enter in a book to be provided and kept for the purposes hereof, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. He shall be liable upon his bond for all funds, moneys, or securities which may be deposited with him, under the provisions hereof. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person to whom the same is due, or to become due, within *one* year from the date of its deposit the clerk shall then deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts.

344. Duty of treasurer. 22 G. A., ch. 41, § 3. Whenever any funds, moneys or securities shall be deposited with the county treasurer, as provided in this act, he shall enter in a book provided and kept for that purpose, the date of such deposit, the amount thereof, from whom received, the source from which derived, and the name of the person to whom the same is due or to become due, if known. Whenever the claimant therefor, upon proper application made to the district court, shall satisfactorily show to such court that he is the rightful owner of said funds, moneys or securities and entitled thereto, the court by order entered of record shall direct the county auditor to issue a warrant on the county treasurer for said money, funds or securities, and upon such order the said treasurer shall pay to the person named in such order the funds, moneys or securities to which the claimant shall have shown himself entitled.

CHAPTER 12.

OF NOTARIES PUBLIC.

345. Appointment. 258. The governor may appoint and commission one or more notaries public in each county, and may at any time revoke such appointment. The commissions of all notaries public heretofore, or hereafter, issued prior to the fourth day of July, A. D. 1876, shall expire on that day, and commissions subsequently issued shall be for no longer period than three years, and all such commissions shall expire on the fourth day of July in the same year. The secretary of state shall, on or before the first day of June, A. D. 1876, and every three years thereafter, notify each notary when his commission will expire. [R., § 195; C., '51, § 78.]

A notary public is a public officer, and the acts of one who is such *de facto*, though not *de jure*, cannot be collaterally assailed; therefore *held* that a deposition taken by a *de facto* notary could not be suppressed on the ground that such notary had not qualified as required by law: *Keeney v. Leas*, 14–464.

A court will take judicial notice of the official character of a notary public, and of the county for which he is appointed: *Rowland v. Brown*, 37 N. W. Rep., 403.

346. Issuance of commission. 259. Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal on which shall be engraved the words "notarial seal" and "Iowa," with his surname at length, and at least the initials of his christian name;

2. Execute a bond to the state of Iowa in the sum of five hundred dollars, conditioned for the true and faithful execution of the duties of his office, which bond shall be approved by the clerk of the district court of the proper county;

3. Write on said bond, or a paper attached thereto, his signature, and place thereon a distinct impression of his official seal;

4. File such bond with attached papers, if any, in the office of the secretary of state;

5. Remit to such secretary the fee required by law;

When the secretary of state is satisfied that the foregoing particulars have been fully complied with, he shall deliver the commission to the person appointed. [R., §§ 197, 200, 207–9; C., '51, §§ 80, 83; 12 G. A., ch. 60.]

An official certificate of the notary is not receivable in evidence without his seal attached, but the seal may be attached subsequently to the date of signing the certificate: *Rindskoff v. Malone*, 9–540.

Although the statute does not in terms prescribe that the acts of the notary shall be authenticated by his seal, there could have been no other purpose in requiring him to procure a seal; and *held* that a wafer with the name, etc., of the notary written thereon was not a sufficient authentication; and that the genuineness of his signature could not be shown by the certificate of the clerk of the court: *Stephens v. Williams*, 46–540, and see notes to § 355.

The acts of the notary should be authenticated both by his seal and his signature: *Tunis v. Withrow*, 10–305; *Chase v. Street*, 10–593.

An affidavit before a notary, not attested by his seal, lacks an essential requisite: *Slyfield v. Healy*, 32 Fed. Rep., 2.

An affidavit showing the county by the usual venue, and to which the notary affixed his signature with his official designation, and to which his seal was affixed showing the city of his residence, *held* to sufficiently show that the person purporting to administer the oath as a notary public was a notary and had authority to act: *Mackie v. Central R. of Iowa*, 54–540.

An affidavit will be presumed to have been sworn to within the jurisdiction of the notary taking it, although the caption is entitled as of another county: *Goodnow v. Litchfield*, 67–691.

Where an affidavit is headed with the name of the state and county, and the notary's signature is authenticated with a seal, such signature is sufficient if it contains his name with the addition "Notary Public," without stating the state or county for which he is notary: *Stone v. Miller*, 60–243.

The court will take judicial notice of the seal of a notary public, attached to the jurat of an affidavit, and knowing from the seal used as required by the state statute that he is notary for the state of Iowa, the court will take judicial notice of the county in which he is

authorized to act as notary: *Stoddard v. Sloan*, 65-680.

But the signature of a certificate of acknowledgment must show the county for which the notary was appointed, which must be that in which the certificate purports to have been taken, the name of the county being deemed a part of the official signature of the notary. The fact that the name of the county appears on the seal is not sufficient, that not being a matter required to be shown by the seal: *Willard v. Cramer*, 36-22; *Greenwood v. Jenswold*, 69-53.

347. Record of appointment. 260; 22 G. A., ch. 100. When the secretary of state delivers the commission to the person appointed, he shall make a certificate of such appointment, and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force.

348. Revocation. 261. Should the commission of any person appointed notary public be revoked by the governor, the secretary of state shall immediately notify such person, and the clerk of the district court of the proper county, through the mail.

349. Powers and duties. 262. Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants. [R., § 196; C., '51, § 79.]

Acts of notary, how authenticated, see notes to § 346.

350. Keep record. 263. Every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself.

351. Records deposited. 264. On the death, resignation, or removal from office of any notary, his records, with all his official papers, shall, within three months therefrom, be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed; and if any notary, on his resignation or removal, neglects for three months so to deposit them, he shall be held guilty of a misdemeanor and be punished accordingly, and be liable in an action to any person injured by such neglect; and if an executor or administrator of a deceased notary wilfully neglects for three months after his acceptance of that appointment, to deposit the records and papers of a deceased notary which came into his hands, in said clerk's office, he shall be held guilty of a misdemeanor and punished accordingly.

352. Removal; resignation. 265. If a notary remove his residence from the county for which he was appointed, such removal shall be taken as a resignation. [R., § 203; C., '51, § 86.]

353. Custody of records. 266. Each clerk aforesaid shall receive and safely keep all such records and papers of the notary in the cases above named, and shall give attested copies of them under the seal of his court, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary. [R., § 294; C., '51, § 87.]

CHAPTER 13.

OF COMMISSIONERS IN OTHER STATES.

354. How appointed; power. 267. The governor may appoint and commission in each of the United States and territories, one or more commis-

sioners, to continue in office for the term of three years from the date of commission, unless such appointment shall be sooner revoked by the governor; such commissioners, when qualified as hereinafter provided, shall be empowered to administer oaths, take depositions and affidavits to be used in the courts of this state, and to take acknowledgments or proof of deeds and other instruments to be recorded and used in this state. [13 G. A., ch. 44, § 1.]

355. Seal. 268. Each commissioner, exercising the authority conferred upon him by this chapter, shall have an official seal, on which shall be engraved the words "COMMISSIONER FOR IOWA," with his surname at length, and at least the initials of his christian name; also the name of the state in which he has been commissioned to act, which seal must be so engraved as to make a clear impression on wax or wafer. [10 G. A., ch. 119; 13 G. A., ch. 44, § 4.]

The certificate of such commissioner *held* not to be sufficiently authenticated by his seal, when the word "Iowa" was written in the body of the seal instead of being impressed upon the paper as here contemplated: *Gage v. Dubuque & P. R. Co.*, 11-310, and see notes to § 346.

356. Signature and seal. 269. A signature and impression of such seal of any commissioner, qualified as herein provided, and corresponding with that on file in the office of the secretary of state, shall be entitled to the same credit as evidence in the courts and public offices of this state, as the signature and seal of a clerk of the district court or notary public of this state. [13 G. A., ch. 44, § 5.]

357. Compensation. 270. Such commissioner is authorized to demand for his services the same fee as may be allowed for similar services by the laws of the state in which he is to exercise his office. [Same, § 6.]

358. Official acts. 271. Oaths administered by any such commissioner, affidavits and depositions taken by him, and acknowledgments as aforesaid certified by him over his official signature and seal, are made as effectual in law to all intents and purposes, as if done and certified by a clerk of the district court or justice of the peace of this state. [Same, § 2.]

As to the requisites of the seal, see § 355 and notes.

359. Qualification. 272. Before such commissioner can perform any of the duties of his office, he is required to take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Iowa, and that he will faithfully perform the duties of such office; which oath shall be taken and subscribed before some judge or clerk of a court of record in the state in which the commissioner is to exercise his appointment, and certified under the hand of the person taking it, and the seal of his court, or before a duly authorized commissioner for Iowa, resident in said state, which certificate shall be filed in the office of the secretary of state of this state, and on which shall be the official signature and a clear impression of the official seal of such commissioner. [Same, § 3.]

360. Duty of secretary of state. 273. The secretary of state, upon the reception of the certificate as provided in section two hundred and sixty-nine of this chapter [§ 356], shall examine the same, and if this chapter has been strictly complied with, it shall be his duty to forward to said commissioner a certificate properly attested, that he has been duly commissioned as commissioner for Iowa; and that he is duly qualified as required by the laws of Iowa authorizing the appointment of commissioners in other states; and it shall be the further duty of the secretary of state to forward a duplicate of said certificate to the secretary of the state in which said commissioner may have been appointed. [Same, § 8.]

361. List of to be published. 274. The secretary of state shall cause to be published with the session laws of each general assembly, a full and complete list of all commissioners for Iowa who are duly qualified, and whose

commissions do not expire on or before the fourth day of July of the year in which such publication is made, which list shall give the postoffice address, date of qualification, and date of expiration of the commission of each commissioner. [Same, § 11.]

362. Power of commissioners of other states. 275. Commissioners of the like nature appointed in this state, under the authority of any other of the United States or territories, are hereby invested with the authority of a justice of the peace to issue subpœnas, requiring the attendance of witnesses before them to give their testimony by deposition or affidavit, in any matter in which such deposition or affidavit may be taken by the law of such other state, and they are also authorized to administer oaths in any matter in relation to which they are required or permitted by such law of the other states; and false swearing in such cases is hereby made subject to the penal laws of this state relating to perjury; *provided* that such commissioner shall cause to be filed in the office of the secretary of state a certificate of the secretary of the state or territory for which he claims to act, that he is properly appointed and qualified as required by the laws of said state, and has in his possession a certificate that this section has been complied with. [Same, § 12.]

363. Record of appointments. 276. The secretary of state shall keep in his office a complete record of all appointments made by the governor, pursuant to the provisions of this chapter. [Same, § 13.]

CHAPTER 14.

OF THE ADMINISTRATION OF OATHS.

364. Who authorized. 277; 18 G. A., ch. 62; 21 G. A., ch. 126. The following officers are authorized to administer oaths, and take and certify the acknowledgment of instruments in writing:

Each judge of the supreme court;
Each judge of the district court;
[Each judge of the circuit court;]
The clerk of the supreme court;
The deputy clerk of the supreme court;
Each clerk of the district court as such, [or as clerk of the circuit court]:
Each deputy clerk of the district [and circuit] courts;
Each county auditor;
Each deputy county auditor;
Each sheriff and his deputies, in cases where they are authorized by law to select commissioners or appraisers, or to impanel jurors for the view or appraisement of property, or are directed as an official duty to have property appraised, or take the answers of garnishees;
Each justice of the peace within his county;
Each notary public within his county;

The governor of the state, the secretary of state, the auditor of state, and the treasurer of state, are authorized to administer oaths in any matter pertaining to the business of their respective offices, or that may come before them for consideration and action as members of the executive council. [R., §§ 201, 1843, 2684, 3201; C., '51, §§ 979, 1594, 1865; 11 G. A., ch. 5; 13 G. A., ch. 146.]

365. Affirmation. 278. Persons conscientiously opposed to swearing may affirm, and shall be subject to the penalties of perjury as in case of swearing. [R., 1844; C.,' 51, § 980.]

TITLE IV.

RELATING TO COUNTY, TOWNSHIP, TOWN AND CITY GOVERNMENT.

CHAPTER 1.

OF COUNTIES.

366. Body corporate; powers. 279. Each county is a body corporate for civil and political purposes only, and as such may sue and be sued; shall keep a seal such as provided by law; may acquire and hold property and make all contracts necessary or expedient for the management, control, and improvement of the same; and, for the better exercise of its civil and political powers, may make any order for the disposition of its property, and may do such other acts and exercise such other powers as may be allowed by law. [R., § 221; C., '51, § 93.]

A county is strictly a political corporation, a grant of power to a designated portion of the people to aid and arrange the machinery of government for the whole state. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character: *Jefferson County v. Ford*, 4 G. Gr., 367.

Although clothed with corporate powers, counties stand low down in the scale of corporate existences, and are reckoned as *quasi*-corporations, as distinguished from municipal corporations, and they are held to a much less extended liability than the latter. They are not liable to an action by a private party for negligence of their officers in respect to highways, unless the statute has expressly created such liability: *Soper v. Henry County*, 26-264.

A county is a political corporation invested with certain limited and specified powers, which are divided among and are to be exercised by a class of agents or county officers appointed for that purpose. Their duties are not only defined, but the mode of performing them is often prescribed by law, and this being done, the power must be exercised precisely as it is given: *Hull v. Marshall County*, 12-142.

367. Jurisdiction. 280. Counties bounded by a stream or other water, have concurrent jurisdiction over the whole of the waters lying between them. [R., § 223; C., '51, § 94.]

Jurisdiction being given to the state over crimes committed upon the Mississippi river between the north and south boundaries of the state, *held*, that the jurisdiction of the district court of any county extended over acts committed upon the river between the north and south boundaries of such county: *State v. Mullen*, 35-199.

RELOCATION OF COUNTY SEAT.

368. How secured. 281. Whenever the citizens of any county desire a relocation of their county seat, they may petition their board of supervisors respecting the same at any regular session. [9 G. A., ch. 49, § 1.]

Proceedings for the relocation of a county seat are special in their character. The board of supervisors is clothed with no other powers with reference thereto than those conferred by statute: *Looms v. Bailey*, 45-400.

It is not error for the board to refuse to entertain a petition of this kind, presented at an adjourned session: *Ellis v. Board of Supervisors*, 40-301.

The legislature cannot, by any act declaring a county seat permanent, deprive the voters of the right to change such county seat as provided by statute. If land has been conveyed to a county for public use under the condition that the location shall be permanent, it should be reconveyed to the grantor in case of a removal: *Twiford v. Alamakee County*, 4 G. Gr., 60.

369. Petition for. 282. Such petition shall designate the place at which the petitioners desire to have the county seat relocated, and shall be signed by none but legal voters of said county, and shall be accompanied by affidavits sufficient to satisfy said board that the signers are all legal voters of said

county, and that the signatures on said petition are all genuine. [Same, §§ 2, 3.]

Where jurats to the affidavits required under this section were imperfect in that they did not show the official title of the officer, or were entirely without signature, *held*, the board might allow them to be amended: *Stone v. Miller*, 60–243.

It is a compliance with the statute to show by affidavit that the signers of the petition were legal voters at the time of signing: *Ibid.*

370. Remonstrances. 283. Remonstrances, signed by legal voters of the county only, and verified in like manner as the petition, may also be presented to the board. If the same persons petition and remonstrate they shall be counted only on the remonstrance, and if a greater number of legal voters remonstrate against the relocation than petition for it, no election shall be ordered. [Same, § 9.]

No other papers, except petition and remonstrance, are to be considered. A re-petition is not authorized; and names appearing both on remonstrance, and re-petition are to be counted on the remonstrance: *Loomis v. Bailey*, 45-400.

Those signing petition, remonstrance and re-petition should be counted as remonstrants: *Jamison v. Board of Supervisors*, 47–388.

While the board in passing upon the sufficiency of the petition and remonstrance acts in a judicial capacity, it is not authorized to consider any evidence not specified, and cannot, therefore, consider counter-affidavits: *Herrick v. Carpenter*, 54–340.

If the number of signers to the remonstrance exceeds the number of signers to the petition the election should not be ordered, although the number of signers to the petition exceeds the majority of the legal voters of the county as provided in § 372: *Loomis v. Bailey*, 45–400; *Duffees v. Sherman*, 48–287.

371. Notice. 284. Sixty days' notice of the presentation of such petition shall be given by three insertions in a weekly newspaper, if there be one printed in the county; if no paper be therein printed, by posting the same in every township in the county and on the door of the court-house therein. [Same, § 5.]

The notice is sufficient if the first of the three insertions is sixty days before the presentation of the petition: *Bennett v. Hetherington*, 41–142.

The giving of notice is not jurisdictional, and a failure therein will not invalidate the election: *Dishon v. Smith*, 10–212.

372. Submission of question. 285. Upon the presentation of such petition signed by at least one-half of all the legal voters in the county as shown by the last preceding census, if the notice hereinbefore prescribed shall have been given, the board shall order that at the next general election a vote shall be taken between said place and the existing county seat, and shall require a constable of each township in the county to post notices of such order in three public places in such township at least fifty days before said election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, for four consecutive weeks, the last publication to be at least twenty days before said election. [Same, § 4.]

The election should not be ordered unless the number of signers to the petition not only exceeds the majority of the legal voters of the county, but also exceeds the number of signers to the remonstrance: *Loomis v. Bailey*, 45-100; *Duffees v. Sherman*, 48–287.

The provision as to posting notices is directory, and a failure to comply therewith will not render an election invalid: *Dishon v. Smith*, 10–212.

The decision of the board upon the sufficiency of the petition and notice is judicial, and is conclusive until set aside in some method provided for direct review: *Baker v. Board of Supervisors*, 40–226; *Bennett v. Hetherington*, 41–142.

The limitation provided in § 4454 upon the time within which an action by *certiorari* to correct an error of the board in holding a petition sufficient may be brought commences to run only from the time the board orders an election, and not from the time they decide that the petition is sufficient: *Jamison v. Board of Supervisors*, 47–388, 391.

373. Election. 286. Such election shall be conducted as elections for county officers. The ballot shall state that it was cast for the county seat and name the place voted for. [Same, §§ 6, 7.]

If the ballot expresses the intention of the voter beyond a reasonable doubt it should be counted, without regard to technical inaccuracies, or the form adopted. The language of the ballot is to be construed in the light of all facts connected with the election: *Hawes v. Miller*, 56–395.

374. Removal. 287. If the point designated in the petition obtain a majority of all the votes cast, the board of supervisors shall make a record thereof, and declare the same to be the county seat of said county, and shall remove the records and documents thereto as early as practicable thereafter. [Same, § 8.]

The result of the election may be declared and record thereof made at a special meeting: *Cole v. Board of Supervisors*, 11-552.

The fact that in declaring the result of the vote the board also fixes the time within which the records shall be removed is no ground for restraining the removal in accordance with the vote, even though there be no authority to fix such time: *Ibid.*

The fact that there is a controversy pending as to which of two places is duly selected as the county seat is a proper ground for enjoining a county official from ordering the erection of a county building at one of such places: *Rice v. Smith*, 9-570.

Where fraud or illegality in the election is alleged, an injunction may be granted to prevent the removal of the records; and in such proceedings the validity of the election may be tried: *Ibid.*; *Sweatt v. Faville*, 23-321.

Action of the board in canvassing the vote is ministerial, but its action in ordering a removal in accordance with the count is judicial, and may be reviewed on *certiorari*: *Herrick v. Carpenter*, 54-349.

Where the board has decided the petition for submission to be legal, and such action has been reversed upon *certiorari*, the board will be guilty of an error which may be corrected if they canvass the votes at an election upon such question and make an order for removal thereon: *Ibid.*

375. How often. 288. The vote for relocation above provided for, shall not take place in any county oftener than once in three years. [Same, § 2.]

The right to a new election at the expiration of three years does not deprive parties of the right to call in question by injunction or otherwise the validity of an election to remove: *Sweatt v. Faville*, 23-321, 327.

BONDED INDEBTEDNESS.

376. When bonds may issue. 289; 15 G. A., ch. 9; 16 G. A., ch. 125, § 1; 17 G. A., ch. 154; 18 G. A., ch. 183; 19 G. A., ch. 147; 20 G. A., ch. 80; 21 G. A., ch. 22; 22 G. A., ch. 91. In any county the outstanding indebtedness of which, on the first day of January, 1888, exceeded the sum of five thousand dollars, the board of supervisors, by a vote of two-thirds of all the members thereof, are empowered, if they deem it for the public interest, to fund the same and issue bonds of the county therefor, in sums not less than one hundred dollars, nor more than one thousand dollars each, having not more than ten years to run, and bearing a rate of interest not exceeding six per cent. per annum, payable semi-annually, which bonds shall be substantially in the following form: [13 G. A., ch. 54, § 1; 14 G. A., ch. 126.]

No. ——.

The county of —— in the state of Iowa, for value received, promises to pay —— —— or order, at the office of the treasurer of said county in —— on the first day of ——, 18—, or at any time before that date, at the pleasure of the county, the sum of —— dollars, with interest at the rate of —— per cent. per annum, payable at the office of said treasurer semi-annually, on the first days of —— and —— in each year on presentation and surrender of the interest coupons hereto attached. This bond is issued by the board of supervisors of said county under the provisions of chapter —— of the code of Iowa, and in conformity with a resolution of said board, dated —— day of ——, 18—.

In testimony whereof, the said county by its board of supervisors, has caused this bond to be signed by the chairman of the board, and attested by the auditor, with the county seal attached, this —— day of ——, 18—.

[SEAL]

—— ——,
Chairman of Board of Supervisors.

Attest:

—— ——,
Auditor ——.

And the interest coupon shall be in the following form:

$ ——. The treasurer of —— county, Iowa, will pay the holder hereof, on the —— day of ——, 18—, at his office in ——, —— dollars, for interest on

county bond No. ——, issued under provisions of chapter —— of the code of Iowa.

——— ———,
County Auditor.

The validity of negotiable bonds, issued in satisfaction of a judgment, in the hands of innocent holders for value, cannot be questioned by showing that the judgment was rendered upon a warrant issued in excess of the constitutional limitation: *Sioux City & St. P. Co. v. Osceola County*, 45–168; *Same v. Same*, 52–26.

377. Bonds issued. 290; 15 G. A., ch. 9; 16 G. A., ch. 125, § 1; 17 G. A., ch. 154; 18 G. A., ch. 183; 19 G. A., ch. 147; 20 G. A., ch. 80; 21 G. A., ch. 22; 22 G. A., ch. 91. Whenever bonds, issued under this chapter, shall be duly executed, numbered consecutively and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms for any legal indebtedness of the county, outstanding on the first of January, 1888, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. And if any portion of the said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness, by indorsing on the face thereof the amount for which they were received, the word "canceled" and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, the name and postoffice address of purchasers, and, if exchanged, what evidence of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his postoffice address; and every such transfer shall be noted on the record. The treasurer shall also report, under oath, to the board at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange; and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county. [13 G. A., ch. 54, § 2.]

378. Board liable. 16 G. A., ch. 125, § 2. Any members of a board of supervisors in any county having four thousand inhabitants and over, according to the last preceding census, who shall vote to order an issue of bonds under this act in excess of the constitutional limit, shall be held personally liable for the excess of such issue.

379. Tax to pay bonds. 291. The board of supervisors shall cause to be assessed and levied each year upon the taxable property of the county, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this chapter accruing before the next annual levy, and such proportion of the principal, that at the end of three years the sum raised from such levies shall equal at least twenty per cent. of the amount of bonds issued; at the end of five years at least forty per cent. of the amount; and at and before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the

bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate and special account thereof, which shall at all times show the exact condition of said bond fund. [13 G. A., ch. 54, § 3.]

This section does not limit the board in its levy to the amount of tax here required, and taxes levied thereunder are exempt from the limitation contained in § 1321: *Sioux City & St. P. R. Co. v. Osceola County*, 52–26.

380. Additional tax. 22 G. A., ch. 47, § 1. In all counties wherein county bonds have been issued in pursuance of a vote of the people to obtain money for the erection of any public building, and wherein the annual tax named in the proposition so submitted to the people for the purpose of paying the annual interest accruing upon such bonds, is insufficient to pay the same as it matures, the boards of supervisors are hereby authorized to levy for said purpose and no other a tax of one and one-half mills on the dollar for the year 1888 and a tax of one mill on the dollar for the years 1889, 1890 and 1891, and thereafter a tax of one-half mill on the dollar until said bonds are paid; *provided* that this act shall not prevent the levy of a greater tax than above mentioned, if any such proposition, so submitted to the people authorize such greater levy.

381. Payment. 292. Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds that he is prepared to pay the same, with all interest accrued thereon, and if not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the exact order of their issuance beginning at the lowest or first number; and the notice herein required shall be directed to the postoffice address of the owner, as shown by the record kept in the treasurer's office. [13 G. A., ch. 54, § 4.]

382. Executive council levy tax. 293. If the board of supervisors of any county which has issued bonds under the provisions of this chapter, shall fail to make the levy necessary to pay such bonds, or interest coupons at maturity, and the same shall have been presented to the county treasurer, and the payment thereof refused, the owner may file the bond, together with all unpaid coupons with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office; and the executive council shall, at their next session as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county, a sufficient rate to realize the amount of principal or interest past due, and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the special credit of such county as bond tax, and shall be paid by warrant, as the payments mature, to the holder of such registered obligations, as shown by the register in the office of the state auditor, until the same shall be fully satisfied and discharged; any balance then remaining being passed to the general account and credit of said county. [Same, § 5.]

REFUNDING BONDED INDEBTEDNESS OF COUNTIES, CITIES AND TOWNS.

383. By board or council. 17 G. A., ch. 58, § 1; 20 G. A., ch. 175; 21 G. A., ch. 14. Counties, cities and towns are hereby authorized and empowered, if by a vote of two-thirds of the board of supervisors or city or town council, as the case may be, it be deemed for the public interest, to refund the indebtedness of such corporation, evidenced by the bonds thereof now out-

standing, and to issue the coupon bonds of such corporation in sums not less than one hundred dollars nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually at a rate not exceeding six per centum per annum, which bonds shall be substantially in the following form:

No. ——.

The —— of ——, in the state of Iowa, for value received, promises to pay —— —— or —— order, at the office of the treasurer of said —— in ——, on the first day of ——, or at time before that date after the expiration of five —— years at the pleasure of the said —— ——, the sum of —— dollars, with interest at the rate of —— per cent. per annum, payable at —— semi-annually, on the first days of —— and —— in each year on presentation and surrender of the interest coupons hereto attached. This bond is issued by the —— of said —— under the provisions of chapter —— of the session laws of the seventeenth general assembly of Iowa, and in conformity with a resolution of said ——, dated —— day of ——, 18—. In testimony whereof the said —— has caused this bond to be signed by the —— [L. S.] —— and attested by the —— seal attached this —— day —— of ——, 18—. And the interest coupons shall be in the following form:

$——.

The treasurer of ——, Iowa, will pay to the holder hereof on the —— day of ——, 18—, at —— in ——, —— dollars for interest on —— bond No. ——, issued under provisions of chapter —— of the session laws of the seventeenth general assembly.

[By a legalizing act (21 G. A., ch. 21), the provisions of this section as amended by 20 G. A., ch. 175, were declared applicable to bonds outstanding April 11, 1884.]

384. Issue. 17 G. A., ch. 58, § 2. The treasurer of any such corporation is hereby authorized to sell and dispose of the bonds issued under this act at not less than their par value, and to apply the proceeds thereof to the redemption of the outstanding bonded debt; or he may exchange such bonds for outstanding bonds par for par; but the bonds hereby authorized shall be issued for no other purpose whatever; *provided*, however, such corporation may appropriate not to exceed two per centum of the bonds herein authorized to pay the expenses of preparing, issuing, advertising and disposing of the same, and may employ a financial agent therefor.

385. Levy to pay. 17 G. A., ch. 58, § 3. The board of supervisors or common council of any city or town, as the case may be, shall cause to be assessed and levied each year upon the taxable property of the county, city, or town, as the case may be, in addition to the levy authorized for other purposes a sufficient sum to pay the interest on outstanding bonds issued in conformity with the provisions of this act, accruing before the next annual levy, and such proportion of the principal that at the end of eight years the sum raised from such levies shall at least equal fifteen per cent. of the amount of bonds issued; at the end of ten years at least thirty per cent. of the amount, and at or before the date of maturity of the bonds, shall be equal to the whole amount of the principal and interest; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer of such county, city or town, shall open and keep in his book a separate and special account thereof, which shall, at all times, show the exact condition of said bond fund.

386. Notice to redeem. 17 G. A., ch. 58, § 4. Whenever the amount in the hands of the treasurer of any such county, city, or town belonging to the bond fund, after setting aside the sum required to pay the interest coupons

maturing before the next levy, is sufficient to redeem one or more bonds, he may notify the owner of such bond or bonds that he is prepared to pay the same, with all interest accrued thereon, and if said bond or bonds are not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented; *provided*, however, that nothing herein shall be construed to mean that any such bond or bonds issued in accordance with this act, shall be due or payable before the expiration of five years after its date of issue. All redemptions shall be made in the exact order of their issuance, beginning at the lowest or first number, and the notice herein required shall be directed to the postoffice address of the owner, as shown by the record kept in the treasurer's office.

387. Executive council levy tax. 17 G. A., ch. 58, § 5. If the board of supervisors of any county, or the common council of any city or town which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds or interest coupons at maturity, and the same shall have been presented to the treasurer of any such county, city, or town, and payment thereof refused, the owner may file the bond, together with all unpaid coupons, with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council shall at their next session, as a board of equalization, and at each annual equalization thereafter, add to the state tax to be levied in said county, city, or town, a sufficient rate to realize the amount of principal or interest past due and to become due prior to the next levy, and the same shall be levied and collected as a part of the state tax, and paid into the state treasury, and passed to the credit of such county, city, or town, as bond tax, and shall be paid by warrant as the payments mature to the holder of such obligation, as shown by the register in the office of the state auditor until the same shall be fully satisfied and discharged; *provided*, that nothing shall be construed to limit or postpone the right of any holder of any such bonds, to resort to any other remedy which such holder might otherwise have.

[Further, as to funding indebtedness of cities and towns, §§ 683-686, 755-762, 707.]

388. Special charter cities. 18 G. A., ch. 140, § 1. All cities and towns organized under special charters, are hereby vested with all the power and authority under such restrictions and provisions, as are "cities and towns," by and under the provisions of chapter fifty-eight of the laws of the seventeenth general assembly [§§ 383-387]; and for such purpose the words "cities and towns," wherever used in such chapter fifty-eight, shall be construed as including "cities" and "towns" when organized under special charters.

CHAPTER 2.

OF THE BOARD OF SUPERVISORS.

389. Number; election. 294. The board of supervisors in each county shall consist of three persons, except where the number may heretofore have been, or hereafter be, increased in the manner provided by section two hundred and ninety-nine of this chapter [§ 394]. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years. [9 G. A., ch. 73, § 2; 13 G. A., ch. 148, § 1.]

390. When elected. 295. At the general election in each year, there shall be at least one supervisor elected in each county, who shall not be a resident of the same township with either of the members holding over, and who

shall continue in office three years. [9 G. A., ch. 73, § 2; 13 G. A., ch. 148, § 2.]

391. Meeting of. 296. The members of the board shall meet at the county seat of their respective counties, on the first Mondays of January, April, June, September, and the first Monday after the general election in each year, and such special meetings as are provided for by law. [13 G. A., ch. 148, § 3.]

Upon the final adjournment of a meeting of the board the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting, unless they be convened in special session in the meantime in the manner prescribed in § 400: *Scott v. Union County*, 63-583.

392. Quorum. 297. A majority of the board of supervisors shall be a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board of supervisors. [Same, § 5.]

It is not necessary that everything done by the board of supervisors must be entered of record in order to be binding, but there should at least be an assent to such action given by a majority of the members of the board, while in session, before it will be binding upon the county: *Rice v. Plymouth County*, 43-136.

393. Resignation. 298. The absence of any supervisor from the county for six months in succession shall be a resignation of his office. [Same, § 6.]

394. Number. 299. The board of supervisors of any county may, and when petitioned to do so by one-fourth of the electors of said county shall, submit to the qualified voters of the county at any regular election, the question, "Shall the number of supervisors be increased to five," or "seven," as the board shall elect in submitting the question. If the majority of the votes cast shall be for the increase of the number, then, at the next ensuing election for a supervisor, the requisite additional supervisors shall be elected, whose terms of office shall be determined by lot in such a manner that one-half of the additional members shall hold their office for three years, and one-half for two years. In any county where the number of supervisors has been increased to "five" or "seven" the board of supervisors, on the petition of one-fourth of the legal voters of the county, shall submit to the qualified voters of the county at any regular election the question, "Shall the number of supervisors be reduced to five," or "three?" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be annually elected the number requisite to keep the board full. [Same, § 7.]

Where the board of supervisors is thus increased, the additional members are not to be designated on the ballots for their election in any different manner from the others: *Bradfield v. Wart*, 36-291.

SUPERVISOR DISTRICTS.

395. Board establish. 15 G. A., ch. 39, § 1; 17 G. A., ch. 68. The board of supervisors of each county may, at their regular meeting in June, A. D. 1874, or at their regular June meeting in any even-numbered year thereafter, divide their respective counties, by townships, into a number of supervisor districts corresponding to the number of supervisors in their respective counties, or at such regular meeting they may abolish supervisors' districts and provide for electing supervisors for the county at large.

396. How constituted. 15 G. A., ch. 39, § 2. Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district.

397. Election of members. 15 G. A., ch. 39, § 3. In case such division, or any subsequent division, shall be found to leave any district or districts without a member of such board of supervisors, then at the next ensuing general election a supervisor shall be elected by and from such district having no member of such board; and, if there be two such districts or more, then the new member or members of said board shall be elected by and from the district or districts having the greater population according to the last state census, and so on till each of such districts shall have one member of such board.

398. Redistricting. 15 G. A., ch. 39, § 4. Any county may be redistricted, as provided by the preceding sections of this act, once in each and every two years, and not oftener, and nothing herein contained shall be construed or have the effect to lengthen or diminish the term of office of any member of such board.

ORGANIZATION — POWERS.

399. Organization. 300. The board of supervisors, at their first meeting in every year, shall organize by choosing one of their number as chairman, who shall preside at all the meetings of the board during the year. Every chairman of the board of supervisors shall have power to administer an oath to any person concerning any matter submitted to the board or connected with their powers. [R., § 308.]

400. Special meetings. 301. Special meetings of the board of supervisors shall be held only when requested by a majority of the board, which request shall be in writing, addressed to the county auditor, and shall specify the object for which such special meeting is desired. The auditor shall thereupon fix a day for such meeting, not later than ten days from the day of the filing of the petition with him, and shall immediately give notice in writing to each of the supervisors personally, or by leaving a copy thereof at his residence, at least six days before the day set for such meeting. The notice shall state the time and place where the meeting will be held and the object of it, as stated in the petition; and at such special meeting no business other than that so designated in the petition and notice shall be considered or transacted. The auditor shall also give public notice of the meeting by publication in not exceeding two newspapers published in the county, or, if there be none, by causing notice of the same to be posted on the front door of the court-house of the county, and in two other public places therein, one week before the time set therefor. [R., § 309.]

Any business transacted at a special meeting of the board will be presumed to have been lawful: *Allen v. Cerro Gordo County*, 34-54.

Upon the final adjournment of a meeting of the board the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting, unless they be convened in special session in the manner prescribed in this section: *Scott v. Union County*, 63-583.

401. Failure of duty. 302. If any supervisor shall neglect or refuse to perform any of the duties which are, or shall be, required of him by law as a member of the board of supervisors, without just cause therefor, he shall, for each offense, forfeit one hundred dollars. [R., § 311.]

402. Powers. 303; 16 G. A., ch. 80; 18 G. A., ch. 46. The board of supervisors at any regular meeting shall have the following powers, to wit:

1. To appoint one of their number chairman, and also a clerk in the absence of the regular officers;

2. To adjourn from time to time, as occasion may require;

3. To make such orders concerning the corporate property of the county as they may deem expedient;

4. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all just claims against the county unless otherwise provided for by law;

5. To build and keep in repair the necessary buildings for the use of the county and of the courts;

6. To cause the county buildings to be insured in the name of the county, or otherwise, for the benefit of the county, as they shall deem expedient, and in case there are no county buildings, to provide suitable rooms for county purposes;

7. To set off, organize, and change the boundaries of townships in their respective counties, designate and give names thereto and define the place of holding the first election;

8. To grant licenses for keeping ferries in their respective counties as provided by law;

9. To purchase for the use of the county, any real estate necessary for the erection of buildings for county purposes, to remove or designate a new site for any county buildings required to be at the county seat, when such removal shall not exceed the limits of the village or city at which the county seat is located;

10. To require any county officer to make a report, under oath, to them on any subject connected with the duties of his office, and to require any such officer to give such bonds, or additional bonds, as shall be reasonable or necessary for the faithful performance of their several duties; and any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected;

11. To represent their respective counties, and to have the care and management of the property and business of the county in all cases where no other provision shall be made;

12. To manage and control the school fund of their respective counties as shall be provided by law;

13. To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter, or discontinue any highway extending through their own and one or more other counties, subject to the ratification of the board;

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

15. To authorize the taking of a vote of the people for the relocation of the county seat as provided by law;

16. To alter, vacate, or discontinue any state or territorial highway within their respective counties;

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

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

19. To determine what bounties, in addition to those already provided by law, if any, shall be offered and paid by their county on the scalps of such wild animals taken and killed within their county as they may deem it expedient to exterminate. But no such bounty shall exceed five dollars;

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

21. To have and exercise all the powers in relation to the poor given by law to the county authorities;

22. To make such rules and regulations, not inconsistent with law, as they may deem necessary for the government of their body, the transaction of business, and the preservation of order;

23. The board of supervisors shall constitute the board of county canvassers;

24. It shall not be competent for said board of supervisors to order the erection of a court-house, jail, poor-house, or other building, or bridge, when the probable cost will exceed five thousand dollars, nor the purchase of real estate, for county purposes, exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one is published in the county, and if none be published therein, then by written notice posted in a public place in each township in the county. *Provided*, that the board of supervisors of any county having a population of more than ten thousand, may appropriate, for the construction of any one bridge, which is or may hereafter become a county charge, within the limits of such county, or may appropriate towards the construction of any bridge across any unnavigable river which is the dividing line between any two counties in this state, and between one county in this state, and another state, such sum as may be necessary, not exceeding the sum of forty dollars a lineal foot for superstructure, but in no case shall they appropriate for said purpose, including superstructure and approaches, a sum exceeding fifteen thousand dollars. *Provided*, however, that in any county having a population exceeding fifteen thousand, said board may appropriate as aforesaid, not to exceed twenty-five thousand dollars. *Provided*, that no county shall expend a sum exceeding fifteen thousand dollars in aid of the construction of a bridge across a stream which is the dividing line between two counties. [R., § 312; 10 G. A., ch. 60; 11 G. A., ch. 87, § 2; 13 G. A., ch. 38; 14 G. A., ch. 1, § 1; ch. 53; ch. 130, § 1.]

In general: By the enactment of the statutory provisions substituting the board of supervisors for the county judge it was the intention of the legislature to confer upon such board all the powers and duties before that time devolving upon the county judge so far as they related to the management of the affairs of the county and the government thereof: *Yant v. Brooks*, 19–87.

Par. 3. The control and management of county property is given to the board. See ¶ 11 and notes.

Par. 4. Claims: A claim cannot be a "just claim" against the county to be allowed under this provision unless the law somewhere either requires or authorizes its payment: *Foster v. Clinton County*, 51–541.

The board has a discretion as to the allowance of claims against the county unless otherwise provided: *Bean v. Board of Supervisors*, 51–53.

The acts of the county judge in allowing certain claims against the county, and issuing warrants thereon, *held* to be ministerial, and not judicial: *Campbell v. Polk County*, 3–467.

Where no vote was taken or record made as to the allowance of a claim by the board, but it was seen and inspected at a meeting of the board by all the members, and marked allowed by one of them, with the knowledge and consent of all, this being the rule in the ordinary course of business, *held*, that it sufficiently appeared that the claim was allowed: *Griggs v. Kimball*, 42–512.

The allowance of a claim by the board, and the issuance of a warrant therefor, does not constitute an adjudication such as to preclude inquiry as to its correctness, and a warrant thus issued may be impeached for illegality: *Hospers v. Wyatt*, 63–264.

An appeal may be taken from an order of the board of supervisors denying a claim for salary by a county officer: *Garber v. Clayton County*, 19–29.

But a creditor is not obliged to appeal from the action of the board disallowing his claim, but may, instead, bring action against the county: *Armstrong v. Tama County*, 34–309; *Curtis v. Cass County*, 49–421.

When a claim presented to the board is not allowed the claimant may bring his action, and cannot be defeated therein because of the failure of the board to take action or make a record thereof: *White v. Polk County*, 17–413.

It being provided by statute that the district court of Lee county might be held in the city of Keokuk, provided the authorities of the city should furnish, free of charge, the necessary rooms for the use of the county in holding court, *held*, that the county was not liable for the rent of rooms used for that purpose, under an arrangement made by the sheriff: *Lee County v. Deming*, 3 G. Gr., 101.

The expense of providing a polling place at the general election is not charged to the county: *Turner v. Woodbury County*, 57–440.

The expenses of township elections to vote aid to railroads are not chargeable to the county: *McBride v. Hardin County*, 58–219.

No action may be brought against the county on an unliquidated claim until the same has been presented to the board and payment demanded: See § 3815 and notes.

Par. 5. Public buildings: The board may order the purchase of real estate, not exceeding $2,000 in value, and the erection

thereon of a public building not costing to exceed $5,000, without submitting the question to a vote: *Merchant v. Tama County*, 32–200.

Under the Code of '51, *held*, that a county judge (possessing substantially the authority of the present board of supervisors) had power to contract for the erection of a county court-house or other public building for the use of the county, but could not be compelled by *mandamus* to submit to the voters of the county the question whether such a contract should be entered into: *State ex rel. v. Napier*, 7–425.

A county is not liable in damages for injuries received by reason of negligence in the construction of a court-house. The principle holding a county liable for the defective construction of a county bridge is not to be extended further or made to apply to public buildings. In such cases there is a difference between the liability of *quasi*-corporations, such as counties, and that of municipal corporations: *Kincaid v. Hardin County*, 53–430.

Therefore, *held*, that a county was not liable for damages caused by the overflow of water from a county ditch, such overflow being due to an accumulation of sediment therein: *Green v. Harrison County*, 61–311; *Nutt v. Mills County*, 61–754.

The county cannot be made liable upon implied agreement beyond the limit of the contract entered into by the board for the erection of a public building: *Reichard v. Warren County*, 31–381.

Par. 11. Power to contract: The power being given to a county, by § 366, to hold property, and by this section to the board of supervisors to control it, *held*, that the power to make all contracts necessary to the protection and perfection of the title to such property rests in such board: *Allen v. Cerro Gordo County*, 34–54: *Page County v. American Emigrant Co.*, 41–115.

Therefore, *held*, that a contract by the county to give to an agent a portion of its interest in the swamp lands in compensation for procuring the allowance of the same by the government was valid: *Ibid.*

Compromising claims: A county has power to make a valid compromise of a disputed claim: *Grimes v. Hamilton County*, 37–290; *Mills County v. Burlington & M. R. R. Co.*, 47–66: *Collins v. Welch*, 58–72.

The board of supervisors have authority to accept from an officer who is in default a promissory note in settlement of the claims of the county against him; and such note will be based upon such consideration that it can be enforced: *Sac County v. Hobbs*, 72–69.

Under Code of '51, *held*, that settlement with the county judge in a matter properly going to him for settlement was binding upon the county, whether he had required from the person making settlement the report contemplated by law or not: *Poweshiek County v. Stanley*, 9–511.

Defending claims: If the board of supervisors neglect or refuse to defend a suit against the county a citizen tax-payer may intervene and do so: *Greeley v. Lyon County*, 40–72.

Offering reward: The board may offer a reward for the recovery of funds stolen from the county, but not for the arrest of the criminal: *Hawk v. Marion County*, 48–472.

Where a reward was offered by a county for the recovery of money, *held*, that a person giving information leading to the recovery of a portion of the money was entitled to a *pro rata* share of the reward: *Ibid.*

Where a person in another state acts upon the promise made by a board of supervisors in Iowa to pay a reward for the arrest and conviction of persons who have robbed the county treasury, he is bound to know the fact that the board has no power to offer such reward. In such case the members of the board will not be individually liable: *Huthsing v. Bosquet*, 3 McCrary, 569.

Peace officers acting under process in arresting a criminal are not entitled to a reward offered for such arrest unless the terms of the reward offered clearly include them: *Means v. Hendershott*, 24–78.

Employment of agents: The board has authority to employ a special agent or attorney to assist in the collection of taxes not collectible by the county treasurer: *Wilhelm v. Cedar County*, 50–254.

As incident to the care and management of the county property, the board may, in a proper case, employ an agent to aid them; and therefore, *held*, an agent employed by the county to find a purchaser for indemnity swamp lands might maintain action for the value of his services: *Call v. Hamilton County*, 62–448.

Employment of counsel: The board may, whenever they deem it expedient, employ counsel to prosecute or defend actions against the county, or to perform other services, and no form of vote by the board or entry of the fact of such employment of record is necessary to the validity of the contract. It may be proved by parol: *Tatlock v. Louisa County*, 46–138; *Jordan v. Osceola County*, 59–388.

The board may employ counsel, in addition to the district attorney, to prosecute criminal cases: *Hopkins v. Clayton County*, 32–15.

The county judge, when that office existed, had the power, and it was his duty, to secure the services of an attorney whenever he thought such services were needed, and he might pay a reasonable compensation therefor out of the county treasury: *Chickasaw County v. Bailey*, 13–435.

Attorney assisting in prosecution: The district attorney cannot render the county liable for services of an additional attorney employed by him to aid in criminal prosecutions: *Tatlock v. Louisa County*, 46–138; *Foster v. Clinton County*, 51–541.

A county can be made liable to pay for additional counsel only as the board of supervisors has determined such counsel to be necessary. The court cannot, at the request of the district attorney, appoint assistant counsel and thereby bind the county to pay therefor, at least unless on account of the absence of the district attorney, and in order to prevent the failure of justice: *Seaton v. Polk County*, 59–626.

In the absence of the district attorney the court may appoint a special prosecutor, but as to whether in such case the county is rendered liable for his compensation the court were

equally divided: *White v. Polk County*, 17-413.

Recovery against county for services rendered on appointment of court to assist in the prosecution in a particular case, *held* proper: *Curtis v. Cass County*, 49-421.

It may be that in proper cases the court may appoint and require a member of the bar to appear and represent the state in a *habeas corpus* proceeding, although no compensation therefor is provided: *Miller v. Buena Vista County*, 68-711.

A justice of the peace has no power to appoint an attorney to prosecute a criminal action in behalf of the state, and no compensation can be recovered by reason of such an appointment: *Davis v. Linn County*, 24-508. See, further, notes to § 268.

Liability for contracts made by officers or agents: A member of the board of supervisors has no power to bind the county by acts, contracts or declarations in the absence of authority of the board authorizing him to do so. He stands on the same footing as any other agent: *Rice v. Plymouth County*, 43-136.

The chairman of the board of supervisors has no more authority to make contracts binding on the county than has any other member; but the chairman or any other member may be empowered by consent, without any formal action, to make contracts for proper purposes as agent for the board: *Tatlock v. Louisa County*, 46-138.

The board having the power to do an act may properly direct the performance of it by a committee: *Hopkins v. Clayton County*, 32-15.

Acceptance by the board of supervisors of the report of a committee appointed to settle with an agent will bind the board to the terms of the settlement, in the absence of fraud or mistake: *Ringgold County v. Allen*, 42-697.

Ratification: While ratification of an unauthorized contract may be inferred from acquiescence therein with knowledge of all the material facts, yet, *held*, that where such ratification was claimed on account of payments being reported as made thereunder by the treasurer, it must appear not only that he reported the contract in full, but also that the board examined his report in this respect: *Wilhelm v. Cedar County*, 50-254.

Where the board, when not in session, offered a reward for the recovery of money stolen from the county, *held*, that a ratification thereof made afterward while in session, even after the acts had been done on which the reward was claimed, would render the county liable: *Hauck v. Marion County*, 48-472.

Certain action of the board in appointing a committee to examine a bridge built under contract, etc., *held* not to amount to an acceptance of the work or ratification of the change. A conditional acceptance, even when not authorized, will not necessarily amount to a full acceptance: *Mallory v. Montgomery County*, 48-681.

Implied contract: The county cannot be made liable upon implied agreement beyond the limit of the contract entered into by the board for the erection of a public building: *Reichard v. Warren County*, 31-381.

Estoppel: Where the county denies that its right and title to land has passed under a claimed conveyance thereof, it is estopped from collecting taxes on such land for the period during which it claims that it had not parted with the title: *Iowa R. Land Co. v. Story County*, 36-48.

Where a county accepts payment of taxes from a person claiming to own lands, and with full knowledge of such claim, it is estopped from afterwards asserting title in itself to such lands: *Adams County v. Burlington & M. R. R. Co.*, 39-507; *Audubon County v. American Emigrant Co.*, 40-460. (On a subsequent appeal in the leading case the doctrine there stated was doubted by some members of the court: *Adams County v. Burlington & M. R. R. Co.*, 55-94.)

The county is estopped from asserting title to lands which it has assessed and sold for taxes as the property of another: *Austin v. Bremer County*, 44-155.

Where a county has taxed property in the name of a person as owner, it cannot afterwards, when he brings action to restrain the collection of the tax, deny that he is the owner of the land: *Brandirff v. Harrison County*, 50-164.

A mere unauthorized assessment of lands by the county will not estop it from afterwards asserting title, the adverse claimant not having parted with his money or changed his position in reliance upon such act: *Page County v. Burlington & M. R. R. Co.*, 40-520.

Unauthorized acts of county officers in levying taxes on lands which are at the time claimed by the county will not constitute an estoppel as against the county: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 46-226.

A county will not be estopped or bound by the acts of its officers which are in violation of law, and void: *Howard County v. Bullis*, 49-519; *Gill v. Appanoose County*, 68-20.

Representations of authorized agents of a county, made in connection with a sale of its lands, that there are no taxes assessed against them, will estop the county from collecting taxes for preceding years: *Calhoun County v. American Emigrant Co.*, 93 U. S., 124.

An action by a county to set aside a conveyance will not render taxes levied on the property after such conveyance void: *American Emigrant Co. v. Iowa R. Land Co.*, 52-323.

In a particular case, *held*, that it was not sufficiently shown that taxation of certain lands by a county was made by such inadvertence or mistake that it should not be estopped from asserting title thereto: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

The fact that land has been taxed to a purchaser, who has obtained title thereto from the county by fraud, will not estop the county from asserting its title: *Bixby v. Adams County*, 49-507.

Assignment of notes to: Under some circumstances a county may take an assignment of notes, and in an action by the county against the maker of a note it will be presumed that the circumstances were such as to authorize the assignment to the county until the contrary is shown: *Marshall County v. Hanna*, 57-372.

Trust property: Where public lands were granted to counties, the proceeds thereof to be used in erecting county buildings, *held*, that such proceeds were held in trust by the counties, and in an action by the county to recover a portion of such fund a general indebtedness due defendant from the county could not be set off: *Davis v. Muscatine County*, Mor., 161.

Construction of ditches: Where the board of supervisors, in pursuance of a proper application, have had a ditch constructed, and have paid the contractor the amount of his claim therefor, a person whose land is taxed for its construction cannot restrain the collection of such taxes. His objection ought to be made sooner: *Noyes v. Harrison County*, 57-312.

While it has been held in this state, against the decided weight of authority in other states, that counties are liable for damages caused by reason of the negligent construction and maintenance of county bridges, the court is not disposed to extend the rule which has been held applicable to bridges so as to make the county liable for damages resulting from the negligent construction of a county ditch, or from negligence in allowing the same to become obstructed: *Green v. Harrison County*, 61-311; *Nutt v. Mills County*, 61-754.

Construction of levees: In a proceeding before the board of supervisors to authorize the construction of a levee, and the assessment of taxes therefor upon adjacent lands, it is essential that a petition signed by residents interested in the improvement shall be presented. Unless this requirement is complied with the supervisors can obtain no jurisdiction: *Richman v. Board of Supervisors*, 70-627.

Construction of roads: The county has authority to aid in the construction of a road, and warrants issued for that purpose are valid: *Long v. Boone County*, 32-181.

Par. 12. School fund: The board of supervisors cannot take advantage of the exemptions from tax sales accorded to school-fund mortgages, and buy in land sold for taxes upon which such a mortgage exists, for the express purpose of defeating a prior mortgage. The purchase of such tax title not being necessary for the protection of the fund, they have no power to make it: *Miller v. Gregg*, 26-75.

Par. 18. Bridges: The board of supervisors have authority to contract for the erection of bridges within the limits of cities in the county: *Oskaloosa Steam-Engine Works v. Pottawattamie County*, 72-134.

Liability for defects: The county being expressly empowered to make and repair bridges and levy a bridge tax for such purposes (§ 1270), it is its duty, and not that of the road supervisors, to build and keep in repair bridges of such size as to require an extraordinary expenditure of money to construct them, or the repairs upon which involve a considerable expense; and the county is liable for the damages resulting from negligence in building or failing to repair: *Wilson v. Jefferson County*, 13-181; *Brown v. Jefferson County*, 16-339; *Soper v. Henry County*, 26-264; *Kendall v. Lucas County*, 26-395; *Davis v. Allamakee County*, 40-217; *Moreland v. Mitchell County*, 40-394; *Chandler v. Fremont County*, 42-58; *Huston v. Iowa County*, 43-456; *Krause v. Davis County*, 44-141; *Cooper v. Mills County*, 69-350.

The general language of this paragraph is to be construed in connection with the general provisions of the statute regulating the making and repairing of highways (§ 1464 *et seq.*): *Soper v. Henry County*, 26-264.

What deemed county bridges: The county is not responsible for bridges which it is contemplated shall be built and kept in repair by the road district (§ 1464), and for damages resulting from the unsafe condition of which the road supervisor is made personally liable, after notice in writing (§ 1504): *Soper v. Henry County*, 26-264; *Chandler v. Fremont County*, 42-58; *Taylor v. Davis County*, 40-295.

But even though it may be the obligation of the road supervisors to make small repairs on county bridges for the purpose of keeping them in order, the county is not thereby relieved from its liability as to such bridges: *Roby v. Appanoose County*, 63-113.

Where a bridge, not originally built by the county, which was twelve feet in span, and could be built for seventy-five dollars, was defective for want of a railing which would have cost five dollars, and the road district had ample means for repairing or rebuilding if necessary, *held*, that such bridge was not a county bridge, and the county was not liable for injuries received from defects therein: *Chandler v. Fremont County*, 42-58.

Held, that the county was not liable for damages resulting from the falling of a bridge, where it did not appear that it had ever assumed control thereof, or made appropriation for building it or keeping it in repair, and that the records of the board showing the appropriation for rebuilding, after the accident, were not admissible to establish such liability: *Titler v. Iowa County*, 48-90.

The fact that the county is authorized to change the location of a highway, and that it is required that the new highway shall be put into as good condition as the old one, will not render it liable for defects in a small bridge upon such new highway, although the committee of the board of supervisors authorized to examine such new highway has accepted it: *Taylor v. Davis County*, 40-295.

Bridges properly designated county bridges, and for the construction or repair of which the county is liable, are bridges of the larger class requiring an extraordinary expenditure of money: *Ibid.*

That citizens or another corporation has contributed to the construction of the bridge does not relieve the county from liability for negligence in constructing it or keeping it in repair: *Moreland v. Mitchell County*, 40-394, and see *Albee v. Floyd County*, 46-177.

The board has power to construct, and levy taxes for, a free bridge over a stream, although within the limits of an incorporated city, when it will accommodate the county and traveling public at large: *Bell v. Foutch*, 21-119; *Barrett v. Brooks*, 21-144.

The board may also aid in the construction of free bridges, erected with the sanction of the proper authorities, for public use upon

public lines of travel within as well as without incorporated towns or cities: *Ibid.*

While the county is liable for injuries resulting, through its fault, from defective bridges erected by it upon a public highway within a town which is not made a separate road district, yet when the town becomes incorporated as a city of the second class, and its organization as such is perfected, the city becomes bound to keep its bridges in repair, and is, in the absence of contract, alone liable for their safe condition: *McCullom v. Black Hawk County*, 21–409.

The provision found in § 726 that public bridges exceeding forty feet in length over any stream crossing a state or county highway shall be constructed and kept in repair by the county is applicable to all bridges and not merely to those within city limits. But this provision does not affect the question whether bridges less than forty feet in length are to be deemed county bridges, and that fact depends upon their necessity to the public, their character and cost, and the financial ability of the road district in which they are located to construct and maintain them: *Casey v. Tama County*, 75–655.

Where, by the provisions of § 403, relating to bridges near a county line, one county constructs a bridge along the line of a county road within the limits of another county, it becomes liable for injury resulting from negligence in constructing and maintaining such bridge: *Ibid.*

Extent of liability: The county is to be held to the exercise of such care with reference to its bridges as reasonably prudent and careful men would use in the conduct and management of their own affairs of like importance: *Cooper v. Mills County*, 69–350.

The county is liable not only for the defective construction of a bridge, but for negligently and carelessly adopting an insufficient plan therefor: *Ferguson v. Davis County*, 57–601.

Where it appeared that the plan, in accordance with which a contract for the erection of a bridge was made and carried out, was defective, and that, although prepared by the contractor, it was so prepared at the direction of the county and against his advice as to particular features, *held*, that such contractor was not liable for defects of the bridge constructed by him due to a defective plan: *Holland v. Union County*, 68–56.

The approaches to a county bridge constitute a part of the bridge, and the county is liable for defects in the construction of such approaches: *Moreland v. Mitchell County*, 40–394; *Albee v. Floyd County*, 46–177.

The county may be liable for injuries received by a person who, in the night-time, goes upon a newly-constructed bridge and suffers injury by reason of the embankments not being completed or properly guarded: *Van Winter v. Henry County*, 61–684.

It is error to instruct the jury that as a matter of law the embankment constituting the approach to the bridge is to be regarded as a part of it. That is a question for the jury: *Nims v. Boone County*, 66–272; *Nims v. Boone County*, 68–642.

Where a span of a bridge over a bayou was separated from the main bridge over a stream on the same line of road by some twenty feet of embankment, *held*, that whether such span was a part of the main bridge was a question for the jury: *Casey v. Tama County*, 75–655.

In an action against a county for damages resulting from the falling of one span of a bridge, *held*, that the jury should not have been limited to the consideration of evidence relating to the condition of that portion of the bridge alone: *Hughes v. Muscatine County*, 44–672.

A county may be liable for injuries received from the falling of a bridge, which, though properly constructed, has become unsafe by decay of the timbers, if it has failed to exercise care and diligence in inspecting and repairing the same, whether the need of such repairs is open and obvious or not: *Huff v. Poweshiek County*, 60–529.

The county will be liable for negligence in failing to inspect and repair where a bridge, though properly constructed, has been built so long that in the exercise of ordinary care and diligence the board of supervisors ought to have known that it would in such time become dangerous: *Ferguson v. Davis County*, 57–601.

The county may also become liable for failure of its authorities, upon being notified of the dangerous condition of the bridge, to have it examined and repaired if defective, and its use in the meantime prevented: *Ibid.*

But where it appeared that an examination had been made by a competent person, who reported that the bridge would run about four years, *held*, that the fact that it had already stood for a period greater than the average life of the timber of which it was composed would not render the county liable unless some member of the board knew or was informed of its unsafe condition, or, in the exercise of reasonable care, should have known such condition: *Ibid.*

Where it appeared that the county authorities had placed a written notice of the defective condition of a bridge somewhere thereon, and put a pole across one end of it, but there was nothing to show that such notice or pole was there when plaintiff received his injury, *held* not error to refuse an instruction assuming that defendant would not be liable if notice was given and the bridge obstructed, and such notice or obstruction were subsequently removed by some unauthorized person: *Brown v. Jefferson County*, 16–339.

Contributory negligence: In an action against a county to recover damages for injuries received by reason of a defective bridge, defendant may show that plaintiff had knowledge of the unsafe condition of the bridge and might have reached his destination by another road equally convenient, over a good bridge: *Walker v. Decatur County*, 67–307.

It will not, however, as a matter of law, constitute contributory negligence that plaintiff, knowing the bridge in question was unsafe, did not take another road which was safe and convenient, the bridge at which the accident occurred not having been barricaded but left open for public travel: *Ibid.*

Par. 22: The rules and regulations here contemplated are for their own government

and not for the government of other bodies or boards: *Hunter v. Jasper County*, 40–568.

Par. 24: The members of a board of supervisors violating these provisions by voting to erect a building or bridge, the probable cost of which exceeds the amount here specified, without having submitted the question to vote, are guilty of a misdemeanor under § 5274: *State v. Conlee*, 25–237.

Where the erection of a building, the probable cost of which exceeds $5,000, has been formally authorized, the board are limited to the amount authorized by such vote, and an indebtedness contracted beyond that amount is void: *Reichard v. Warren County*, 31–381.

The county cannot be held on an implied contract for a *quantum meruit* where an express contract would have been unauthorized. The acceptance and occupation of a building, erected at greater expense than that authorized, will not render the county liable for its cost beyond the amount authorized: *Ibid.*

The board may order the purchase of real estate, not exceeding $2,000 in value, and the erection thereon of a public building not costing to exceed $5,000, without submitting the question to a vote: *Merchant v. Tama County*, 32–200.

In the submission of a proposition for the outlay of money, two distinct objects, each calling for a certain specified amount, cannot be included in one proposition: *Gray v. Mount*, 45–591.

Before the amendment made by 18th G. A., ch. 46, *held*, that the submission here authorized could only be made at a general election: *Ibid.*; *Yant v. Brooks*, 19–87.

Where a proposition was made to a county to sell property to it for a court-house, and the proposition was submitted to the voters and acquiesced in by them, *held*, that such action did not constitute an acceptance, but only authorized an acceptance by the board of supervisors, and in the absence of such action on the part of the board the contract was not binding on the county: *Starr v. Board of Supervisors*, 22–491.

And *held* that such a proposition must be accompanied, when submitted to vote, by a provision to lay a tax for the payment thereof, as provided in § 432. *Ibid.*

The proceeds of swamp lands may be appropriated to the building of public bridges when duly authorized by the vote of the people: *Barrett v. Brooks*, 21–144.

The submission of such a question to vote need not include the submission of the contract under which the bridge is to be built: *Ibid.*

That proceeds of swamp lands are appropriated by a vote of the electors to the construction of a bridge does not restrict the board from appropriating a further sum from the bridge fund: *Bell v. Foutch*, 21–119.

Under § 407, authorizing the voting of taxes by a township to aid in the construction of county bridges, the electors of the township can only vote such taxes when the cost is at least $10,000, which estimate or cost must be fixed by the board of supervisors: *Ritz v. Tannehill*, 69–476.

Par. 19. Bounties for scalps of wild animals: To entitle a party to recover the additional bounty herein contemplated, the animals must be taken and killed within the county: *Murray v. Jones County*, 72–286.

403. Bridges on county line roads. 17 G. A., ch. 40, § 1. Wherever a county line road intersects a stream of sufficient width to require a county bridge, and the point of intersection does not afford a suitable site for the construction of such bridge, and there is a good site for the erection of a bridge wholly within one or the other of said counties, at a reasonable distance from the county line, the boards of supervisors of the respective counties to be benefited by said bridge may make the necessary appropriations for the construction and maintenance of such bridge, the same as they might do if said bridge was located on county line.

Where, under the provisions of this statute, one county erects a bridge along a county road but within the limits of another county, it may be held liable for injuries resulting from negligence in constructing and repairing such bridge: *Casey v. Tama County*, 75–655.

404. Establishing highway to avoid bridging. 21 G. A., ch. 85, § 1. The board of supervisors shall have the power to change and establish highways along streams where they can avoid building a bridge or bridges over said stream, and said highway shall be placed in good traveling condition by said county board of supervisors; and all cost accruing in the establishment of said road shall be paid out of the county bridge fund.

405. Commission to assess damages. 21 G. A., ch. 85, § 2. The board of supervisors shall have power wherever such highway is necessary to be established, at their regular session, to appoint three disinterested persons to assess the damages of the same.

406. Appeal. 21 G. A., ch. 85, § 3. In all cases the party or parties aggrieved by said assessment may appeal to the circuit [district] court, but the party or parties appealing must give sufficient bond for costs, to be approved by the clerk of said court.

407. Cities, towns or townships may aid county bridges. 19 G. A., ch. 63, § 1. It shall be lawful for any township, incorporated town, or city, including cities acting under special charters, to aid in the construction of county bridges when the estimated cost of the same is not less than ten thousand dollars, as fixed by the board of supervisors, as hereinafter provided.

See *Ritz v. Tannehill*, 69-476.

408. Petition; notice, election, rate, levy. 19 G. A., ch. 63, § 2. Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or trustees of any township, signed by a majority of the resident property tax-payers of such township, incorporated town, or city, asking that the question of aiding the construction of a county bridge, to be situated in whole or in part within such township, incorporated town, or city, or within the township in which such incorporated town or city is situated, be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city, or trustees of such township, to immediately give notice of a special election, by publication in some newspaper published in the county, if any be published therein, and also by posting such notice in five public places in such township, incorporated town or city, at least ten days before such election, which notice shall specify the time and place of holding said election, the proposed location of the bridge to be aided, the rate per centum of tax to be levied, and whether the entire per centum voted is to be collected in one year, or one-half collected the first year, and all the conditions in the petition. At such election the question of taxation shall be submitted, and if a majority of the votes polled be for taxation, then the recorder of the incorporated town, the clerk of the city or township, or clerk of said election shall forthwith certify to the county auditor the rate per centum of tax then voted by said township, city, or incorporated town, the year or years during which the same is to be collected, and the time and terms upon which the same, when collected, is to be paid as hereinafter provided under the stipulation contained in the notice under which such election was held, which said certificate shall be recorded in the office of the recorder of deeds of the county, and filed in the office of the county auditor. When such certificate shall have been filed and recorded as aforesaid, the board of supervisors of the county shall, at the time of levying the ordinary taxes next following, levy the tax certified as above, under the provisions of this act, and cause the same to be placed on the tax list of the proper township, incorporated town, or city, indicating in their order, when and in what proportion the same is to be collected; and these facts shall be noted upon the tax list by the auditor. Said tax shall be collected at the time or times specified in said order in the same manner, and be subject to the same penalties for non-payment after the same becomes due and delinquent, as other taxes.

409. Limit of tax. 19 G. A., ch. 63, § 3. The aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town, or city, shall not exceed five per centum of the assessed value of the property therein, respectively, nor shall it exceed one-half the estimated cost of the bridge sought to be aided as fixed by the board of supervisors.

410. Tax paid out. 19 G. A., ch. 63, § 4. The moneys collected under the provisions of this act shall be paid out by the county treasurer, on the order of the board of supervisors of the county, and such order shall specify that it is on the special bridge fund belonging to the township, incorporated town, or city from which such tax has been collected, but in no case shall the said board make such order until the conditions specified in the petition and notice have been complied with.

411. Conditions. 19 G. A., ch. 63, § 5. The petitioners may provide, by stipulations contained in the petition for the tax, the conditions upon

which the board of supervisors may order the money, when collected, paid out.

412. Expenses of election. 19 G. A., ch. 63, § 6. The expense of giving notice and holding the election provided for herein, shall be audited and paid out of the county fund like other claims against the county.

413. Surplus bridge fund. 18 G. A., ch. 88, § 1. Whenever any county in this state is free from debt, and has a surplus in its bridge fund, after providing for the necessary repairs of bridges in said county, then the board of supervisors of such county may, out of such surplus, make improvements on the highways upon the petition of one-third of the resident freeholders of any township in said county, but in no case shall they be authorized to run the county in debt for such improvements of the highways, and whenever they shall make such improvements they shall let the work by contract to the lowest responsible bidder, after having advertised for proposals in some newspaper printed in the county for not less than fourteen days previous to the letting of said contract.

414. Transfer of bridge fund to city. 18 G. A., ch. 45, § 1. In each county in this state containing a city of the first class within the corporate limits of which there are any bridge or bridges, exceeding three hundred feet in length, constructed by such city, and for the cost of constructing which such city shall be indebted in a sum of not less than one hundred thousand dollars, the board of supervisors hereby is required to annually set apart and pay to such city out of the bridge fund of such county, the whole amount of bridge tax collected on the taxable property within the limits of such city for that year, until such indebtedness shall be fully paid. Thereupon such bridge or bridges [shall] become free, and such city hereby is required to apply the money so set apart and paid to it, and the tolls meanwhile collected on such bridge or bridges, after first paying the necessary expense of maintaining the same, on such indebtedness, and it shall be unlawful to use or apply the same or any part thereof for or to any other purpose, except that so much thereof as may be necessary for that purpose may be used to repair any bridge or bridges in such city, the repair of which is required for public safety.

415. Rebuilding public buildings with insurance money. 19 G. A., ch. 54, § 1. In any county in this state, where the public buildings thereof, or any of them, have been or may hereafter be destroyed by fire, wind, or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may appropriate, in addition to the amount now authorized by law, the amount received by way of insurance on such building or buildings so destroyed.

416. Tax for relief of soldiers and sailors and families. 22 G. A., ch. 105, § 1. The board of supervisors of the several counties of this state are hereby authorized to levy, in addition to the taxes now levied by law, a tax not exceeding three-tenths of one mill upon the taxable property of their respective counties, to be levied and collected as now provided by law for the assessment and collection of taxes, for the purpose of creating a fund for the relief and for funeral expenses of honorably discharged indigent Union soldiers, sailors and marines, and the indigent wives, widows and minor children not over fourteen years of age in the case of boys and not over sixteen years of age in the case of girls, of such indigent or deceased Union soldiers, sailors or marines, having a legal residence in said county to be disbursed as hereinafter provided.

417. Soldiers' relief commission. 22 G. A., ch. 105, § 2. The board of supervisors in each county of this state shall on or before the first Monday of September, 1888, appoint three persons, who are residents of such county, at

least two of whom shall be honorably discharged Union soldiers, one to serve three years, one to serve two years, one to serve one year from date of appointment, and each year thereafter one person to serve for three years, such persons so appointed, when organized by the selection of one of their number as chairman, and one as secretary, shall be designated and known as "The Soldiers' Relief Commission." The members of said commission shall qualify by taking the usual oath of office and shall each give bonds in the sum of five hundred dollars for the faithful performance of their duties. In the event of a vacancy in said commission occurring from any cause, the board of supervisors shall fill the vacancy for the unexpired term.

418. Meeting and duties of; compensation. 22 G. A., ch. 105, § 3. The soldiers' relief commission shall meet at the county auditor's office on the first Monday in September of each year, and at such other times as is deemed necessary, and shall examine and determine who are entitled to relief under the provisions of this act, and shall make lists of such persons, and at the September meeting such commission, after determining the probable amount necessary for the purpose provided herein, shall certify the amount to the board of supervisors, and the board of supervisors of each county, at its September meeting each year, shall make such levies as shall be necessary to raise the required relief fund, not exceeding three-tenths of a mill on the taxable property of such county. The soldiers' relief commission shall fix the amount to be paid in each case, the aggregate not to exceed the levy of said tax for any one year and shall certify the lists to the county auditor. The auditor shall within twenty days thereafter, transmit to the township clerks in his county a list of the names of the persons in the respective townships to whom relief has been awarded and the amount thereof. The auditor, on the first Monday of each month after said fund is ready for distribution shall issue his warrant to the soldiers' relief commission, upon the county treasurer, for the several amounts awarded. Such commission shall disburse the same to the person or persons named in the lists, taking receipts therefor; or such fund may be disbursed in any other manner directed by the commission; *provided*, however, that when said commission is satisfied that any person entitled to relief under this act will not properly expend the amount allowed, the commission may pay the amount to some suitable person who shall expend the same for such person in such manner as the commission may direct; and *provided*, further, that said commission, at any meeting, may decrease, increase, or discontinue any amount before awarded, and may add new names to the lists, which shall be certified to the county auditor. The soldiers' relief commission shall, at the end of each year, make to the board of supervisors a detailed report of the transactions of such commission; such report shall be accompanied with vouchers for all moneys disbursed.

419. Removal. 22 G. A., ch. 105, § 4. The board of supervisors may at any time remove any member of the commission for neglect of duty or maladministration and appoint others in the place of members thus removed.

420. Burial of soldiers and sailors. 20 G. A., ch. 178, § 1. It shall be the duty of the board of supervisors in each of the counties of this state, to designate some suitable person in each township, whose duty it shall be to cause to be decently interred the body of any honorably discharged soldier, sailor, or marine, who served in the army or navy of the United States during the late war, who may hereafter die without leaving sufficient means to defray funeral expenses. Such burial shall not be made in any cemetery or burial ground used exclusively for the burial of the pauper dead. *Provided*, the expenses of such burial shall not exceed the sum of thirty-five dollars; and *provided further*, that in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor,

they shall be permitted so to do, and the expenses shall be paid as herein provided.

421. Head-stone. 20 G. A., ch. 178, § 2. The grave of any such deceased soldier, sailor, or marine, shall be marked by a head-stone containing the name of the deceased and the organization to which he belonged or in which he served. *Provided*, such head-stone shall not cost more than the sum of fifteen dollars, and shall be of such design and material as may be approved by the board of supervisors.

422. Expense. 20 G. A., ch. 178, § 3. The expenses of such burial and head-stone shall be paid by the county in which such soldier, sailor, or marine shall have died. And the board of supervisors of such county is hereby authorized and directed to audit the account and pay the said expenses, in similar manner as other accounts against such county are audited and paid.

423. Soldiers' monuments and memorial halls. 21 G. A., ch. 62, § 1. A tax, not to exceed one mill on the dollar on the assessed valuation of any county, may be voted for the purpose of erecting monuments and memorial halls on which or in which shall be included the names of all deceased soldiers and sailors and all who may hereafter die, who enlisted or entered the service from the county where such appropriations may be made and also the names of such other deceased soldiers as the grand army posts of said county shall direct, as hereinafter provided.

424. Voting tax. 21 G. A., ch. 62, § 2. Whenever a petition shall be presented to the board of supervisors of any county in this state signed by a majority of the members of the grand army posts in said county asking said board of supervisors to submit to the legally qualified voters of said county, at the next general election, after said petition shall have been presented, the question of aiding in the erection of a soldiers' and sailors' monument or memorial hall, as provided for in section one of this act [§ 423]. At such election the question of taxation shall be submitted, the form of the ballot shall be "for taxation" and "against taxation" and if a majority of the ballots polled be for taxation, then the board of supervisors of said county at the time of levying the ordinary taxes, next succeeding said election shall levy such tax as is voted under the provisions of this act, the same to be placed upon the tax lists of said county and collected as other taxes.

425. Collection and expenditure. 21 G. A., ch. 62, § 3. The taxes when collected by the county treasurer shall be drawn and expended for the erection of such soldiers' and sailors' monuments or memorial halls under the direction of a committee of three to be selected by a majority of all the members of the grand army posts in the county where such tax is voted, and the county auditor shall draw his warrants upon the treasurer for said money at the times and in the amounts as may be directed by said committee and shall charge it with the same and the committee shall settle and account with the board of supervisors for all money so drawn in the same manner as is now or may hereafter be provided by law for the settlement of the accounts of township clerks. *Provided*, this act shall not be held to apply to any county which has before the passage of this act made an appropriation for the erection of a soldiers' monument under the provisions of chapter one hundred and sixty-two of the acts of the twentieth general assembly.

[20 G. A., ch. 162, referred to in the last section, is repealed by 21 G. A., ch. 62, § 4.]

[Sec. 304 is repealed by 20 G. A., ch. 197, § 1.]

426. Majority of board. 305. No tax shall be levied, no contract for the erection of any public buildings entered into, no settlement with the county officers made, no real estate purchased or sold, no new site designated for any county buildings, no change made in the boundaries of townships, and no money appropriated to aid in the construction of highways and bridges,

without a majority of the whole board of supervisors voting therefor and consenting thereto. [R., § 313.]

The authority of a county to aid in the construction of a road is here necessarily implied, and warrants issued therefor are valid: *Long v. Boone County*, 32–181.

While it is not necessary that everything done by the board must be entered of record or be put in writing in order to be binding, yet there should at least be an assent to such action given by a majority of the members of the board, while in session, before it will be binding on the county: *Rice v. Plymouth County*, 43–136.

427. Publication of notices. 306. The clerk of the district court, sheriff, auditor, treasurer, and recorder shall designate the newspapers in which the notices pertaining to their several offices shall be published, and the board of supervisors shall designate the papers in which all other county notices shall be published; and in counties having a population exceeding eighteen thousand inhabitants, the board shall designate as one of such papers, a paper published in a foreign language, if there be such in its county.

This refers only to county notices and not to notices in reference to the commencement of actions or sales upon execution, in which cases plaintiff may designate the papers in which publication shall be made: See § 5112, and note.

428. Publication of proceedings. 307; 20 G. A., ch. 197, § 2; 21 G. A., ch. 86, § 2. The board of supervisors shall, at its January session of each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: in case of contest the applicants shall each deposit with the county auditor on or before a day named by the board of supervisors, a certified statement subscribed and sworn to before some competent officer, giving the names of the several postoffices and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county, such statements to be in sealed envelopes and opened by the county auditor upon direction by the board of supervisors to do so, and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditure, shall be published at the expense of the county during the ensuing year, and the cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements, and *provided*, that in counties having a population of seventeen thousand inhabitants or more, three papers (not more than two of which shall be published in the same town) may be selected in which such proceedings shall be published with the same limitation as to compensation, and the county auditor shall furnish all such papers selected a copy of such proceedings for that purpose; and furthermore *provided*, that in counties having two county seats each district shall be regarded as a county for that purpose. In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation and the aggrieved publisher shall have the right of appeal to the circuit [district] court for redress of grievance. Said appeal shall be taken as in ordinary actions, and in case of appeal, neither publisher to the contest shall receive pay for publishing such proceedings until the case is disposed of in the circuit [district] court.

Decisions under the original section: The proprietor or publisher of a newspaper has no interest in the selection of his paper for the publication of proceedings, etc., that he can maintain an action in his own name to compel the board to comply with the law, and order such publication in his paper: *Welch v. Board of Supervisors*, 23–199; *Smith v. Yoram*, 37–89; *Iowa News Co. v. Harris*, 62–501.

The schedule of the receipts and expenditures, with the names of all claimants, etc., required to be published under the provisions of Code, § 304, before its repeal, were not required to be published under this section as a part of the proceedings of the board: *McBride v. Hardin County*, 58–219. Nor was the treasurer's semi-annual report to be so published: *Haislett v. Howard County*, 58–377.

Where the board entered into a contract for the publication of matter authorized to be published by them, in four newspapers instead of two as authorized by law, but at such rate that the aggregate amount of compensation was less than that which they they were authorized to pay for the proper printing of such matter, *held*, that their action could not be restrained by injunction at the suit of a tax payer: *Sperry v. Kretchner*, 65-525.

429. Books kept. 308. The board is authorized and required to keep the following books:

1. A book to be known as the "minute book," in which shall be recorded all orders and decisions made by them, except those relating to highways. All orders for the allowance of money from the county treasury, shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively through each year;

2. A book to be known as the "highway record," in which shall be recorded all proceedings and adjudications relating to the establishment, change, or discontinuance of highways;

3. A book to be known as the "warrant book," in which shall be entered in the order of their issuance, the number, date, amount, name of drawee of each warrant drawn on the treasury, and the number of warrants as directed in relation to the minute book. [R., § 318.]

It is not necessary that everything done by the board be entered of record in order to be binding, although there must at least be an assent thereto given by a majority of the members while in session: *Rice v. Plymouth County*, 43-136.

The fact that the members of the board, when not in session, expressed views different from their recorded action will not affect such action as recorded: *Palo Alto County v. Burlingame*, 71-201.

QUESTIONS SUBMITTED TO THE PEOPLE.

430. What questions. 309; 15 G. A., ch. 70, § 4. The board of supervisors may submit to the people of the county at any regular election, or at any special one called for that purpose, the question whether money may be borrowed to aid in the erection of any public buildings, whether any species of stock, not prohibited by law, shall be permitted to run at large and at what time it shall be prohibited, and the question of any other local or police regulation not inconsistent with the laws of the state. And when the warrants of a county are at a depreciated value, they may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied, and in all cases when an additional tax is laid, in pursuance of a vote of the people of any county, for the special purpose of repaying borrowed money, or constructing, or aiding to construct, any highway or bridge, such special tax shall be paid in money, and in no other manner. [R., § 250; C., '51, § 114.]

[As to meaning of the word "stock," and as to submitting to vote the question whether stock shall be permitted to run at large, see § 2253.]

Submission of proposition: Where the proposition submitted to the voters was to issue bonds for the erection of a court-house and provide a tax for their payment, and the ballots were "for court-house bonds" and "against" the same, a majority of the ballots cast being in the affirmative, *held*, that such vote authorized the levy of a tax as well as the issuance of the bonds: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41-57.

Where a proposition is submitted for ratification at an election it is necessary that the voters shall be advised of the nature or terms of the contract or proposition submitted, and when or where they are called upon to express by vote their assent or dissent: *Page County v. American Emigrant Co.*, 41-115.

The manner and form of notice is not essential if there has been sufficient notice in fact upon which the voters of the county have acted; and in a particular case, *held*, that a notice of submission of a proposition for the disposition of swamp lands by the county was sufficient, although such notice was not in the form required by statute: *Ibid.*

Two or more propositions may be submitted to vote at the same time, but they cannot be joined together so as to make the adoption of each depend upon the adoption of all the others: *McMillan v. Lee County*, 3-311; *Gray v. Mount*, 45-591.

If the board are authorized to borrow money they may do it by means of negotiable bonds, but if not so authorized they have no authority to issue such bonds, and bonds so issued would be void. [Decided under § 114, Code 1851]: *Hull v. Marshall County*, 12-142; *Casady v. Woodbury County*, 13-113.

When authorized by vote of the people the counties of Iowa have the power to issue negotiable bonds for borrowed money or extraordinary expenditures: *Carpenter v. Buena Vista County*, 5 Dillon, 556.

431. Mode. 310. The mode of submitting such questions to the people shall be the following: the whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be published at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication shall be by being posted up in at least one of the most public places in each township in the county, and in addition, in at least five among the most public places in the county, one of them being the door of the court-house, for at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election. [R., § 251; C., '51, § 115.]

Where the question submitted was whether a special tax should be levied to pay depreciated county warrants, *held*, that the omission to specify for what year the tax should be levied rendered the submission invalid: *Iowa R. Land Co. v. Sac County*, 39-124, 149.

432. Provision for tax. 311. When a question so submitted involves the borrowing or the expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof in addition to the usual taxes, as directed in the following section, and no vote adopting the question proposed will be of effect unless it adopt the tax also. [R., § 252; C., '51, § 116.]

The adoption of a proposition for the expenditure of money is of no effect unless the submission of such proposition was accompanied by the provision to lay a tax for the payment thereof. The provisions of this section *held* applicable to submission of propositions provided for in subdivision 24, § 402: *Starr v. Des Moines County*, 22-491. But it is not necessary that the provision for levying the tax be a distinct proposition to be voted upon separately from the main one; each proposition, however, must be accompanied by such provision: *McMillan v. Lee County*, 3-311.

433. Rate. 312. The rate of tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of valuation, and any of the above taxes becoming delinquent shall draw the same interest with the ordinary taxes. [R., § 253; C., '51, § 117.]

The authority of a county to aid in the construction of a road is here necessarily implied, and warrants issued therefor are valid: *Long v. Boone County*, 32-181.

434. Levy to continue. 313. When it is supposed that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year, until the amount is paid. [R., § 254; C., '51, § 118.]

435. Record of adoption. 314. The board of supervisors, on being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the proposition and the result of the vote to be entered at large in the minute book, and a notice of its adoption to be published for the same time and in the same manner as above provided for publishing the preliminary notice, and from the time of entering the result of the vote in relation to borrowing or expending money, and from the completion of the notice of its adoption in the case of a local or police regulation, the vote and the

entry thereof on the county records shall be in full force and effect. [R., § 255; C., '51, § 119.]

After the authority to levy the tax has been duly conferred by vote of the people, the board must proceed to make a levy of the tax, as provided by law, in order to make it valid: *Iowa R. Land Co. v. Woodbury County*, 39-172.

436. Rescinding. 315. Propositions thus adopted, and local regulations thus established, may be rescinded in like manner and upon like notice by a subsequent vote taken thereon, but neither contracts made under them, nor the taxes appointed for carrying them into effect, can be rescinded. [R., § 256; C., '51, § 120.]

437. Number of petitioners. 316. The board shall submit the question of the adoption or rescission of such a measure when petitioned therefor by one-fourth of the voters of the county, unless a different number be prescribed by law in any special case. [R., § 257; C., '51, § 121.]

438. Record as evidence. 317. The record of the adoption or rescission of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted. [R., § 258; C., '51, § 122.]

439. Excess of tax. 318. In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object, it shall not, therefore, be held invalid, but the excess shall go into the ordinary county funds. [R., 259; C., '51, § 123.]

440. Distinct fund. 319. Money so raised for such purposes is specially appropriated, and constitutes a fund distinct from all others in the hands of the treasurer until the obligation assumed is discharged. [R., § 260; C., '51, § 124.]

441. Funds uncalled for. 16 G. A., ch. 84, § 1. In any county of this state, where any special levy has been made to pay any claim, bond or other indebtedness, and the same shall have remained in the treasury of the county, uncalled for, for a period of three years, the board of supervisors of such county may authorize such unclaimed fund to be transferred to the general county fund.

CHANGING NAMES OF UNINCORPORATED TOWNS AND VILLAGES.

442. Board may change. 16 G. A., ch. 146, § 1. The board of supervisors may change the name of unincorporated towns or villages within their respective counties in the manner herein prescribed.

443. Petition. 16 G. A., ch. 146, § 2. When any number of the inhabitants of such town or village shall desire to change the name thereof, there shall be filed in the office of the county auditor of the proper county, at least ten days before the regular meeting of the board of supervisors, a petition for that purpose, which must be signed by at least two-thirds of the qualified electors of said town or village, setting forth the name by which said town or village is known, its location as near as practicable, and giving the name which they desire the town shall thereafter be known by.

444. Notice. 16 G. A., ch. 146, § 3. Notice of the filing of said petition and the time and place when the same shall be heard, and the objects and purposes thereof, shall be given at least four weeks before the regular meeting of the board of supervisors, in like manner as the publication of original notices in civil actions where the defendant cannot be personally served within the state; or by posting up a notice of said petition in three public places in the town or village the name of which is sought to be changed, at least four weeks before the meeting of said board, and also one copy of said notice for

the same length of time on the front door of the court-house of the proper county wherein the last term of the district court was held.

445. Hearing; remonstrances. 16 G. A., ch. 146, § 4. At the first regular meeting of said board after publication of notice is completed, the board of supervisors shall proceed to hear and determine said petition, unless said hearing is for good cause continued until the next meeting; and said board on the hearing of said petition, shall hear any remonstrances against the proposed change, and in all its proceedings in relation to the hearing of said petition and remonstrances to the same, the said board shall be governed by the law regulating the hearing of petitions for the establishment of highways, so far as they are applicable and not inconsistent with this act.

446. Change ordered. 16 G. A., ch. 146, § 5. If, on the hearing, it shall appear to the said board that two-thirds of the qualified electors of said town or village in good faith signed said petition for change of name, and desired the same, then the said board shall order said name to be changed as prayed for.

447. Record; notice. 16 G. A., ch. 146, § 6. Said order of the board shall thereupon be entered of record, giving the name of said town or village as set forth in said petition, the new name given, the time when the change shall take effect which shall not be less than thirty days thereafter, and directing that notice of said change shall be published in at least one newspaper published in said county, if any; and if there is no newspaper published in said county, then said notice shall be published by posting the same for four weeks on the front door of the court-house where the last term of the district court of said county was held.

448. Proof of publication. 16 G. A., ch. 146, § 7. The ordinary proof of such publication shall be filed in the office of the county auditor, shall be by him filed for preservation, and on the day fixed by the board as aforesaid the change shall be complete.

449. Costs. 16 G. A., ch. 146, § 8. In all cases arising under the provisions of this act where there is no remonstrance or opposition to said petition, the petitioners shall pay all costs; but in all other cases, costs shall abide the result of the proceeding, and be taxed to either party, in the discretion of the board, or divided equitably between the parties.

CHAPTER 3.

OF THE COUNTY AUDITOR.

450. Duties of. 320. The county auditor shall:

1. Record all the proceedings of the board in proper books provided for that purpose;
2. Make full entries of all their resolutions and decisions on all questions concerning the raising of money, and for the allowance of money from the county treasury;
3. Record the vote of each supervisor on any question submitted to the board, if required by any member present;
4. Sign all orders issued by the board for the payment of money, and record in a book provided for the purpose, the reports of the county treasurer of the receipts and disbursements of the county;
5. Preserve and file all accounts acted upon by the board, with their action thereon, and perform such special duties as are or may be required of him by law;

6. Designate upon every account on which any sum shall be allowed by the board, the amount so allowed and the charges for which the same was allowed;

7. Deliver to any person who may demand it, a certified copy of any record or account in his office on payment of his legal fees therefor. [R., §§ 319, 320; 12 G. A., ch. 160, § 1.]

[The auditor to report the expenses of the county for criminal prosecutions to the clerk, see § 455.]

Mandamus may be brought to compel the proper officer to attach the county seal to a warrant drawn by him or his predecessor on the treasurer, to make it conform to the requirements of § 458. Such action will be barred under § 3734, ¶ 3, in three years from the issuance of the warrant, and not from the time demand was made to have the seal attached: *Prescott v. Gonser*, 34-175.

The county auditor not being authorized to receive money due on school-fund notes, his sureties cannot be held for money paid to him in satisfaction of a judgment for such funds: *Mahaska County v. Ruan*, 45-328.

Sureties of the auditor are liable for overdrafts made by him from the treasury in the payment of his compensation. The auditor being authorized to sign orders, the treasurer is not in fault in paying them: *Ibid.*

Where a county auditor surrenders securities of the school fund in his hands under improper circumstances, he becomes liable on his bond for damages resulting therefrom; and if no actual damages are shown he is at least liable for nominal damages: *Madison County v. Tullis*, 69-720.

In an action against a board of supervisors, service of notice cannot be made on the county auditor: *Polk v. Foster*, 71-26.

451. Signing warrants. 321. The auditor shall not sign or issue any county warrant except upon the recorded vote or resolution of the board of supervisors authorizing the same, except for jury fees, and every such warrant shall be numbered, and the date, amount, and number of the same, and the name of the person to whom issued, shall be entered in a book to be kept by him in his office for the purpose. [R., § 321.]

If a vote is legally passed authorizing the issuance of warrants, and the failure to record it is a mere clerical omission, such failure to record will not invalidate a warrant otherwise legally and properly issued: *Clark v. Polk County*, 19-248: *Long v. Boone County*, 36-60, 66.

As no recorded vote is necessary to authorize the issuance of warrants for jury fees, *held*, that the fact that no vote authorizing certain warrants appeared of record did not necessarily render such warrants invalid: *Clark v. Polk County*, 19-248.

County warrants are not negotiable instruments: *Ibid.*

This section is directory and not mandatory, and a warrant issued where there is no recorded vote is not on that account void: *Griggs v. Kimball*, 42-512.

Where a warrant is issued by the proper officers to a contractor for work done under an unauthorized contract, and the warrant is paid, the county cannot recover back the amount thus paid: *Long v. Boone County*, 36-60.

452. School fund. 322. Whenever the auditor of any county shall receive from the state auditor, notice of the apportionment of school moneys to be distributed in the county, he shall file the same in his office and transmit a certified copy thereof to the county treasurer, and he shall also lay a certified copy thereof before the board at its next regular meeting. [R., § 322.]

453. Court-house. 323. The county auditor shall have the general custody and control of the court-house in each county respectively, subject to the direction of the board of supervisors. [Ex. S., 8 G. A., ch. 2.]

454. Report to secretary of state. 324. The county auditor shall report to the secretary of state the name, office, and term of office of every county officer elected or appointed, within ten days after their election and qualification, and the secretary of state shall record the same in a book to be kept for that purpose in his office. [R., § 291.]

455. Report expenses of prosecutions. 18 G. A., ch. 22, § 2. In order to enable the clerk of the district court properly to comply with the provisions of section two hundred and three of the code, [§ 264] it is made the duty of the county auditor to report to said clerk, before the first day of November in each year, the expenses of the county for criminal prosecutions during the

year ending the thirtieth day of September preceding, including, but distinguishing the compensation of district [county] attorney.

[The penalty for violation of this section is provided by § 515, which is a part of the same act as the foregoing.]

456. Who eligible. 325. The clerk of the district court and county recorder shall each be eligible to the office of county auditor, and may discharge the duties of both offices. [12 G. A., ch. 160, § 7.]

457. Cannot be treasurer. 326. The offices of county auditor and county treasurer shall not be united in the same person. The auditor and his deputy are prohibited from acting as attorney, either directly or indirectly, in any matter pending before the board of supervisors.

CHAPTER 4.

OF THE COUNTY TREASURER.

458. Duties. 327. The treasurer shall receive all money payable to the county, and disburse the same on warrants drawn and signed by the county auditor and sealed with the county seal, and not otherwise; and shall keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the board of supervisors. [R., § 360; C., '51, § 152.]

Liability: The county treasurer is only held to a reasonable degree of care and diligence, and if, notwithstanding such care, moneys of the county are stolen from him, he is not liable: *Ross v. Hatch*, 5-149.

Where a county treasurer deposited public money in a bank which subsequently failed, *held*, that this constituted an unlawful disposal of the public funds for which he was liable on his bond: *Lowry v. Polk County*, 51-50.

Where, under the statutory provision authorizing the deposit of public money in a bank to be selected for that purpose, upon the giving of bond by such bank, if the bond is given and allowed to remain outstanding it constitutes security, not merely for the first deposit, but for other deposits which may subsequently be made: *Poor v. Merrill*, 68-436.

Demand upon the person in charge of the bank where the deposit is made is sufficient to constitute a breach of the bond in case of nonpayment of the funds: *Ibid.*

Where a certificate of deposit is issued for the repayment of the deposit when it is returned, but no objection to the payment of the money is made on the ground of the failure to return such certificate, the fact that it is not returned will not defeat the right to recover, it being afterwards surrendered: *Ibid.*

One who has wrongfully borrowed county funds of the treasurer, and repaid them, cannot be held liable to the county: *Marshall County v. Baum*, 53-528.

Where a county treasurer had made use of county funds in a partnership business, but it did not appear that such illegal use was known to his partner, or that all the funds so used had not been paid back, *held*, that the county could not establish a trust in lands held in the name of such partner: *Ibid.*

Under the provisions of previous statutes, *held*, that as to the state revenue the county treasurer was required to account to the auditor of state, and could not by a settlement with the county authorities defeat an action for deficiency of state funds unaccounted for by him: *Ford v. Jefferson County*, 4 G. Gr., 273; *Jefferson County v. Ford*, 4 G. Gr., 367.

Where the treasurer failed to cancel warrants redeemed by him as required by law, and they were stolen, without fault on his part, and again put in circulation, and paid, *held*, that there was such neglect of duty as to render him liable: *Johnson County v. Hughes*, 12-360.

A county treasurer having paid over to the treasurer of a school district taxes belonging to such district without a warrant signed by the president and countersigned by the secretary, as required by law, and the treasurer of the district having failed to account for all the money so paid over, *held*, that the directors of the district must, under the circumstances, have known that such money came into the hands of their treasurer, and might have protected themselves by requiring from him a sufficient bond; that the irregular payment by the county treasurer was not the proximate cause of the loss, and he was not liable therefor: *District T'p v. Bowman*, 55-129.

As to bond of county treasurer and his liability thereon, see § 1139, and notes.

Warrants: A warrant to which the county seal is not affixed is not valid. The county may be liable on the indebtedness for which such warrant was issued, but not on the warrant: *Springer v. Clay County*, 35-241. As to com-

pelling auditor to affix the seal in a proper case, see note to § 450.

A county treasurer, in taking up and canceling warrants, is a servant of the county; and, although he issues a new warrant for an excess of warrants presented in payment of indebtedness to the county, instead of a certificate of overplus as provided by law, a recovery of such overplus may be had as against the county: *Barney v. Buena Vista County*, 33–261.

Collection of taxes: A special tax for, and in aid of, a railway company is not payable to the county; and where the tax payer becomes entitled to have it refunded the treasurer may refund it so far as the proceeds of such tax are in his hands, without a warrant from the auditor: *Barnes v. Marshall County*, 56–20.

Taxes paid without objection by the tax payer, and received by the treasurer under color and by virtue of his official authority, must be accounted for by him. Irregularities or illegalities in the assessment and collection of taxes will not constitute a defense in an action, on his part, for taxes actually received: *Mahaska County v. Ingalls*, 14–170.

The treasurer, and not the auditor, should receive money belonging to the school fund: *Mahaska County v. Searle*, 44–492; *Mahaska County v. Ruan*, 45–328.

The county is not liable for wrongful acts of the treasurer in wilfully, and without authority, collecting taxes in excess of the sum due, where it has not subsequently approved the act or been benefited thereby: *Estep v. Keokuk County*, 18–199.

459. Indorsement of warrants. 328. When the warrant drawn by the auditor on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of six per cent.; and when a warrant which draws interest is taken up, the treasurer is required to indorse upon it the date and amount of interest allowed, and such warrant is to be considered as canceled and shall not be reissued. [R., § 361; C., '51, § 153.]

A county cannot stop interest on outstanding warrants by notice that it is ready to redeem the same. Nothing short of actual tender is sufficient for that purpose: *Roony v. Dubuque County*, 44–128. But see now the provision in the next section.

Judgment may be rendered against a county upon a county order or warrant drawn upon the county treasurer: *Steel v. Davis County*, 2 G. Gr., 469.

Where a warrant is issued, payable out of a special fund, and the county has ample power to provide such fund for the payment of the warrant, a general judgment against the county upon such warrant may be rendered. Demand on the board of supervisors to levy a tax to pay the warrant is not necessary: *Mills County Nat. Bank v. Mills County*, 67–697.

It seems, however, that in such case the creditor, after obtaining judgment on the warrant, could not by *mandamus* compel the treasurer to pay his judgment out of the general fund, a method of raising the amount for the payment of claims against the special fund being provided by statute: *Ibid.*

A warrant drawn, payable "out of any money in the county treasury not otherwise appropriated," is a general warrant payable unconditionally, and action may be brought thereon without proof that there is any money in the treasury subject to such warrant. (Overruling *Brown v. Johnson County*, 1 G. Gr., 486): *Campbell v. Polk County*, 3–467.

460. Call for warrants. 19 G. A., ch. 103, § 1. County treasurers are hereby authorized to issue calls for outstanding warrants at any time he may have sufficient funds on hand for which such warrant was issued; and from and after such calls have been made, public interest shall cease on all warrants included in said call.

461. Notice. 19 G. A., ch. 103, § 2. County treasurers shall publish said notice twice in the newspaper having the largest circulation in the county in which such publication is made, and each notice shall designate the warrants called.

462. Order of payment. 21 G. A., ch. 84, § 1. The treasurer shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, which shall be paid in the order of such presentation. When there are funds in the treasury for their payment to an amount sufficient to render it advisable, he shall give notice to what number of warrants the funds will extend, or the number which he will pay, by posting a written notice in his office, and at the expiration of thirty days from the date of such posting, interest on the warrants so named as being payable shall cease.

463. Warrants divided. 329. When a person wishing to make a payment into the treasury presents a warrant of an amount greater than such

payment, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the county auditor, he shall file it and issue a new warrant of that amount, and charge the treasurer therewith, and such certificate is transferable by delivery, and will entitle the holder to the new warrant, which, however, must be issued in the first drawee's name. [R., §§ 362, 755; C., '51, §§ 154, 490.]

Where the treasurer failed to cancel warrants as here provided, and they were stolen without fault on his part, and again put in circulation and paid, *held*, that there was such neglect of duty as to render him liable: *Johnson County v. Hughes*, 12-360.

Where the treasurer issued what purported to be warrants instead of certificates for such overplus as here provided, such instruments were held invalid: *Barney v. Buena Vista County*, 33-261.

464. Warrant book. 330. The treasurer shall keep a book, ruled so as to contain a column for each of the following items in relation to the warrants drawn on him by the auditor — the number, date, drawee's name, when paid, to whom, original amount, and interest paid on each. [R., § 363; C., '51, § 155.]

465. Separate accounts. 331. The treasurer shall keep a separate account of the several taxes for state, county, school and highway purposes, opening an account between himself and each of those funds, charging himself with the amount of the tax, and crediting himself with the amounts paid over severally, and with the amount of delinquent taxes when legally authorized so to do. [R., § 364; C., '51, § 156.]

466. Warrants canceled. 332. The warrants returned by the treasurer shall be compared with the warrant book, and the word "canceled" be written over the minute of the proper numbers in the warrant book, and the original warrant be preserved for at least two years. [R., § 365; C., '51, § 159.]

467. Returns of. 333. The treasurer is required to make weekly returns to the auditor of the number, date, drawee's name, when paid, to whom paid, original amount, and interest, as kept in the book before directed. [R., § 366; C., '51, § 160.]

468. Accounts. 334. A person re-elected to, or holding over the office of treasurer, shall keep separate accounts for each term of his office. [R., § 367; C., '51, § 161.]

CHAPTER 5.

OF THE COUNTY RECORDER.

469. Duties of. 335. The recorder shall keep his office at the county seat, and he shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. [R., § 358; C., '51, § 150.]

470. Treasurer eligible. 336. The same person may be eligible to, and hold the office of county recorder and county treasurer; *provided*, the number of inhabitants in such county does not exceed ten thousand. [10 G. A., ch. 129, § 8.]

471. Women eligible. 18 G. A., ch. 40, § 1. No person shall be disqualified for holding the office of county recorder on account of sex.

CHAPTER 6.

OF THE SHERIFF.

472. Duties. 337. The sheriff shall, by himself or his deputies, execute according to law, and return all writs and other legal process issued by lawful authority and to him directed or committed, and shall perform such other duties as may be required of him by law. [R., § 383; C., '51, § 170.]

Liability of: A sheriff who seizes property beyond the limits of his own county is a wrong-doer, and is liable to the owner and possessor in an action for trespass: *Parmlee v. Leonard*, 9-131.

A sheriff who commits a trespass by taking goods illegally is liable after going out of office, though his successor sells the same and receives the money: *Duke v. Vincent*, 29-308.

Failure to make return of execution, etc., as required by § 4262 renders the sheriff liable for damages only when such failure has resulted in injury to the plaintiff: *Musser v. Maynard*, 55-197.

A sheriff is not liable in damages for failure to levy execution upon property in defendant's hands if he uses ordinary skill and diligence in the discharge of his duties: *Crosby v. Hungerford*, 59-712.

Deputy-sheriff: The sheriff is responsible for the acts of his deputy, and action upon the sheriff's bond, and not upon the bond of the deputy, is the proper remedy in case of neglect or failure of the deputy to pay over to the person entitled thereto money collected by him: *Brayton v. Town*, 12-346.

In executing process the deputy-sheriff acts for the sheriff, and the latter is responsible for whatever is done: *Headington v. Langland*, 65-276.

Therefore the sheriff is liable under his bond for the wrongful act of the deputy in making a levy: *Ibid.*

In case of vacancy in the office of sheriff caused by his suspension, the duties of the office do not devolve upon his deputy, but the vacancy is to be filled by the board of supervisors under § 1224: *McCue v. Circuit Court*, 51-60.

Resisting sheriff: A receiver directed to take possession of property may call upon the sheriff to prevent the commission of the crime of resisting the execution of such order on the part of the person in possession of the property: *State v. Rivers*, 65-655.

Suspension: When a sheriff is suspended from office by order of court, and the district attorney is directed to file a petition for his removal (§§ 1228, 1229), such suspension will continue after the term although there may not be time to file the petition and serve the notice before the adjournment of the term: *McCue v. Circuit Court*, 51-60.

473. Disobedience. 338. His disobedience of the command of any such process is a contempt of the court from which it issued, and may be punished by the same accordingly, and he is further liable to the action of any person injured thereby. [R., § 384; C., '51, § 171.]

474. Charge of jail. 339. He has the charge and custody of the jail or other prison of his county, and of the prisoners in the same, and is required to receive those lawfully committed, and to keep them himself, or by his deputy or jailer, until discharged by law. [R., § 385; C., '51, § 172.]

475. Conservators of the peace. 340. The sheriff and his deputies are conservators of the peace, and to keep the same, or to prevent crime, or to arrest any person liable thereto, or to execute process of law, may call any person to their aid, and, when necessary, the sheriff may summon the power of the county. [R., § 386; C., '51, § 173.]

476. Attend courts; bailiffs. 341. The sheriff shall attend upon the district [and circuit] courts of his county, and while either remains in session he shall be allowed the assistance of such number of bailiffs as either may direct. They shall be appointed by the sheriff, and shall be regarded as deputy-sheriffs, for whose acts the sheriff shall be responsible. [R., § 387; C., '51, § 174.]

The bailiffs here provided for are entitled to compensation from the county, which shall be reasonable in amount: *Bringolf v. Polk County*, 4-1554, 561; and such bailiffs may serve a precept for a jury: *State v. Arthur*, 39-631.

477. Not act as attorney. 342. No sheriff, deputy-sheriff, coroner, or constable, shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence, or to be in any manner used in the

same, and such writing or process made by any of them shall be rejected. [R., § 388; C., '51, § 175.]

This section does not prevent the officers named from making complaint before a magistrate of the violation of a penal law: *Santo v. State*, 2-165, 221.

478. Cannot be purchaser. 343. No sheriff, deputy-sheriff, coroner, or constable, shall become the purchaser, either directly or indirectly, of any property by him exposed to sale under any process of law, and every such purchase is absolutely void. [R., § 389; C., '51, § 176.]

479. Execution of process after expiration of term. 344. Sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office, and, in case of a vacancy occurring in the office of sheriff from any cause, his deputies shall be under the same obligation to execute legal process then in his or their hands, and return the same, as if the sheriff had continued in office, and he and they will remain liable therefor under the provisions of law as in other cases. [R., § 390; C., '51, § 177.]

480. Deliver to successor. 345. Where a sheriff goes out of office, he shall deliver to his successor all books and papers pertaining to the office, and property attached and levied upon, except as provided in the preceding section, and all prisoners in the jail, and take his receipt specifying the same, and such receipt shall be sufficient indemnity to the person taking it. [R., § 391; C., '51, § 178.]

This section is directory only, and if the attached property, etc., be actually delivered to the incoming sheriff he would become responsible therefor, and the outgoing officer would be discharged, although no receipt was given: *McKay v. Thorington*, 15-25; *McKay v. Leonard*, 17-569.

An offer on the part of the outgoing sheriff to deliver attached property to the incoming one, and a waiver of delivery by the latter, discharges the former from further responsibility for the safe keeping of the property: *Fockler v. Martin*, 32-117.

481. Successor may serve. 346. If the sheriff die or go out of office before the return of any process, then in his hands, his successor, or other officer authorized to discharge the duties of the office, may proceed to execute and return the same in the same manner as the outgoing sheriff should have done, but nothing in this section shall be construed to exempt the outgoing sheriff and his deputies from the duty imposed on them by section three hundred and thirty-seven of this chapter [§ 472], to execute and return all process in their hands at the time the vacancy in the office of sheriff occurs. [R., § 3264.]

482. New process. 347. On the election or appointment of a new sheriff all new process shall be directed to him. [R., § 392; C., '51, § 179.]

483. Deed by successor. 348. If the sheriff, who has made a sale of real estate on execution, die, or go out of office before the period of redemption expires, his successor shall make the necessary deed to carry out such sale.

CHAPTER 7.

OF THE CORONER.

484. Duties. 349. It is the duty of the coroner to perform all the duties of the sheriff when there is no sheriff, and in cases where exception is taken to the sheriff as provided in the next section. [R., § 393; C., '51, § 183.]

The sureties upon the official bond of the coroner are accountable on such bond for his acts while acting as *ex officio* sheriff: *Tieman v. Haw*, 49-312.

485. Serve process. 350. In all proceedings in the courts of record, where it appears from the papers that the sheriff is a party to the action; or where, in any action commenced or about to be commenced, an affidavit is filed with the clerk of the court, stating that the sheriff and his deputy are absent from the county, and are not expected to return in time to perform the service needed; or stating a partiality, prejudice, consanguinity, or interest, on the part of the sheriff, the clerk or court shall direct process to the coroner, whose duty it shall be to execute it in the same manner as if he were sheriff. [R., § 394; C., '51, § 184.]

To make a service of notice by the coroner, as such, good, it must appear from the record that the sheriff was disqualified to act: *Beard v. Smith*, 9–50; *Chord v. McCoy*, Mor., 311.

Where the sheriff is disqualified by interest or other personal reason, the coroner, and not the deputy-sheriff, should act: *Minott v. Vineyard*, 11–90.

This section applies in criminal as well as in civil cases, and upon the filing of the affidavit here contemplated the coroner should be directed to act in place of the sheriff: *State v. Hardin*, 46–623.

486. Same. 351. When there is no sheriff, deputy-sheriff, or coroner qualified to serve legal process, the clerk of the court may, by writing under his hand and the seal of the court certifying the above fact, appoint any suitable person specially in each case to execute such process, who shall be sworn, but he need not give bond, and his return shall be entitled to the same credit as the sheriff's when the appointment is attached thereto. [R., § 395; C., '51, § 185.]

Where the disqualification of the sheriff is made known before the issuance of a writ, and also the disqualification of the coroner, it is not objectionable to direct the writ to the person specially appointed: *Minott v. Vineyard*, 11–90.

The credit to be given to the return of the person so appointed will depend on the validity of the appointment. In a particular case the appointment *held* not to show sufficiently that there was "no sheriff, deputy-sheriff, or coroner qualified," etc.: *Currens v. Ratcliffe*, 9–309.

487. Inquest. 352. The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person supposed to have died by unlawful means, found or being in his county, he is required to issue his warrant to a constable of his county, requiring him to summon forthwith three electors of the county to appear before the coroner at a time and place named in the warrant. [R., § 396; C., '51, § 186.]

488. Warrant. 353. The warrant may be in substance as follows:

STATE OF IOWA, }
—— County. }

To any constable of the said county:—In the name of the state of Iowa you are hereby required to summon forthwith three electors of your county, to appear before me at (name the place), at (name the day and hour or say forthwith), then and there to hold an inquest upon the dead body of —— ——, there lying, and find by what means he died.

Witness my hand this —— day of ——, A. D. 18—.

A. B., Coroner of —— County.

[R., § 397; C., '51, § 187.]

489. Service. 354. The constable shall execute the warrant, and make return thereof at the time and place named. [R., § 398; C., '51, § 188.]

490. Jurors. 355. If any juror fails to appear, the coroner shall cause the proper number to be summoned or returned from the by-standers, immediately, and proceed to impanel them and administer the following oath in substance:

"You do solemnly swear (or affirm) that you will diligently inquire and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence given you." [R., § 399; C., '51, § 189.]

491. Subpœnas; contempts. 356. The coroner may issue subpœnas within his county for witnesses, returnable forthwith, or at such time and place as he shall therein direct, and witnesses shall be allowed the same fees as in cases before a justice of the peace, and the coroner has the same authority to enforce the attendance of witnesses, and to punish them and jurors for contempt in disobeying his process, as a justice of the peace has when his process issues in behalf of the state. [R., § 400; C., '51, § 190.]

492. Oath. 357. An oath shall be administered to the witnesses in substance as follows:

"You do solemnly swear that the testimony which you shall give to this inquest concerning the death of the person here lying dead, shall be the truth, the whole truth, and nothing but the truth." [R., § 401; C., '51, § 191.]

493. Testimony. 358. The testimony shall be reduced to writing under the coroner's order, and subscribed by the witnesses. [R., § 402; C., '51, § 192.]

494. Verdict. 359. The jurors having inspected the body, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing, under their hands in substance as follows, and stating the matters in the following form suggested, as far as found:

STATE OF IOWA, }
—— County. }

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

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

(which shall be attested by the coroner.) [R., § 403; C., '51, § 193.]

495. Kept secret. 360. If the inquisition find that a crime has been committed on the deceased, and name the person whom the jury believe has committed it, the inquest shall not be made public until after the arrest directed in the next section. [R., § 404; C., '51, § 194.]

496. Arrest. 361. If the person charged be present, the coroner may order his arrest by an officer or any other person present, and shall then make a warrant requiring the officer or other person to take him before a justice of the peace. [R., § 405; C., '51, § 195.]

497. Warrant. 362. If the person charged be not present, and the coroner believes he can be taken, the coroner may issue a warrant to the sheriff and constables of the county, requiring them to arrest the person and take him before a justice of the peace. [R., § 406; C., '51, § 196.]

498. Proceedings upon. 363. The warrant of a coroner in the above case shall be of equal authority with that of a justice of the peace, and when the person charged is brought before the justice, such justice shall cause an information to be filed against him, and the same proceedings shall be had as in other cases under information, and he shall be dealt with as a person held under an information in the usual form. [R., § 407; C., '51, § 197.]

499. Form of. 364. The warrant of the coroner shall recite substantially the transactions before him and the verdict of the jury of inquest leading to the arrest, and such warrant shall be a sufficient foundation for the proceeding of the justice instead of an information. [R., § 408; C., '51, § 198.]

500. Inquest; return. 365. The coroner shall then return to the district court the inquisition, the written evidence, and a list of the witnesses who testified material matter. [R., § 409; C., '51, § 199.]

501. Disposition of body. 366. The coroner shall cause the body of a deceased person which he is called to view, to be delivered to his friends if any there be, but if not, he shall cause him to be decently buried and the expense to be paid from any property found with the body, or, if there be none, from the county treasury, by certifying an account of the expenses, which, being presented to the board of supervisors, shall be allowed by them, if deemed reasonable, and paid as other claims on the county. [R., § 410; C., '51, § 200.]

502. When no coroner. 367. When there is no coroner, and in case of his absence or inability to act, any justice of the peace of the same county is authorized to perform the duties of coroner in relation to dead bodies, and in such case he may cause the person charged to be brought before himself by his warrant, and may proceed with him as a justice of the peace. [R., § 411; C., '51, § 201.]

503. May summon physician; fees. 368; 20 G. A., ch. 64. In the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors. [R., § 412; C., '51, § 202.]

The compensation of such witnesses is to be fixed by the coroner, or justice acting in his place, and his jurisdiction in such matter is exclusive. He may be compelled by *mandamus* to act, but no appeal is provided: *Cushman v. Washington County*, 45-255; *Sanford v. Lee County*, 49-148.

CHAPTER 8.

OF THE COUNTY SURVEYOR.

504. Duties. 369. The county surveyor shall make all surveys of land within his county which he may be called upon to make, and his surveys shall be held as presumptively correct. [R., § 413; C., '51, § 203.]

505. Transcribing field-notes, etc. 370. The field-notes and plats made by the county surveyor shall be transcribed into a well-bound book under the supervision of the surveyor, when desired by a person interested and at his expense. [R., § 414; C., '51, § 204.]

506. Original field-notes. 371. Previous to making any survey, he shall furnish himself with a copy of the field-notes of the original survey of the same land, if there be any in the office of the county auditor, and his survey shall be made in accordance therewith. [R., § 415; C., '51, § 205.]

507. Corners. 372. He is required to establish the corners by taking bearing trees and noting particularly their course and distance, but if there be no trees within reasonable distance, the corners are to be marked by stones firmly placed in the earth, or by mounds. [R., § 416; C., 51, § 206.]

508. Rules. 373. In the resurvey and subdivisions of lands by county surveyors, their deputies, or other persons, the rules prescribed by acts of congress and the instructions of the secretary of the interior shall be in all respects followed. [13 G. A., ch. 183.]

509. Plat and copy, evidence. 374. The county surveyor shall, when requested, furnish the person for whom the survey is made with a copy of the field-notes and plat of the survey, and such copy certified by him, and also a copy from the record, certified by the county auditor, with the seal, shall be presumptive evidence of the survey and of the facts herein required to be set forth, and which are stated accordingly, between those persons who join in

requesting it, and any other person then concerned who has reasonable notice that such a survey is to be made and the time thereof. [R., § 417; C., '51, § 207.]

510. Book furnished. 375. The board of supervisors is required to furnish a substantial, well-bound book, in which the field-notes and plats made by the county surveyor may be recorded. [R., § 418; C., '51, § 208.]

511. Plat. 376. The plat and record shall show distinctly of what piece of land it is a survey; at whose personal request it was made, the names of the chainmen, and that they were approved and sworn by the surveyor, and the date of the survey; and the courses shall be taken according to the true meridian, and the variation of the magnetic from the true meridian stated. [R., § 419; C., 51, § 209.]

512. Chainmen. 377. The necessary chainmen and other persons must be employed by the person requiring the survey done, unless otherwise agreed; but the chainmen must be disinterested persons and approved of by the surveyor, and sworn by him to measure justly and impartially to the best of their knowledge and ability. [R., § 420; C., '51, § 210.]

513. Administer oaths. 378. County surveyors, when establishing defaced or lost land corners or lines, may issue subpœnas for witnesses and administer oaths to them, and all fees for service of officers and attendance of witnesses shall be the same as in proceedings before justices of the peace. [14 G. A., ch. 101.]

[As to proceedings in court for permanent surveys and establishment of lost corners, see §§ 4507-4510.]

CHAPTER 8*a*.

COUNTY OFFICERS TO REPORT INFORMATION OR STATISTICS.

514. Upon call. 18 G. A., ch. 22, § 1. It is hereby made the duty of each county officer, whenever called upon by the governor or either house of the general assembly so to do, to communicate to the governor, or such house, any information that may be in his possession as such officer, and to furnish any statistics at his command when thus called upon.

515. Penalty. 18 G. A., ch. 22, § 4. Failure on the part of any officer to perform any duty required of him by this act, shall render him liable to prosecution and punishment for misdemeanor.

CHAPTER 9.

OF TOWNSHIPS AND TOWNSHIP OFFICERS.

516. Formation; change. 379. The board of supervisors of each county shall divide the same into townships, as the convenience of the citizens may require, accurately defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of the townships as it may deem proper; *provided*, however, that if the congressional township lines are not adopted and followed, the board of supervisors shall not change the lines of any civil township so as to divide any school district

or sub-district, unless a majority of the voters of such district or sub-district shall petition therefor. [R., § 441; C., '51, § 219; 14 G. A., ch. 122.]

[For similar provision as to dividing school districts, see § 2918.]

A township is not a corporation authorized to sue and to be sued. It is no more than a legal subdivision of a county for governmental purposes and has no corporate powers as such: *Township of West Bend v. Munch*, 52-132; *Wells v. Stomback*, 59-376.

But if the action is brought in the name of the township the petition may be amended by the substitution of the name of the officer of the township as plaintiff, who is entitled to the custody of the money sued for: *Wells v. Stomback*, 59-376

The board has the power, and it is its duty, to divide the county into townships, and it has the power to divide the townships and create new ones when the public convenience requires that that be done: *Lones v. Harris*, 71-478.

517. Must be ten voters. 380. No township shall be organized in which at the time of organization there shall not be at least ten legal voters; *provided*, that each county shall have one civil township. [9 G. A., ch. 73, § 1.]

518. Changes recorded. 381. The description of the boundaries of each township, and of all alterations in them, and of all new townships, shall be recorded in full in the records of the board of supervisors and of the township. [R., § 442; C., '51, § 220.]

OF DIVIDING TOWNSHIPS.

519. Application for. 382; 20 G. A., ch. 106. When any township has within its limits an incorporated city or town with a population exceeding fifteen hundred inhabitants, the electors of such township residing without the limits of such city or town, may, at the January, April, or June session of the board of supervisors of the county, petition to have such township divided into two townships; the one to embrace the territory without, and the other the territory within such corporate limits; which petition shall be accompanied by the affidavit of three individuals, to the effect that all the signatures to such petition are genuine, and that the signers thereof are all legal voters of said township, residing outside said corporate limits. Remonstrances signed by such legal voters may also be presented at the hearing before the board of supervisors hereinafter provided for, and, if the same persons petition and remonstrate, they shall be counted on the remonstrance only. [14 G. A., ch. 52, §§ 1, 2.]

520. Notice. 383. Notice of the time when such petition will be presented, shall be given by two publications in a weekly newspaper published in the township, the last of which publications shall be at least ten days prior to the time fixed for the presentation of such petition; or if no paper is printed in such township, or the papers therein printed refuse to make such publication, the notice herein contemplated shall be given by posting in five public places in the township, two of which shall be without and three within such corporate limits. [Same, § 3.]

521. Division. 384; 21 G. A., ch. 48. If such petition is signed by a majority of the electors of such township residing without the corporate limits of such city or town, the board of supervisors shall divide such township into two townships, as prayed therein, but except for election purposes, including the appointment of all judges and clerks of election rendered necessary by the change, such division shall not take effect until the first Monday of January next ensuing. *Provided* that when the citizens of any township so set off desire to dissolve their township organization and return again to the township from which they were taken, they may do so by the same procedure as provided in sections three hundred and eighty-two and three hundred and

eighty-three [§§ 519, 520] for the division except that said petition shall be signed by a majority of the electors of both townships. [Same, §§ 4, 5.]

Where the application for division is properly made, the board of supervisors has no discretion and may be compelled by *mandamus* to make such division: *Henry v. Taylor*, 57–72.

The new township does not become independent until its complete organization, which is on the 1st of January following, when the officers elected for it enter upon the discharge of their duties: *Lamb v. Burlington, C. R. & M. R. Co.*, 39–333.

Upon the formation of a new township, no election except one for the election of officers of such township can be held until after the 1st of January following. Special elections contemplated or authorized by law to be held prior to that time must be held in the old or original township: *Williams v. Poor*, 65–410.

522. First election. 385. When a new township is formed, the board of supervisors shall call the first township election, to be held at such place as it may designate, on the day of the next general election. [R., § 453; C., 51, § 231.]

523. Warrant for. 386. The auditor shall issue a warrant for such first election, stating the time and place of the same, the officers to be elected, and any other business which is to be attended to; and no other business shall be done than such as is so named. [R., § 454; C., '51, § 232.]

The warrant provided for by this section relates only to the first election in a new township. Failure to issue it will not render subsequent elections invalid: *Lones v. Harris*, 71–478.

524. How served. 387. Such warrant may be directed to any constable of the county, or to any citizen of the same township, by name, and shall be served by posting up copies thereof in three of the most public places in the township fifteen days before the day of the election; the original warrant shall be returned to the presiding officer of the election, to be returned to the clerk when elected, with a return thereon of the manner of service, verified by oath if served by any other than an officer. [R., § 455; C., '51, § 233.]

525. Election. 388. The election shall be conducted as other township elections, and the electors shall proceed to elect the officers named in this chapter. [R., § 457; C., '51, § 235.]

OFFICERS — DUTIES.

526. Officers. 389. In each township there shall be elected three trustees, one clerk, one assessor, two constables, and two justices of the peace, but where a city or incorporated town is situate in a township, the trustees of the township may order the election of one or two additional justices and constables, and at least one justice and constable shall reside within the limits of such city or town. [R., §§ 443, 726; C., '51, § 221.]

527. May employ attorney. 20 G. A., ch. 120, § 1. Whenever litigation shall arise involving the right or duty of township trustees to certify or levy taxes which have been authorized upon expressed conditions, then, in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation.

528. Assessors. 390; 16 G. A., ch. 6; 18 G. A., ch. 201, § 1; 19 G. A., ch. 110. At the general election in the year 1882, and biennially thereafter, there shall be elected in each township a part of which is included within the incorporate limits of any incorporated city or town, by the qualified voters of such township residing without the corporate limits of such city or town, one assessor in the same manner as provided by law for the election of township assessors, and at the regular municipal election of each incorporated town or city in the

year 1882, and biennially thereafter, whether such city or town embraces one or more townships or parts of townships, there shall be elected by the qualified voters of such city or town one or more assessors for such city or town, and such assessors shall be restricted in the discharge of their official duties to the limits within which they are elected, and shall hold their offices for the term of two years from the first day of January next ensuing. The city council of any incorporated city having a population of ten thousand or over may, by a resolution to be adopted at least five weeks before the time for any regular municipal election, determine whether it shall be necessary to elect more than one assessor, and fix the number thereof, not exceeding three, and thereupon the mayor of such city shall make proclamation of such determination in like manner, and at the same time that he shall proclaim the election of other city officers to be elected at the municipal election next ensuing, and such resolution shall also divide such city into districts for assessment purposes; and the county auditor of the county in which such city is situate, upon being notified of such division, shall provide a separate assessment book for each of said assessment districts. Said assessors, when so elected, shall give bond and qualify, receive the same compensation, be under like penalties, and perform the same duties in like manner as township assessors, except as herein provided. In case there should be a failure to elect, [or] a vacancy shall occur in the office of assessor within such incorporated city, the city council may elect some suitable person to perform the duties of such office for the unexpired term. It shall be the duty of such assessors, if more than one shall have been elected, to meet at least once a week, and oftener if they shall deem it necessary, and carefully compare valuations in order to secure a uniform assessment of all the property of such city, and when so met they shall constitute a board of assessment, a majority of whom shall determine the value of any property as to which difference may arise in such board: *Provided*, that the city council of any city or town, having a population as aforesaid shall have power in the year 1882 by resolution to increase the number of assessors not exceeding three, and to appoint the additional number provided for; and each assessor so appointed shall qualify and act and hold *their* [his] office for the term as provided for in this act.

[Further as to assessors, see §§ 789 and 790.]

Under the original section *held* that an assessor elected by the city as therein prescribed was not a city but a township officer: *Lennie v. Waverly*, 42–486.

This section, both as it originally stood and as re-enacted by the sixteenth general assembly, applies only to townships containing cities incorporated under the general incorporation law and not those existing under special charter: *State v. Finger*, 46–25.

Where two townships being included within the corporate limits of a city comprise but one assessorial district, the county board of equalization cannot equalize taxation as between such townships, but can only act upon the whole district: *Getchell v. Board of Supervisors*, 51–107.

529. Division of work between assessors. 18 G. A., ch. 201, § 2. It shall be the duty of such assessors, if more than one shall have been elected, to agree between themselves for such systematic distribution of their work as will most efficiently further the satisfactory completion of the same within the time prescribed by law; and in assessing the property of such incorporated city, each shall faithfully and industriously work to that end, and for any failure or delinquency in that respect on the part of any or all of said assessors, he or they shall be liable as provided by section eight hundred and twenty-seven of the code of 1873 [§ 000].

530. Place of election. 391. The trustees shall designate the place where elections will be held, and whenever a change is made from the usual place of holding elections in the township, notice of such change shall be given by

posting up notices thereof in three public places in the township, ten days prior to the day on which the election is to be held. [R., § 444; C., '51, § 222.]

No provision is made for the payment by the county of compensation for the place thus designated, and it is not liable therefor: *Turner v. Woodbury County*, 57-440; *McBride v. Hardin County*, 58-219.

531. Record. 392. They shall cause a record to be kept of all their proceedings. [R., § 445; C., '51, § 223.]

Written orders for the relief of poor persons, given by the township trustees under § 2152, are valid, without being otherwise made of record under this section or § 534: *Bremer County v. Buchanan County*, 61-624.

The complaint to trustees as fence-viewers is not part of their proceedings, and need not be in writing nor of record: *Tubbs v. Ogden*, 46-134.

532. Trustees; duties. 393. The township trustees are the overseers of the poor, fence-viewers, and the township board of equalization and board of health, and shall have charge of all cemeteries within the limits of their township dedicated to public use when the same is not controlled by other trustees or incorporated bodies. [R., § 446; C., '51, § 224.]

[Further as to cemeteries, see §§ 562-568.]

533. Refusing to serve. 394. Any person elected to a township office and refusing to qualify and serve, shall forfeit the sum of five dollars, which may be recovered by action in the name of the county, to the use of the school fund in the county, but no person shall be compelled to serve as a township officer two terms in succession. [R., § 447; C., '51, § 225.]

534. Clerk; duties. 395. The township clerk shall keep accurate records of the proceedings and orders of the trustees, and perform such other acts as may be required of him by law. [R., § 448; C., '51, § 226.]

Entries made on the record by one township clerk from memoranda of the action of the trustees made by the previous clerk are admissible as a part of the record: *Moses v. Penquit*, 72-611. See note to § 531.

535. Oaths. 396. He is authorized to administer the oath of office to all the township officers, and he shall make a record thereof, and also of all who file certificates of their having taken the oath before any other officer authorized to administer the same. [R., § 449; C., '51, § 226.]

536. 16 G. A., ch. 110, § 1. Township clerks shall have power to administer oaths to township officers, judges of election, clerks of election, and highway supervisors, for services rendered in their respective townships.

537. Notify auditor. 397. The clerk, immediately after the election of officers in his township, shall send a written notice thereof to the county auditor, stating the names of the persons elected and the time of the election, and shall enter the time of the election of each officer in the township record. [R., § 450; C., '51, § 228.]

538. Receipts and disbursements. 16 G. A., ch. 50, § 1. Hereafter it shall be the duty of township clerks in each county in the state, on the morning of the day of each general election, and before the hour for opening the polls, to post up at the place where such general election is to be held in his township, a statement, in writing, showing all receipts of money and disbursements in his office, for the preceding year, such statement to be certified by the trustees of the said township.

539. Constables; duty. 398. The constables shall serve all warrants, notices, and other process, lawfully directed to them by the trustees or clerk of the township, or any court, and perform such other duties as are or may be required by law. [R., § 451; C., '51, § 229.]

540. 399. Constables are ministerial officers of justices of the peace. [R., § 452; C., '51, § 230.]

A constable is properly a township officer, although he is considered as a county officer for some purposes: *State v. Bevans*, 37–178.

A justice of the peace has no authority to appoint a special constable to assist peace officers in seizing liquors. He cannot give to a special constable thus appointed general authority: *Foster v. Clinton County*, 51–541.

TOWNSHIP COLLECTOR.

541. When elected. 400. There shall be elected at the general election in every year, a township collector in and for each organized township in every county, except the township in which the county seat is located, who shall hold office for one year; *provided*, the board of supervisors of the county shall order the election of township collectors as in this chapter hereinafter provided. [12 G. A., ch. 137, § 1.]

542. Qualification of. 401. He shall qualify as other elective officers, and give a bond to the county in a penal sum equal to double the whole amount of tax to be by him collected, which shall be presented to and approved by the board of supervisors of the county and recorded the same as the bond of county officers. [Same, § 2.]

543. Auditor's duty. 402. The auditor, in counties where township collectors are elected, shall make out a duplicate tax-list of each township, and deliver the same, with the original, to the county treasurer. [Same, § 4.]

544. Treasurer's duty; powers of collector. 403. The county treasurer shall deliver to each township collector in the county, as soon as he has qualified, such duplicate tax-list of his township and take his receipt therefor, specifying the total amount of the tax charged in such list, and charge the same over to each township collector in a book to be kept for that purpose; and such duplicate tax-list, when so made out and delivered to the township collectors, may be used as an execution, and shall be sufficient authority for them to collect the taxes therein charged in any township in the county by distress and sale or otherwise, as now provided by law for the collection of taxes by the county treasurer; and the county treasurer shall not receive or collect any of the taxes charged in any duplicate tax-list so delivered, except the tax of non-residents of the township, until the same has been returned to him as hereinafter provided. The said county treasurer shall procure for and deliver to each township collector with said tax-list, a tax receipt-book, with a blank margin or stub, upon which the said township collector shall enter the number and date of the tax-receipt given to the tax-payer, the amount of tax and by whom paid, which said tax-receipt book shall be returned to the county treasurer, with the said duplicate tax-list, as hereinafter provided. [Same, § 5.]

A warrant is not required to be attached to such duplicate tax-list: *Shaw v. Orr*, 30–355, 361.

545. Notice. 404. Upon the receipt of said tax-lists, each township collector, immediately, shall cause the notice of the reception thereof to be posted up in some conspicuous place in every school district in the township, and in every ward of any city therein, so located as will be most likely to give notice to the inhabitants thereof, and also publish such notice for four weeks in one or more weekly papers, if any published in the township, designating in such notice a convenient place in such township where he will attend from nine o'clock A. M. to four o'clock P. M., at least once in each week, on a day to be specified in said notice until March first following, for the purpose of receiving payment of taxes, and each collector shall attend accordingly, and he shall proceed to collect and receipt for all taxes therein charged, in the same manner as now provided by law for the collection of taxes by the county treasurer, and all the laws which apply to and govern the collection of taxes, by county

treasurers, shall apply to and govern the collection of taxes, by said township collector, when not inconsistent with the provisions of this chapter. [Same, § 6.]

546. Demand taxes; distress and sale. 405. Every collector, after the first of March in each year, shall call at least once on each person whose tax remains unpaid, or at the place of his usual residence, if in the township for which such collector has been chosen, and shall demand the payment of the taxes charged to him on his property. In case any person shall attempt to remove from the township, property on which tax is due, without leaving sufficient to pay such tax, at any time after the duplicate comes into his hands, the collector shall attach such property and hold the same until the tax is paid, or make the tax out of such property. In case any person shall refuse or neglect to pay the tax, or shall have removed from said township, the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same, or of any goods and chattels on which the said tax was assessed, wheresoever the same may be found within the county. The collector shall give public notice of the time and place of sale, and of the property to be sold, at least six days previous to the sale, by advertisements to be posted up in at least three public places in the township where such sale shall be made. The sale shall be made by public auction, and if the property shall be sold for more than the amount of the tax, penalty, and costs, the surplus shall be returned to the person in whose possession such property was when the distress was made. [Same, § 7.]

547. Monthly statements. 406. The township collectors shall make monthly statements to the county treasurer of the amount of tax collected by them on each fund, and pay the same over to the county treasurer and take his receipt therefor; and they shall complete the collection of the tax charged in the said duplicate tax-lists, by distress and sale or otherwise, on or before the first Monday in May next after the receipt of said duplicate tax-list, and pay over the amount so collected to the county treasurer and return to him the said tax-lists and receipt-books, and make a full and complete settlement for the taxes so collected with the county treasurer, which settlement shall be subject to the examination and correction by the board of supervisors of the county at its next session. [Same, § 8.]

The provision as to return of tax-list to the treasurer by the first Monday in May is merely directory and does not limit his authority to act after that time: *Shaw v. Orr*, 30-355.

548. Compensation. 407. Each township collector shall receive for his services the following compensation: 1. Two per cent. of all sums collected by him on the first two thousand dollars, and one per cent. on all sums in excess thereof collected by him otherwise than by distress and sale, to be paid out of the county treasury. 2. Five per cent. upon all taxes collected by him by distress and sale, which percentage and costs shall be collected of the delinquent tax-payer, and the same fees in addition to the said five per cent. as constables are entitled to receive for the sale of property on execution. [Same, § 9.]

549. Unpaid taxes. 408. After the return of said duplicate tax-lists and settlement as provided above, the county treasurer shall receive, receipt for, and collect any unpaid taxes in the county, and shall proceed to advertise and sell all the real estate in the county upon which the taxes have not been paid, for the unpaid taxes thereon as provided by law. [Same, § 10.]

550. When there is failure to collect. 409. If any of the taxes mentioned, in the tax-list shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes so remaining due; and upon making oath before the county auditor, or in case of his absence before any justice of the peace, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry,

been able to discover any goods or chattels belonging to or in the possession of the person charged with or liable to pay such sums, whereon he could levy the same, he shall be credited by the county treasurer with the amount thereof, but such oath and credit shall only be presumptive evidence of the correctness thereof. [Same, § 11.]

551. Liability. 410. Such collector and his sureties shall be liable for the loss by theft or otherwise, of any money collected by him and in his possession. [Same, § 13.]

552. When election of collector ordered. 411. The board of supervisors of each county in the state having a population exceeding seven thousand inhabitants, as shown by the last preceding census, are hereby authorized and empowered to order an election of a township collector in each organized township in their county, by a resolution to that effect, passed at their regular meeting in June in any year by a two-thirds vote of the board, which shall be spread upon the records of the board, and the first election of township collectors in such county shall be held at the next general election after the passage of such resolution, and every year thereafter until the said resolution is repealed by the board, by a like vote, at their regular meeting in June in any year. They shall be voted for and elected in the manner of the other township officers, and in all counties in the state where such resolution is not in force, as provided in this section, then sections four hundred and one to four hundred and eleven inclusive, of this chapter [§§ 542-552] shall be inoperative and of no effect. [Same, § 12.]

CHANGING NAME OF TOWNSHIP.

553. How changed. 412. Any township desirous of changing its name, may petition the board of supervisors of the county in which such township is situated; and if it shall appear to said board that a majority of the actual resident voters of such township are in favor of such change, such board shall cause three notices to be posted up in three of the most public places of such township, for at least thirty days previous to the next session of said board, which notice shall state the fact that a petition has been presented to said board by the citizens of said township praying for a change of the name of the same, and the name prayed for in said petition, and that unless those interested in the change of such name shall appear at the next regular session of said board and show cause why said name shall not be changed, there will be an order made granting such change, which notice shall be attested by the auditor. [9 G. A., ch. 80, § 1.]

554. Order. 413. If, at the time fixed for the hearing of said petition, said board is satisfied that there is a majority in favor of such change of name, said board shall make an order granting such change, which shall be attested by the auditor and recorded in the office of the recorder of the county where such township is situated. [Same, § 2.]

555. Costs. 414. The cost of such change and recording shall be paid by the petitioners. But should it appear to said board that a majority of the citizens of such township are opposed to such change, such petition shall be dismissed and the cost of the proceeding taxed against the petitioners. [Same, § 2.]

BOARD OF HEALTH.

556. Trustees constitute. 415. The township trustees shall have power to make whatever regulations they deem necessary for the protection of the public health, and respecting nuisances, sources of filth, and causes of sickness within their respective townships; *provided*, that their jurisdiction as such board shall not extend to any city or incorporated town situated therein. [11 G. A., ch. 107, §§ 1, 2.]

[Further, as to trustees constituting board of health, see § 2570 *et seq.*]

557. Regulations published. 416. Notice shall be given of all regulations made, by publishing the same in a newspaper published in the township, or, where there is no newspaper, by posting in five public places therein. [Same, § 3.]

558. Power. 417. The trustees may order the owner or occupant, at his own expense, to remove any nuisance, source of filth, or cause of sickness found on private property within such time as they deem reasonable, and if such person neglects to do so he shall forfeit a sum of not exceeding twenty-five dollars for every day during which he knowingly permits such nuisance or cause of sickness to remain after the time prescribed for the removal thereof. The order shall be in writing, and served by any constable of the town in the usual way of serving notices in civil suits. If the owner or occupant fails to comply with such order, the trustees may cause the nuisance, source of filth, or cause of sickness to be removed, and all expenses incurred thereby shall be paid by such owner or occupant. [Same, §§ 5, 6, 7.]

559. Enforcing regulations. 418. The trustees shall have power to employ all such persons as shall be necessary to carry into effect the regulations adopted and published according to the powers vested in the trustees and to fix their compensation; to employ physicians in case of poverty, and to take such general precautions and actions as they may deem necessary for the public health. [Same, § 8.]

The provisions of this section are superseded by § 2578: *Staples v. Plymouth County*, 62-364.

560. Punishment. 419. Any person who shall wilfully violate any of the regulations so made and published by the trustees, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine or imprisonment, such fine not to exceed one hundred dollars, and such imprisonment not to exceed thirty days. [Same, § 9.]

561. Expenses. 420. All expenses, now or hereafter incurred by the trustees of a township in the exercise of the powers heretofore or herein conferred, shall be borne by the township. The trustees shall certify the amount required to pay such expenses to the board of supervisors of the county, and that board shall, at the time it levies the general taxes, and in addition thereto, levy on the property of such township a sufficient tax to pay the amount so certified by the trustees. The tax so levied shall be collected by the county treasurer with the other taxes, and be by him paid over to the township clerk. [Same, §§ 10, 11.]

The board will not be bound by the action of individual members in authorizing a physician to render services. Such action must be by the board as a body: *Young v. Blackhawk County*, 66-460.

RELATING TO CEMETERIES.

562. Laying out. 16 G. A., ch. 130, § 1. Where there is located in any township one or more cemeteries the owner or owners of the same, or any party or parties owning an interest therein, may cause the same to be surveyed, platted and laid out into subdivisions and lots, numbering the same by progressive numbers, giving the dimensions, length and breadth thereof, with reference to known or permanent monuments to be made; and which plat shall accurately describe all the subdivisions of the tract of land used or designed to be used as a cemetery; said plat shall be recorded in the office of the county recorder, and filed with and recorded by the township clerk and preserved by him among the records of his office.

563. Conveyance of lots. 16 G. A., ch. 130, § 2. All conveyances of subdivisions or lots of a cemetery thus platted, shall be by deed from the proper owner, which deed shall be recorded with the township clerk in a book

kept by him for that purpose, for the recording of which the said clerk shall be entitled to a fee of fifty cents for each instrument recorded, to be paid by the party desiring the record made.

564. Condemning any lands. 16 G. A., ch. 130, § 3. The township trustees are hereby empowered to condemn or purchase and pay for out of the general fund, and enter upon and take any lands within the territorial limits of such township for the use of cemeteries in the same manner as is now provided for incorporated cities and towns.

565. Tax. 16 G. A., ch. 130, § 4. They shall at the regular meeting in April, levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established. They shall have power to control any such cemeteries, or appoint trustees for the same or sell it to any private corporation for cemetery purposes.

566. Power of officers. 17 G. A., ch. 106, § 1. The trustees, board of directors or other officers having the custody and control of any cemetery in this state shall have power, subject to the by-laws and regulations of said cemetery, to inclose, improve and adorn the grounds of such cemetery, to construct avenues in the same, to erect proper buildings for the use of said cemetery, to prescribe rules for improving or adorning the lots therein, or for the erection of monuments or other memorials of the dead upon such lots; to prohibit any use, division, improvement or adornment of a lot which they may deem improper.

A grantor of land conveyed to township trustees for use as a cemetery cannot maintain action by *mandamus* against them to compel its use for such purpose, before it has been actually appropriated to that purpose, it not appearing that the use to which it was to be put constituted any part of the consideration for the sale: *Christy v. Whitmore*, 67–60.

567. Penalty for injuring or defacing graves, etc. 17 G. A., ch. 106, § 2. Any person who shall wilfully and maliciously destroy, mutilate, deface, injure or remove any tomb, vault, monument, gravestone or other structure, placed in any public or private cemetery in this state, or any fences, railing or other work for the protection or ornamentation of said cemetery, or of any tomb, vault, monument or gravestone, or other structure aforesaid, on any cemetery lot within such cemetery, or shall wilfully and maliciously destroy, cut, break, or injure any tree, shrub, plant, or lawn within the limits of said cemetery, or shall drive at unusual and forbidden speed over the avenues or roads in said cemetery, or shall drive outside of said avenues and roads and over the grass or graves of said cemetery, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof before any court of competent jurisdiction, be punished by a fine of not less than five dollars, nor more than one hundred dollars, or by imprisonment in the county jail for a term of not less than one nor more than thirty days, in the discretion of the court, and such offender shall also be liable in an action of trespass in the name of the person or corporation having the custody and control of said cemetery grounds, to pay all such damages as have been occasioned by his unlawful act or acts, which money, when recovered, shall be applied by said person or corporation to the reparation and restoration of the property so injured or destroyed, if the same can be so repaired or restored.

568. Watchmen. 17 G. A., ch. 106, § 3. It shall be lawful for the trustees, directors, or other officers having the custody and control of any cemetery in this state, to appoint as many day and night watchmen of their grounds as they may think expedient; and such watchmen, and also all their sextons, superintendents, gardeners, and agents stationed upon or near said grounds, are hereby authorized to take and subscribe before any mayor of a city, or justice of the peace of the township where such cemetery is situated, an oath of office similar to that required by law of constables, and upon the

taking of such oath, such watchmen, sextons, superintendents, gardeners and agents, shall have, exercise and possess all the powers of police officers within and adjacent to the cemetery grounds, and they and each of them shall have power to arrest any and all persons engaged in violating the laws of this state in reference to the protection, care and preservation of cemeteries, and of the trees, shrubbery, plants, structures, grass and adornments therein, and to bring such persons so offending before any justice of the peace within such township, to be dealt with according to law.

CHAPTER 10.

OF CITIES AND INCORPORATED TOWNS.

569. How incorporated. 421; 18 G. A., ch. 79. When the inhabitants of any part of any county not embraced within the limits of any city or incorporated town shall desire to be organized into a city or incorporated town, they may apply by petition in writing, signed by not less than twenty-five of the qualified electors of the territory to be embraced in the proposed city or incorporated town, to the circuit [district] court of the proper county, which petition shall describe the territory proposed to be embraced in such city or incorporated town, and shall have annexed thereto an accurate map or plat thereof and state the name proposed for such city or incorporated town, and shall be accompanied with satisfactory proofs of the number of inhabitants within the territory embraced in said limits. [12 G. A., ch. 61, § 2.]

570. Commissioners; election. 422. When such petition shall be presented, the court shall forthwith appoint five commissioners who shall at once call an election of all the qualified electors residing within the territory embraced within said limits as described and platted, to be held at some convenient place within said limits, the notice for which shall be given by publication in some newspaper published within said limits, if any there be, for three successive weeks, and by posting notices in five public places within said limits; said posting and the first publication to be not less than three weeks preceding such election. Such notice shall specify the place and time of such election and a description of the limits of said proposed town or city, and that a description and plat thereof are on file in the office of the clerk of the circuit [district] court. Said commissioners shall act as judges and clerks of the election, and shall qualify as required by law for judges and clerks of township elections, and shall report the result of the ballot to the court aforesaid. The ballot used at said election shall be "For incorporation," "Against incorporation." [Same, § 3.]

[The word "township" as used in the fourth line from the bottom of this section is "county" in the printed Code: but is as here given in the original of the Code as passed by the legislature and found in the office of the secretary of state.]

Where notice, instead of being given as required by statute, was published only on the morning of the day of election, *held*, that although a majority of the votes cast were in favor of organization, the election was void: *State ex rel. v. Young*, 4-561.

571. Result published. 423. If a majority of the ballots cast at such election be in favor of such incorporation, the clerk shall, immediately on the return of the commissioners being filed in his office, give notice of the result by publication in a newspaper, or, if no newspaper be published in the county, by posting in five public places within the limits of the proposed city or town; and in such notice he shall designate to which of the classes of incorporation hereinafter prescribed, such city or town shall belong. A copy of the notice,

with proper proof of its publication, shall be filed with the papers, and a certified copy of all papers and record entries relating to the matter on file in the clerk's office, shall be filed in the recorder's office of the county and in the office of the secretary of state. [Same, § 4.]

572. Incorporation complete. 424. When certified copies are made and filed as required by the preceding section, and officers are elected and qualified for such city or town as hereinafter provided, the incorporation thereof shall be complete; whereof notice shall be taken in all judicial proceedings. [Same, § 5.]

A court will take judicial notice in what county a given incorporated town is situated: *State v. Reader*, 60-527.

573. First election; notice. 425. When the incorporation of such city or town is completed, the commissioners shall give notice for two consecutive weeks of the time and place of holding the first election of officers therefor by publication in a newspaper, or, if none be published within the limits of such city or town, by posting in five public places within the limits of the same. At such election the qualified electors residing within the limits of such city or town shall choose officers therefor, to hold until the first annual election of officers according to its grade, as hereinafter in this chapter prescribed. The commissioners shall act as judges and clerks of the election, and otherwise it shall be conducted and the officers elected thereat shall be qualified in the manner prescribed by law for the election and qualification of township officers. [Same, § 6.]

[The words, "of such city or town," as they stand in the printed Code between "electors" and "residing," in the seventh line of the section, are not in the original section of the Code as passed by the legislature and now preserved in the office of the secretary of state.]

CONTIGUOUS TERRITORY ANNEXED.

574. Petition. 426. When the inhabitants of a part of any county adjoining any city or town shall desire to be annexed to such city or town, they may apply by petition in writing to the circuit [district] court of the proper county, signed by not less than a majority of the electors residing within the territory proposed to be annexed; which petition shall state at whose instance it is presented, and shall be accompanied by an accurate plat or map of such territory. [R., § 1038.]

It is not competent in the petition for incorporation to provide for the exemption in the annexed territory of certain property from city taxes, and such provision is a nullity: *Hayzlett v. Mt. Vernon*, 33-229.

575. Procedure. 427. Like proceedings, as nearly as applicable, shall be had on such petition as are prescribed in sections four hundred and twenty-two and four hundred and twenty-three of this chapter [§§ 570, 571], *provided*, that notice of the election shall also be served on the mayor or other presiding officer of the town or city to which the annexation is proposed, and such election shall be held in the territory proposed to be annexed. [R., § 1039.]

576. Proposition submitted. 428. The council or trustees of said city or town may give the consent thereof to such annexation, or they may, in their discretion, provide by ordinance or resolution for submitting to the electors at the next annual election of municipal officers the question whether such annexation shall be made; and if such consent be given, or if a majority of the electors of such city or town voting at such election shall vote in favor of annexation, then on the return of such vote to the proper authority of such city or town, a resolution or ordinance shall be adopted or passed declaring that the territory described in the petition has been annexed to and is a part of such city or town; and the clerk or recorder of the said city or town shall

make out two copies of the petition, plat, orders of the circuit [district] court, abstract of votes, and resolutions or ordinances in relation to such annexation, with a certificate that the same are correct, attested by the seal of such city or town and he shall deliver one of said copies to the recorder of the county, who shall, having first made record thereof in the proper books of record, file and preserve the same, and the other of said copies shall be forwarded by the clerk or recorder of said city or town to the secretary of state. [R., § 1041.]

577. Annexation, when complete. 429. So soon as said resolution or ordinance declaring such annexation has been adopted, and the said copies transmitted, delivered, and recorded, the said territory shall be deemed and taken to be a part and parcel of the said city or town, and the inhabitants residing therein shall have and enjoy all the rights and privileges of the inhabitants within the original limits of such city or town. [R., § 1042.]

578. Extension by application to council. 18 G. A., ch. 56, § 1. In addition to the methods now provided by law for extending city limits, whenever the owner or owners of lands adjoining the limits of any city of the first or second class, organized under the general laws of the state of Iowa, shall desire to have their lands brought within the limits of such city, they may apply to the city council of such city to have the limits of the city extended so as to include such lands, and shall attach to the application a map of such lands, showing their situation, with respect to the existing limits of the city. If the city council shall assent to the extension of the limits of the city, as applied for, a minute thereof shall be indorsed upon the map by the city clerk, and the same shall then be acknowledged by the owner and recorded in the office of the recorder of the proper county, as provided in section five hundred and sixty of the code [§ 995]. Thereafter the limits of the city shall be extended so as to conform to the line proposed and so assented to by the city council.

BY CORPORATION.

579. Submission of question. 430. When any municipal corporation shall desire to annex any contiguous territory thereto, not embraced within the limits of any city or town, it shall be lawful for the trustees or council of the corporation, by an ordinance passed for that purpose at least one month before the regular annual election, to submit the question of annexation to the qualified electors of such corporation; and if a majority of the electors of the corporation voting on the question shall vote in favor of such annexation, the council or trustees of such corporation shall present to the circuit [district] court a petition praying for such annexation, which petition shall describe the territory proposed to be annexed to such municipal corporation, and have attached thereto an accurate map or plat thereof, and like proceedings shall be had upon said petition as are provided in sections four hundred and twenty-two and four hundred and twenty-three of this chapter [§§ 570, 571] so far as the same may be applicable; and if the result of the election be favorable to the proposed annexation, the same record shall be made as provided in said sections, and thereupon the said contiguous territory proposed to be annexed shall be in law deemed and taken to be included in, and shall be a part of said municipal corporation, and the inhabitants thereof shall in all respects be citizens thereafter of the said municipal corporation.

Extension of limits of an incorporated city or town and bringing additional land or people under municipal authority are acts of like nature with the incorporation of such city or town, and depend for their authority upon the same constitutional provisions: *Morford v. Unger*, 8-82.

Property which is so far removed from the local government as not to derive benefit therefrom, and which the owner desires to use as farming land and not for laying off into city lots, cannot, by being included in city limits against the will of the owner, be subjected to city taxation, even though it is provided that it shall be assessed only at its value for farming land: *Ibid.*

While enlargement of boundaries of a city or town whereby the property of individuals is brought within the corporate limits without the consent of its owners, and subjected to taxation for town purposes, may not be an infringement of the constitutional provision against taking private property for public use without compensation, yet it may become so by an unreasonable extension in taking in lands not at all needed for buildings and population, and taxing the same for the benefit of the portion of the corporate domain which may be peopled or occupied. In such cases the courts will limit the taxing power whenever practicable to the point or line where it ceases to operate beneficially to the proprietor in a municipal point of view: *Langworthy v. Dubuque*, 16–271; *Fulton v. Davenport*, 17–404.

Facts in particular cases considered as determining whether the property was properly subject to municipal taxation or not: *Morford v. Unger*, 8–82; *Butler v. Muscatine*, 11–433; *Langworthy v. Dubuque*, 16–271; *Hershey v. Muscatine*, 22–184.

Where the land thus included is laid off into lots and platted as an addition, it becomes subject to municipal taxation: *Fulton v. Davenport*, 17–404.

So where the proprietors of undedicated town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the property arises; but in its exercise great care and circumspection should be observed less perchance injustice and oppression should ensue: *Ibid.*

Certain tracts of land in Dubuque *held* not liable to taxation for municipal objects under the foregoing doctrines: *Davis v. Dubuque*, 20–458.

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

But *held* that a lot was not liable to such taxation which was not upon a principal street, nor accessible by any street leading to the business part of the city, and was surrounded exclusively by agricultural and mineral lands, and was not benefited by current expenditures: *Ibid.*

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

Tracts of forty and ten acres respectively, all lying together, occupied for agricultural purposes, remote from the city proper, no streets or alleys having been worked near them, *held* not liable for municipal taxation: *Deeds v. Sanborn*, 26–419.

Lands included within an extension of the city limits but used exclusively for agricultural purposes, and not affected by the current expenditures of the city, no money being spent for improvements thereon, and no streets or alleys being worked for their benefit, such lands not being used for buildings and not being enhanced in value by being within the corporate limits, *held* not subject to municipal taxation: *Deiman v. Fort Madison*, 30–542.

The fact of payment of previous taxes will not estop the property owner from claiming the exemption of his property from municipal taxation: *Ibid.*

Property included within the corporate limits, deriving no benefit from being thus included, and used alone for agricultural purposes, and not demanded for use as city property, nor possessing a value on account of its adaptation for dwellings or business, is exempt from taxation; but property which is held for the opportunity of bringing it into the market as city lots is not entitled to exemption. So, if land within the city limits is used for the purpose of dwellings or business, it cannot ordinarily be claimed to be exempt from taxation, even though the city fails to open or improve the streets leading thereto: *Durant v. Kauffman*, 34–194.

Municipal taxes from which farm property within the corporate limits is exempt are those which but for municipal purposes would not have been levied, such as taxes to support the police of the city, its necessary lights, water, sewerage, fire department, local government, etc.; but such property is not exempt from taxes voted by the city in aid of a railway, which might be levied as effectually upon property not included within the city: *Sears v. Iowa Midland R. Co.*, 39–417.

A tract of one hundred acres within city limits, used only for farming purposes and having no houses thereon, but against which streets abut, and adjoining an addition laid out in lots and partially improved, *held* subject to city taxes: *Brooks v. Polk County*, 52–460.

The fact that land included within the city limits is used for agricultural purposes will not render the taxation thereof illegal, it not being shown that it is used exclusively for such purposes, nor that it does not derive such benefit from the expenditure of municipal taxes that it is properly subject to such taxation: *Tubbesing v. Burlington*, 68–691.

The character and use of the land alone are not sufficient to determine the question of exemption. It is important to consider the benefits, if any, derived from the expenditure of municipal taxes. Although land is adjudged not to be liable to municipal taxation for a particular year, such adjudication will not necessarily show that municipal taxes thereon for previous years were illegal: *Ibid.*

A tract of land used for railway depot purposes, and situated within the boundaries of the city, is to be deemed subject to municipal taxes, although not platted into lots: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

580. By proceedings in court. 431. When any incorporated city shall desire to annex to such corporation any abutting and contiguous territory thereto, which is not embraced within the limits of any city, and which territory has been laid out in lots or parcels containing two acres or less, the council of such corporation may present to the circuit [district] court of the county in which such city is situate, a petition setting forth the facts and describing the territory that is desired to be annexed, and that the same has been laid out as above mentioned, together with the names of each owner of any portion of such territory, without describing at length, if there is more than one such owner, the particular portion of such territory owned by each, which petition shall have attached thereto a map or plat of such territory. A notice of the filing of such petition shall be served by publication in one daily or weekly newspaper published in such city, and by posting in five public places in the territory outside of said city for the period of four weeks; and the corporation shall be plaintiff and said owners defendants, and issues joined and the cause tried in the ordinary manner as far as applicable, except that no judgment for costs shall be rendered against any defendant who does not make any defense. If the court find the allegations of the petition to be true, and that justice and equity require that said territory or any part thereof should be annexed to such corporation, a decree shall be entered accordingly, and from the time of entering such decree, the territory therein described shall be included in and become a part of such corporation. The powers conferred under the provisions of this section shall also apply to cities acting under special charters.

This section is not void as conferring legislative power upon the circuit court in violation of the constitution, art. 3, § 1; nor is the provision that this section shall apply to cities acting under special charter controlled or neutralized by § 906: *Burlington v. Leebrick*, 43–252.

581. Corporations unite. 432; 17 G. A., ch. 3, § 1. When any city or incorporated town shall desire to be annexed to another and contiguous city or incorporated town, the council or trustees of each of such cities or towns, shall appoint three commissioners to arrange and report to such council or trustees respectively the terms and conditions on which the proposed annexation can be made; and if the council or trustees of each of such cities or towns, approve of the terms and conditions proposed, they shall, by proper ordinance, so declare; and thereupon the council or trustees of each of such cities or towns, by ordinance passed, and one publication had thereof at least ten days prior to the general annual election therein, may submit the question of such annexation, upon the said terms and conditions so proposed, to the electors of their respective cities or towns, and if a majority of the electors of each vote in favor of such annexation, the council or trustees of each shall, by proper ordinance, so declare; and a certified copy of the whole proceedings for annexation of the city or town to be annexed being filed with the clerk or recorder of the city or town to which the annexation is made, the latter shall file with the secretary of state and in the recorder's office of the county, a certified copy of all proceedings had by both of such cities or towns in the matter of such annexation. [R., § 1044.]

582. Annexation complete. 433; 17 G. A., ch. 3, § 2. When certified copies of the proceedings for annexation are filed as contemplated in the preceding section, the annexation shall be deemed complete, and the terms and conditions mentioned in section four hundred and thirty-two of the code [§ 581] shall be part of the law for the government of the city or town to which annexation is made, and said city or town shall have the power and it shall be its duty to pass such ordinances, not inconsistent with law, as will carry into effect and maintain the terms of such annexation, and thereafter the city or town annexed shall be governed as part of the city or town to which the an-

nexation of it is made; and any citizen of the annexed city or town may institute and maintain legal proceedings to compel the city or town, and the council or trustees thereof, to which annexation is made, to execute such terms and conditions; *provided*, that such annexation shall not affect or impair any rights or liabilities then existing for or against either of such cities or towns, and that they may be enforced the same as if no such annexation had taken place; *and provided further*, that a city or town separated from another city or town by an intervening city, town, or territory may be annexed to such city or town in the manner hereinbefore provided, but such annexation shall not be consummated and completed until such intervening city, town, or territory is also annexed. Any proceedings which may have been commenced under said sections as amended under the provisions of this act and prior to the taking effect of this act for the annexation of a city or town, are hereby declared valid and legal, and such proceedings may be completed in accordance with said sections and the provisions of this act.

EXTENSION OF CITY LIMITS.

583. Additional mode. 16 G. A., ch. 47, § 1; 17 G. A., ch. 169, § 1. In addition to the methods now provided by law, any city or incorporated town in this state may have its limits enlarged in the manner herein prescribed.

Under these provisions it is not necessary that the territory annexed be abutting or contiguous, and laid out in lots or parcels, as is required under the provisions of § 580: *Glass v. Cedar Rapids*, 68–207.

584. Council may fix limits. 16 G. A., ch. 47, § 2; 17 G. A., ch. 169, § 2. The council may fix the boundaries of the city or incorporated town as enlarged to the proposed extent, which boundaries shall, as far as practicable, be terminated by straight lines drawn parallel respectively to the corresponding lines of the government survey.

585. Submission of question. 16 G. A., ch. 47, § 3; 17 G. A., ch. 169, § 3. The question of making such extension must then be submitted to the vote of all the qualified electors inhabiting the whole city or town as thus proposed to be enlarged. A day must be fixed for such election by resolution of the council of the city or town whose limits are proposed to be enlarged, and notice thereof must be given by proclamation of the mayor of said city or town of the time of holding such election, and setting forth the exact question to be presented to the electors for determination; which proclamation shall be published for four weeks consecutively prior to said election in some newspaper published in said city or town, which notice shall be deemed sufficient notice of said election and its purposes to all the inhabitants of the city or town as proposed to be enlarged; and if at such election the number of legal votes cast for such extension shall exceed those cast against it, the mayor shall issue his proclamation announcing that fact, and from thenceforth the limits of said city or town shall be enlarged as proposed.

586. Taxation of lands. 16 G. A., ch. 47, § 4; 17 G. A., ch. 169, §§ 4, 5. 20 G. A., ch. 158. No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less, by the extension of streets or alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which said tax shall be paid into the city treasury. The provisions of this chapter shall apply to cities organized and acting under special charters.

This provision, making distinction between lots of ten acres or more and those of less than ten acres, is not unconstitutional: *Leicht v. Burlington*, 73–29.

Under this provision, *held*, that land included within territory annexed to a city under a previous similar statute by which the lots exempt from taxation because used for agricultural purposes must exceed twenty acres, became exempt under the new statute, although not exempt under the previous one, by virtue of which the annexation was made: *Winzer v. Burlington*, 68–279.

Municipal corporations have no vested right to tax rural or farming property within their limits for city purposes, and if such right is given by statute it is competent for the legislature to take it away: *Ibid.*

The fact that the owner has a residence upon land not platted, and used for agricultural purposes, does not destroy his right to exemption under this statutory provision: *Ibid.*

In general, as to the taxation of agricultural lands within city limits, see notes to § 579.

ABANDONMENT OF SPECIAL CHARTERS.

[For acts applicable only to cities under special charters, see §§906–986.]

587. By city or town. 434. Any city or town incorporated by special charter, or in any other manner than that provided by this chapter, may abandon its charter and organize itself under the provisions of this chapter with the same territorial limits, by pursuing the course hereinafter prescribed. [Ex. S., 9 G. A., ch. 25, § 1; 11 G. A., ch. 69.]

The mere act of a town, existing under special charter, in electing officers provided by the general incorporation act, at the time and in the manner there contemplated, does not amount to a surrender of its charter, and an organization under the provisions of the general act; and where the officers, etc., are not the same the officers so elected will not even be officers *de facto: Decorah v. Bullis*, 25–12.

Mere irregularities in effecting the change cannot be made available in a suit by the city to enforce payment of an assessment not valid under the general law: *Des Moines v. Casady*, 21–570.

Where, upon an election to re-organize a city under the general incorporation laws, and abandon its special charter, a person who had been acting as city marshal under the special charter was re-elected, and was entitled, under § 591, to hold such office until qualification under the new election, *held*, that the city council could not, between the time of re-election and qualification, reduce his salary: *Cox v. Burlington*, 43–612.

588. Petition; action upon; election ordered. 435. Upon the petition of fifty legal voters in any such city or town to the council or trustees thereof, praying that the question of abandoning its charter be submitted to the legal voters, the council or trustees shall immediately direct a special election to be held, at which such question shall be decided, specifying at the same time, the time and place of holding the same, and appointing the judges and clerks of the election. [Ex. S., 9 G. A., ch. 25, §§ 2, 3.]

589. Proclamation; notice. 436. The mayor, or in case there is no mayor, the president of the council or board of trustees, shall at once issue a proclamation giving notice of such election, of the question submitted to the electors, and of the time and place of holding the election; which proclamation shall be published for four consecutive weeks in some newspaper published in such city or town; and if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office. [Same, § 4.]

590. Manner of voting; result. 437. At such election, those who desire to vote in favor of the abandonment of the charter shall deposit a ballot with the words "in favor of abandonment;" those desiring to vote against the abandonment shall deposit a ballot with the words "against abandonment." The election shall be conducted in other respects as elections for city officers are conducted under the charter. The abstract of votes shall be returned to the city council or board of trustees, who shall canvass the same and declare the result, which shall be entered on the journal. [Same, § 5.]

591. Officers elected; ordinances; resubmission. 438; 19 G. A., ch. 164. If a majority of the votes cast at such election be in favor of the abandonment of the charter, the council or trustees shall immediately call a special election for the election of officers for such corporation according to its

class as defined by this chapter; and from and after the election and qualification of such officers, the former charter of such city or town shall be considered as abandoned, and such city or town shall be considered as organized, and shall have all the rights and be subject to all the liabilities of the class to which it belongs, but the officers so elected shall hold their offices only until the next annual municipal election in such city or town; except in cities of the first class, where such special election is, or shall have been, held on the first Monday of March of an even year, when they shall hold their offices for the term of two years thereafter. All ordinances of such city or town in force at the time of the abandonment of such special charter, not inconsistent or in conflict with the general incorporation laws of the state, shall be and remain in force until otherwise altered, amended, or repealed by the council or trustees of such new organization. If a majority of the votes be against abandonment, that question cannot be again submitted until after the expiration of one year from the time of such election. [Same, § 6.]

592. Vested rights. 439. All rights and property of every description which were vested in any municipal corporation under its former organization, shall be deemed and held to be vested in the same municipal corporation under the organization herein contemplated; and no right or liability, either in favor of or against such corporation existing at the time, and no suit or prosecution of any kind, shall be affected by such change; *provided*, that when a different remedy is given by this chapter which can properly be made applicable to any right existing at the time such change is made, the same shall be deemed cumulative to the remedies before provided, and may be used accordingly. [Same, § 7.]

SEVERANCE OF TERRITORY.

593. Application. 440. When the inhabitants of a part of any town or city shall desire to have the part of the territory of such city or town in which they reside severed from, or stricken out of the limits of such city or town, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the circuit [district] court of the county, which petition shall describe the territory proposed to be thus severed or stricken out of the limits of such city or town, and have attached thereto an accurate map or plat thereof, and shall also name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition. [R., § 1048.]

Land not needed for city purposes, and not benefited by being within the corporation, should be severed upon proper proceedings being taken, and the part severed should not be held liable for municipal indebtedness incurred during its attachment, if it was not liable to municipal taxation whilst attached: *Evans v. Council Bluffs*, 65–238.

The provisions of this section apply to any territory within a city or town, whether such territory is or is not laid out into lots and blocks. If so laid out *it seems* that the severance would operate as an extinguishment of the rights of the corporation in the streets and alleys of such portion: *McKean v. Mt. Vernon*, 51–306; *Way v. Centre Point*, 51–708.

Where property was sought to be charged with a tax levied by a municipal corporation, such property being situated in a plat that had been vacated since the levy, *held* that, under the statute providing for such vacation, it was proper to admit evidence that the city was indebted in a large sum prior to the vacation of the plat, the property being liable for its proportion thereof: *Deeds v. Sanborn*, 26–419.

Previous statutes as to severance construed: *Whiting v. Mt. Pleasant*, 11–482.

594. Notice. 441. Notice of the filing of the same shall be given by publication in a newspaper published in said city or town, or by posting a notice of the same in five public places in said city or town four weeks previous to the succeeding term of said court, which notice shall contain the substance of said petition and state the term of court at which the hearing thereof will be had. [R., § 1049.]

595. Hearing; affidavits. 442. The hearing of such petition may be had by the court, or either party may demand a jury, and the proper authorities of such city or town, or any person interested in the subject-matter of said petition, may appear and contest the granting of the same; and affidavits in support of or against said petition may be prepared and submitted, and may be examined by the court or jury, and the court may, in its discretion, permit the agent or agents named in the petition to amend or change the same, except that no amendment shall be permitted whereby the territory embraced in said petition shall be increased or diminished without continuing the case to the next term, and requiring new notice to be given as above provided. [R., § 1050.]

This peculiar provision for the introduction of affidavits in evidence is not improper. The question to be determined is whether the interests of the territory in question require the severance, and upon appeal from the decision the only question is whether the court and jury abused the discretion reposed in them by the statute: *Ashley v. Calliope*, 71–466.

596. Trial; commissioners appointed. 443. If the court or jury, after hearing the petition and evidence, shall be satisfied that said petition has been signed by a majority of the property holders residing within the limits of the part of the city or town described in the petition and plat, and that the limits have been accurately described, and a correct map or plat thereof made and filed, and if the court or jury shall be further satisfied that the prayer of the petitioners should be granted, the court shall appoint three disinterested persons commissioners to adjust the terms upon which such part shall be so stricken out as to any liabilities of such city or town that have accrued during the connection of such part with such corporation. [R., § 1051.]

A decision granting the severance of certain territory, as prayed in a proceeding, such as is here contemplated, *overruled* on appeal, for the reason that, under the circumstances, justice and equity did not require it: *Mosier v. Des Moines*, 31–174.

597. Hearing and report. 444. The commissioners so appointed shall take and subscribe an oath that they will impartially perform their duties as such, and shall, at a time by them fixed, hear the agent named in the said petition and also the proper authorities of the city or town in regard to the subject-matter to them submitted, and report to the next succeeding term of said court their doings and judgment in the premises, and upon the filing of said report the court shall decree in accordance therewith and with the prayer of said petition; *provided*, that for good and sufficient cause, and upon a proper showing, the court may reject or set aside said report, and appoint new commissioners, and continue the cause for further action to be had thereon. [R., § 1052.]

598. Transcript. 445. The clerk shall forthwith file a certified transcript of such decree, together with the petition and map, in the office of the recorder of the county and in the office of the secretary of state. [R., § 1053.]

599. Costs. 446. When such certified transcripts are filed, the severance shall be deemed complete. The costs shall be paid by the petitioners, but each party shall pay their own witness fees. [R., § 1054.]

[As to severance of territory from cities acting under special charter, see § 907.]

DISCONTINUANCE.

600. How effected. 447. Whenever one-fourth of the legal voters of any city or incorporated town in this state shall petition the circuit [district] court of the county wherein such corporation is situated for the discontinuance of the same, the said court shall cause to be published for at least thirty days, a notice stating that the question of discontinuing such corporation will be submitted to the legal voters of the same at the next annual corporation election. [11 G. A., ch. 142, § 1.]

601. Ballot. 448. The form of ballot shall be, "For the incorporation," and "Against the incorporation." [Same, § 2.]

602. Majority required; indebtedness. 449. If a two-thirds majority of all the legal votes cast for and against such proposition shall be cast "against the incorporation," then the same may be discontinued. The vote provided for in this and the two preceding sections shall not be construed to discontinue any corporation until the said corporation shall have made ample provisions for the payment of all its indebtedness, and for the faithful performance of all its contracts and obligations, and shall have levied the requisite tax therefor. [Same, § 3.]

603. Canvass and return. 450. The vote for this purpose shall be taken, canvassed, and returned in the same manner as other municipal elections, and all expenses of the same paid by the corporation so voting. No more than one such election shall be held in the same year. [Same, § 4.]

604. Records deposited. 451. The books, documents, records, papers, and corporate seal of any city or town so discontinued shall be deposited with the county auditor of the county for safe keeping and reference in future; and all court records of any mayor or other officer shall be deposited with the nearest justice of the township, who shall have authority to execute and complete all unfinished business standing on the same. [Same, § 5.]

605. Publication. 452. Whenever the incorporation of any city or town shall have been discontinued under the provisions of the four preceding sections, the auditor of the county wherein such corporation was situated shall publish such fact for thirty days in a county paper, if one is published in the county; if not, shall post three notices for the same length of time, and also certify the fact to the secretary of state. [Same, § 6.]

606. Payment of debts; surplus. 453. For the payment of its indebtedness, the corporation shall issue warrants in cases where there is no money in the treasury, and the county treasurer shall collect the tax which shall be levied to pay such indebtedness as hereinbefore contemplated and prescribed as he collects other taxes, and pay the said warrants; and any surplus of this fund shall be passed over to the temporary school fund of the district where the same was levied. [Same, § 7.]

CHANGING NAMES.

607. By city or town. 19 G. A., ch. 16, § 1. The corporate name of any city of the first or second class or incorporated towns in this state may be changed in the manner prescribed by this act.

608. Proposal. 19 G. A., ch. 16, § 2. The council of any city of the first or second class, or any incorporated town may, by resolution, propose a change of the corporate name of such city or incorporated town setting forth therein the proposed new name, which shall not be the same as that of any city of either the first or second class or incorporated town or postoffice existing in this state at the time of the passage of such resolution.

609. Question submitted; notice. 19 G. A., ch. 16, § 3. The question of making such change shall then be submitted to a vote of the qualified electors of such city or incorporated town at the next following annual election, or at a special election, as the council may provide. Notice that a change of name is to be voted on at any election shall be published in a newspaper published in said city or incorporated town at least ten days before the election.

610. Manner of voting; result. 19 G. A., ch. 16, § 4. The manner of voting on the question of change shall be by having printed or written on the ballots, "Shall the name be changed as proposed?" followed by the word "yes," or "no." If a majority of the votes cast for and against are in favor

of the proposed change, the clerk of the city or incorporated town shall enter upon the records of the city or incorporated town the result of such election, and set forth in such record the new name adopted for such city or incorporated town, as well as the original name thereof, and shall cause to be filed a certified copy of the entry so made in the office of the recorder of deeds of the county in which such city or incorporated town is situated and in the office of the secretary of state.

611. Change complete. 19 G. A., ch. 16, § 5. When certified copies are made and filed, as required by the preceding section, the change of name shall be deemed complete, and the new name thus adopted shall be judicially recognized in all subsequent proceedings wherein said city may be interested.

612. Rights or liabilities not affected. 19 G. A., ch. 16, § 6. Nothing herein contained shall in any manner affect the rights or liabilities of said city or incorporated town, nor invalidate any contract to which the said city or incorporated town may be a party before such change.

POWERS.

613. Enumerated. 454. Cities and towns organized as provided in this chapter shall be bodies politic and corporate under such name and style as they may select at the time of their organization, and may sue or be sued; contract or be contracted with; acquire and hold property, real and personal; have a common seal which they may change and alter at pleasure, and have such other privileges as are incident to municipal corporations of like character or degree not inconsistent with the laws of the state. [R., § 1047; C., '51, § 664.]

Extent of powers: Cities have no inherent jurisdiction to make laws or adopt regulations of government. They are governments of enumerated powers, acting by delegated authority, and are therefore different from state legislatures, which may exercise such powers of government coming within a certain designation of legislative power as the constitution does not expressly or impliedly prohibit: *Keokuk v. Scroggs*, 39–447.

Cities can exercise such powers as are expressly granted and such implied ones as are necessary to make available the powers expressly conferred and essential to effect the purposes of the corporation, and these powers are strictly construed: *Ibid.*

Only such powers and rights can be exercised under a grant of power to a municipal corporation as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant: *Clark v. Davenport*, 14–494.

A municipal corporation can possess and exercise the following powers and no others: first, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation: *Merriam v. Moody's Ex'rs*, 25–163; *Hanger v. Des Moines*, 52–193; *Clark v. Des Moines*, 19–199.

Any doubt or ambiguity arising from the terms used by the legislature in a grant of power to a municipal corporation must be resolved against the existence of the power and in favor of the public: *Clark v. Davenport*, 14–494; *Merriam v. Moody's Ex'rs*, 25–163; *State v. Smith*, 31–493; *Keokuk v. Scroggs*, 39–447; *Logan v. Pyne*, 43–524.

Power of a municipal corporation to provide for the accomplishment of certain results does not necessarily impose upon it a liability for their imperfect accomplishment: *Vanhorn v. Des Moines*, 63–447.

Liability for acts of officers: The city is not liable for neglect or non-feasance of its officers or agents in exercising the powers conferred: *Ogg v. Lansing*, 35–495.

A municipal corporation will not be liable for the acts of its officers which it has no power to authorize: *Field v. Des Moines*, 39–575.

A city is not liable for the acts of its officers in attempting to enforce police regulations. As it cannot authorize them to do an unlawful act, neither can it become liable for such act by ratification: *Calwell v. Boone*, 51–687.

The fact that the officers of an incorporated town engage in doing an act in violation of its ordinances, without effort being made to prevent their doing such act, will not render the corporation liable for damages: *Ball v. Woodbine*, 61–83.

Where a peddler was arrested under an ordinance which was void, and suffered the penalty imposed thereunder without proper action to defeat the infliction of the penalty and without appeal, *held*, that he had afterwards no right of action against the city for the amount paid by him: *Trescott v. Waterloo*, 26 Fed. Rep., 592.

As to liability of city for malfeasance or negligence of its officers in regard to street improvements, see notes to § 624.

As to liability for loss from failure of water supply, see notes to § 641.

614. 455. All municipal corporations organized under this chapter shall have the general powers and privileges, and be subject to the rules and restrictions granted and prescribed in the succeeding section. [R., § 1056.]

615. Nuisances, riots, gaming houses, markets. 456. They shall have power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated; to regulate the transportation and keeping of gunpowder or other combustibles, and to provide or license magazines for the same; to prevent and punish fast or immoderate riding or driving of horses through the streets; to regulate the speed of trains and locomotives on railways running over the streets or through the limits of the city or incorporated town by ordinance, and enforce the same by a fine not exceeding one hundred dollars; to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article of sale; to prevent any riots, noise, disturbance, or disorderly assemblages; to suppress and restrain disorderly houses, houses of ill-fame, billiard tables, nine or ten pin alleys, or tables and ball alleys, and to authorize the destruction of all instruments or devices used for purposes of gaming, and to protect the property of the corporation and its inhabitants and to preserve peace and order therein. [R., § 1057.]

Nuisances: The power given by this section in relation to nuisances is to abate them, and in the exercise of this power a city cannot provide for the punishment by fine of one who maintains a nuisance: *Nevada v. Hutchins*, 59–506.

The power to abate nuisances does not enable the council to determine conclusively that a particular thing constitutes a nuisance; and if it orders the removal of a thing which is in fact not a nuisance, the person causing its removal will be individually liable in damages: *Cole v. Kegler*, 64–59.

The power to suppress does not imply the power to punish, and must be exercised in such way that suppression shall be the direct, and not merely the incidental, result of the exercise of power: *Charlton v. Barber*, 54–360.

Markets; power as to markets: The power given to a city to establish and regulate markets necessarily carries with it the power to prohibit the sale of meat, etc., at other times and places than those provided for: *Davenport v. Kelley*, 7–102.

The city may authorize an individual to erect a market building upon private property and lease stalls therein, and treat such building as a public market, prohibiting sales at other places: *Le Claire v. Davenport*, 13–210.

The city may provide that any person who shall use or keep any stall in the market for the purpose of selling meat or provisions without authority of law shall be subject to a penalty: *State v. Leiber*, 11–407.

The lease of a stall in a city market may be made by the city without regard to the prohibitions or requirements relating to the sale of real estate by the city: *Dubuque v. Miller*, 11–583.

The power here given to regulate markets and provide for the measuring and weighing of articles for sale implies that the corporation is empowered to do all things essential and necessary to the proper exercise of the power expressly provided, and the corporation may therefore declare that certain scales shall be deemed city scales, appoint a weigh-master, and make it unlawful to sell certain articles unless weighed upon such scales: *Davis v. Anita*, 73–325.

The power to establish and regulate markets does not authorize the city to pass an ordinance to prevent the peddling of meats until it has established a meat market, and not then unless it may be as a regulation of the market: *Burlington v. Dankwardt*, 73–170.

Obstruction of streets: Under an ordinance giving the cars of a street railway precedence over other vehicles, and providing that any persons unnecessarily obstructing the running of such cars should be punished by fine, *held*, that where there was no impediment to the removal of a vehicle from the track of a street railway, the owner, failing to remove it, and thereby impeding the running of a car, was subject to a fine, although such removal would cause him inconvenience and the obstruction was intended to be but for a few moments: *State v. Foley*, 31–527.

The city council may require the removal of scales erected in the street for the purpose of carrying on a private business: *Emerson v. Babcock*, 66–257.

As to shade-trees in streets, see § 1503 and notes.

Disorderly houses, gambling, etc.: Under the authority here given to prevent riots, disturbances, disorderly assemblages, etc., the city may provide that the keeping of any houses within the city limits where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane and vulgar language to the disturbance of others, shall be considered and punished as a common nuisance: *Centerville v. Miller*, 57–56; *Centerville v. Miller*, 57–225.

The authority to repress and restrain disorderly houses may be exercised by providing for the punishment of persons entering such houses or being found there: *State v. Botkin*, 71–87.

An ordinance providing for the punishment of persons found in disorderly houses is not

invalid by reason of the fact that defendant might prove he was lawfully there. Such fact may be shown as a defense: *Ibid.*

The authority to destroy all instruments or devices used for the purposes of gaming does not confer power to punish any one or prescribe penalties for permitting gambling or engaging therein: *New Hampton v. Conroy*, 56-498.

Authority to suppress gambling does not give authority to punish such act as a misdemeanor: *Mt. Pleasant v. Breeze*, 11-399.

The power given to suppress and restrain houses of ill-fame, and, under § 660, to make ordinances to improve the morals, etc., of the inhabitants, does not authorize a city to pass an ordinance to punish the keeping of a house of ill-fame: *Chariton v. Barber*, 54-360.

But a municipal corporation does have authority, under this section, to provide by ordinance for the punishment of intoxication: *Bloomfield v. Trimble*, 54-399.

The power to suppress or restrain billiard tables may be exercised by way of license: *Burlington v. Lawrence*, 42-681.

616. Danger from fire. 457. They shall have power to make regulations against danger from accidents by fire, to establish fire districts, and, on petition of the owners of two-thirds of the grounds included in any square or block, to prohibit the erection thereon of any building or any addition to any building, unless the outer walls thereof be made of brick and mortar, or of iron and stone and mortar, and to provide for the removal of any building or additions erected contrary to such prohibition. [R., § 1058; 12 G. A., ch. 106.]

[As to power of board of public works to require fire-proof buildings, etc., see § 895. As to power of cities of first class to establish fire limits, etc., see § 818.]

An ordinance of the city passed under the authority of this section, authorizing the destruction of private buildings to prevent the spread of fire does not make a corporation liable for property so destroyed: *Field v. Des Moines*, 39-575.

An ordinance establishing fire limits, and prohibiting the erection of wooden buildings within such limits, cannot be legally passed except in accordance with the provisions of this section: *Des Moines v. Gilchrist*, 67-210.

Nor can the council prohibit the keeping or maintaining of lumber yards or wood yards within the fire limits: *Ibid.*

The power to establish fire limits is not included in the power given to establish fire districts: *Ibid.*

An ordinance with reference to prevention of fires, *held*, in a particular case, to be beyond the powers conferred upon a city by special charter, with reference to providing against calamities by fire: *Keokuk v. Scroggs*, 39-447.

617. Burial of the dead. 458. They shall have power to regulate the burial of the dead; to provide without the limits of the corporation places for the interment of the dead, to prevent any sub-interments within such limits and to cause any body interred contrary to such prohibition to be taken up and buried without the limits of the corporation. [R., § 1060.]

618. Animals running at large. 459. They shall have power to restrain and regulate the running at large of cattle, horses, swine, sheep, and other animals within the limits of the corporation, and to authorize the distraining, impounding, and sale of the same for the penalty incurred and costs of the proceeding, to prevent the running at large of dogs and injuries therefrom, and to authorize the destruction of the same when at large contrary to any prohibition to that effect. [R., § 1061.]

Animals which are not permitted to run at large within a city, upon coming within its limits from without, may be taken up and dealt with in accordance with the ordinances of the city, although their owner may live outside the city and where such animals are permitted by law to be at large: *Gosselink v. Campbell*, 4-296.

619. Theatrical exhibitions. 460. They shall have power to regulate or prohibit all theatrical exhibitions of whatever name or nature, for which money or any other reward is in any manner demanded or received; but lectures on scientific, historical, or literary subjects shall not come within the provisions of this section. [R., § 1062.]

620. Public library. 461. The establishment and maintenance of a free public library is hereby declared to be a proper and legitimate object of municipal expenditure; and the council or trustees of any city or incorporated town may appropriate money for the formation and maintenance of such a library, open to the free use of all its inhabitants under proper regulations,

and for the purchase of land and erection of buildings, or for the hiring of buildings or rooms suitable for that purpose, and for the compensation of the necessary employees: *provided*, that the amount appropriated in any one year for the maintenance of such a library shall not exceed one mill upon the dollar upon the assessed valuation of such city or town. Any such city or incorporated town may receive, hold, or dispose of any and all gifts, donations, devises, and bequests that may be made to such city or incorporated town for the purpose of establishing, increasing, or improving any such public library; and the city or town council thereof may apply the use, profits, proceeds, interests, and rents accruing therefrom, in such manner as will best promote the prosperity and utility of such library. Every city or incorporated town, in which such a public library shall be maintained, shall be entitled to receive a copy of the laws, journals, and all other works published by authority of the state after the establishment of such library, for the use of such library, and the secretary of state is hereby authorized and required to furnish the same from year to year to such city or incorporated town. But no appropriation of money can be made under this section, unless the proposition is submitted to a vote of the people; and at the municipal election of such city or town, the question, "Shall the city (or town council, as the case may be) accept the benefit of the provisions of this section." [13 G. A., ch. 45; 14 G. A., ch. 17.]

[Additional powers to levy a tax for public library purposes are given to cities of the first class by § 820.]

621. Auctioneers and transient merchants. 462. They shall have power to regulate and license sales by auctioneers and transient merchants within their corporate limits, provided, that the exercise of the power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property. [9 G. A., ch. 97.]

The legislature may confer upon a city power to tax transient merchants doing business in the city: *Mt. Pleasant v. Clutch*, 6–546.

This section gives general power to regulate and license sales by auctioneers, etc.: *Decorah v. Dunstan*, 38–96.

A resident merchant, engaged in selling goods at retail, who employs an auctioneer to sell part of his goods, is not an auctioneer in such sense that he can be compelled to pay a license under this section: *Oskaloosa v. Tulliss*, 25–440.

An ordinance discriminating in favor of resident merchants of the city as against other merchants of the state or non-resident merchants, or in favor of those selling goods of domestic manufacture and against those selling goods of foreign make, by imposing a license tax upon the latter which is not required of the former, is unconstitutional: *Marshalltown v. Blum*, 58–184; *Pacific Junction v. Dyer*, 64–38.

As to peddlers, see notes to next section.

622. Regulations; licenses. 463; 16 G. A., ch. 24; 19 G. A., ch. 136. They shall have power to regulate, license or prohibit the sale of horses or other domestic animals at auction in the streets, alleys or public places; to regulate, license and tax all carts, wagons, drays, coaches, hacks, omnibusses, and every description of conveyance kept for hire; to regulate, license and tax taverns, restaurants, eating houses; to regulate, license and tax or prohibit beer and wine saloons, but no license issued therefor shall extend beyond the first day of May following the grant thereof; to regulate, license and tax or prohibit billiard saloons, pool tables, and all other tables kept for hire, ten-pin or other ball alleys, shooting galleries or places; to regulate and license pawn-brokers and peddlers; to regulate, license or prohibit circuses, menageries, theaters, shows, and exhibitions of all kinds, except such as may be exempted by the general laws of the state; and to regulate or prohibit the sale of intoxicating liquors not prohibited by the laws of the state. [R., § 1063; 12 G. A., ch. 154, § 1.]

[The provisions of §§ 613 to 622, inclusive, are made applicable to cities under special charter: See § 908. Further powers of a similar character are given to cities of the first class by

§ 725, and to cities in general by §§ 731–740. Municipal corporations are given power to regulate or prohibit sale of liquors within two miles of corporate limits: See § 2421.]

Power to license: Neither the power to tax nor the power to regulate gives the right to license. So held in case of taverns, etc., under this section: *Burlington v. Bumgardner*, 42–673.

But under the power to *prohibit* the sale of wine, beer, etc., the city may impose a license: *Keokuk v. Dressell*, 47–597.

The power to license does not authorize taxation for revenue. Licenses are a part of the police regulations and should be charged for as such; and while a court may interfere if the sum charged as license is unjust or oppressive, or levied for the purpose of raising revenue, yet where it does not appear that the charges fixed by the corporation for the expense and enforcement of the license and the protection of the person licensed, under police regulations connected with or growing out of the license, are not necessary and proper, the court will not interfere: *Burlington v. Putnam Ins. Co.*, 31–102.

The right to fix the charge for the license, which is vested in the city, will also authorize it to vary the amount with different parties as may be deemed prudent and just: *Ibid.*

Where an ordinance of a city assumes the power to license, and declares that licenses shall be taken by certain persons, the council may by resolution fix the amount to be charged: *Ibid.*

Where the city has power to impose a license it may leave the amount thereof within certain limits to the discretion of the mayor: *Decorah v. Dunstan*, 38–96.

A municipal corporation can exercise no power of taxation such as here contemplated unless it be expressly conferred by the legislature or absolutely necessary to carry out some other power expressly conferred, and in case of doubt the power will be denied: *State v. Smith*, 31–493.

Peddlers: While the power to regulate and license peddlers is given to cities, such power can be exercised only under an ordinance, and if an ordinance is passed for such purpose, and is such that the court must, upon mere examination, declare it unreasonable, it is void: *State Center v. Barenstein*, 66–249.

A charter authorizing a city to license and tax peddlers, etc., and bankers, dealers in money and notes and other evidence of indebtedness, and warrants of all kinds, *held* not to authorize the city to impose a license on insurance agents: *State v. Smith*, 31–493.

Therefore, *held*, that an ordinance authorizing the mayor, at his discretion, to charge peddlers a license of from one to twenty-five dollars, without stipulating the terms of such license, was unreasonable and void: *Ibid.*

Taking orders for goods to be manufactured does not constitute the person taking such orders a peddler requiring a license under an ordinance for the licensing of peddlers: *Spencer v. Whiting*, 68–678.

Also, *held*, that a particular sale of articles to one person on his request, such articles not being offered in general, nor to other persons, did not constitute the seller a peddler: *Ibid.*

Regulation of sale of liquors: Previous to the adoption of the present prohibitory statute, *held*, that a city might prohibit the sale of liquors which were not prohibited by state law under the statute then existing: *Burlington v. Kellar*, 18–59.

And that the statutory provisions giving the power to regulate the sale of such liquors were neither special nor local laws, nor an improper delegation of legislative authority: *State v. King*, 37–462.

Where a general law exists prohibiting the sale of intoxicating liquors, a charter giving to the city an exclusive authority to license the sale of liquors will not confer upon such city an exclusive power to punish the violation of the general statute: *State v. Gurlock*, 14–444.

A city or town has no authority to provide a penalty for the sale of intoxicating liquors, the sale of which is prohibited by statute: *Foster v. Brown*, 55–686; *New Hampshire v. Conroy*, 56–498; *Cantril v. Sainer*, 59–26.

Where an ordinance prohibited the sale of liquors, some of which the municipality had the power to regulate the sale of, while the sale of others was prohibited by general statute, *held*, the ordinance would be supported and enforced so far as within the lawful authority of the corporation: *Eldora v. Burlingame*, 62–32.

Licenses for the sale of liquors not prohibited by general statute are not contracts between the city and the person licensed, but are merely temporary permits to do what would otherwise be an offense, issued in the exercise of police power and subject to the direction of government, which may revoke them as it deems fit: *Columbus City v. Cutcomp*, 61–672.

Whether in case of a revocation of the license the person licensed would, in a proper proceeding, be entitled to have refunded to him the *pro rata* proportion of the license paid, *quœre: Ibid.*

A license tax paid to a city for the privilege of selling intoxicating liquors cannot, after the enjoyment of the license for the period stipulated therein, be recovered back upon the ground that the statute under which it was granted has been declared unconstitutional: *Kraft v. Keokuk*, 14–86.

As to statute authorizing city to regulate sale of liquor within two miles of the city limits, see § 2421.

623. Streets, alleys, public grounds, and railways. 464; 15 G. A., ch. 6. They shall have power to lay off, open, widen, straighten, narrow, vacate, extend, establish and light streets, alleys, public grounds, wharves, landing, and market places, and to provide for the condemnation of such real estate as may be necessary for such purposes. They shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys, and public places; but no railway track

can thus be located and laid down until after the injury to property abutting upon the street, alley, or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code of 1873. [R., § 1064.]

[The word "open" in the first line of the section is omitted in the printed Code. This section is made applicable to cities under special charter: See § 923. As to right of way given to street railways over highways outside of city limits, see § 1947. As to wharves, see § 727. As to viaducts over railway tracks, see § 1937.]

Eminent domain: The city does not have the power of eminent domain except as expressly granted by statute: *Field v. Des Moines*, 39–575.

Under the provisions of a city charter authorizing the appointment of commissioners to assess damages for taking private property by a city, *held*, that the city council could not, after having appointed commissioners for that purpose, set aside the report made by them, and appoint new commissioners to assess the same damages: *State ex rel. v. Keokuk*, 9–438.

A railway company, lessee of another company under a lease which may be perpetual at the election of the lessee, has such an interest in property owned by the lessor that it should be a party to proceedings to condemn such property for city purposes: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62–218.

Location of streets: The action of a city council, in determining whether the location of a street is demanded by the public interest, cannot be questioned by judicial proceedings: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52–279.

Diversion of travel from other streets cannot be taken into consideration in estimating the damage to property from the opening of a street: *Ibid.*

The fact that a city has power to open and vacate streets will not render it liable for failure to keep a street open and in repair, whereby travel is diverted from a ferry outside of the city limits: *Prosser v. Oltumwa*, 42–509.

The power of the state to establish highways within the limits of cities or corporated towns is not vested in the board of supervisors: *Gallaher v. Head*, 72–173.

Vacation of streets: The city council has authority to vacate streets and alleys, and may exercise such power simply by the enactment of an ordinance calculated to effect that object. This power is not limited by the provisions of § 997, relating to the method of vacating streets and alleys in a plat: *Dempsey v. Burlington*, 66–687.

The city council has the power to divert the ground covered by an alley which is vacated from a public to a private use by granting it to a private individual: *Ibid.*

The city council may vacate an alley for the purpose of allowing it to be devoted to a private use, if the power is in other respects rightfully exercised, and no private rights are injuriously affected: *Marshalltown v. Corney*, 61–578.

Where the power to vacate streets is wisely and discreetly used, its exercise will not be restrained at the suit of a private individual claiming to be injured: *Gray v. Iowa Land Co.*, 26–387.

It seems that the general assembly may authorize a city to vacate streets, although under its charter as existing at the time of dedication of the streets no such power existed. It is doubtful, at least, if a property owner can have such vested interest in streets as to prevent such vacation: *Stubenrauch v. Neyenesch*, 54–567.

Action of the city council in vacating streets cannot be interfered with by proceedings in equity. *Certiorari* is the proper remedy: *Ibid.*

The burden is upon plaintiff seeking to enjoin the vacation of a street to prove that he had rights at the time the street was vacated which were abridged by such vacation: *Sawyer v. Meyer*, 45–152.

A city having authority to vacate streets cannot be made to respond in damages for injuries resulting therefrom to an adjoining property owner: *Barr v. Oskaloosa*, 45–275.

The vacation of a street is not such taking of private property as to entitle a property owner to compensation for any loss resulting therefrom: *Ibid.*

The power to vacate streets being vested in the city, it can be exercised only by the council or trustees; parol evidence of abandonment is not competent: *Lathrop v. Central Iowa R. Co.*, 69–105.

The power to narrow or widen or vacate a street is practically unlimited when it is exercised for the public good, but it cannot be arbitrarily exercised, and is subject to equitable control. However, an abutting lot owner cannot upon slight grounds prevent the accomplishment of that which is a material benefit to the public, and the decision of the city council will ordinarily be conclusive as to the question whether the vacation of a street is for the public good. In a particular case, *held*, that the damage to abutting property owners was not such as to justify overruling the action of the city council: *Williams v. Carey*, 73–194.

The proper steps having been taken for vacation of streets by owners of property in a plat (as contemplated by § 999), such vacation becomes effective as against the city, subject only to the judicial determination as to whether the rights of private persons are affected. The city council cannot, by subsequently directing such street to be opened, affect the validity of such vacation: *Conner v. Iowa City*, 66–419.

The fact that the vacation of a portion of a plat will close streets therein, and thus abridge the number of ways of access to the property of the proprietor of another portion of the plat, will not be ground for objecting to such vacation, if one or more ways are left, reasonably convenient, so that no substantial right is abridged: *Lorenzen v. Preston*, 53–580.

Abandonment of streets: A city cannot authorize streets dedicated to public use to be closed. This can only be done lawfully after they are vacated in the manner prescribed by law. The fact that, after dedication is made, the public does not use the streets, does not of itself authorize the party making the dedication to resume possession of the land: *Prince v. McCoy*, 40 553.

If streets are in such condition that they are incapable of use, an injunction cannot be maintained by one who has no other right than as one of the general public to prevent them from being temporarily inclosed for private purposes: *Ibid.*

Where plaintiff had held possession of property for thirty years under claim of right, and the city had made no attempt or claim to occupy the same as a street, *held*, that any right of the city to use the property for a street must be regarded as abandoned: *Simplot v. Dubuque* 40–650.

The severance of a portion of the territory of a city it would seem, would operate as an extinguishment of the rights of the corporation in the streets and alleys: *McKean v. Mt. Vernon*, 61–306.

The city council may authorize the laying of a railway track along an alley in accordance with statutory authority, although the effect thereof may be to close the alley for other purposes: *Heath v. Des Moines & St. L. R. Co.*, 61–11.

As to title to streets, dedication, abandonment, etc., see notes to § 996.

Lighting: A city cannot be enjoined at the suit of a rival paver from contracting for electric lighting, although there is an existing contract for lighting by gas: *Searl v. Abraham*, 73 507.

Right to locate railways upon streets: Since the change made in Code, § 1202, by 15 G. A., ch. 47 (see § 1930), the power to authorize the laying down of tracks for street and other railways, and the use of steam motors thereon, does not exist except as here given, the earlier case of *Milburn v. Cedar Rapids*, 12–246, and many cases following it, being no longer applicable: *Stanley v. Davenport*, 54–463; *Stange v. Hill & West Dubuque St. R. Co.*, 54–669.

The provisions of this section are not applicable to cities acting under special charter: *Ibid.*; *Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158.

An ordinance authorizing the construction of railway tracks upon city streets, without making the right to occupy such streets conditional upon payment of damages as required by statute, does not confer any rights upon the railway company: *Stange v. Dubuque*, 62–703.

Where the fee of the street is in the city for the use and benefit of the public, the general assembly has the control thereof, and may prescribe the terms and conditions under which the public may use such streets: *Sears v. Marshalltown Street R. Co.*, 65–742.

Consent by city council: The statute does not prescribe the manner by which authority may be granted to a railroad company to construct its track upon the streets of the city, and such authority may be given by resolution duly passed, or by vote duly taken, appearing in the proper record of the city: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70–105.

The city council may authorize the laying of a railway track over an alley, although the effect may be to prevent the use of the alley for other purposes. Whether the same rule would apply in case of a street, *quere*: *Heath v. Des Moines & St. L. R. Co.*, 61–11.

But the city council is not authorized to devote an alley to a railway track for the private benefit of some individual; and the fact that leave has been granted to lay the track over an alley for purely private benefit will not prevent a subsequent grant of a right to a railway company to lay a track through such alley for public use: *Ibid.*

The city having been given by this section the power to grant the right to lay down a railway track over its streets, all else in connection therewith is a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulations: *O'Neil v. Lamb*, 53–795.

Compensation to property owners: A railway which has been located over the streets of a city, at a time when compensation to adjacent property owners for such use of the street was not required, cannot lay new switches and side tracks in connection with such railway, without making compensation: *Brady v. Des Moines & Ft. D. R. Co.*, 57–396; *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70–105.

The statutory provisions requiring compensation apply to a railroad authorized by ordinance and partly constructed prior to the time that the change in the statute went into effect: *Mulholland v. Des Moines, A. & W. R. Co.*, 60–740; *Hanson v. Chicago, M. & St. P. R. Co.*, 61–588.

Where a railway company had commenced the use of its track constructed under permission granted by the city council before the statutory change requiring compensation, *held*, that it could not afterward be made liable for damages to abutting lot owners: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70–105.

When the road is located upon private property and not upon a street an abutting owner cannot recover damages resulting from the ordinary operation of the road: *Rinard v. Burlington & N. R. Co.*, 66–440. Nor can damages be recovered from the city in such a case for injuries from an embankment: *Callahan v. Des Moines*, 63–705.

The provisions as to making compensation for injury to property abutting on a street upon which a railway track is proposed to be located are only applicable to property owners whose property abuts upon the portion of the street occupied by the track, and not to owners of property abutting upon a street which is merely crossed by the track: *Morgan v. Des Moines & St. L. R. Co.*, 64–589.

The damages to be allowed to an abutting property owner by reason of the construction of a track over a street are not limited to damages arising from a change of grade, but extend to all legitimate damages which are contemplated in other provisions for condemning

the right of way: *Drady v. Des Moines & Ft. D. R. Co.*, 57–393.

In estimating the damages caused by the operation of a steam railway along a street where damages to the property owner have not been previously assessed and paid, the fact that such operation has diverted travel from the street may be shown in evidence as showing the manner in which the rental value of the property has been diminished, and for the purpose of ascertaining the measure of damage: *Stange v. Dubuque*, 62–305.

In an action for such damages all the facts attending the use and operation of the railroad may properly be given in evidence as bearing upon the effect of the operation of the road on the rental value of the property; such, for instance, as annoyance to the occupants of the property by noise, escape of fire from engines, etc.: *Wilson v. Des Moines, O. & S. R. Co.*, 67–509.

In a proceeding to assess damages to abutting property by reason of the location and operation of a railway upon a street, the property owner is entitled to be compensated for injuries which he will sustain on account both of the laying down of the track in the street on which his property abuts, and of the appropriation of his land, if any, which is taken for right of way purposes: *McClean v. Chicago, I. & D. R. Co.*, 67–568.

The provisions of this section as to the manner of assessment of damages resulting from the location of a railway upon the streets of a city refer exclusively to the company and not to the abutting owner: such owner does not have any interest in the fee of the street, and he cannot take steps to have his damages assessed by a sheriff's jury according to the provisions applicable where property is taken for right of way; therefore, he may bring action for damages without such proceeding: *Mulholland v. Des Moines, A. & W. R. Co.*, 60–740.

The provision with reference to assessing damages for laying a railroad track through the streets refers exclusively to the railroad company and not to the abutting owners. The latter cannot have his damages assessed in that manner: *Stough v. Chicago & N. W. R. Co.*, 71–641.

As the abutting property owner is not authorized to cause his damages to be assessed, and the corporation alone can institute the proceedings, an action by the property owner may be maintained for damages accruing to him before the assessment is made: *Wilson v. Des Moines, O. & S. R. Co.*, 67–509.

A right of action for injuries to an abutting property owner accrues at once and is entire, and must be brought in five years. Such a right of action does not pass to the grantee under a conveyance made subsequent to the time when the right of action accrues, and, without an assignment of such cause of action to him, grantee can maintain no action for such injuries: *Pratt v. Des Moines N. W. R. Co.*, 72–249; *Jolly v. Des Moines N. W. R. Co.*, 72–759.

Special damages: A railway company which so negligently builds its track over the streets of a city, or so occupies such streets, as to create a nuisance, is liable in damages to any one suffering therefrom special injury not common to the whole public: *Park v. Chicago & S. W. R. Co.*, 43–636; *Frith v. Dubuque*, 45–406.

It is immaterial in such case whether the party injured owns the fee in the street or not: *Cadle v. Muscatine Western R. Co.*, 44–11; *Frith v. Dubuque*, 45–406; *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

If a railway, therefore, be constructed in a careless, improper and negligent manner, to the injury of an abutting property owner, he may recover damages, provided his injury be special: *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

So the city may, by ordinance, make and enforce reasonable restrictions, and a use of the street in violation of such restrictions will be a nuisance for which a person sustaining special damage may recover: *Ibid.*

The city is not liable for damages resulting from the laying down of tracks, etc., under permission granted by it: *Frith v. Dubuque*, 45–406.

Although a railway company is liable for negligence in failing to keep its crossings where the track intersects the street in proper condition, such liability does not relieve the city from liability for injuries arising from such defect in its streets: *Fowler v. Strawberry Hill*, 74–644.

As to the measure of damages in such cases, see *Cadle v. Muscatine W. R. Co.*, 44–11; *Frith v. Dubuque*, 45–406; *O'Connor v. St. Louis, K. C. & N. R. Co.*, 56–735; *Kuchcman v. Chicago, C. & D. R. Co.*, 46–366.

Equitable control: The doctrine of equitable control over the use of the streets by railway companies, which was recognized when such companies had the right to use the streets of cities for railway purposes without compensation to property owners, or consent of the city, has now no application: *Heath v. Des Moines & St. Louis R. Co.*, 61–11.

Street railways: Aside from any special provision in the city charter, it may be regarded as the doctrine of this state that the city may authorize the construction of a street railway in its streets: *Damour v. Lyons*, 44–276.

The provision that a railway track can be located and laid down only upon damages to abutting owners being paid does not apply to street railways, and the city council may authorize the location of such tracks upon the streets without payment of damages caused thereby: *Sears v. Marshalltown Street R. Co.*, 65–712.

In the absence of special authority conferred by the legislature, the city has no authority to authorize the use of a steam motor on a street railway, and it will be liable in damages for injuries resulting from the use of such motor on the streets under its permission: *Stanley v. Davenport*, 54–463.

As to right to permit use of streets by horse railway, see *O'Niel v. Lamb*, 53–725.

Under this section a city has the right to grant the exclusive privilege for a reasonable length of time to construct and operate a street railway over any and all streets of the city, but it could not make such exclusive grant in perpetuity. Such a grant to a company to operate a street railway by horse power will

not, however, preclude the grant to another company of the right to operate a street railway by other power: *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.*, 73–513.

The right to grant an exclusive privilege to operate a street railway did not exist prior to the enactment of this section in the Code of 1873: but *held* that an ordinance granting such exclusive privilege prior to that time was ratified by action of the city after this section was enacted: *Ibid.*

Under the decision as to the right of a street railway company under an exclusive charter to lay its track over the streets of a city, *held*, that acts of the officers of the city in attempting to prevent the company from doing so were a violation of the injunction in that case: *Des Moines Street R. Co. v. Des Moines Broad-Gauge R. Co.*, 75–585.

A grant to a street railway company of the exclusive right to operate a street railway over streets of the city by animal power does not prevent the grant to another company of the right to operate street cars by other power: *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75–722.

624. Grading; sewering. 465. They shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers, and shall defray the expenses of the same out of the general funds of such city or town, but no street shall be graded except the same be ordered to be done by the affirmative vote of two-thirds of the city council or trustees. [13 G. A., ch. 65; 14 G. A., ch. 45, § 1.]

[Expense of grading alleys is not to be paid out of the general fund: See § 629.]

Grade of streets: As a rule the base line is to govern as to the grade, but a mistake may be shown in that as well as in other figures: *Freeland v. Muscatine*, 9–461.

The city is not liable in its corporate capacity for negligence of the engineer in establishing for a private person the grade of a street in accordance with the ordinances of the city: *Waller v. Dubuque*, 69–541.

A city may be rendered liable by the acts of its officers in making excavations below the established grade: *Ibid.*

The city is not liable for damages resulting from the grading of its streets, if done in a careful and skilful manner: *Ellis v. Iowa City*, 29–229.

But the city is liable in such cases if the grading is done in an unskilful manner, as where the natural drainage is destroyed and no means is provided for the escape of surface water: *Ibid; Cotes v. Davenport*, 9–227; *Templin v. Iowa City*, 14–59; *Ross v. Clinton*, 46–606.

As to change of grade and liability for damages caused thereby, see § 635 and notes.

Damages from surface water: It is the duty of the city, in case of obstructing the natural flow of surface water, to provide waterways sufficient to carry off the water that may reasonably be expected to accumulate, as well as that from floods, freshets, etc.: *Damour v. Lyons*, 44–276.

An adjoining property owner cannot be held guilty of contributory negligence in building his walls in reference to the grade of the street, nor in storing goods in the cellar which is not subject to being flooded if the city does not allow the street to become obstructed: *Ibid.*

A municipal corporation in raising the grade of a street is under obligation to provide at least temporary means of escape for surface water to prevent its being backed upon adjoining property: *Cotes v. Davenport*, 9–227.

How long this escape must be kept open, and whether the closing of the means so provided is an act of negligence, are questions of fact for the jury: *Ross v. Clinton*, 46–606.

It is the duty of the city to provide waterways sufficient to carry off the water that might reasonably be expected to accumulate, judging by such floods as have previously occurred; and where it appeared that there had been two previous storms of equal severity, *held*, that the finding that the rainfall was not unusual was not contrary to the evidence: *Powers v. Council Bluffs*, 50–197.

A city is not ordinarily, if ever, liable for failure to provide culverts or gutters adequate to keep the surface water off from adjoining lots below grade, particularly if the injury would not have occurred had the lots been filled up to a level with the street: *Freburg v. Davenport*, 63–119.

As between a property owner and the city, the property owner is required, in order to protect himself from accumulation of surface water, to raise his lot to grade, and the same principle must obtain between adjoining owners: *Phillips v. Waterhouse*, 69–199.

A city is under no obligation to raise the lots to the line of grade of the streets, nor chargeable with the duty of keeping such lots free from overflow of water. The lot owner may escape annoyance or loss by such overflow by filling his lot to grade, or constructing sewers and sluices, but the city is not liable for the failure to drain such lots: *Gilfeather v. Council Bluffs*, 69–310.

A city is not liable for damages resulting from obstruction of overflow water as it is from the obstruction of water flowing in the natural channel: *Morris v. Council Bluffs*, 67–343.

The supreme court has never gone further in maintaining the property owner in the right to protection against surface water than to hold that the city must provide temporary means of escape therefor. But it has on the other hand held that an owner of a lot below grade must take notice of any exposure by bringing the street to grade, and must exercise reasonable diligence to protect himself by bringing his own lot to a corresponding grade: *Ibid.*

Liability for failure to repair: Being clothed with the power to establish and keep

in repair its streets, the exercise of such power is not discretionary, and a city is liable to an action for damages resulting from an injury caused by a failure in that respect, as, for instance, by reason of an obstruction from snow and ice: *Collins v. Council Bluffs*, 32–324; or by reason of an obstruction upon the sidewalk placed there by the adjoining owner: *Rowell v. Williams*, 29–210.

Further as to sidewalks, see *infra*.

Where the city makes improvements and property owners build, etc., with reference thereto, the city is liable for neglect to keep such improvements in repair, although they would not be liable originally for not making the improvements. So *held* in case of damages from the obstruction of a sewer: *Powers v. Council Bluffs*, 50–197.

A city is liable for injuries received by reason of a hole in its street of which the street commissioner has been notified prior to the injury: *Case v. Waverly*, 36–545.

The fact that the municipal corporation has no funds with which to make repairs, and that it is indebted beyond the constitutional limit, is no defense in an action against such city for damages received from defects in its sidewalks: *Rice v. Des Moines*, 40–638.

Failure to make improvements: A city cannot obligate itself by contract to make an improvement which it has a right to make, nor render itself liable in damages for failure to make it, except in so far as it is necessary to make contracts and incur liabilities in the prosecution of the work: *Stewart v. Council Bluffs*, 50–668; *S. C.*, 58–642.

Negligence in making improvements: Where a municipal corporation has authority to make improvements in streets it is liable for damages occasioned by the improper and negligent manner in which such power is executed: *Wallace v. Muscatine*, 4 G. Gr., 373.

Where the city, in making an improvement in front of the property of an abutting owner, does so in a negligent and unskilful manner, he may recover damages for injury occasioned thereby, but cannot treat the construction as a nuisance and proceed to abate it by his own acts: *McGregor v. Boyle*, 34–268.

Where a city makes improvements creating a necessity for a culvert, it would be guilty of negligence in failing to provide such culvert, and in doing so it must exercise reasonable care, judgment and skill in its construction: *Van Pelt v. Davenport*, 42–308.

The fact that the money for the making of an improvement was appropriated by the county will not release the city making the improvement from liability therefor: *Ibid.*

While the city has power to change the grade of streets, thereby reducing or elevating their natural surface, yet if in making such change it is negligent, so that adjacent lots are injured, the city is liable for damages: *Hendershott v. Ottumwa*, 46–658.

Therefore, *held*, that where, in raising the grade of a street by making an embankment, the earth deposited for that purpose rolled upon an adjoining lot, the city was liable: *Ibid.*

Allowing a water company to lay its mains will not render the city liable for damages to premises from water caused by the filling up of a ditch by such water company, the granting of such privilege not being in itself negligence: *Ross v. Clinton*, 46–606.

A party cannot recover damages caused to his property by the act of the city in diverting a stream of water against it, if he might, by ordinary diligence and at a moderate expense, have prevented the damage: *Hoehl v. Muscatine*, 57–444; *Fulleam v. Muscatine*, 57–457.

The party suffering injury from water by reason of erecting his building where a stream of water has been flowing for ten years cannot recover for injury to his building from such stream, whether he has ever consented to the flow of the stream or not: *Hoehl v. Muscatine*, 57–444.

Where negligent and reckless driving over a street that is out of repair causes an injury the driving is deemed the proximate cause and the city will not be liable for damages resulting: *De Camp v. Sioux City*, 74–392.

The township trustees cannot include an incorporated town in a road district, and the road supervisor has no authority over its streets. For an accident resulting from acts of such supervisor in repairing such streets the town is liable: *Clark v. Epworth*, 56–462.

Acts or negligence of officers: A municipal corporation is liable for the malfeasance or neglect of its agents in the construction of public works on the same principle that a natural person is liable for damages resulting from his carelessness, unskilfulness or wrongdoing: *Templin v. Iowa City*, 14–59; *Cotes v. Davenport*, 9–227.

If by mistake or error of judgment on the part of proper officers who are competent and act in good faith an improvement is made in such manner that injury results therefrom the city will not be held responsible therefor: *Van Pelt v. Davenport*, 42–308.

Although the city acts through its officers in making improvements, and is bound by their negligence, yet it is not liable for a mere mistake or error of judgment in making an improvement, if reasonable skill, prudence and care be exercised; but it may be liable for negligence in allowing an obstruction to remain after it has been shown to be such: *Powers v. Council Bluffs*, 50–197.

The instruction that in constructing culverts, sewers, etc., a municipal corporation is only required to use ordinary care, and that if the city had an engineer competent to take charge of the work, and he planned the sewers, etc., and honestly believed them to be of sufficient capacity, the city would not be liable for mistakes therein, *held*, properly refused where there was no evidence to support it: *Parker v. Des Moines*, 53–679.

Where a municipal corporation is vested with full power to construct an improvement, and its location or the general plan adopted is within the exclusive control of the municipality, it cannot be held liable for improper exercise of judgment in the execution of the plan: *Wicks v. De Witt*, 54–130.

Where a municipal corporation in exercising the right to grade, protect and improve its streets and construct necessary bridges, etc., acts in good faith in the adoption of plans of skilful and competent engineers and workmen, it is not liable for an unforeseen and un-

expected damage resulting from the diversion of a stream by reason of such improvement, where such damage results notwithstanding the exercise of reasonable caution, prudence and skill: *Fulleam v. Muscatine*, 57–457.

Proof of a custom in a certain city of barricading excavations in the streets in any particular manner is not receivable for the purpose of showing or rebutting negligence in the particular case. A custom will not render it necessary for the city to do more, nor excuse it for doing less, than is required in the exercise of ordinary care: *Koester v. Ottumwa*, 34–41.

A municipal corporation is not liable beyond the actual damage caused by its negligence. Exemplary, punitive or speculative damages cannot be given: *Collins v. Council Bluffs*, 35–432.

Obstructions: Where an obstruction from which an injury results is not the mere result of a defect, but is an object entirely foreign to the street itself, the duty of the city is, if it allows such obstruction to remain at all, to see that it is kept in such a situation as that the safety of travelers on the street is not endangered by it; and the fact that at the time the obstruction is first placed on the street it is sufficiently protected will not relieve the city from liability for an injury resulting from a change in the situation, although such change is not known to the city authorities: *Duffy v. Dubuque*, 63–171.

It is doubtful whether, under any circumstances, a village street should, in law, be regarded as obstructed by vehicles left by farmers along the sides of the street, where their teams are fed. At any rate, a sleigh standing for fifteen minutes at the side of the street, for the purpose of unloading goods, ought not to be regarded as such obstruction: *Sikes v. Manchester*, 59–65.

Adjacent property owners cannot maintain an action for injunction to prevent the city from changing the bed of a stream so as to make it run, in a part of its course, along a street, it not appearing that the work permanently obstructs the street: *McMahon v. Council Bluffs*, 12–268.

Unlawful use of streets: The city is responsible for the use of its streets, and liable in damages for injuries resulting from an unlawful use thereof by it, although the council or officers, in permitting such use, did an unlawful act: *Stanley v. Davenport*, 54–463.

Dangers adjoining streets: It is the duty of a municipal corporation to protect travelers against passing from its streets into dangers and obstructions, and it is a question for the jury to determine whether the defect or obstruction is so near the highway as to be dangerous to persons traveling thereon: *Manderscnd v. Dubuque*, 29–73.

Approaches to street: A city is not bound to provide a safe way, or any way, by which streets may be entered from private property; and where plaintiff was injured in passing along a private way on to a street where an excavation had been made, *held*, that the city was not liable: *Goodin v. Des Moines*, 55–67.

A person who is on the street in the ordinary course of business, although not passing along it at the time, may recover for negligence of the city in allowing an obstruction thereon from which he receives an injury: *Duffy v. Dubuque*, 63–171.

So *held* where the person injured had stopped with one foot on the sidewalk and the other upon the ground of an adjoining lot for the purpose of procuring a drink from the hydrant: *Ibid.*

Defects in portion of the street not traveled: The liability of a city as to the safety of its streets exist not only as to the ordinary traveled part of such street, but also to the gutters and sidewalks: and where a city dug a ditch across a street, and constructed a bridge over the same, *held*, that it was not only liable for failure to keep the bridge in repair as far as built, but that it must afford a safe and convenient crossing for the ditch of the same width of the street: *Rusch v. Davenport*, 6–443.

If a street be open for public travel for but a part of its width, and the other part is not in condition to be used by the public, the city will not be chargeable with negligence for failing to improve the whole of the street, or for accidents occurring to those attempting to use the part not improved; but where the whole street is open to use it is the duty of the city to keep it in a reasonably safe condition for the entire width, that is, from sidewalk to sidewalk: *Stafford v. Oskaloosa*, 57–748.

Where there is nothing in the character of the improvement upon a street to indicate that it is the intention of the city that travel shall be confined to a particular portion thereof, the city will not be relieved from the duty of keeping such street in repair for its entire width: *Stafford v. Oskaloosa*, 64–251.

Where a street is open for travel its entire width the city is bound to keep it in safe condition from sidewalk to sidewalk, and cannot by an excavation temporarily withdraw it from public use without using proper precautions to prevent travelers at night from driving thereon; and in an action for injuries resulting from the negligence of the city in leaving an excavation in the streets unprotected, it is not competent to show that there was no travel at the point where the excavation was made: *Crystal v. Des Moines*, 65–502.

The court is not prepared to say that it is the duty of the city to keep every street safe for travel thoughout its entire width, regardless of its location, amount of travel and all other circumstances: and *held*, that the refusal of an instruction, that the law imposes on a municipal corporation the duty to keep its streets in a reasonably safe condition to the whole width of the street, was not error where the jury were instructed that if the street was not safe for persons passing over the same while using reasonable care, and the city had knowledge of the unsafe condition or should have had such knowledge, it was guilty of negligence: *Fullam v. Muscatine*, 70–436.

Defects or obstructions in sidewalks: The city is liable for damages occasioned by injuries received by reason of an obstruction upon the sidewalk placed there by the adjoining property owner: *Rowell v. Williams*, 29–210.

Where an injury results not merely from

the dangerous and defective condition of the walk itself, but by reason of a defective scuttle covering constructed for private use of an adjoining property owner, either with or without the authority of the city, the property owner is liable for such injury: *Calder v. Smalley*, 66–219.

In such case it is immaterial that a tenant in possession of the premises has agreed with the owner thereof to keep the scuttle closed: *Ibid.*

The construction of ways in a sidewalk to the cellars of adjacent buildings is not necessarily negligence. If such ways are so constructed that when open they are sufficiently conspicuous to be seen by a pedestrian using the sidewalk, in the exercise of proper diligence, or are sufficiently lighted in the nighttime to disclose the danger to such person, it cannot be held that the mere omission to have barriers around them is *per se* evidence of negligence: *Day v. Mt. Pleasant*, 70–193.

In an action against a city for damages received from the existence of a cellar-way occupying a part of the sidewalk and left without railing, guard or protection, *held*, that the question whether the leaving of such cellar-way without other guard or protection than the door thereto was negligence was a question to the jury: *Ibid.*

Sidewalk constructed by property owner: An allegation in a petition for the recovery of damages for injuries resulting from a defective sidewalk in which it is alleged that such sidewalk had been ordered and caused to be constructed by the corporation is sufficiently supported by proof that the work was done by the property owner. It is a fair presumption that it was done at least with the permission of the city: *Barnes v. Newton*, 46–567.

To hold a city liable for injuries received from a defective sidewalk it is not necessary to show by evidence that the city built the sidewalk or had assumed control over it: *Shannon v. Tama City*, 74–22.

Although an incorporated town may not be liable for failure to construct sidewalks, yet where it appears that a sidewalk has been constructed, the corporation becomes liable for failure to maintain it in repair, no matter by whom constructed: *Beazan v. Mason City*, 58–233.

Frequency of use: The liability of a municipal corporation for injury from a defective sidewalk should not be made dependent upon the probability or frequency of its use by persons not acquainted with its condition. The corporation is bound to maintain its sidewalks in a reasonably safe condition for the protection of such persons as may possibly use them contrary to such assumed probability: *Thomas v. Brooklyn*, 58–438.

Stepping off sidewalk: In determining whether the corporation was liable for injuries received from stepping off the sidewalk into a ditch, *held*, that the question was not whether the sidewalk was not reasonably safe for the traveling public, but whether, all things considered, it was reasonably safe for plaintiff at the time of the accident, and *held*, that under the circumstances the accident appeared to have been the result of want of ordinary care on the part of the plaintiff: *McLaury v. McGregor*, 54–717.

Difficulties: A city is charged with the duty of keeping its streets in reasonable repair, and the difficulties which may attend the performance of that duty will not relieve it from such performance: *Stafford v. Oskaloosa*, 64–251.

The extent of sidewalk in a city is not to be taken into consideration by the jury in deciding whether the city officer used proper diligence in removing the snow and ice: *Lindsay v. Des Moines*, 68–368.

Snow and ice: The duty to keep streets in repair requires the city to remove obstructions from deposits of snow. To repair means to restore to a good state after partial destruction. And *held*, that the city was liable for damages from an injury caused by snow and ice remaining upon a sidewalk after knowledge thereof by the proper officers of the city and sufficient opportunity to remove the same: *Collins v. Council Bluffs*, 32–324.

The mere fact that a street is in a dangerous condition because of snow and ice rendering the walks and crossings slippery, due to the operation of natural causes, will not render the city liable, even if such snow and ice are not removed within a reasonable time. It is only when they are suffered to remain on the sidewalk in such an uneven and rounded form that a person cannot walk over it, while using due care, without danger of falling down, that such snow and ice constitute a defect for which the city is responsible: *Broburg v. Des Moines*, 63–523.

Evidence of former negligence: In an action against a city for negligence in permitting an obstruction in a street, *held*, that evidence that similar obstructions had often existed at the same place was admissible as showing the need of greater diligence on the part of the city: *Moore v. Burlington*, 49–136.

In such cases evidence may be introduced of such facts as tended to render the obstruction dangerous: *Ibid.*

It is the condition of the streets at the time of the injury which determines the city's liability; unsafe condition at a prior time cannot be shown to render it liable: *Cramer v. Burlington*, 42–315.

Subsequent repairs: In an action for damages sustained from defect in a bridge, where the question is whether the bridge was a city bridge, and under the care and supervision of the city, evidence to show that the city reconstructed and repaired it after the injury occurred is not admissible to show the relation of the city to the bridge at the time of the injury: *Holmes v. Hamburg*, 47–348.

The fact that a walk was repaired several months after the time of the alleged accident should not be admitted for the purpose of showing that it was probably defective at the time of such accident: *Parkhill v. Brighton*, 61–103.

Subsequent defective condition: Although the condition of a sidewalk soon after the accident, alleged to have been due to its defective condition, might be of such a character as to indicate that such condition had existed substantially at the time of the accident,

yet, where the length of time intervening is such that evidence in respect to a subsequent defective condition would more probably lead to a wrong inference than a correct one, it ought not to be admitted: *Ibid.*

Notice of defects: Evidence that a plank in a sidewalk was at various times out of place, *held* sufficient as showing the existence of a notorious defect so as to charge the city with notice thereof: *Hollenbeck v. Marshalltown*, 62–21.

If the defect is notorious and has remained so a sufficient length of time to enable the city, by reasonable diligence, to know of its existence and to repair it, the law conclusively presumes either that such diligence has been exercised and that the knowledge which such diligence would procure has been acquired, or that the city has been culpably negligent in not employing such diligence: *Rice v. Des Moines*, 40–638; *Montgomery v. Des Moines*, 55–101.

Where an injury from the improper method of filling a ditch in the street resulted six weeks after the filling of such ditch, *held*, that the jury might properly find that if there was any defect it could have been discovered by the city in the exercise of reasonable diligence within that time: *Rosenberg v. Des Moines*, 41–415.

A municipal corporation is liable for injuries received by reason of a sidewalk having become out of repair and in an unsafe and dangerous condition, if it appears that, knowing it to be in that condition, it was allowed to remain for such length of time that it might, in the exercise of ordinary care and reasonable diligence, have been repaired before the injury: *Townsend v. Des Moines*, 42–657.

A municipal corporation cannot be held guilty of negligence on account of defects in a sidewalk not arising from its original construction, without express notice of the existence of the defect or obstruction has been brought home to it, or such defect or obstruction has been so notorious as to be observed by all: *Doulon v. Clinton*, 33–397; *Cramer v. Burlington*, 39–512.

Therefore proof of the mere existence of a defect in a sidewalk is not enough to establish negligence on the part of the corporation; and in the absence of other evidence of negligence there can be no recovery for injuries received by reason of such defect: *Doulon v. Clinton*, 33–397.

It is not sufficient to charge the city with notice that two or more citizens of the city knew of the dangerous condition of the walk: *Cramer v. Burlington*, 39–512.

To render a municipal corporation liable for an injury arising from an obstruction in its streets it must be shown that through its officers it had notice of the obstruction, or that such obstruction had existed so long as to raise a presumption that knowledge thereof was possessed by such officers: *Sikes v. Manchester*, 59–65.

A city will be liable for injuries received from defects in a sidewalk which, originally constructed in a proper manner, has afterwards become out of repair, if it had actual knowledge of the defect in such time that with the exercise of reasonable diligence it might have repaired the defect and thereby prevented the injury, or if the defect was of such a nature and had existed for such a period of time that with the exercise of ordinary care and diligence in the discharge of its duty it would have learned of its existence in time to have prevented the injury: *Cook v. Anamosa*, 66–427.

Where a defect is one which is not readily prevented the city will not be charged with notice thereof by reason of existing and apparent defects at a distance from the one which has caused the injury: *Ruggles v. Nevada*, 63–185; *Goodson v. Des Moines*, 66–255.

Neither can evidence be introduced against defendant's objection to show that after the accident loose boards were seen upon other parts of the sidewalk: *Goodson v. Des Moines*, 66–255.

The fact that the defective condition of a plank walk at one point is known to the officers of the city does not affect them with knowledge of its defective condition at a point half a block away, so as to render the city liable for damages resulting from the defective condition at the first point: *Conklin v. Marshalltown*, 66–122.

A city cannot be held guilty of negligence in not having knowledge that a street is dangerous by reason of accumulations of snow and ice where there is no evidence tending to show that any one observed that the street was in a dangerous condition prior to the time of the accident for which recovery is sought: *Broburg v. Des Moines*, 63–523.

The city marshal, not being charged by statute or ordinance with any duty with reference to the inspection and repair of streets or sidewalks, notice to him of a defect in a sidewalk is not notice to the city: *Cook v. Anamosa*, 66–427.

Notice to the mayor or council or the street committee, or the individual members thereof, will effect notice to the city of defects in its streets: *Ibid.*

In a particular case, *held*, that the defect was not so apparent that the city was negligent in failing to ascertain its existence before the occurrence of the injury: *Ibid.*

Notice to members of the city council of the obstruction of a sewer, *held* sufficient to charge the city with notice thereof; and *held* that it was not necessary to show that the council while in session expressly authorized the obstruction in order to charge the city with liability therefor: *Powers v. Council Bluffs*, 50–197.

While a city will be bound by notice of a defect communicated to a member of the city council, such notice must relate to the defect which caused the injury, and a notice to a member of the council of defects which have been repaired before the accident will not charge the city with notice of another defect which does cause the accident, although it occurs at the place where the repairs have been made: *Carter v. Monticello*, 68–178.

The testimony of travelers or sojourners, as well as of citizens, is competent to show that defects in the streets were so notorious as to

charge the city officers with knowledge thereof: *Varnham v. Council Bluffs*, 52–698.

Contributory negligence of party injured: All that can be demanded of a party in regard to obstructions in the street is ordinary care to avoid them: *Hanlon v. Keokuk*, 7–488.

A person injured cannot recover for injuries received from the defect in a sidewalk which could have been discovered by the exercise of ordinary care: *Cressy v. Postville*, 59–62.

In order to recover for an injury resulting from a defect in a street the plaintiff must show that the street was not safe, and that he was in the exercise of ordinary care. But the action may be supported, although the primary cause is an accident which prevents the exercise of care to avoid the injury, if it occurred without the fault of the person injured: *Manderschid v. Dubuque*, 25–108.

Where there is a defect such as a declivity in the street which is not guarded by railing, and which is so situated that it would be contributory negligence on the part of any one to drive his team over such declivity, and a horse, properly hitched in the street, breaks loose and is injured by running over such declivity, the city is not liable: *Moss v. Burlington*, 60–438.

Where a resident of a city, having knowledge of an excavation in an unused street, turned his mare at large and she was injured by falling into such excavation, *held*, that, as he had equal means of knowledge of the danger with the officers of the city, he was equally guilty of negligence, and could not recover: *Gribble v. Sioux City*, 38–390.

Sidewalks and cross-walks are constructed for foot travelers, and a person who, without some good and sufficient reason, walks elsewhere and is injured, should not be permitted to complain that he has been injured through the fault and negligence of the city: *O'Laughlin v. Dubuque*, 42–539.

On a subsequent trial of the case, *held*, that facts were shown sufficient to take the case out of the rule therein laid down: *O'Laughlin v. Dubuque*, 52–746.

Where a person undertakes to drive a horse in one direction, while looking and talking in another direction, and no special exigency is shown, such person must be considered as voluntarily assuming the risk of driving against any obstacle in the way, and he cannot be said to be in the exercise of due care, especially when outside of the usually traveled highway, and in the vicinity of a dwelling-house where more or less obstacles are to be found; and *held*, that it was error to instruct the jury in such case that they might consider the presence of other persons with whom the injured party was conversing, in determining whether such party was negligent in driving against the obstacle: *Tuffree v. State Center*, 57–538.

Where an obstruction in the street is in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him from seeing it, and he drives against it or into it, he is guilty of contributing proximately to any injuries which may result: *Yahn v. Ottumwa*, 60–429.

If the plaintiff knew that it was imprudent to go over a walk, and there was another one by which he could have reached his destination, he is to be considered guilty of contributory negligence in attempting to walk, even cautiously, over it in the dark instead of taking the other way: *Parkhill v. Brighton*, 61–103.

A person who is injured by reason of defects in the sidewalk cannot be defeated of recovery therefor by reason of knowledge of the defective condition of the walk, except as he has been guilty of negligence operating to his injury. He is not to be denied relief simply because he goes upon a street which he knows to be dangerous: *Rice v. Des Moines*, 40–638. And see *Walker v. Decatur County*, 67–307.

Knowledge by the party injured, previous to the injury, of the defect from which the injury results, will not defeat his claim for damages if he was not guilty of negligence: *Ross v. Davenport*, 66–548.

It is error, in an action for injuries from a defective walk, to refuse an instruction that if the jury find that plaintiff, at the time of passing over the walk, knew that it was unsafe and that it was imprudent to pass over it at that time, in consequence of darkness or any other cause, and that with this knowledge he still persisted in passing over it, though there was another walk which he might have taken going in the same direction he desired to go, then his own negligence contributed to the accident and he could not recover: *McGinty v. Keokuk*, 66–725.

It is not negligence to travel the streets of a city on a dark night without a lantern, or to walk rapidly therein: *Moore v. Burlington*, 49–136.

In determining whether a plaintiff who has been injured by a defect in a sidewalk has contributed to the injury by his own negligence, it is proper for the jury to take into consideration the hour of the night the injury was received, the darkness of the night, whether the plaintiff was under the influence of intoxicating liquors, etc.: *Cramer v. Burlington*, 39–513.

In an action for personal injuries received from defects in a street, the jury may properly be instructed that the law demanded of plaintiff the exercise of ordinary care, and that in determining whether he exercised such care they should consider all the circumstances of the case, the hour of the night, etc., but it is not proper to instruct them that greater caution was demanded of plaintiff in passing upon a street after night than in daytime. The degree of care to be used is the same at all times: *Stier v. Oskaloosa*, 41–353.

In order to constitute contributory negligence it is not necessary that plaintiff must have known of the danger and assumed the risk before it can be said that he was negligent. The true rule is that plaintiff should have used due care and caution to discover the danger; but *held* erroneous to charge the jury that in order to render plaintiff, suing for damages for injuries received from a defective sidewalk, chargeable with contributory negligence preventing his recovery, it must appear that he went voluntarily into apparent danger: *Munger v. Marshalltown*, 56–216.

The fact that a party in crossing a street has crossed a place which he knew to be dan-

gerous when he might, without increasing the distance and without inconvenience, have crossed at another place, will not prevent his recovery; but if, knowing that the place was dangerous, he knew or ought to have known that it was not prudent to cross at such place, and there was another way which he might have taken without material inconvenience, he cannot recover: *Hartman v. Muscatine*, 70–511.

A person cannot be excused if he consciously incurs danger which there is no necessity for incurring: *Fulliam v. Muscatine*, 70–436.

A person is not as a matter of law guilty of contributory negligence because, knowing a walk to be unsafe, he does not cross the street, as he might do with safety, instead of taking the walk. Such question is for the jury: *Kendall v. Albia*, 73–241.

Intoxication: Under evidence showing that plaintiff suing for injuries received from a defective sidewalk was intoxicated at the time of the accident, *held*, that the verdict of the jury allowing only nominal damages would not be interfered with on appeal: *Hubbard v. Mason City*, 64–245.

The fact of intoxication of the person injured, at the time of the injury, may be shown as tending to show contributory negligence: *Cramer v. Burlington*, 39–512.

Imputed negligence: Where it was sought to impute negligence to a party suing for injuries received from obstructions in a street while traveling thereon, *held*, that the fact that the owner of the team which plaintiff was driving knew that the team was unmanageable could not be imputed to plaintiff as negligence in the absence of such knowledge on his part: *Martin v. Algona*, 40–390.

Remedy over against property owner: The fact that the city has a remedy over against a private party who has so used a sidewalk, or left exposed a dangerous place, as to cause injury to a traveler, does not relieve the city of its duty towards such traveler to keep sidewalks in repair, and guard places of danger of which it has notice: *Rowell v. Williams*, 29–210.

Where a person places an obstruction in a street he cannot demand of the city that it shall remove the obstruction at its expense if it has knowledge of it, and in case of failure to remove it after such knowledge, that it shall be precluded from looking to him for indemnification for damages which it is compelled to pay for the injury caused by the obstruction. Such circumstances would not establish contributory negligence on the part of the city, defeating its right to recovery from the property owner: *Sioux City v. Weare*, 59–95.

If a person for his private advantage, under permission from the city, makes an excavation in the street, and the city erects a barrier on one side of it, the person making the excavation is not thereby relieved from the duty of erecting a barrier on the other side if the safety of travelers requires it: *Ottumwa v. Parks*, 43–119.

Where suit was brought against a city for damages sustained by reason of an excavation in the street made by a property owner, and such property owner employed an attorney to defend in such action against the city, *held*, that in the action by the city against the property owner to recover the amount of damages which it had been compelled to pay on account of such injury, the measure of damages was the amount of the judgment with interest and cost which had been recovered in the action against the city: *Ibid.*

Where joint judgment for injuries from negligence in the obstruction of a street is recovered against a municipal corporation and the party guilty of causing the obstruction, the corporation cannot require that plaintiff proceed first against the co-defendant, even though he has property subject to execution: *Palmer v. Stacy*, 44–340.

Even where the city directs sidewalks to be made or repaired, and assesses a special tax upon abutting lots to pay therefor, the lot-owner failing to make the improvement, after being notified, does not become liable for injuries by reason of failure to make such improvement, or to make repairs, as the case may be: *Keokuk v. Independent Dist.*, 53–352.

The city cannot escape liability for the defective condition of its streets for the reason that a third person is under obligation to keep such portion in repair. So *held* with reference to defective crossings on the street put in by a railway company: *Fowler v. Strawberry Hill*, 74–644.

625. Grading alleys. 15 G. A., ch. 51, § 1. The city council or trustees of any incorporated city or town, organized under special charter or under the provisions of the general incorporation laws of the state, are hereby authorized and empowered to provide by ordinance for the improvement of alleys (in said city or town) by grading the same, and for the assessment of the expenses thereof, upon the owners of lots or parcel of land abutting on said alley, pro rata, according to the front feet of said lots or parcel of land; *provided*, that such ordinance shall not be adopted except after the presentation to said council of a written petition for the improvement of such alley, signed by a number of the owners of property so to be assessed therefor equal to a majority of the owners of such property.

[This section as applicable to cities under special charter is modified by § 952, and as applicable to cities of the first class is repealed and other provisions substituted by § 821.]

626. Contract. 15 G. A., ch. 51, § 2. It shall be the duty of such city council or trustees to require the work of grading such alley to be done under

contract therefor, to be entered into with the lowest responsible bidder; *provided*, that all bids for such work may be rejected by such council or trustees, if by them deemed to be exorbitant, and new bids ordered.

627. Assessments a lien. 15 G. A., ch. 51, § 3. All assessments for the grading of alleys under this act shall be a lien upon the lots and lands assessed, and shall bear the same rate of interest, and the said property assessed may be sold for payment thereof in the same manner, at any regular or adjourned sale, with the same forfeiture, penalties, and rights of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect, as in cases of sales for non-payment of the annual taxes of such cities or towns respectively, as now or hereafter provided by law in respect thereto.

628. Mode of assessment. 15 G. A., ch. 51, § 4. Such city council or trustees may provide by ordinance for the particular mode of making and returning the assessment hereinbefore authorized, and payment of such assessments may, if so directed by said council or trustees, be enforced in the manner and by the proceedings provided for by sections four hundred and seventy-eight, four hundred and seventy-nine, and four hundred and eighty-one of the code [§§ 649, 650, 652].

629. Expense. 15 G. A., ch. 51, § 5. So much of section four hundred and sixty-five, chapter ten, title four [§ 624], as requires the expense of the grading of alleys to be paid out of the general funds of any incorporated city or town, are [is] hereby repealed.

630. Sidewalks; curbing; paving; special tax. 466. They shall have power to construct sidewalks, to curb, pave, gravel, macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley to pay the expense of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement petition the council or trustees to make the same, such improvements shall not be made until three-fourths of all the members of such council or trustees shall, by vote, assent to the making of the same. [13 G. A., ch. 65; 14 G. A., ch. 45, § 2.]

[Further provisions as to paving and taxes therefor in cities are found in §§ 741-745 and §§ 824-833.]

Sidewalks: The construction of a sidewalk is a public rather than a private improvement, and the property is not subject to a mechanic's lien for the expense thereof: *Coenen v. Staub*, 74-32.

As to liability for injuries from defects in, or obstructions upon, sidewalks, see notes to § 624.

As to what improvements may be made under this section: "Macadamizing" includes "trimming" and "guttering:" *McNamara v. Estes*, 22-246.

"To pave" may include all things necessary to make a level and convenient surface for horses, carriages and foot passengers of any convenient or practical material: *Buell v. Boil*, 20-282, 290.

The authority to "pave," given in a special charter, *held* to include the power to macadamize and gutter: *Warren v. Henley*, 31-31.

A sidewalk is a part of the street and may be paved with brick or stone under the same authority which authorizes the improvement of the rest of the street: *Ibid.*

The laying of a plank sidewalk is within the authority to cause streets to be paved or macadamized: *Burlington & M. R. R. Co. v. Spearman*, 12-112.

Where an improvement consisted in an entire raising and changing of the surface of the street, *held*, that it was an improvement for which a special tax might be levied under this section, and not "repairing" as contemplated by the preceding section, to be paid for out of the general funds: *Koons v. Lucas*, 52-177.

Where the improvement, such as paving or macadamizing, becomes worn out, it may be renewed at the expense of the owners of abutting property: *Coates v. Dubuque*, 68-550.

The question whether an improvement is demanded by the public wants or necessities is to be determined by the city council, and then determination is conclusive except for want of authority or fraud or oppression: *Ibid.*

The statute confers no authority to assess abutting property for grading or filling a street: *Bicroft v. Council Bluffs*, 63-646; *Scofield v. Council Bluffs*, 68-695.

Such grading or filling as may be properly part of the work of paving may be charged upon abutting lots as a portion of the expense of paving, but any considerable filling or substantial change of the grade does not, in a proper sense, constitute a part of the work of paving: *Ibid.*

Where a city constructed a sewer through a street, rendering it necessary to tear up the macadamizing previously done and macadamize again, *held*, such expense was not one for which abutting property could be specially assessed, but that it was incident to the construction of the sewer, and might, as such, be paid out of the general fund: *Burlington v. Palmer*, 67-681.

The city may grade and macadamize less than the whole width of the street where it is not shown to be for the injury or oppression of owners of property adjacent thereto: *Morrison v. Hershire*, 32-271, 276.

Who responsible for: An owner of a corner lot may be required to pay for the cost of macadamizing one-fourth of the square occupied by the intersection of the streets abutting his property: *Wolfe v. Keokuk*, 48-129.

A special tax for the improvement of a street cannot be taxed to a street railway company occupying a portion of such street: *Koons v. Lucas*, 52-117.

Special assignments, under this section, *held* to be covered by the provisions of a lease requiring the tenant to pay all taxes assessed upon the property during such lease: *Cassady v. Hammer*, 62-359.

The assessment is to be made upon owners of property abutting upon the part of the street which is improved: *Kendig v. Knight*, 60-29.

Proceedings: Improvements may be ordered *either* when the proper petition is presented, *or* by three-fourths vote without such petition: *Tallant v. Burlington*, 39-543.

In ordering an improvement in the absence of a petition therefor, the council may act upon information furnished by the report of a committee as well as upon their own knowledge in determining the necessity of the improvement: *Brewster v. Davenport*, 51-427.

Under the provisions of a special charter somewhat similar to this section, *held*, that a party, who with others signed and presented to the council a petition praying that certain improvements should be made, could not object to the proceedings thereunder on the ground that a sufficient number of property owners had not signed such petition. The proceedings would be binding as to him, although they might not be as to others who had not signed: *Burlington v. Gilbert*, 31-356.

Levying and collecting the tax: Making the cost of such improvements a charge upon abutting property is an exercise of the power of taxation and not of the right of eminent domain, and such a provision is not unconstitutional as being unequal, applying to particular individuals or classes, and not uniform: *Warren v. Henley*, 31-31.

The power to make special assessments is distinct from the power of general taxation; but both may be granted by the legislature: *Fairfield v. Ratcliff*, 20-396.

All expenses of street improvements may be, in accordance with the law, assessed upon abutting property without regard to the benefits to be conferred upon such property: *Gatch v. Des Moines*, 63-718.

The powers given a city or town to make special assessments against abutting property for street improvements are usually strictly construed: *Bucroft v. Council Bluffs*, 63-646.

While such power must be clearly given, it will be enforced when it is within the reasonable construction of the law: *McNamara v. Estes*, 22-246.

The city council may provide the mode under which the taxes contemplated in this and the following section shall be assessed and authorize the city auditor to make such assessment: *Burlington v. Quick*, 47-222.

The word "lot," in this section, means any portion, piece or division of land: *Buell v. Ball*, 20-282.

Exemption from special assessment: School property is not exempt from liability for taxation by special assessment for improvement of streets, building of sidewalks, etc. Though, perhaps, such tax cannot be enforced by a sale of the property, it may be exacted in some other manner, probably by an action: *Sioux City v. Independent School Dist.*, 55-150.

But the city has no authority to assess expenses of constructing a sewer upon abutting property belonging to the state. It has such powers only with reference to taxing property for improvements as are conferred upon it by statute, and the power of subjecting the property of the state to the payment of such assessment is not contemplated by statutory provisions: *Polk County Savings Bank v. State*, 69-24.

Method of making special assessments: The fact that in assessing the costs of improvements upon communicating streets the entire frontage of the corner lot upon both streets is made the basis of assessment does not amount to double assessment of such property: *Morrison v. Hershire*, 32-271.

Where a corner lot faced upon two streets, and the tenant thereof was under obligation to keep up sidewalks in front of the lot, etc., *held*, that he was liable for taxes assessed for the construction of sidewalks on each of the streets: *Des Moines v. Dorr*, 31-89.

An owner of a corner lot may be required to pay for the cost of macadamizing one-fourth of the square occupied by the intersection of the streets on which his property abuts: *Wolf v. Keokuk*, 48-129.

The assessment is to be made upon owners of property abutting upon the part of the street which is improved: *Kendig v. Knight*, 60-29.

Special assessments for street improvements *held* to be covered by the provisions of a lease requiring the tenant to pay all taxes assessed upon the property during such lease: *Cassady v. Hammer*, 62-359.

The fact that an improvement, made on two streets in pursuance of two different resolutions, is made the basis of one assessment on both streets does not render the tax illegal: *Kendig v. Knight*, 60-29.

Under the statute improvements may be ordered by the city council either when the petition is presented, signed by the requisite number of property owners, or upon a three-fourths vote of the council without such petition: *Tallant v. Burlington*, 39-543.

In ordering an improvement in the absence of a petition therefor, the council may act

upon information furnished by the report of a committee as well as upon their own knowledge in determining the necessity of the improvement: *Brewster v. Davenport*, 51–427.

A party who signs and joins in presenting to the council a petition praying for a certain improvement cannot afterwards object to the proceedings upon such petition on the ground that a sufficient number of property owners did not sign it. The proceedings would be binding as to him although they might not be as to others not signing: *Burlington v. Gilbert*, 31–356.

The fact that the city issues warrants in payment of expenses of improvements on the street, greater in amount than the actual cost of the improvements, for the purpose of making up a deficiency caused by the warrants being below par, will not be a ground of objection to the assessment on the part of an adjoining property owner whose property is assessed for such improvements: *Warren v. Henly*, 31–31.

Notice of assessment: Notice by publication is sufficient to warrant personal judgment against the property owner for the expense of filling up a lot according to a proper resolution: *Independence v. Purdy*, 46–202.

Although the statute does not in terms require notice of an assessment for special improvements to be given to the property owner, yet such notice is an indispensable requisite to the exercise of the taxing power, and an ordinance providing for such assessment without such notice and opportunity to the party assessed to appear and object to the assessment on his property is void: *Gatch v. Des Moines*, 63–718.

At least this is true where the statute or ordinance provides for an assessment according to the benefits, so that in making the assessment an opinion is to be formed and discretion exercised by the assessors: *Trustees of Griswold College v. Davenport*, 65-633.

So where an ordinance providing for the filling of lots, to prevent the standing of stagnant water thereon, made no provision for notice to the owner of the property, and no notice of the proceeding was in fact served upon him, so as to give him opportunity to show that no such burdensome and extraordinary expenditure as contemplated by the resolution adopted under such ordinance was necessary for the abatement of the nuisance, *held*, that the proceedings were void: *Bush v. Dubuque*, 69–233.

It is immaterial, in such a case, that the lot owner has notice and an opportunity to be heard before the tax is assessed upon his lots. He has a right to have the council enjoined from involving the city in an unauthorized and illegal contract to fill his lots to a greater height than necessary, and to expend more money than they had a right to collect from him for such improvement: *Ibid.*

Where the proportion of taxes to be levied upon abutting property is determined by the frontage of the property upon the street improved, and nothing is necessary to determine the amount of tax to be charged to the property owner except a mathematical computation, no discretion being left to the city council, no notice of the assessment is necessary: *Amery v. Keokuk*, 72–701.

Under an ordinance providing that a resolution for the improvement of streets and taxation of costs to abutting owners should be published before being acted upon, *held*, that such requirement was mandatory, and that proceedings under a resolution not thus published were void: *Roche v. Dubuque*, 42–250.

Method of collecting special assessments: A city which has properly ordered special assessments for improvements, and paid the contractor for the same, may, in an action, recover from property owners the respective amounts with which they are chargeable: *Burlington v. Quick*, 47–222.

It seems that an action by the city to recover such assessments can only be brought after it has paid the contractor: *Ibid.*, 229.

Proceedings for the collection of special assessments will not be reviewed upon appeal, except in case of manifest abuse resulting in substantial prejudice: *Des Moines v. Stephenson*, 19–507.

A municipal corporation which has the power to levy and collect a certain tax cannot delegate its powers so as to enable its assignee to collect such tax in his own name, either in an action at law or in equity, but the city may proceed to collect such tax after a void assignment thereof, and enforce its lien: *McInerny v. Reed*, 23–410.

Estoppel: Where the owner of abutting property knows that it is the intention to assess the cost of improvements of the adjoining street upon such property, and makes no objection, he will be estopped from questioning the regularity of the assessment: *Robinson v. Burlington*, 50–240. And see *Patterson v. Baumer*, 43–477.

But where a land owner protests against the work being done, and it is done notwithstanding his remonstrance, he is not estopped from contesting the regularity of the assessment, although he has not taken steps to enjoin the prosecution of the work: *Tallant v. Burlington*, 39–543.

A property owner is not estopped from objecting to the validity of an assessment on the ground that the method of making such assessment has not been complied with, by standing by and allowing the improvement to be made without objection, if he might have supposed that the improvement was to be paid for out of the general fund: *Hager v. Burlington*, 42–661.

Where proceedings for the levy of a special assessment for the improvement of a street are void for want of jurisdiction from the beginning, a property owner is not estopped to deny the validity of the assessment on the ground that he has made no objection to the proceeding while the improvement was in progress: *Starr v. Burlington*, 45–87.

Liability of city on special assessment certificates: Where, in pursuance of a contract for improving a street, the city issued certificates of assessment against owners of abutting lots, which by the contract were to be taken by the contractor in full payment for the work performed, and by reason of the nature of the improvement it was not chargeable against abutting property, but might be

contracted for by the city, and paid out of the general revenue, *held*, that a recovery against the abutting property owners not being possible, the city became liable: *Bucroft v. Council Bluffs*, 63–646; *Polk County Savings Bank v. State*, 69–24.

Where the city issues in payment for work certificates of assessment upon abutting property, it thereby impliedly agrees that they are not invalid; and if it is shown that they are invalid the city becomes liable for the contract price of the work: *Scofield v. Council Bluffs*, 68–695.

The whole contract does not become void by reason of the invalidity of the certificates, but the contract price measures the right of recovery as against the city: *Ibid.*

631. Repair sidewalks. 467; 22 G. A., ch. 15. They shall have power to repair sidewalks, and to assess the expense thereof on the property in front of which such repairs are made. [13 G. A., ch. 65; 14 G. A., ch. 45, § 4.]

[As to liability for injuries from defects in sidewalks, see notes to § 624.]

632. Temporary sidewalks. 468. They shall have power to provide for the laying of temporary plank sidewalks upon the natural surface of the ground, without regard to grade, on streets not permanently improved, at a cost not exceeding forty cents a lineal foot, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid. [13 G. A., ch. 65; 14 G. A., ch. 45, § 5.]

633. Limitation of action for injury. 22 G. A., ch. 25, § 1. In all cases of personal injury resulting from defective streets or sidewalks or from any cause originating in the neglect or failure of any municipal corporation, or its officers to perform their duties in constructing or maintaining streets or sidewalks, no suit shall be brought against the corporation after six months from the time of the injury unless written notice specifying the place and circumstances of the injury shall have been served upon such municipal corporation within ninety days after the injury.

634. Special charter cities. 22 G. A., ch. 25, § 2. All the provisions of this act shall be applicable to all cities in this state now organized under special charters.

635. Change of grade; damages. 469. When any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvements on such street or alley according to the established grade thereof, and such city or town shall alter said established grade in such a manner as to injure or diminish the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damage or injury, which shall be assessed by three persons — one of whom shall be appointed by the mayor of such city or town, one by the owner of the property, and one by the two so appointed, or in case of their disagreement, by mayor and owner, or in case of their disagreement, by the city council or town trustees. If the owner of such property shall fail to appoint one such appraiser in ten days from the time of receiving notice so to do, then the city council or town trustees shall appoint all such appraisers, and no such alteration of grade shall be made until said damages so assessed shall have been paid or tendered to the owner of the property so injured or damaged. The appraisers shall be sworn to faithfully execute their duties according to the best of their ability. Before entering upon their duties, they shall give notice by publication for three weeks in one or more newspapers printed in such city, of the time and place of their meeting for the purpose of viewing the premises and making their assessment. They shall view the premises, and, in their discretion, receive any legal evidence and may adjourn from day to day. When the appraisement shall be completed, the appraisers shall sign and return the same to the city council or town trustees within thirty days of their appointment. The city council or town trustees shall have power, in their discretion, to confirm or annul the appraisement, and if annulled, all the proceedings shall be void, but if confirmed, an order of the

confirmation shall be entered. Any person interested may appeal from the order of confirmation to the circuit [district] court of the county in which such city or town is situated, by notice in writing to the mayor at any time before the expiration of twenty days after the entering the order of confirmation. Upon the trial of the appeal, all questions involved in the proceedings, including the amount of damages, shall be open to investigation, and the burden of proof shall, in all cases, be upon the city or town to show that the proceedings are in conformity with this section. The cost of any proceedings incurred prior to the order of such city council or trustees confirming or annulling the appraisement, shall in all cases be paid by such city or town. [14 G. A., ch. 40.]

Establishing grade: The grade of a street can only be established by ordinance. It is not dependent upon the actual lowering or raising of the surface. If the property owner erects buildings or otherwise improves his lots before such action is taken by the city council he cannot recover for any changes in the surface of the street made after such improvement pursuant to grade lines established by the council, provided such changing of the surface be not negligently done: *Kepple v. Keokuk*, 61–653.

Where an ordinance provided that the grade line should be ascertained by or calculated for the middle of the street, *held*, that it was improper in improving streets to the grade established by the ordinance to take the outer line of the street as the grade line. In determining whether there has been a change of grade the height of the surface of the street must govern and it is wholly immaterial whether a change by which the surface is made to vary from the grade be by reason of earth or wood or iron. So *held* with reference to railroad tracks laid upon the street: *Given v. Des Moines*, 70–637.

Where the natural surface of the street is above or below the established grade line, the abutting property owners cannot require the city to excavate or fill up the street to grade; and therefore *held*, that where the track of the railroad was on a level with the natural surface of the street the railroad company could not be required to lower such track to the established grade so long as the street itself was not lowered to such grade: *Given v. Des Moines*, 70–637.

A city may be rendered liable by the acts of its officers in making excavations beyond the established grade: *Freeland v. Muscatine*, 9–461.

The city is not liable for the negligence or want of skill of the city engineer in fixing the grade of a street in accordance with the ordinances of the city: *Waller v. Dubuque*, 69–541.

Change of grade: Macadamizing the street, thereby raising the surface about one foot, *held* not to constitute a change in grade, as it would be presumed, in the absence of proof to the contrary, that the street was left at the proper grade line to receive the material: *Warren v. Henly*, 31–31.

Alteration in the surface of the street due to an improvement, but without any substantial change in the grade of the surface as originally fixed, will not entitle the property owner to damages for change of grade: *Coates v. Dubuque*, 68–550.

The change of grade of a street necessarily effects a change of grade of cross-streets intersecting the same: *Conklin v. Keokuk*, 73–343.

Liability for damages: A city has authority to change the grade of its streets, and the fact that a property owner has built in accordance with the established grade, and thereafter the grade is changed to his injury, will not entitle him to damages except as the statute gives compensation or his property has been injured by negligence or unskilfulness in making the change: *Russell v. Burlington*, 30–262.

Aside from statutory provisions the city is not liable for necessary damages done to property in consequence of establishing or changing the grade of streets, etc.: *Creal v. Keokuk*, 4 G. Gr., 47; and a party claiming the benefit of the remedy provided by statute must pursue the method pointed out: *Cole v. Muscatine*, 14–296; *Cotes v. Davenport*, 9–227; *Burlington v. Gilbert*, 31–356.

The right to compensation only arises when improvements have been made subsequently to the establishment of the grade, but the damages for which compensation is to be made are those accruing to the entire real estate, and not alone those accruing to the improvements: *Dalzell v. Davenport*, 12–437.

The city is made liable in such cases not only for *injury* to the property, but for *damages* resulting from the value of the property being diminished. Such diminution is not to be estimated alone on the improvements erected subsequently to the establishment of the grade, but upon the whole property: *Hempstead v. Des Moines*, 52–303.

The improvements referred to in the statute, the making of which entitles the property owner to damages in case of change of grade, are those made on lots situated on a street the grade of which is changed: *Ibid.*

Where improvements are made to correspond with the street as constructed under an existing grade, it will be presumed, in assessing damages resulting from a change in such grade, that the street was constructed in accordance with the grade as previously established, and that the change in grade necessitated a corresponding change in the surface of the street: *Thompson v. Keokuk*, 61–187.

Property is to be deemed improved according to the established grade of the street within the meaning of this section whenever it is so improved that it can be comfortably and conveniently used for the purpose for which it is devoted, while the street upon which it abuts is maintained at that grade. Such question is for the jury to decide, and it is error to instruct them that the question

whether the improvements were made according to the grade depends entirely upon whether they were intentionally built above the line: *Conklin v. Keokuk*, 73–343.

It is not the passage of an ordinance changing the grade which gives right of action to a property owner for damages, but the actual making of the physical changes therein contemplated: *Hempstead v. Des Moines*, 63–36.

When the council affirms the appraisement it determines that it will make the physical change necessary to conform the street to the grade established, and from that time the right of compensation constitutes a claim in favor of the owner of the property, and in case of his death his executor or administrator and not his heirs are the proper parties to prosecute an appeal in the proceedings to collect such damages: *Conklin v. Keokuk*, 73–343.

Where the grade is changed and the street cut down from curb to curb, the right of action for the change of grade of the sidewalk as well as for the change in grade of the street accrues, and a subsequent and separate action for injuries resulting from the change of the grade of the sidewalk cannot be maintained: *Ibid.*

In estimating the damages opinions of witnesses may be received as to the value of the property before and after the change in grade: *Dalzell v. Davenport*, 12–437.

Where the effect of the change in grade is such as upon the whole to increase the value of the property, the owner cannot recover for incidental disadvantage or expense resulting therefrom: *Meyer v. Burlington*, 52–560.

In an action for damages for changing the grade the question to be determined by the jury is whether the alteration of the grade diminished the value of plaintiff's property. If the property is benefited more than it is injured by the change, there is no right to recover damages: *McCash v. Burlington*, 72–26.

Where, by filling the lot and raising the house to correspond to the grade as changed, the value of the property was made greater than before the change, *held*, that the cost of filling the lot and raising the house should be taken into account in determining the damage: *Thompson v. Keokuk*, 61–187.

The statute provides the steps to be taken by the city, when it proposes to change the grade, for the purpose of determining the damage to property owners, etc., and the city having failed to take such steps is liable to an action by a property owner for the damages, and he is not limited to injunction or *mandamus* to compel the city to pursue the statutory course: *Noyes v. Mason City*, 53–418.

As no appeal is provided for in the proceedings contemplated by statute for the assessment of damages and such assessment may be annulled by the city council, the lot owner is not confined to the remedy there provided, and may maintain an action for damages: *Hempstead v. Des Moines*, 52–303.

Where the city proceeds to alter the grade of a street without taking the proper steps for ascertaining damages, the property owner has no adequate remedy except to enjoin the city from making the alterations until it has the damages assessed, and pays or tenders the amount so ascertained. He may, however, if he sees fit, allow the city to make the alteration and then bring suit to recover the damages: *Phillips v. Council Bluffs*, 63–576.

A party who before the making of improvements waives, in writing, his claims for damages, cannot afterwards make a claim for damages when the city has acted in accordance with the plan to which he has thus given his assent: *Burlington v. Gilbert*, 31–356.

These provisions as to changing grade of streets are, by § 650, made applicable to cities acting under special charter, and while another statute (§ 928) makes similar provisions specially applicable to such cities, yet that statute does not repeal the general provisions which are applicable to such cities, and the two are to be construed together: *Phillips v. Council Bluffs*, 63–576.

Appeal: The notice of appeal must be given to the mayor. If sufficient in form and given to the person who holds the office of mayor, it is immaterial whether directed to the mayor in his official capacity, or to the city or to the individual: *Conklin v. Keokuk*, 73–343.

On the trial of the appeal the city cannot challenge a tax payer as juror: *Ibid.*

636. Land taken for public purpose. 470. They shall have power to purchase or condemn, and pay for out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town for the use of public squares, streets, parks, commons, cemeteries, hospital grounds, or any other proper or legitimate municipal use, and to inclose, ornament and improve the same. They shall have entire control of the same, and shall have power, in case such lands are deemed unsuitable or insufficient for the purpose for which they were originally granted, to dispose of and convey the same; and conveyances executed in accordance with this chapter shall be held to extinguish all rights and claims of any such town or city to such lands existing prior to such conveyance. But when such lands are so disposed of and conveyed, enough thereof shall be reserved for streets to accommodate adjoining property owners. [10 G. A., ch. 127; 13 G. A., ch. 80.]

[General provisions as to cemeteries are found in §§ 562–568. Certain cities under special charter are given authority to use public grounds for school purposes: See § 925. Cities may purchase property at execution sale: See § 730.]

The act of 1864 (10 G. A., ch. 127), in so far as it was attempted thereby to confer upon cities and towns the power to sell and convey squares and parks therein, laid off and dedicated by individuals, *held* void as authorizing a perversion of a trust. Whether the corporation might not be given power to part with whatever interest it possessed in the property, *quære: Warren v. Mayor*, 22-351. And further, see notes to § 996.

DONATION OF DEPOT GROUNDS TO RAILWAYS.

637. Sites for depots, shops, etc. 19 G. A., ch. 133, § 1. It shall be lawful for any incorporated town or city to procure for the purpose of donating, and to donate, to any railway company owning a line of railroad in operation or in process of construction in such incorporated town or city, sufficient land for depot grounds, engine-houses, and machine-shops for the construction and repair of engines, cars, and other machinery necessary to the convenient use and operation of said railroad.

638. Submission of question. 19 G. A., ch. 133, § 2. Before such donation shall be made or appropriation of funds to procure land for such purpose, a petition shall be presented to the trustees or council of such incorporated town or city, signed by a majority of the resident freehold taxpayers of such incorporated town or city, asking that such donation be made and limiting the sum to be appropriated for that purpose. Upon the presentation of such petition, a special election of such city or town shall be called. On the ballots used at such election shall be printed the words, "for the donation" and "against the donation," and if a two-thirds majority of the qualified electors voting at such election shall vote for the donation, said trustees or council shall determine the site to be donated, designating the boundaries thereof, and the amount to be appropriated in procuring said site, not exceeding the amount named in said petition; and may in the name of such incorporated town or city procure said land by purchase, or by payment of the estimated damages in case said land or any part thereof shall be taken in the name of such railway company by process of condemnation for railroad purposes, and may also vacate any streets and alleys within the boundaries of said site and may prescribe the terms, conditions, and limitations upon which such grant shall be made, which shall be binding upon the railway company accepting such donation: *Provided* that land set apart as a park, public square, or levee shall not be appropriated or donated under the provisions of this act, and no land occupied with buildings used for business purposes or as private residences shall be appropriated or donated under the provisions of this act, unless the consent of the owners thereof shall first be obtained.

WATER OR GAS WORKS; ELECTRIC LIGHT PLANTS.

639. Powers to erect. 471; 22 G. A., ch. 11, § 1; 22 G. A., ch. 26. They shall have power to erect water-works, or to establish and maintain gas-works or electric light plants, with all the necessary poles, wires, burners and other requisites of said gas-works or electric light plants, or to authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town at a general or special election, by vote, approve the same.

This section applies to cities acting under special charter as well as to others: *Grant v. Davenport*, 36-396.

640. Jurisdiction beyond limits. 472. They shall have power to construct or authorize the construction of such works without their limits, and for the purpose of maintaining and protecting the same from injury, and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes, and drains, used in, and necessary for the construction, maintenance, and operation of the

same, and over the stream or source from which the water is taken for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect. [14 G. A., ch. 78, §§ 2, 3, 4.]

641. Privilege to individuals. 473. When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and said city or town; and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties. [Same, § 5.]

A city so indebted that a contract by it for the erection of water-works would be void may still contract to pay out of its ordinary revenues a sum as rent for the supplying of water to the city and its inhabitants as part of its ordinary expenses: *Grant v. Davenport*, 36–396.

An ordinance granting to a private company the right to build and operate such works, and providing that the city may, upon certain terms, purchase them, is not an incurring of an indebtedness within the meaning of art. 11, § 3, of the constitution: *Burlington Water Co. v. Woodward*, 49–58.

The power to make a contract with a water company as exercised in the passage of a certain ordinance upheld in a particular case: *Burlington Water Co. v. Woodward*, 49–58.

The proviso exempting from water-tax the property outside of the benefit of water-works is not unconstitutional: *Grant v. Davenport*, 36–396, 405.

The fact that a water company, which has agreed to furnish water to the city for the extinguishment of fires, fails to do so, will not render it liable to an action by a property owner for damages for the destruction of his property by reason of such failure, there being no privity of contract between the property owner and the company: *Davis v. Clinton Water-Works Co.*, 54–59.

The fact that a city is authorized to provide for a water supply will not render it liable for failure to make adequate provision for the extinguishment of fires, nor would the fact that it had a contract with the water-works company to protect it against all actions which might be brought against it for malfeasance or neglect on the part of the company render it liable: *Vanhorn v. Des Moines*, 65–447.

Where a company was authorized to erect water-works and charge certain rates for water furnished, with the privilege to the city of buying the works upon certain terms, *held*, that such water-works were not public property and were subject to taxation: *Appeal of the Des Moines Water Co.*, 48–324.

The buildings, machinery and mains of such a company are all real estate. The mains are appurtenant to the principal structure, and although they may extend into another township the whole property is taxable in the township where the works are situated: *Ibid.*

642. May condemn private property. 474. Said cities or towns are hereby authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of said water-works; and when they shall authorize the construction and operation thereof by individuals or corporations, they may confer, by ordinance, upon such person or corporation the said power to take and appropriate private property for said purpose. [Same, § 6.]

Cities may authorize the construction of such works by foreign corporations, and in such case they may confer upon such foreign corporation the power to condemn private property: *Dodge v. Council Bluffs*, 57–560.

643. Water rents. 475. All cities and incorporated towns constructing such works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, such water rents as may be agreed upon; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the taxes now authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water rents hereby authorized, shall be sufficient to pay the expenses of running and oper-

ating such works, and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works; *provided*, however, that said tax shall not exceed the sum of five mills on the dollar for any one year, nor shall the same be levied upon the taxable property of said city or town which lies wholly without the limits of the benefit or protection of such works, which limit shall be fixed by the city council or board of trustees each year before making said levy. [Same, § 8.]

[Cities of the second class may issue water-works bonds: See § 793.]

The proviso exempting from water tax the property outside of the benefit of water-works is not unconstitutional: *Grant v. Davenport*, 36–396, 405.

644. Gas-works and electric plants. 22 G. A., ch. 11, § 2. Sections four hundred and seventy-two, four hundred and seventy-three, four hundred and seventy-four and four hundred and seventy-five of the code of 1873 [§§ 640–643] shall be held to apply to the establishment and maintainance [maintenance] of gas-works and electric light plants as fully as they do to the erection of water-works.

645. Bonds. 22 G. A., ch. 11, § 3. Incorporated cities and towns for the purpose of establishing such gas-works or electric light plants shall have the power to issue their bonds running for not more than twenty years at a rate of interest not higher than six per cent., *provided*, that the total amount of indebtedness for all purposes in said cities shall not exceed the five per cent. of the assessed valuation of said cities as provided by the constitution.

646. Questions submitted. 22 G. A., ch. 11, § 4. No such gas-works or electric light plant shall be established by any city or town until a majority of the legal voters thereof, at a general or special election, decide in favor of the same. The council may order the question, whether such gas-works or electric light plant shall be established by the city or town, submitted to a vote as herein contemplated, at any general election or at any election specially called for that purpose; or the mayor shall submit said question, upon the petition of twenty-five property owners of each ward in the city or town. Notice of said election shall be given in two newspapers published in said city or town if there are two, if not, then in one, for, at least, two consecutive weeks. The ballots shall either be printed or written and in the following form—"for electric light plant" (or "for gas-works," as the case may be), or, "against electric light plant" (or "against gas-works").

PROCEEDINGS TO CONDEMN PROPERTY.

647. Assessment. 476. When it shall be deemed necessary by any such corporation to enter upon or take private property for any of the above uses, an application in writing shall be made to the circuit [district] court, which application shall describe, as correctly as may be, the property to be taken, the object proposed, and the owners of the property, and of each lot or parcel thereof known, and notice of the filing thereof shall be given as is required to commence a civil action in said court. After such notice shall have been given, the court shall proceed to determine the compensation to be paid for the taking of the property, and for that purpose shall impanel a jury, and the mode of procedure therein shall be the same, so far as applicable, as in an action by ordinary proceedings. The assessment shall be made so that the amount payable to each owner may be ascertained either by allotting it to each owner by

name or on each lot or parcel of land, and the inquiry and assessment shall in other respects be made by the jurors under such instructions as shall be given by the court. The jurors shall be sworn to make the whole inquiry and assessment, but may be allowed to return a verdict as to part and be discharged as to the rest, in the discretion of the court, and in case they shall be discharged from rendering a verdict in whole or in part, another jury may be impaneled at the earliest convenient time, which shall make the whole inquiry and assessment, or the part not made, as the case may be. [R., § 1065; 13 G. A., ch. 80.]

The purposes here enumerated are the only ones for which the city has power to take private property. It does not have the power of eminent domain except as expressly granted: *Field v. Des Moines*, 39–575, 585.

A railroad company, lessee of another company under a lease which may be perpetual at the election of such lessee, has such an interest in the property owned by the lessor that it should be a party to proceedings under this section to condemn such property: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62–218.

648. Payment; possession; costs. 477. When the amount of compensation due to any of the owners of the property to be taken shall be ascertained, the court shall make such order as to its payment or deposit as may be deemed just and proper, and may require adverse claimants to any part of the money or property to interplead, so as to fully settle their rights and interests, and may direct the time and manner in which possession of the property shall be taken or delivered, and may, if necessary, enforce an order giving possession. But none of the property shall be actually taken or occupied until the compensation thus ascertained shall have been paid, or secured to be paid. The costs occasioned by the inquiry and assessment shall be paid by the corporation, and as to the other costs which may arise, they shall be charged or taxed as the court, in its discretion, may direct; no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interest of the respective owners; but in such cases the court shall require the deposit of the money allowed as compensation for the whole of the property, or the part in dispute; and in all cases as soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken and the public work or improvement progress. [R., § 1066.]

SPECIAL ASSESSMENTS.

649. How enforced. 478. Each municipal corporation may, by a general ordinance, prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this chapter; such charge, when assessed, shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation, or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway. Proceedings may be instituted against all the owners or any of them, to enforce the lien against all the lots or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each. Any proceedings may be severed, in the discretion of the court, for the purpose of trial, review, or appeal. [R., § 1068; 12 G. A., ch. 111; 14 G. A., ch. 45, § 6.]

[As to special assessments for street improvements in cities of the first class, see §§ 824–837.]

This section makes the charges a lien upon abutting property, and it is not necessary that the ordinance shall so provide: *Kendig v. Knight*, 60-29.

This section, in so far as it authorizes the rendering of a personal judgment against the property owner, *held* not unconstitutional: *Burlington v. Quick*, 47-222, 226; and *it seems* that an action by the city can only be brought after it has paid its contractors: *Ibid.*, 229.

Under provisions of a special charter making costs of special improvements a lien upon abutting property, *held*, that the property owner was not individually liable for the tax for improvements assessed against his lot: *Buell v. Ball*, 20-282.

As to whether he could be constitutionally made individually liable for such taxes, *quære: Ibid.*

In a proceeding to recover the costs of constructing sidewalks, under a city ordinance, *held* error to render personal judgment against parties not personally notified to make the improvements as required by ordinance, or who did not acquire ownership of the property until after the improvements were made: *Des Moines v. Casady*, 21-570.

Counter-claim: In an action by a city to recover from a property owner a special tax for improvement in streets, defendant cannot set up a counter-claim against the city for damages to his property by reason of the negligent performance of the work. Such a counter-claim, if established, would be payable out of the general fund of the city, and should not be allowed to be deducted from the special fund raised for the improvement: *Burlington v. Palmer*, 67-681.

Where a property owner brought action to restrain the sale of his property for the payment of a special tax, *held*, that the city might, by way of counter-claim, ask judgment for the amount of the tax, and was entitled to such relief: *Kendig v. Knight*, 60-29.

Recovery of illegal tax: Under an ordinance of a city under special charter, substantially the same in its provisions as the statute, with reference to county taxes illegally paid, *held*, that an illegal tax paid under protest might be recovered back: *Tallant v. Burlington*, 39-543.

Under such ordinance, *held*, that a person who had paid an illegal special assessment might recover the same in an action: *Robinson v. Burlington*, 50-240.

The discretion to be exercised by the court in regard to severing proceedings, as herein provided, will not be reviewed upon appeal, except in case of manifest abuse resulting in substantial prejudice: *Des Moines v. Stephenson*, 19-507.

650. Charge enforced. 479. In any such proceeding, where the court trying the same shall be satisfied that the work has been done, or materials furnished, which, according to the true intent of the act, would be properly chargeable upon the lot or land through or by which the street, alley or highway improved, repaired, or lighted, may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informality, irregularity, or defect in any such municipal corporation or any of its officers. But in such case the court may adjudge as to costs as may be deemed proper, and in cases where an assessment shall have been regularly made, and payment shall have been neglected or refused at the time when the same was required, any municipal corporation may be entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent. from the time of the assessment, five per cent. to defray the expenses of collection, which shall be included in any judgment or decree which may be rendered. The provisions and powers conferred in this chapter from section four hundred and sixty-five to section four hundred and seventy-nine, inclusive [§§ 624–650], shall apply to cities acting under special charters. [R., § 1069; 12 G. A., ch. 111.]

[As to proceedings by cities of the first class and cities under special charter to cure irregularities, etc., in special assessments, see § 834; and as to method of collecting special assessments in cities of first class, see §§ 870, 871.]

If an improvement is such as the city is authorized to make, according to the true intent of the law, all errors and irregularities should be discarded and a recovery permitted for the proper proportion of the value of the work from the abutting property owner: *Burlington v. Quick*, 47-222, 228.

The fact that the cost of the improvement is not assessed on the owner of the property in the manner provided by ordinance is an informality which should be disregarded where it appears that after the improvement was made the cost was ascertained and the property owner notified of the amount due, and an opportunity was given him to pay it. Under such circumstances the formal assessment made against the property owner is not an essential requisite to a recovery: *Charlton v. Holliday*, 60-391.

The irregularity or defect which under this section can be disregarded must be a mere error or omission to do something which in no manner affects the jurisdiction of the city. Unless jurisdiction has been acquired, the proceedings of the city will be void: *Ibid.*

Want of notice of the assessment and levy

are formal irregularities which will not defeat recovery for the cost of the sewer in an action authorized by this section. This right of recovery depends upon doing the work in the manner and for the purposes authorized by law and may be adopted at any time: *Dittoe v. Davenport*, 36 N. W. Rep., 895.

The fact that an improvement is made on two streets in pursuance of two different resolutions, but that in making the assessment the entire improvement on both streets is taken into consideration, does not render the tax illegal: *Kendig v. Knight*, 60-29.

Additional powers may be granted by general statute to cities existing under special charter, as is here done: *Lytle v. May*, 49-224.

This section, in so far as it is to appy to cities acting under special charter, differs from the corresponding one in the Revision, and should not be construed as retroactive: *Starr v. Burlington*, 45-87, 90.

FILLING OR DRAINING LOTS.

651. Proceedings. 480. Municipal corporations shall have power to cause any lot of land within their limits on which water at any time becomes stagnant, to be filled up or drained in such manner as may be directed by a resolution of the council or trustees; and such owner or his agent, shall, after service of a copy of such resolution, or after a publication of the same in some newspaper of general circulation in such corporation for two consecutive weeks, comply with the directions of such resolution within the time therein specified; and in case of a failure or refusal to do so, it may be done at the expense of said corporation; and the amount of money so expended shall be a debt due to said corporation from the owner of said lot, and shall, moreover, from the time of the adoption of such resolution, be a lien on such lot or lots. [R., § 1070; 12 G. A., ch. 111.]

[For similar provisions as to cities under special charter, see § 926.]

The city has no authority to order such lots to be filled to grade where it appears that a much less amount of filling would prevent stagnant water standing thereon: *Bush v. Dubuque*, 69-233.

The word "lot" means any portion, piece or division of land: *Buell v. Ball*, 20-282.

Service by publication is sufficient under this section. Personal service is not necessary: *Independence v. Purdy*, 46-202.

CERTIFYING SPECIAL ASSESSMENTS FOR COLLECTION.

652. To auditor. 481. Any municipal corporation may, in addition to the means provided by the three preceding sections, if, by ordinance, it so elects, cause any or all delinquent charges, assessments, and taxes made or levied under and by virtue of, and for the purpose specified in said section or referred to therein, to be certified to the county auditor of the county, and be collected and paid over by the treasurer of the county in the same manner as taxes are authorized to be by this chapter. [12 G. A., ch. 111; 13 G. A., ch. 14.]

While special assessments may be thus certified and collected they are not subject to the penalties provided for non-payment of other taxes, but only to those provided by § 650: *Ankeny v. Henningsen*, 54-29.

After an entry of the municipal taxes upon the county books, sales are to be made therefor as though they were a part of the county taxes: *Morrison v. Hershire*, 32-271.

For mere irregularities in the levy and apportionment of taxes, injunction against their collection cannot be maintained against a city: *Ibid.*

A statute similar to this section, giving to cities organized under special charter power to collect taxes by certifying them to the county treasurer, was held not to take away the right previously existing to provide for the collection of such tax by action in the courts: *City of Dubuque v. Harrison*, 34-163.

The levy and collection of special taxes upon particular property by a municipal corporation must follow the law authorizing them with the same degree of strictness as in other cases of taxation. Where an ordinance requires publication before such tax is due and payable, the tax cannot become due and payable until this requirement is complied with: *Dubuque v. Wooton*, 28-571.

RELATING TO PARKS.

653. Park commissioners. 20 G. A., ch. 151, § 1. Cities acting under special charters and cities and incorporated towns may provide by ordinance

for the election of three park commissioners and the terms thereof shall be three, four and five years, respectively, and their successors shall be elected for the full term of five years, and such park commissioners shall reside in such city or town.

654. Powers of. 20 G. A., ch. 151, § 2. Said park commissioners shall have exclusive control of such parks and shall manage, improve, and supervise the same.

655. Taxes for parks. 20 G. A., ch. 151, § 3. The councils of such cities and incorporated towns, may by resolution submit to the qualified electors of such city or town, at a regular or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding two mills on the dollar, for the purpose of purchasing real estate for parks and the improvement of parks, or for either or both of said purposes.

656. Levy and collection. 20 G. A., ch. 151, § 4. Said councils shall, in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied, and if a majority of the votes cast at such election shall be in favor of such taxation, said council shall levy the tax so authorized, which shall be collected and paid over to the treasurer of such city as other taxes thereof are collected, which shall be known as "Park Fund," and shall be paid on the order of the commissioners and to be expended for the purposes herein provided and for no other purpose whatever.

657. Disbursement; account. 20 G. A., ch. 151, § 5. Said commissioners may use said fund for improving such parks, or for purchasing additional grounds or laying out and improving avenues thereto, and do all things necessary to preserve such parks, and they may appoint one or more park policemen, and pay such police force out of said fund; said commissioners shall keep a full account of their disbursements, and all orders drawn on said fund shall be signed by at least two of said commissioners.

658. Bonds. 20 G. A., ch. 151, § 6. Said commissioners shall each give a bond to the use of such city in the penal sum of five thousand dollars, before they shall be permitted to enter upon such duty, which bonds shall be approved by the auditor, recorder or clerk, of such city or town, and by him retained in his office.

659. Penalty. 20 G. A., ch. 151, § 7. It shall be deemed a misdemeanor for any person to cut, break or deface any tree or shrub growing in any such park or parks, or avenues thereto, except by authority of such commissioners.

ORDINANCES, FINES AND SUITS.

660. For what purposes; penalty. 482. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this chapter, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. [R., §§ 1071, 1072, 1073.]

The right to enforce a city ordinance is limited to a pecuniary penalty unless there is some express act giving power to inflict other punishment: *Burlington v. Kellar*, 18–59.

A town cannot pass an ordinance creating a forfeiture unless clear and distinct authority be given therefor: *Gosselink v. Campbell*, 4–296.

A fine cannot be enforced by forfeiture without trial and adjudication: *Ibid.*

The fact that the present statutes do not authorize forfeitures as a method of enforcing an ordinance does not prevent the city from providing that a license shall be forfeited on certain conditions, and enforcing such forfeiture: *Hurber v. Baugh*, 43–514.

A city may, for violation of the ordinance under which a license is granted, declare the same forfeited: *Ottumwa v. Schaub*, 52–515.

A city has no authority to pass an ordinance creating a forfeiture of goods and chattels as a penalty for violation of an ordinance, unless that power is expressly conferred: *Henke v. McCord*, 55–378.

No authority being expressly conferred by statute to punish, by forfeiture, the keeping of intoxicating liquors for sale, *held*, that an ordinance to that effect was invalid: *Ibid.*

An action to recover a fine imposed by ordinance may properly be brought in the name of the town: *Centerville v. Miller*, 51–712.

Proceedings to punish for violation of an ordinance constitute a criminal prosecution: *Jaquith v. Royce*, 42–406; *State v. Vail*, 57–103; *Creston v. Nye* 74–369.

The regularity of the incorporation of a city or town, existing *de facto*, cannot be inquired into collaterally in an action brought for the violation of an ordinance: *Decorah v. Gillis*, 10–234.

A municipal corporation cannot be enjoined from passing an act because, if passed, it would be unconstitutional, or void: *Des Moines Gas Co. v. Des Moines*, 44–505.

Under the authority here given, the city may provide for the punishment of intoxication: *Bloomfield v. Trimble*, 54–399.

But the city cannot, under this authority, fix fire limits and prevent the erection of wooden buildings therein. Such power can only be exercised as authorized by § 616: *Des Moines v. Gilchrist*, 67–210.

As to whether judicial notice can be taken of the ordinances of a city, see notes to § 662.

As to publication, see § 672.

661. Published ordinances. 19 G. A., ch. 128, § 1. Where any city or town, organized under the general incorporation laws of the state, shall cause, or have heretofore caused its ordinances to be published in book or pamphlet form, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned or provided for therein, in all courts and places without further proof.

662. Fines recovered. 483. Fines may, in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use. And in any such suit or action where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation. [R., § 1074.]

This section has no reference to criminal prosecutions, and applies solely to civil actions for the recovery of a fine or forfeiture: *Goodrich v. Brown*, 30–291.

The mayor of a city is required to take judicial notice of city ordinances in a prosecution for their violation, without their being pleaded: *Conboy v. Iowa City*, 2–90; *State v. Leiber*, 11–407; *Laporte City v. Goodfellow*, 47–572: and see § 811.

A court cannot take judicial notice of the ordinances of a city: *Garvin v. Wells*, 8–286; *Goodrich v. Brown*, 30–291; *Wolf v. Keokuk*, 48–129.

Courts will take judicial notice of the charter or laws under which a city is incorporated, and it is not therefore necessary, in an action for negligence in regard to its streets, to allege and prove the power possessed by the city over its streets under the laws of the city: *Stier v. Oskaloosa*, 41–353.

As the statute requires the court to take judicial notice of the fact of the incorporation of incorporated towns, it will take judicial notice of the acts by which a town becomes incorporated so far as they are made to appear upon public records provided by law for such purpose; and as the petition for the incorporation must describe the territory of the town accompanied by a plat and be presented to the circuit court of the proper county, the court will take judicial notice in what county the incorporated town is situated: *State v. Reader*, 60–527.

663. Commitment. 484. Whenever a fine and costs imposed for the violation of any ordinance are not paid, the person convicted may, by the officer having jurisdiction of the case, be committed until the fine and costs are paid, not to exceed thirty days. [13 G. A., ch. 81, § 2.]

664. Use of county jails. 485. Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or town, but it shall be liable to the county for the cost of keeping such prisoners. [Same, § 1.]

665. Limitation of suits and prosecutions. 486. All suits for the recovery of any fine, and prosecutions for the commission of any offense made punishable as herein provided, shall be barred in one year after the commis-

sion of the offense for which the fine is sought to be recovered, or the prosecution is commenced. [R., § 1075.]

666. Trial by jury. 18 G. A., ch. 77, § 1. On an information for a violation of an ordinance of an incorporated town or city of the second class, the defendant shall not be entitled to a trial by jury; but shall be tried by the court without a jury except on appeal. All acts or parts of acts inconsistent with this are hereby repealed.

This provision is not applicable to cities in which there is a superior court. As appeals are taken directly from such court to the supreme court, in such cases, there is a right to trial by jury: *Creston v. Nye*, 74–369.

667. Labor on highways. 487; 19 G. A., ch. 32. All municipal corporations are hereby empowered to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years shall, between the first day of April and the first day of September each year, either by themselves or satisfactory substitute, perform two days' labor upon the streets, alleys, or highways within such corporation, at such times and places as the proper officer may direct, and upon three days' notice in writing given. They may further provide that, for each day's failure to attend and perform the labor as required at the time and place specified, the delinquent shall forfeit and pay to the corporation any sum not exceeding three dollars for each day's delinquency, and in case of failure to pay such forfeit within ten days the supervisor of highways or street commissioner of said corporation shall recover the same by action in the name of the supervisor of the highways or street commissioner of said corporation; and no property or wages belonging to said person shall be exempt to the defendant on execution; said judgment to be obtained before the mayor of said corporation, or any justice of the peace in the proper township, which money when collected shall be expended upon the streets of the corporation; and that all such sums remaining unpaid on the first day of September in each year may be treated and collected as taxes on property, and the same shall be a lien on all the real property of the delinquent that may be listed for taxation, and assessed and owned by him on the first day of November of the same year.

668. Highways outside corporate limits; appropriations for. 488; 18 G. A., ch. 52. Any city or incorporated town may aid in the construction and repair of any highway leading thereto, by appropriating therefor a portion of the highway tax belonging to said city or incorporated town, not exceeding fifty per cent. thereof, annually, as hereinafter provided. When a petition shall be presented to the council or trustees, signed by one-third of the resident tax payers of said city or town, asking that the question of aiding in the construction or repair of any highway leading thereto be submitted to the voters thereof, the council or trustees, immediately, shall give notice of a special election by posting notice in five public places in said town, at least ten days before said election, which notice shall specify the time and place of holding said election, the particular highway proposed to be aided, the proportion of the highway tax then levied and not expended, or next thereafter to be levied, to be appropriated; at which election the question of "appropriation" or "no appropriation" shall be submitted, and if a majority of votes polled be for appropriation, then the council or trustees may aid in the construction and repair of said highway to the extent of said appropriation, in the same manner as they otherwise would if said highway was within the corporate limits of said city or town; but no part of such highway tax shall be expended more than two miles from the limits of such city or town. *Provided*, that in incorporated towns, and cities of the second class, whether organized under a special charter or under the general incorporation law, with a population under ten thousand inhabitants, whenever one-third of the resident tax

payers of such incorporated town or city shall petition the trustees or council of such incorporated town or city, asking that a portion of the highway tax of such incorporated town or city may be used to aid in the construction or repair of highways outside and within three miles of the limits of such incorporated town or city, such trustees or council may, upon the presentation of such petition, order a part of the highway tax of such incorporated town or city, not exceeding twenty-five per cent. thereof, to be used and expended to aid in the construction or repair of highways outside and within three miles of the limits of such incorporated town or city. [14 G. A., chs. 13, 98.]

669. Adoption of ordinances. 489; 18 G. A., ch. 146, § 2. All ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation; ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule; no ordinance shall contain more than one subject, which shall be clearly expressed in its title, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section reviewed or amended, and the ordinance or section so amended shall be repealed. *Provided*, that in incorporated towns, ordinances and resolutions, or orders for the appropriation or payment of money, shall require for their passage or adoption a concurrence of four trustees, or of three trustees and the mayor. [R., § 1122; 14 G. A., ch. 111, § 5.]

[Signature of mayor to ordinances of city is required by § 710.]

Adoption: Under the provision requiring an ordinance to be read on three different days before its passage, it is not meant that the ordinance must be read at three general meetings. Where it appeared that an ordinance was read on three different days, *held*, that this was sufficient, although the last two of the meetings at which it was read were special meetings held by adjournment: *Cutcomp v. Utt*, 60–156.

It is not necessary that the three readings be before the same body. If one or more of them take place before the change of the council by reason of an election, and another afterward, that is sufficient. The council is deemed a continuing body: *McGraw v. Whitson*, 69–348.

It is not intended that all unfinished business pending before the council shall be dropped at each change of membership by reason of new members taking their seats: *Ibid.*

Where by less than the three-fourths vote required by the statutory provision above referred to the requirement of reading on three different days was dispensed with and the ordinance declared passed on the day of the first reading, *held*, that such ordinance was void: *Horner v. Rowley*, 51–610.

It is not necessary that the yeas and nays on a vote to suspend the rule requiring reading on three different days be recorded; and where a sufficient number of members to suspend the rule appear to have been present, and such motion is declared adopted, it will be presumed that a sufficient majority voted therefor: *State v. Vail*, 53–550.

The record reciting the suspension of a rule requiring three readings on separate days cannot be impeached, in a prosecution under an ordinance thus passed, by oral evidence showing that such suspension was not carried by the requisite majority: *Eldora v. Burlingame*, 62–32.

The provisions requiring three readings apply only to ordinances and not to resolutions: *Strohm v. Iowa City*, 47–42.

The words "for the appropriation or payment of money" limit "resolutions" as well as "orders," and other resolutions than those, "for the appropriation or payment of money" (*for instance, to change the boundaries of a city* or town), do not require the concurrence of a majority of all the trustees: *Ibid.*

Where it appeared from the journal of the proceedings of the council that a certain resolution was adopted, the nature of which was such that under the statute a three-fourths vote was necessary to pass it, *held*, that it would be presumed that a sufficient number voted for it, as required by law: *Brewster v. Davenport*, 51–427.

Under the rule of the council of a city, providing that a member directly interested in any question could not vote thereon, *held*, that in a particular case a certain member was interested otherwise than as the general public in the making of an improvement, and that an ordinance in respect thereto, which only received a sufficient number of votes for its passage by counting the vote of such member, was not valid: *Buffington Wheel Co. v. Burnham*, 60–493.

The act of the mayor as presiding officer of the council, in announcing the vote of the council, is ministerial and not judicial. He cannot by an erroneous and arbitrary announcement qualify or render invalid the action of the council: *Chariton v. Holliday*, 60–391.

So where the mayor erroneously announced that a resolution was not adopted for a reason

that it did not receive a three-fourths vote, when a majority vote was all that was necessary to its adoption, *held*, that the resolution was legally adopted: *Ibid.*

Containing more than one subject: An ordinance defining and prescribing the punishment for certain offenses, and in which many such offenses are included, does not contain "more than one subject:" *State v. Wells*, 46–662.

The provision that an ordinance shall contain but one subject is a limitation on the power of the council to enact ordinances. It is mandatory, and an ordinance passed in violation of it is inoperative because of want of power in the council to enact it: *Dempsey v. Burlington*, 66–687.

But this provision does not forbid the enactment in a single ordinance of all the legislation which may be necessary to the accomplishment of a single object. Therefore, *held*, that an ordinance providing for the vacation of an alley and granting the ground covered by the vacated alley to a private person, was not void as containing more than one subject: *Ibid.*

Subject expressed in title: Where the title of an ordinance absolutely prohibiting the sale of vinous and malt liquors was "Regulating the use and sale of intoxicating liquors," *held*, that the subject of the ordinance was not clearly expressed in the title and that the ordinance was therefore void: *Cantril v. Sainer*, 59–26.

Amendment: Under the statutory provision requiring that an ordinance or section thereof shall not be revised or amended unless the new ordinance contains the entire ordinance or section revised or amended, *held*, that where but one section of an ordinance is amended that section alone need be contained entire in the amendment: *Decorah v. Dunstan*, 38–96.

Where a city, by ordinance, granted to a street railway the right to lay a single or double track over its streets, in pursuance of which a single track was laid, and afterwards the city, before the laying of a double track, amended the ordinance so as to prohibit the laying of such double track, *held*, that the amendment was a change in the terms of the contract entered into by the original ordinance, and was therefore void: *Burlington v. Burlington Street R. Co.*, 49–144.

Repeal: An ordinance making provisions repugnant to a former one will operate to repeal it, though the former one be not contained in the latter: *Des Moines v. Hillis*, 55–643.

It seems that where it is required that a resolution for a particular purpose must be passed by a vote greater than a majority vote, a repeal thereof is sufficient if concurred in by a majority vote: *Charlton v. Holliday*, 60–391.

Record of adoption: A paper purporting to be a resolution passed by a city council levying a tax, marked on the back "adopted," such indorsement being in the handwriting of a person who was at the time city recorder, is not competent evidence of the action of the council. It is not such a record as the law requires: *Hintrager v. Kiene*, 62–605.

It is competent for the city, when not inconsistent with the restrictions of its charter, to prescribe by ordinance the steps to be taken in order to acquire jurisdiction over particular subjects. If these steps are not taken, and the requirements of the ordinance are mandatory, the act of the city in attempting to exercise its authority will be void: *Dubuque v. Wooton*, 28–571; *Starr v. Burlington*, 45–87.

Therefore, where an ordinance providing for improvement of streets required that such improvement should be ordered by resolution describing the streets and the improvement, and that notice be given by publication, *held*, that both these requirements were mandatory, and the record failing to show the passage of the resolution or its publication, the city acquired no jurisdiction of the subject-matter, and the sale of adjoining property for the making of such improvements was void: *Starr v. Burlington*, 45–87.

Resolutions for the making of improvements: Where an ordinance provided the kind, character and width of sidewalks, and the resolution directed the construction of a particular sidewalk in accordance with such ordinance, *held*, that this was a sufficient designation of the material, etc., of which the sidewalk was to be constructed: *Charlton v. Holliday*, 60–391.

Where a committee was appointed by the council to report on the propriety of establishing a certain sidewalk, but only one of the committee reported and the work was ordered, *held*, that in such matters the councilmen might act upon personal knowledge or otherwise, and the action was not invalid: *Brewster v. Davenport*, 51–427.

Void ordinance: The fact that a provision in an ordinance is void does not necessarily give a tax payer the right to an injunction against the exercise of power thereunder: *Dodge v. Council Bluffs*, 57–560.

670. Eligibility to office; interest in contract. 490. No trustee or member of any council shall, during the time for which he has been elected, or for one year thereafter, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased during the term for which he shall have been elected, except in the cases provided in this chapter; nor shall any such trustee be interested, directly or indirectly, in the profits of any contract or job for work, or services to be performed for the corporation. [R., § 1122.]

671. Salary not to be changed. 491. The emoluments of no officer whose election or appointment is required by this chapter, shall be increased or diminished during the term for which he shall have been elected or ap-

pointed; nor shall any change of compensation affect any officer whose office shall be created under the authority of this chapter during his existing term, unless the office be abolished; and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed, when during the same time the emoluments had been increased. [R., § 1122.]

The term of office, as here contemplated, commences with the election and not with the qualification of the officer: *Cox v. Burlington*, 43–612.

An ordinance cannot be passed under § 813, which allows cities of the first class to change the method of compensation of police judges, marshals, etc., from fees to a fixed salary, which shall change the compensation of such officers during the term of office for which they were elected: *Bryan v. Des Moines*, 51–590.

672. Ordinances recorded and published. 492. All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose and be authenticated by the signature of the presiding officer of the council and the clerk, and all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper of general circulation in the municipal corporation, and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made; *provided*, however, that if no such newspaper is published within the limits of the corporation, then and in that case, such by-laws may be published by posting up three copies thereof in three public places within the limits of the corporation, two of which places shall be the postoffice and the mayor's office of such town or city; and such by-laws and ordinances shall take effect and be in force at the expiration of five days after they have been published. [R., § 1133; 11 G. A., ch. 34, § 1.]

[The word "or" in the seventh line, between "suit" and "prosecution," is "as" in the printed Code. As to publication, see also § 660.]

Where it was required that a resolution for improvement of a street be published, *held*, that personal service on a party rendered publication unnecessary so far as he was concerned: *Ibid.; Charlton v. Holliday*, 60–391.

Where by ordinance a resolution for the making of improvements and assessing the expense thereof on abutting property is required to be published, a failure to make such publication will render the resolution void: *Dubuque v. Wooton*, 28–571; *Starr v. Burlington*, 45–87.

Action to enjoin the enforcement and carrying out of an ordinance cannot be maintained on the ground that it has not been properly published as required by the charter, where such publication might be completed after the time when the action is brought: *Dodge v. Council Bluffs*, 57–560.

Where it is attempted to disprove the publication of an ordinance by way of a defense in a criminal prosecution thereunder, oral evidence is admissible to establish the fact of publication: *Eldora v. Burlingame*, 62–32.

The city council has no authority to direct the publication of their proceedings, aside from the ordinances enacted by them, and bind the city therefor: *Studger v. Red Oak*, 64–465.

Where the ordinance of a municipal corporation is introduced in evidence, it is to be considered at least *prima facie* valid and in force without proof of publication: *State v. King*, 37–462.

673. Yeas and nays. 493; 18 G. A., ch. 146, § 3. On the passage or adoption of every by-law or ordinance, and every resolution or order to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, or any such resolution or order, a concurrence of a majority of the whole number of members elected to the council shall be required; all appointments of officers by any council shall be made viva voce, and the concurrence of a like majority shall be required and the names of those, and for whom they voted, on the vote resulting in an appointment, shall be recorded. No money shall be appropriated by the council except by ordinance. *Provided*, that in incorporated towns, by-laws, ordinances, resolutions, or orders to enter into any contract, shall require for their passage or adoption a concurrence of four trustees, or of three trustees and the mayor. [R., § 1134.]

Yeas and nays: The requirement that the yeas and nays be called and recorded upon the passage of an ordinance is mandatory, and unless the record affirmatively shows such

fact the ordinance will be invalid: *Olin v. Meyers*, 55–209.

Majority vote: Upon the passage of an ordinance the yeas and nays must be called and entered of record, and a majority of all the members elected to the council must vote in favor of the ordinance before it can be regarded as passed; but a resolution, unless it is proposed thereby to enter into a contract, may be lawfully passed by a majority of the members present: *Laughlin v. Washington*, 63–652.

Resolutions for the appropriation of money are required to be passed by a majority vote of all the members, but other resolutions only require the occurrence of a majority of those present: *Strohm v. Iowa City*, 47–42.

Contracts: This section defines how the order to contract shall be made and evidenced when directed by the council, but it is not a limitation on the power of the city to contract otherwise. Municipal corporations may, through their authorized agents, contract in parol the same as individuals: *Indianola v. Jones*, 29–282; *Duncombe v. Fort Dodge*, 38–281.

Election of officers: The method of appointing officers here provided must be followed in filling vacancies in an elective office under § 729: *State v. Dickie*, 47–629.

674. Vote required. 494. No street or highway shall be opened, straightened, or widened, nor shall any other improvement be made which will require proceedings to condemn private property without the concurrence, in the ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners of the property, unless two-thirds of the owners to be charged therefor shall petition in writing for the same. [R., § 1135.]

COLLECTION OF TAXES.

675. Certifying to county officers. 495. The council or trustees, as the case may be, of each municipal corporation is required to cause to be certified to the county auditor, on or before the first Monday of September of each year, the percentage or number of mills on the dollar of tax levied for all city purposes by them on the taxable property within said corporation for the year then ensuing, as shown by the assessment roll of said city for said year, and the said auditor is required to place the same on the tax books of the county in the same manner as county taxes are placed thereon, which tax for municipal purposes shall be collected by the county treasurer; and in all things relating to the collection of the same, and the sale of real or personal property, he is authorized and required to proceed according to the provisions of the statutes regulating the sale of property for delinquent state and county taxes, and in all sales for such, or any delinquent taxes for municipal purposes, if there be other delinquent taxes due from the same person, or lien on the same property, the sale shall be for all the delinquent taxes; and such sales, and all sales made under or by virtue of this section or the provisions of law herein referred to, shall be of the same validity, and, in all respects, be deemed and treated as though such sales had been made for the delinquent state or county taxes exclusively. And in any city or town incorporated under or by special charter, which now is, or hereafter may be regulated by or subject to the general incorporation laws, all delinquent taxes, except such as were levied to pay indebtedness created to take stock or aid in the building of railways, remaining unpaid upon the tax books of such city or town, shall be certified at the time, collected and paid over as above directed. And the county treasurer shall include said delinquent taxes so certified with the delinquent state and county taxes on his books, and collect the same by sale of real or personal property in the same manner as is by statute required for delinquent state and county taxes; and all sales of property for such delinquent municipal taxes shall be as valid, and, in all respects, be deemed and treated as though such sales had been made for delinquent state and county taxes. [R., § 1123; 10 G. A., ch. 25, § 3.]

[The word "tax," in the ninth line of the section, is erroneously printed "taxes" in the printed Code, and so also "or" in the twenty-first line is printed "and." For similar provision as to cities under special charter, see § 960.]

These provisions, as others of the general law as to cities and towns, apply only to those organized under such general law, and not to those having special charters. (Decided under Rev., § 1123): *Burk v. Jeffries*, 20-145.

In cities acting under special charter in which city taxes are made a perpetual lien upon real estate, and the city collector is authorized to collect the same by sale, a sale under § 1353 for state and county taxes does not divest the property from the lien of city taxes, and the purchaser takes subject thereto; nor does the sale for city taxes of one year divest the property of the lien of city taxes for former years: *Dennison v. Keokuk*, 45-266.

Under this section sales can be made by the county treasurer for city taxes as for other taxes: *Morrison v. Hershire*, 32-271.

Under a previous statute authorizing cities to sell real and personal property for delinquent taxes, and provide needful rules and regulations for the proper enforcement of their powers as to taxation, *held*, that such city might provide a penalty for non-payment of taxes, and for the sale of property for such taxes and penalties, and provide further that in redeeming from such sale a penalty be paid, in addition to the amount for which the property was sold: *Augustine v. Jennings*, 42-198.

Where a city for many years failed to bring forward on its tax books or attempt to collect taxes claimed to be delinquent although the same property was regularly assessed for subsequent taxes which were paid, *held*, that it would thereby be considered as having abandoned all claim to such tax: *Bradley v. Hintrager*, 61-337.

Recovery of tax by action: The grant of power to a municipal corporation to levy and collect a tax carries with it all the usual, ordinary and necessary means for the exercise of the power, and while the city may not have the right to collect such taxes by a sale of property, yet the lien may be enforced by an action in equity for that purpose: *McInerny v. Reed*, 23-410.

Action may be maintained to collect city taxes, although another remedy is provided by law: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633; *Dubuque v. Illinois Cent. R. Co.*, 39-56; *Burlington v. Burlington & M. R. R. Co.*, 41-134.

Where the charter of a city authorizes it to levy and collect taxes, the city council may, by ordinance, provide for the collection of such taxes by judicial proceedings in the courts, and the fact that by statute subsequent to the charter another method of collection is provided will not take away the right of resorting to legal proceedings: *Dubuque v. Harrison*, 34-163.

The power given to cities to provide by ordinance for the collection of taxes is cumulative merely, and does not, if adopted, deprive the city of other remedies: *Sioux City v. Independent School Dist.*, 55-150.

An action for the collection of taxes is subject to the same limitation as any action to recover a debt: *Burlington v. Burlington & M. R. R. Co.*, 41-134.

In an action to recover taxes, penalties provided by law for non-payment thereof may also be recovered: *Ibid.*

Vested right: The right of a city to taxes already accrued cannot be released by legislation: *Dubuque v. Illinois Cent. R. Co.*, 39-56.

676. Taxes limited. 496. The amount which may be so certified, assessed, and collected, shall not exceed ten mills on the dollar, to defray its general and incidental expenses. [R., § 1124.]

The tax provided in § 4274 may be in addition to the tax authorized by this and the following section: *Rice v. Walker*, 44-458.

677. Road taxes. 19 G. A., ch. 158, § 1; 22 G. A., ch. 46, § 1. All property now subject to taxation in any city or town, which by law is not subject to taxation for general municipal purposes, shall, nevertheless, be liable to taxation for road purposes as may be provided by the council of such city or town, but not exceeding the rate of five mills upon the dollar of the assessed valuation thereof. And all personal property necessary for the use and cultivation of agricultural or horticultural lands shall be liable for such road taxes, but shall not be liable for any other city tax.

The provisions of this section do not authorize taxation for road purposes of property subject to general taxation, in excess of the ten-mill limit here fixed: *Illinois Cent. R. Co. v. Hamilton County*, 73-313.

A city has no power to levy a road tax upon property subject to taxation for general purposes, in excess of the limit of ten mills: *Ibid.*

678. Sinking fund. 497. For the purpose of creating a sinking fund for the gradual extinguishment of the bonds and funded debt of any municipal corporation, the council thereof may, in their discretion, annually, levy and collect, in addition to the other taxes of said corporation, a tax of not more than two mills on the dollar upon the assessed value of said property appraised and returned as aforesaid, which shall be paid into said treasury and be applied by order of the city council towards the extinguishment of the said bonds and funded debt, and to no other purpose whatever. [R., § 1125; 13 G. A., ch. 59.]

679. Paying over taxes. 498. The treasurer of the county shall pay over to the treasurer of any municipal corporation, all moneys received by him arising from taxes levied belonging to such municipal corporation, on or before the first day of March in each year; and such moneys as said county treasurer may receive after that time, for delinquent taxes belonging to such corporation, he shall pay over to the treasurer thereof when demanded. [R., § 1126.]

680. Taxing dogs; animals. 499. The council of any municipal corporation shall have power, whenever in their opinion the interests of the corporation require it, to lay and collect a tax on dogs and other domestic animals not included in the list of taxable property, for the state and county purposes; which said tax shall be collected by the collector of such corporation and paid into the treasury thereof. [R., § 1128.]

[In the printed Code "which" in the fifth line is erroneously printed "and." As to powers in regard to dogs, given to cities under special charter, see § 913.]

LOANS AND BONDS.

681. Loans. 500. Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of three per cent. upon the taxable property of any city or town. [R., § 1129.]

682. 16 G. A., ch. 95, § 1; 20 G. A., ch. 79; 21 G. A., ch. 108. Section five hundred of chapter ten, title four, of the code of Iowa [§ 681], is amended by striking out the word "three" in the third line of said section, and inserting the word "five;" *provided*, that the provisions of this act shall not apply to cities having over six thousand inhabitants, or less than one thousand inhabitants, and in all other cases such loans shall not exceed the sum of three per cent. on such property.

[Cities of the first class may issue improvement bonds: See §§ 827, 828.]

A municipal corporation may issue bonds to a judgment creditor in payment of a judgment. Possibly such bonds would be invalid if given in excess of the limitation, even if given for the extinguishment of an antecedent and valid indebtedness; but in an action by the city against a third person who is liable to the city for the indebtedness which it thus attempts to pay, such invalidity of the bonds cannot be set up to show that the city has not been compelled to pay such indebtedness: *Sioux City v. Weare*, 59-95.

683. Refunding. 16 G. A., ch. 57, § 1. Cities and towns are hereby authorized, upon such terms as they may deem just and for their best interest, to settle, adjust, renew or extend such indebtedness as may be owing by or claimed against them and evidenced by the bonds or other negotiable promissory instruments of such municipal corporation, and to issue new securities for such indebtedness, except as hereinafter mentioned.

684. Special tax. 16 G. A., ch. 57, § 2. Said several corporations are hereby authorized, whenever any extension or renewal of such indebtedness is made, to provide for the payment of the interest and principal of such extended or renewed indebtedness, by the levy and collection of the necessary taxes, at the same time and in the same manner as other taxes; and the levy, collection and payment of such taxes may be enforced by proper legal process, when necessary, in addition to the ordinary means provided by law for the levy and collection of taxes.

685. Current expenses not included. 16 G. A., ch. 57, § 3. This act is intended to and shall apply only to the settlement, adjustment and extension or renewal of bonds and securities heretofore issued and outstanding at the time of this act, and not including warrants or other evidences of indebtedness issued or incurred for current expenses of such corporations.

686. New securities. 16 G. A., ch. 57, § 4. New bonds or securities issued by virtue hereof, shall in no case be for a greater sum than the principal and accrued interest unpaid on the bond or security for which such new bond or security may be given.

[As to the funding of indebtedness of cities, see §§ 755-762 and of towns, see § 707. See, also, on the same subject, §§ 383-387, applicable to counties, cities and towns.]

ELECTION AND QUALIFICATION OF OFFICERS.

687. Annual election. 501. The first Monday of March shall be the regular annual period for the election of municipal officers, and all officers whose election is provided for in this chapter, or may be provided for by ordinance, shall be elected on that day. The trustees or council of every municipal corporation shall direct the place or places for holding elections for municipal officers, and whenever the corporation is divided into wards or precincts, there shall be one such place in each ward and precinct, and any person who, at the time of any election of municipal officers, would be a qualified elector under the laws of the state for county officers, and shall have actually resided in the ward or precinct in which he offers to vote for the ten days last preceding the election, shall be deemed a qualified voter; and all elections shall in all respects be held and conducted in the manner prescribed by law in case of township elections. [R., § 1130; 10 G. A., ch. 25, § 4.]

[The word "township" in the last line is erroneously printed "county" in the Code.]

688. Elections; certificate. 502. At all elections in cities and incorporated towns which are not divided into election districts or wards, the mayor and trustees, any three of whom shall be a quorum, shall serve as judges, and the recorder shall serve as clerk, and after canvassing the votes which may be given at such election, they shall declare the result, and the recorder shall make out and deliver to each person elected to any office in such city or town a certificate of such election. [R., § 1131.]

689. Returns; canvass. 503. The returns of all municipal elections in cities and incorporated towns which are divided into election districts or wards, shall be made to the clerk or recorder of the corporation, and shall be opened by him on the third day after election. He shall call to his assistance the mayor of the corporation, or if there be no mayor, or the mayor shall have been a candidate at such election, then any justice of the peace of the county, and shall, in his presence, make out an abstract and ascertain the candidates elected in all respects as required by law for the canvass of the returns of county elections, and shall, in like manner, make out a certificate as to each candidate so elected and cause the same to be delivered to him or to be left at his place of abode. [R., § 1131.]

690. Oath of office; bond; vacancy. 504. All officers elected or appointed in any municipal corporation, shall take an oath or affirmation to support the constitution of the United States and the constitution of the state of Iowa, and the trustees or council of any municipal corporation may require from such officers, as they may think proper, a bond, with proper penalty and surety, for the faithful discharge of the duties of their office; and such trustees or council shall have the power to declare the office of any person appointed or elected to any office who shall fail to take the oath of office, or give bond when required, for ten days after he shall have been notified of appointment or election, vacant, and proceed to appoint as in other cases of vacancy. [R., § 1132.]

691. Compensation of council or trustees. 505. The compensation of the council or trustees shall not exceed one dollar to each member for every

regular or special meeting of the board, and shall not exceed fifty dollars to each in any one year. [R., § 1095.]

[As to compensation of members of city council in cities of first class, see § 816.]

692. Jurisdiction of mayor. 506. The mayor of each city or incorporated town shall be a magistrate and conservator of the peace, and, within the same, have the jurisdiction of a justice of the peace in all matters, civil and criminal, arising under the laws of the state or the ordinances of such city or town; and the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor; but the criminal jurisdiction hereby conferred shall be co-extensive with the county in which such city or town is situated. [R., §§ 1085, 1102, 1105.]

The civil jurisdiction of a mayor, like that of a justice of the peace, extends throughout the county: *Weber v. Hamilton*, 72-577.

The jurisdiction of the mayor under this section is not exclusive, but concurrent with that of justices of the peace: *Jaquith v. Royce*, 42-406; and the rules governing changes of venue before justices are applicable in proceedings before a mayor: *Finch v. Marvin*, 46-284; but the filing of a motion for a change of venue does not deprive the mayor of his jurisdiction, and if the motion is overruled the ruling is, at most, simply an error, and a judgment subsequently rendered is not void: *Ottumwa v. Schaub*, 52-515.

Rules regulating appeals from justices in criminal cases are applicable to proceedings before the mayor: *State v. Hoag*, 46-337.

This section is not applicable to police courts (§ 808): *Zelle v. McHenry*, 51-572.

Although the mayor is clothed with the jurisdiction of justices of the peace, there is no provision for allowing him the same or any other fees in criminal cases when exercising such jurisdiction. By an omission, no compensation in such cases is provided and none can be recovered from the county: *Upton v. Clinton County*, 52-311.

Mayor's court: The court of a mayor is not a court of record: *Santo v. State*, 2-165, 220.

693. Jurisdiction exclusive. 18 G. A., ch. 189, § 1. The mayor of cities of the second class or incorporated towns, shall have exclusive jurisdiction of violations of the city ordinances; *provided*, that if he is unable to hold court, or in case of his absence from the city or town, the action may be brought before any justice of the peace having an office in the city or town. All acts or parts of acts inconsistent with this act are hereby repealed.

OF THE CLASSES OF MUNICIPAL CORPORATIONS.

694. How classified. 507. In respect to the exercise of certain corporate powers and duties of certain officers, municipal corporations are divided into cities of the first and cities of the second class, and incorporated towns. [R., § 1077.]

695. Defined by population. 508. Every municipal corporation having a population of fifteen thousand and upwards, shall be a city of the first class; every municipal corporation having a population exceeding two thousand, but not exceeding fifteen thousand, shall be a city of the second class; and every municipal corporation having a population not exceeding two thousand shall be deemed an incorporated town. [R., § 1078.]

696. Change of grade. 509; 15 G. A., ch. 52. The governor, auditor, and secretary of state, or any two of them, within six months after the returns of any census taken by authority of the state or any town or city council, have been filed in the office of the secretary of state, shall ascertain what cities of the second class are entitled to become cities of the first class, and what incorporated towns are entitled to become cities of their proper class. And the governor shall cause a statement thereof to be prepared by the secretary of state, which statement he shall cause to be published in some newspaper published in the city of Des Moines, and also in some newspaper printed in each of the cities and incorporated towns the grade of which shall have been so advanced, and a copy of said statement shall also be transmitted by the secretary of state to the next general assembly, and any such city or in-

corporated town shall, at the next regular annual period for the election of municipal officers, proceed to organize according to its new grade, by the election of officers properly belonging thereto, and on their election and qualification the term of service of any former officer shall expire. [R., § 1079.]

[The word "shall" in the last line is omitted in the printed Code.]

697. When class is changed the proper ordinances to be passed. 510. So soon as the statement shall be published, as above provided, showing that any city or incorporated town will be entitled, at the next regular annual period for the election of municipal officers to be organized into a city of the first or second class, as the case may be, the proper authority of such city or incorporated town shall make and publish such ordinances as may be necessary to perfect such organization in respect to the election, duties, and compensation of officers or otherwise. [R., § 1080.]

OF INCORPORATED TOWNS.

698. Officers. 511; 17 G. A., ch. 9. The corporate authority of incorporated towns organized for general purposes shall be vested in one mayor, one recorder, and six trustees, to be elected by the people, who shall be qualified electors residing within the limits of the corporation, and who shall constitute the council of the incorporated town, any five of whom shall constitute a quorum for the transaction of business. The mayor and recorder shall hold their offices for one year, and the trustees shall hold their offices for three years. At the first election after this law is in force six trustees shall be elected, two of whom shall serve for one year, two for two years, and two for three years, to be determined by lot at the first meeting of the council after the trustees are qualified, and thereafter two trustees shall be elected annually. [R., § 1081.]

699. Mayor; recorder. 512; 17 G. A., ch. 9; 18 G. A., ch. 146, § 1. The mayor shall preside at all meetings of the council, and shall have the right to vote upon all questions coming before the council. In the absence of the mayor, the council shall elect one of their number to preside *pro tempore*. The recorder shall be clerk of the corporation, and shall attend all meetings of the council, and shall make a fair and accurate record of all proceedings, rules and ordinances made and passed by the council, and the same shall at all times be open to the inspection of the electors of the corporation, but in no event shall the recorder have the right to vote on any question before the council. [R., § 1082.]

700. Vacancies. 513. The council shall have power to order special elections to fill vacancies, which may happen in the board, from the qualified electors of the corporation, who shall hold their office until the next annual election and until their successors are elected and qualified, and in the absence of the mayor and recorder from any meeting of the council, the council shall have power to appoint any two of their number to perform the duties of mayor and recorder for the time being. [R., § 1083.]

701. Treasurer and other officers; compensation. 514. The council of any incorporated town shall have power to provide by ordinance for the election of a treasurer, and such subordinate officers as they may deem necessary for the good government of the corporation, to prescribe their duties and compensation, or the fees they shall be entitled to receive for their services, and to require of them an oath of office, and a bond, with surety, for the faithful discharge of their duties. The election of any such officer shall be at the regular annual election, and no appointment of any officer shall endure beyond one week after the qualification of the members of the succeeding council. [R., § 1084.]

702. Marshal. 515. A marshal shall be appointed by the trustees, and shall be the principal ministerial officer of the corporation, and shall have the same power that constables have by law, co-extensive with the county, for offenses committed within the limits of the corporation. He shall execute the process of the mayor, and receive the same fees for his services that constables are allowed in similar cases. [R., § 1086.]

703. Removal. 516. By the concurrent vote of five members of the council, the mayor, recorder, or any member of the council, or any officer of the corporation, may be removed from office; but no such removal shall be made without a charge in writing being made and an opportunity of hearing being given, unless the officer against whom the charge is made shall have removed out of the limits of the corporation, and when any officer shall cease to reside within the limits of the corporation, it shall be deemed a good ground for a removal from office. [R., § 1087.]

704. Filling vacancies. 19 G. A., ch. 124, § 1. Whenever, from death or other cause, a vacancy in the office of mayor, recorder, councilman, trustee, or other officer, in any incorporated town, shall occur, such vacancy shall be filled by the council of such incorporated town at the first regular meeting of such council after such vacancy shall occur, or as soon thereafter as may be.

705. By ballot. 19 G. A., ch. 124, § 2. The manner of filling such vacancy shall be by ballot, and the person receiving a majority of the votes of the whole number of the members elected to the council shall be declared duly elected to fill such vacancy, and, on duly qualifying, shall hold such office until the next annual election, and until his successor is elected and qualified.

706. 19 G. A., ch. 124, § 3. All acts or parts of acts inconsistent herewith are hereby repealed.

707. Refunding bonds. 22 G. A., ch. 20, § 1. Incorporated towns having outstanding bonded indebtedness of not less than one thousand dollars and past due at the time of the passage of this act are hereby authorized, by a vote of two-thirds of the town council, to refund such indebtedness as evidenced by the bonds thereof, and to issue the coupon bonds of such corporation in sums not less than one hundred dollars nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States at the pleasure of such corporation, after five years from the date of their issue, and bearing interest payable semi-annually at a rate not exceeding seven per centum per annum.

OF CITIES.

708. Organization. 517. The corporate authority of cities organized under this chapter, shall be vested in a mayor and a board, to be denominated the city council, together with such officers as are in this chapter mentioned, or may be created under its authority. [R., § 1090.]

709. Mayor. 518; 16 G. A., ch. 58. The mayor shall be elected biennially in cities of the first class, and annually in cities of the second class, by the qualified voters of the city. He shall be a qualified elector and reside within the limits of the city, and shall hold his office for the term for which he shall have been elected and qualified. He shall keep an office at some convenient place in the city, to be provided by the council, and shall keep the corporate seal of the city in his charge; he shall act as president of the city council, shall sign all commissions, licenses, and permits granted by the authority of the city council, and such other acts as by law or ordinance may require his certificate. [R., § 1091; 10 G. A., ch. 25, §§ 1, 2.]

[As to election, qualification and terms of mayors in cities of the second class, see §§ 787, 790.]

[illegible] it was held that the mayor of [illegible] the second class [illegible] not the presiding officer of the city council for a [illegible]. Cochran v. McCleary, 22-75. (But see [illegible] 687, the mayor is now ex officio president of the council.)

[illegible] right to preside at a meeting of the council [illegible] may be protected [illegible] quo warranto. Cochran v. McCleary, 22-75.

The mayor [illegible] the [illegible] officer of the council, and [illegible] casting vote, [illegible] is equally liable with the councilmen under the statute [illegible] liable for [illegible] under proper circumstances to levy a tax for the payment of a judgment against the city. Porter v. Thomson, 22-391.

The action of the mayor in erroneously announcing that a resolution is not adopted, for the reason that it has not received a three-fourth vote, when a majority vote is all that is necessary, is not judicial in its character in such a sense that it cannot be called into question in a collateral proceeding. The erroneous arbitrary announcement cannot have the effect to nullify the act of the majority of the city council. Chariton v. Holliday, 60-391.

710. Signing ordinances. 20 G. A., ch. 192, § 1. The mayor of every city of the first and second class, except of less than eight thousand inhabitants by the last census report in the state, shall sign every ordinance or resolution passed by any city of the first or second class before such ordinance or resolution shall take effect or be in force.

711. Special session. 20 G. A., ch. 192, § 2. If the mayor of any city of the first and second class only as above excepted shall refuse to sign any ordinance or resolution after it has been passed by the council of such city he shall call a meeting of such city council within fourteen days after the passage of such ordinance or resolution and shall return the ordinance or resolution to them with his reasons for refusing to sign the same.

712. Passing over veto. 20 G. A., ch. 192, § 3. Upon the return of the ordinance or resolution by the mayor to the city council they may pass the same upon a call of the yeas and nays by not less than two-thirds vote of all the members of said council over the mayor's veto and the clerk or recorder of such city shall certify on said ordinance that the same was passed by a two-thirds vote of the council and sign it officially as clerk or city recorder.

713. Two-thirds vote. 20 G. A., ch. 192, § 4. But if any ordinance fails to obtain at least a two-thirds majority of all the council elected of such city after being vetoed by the mayor then such ordinance or resolution shall be void and of no effect.

[The provisions of these four sections last above are made applicable to cities under special charter: See § 914.]

714. Mayor. 519. In case of the mayor's death, disability, resignation, or other vacation of his office, the city council shall order a special election as soon as practicable, to fill the vacancy for the remainder of the time of office, and may appoint some qualified elector to act as mayor until such special election. The mayor of the city shall be its chief executive officer and conservator of the peace, and it shall be his special duty to cause the ordinances and the regulations of the city to be faithfully and constantly obeyed, he shall supervise the conduct of all the officers of the city, examine the grounds of all reasonable complaints made against any of them, and cause all the violations of their duty, or their neglect, to be promptly corrected or reported to the proper tribunal for punishment and correction, he shall have and exercise within the city limits the powers conferred upon the sheriffs of counties to suppress disorders and keep the peace, he shall also perform such other duties compatible with the nature of his office, as the council may from time to time require, he shall receive such salary, payable quarterly out of the city treasury, as may be provided by ordinance, but the amount of such salary shall neither be increased nor diminished during an incumbent's term of office. [R., § 1091.]

715. Wards. 520, 18 G. A., ch. 23. The numbers, divisions, and boundaries of the several wards of all cities heretofore incorporated, shall remain as fixed when this code goes into operation, until changed by the city council

Said council may at any time create new wards, or alter those now established, or the boundaries thereof, as may be deemed expedient; but in cities of the second class the number of wards now existing shall not be increased to a greater number than seven, nor decreased to a less number than three. [R., § 1092.]

716. Election of councilmen. 521; 17 G. A., ch. 14; 19 G. A., ch. 25. In cities of the second class the qualified electors of each ward shall, on the first Monday of March of each year, elect by a plurality of votes one member of the city council, who shall at the time be a resident of the ward and a qualified elector therein. His term of office shall be two years, so that there may always be in the council two members from the same ward whose term of office shall expire in different years; but at the first election held on the organization of a new city government under this chapter, two members of the city council shall be elected in each ward, and the city council shall determine by lot their term of service, so that one trustee from each ward may serve for two years, and one for one year. In cities of the first class, the qualified electors of each ward shall, on the first Monday of March of the year 1882, elect by a plurality of votes, one member of the city council who shall at the time be a resident of the ward and a qualified elector thereof. And in the same year the qualified electors of cities of this class shall also elect two members at large of such city council, each of whom shall be a resident and qualified elector of the city in which he shall be elected. But in order that their term of service expire in different years, the council at the first regular meeting shall determine by lot which of the aldermen-at-large shall serve one, and which two years. The term of service of the other aldermen shall be determined in the same way, time, and manner; in cases where the number is uneven the majority shall serve one year. On the first Monday of March of each year thereafter the qualified electors shall elect for the term of two years one alderman-at-large and one in each ward where the term of their alderman expires: *Provided*, that when any city of the first class embraces within its corporate limits the whole or parts of two or more different townships, two of which townships or parts thereof contain one thousand electors each, that only one of the aldermen-at-large herein provided for shall be elected from any one of such townships or parts of townships. [R., § 1093.]

717. Organization; duties; clerk. 522. The members elected for each city shall, on the second Monday after their election, assemble together and organize the city council. A majority of the whole number of members shall be necessary to constitute a quorum for the transaction of business, they shall be judges of the election returns and qualification of their own members; they shall determine the rule of their own proceedings and keep a journal thereof, which shall be open to the inspection and examination of any citizen; they may compel the attendance of absent members in such manner and under such penalties as they shall think fit to prescribe; and shall elect from their own body a temporary president; they shall also appoint from the qualified electors of the city, a city clerk who shall have the custody of all the laws and ordinances of the city, and shall keep a regular and correct journal of the proceedings of the council, and shall perform such other duties as may be required by the ordinance of the city. The clerk in office at the expiration of the term of service of any council, shall continue in office until his successor shall be appointed and qualified. [R., § 1093.]

The provision that the council shall be judges of the election returns and qualification of their own members does not mean that they are to canvass the returns of the election; but they may go behind the returns and decide questions arising in respect thereto. *It seems* also that they are judges of the returns for all city officers, including mayor: *Ex parte Strohl*, 16–369, 376.

As to who is permanent president of the council, see note to § 709.

718. Seal for clerk. 523. Each city council shall cause to be provided for the clerk's office a seal, in the center of which shall be the name of the city, and around the margin the words "city clerk," which shall be affixed to all transcripts, orders, or certificates which may be necessary or proper to authenticate under the provisions of this chapter or any ordinances of the city. For all attested certificates and transcripts, other than those ordered by the city council, the same fees shall be paid to the clerk as are allowed to county officers for the same services. [R., § 1094.]

719. Warrants. 22 G. A., ch. 3, § 1. The city auditor or city clerk or other officer of such cities whose duty it is to draw warrants of any city of the first or second class or any city organized under special charter shall not draw any warrant, except upon the vote of the city council, and he shall on the first Monday of each month furnish the council a sworn and complete list of all warrants, and the amount thereof drawn by him during the preceding month, and such list shall state on whose account, and the object and purposes for which the same were drawn, and the auditor or other proper officer of such city shall publish such report monthly in the official newspaper of such city.

720. Warrants presented; calls. 22 G. A., ch. 3, § 2. The city treasurer of such cities shall keep a list of all warrants presented for payment, and the date of presentation and of the particular fund upon which they are drawn. Warrants so presented where there are no moneys in the funds on which they are drawn to pay the same, shall be indorsed as follows: "Presented and not paid for want of funds," and thereafter such warrants shall bear interest at the rate of six per cent. per annum, except warrants issued by a resolution of the city council, or contract with the city in which it is provided that they shall not bear interest. Warrants shall be paid in the order of their presentation from the particular fund upon which they are drawn, and whenever there is an accumulation in the city treasury of any city of the first class or city organized under a special charter the sum of two thousand, five hundred dollars or in the city treasury of any city of the second class the sum of five hundred, in any fund or sufficient to pay all warrants drawn on that fund, he shall call in warrants to the amount of such fund for payment in the order of their presentation or the city council may at any time direct a call. The notice of such call shall be published in two of the daily newspapers of the cities of the first class or cities organized under special charters for one week, and in one daily or weekly newspaper in cities of second class or cities organized under special charters, and shall state that after a certain date, no interest will be paid on warrants therein described. He shall set out in such notice the several numbers of warrants to be paid. Warrants issued by any such cities shall not be tendered or received by the county treasurer in payment of city taxes.

721. Amount of warrant. 22 G. A., ch. 3, § 3. The city auditor or other proper officer shall draw no single warrant for an amount in excess of five hundred dollars.

722. Powers of council; compensation of officers. 524. The city council shall possess all the legislative powers granted in this chapter and other corporate powers of the city not herein, or by some ordinance of the city council, conferred on some officer of the city; they shall have the management and control of the finances, and all the property, real and personal, belonging to the corporation; they shall determine the times and places of holding their meetings, which shall at all times be open to the public; and the mayor, or any three members, may call special meetings, by notice to each of the members of the council personally served, or left at his usual place of abode; they shall appoint or provide by ordinance, that the qualified electors

of the city, or of the wards or districts, as the case may require, shall elect all such city officers as may be necessary for the good government of the city, and for the due exercise of its corporate powers, and which shall have been provided for by ordinance, as to whose election or appointment provision has not herein been made; and all city officers whose term of service is not prescribed, and whose powers and duties are not defined by this chapter, shall perform such duties, exercise such powers, and continue in office such term of time, not exceeding one year, as shall be prescribed by ordinance; but all officers to be elected, shall be elected at the regular annual election for municipal corporations. The officers of cities shall receive such compensation and fees for their services as the council shall by ordinance prescribe. [R., § 1095.]

723. Board of health; fire companies. 525. The city council shall have power to establish a board of health, with all the powers and duties specified in sections four hundred and fifteen, four hundred and sixteen, four hundred and seventeen and four hundred and eighteen of the ninth chapter of this title [§§ 556–559]; to establish a city watch, or police, to organize the same under the general supervision of the mayor, or marshal, to prescribe their duties and powers, and to establish and organize fire companies and provide them with proper engines and such other instruments as may be necessary. [R., § 1695; 11 G. A., ch. 107, § 1.]

[As to boards of health and fire companies in cities under special charter, see §§ 961 and 920.]

In establishing boards of health, etc., as here provided, the city acts as a *quasi*-sovereignty, and is not responsible to individuals for the neglect or non-feasance of its agents or officers in executing the powers so conferred: *Ogg v. Lansing*, 35–495.

The provisions of this section as to a board of health are repealed by the later provisions as to a state board of health: See §§ 2578–2580; *Staples v. Plymouth County*, 62–364.

724. Regulation of markets. 526. No charge or assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses thereto attached, or on the owner thereof, bringing produce or provisions to any of the markets in the city for standing in or occupying a place in any of the market spaces of the city, or in the streets contiguous thereto, on market days and evenings previous thereto; but the city council shall have full power to prevent forestalling, to prohibit or regulate huckstering in the markets, to prescribe the kind and description of articles which may be sold, and the stands or places to be occupied by the vendors, and may authorize the immediate seizure and arrest, or removal from the markets, of any person violating its regulations as established by ordinance, together with any article of produce in their possession, and the immediate seizure and destruction of tainted or unsound meat or other provisions. [R., § 1096.]

[For general provisions as to markets, see § 615.]

725. Additional powers. 22 G. A., ch. 16, § 1. All cities of the first class and cities of the second class having over seven thousand inhabitants and cities organized under special charters in this state in addition to the powers now granted, shall have the further and additional powers conferred by this act, as follows, to wit: they shall have power to establish, build and regulate market houses, slaughter houses; to license and regulate bill posters; to repair temporary sidewalks without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such repairs are made; to remove snow or ice from the sidewalk without notice to the property owner and provide by ordinance for the manner of assessing the expense thereof on the property in front of which such snow or ice shall be removed; *provided*, however, that the expense thereof shall not exceed one and one-half cent per front foot of any lot; *provided*, that the snow or ice has remained upon the walk for the period of fifteen hours; to repair paving, curbing, sewers and catch-basins; to regulate telegraph, tele-

phone, electric light, district telegraph and other electric wires, and provide the manner in which, and places where the same shall be placed upon, along or under the streets and alleys of such city; to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters, or any other device or means necessary for determining the consumption of gas, water or electric light. This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract, whereby the above powers are abridged. To fix the charges for making gas, electric light, steam heating, water, telephone and district telegraph connections; to compel street railway companies, whenever any street is ordered paved to pave and maintain in width three and one-half feet each way commencing at the center of the space between the rails, and in case of failure to do so to provide by ordinance for such paving and maintenance, and for the manner of assessing against such companies the cost thereof; to compel railroad companies to erect, construct, maintain and operate under such regulations as may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; to provide that magazines used for the keeping of gunpowder, inflammable oils and other combustibles, shall not be located or maintained within a certain distance of the corporate limits of such cities; to provide that before any association, company, society, order, exhibition or aggregation of persons shall parade or march upon the streets of such cities, that they shall first obtain from the mayor of such city a permit, when issued to be without charge, and the same shall state the time, manner and conditions of such parade or march; to provide by ordinance that the width of all streets and alleys, of all additions to such cities, shall be graded in the same manner, and that they shall conform to the width of the existing streets and alleys of such cities; to expel and remove from office, by a vote of three-fourths of the members of the city council any elective officer of such city charged with any crime under the statutes of this state, and such removal shall be as provided by section five hundred and thirty of the code, title four, chapter ten [§ 729], for the removal of members of the city council, to make its bonds for all purposes now provided by law or hereafter to be provided by law, payable on or before a date named, or payable at a time certain, as the city council may determine. And such cities shall have full control of the bridge fund levied and paid upon the property within their corporate limits, and shall have the right to use the same for the construction of bridges and culverts and approaches thereto, repairing the same and paying bridge bonds and interest thereon, issued by such city; and it is hereby made the duty of the board of supervisors of the counties within which such cities are located to levy annually upon all of the taxable property within such city such a per centum for that purpose as may be directed by the city council of such cities not exceeding the limit fixed by law: *provided* that no contract heretofore made respecting the application of the bridge tax shall be affected hereby.

726. Highways, bridges, streets and squares. 527. The city council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair, and free from nuisances; all public bridges exceeding forty feet in length, over any stream crossing a state or county highway, shall be constructed and kept in repair by the county; *provided*, that the city council may appropriate a sum not exceeding ten dollars per lineal foot to aid in the construction of any county bridge within the limits of such city, or may appropriate a like sum to aid in the construction of any bridge contiguous to said city on a highway leading to the same, or any bridge across any unnavigable river which divides the county in which said city is located from another state; and that no street or alley which shall

hereafter be dedicated to public use by the proprietor of ground in any city, shall be deemed a public street or alley, or to be under the use or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purpose. [R., § 1095; 13 G. A., ch. 179; 14 G. A., ch. 1, § 2; ch. 130, § 2.]

[As to transfer of portion of county bridge fund to city in certain cases, see § 414. As to voting aid for construction of county bridges, see §§ 407–412.]

Road taxes in city limits: Property within city limits is not subject to taxation by township trustees for highway purposes: *Marks v. Woodbury County*, 47–452; *Hawley v. Hoops*, 12–506.

Township trustees cannot include an incorporated town in a road district (see § 630), and a road supervisor has no authority over its streets. For an accident resulting from acts of such supervisor in repairing such streets the town is liable: *Clark v. Epworth*, 56–462.

Bridges: The county has the right to erect public bridges on public highways inside the limits of a city: *Bell v. Foutch*, 21–119; *Barrett v. Brooks*, 21–144.

The provisions of this section do not preclude the county from exercising its authority to build bridges at other places within city limits where the public good requires: *Oskaloosa Steam-Engine Works v. Pottawattamie County*, 72–134.

The provision of this section that bridges forty feet or more in length shall be deemed county bridges is applicable to bridges outside as well as within city limits, but it has no effect in determining whether bridges less than forty feet in length are to be deemed county bridges. That will depend upon the necessity and importance to the public of each bridge, its character and cost, and the financial ability of the road district in which it is located to construct and maintain it: *Casey v. Tama County*, 75–655.

As to the liability of the county for injuries resulting from defects in bridges which it is under obligation to maintain, see notes to § 402, subd. 18.

Before the repeal of the statute allowing cities to erect toll bridges, *held*, that a city might erect free or toll bridges at its option, and convert the one into the other: *Scott v. Des Moines*, 34–552.

The conveyance to a city for free and public use of a bridge built as a toll bridge by private enterprise and with the aid of individual subscriptions, in return for which the right of free passage was granted to such subscribers, *held* not to obligate the city to keep such bridge in repair, or prevent their erecting a new toll bridge on the site of the one purchased, and denying free passage thereon to the subscribers to the old bridge: *Ibid.*

The city is only required to keep bridges within its limits in reasonable and ordinarily good repair: *Holmes v. Hamburg*, 47–348.

A municipal corporation is liable for material furnished by it for repairs upon a bridge for a county road within the corporate limits: *Tubbs v. Maquoketa*, 32–564.

727. Wharves, docks and piers. 528. The city council shall have power to establish and construct and regulate landing-places, wharves, docks, piers, and basins, and to fix the rates of landing, wharfage, and dockage, and to use for the purpose aforesaid any public building or any property belonging to or under the control of the city, and the city council shall have the use and control, for the above purpose, of the shore or bank of any lake or river not the property of individuals, to the extent, and in any manner, that the state can grant such use or control. The city council shall have the power to appoint or provide that the qualified electors shall elect harbor masters, wharf masters, port wardens, and other officers usual and proper for the regulation of the navigation, trade, or commerce of such city, to define their duties and powers, and to fix their fees or compensation. Copies of examination and surveys, and of the proceedings of any port warden in the usual discharge of the duties of such officers, certified under his hand and seal, shall be presumptive evidence of the facts therein duly stated. [R., § 1098.]

The streets of a city are rarely subject to use for many purposes to which a highway in the country would not be, and a street adjoining a navigable river may properly be used for the purpose of a wharf: *Haight v. Keokuk*, 4–199.

A paved street, terminating at the water's edge, at which boats can moor for loading and unloading, may constitute a wharf: *Keokuk v. Keokuk N. L. Packet Co.*, 45–196.

A city may establish wharves and provide that fees be paid for the use thereof, and in the exercise of this police power may designate the place where the boats shall receive and discharge freight and passengers: *Ibid.*; *Muscatine v. Keokuk N. L. Packet Co.*, 45–185.

Such regulations are not in conflict with the provisions of the constitution of the United States with reference to commerce: *Ibid.*

An ordinance providing a charge for the landing of boats at places within the city limits where there are no wharves may be sustained in order to prevent boats from discharging and receiving freight where no wharves have been constructed, to the inconvenience of shippers and consignees: *Keokuk v. Keokuk N. L. Packet Co.*, 45–196.

Such provisions may be made applicable to the landing of boats within the city limits, even upon the premises of the owner: *Dubuque v. Stout*, 32–47; *Dubuque v. Stout*, 32–80.

But the right to collect wharfage must follow and not precede the establishment of wharves: *Dubuque v. Stout*, 32–47; *Muscatine v. Hershey*, 18–39.

Where the ordinance fixes the fees to be paid by boats using the city wharves, such fees can be recovered unless it is shown that the charges are beyond the limit of just compensation: *Keokuk v. Keokuk N. L. Packet Co.*, 45–196.

But the person using the public wharves does not become liable to compensation therefor unless the rates of compensation have been fixed: *Muscatine v. Keokuk N. L. Packet Co.*, 45–185.

The erection of a wharf must be presumed to have been made for the use and benefit of the public, like the paving of a street or other public improvement, unless the contrary is shown: *Ibid.*

Where the city has permitted the erection and use for years of a private wharf, it cannot without compensation to the owner appropriate the benefits of such wharf by demanding wharfage from boats landing thereat: *Grant v. Davenport*, 18–179.

A riparian proprietor outside of the corporation limits may erect a wharf on the shore of a navigable stream, conforming to state regulations, if any, and without obstruction to navigation. But within the corporation limits the city has the paramount right in this respect, and may regulate, but not destroy, a private wharf: *Ibid.*

728. Ferries. 529. The city council of any city shall have the exclusive power to establish and to regulate, and to license ferries from such city, or any landing therein, to the opposite shore, or from one part of said city to another, and in granting such license to impose such reasonable terms and restrictions in relation to the keeping of such ferries, and the time, manner, and rates of the carriage and transportation of persons and property as the city council may prescribe, and the city council shall have power to provide for the revocation of any such license, and for the punishment by proper fines and penalties of the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed. [R., § 1099.]

729. Removals; vacancies. 530. Any member of the city council may be expelled or removed from office by a vote of two-thirds of all the members elected to the city council, but not a second time for the same cause; any officer appointed by the city council may be removed from office by a vote of two-thirds of all the members elected to the city council, and provision may be made by ordinance as to the mode in which charges shall be preferred and a hearing be had; in all cases of vacancies in the city council they shall be filled by special election, and in case any office of an elective officer, except members of the city council, shall become vacant before the regular expiration of the term thereof, the vacancy shall be filled by the city council until a successor is elected and qualified, and such successor shall be elected for the unexpired term at the first annual election that occurs after the vacancy shall have happened. [R., § 1101.]

The filling of vacancies in elective offices must be by a majority of all the council, as provided in § 673: *State v. Dickie*, 47–629.

730. May purchase at execution sale. 18 G. A., ch. 89, § 1. Any city of the first or second class, organized under the general laws of this state, shall have power to acquire real estate, or an interest therein as a purchaser at an execution sale where such city is the plaintiff in execution, or otherwise interested in the proceeding, and to dispose of the property, or interest therein, so acquired, and also to dispose of any real estate, or interest therein, including any streets or portion thereof vacated or discontinued, however acquired or held by such city, in such manner and upon such terms as the city council shall deem just and proper.

731. Itinerant doctors, junk dealers, pawnbrokers. 19 G. A., ch. 89, § 1. Cities organized under the general incorporation laws of the state, in addition to the powers now granted them, shall have power: To regulate, license and tax itinerant doctors, physicians and surgeons, junk dealers, and to prohibit pawnbrokers and junk or second-hand dealers purchasing or receiving from minors without the written consent of their parents or guardians.

732. Numbering buildings. 19 G. A., ch. 89, § 2. To require all buildings to be numbered; and in case of the failure of the owners to comply with such requirement, to cause the same to be done, and to assess the cost thereof against the property or premises numbered.

733. Water-courses. 19 G. A., ch. 89, § 3. To deepen, widen, cover, wall, alter or change the channel of water-courses within their corporate limits.

734. Chimneys and heating apparatus. 19 G. A., ch. 89, § 4. To regulate and control the construction of chimneys, stacks, flues, fire-places; hearths, stove-pipes, ovens, boilers, and heating apparatus used in or about buildings, and to require and regulate the construction of fire-escapes, and to cause any or all of them to be removed, or placed in a safe condition, when considered dangerous, and to assess the cost thereof on the property and against the owners thereof.

735. Manufactories; unsafe buildings. 19 G. A., ch. 89, § 5. To regulate manufactories which are dangerous in causing or promoting fires; to prevent the deposit of ashes and combustible matter in unsafe places; and to cause all such buildings and inclosures as may be in a dangerous or unsafe state to be put in a safe condition.

736. Lights; bonfires; fire-works. 19 G. A., ch. 89, § 6. To regulate the use of lights in stables, shops and other places, and the building of bonfires, and to regulate or prohibit the use of fire-works, fire-crackers, torpedoes, roman candles, sky-rockets and other pyrotechnic displays.

737. Inspection of steam-boilers and magazines. 19 G. A., ch. 89, § 7. To provide for the inspection of steam-boilers, and all places used for the storage of explosive or inflammable substances or materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, and to assess the costs and expense of such proceedings against the property and owners thereof.

738. Packing-houses; soap factories; tanneries. 19 G. A., ch. 89, § 9. To establish all needful regulations as to the management of packing and slaughter-houses, renderies, tallow-chandleries and soap-factories, bone-factories, tanneries, and manufactories of fertilizing and chemicals within the limits of such cities, and the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, as will protect the public against the same.

739. Gas and water connections. 19 G. A., ch. 89, § 8; 21 G. A., ch. 116. City councils of all cities organized under the general incorporation laws or special charters of the state of Iowa shall have power to require the connections from gas pipes, water pipes, steam-heating pipes and sewer to the curb line of adjacent property to be made before the permanent improvement of the street whereon they are located; and to regulate the making of such connections on streets already improved, and in case the owners of property on such streets shall fail to make such connections within the time fixed by such council, they may cause such connections to be made, and to assess against the property in front of which such connections are made, the cost and expense thereof.

740. Sewer connections. 21 G. A., ch. 116; 22 G. A., ch. 9. They shall also have power to compel all property owners on streets along which sewers shall have been constructed to make proper connections therewith and to use the same for proper purposes, and in case the owners of property on such street shall fail to make such connections within the time fixed by such council they may cause such connections to be made and to assess against the property in front of which such connections are made the cost and expenses thereof.

GENERAL PAVING FUND.

741. Paving intersections. 19 G. A., ch. 38, § 1. The cost of paving the intersections of streets and alleys in all cities organized under the general incorporation laws of this state, including cities acting under special charters therein, and which have not commenced to pave the same at the expense of the property fronting on the street or streets paved, shall be paid for out of a general paving fund to be raised or created as hereinafter provided: *Provided*, nothing herein contained shall prevent councils of said cities from requiring railroads and street railways to pave any portion of said intersections.

742. Special tax. 19 G. A., ch. 38, § 2. In addition to the taxes which they are now empowered to levy, the city council of any such city are hereby authorized to levy a special tax, not exceeding two mills on the dollar on the assessed valuation of all the property in such city, for the purpose of creating such general paving fund.

743. How used. 19 G. A., ch. 38, § 3. The money raised by the tax hereby authorized to be levied shall not be used for any other purpose than that hereby contemplated.

744. Pledging tax. 19 G. A., ch. 38, § 4. It shall be competent for any city authorized by this act to levy such tax, to anticipate the collection thereof by borrowing money and pledging such tax, whether levied or not, for the payment of the money so borrowed, but such money shall be used or appropriated to no other purpose.

745. Paving already done. 19 G. A., ch. 38, § 5. Any city organized or acting as aforesaid, and which shall have paved the intersections of any of its streets and alleys at the expense of the property fronting on said street, may, by ordinance, avail itself of the benefits of this act: *Provided*, such ordinance shall receive the affirmative vote of two-thirds of all the members of the city council thereof.

CONSTRUCTION OF SEWERS IN CITIES.

746. Sewerage fund. 16 G. A., ch. 107, § 1. Any city within this state may levy a tax of not more than two mills on the dollar in addition to the maximum tax now authorized by law for the purpose of commencing a general system of sewerage in such city, and the money so raised shall constitute a sewerage fund, and shall be applied to no other purpose.

The limitation of two mills on the dollar applies only where the city is divided into sewage districts, and the sewage tax is levied on the property within such districts without regard to its location with reference to the sewer: *Dittoe v. Davenport*, 74-66.

747. Private property taken. 16 G. A., ch. 107, § 2. When, for the purpose of carrying off the water of any stream which flows within or through the said city, it becomes expedient to cause a principal sewer to pass through private property, the right to condemn such property for this purpose is hereby conferred upon its council. And the powers granted shall be the same in other respects as those enjoyed by railway companies, by and under the provisions of the code. The proceedings to enforce their powers shall also be the same, except that all damages shall be assessed by a board of three commissioners. These shall be appointed by the city council and may be changed at the pleasure thereof. They must be free from all personal interest in subjects brought before them for their adjudication, and they may decide on any question of damages that may arise in respect to any of the property that may be claimed to be injured by the construction of said sewer.

748. Construction. 16 G. A., ch. 107, § 3. Instead of constructing such principal sewer itself, the city may authorize its construction by any individual or company, and may agree to pay therefor out of the sewerage fund.

And the city council may also make all needful rules and regulations in relation to any of the sewers in their respective cities and may regulate the manner in which any property holder may connect therewith, and may also prescribe all needful regulations pertaining thereto.

749. Sewers for state buildings. 18 G. A., ch. 55, § 1. In any incorporated city, or city acting under special charter, within the limits of which may be situated any state buildings, the trustees or commissioners having charge of said buildings or of the construction thereof, shall have authority to construct sewers therefor, through or under any of the streets or alleys of said city.

750. 18 G. A., ch. 55, § 2. All acts or parts of acts, conflicting with this act are hereby repealed.

[As to sewers in cities of the first class, see §§ 838–858, and in cities under special charter, see §§ 943–952.]

TAX TO AID IN BUILDING BRIDGES OVER BOUNDARY RIVERS.

751. Amount. 21 G. A., ch. 13, § 1. Taxes not to exceed five per centum on the assessed value of any incorporated city having over five thousand inhabitants, may be voted to construct, or to aid any company which is or may be incorporated under the laws of the state of Iowa, in the construction of a highway bridge, commencing or terminating in such city, across any navigable boundary river of the state of Iowa.

752. Submission of question; levy. 21 G. A., ch. 13, § 2. Whenever a petition shall be presented to the council of any incorporated city, containing the population herein provided, signed by a majority of the resident freehold tax payers of said city, asking that the question of construction or aiding any company incorporated under the laws of the state of Iowa, in the construction of a highway bridge over such river, be submitted to the voters thereof, it shall be the duty of the council of such incorporated city to immediately give notice of a special election, by publication in some newspaper published in such city: and also by posting copies of such notice in five public places in such incorporated city at least ten days before such election which notice shall specify the time and place of holding such election and in case of a petition to vote aid to such incorporated company, the name of the company proposed to be aided, minimum rate per centum of the tax to be levied, the amount which the board of supervisors are instructed and authorized to cause to be collected each year and in case of proposed aid to such company said notice to also state the amount of work required to be done on such bridge, and any other condition which shall be performed before said tax or any part thereof shall become due, collectible or payable, until the conditions are complied with by such company. Such notice may also contain terms and conditions to be performed by such company receiving such aid, after the completion of such bridge, which terms and conditions shall become obligatory and binding upon such company and its successors and assigns. At such election the question of taxation shall be submitted to the electors of such incorporated city, and the form of the ballots shall be: "For taxation" and "Against taxation" and if a majority of the votes polled be "For taxation" then the clerk of such city shall forthwith certify to the county auditor of the county in which such city is situated, the result of said election, the maximum rate per centum of tax thus voted, the years during which the same is to be collected, the amount to be collected each year and, provided aid is voted to such incorporated company, the name or designation of such company, and the terms and conditions upon which the same when collected is to be paid to such company, together with an exact copy of the notice under which such election was held, which the county auditor shall at once cause to be recorded in the office of the re-

corder of deeds of the county. When such certificate shall have been recorded, the board of supervisors of the county shall at the time of the levying the ordinary taxes, levy each year on the taxable property of such incorporated city such taxes as are voted under the provisions of this act, as shown by said certificate, and cause the same to be placed on the tax lists of said incorporated city. Said taxes shall be collected in the same manner, and subject to the same laws after they are collected or collectible as other taxes; in conformity with the terms and conditions of the notice submitting the question of taxation to said electors.

753. Tax paid out. 21 G. A., ch. 13, § 3. The moneys collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of such company to whom such aid is voted for the purpose of such highway bridge, or the treasurer of such incorporated city, upon the order of the president or a majority of the directors of such company or the order of the council of such incorporated city, at any time after such council, or a majority of its members, shall have certified to the county treasurer that the conditions required as set forth in the notice for the special election at which the tax was voted, have been complied with; and said council or a majority of its members shall make such certificate whenever such conditions shall have been so performed.

754. Forfeiture. 21 G. A., ch. 13, § 4. Should taxes levied under the provisions of this act remain in the county treasury more than one year after the same shall have been collected, the right to them shall be considered forfeited, and the same shall be refunded to the tax payers, and the board of supervisors shall cause the same to be canceled, and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes.

[By § 924 this whole act is made applicable to cities under special charter.]

FUNDING OUTSTANDING INDEBTEDNESS.

755. When authorized. 21 G. A., ch. 78, § 1; 22 G. A., ch. 17, § 1. All cities organized under the general incorporation laws of the state, and having a population of five thousand or more according to the census of 1885, and whose outstanding indebtedness, evidenced by the warrants of said cities exceeds the sum of ten thousand dollars, are hereby authorized and empowered to fund the same and issue bonds of said cities therefor, in sums of not less than one hundred and not more than one thousand dollars each, having not more than twenty years to run, and bearing a rate of interest not exceeding six per cent. per annum, payable semi-annually. And such cities may also in the same manner refund the indebtedness of said corporations evidence by bonds thereof heretofore issued and outstanding at the time of the passage of this act.

756. Form of bond. 21 G. A., ch. 78, § 2; 22 G. A., ch. 17, § 2. Said bonds shall be substantially in the following form:

No. ——. The city of ——, in the state of Iowa, for value received promises to pay —— —— [or order, at —— on the —— day of ——], 18—, or at any time before the [that] date, at the pleasure of said city, the sum of —— dollars, with interest at the rate of —— per cent. per annum, payable semi-annually at —— on the —— days of —— and —— in each year, upon presentation and surrender of the interest coupons hereto attached. This bond is issued by the city council of said city, under the provisions of chapter ——, of the acts of the twenty-second general assembly of the state of Iowa, and in conformity with a resolution of said city council, dated —— day of ——, 18—.

In testimony whereof the said city council of the city of —— have caused

this bond to be signed by its mayor and attested by its auditor or clerk with the seal of said city affixed, this —— day of ——, 18—.

—— ——, Auditor or Clerk.

—— ——, Mayor of the City of ——.

And the interest coupons attached to said bonds shall be substantially in the following form:

No. ——. The treasurer of the city of ——, in the state of Iowa, will pay the holder hereof on the —— day of ——, 18—, at ——, the sum of —— dollars for interest on city bond No. ——, Series of ——, issued under the provisions of chapter —— of the acts of the twenty-second general assembly of the state of Iowa.

—— ——, City Auditor or Clerk.

[The portion of this form inclosed in brackets is found in the act of 21 G. A., but not in that of 22 G. A. They seem to have been omitted by accident from the latter act, which is in other respects identical with the former except that it includes cities of a less population and applies to outstanding bonds as well as warrants.]

757. Negotiation. 21 G. A., ch. 78, § 3; 22 G. A., ch. 17, § 3. Whenever any bonds issued under the provisions of this chapter shall be duly executed, numbered consecutively and sealed, they shall be delivered to the treasurer of said city issuing the same, and his receipt taken therefor, and he shall stand charged on his official bond with all bonds so delivered to him and the proceeds thereof, and he shall sell them on the best available terms or exchange them for any legal indebtedness of said city, evidenced by the outstanding warrants or bonds of said city outstanding at the date of the final passage of this act, but in no case shall said bonds be so sold or exchanged for a less sum than their face value and all interest accrued at the date of said sale or exchange; and if any such bonds shall be sold for money, the proceeds thereof shall be applied exclusively to the payment of such bonds or indebtedness outstanding at the date of the final passage of this act. When they are exchanged for warrants of said city said treasurer shall at once cancel said warrants as by the ordinances of said city provided. He shall keep a record of all bonds sold or exchanged by him, by number, date of sale, amount, date of maturity, the name and address of the purchaser, and if exchanged, what evidences of debt were received therefor, which record shall at all times be open to the inspection of the citizens of said city; said treasurer shall also report under oath to the city council of said city, at each first regular session thereof in each month, a statement of all such bonds so sold or exchanged by him since his last report and the date of such sale or exchange, and when exchanged, a description of the city indebtedness exchanged therefor.

758. Limit. 21 G. A., ch. 78, § 4; 22 G. A., ch. 17, § 4. No bonds shall be issued under this act in excess of the constitutional limit nor for any other purposes than to fund the outstanding indebtedness of said cities evidenced by the warrants of said cities outstanding at the date of the final passage of this act, or to refund outstanding bonds, at such time or by contracts existing at such date and to be performed within the year 1888.

759. Tax to pay interest. 21 G. A., ch. 78, § 5; 22 G. A., ch. 17, § 5. The city council of all cities issuing bonds under and by virtue of this chapter shall cause to be assessed and levied each year upon all the taxable property of said city, in addition to the levy for other purposes, a sum sufficient to pay the interest on bonds outstanding issued in conformity with and by virtue of the provisions of this act, accruing before the next annual levy, and such proportion of the principal, that at the end of five years the sum raised shall equal at least twenty per cent. of the amount of bonds issued; at the end of ten years at least forty per cent. of said amount; at the end of fifteen years at least sixty-five per cent. of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the principal and

interest, and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of the bonds issued under and by virtue of the provisions of this act, and the interest thereon and for no other purpose.

760. Redemption of bonds. 21 G. A., ch. 78, § 6; 22 G. A., ch. 17, § 6. Whenever the amount in the hands of the treasurer belonging to the bond fund, after deducting the amount required to pay the interest on said bonds maturing before the next levy, shall be sufficient to redeem one or more bonds, he shall notify the owner of such bond or bonds that he is prepared to pay the same with all interest accrued thereon, and if not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for the payment thereof whenever presented. All redemptions shall be made in the exact order of their issuance, and the notice herein required shall be directed to the address of the owner of said bonds as shown by the record thereof kept in the treasurer's office.

761. Enforcement of payment. 21 G. A., ch. 78, § 7; 22 G. A., ch. 17, § 7. If the city council of any city which has issued bonds under the provisions of this act, shall fail to make the levy necessary to pay such bonds and interest coupons at maturity and the same shall have been presented to the treasurer of such city, and payment thereof refused, the owner may file the bond together with all unpaid coupons with the auditor of state, taking his receipt therefor, and the same shall be registered in the auditor's office, and the executive council at their next session as a board of equalization, and at each annual equalization thereafter shall add to the state tax to be levied in said city a sufficient rate to realize the amount of principal and interest past due and to become due prior to the next levy, and the same shall be collected as part of the state tax and paid into the state treasury and passed to the credit of such city, as bond tax, and shall be paid by warrants as the payments mature to the holder of such bond as shown by the register of the state auditor, until the same shall be fully satisfied and discharged; *provided*, that nothing herein contained shall be construed to limit or postpone the right of any holder of any such bonds to resort to any other remedy which such holder might otherwise have.

762. Embezzlement. 21 G. A., ch. 78, § 8; 22 G. A., ch. 17, § 8. Any member of the council or any officer of any city levying and collecting taxes under the provisions of this act who shall in any manner participate in, or advise the diversion of said tax to any other purpose than that provided for in this act shall be deemed guilty of the crime of embezzlement, and shall be punished accordingly

SUPERIOR COURTS.

763. What cities may establish. 16 G. A., ch. 143, § 1; 19 G. A., ch. 24, § 1; 21 G. A., ch. 2. Any city in this state containing seven thousand inhabitants whether organized under a special charter or the general act for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city.

764. Question submitted. 16 G. A., ch. 143, § 2; 19 G. A., ch. 24, § 2. Upon the petition of one hundred citizens of any such city, the mayor by and with the consent of the common council, may at least ten days before an annual election for city officers, issue a proclamation submitting to the qualified voters of said city, the question of establishing said court. At the same election and every fourth year thereafter (if the said court is established), there shall be elected a judge of the superior court, the votes for whom shall be

upon the same ballot with other city officers. Should a majority of all the votes cast at such election be in favor of said court, the same shall thereby be established, and the said judge shall qualify and hold his office for the term of four years, and until his successor is elected and qualified. Immediately after each election of said judge, the mayor of said city shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge as herein provided.

This act is not unconstitutional as providing for the exercise of legislative power by the people. In confers upon cities certain powers which may be accepted and exercised by a vote of the people, but the validity of the act of the legislature is not made dependent upon popular vote: *Lytle v. May*, 49–224.

765. Judge. 16 G. A., ch. 143, § 3. Said judge shall be a qualified elector of the city, and be possessed of the legal acquirements prescribed in section two hundred and eight of the code of Iowa [§ 281], and shall subscribe in writing the same oath required of judges of the district court and file the same with the mayor of the city, and shall give bond to the state of Iowa in the sum of four thousand dollars, for the faithful discharge of his duties, which bond must be filed with and approved by the mayor; and the effect of such election and qualification shall be to abolish the office of police judge of such city.

766. Vacancy. 16 G. A., ch. 143, § 4. In case of a vacancy occurring in the said office of judge the mayor, by and with the consent of the common council, shall appoint a judge, who shall hold the office until the next annual city election, and until his successor is elected and qualified, who shall be chosen to fill the unexpired time.

767. Terms. 16 G. A., ch. 143, § 5. Said judge shall hold at least one term of court in each month, except in August, commencing on the first Monday in each month, but as a police court it shall always be open for the dispatch of business.

768. Number of terms each year. 22 G. A., ch. 40, § 4. Said court shall hold at least eight, and not to exceed eleven terms each year, the times thereof being arranged by the judge of the court in such manner as shall least conflict with the terms of the district court of the county where said superior court is held, the terms to be fixed by the general order made of record at least ten days before the first term of that year, but no term need be held in the month of August.

769. Jurisdiction. 16 G. A., ch. 143, § 6; 19 G. A., ch. 24, § 3; 22 G. A., ch. 40, § 1. Said court shall have jurisdiction in all civil matters concurrent with the district court as now and as may hereafter be provided by law, except in probate matters and actions for divorce, alimony and separate maintenance. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law; and concurrent jurisdiction with justices of the peace, and writs of error and appeals may be taken from justices' courts in the township in which the court is held, and by consent of parties from any other township in the county. For the trial of criminal actions on information and complaint the court shall be open at such times under such rules as the court shall prescribe. In actions by attachment, where real property is levied on by writs of attachment, the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk of the district court, in like manner and with like effect as of levies made in the district court. And parties may be committed to the city prison for confinement or punishment instead of the county jail, at the option of the judge: *Provided, however*, that in the absence of the said

judge, or in case of his inability to act, then during such time proceedings for the violation of city ordinances may be had before a justice of the peace residing in such city.

[The latter part of this section, commencing "and parties may be committed," etc., is an amendment to the original § 6 of 16 G. A., ch. 143, added by 19 G. A., ch. 24, § 3. Sec. 1 of 22 G. A., ch. 40, repeals § 6 of the act of 16 G. A., but it does not appear that it was intended thereby to repeal the amendment, which is therefore here retained.]

The superior court has, as to cases originally brought therein, concurrent jurisdiction throughout the county with courts of general jurisdiction. The limitation of jurisdiction to the township in which the city is located applies only to appeals and writs of error from justices of the peace: *Winet v. Berryhill*, 55-411.

Under the original section the jurisdiction of superior courts over appeals in civil cases from justices of the peace in the township was not exclusive of that of the circuit courts in the respective counties: *Hickox v. Nutting*, 55-403; *Hickox v. Burlington, C. R. & M. R. Co.*, 55-431.

770. Change of venue; trial without jury; appeal. 16 G. A., ch. 143, § 7; 19 G. A., ch. 24, § 4; 22 G. A., ch. 40, § 2. Changes of venue may be had from said court in all civil actions to the district court of the county, in the same manner, for like causes and with the same effect as the venue is changed from the district court as now or hereafter may be provided by law. All criminal actions, including those for the violation of the city ordinances shall be tried summarily and without a jury, saving to the defendant right of appeal to the district court, which appeals shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions.

Under a previous statute *held* that there was no law in force authorizing an appeal from a superior court except to the supreme court, and therefore the defendant in a prosecution in the superior court had the right of trial by a jury: *Creston v. Nye*, 74-369.

771. Powers of judge in vacation. 16 G. A., ch. 143, § 8. The said judges shall have the same power in regard to injunctions, writs, orders and other proceedings, out of courts as are now or may be hereafter possessed *for* [by] the judges of the district [or circuit] courts; and may also administer oaths, take acknowledgments and depositions (except depositions to be used in his own court), and solemnize marriages. But he shall not practice in any of the courts of this state.

772. Procedure. 16 G. A., ch. 143, § 9. The superior court shall be a court of record, and all statutes in force respecting venue and commencement of actions, the jurisdiction, process, and practice of the [circuit and] district court, the pleadings and mode of trial of action at law or in equity, and the enforcement of its judgments by execution or otherwise, and the allowance and taxing of costs, and the making of rules for practice or otherwise, shall be deemed applicable to the superior court, except wherein the same may be inconsistent with the provisions of this act. The records and papers properly filed in a cause in [either] the district [or circuit] court[s] are equally evidence in said superior court.

773. Seal. 16 G. A., ch. 143, § 10. The said court shall have and use its own seal, having on the face thereof the words, "superior court," and the name of the city, county and state.

774. Clerk. 16 G. A., ch. 143, § 11. As long as the business of the court can be done with convenience and dispatch, without a clerk, the judge shall be the clerk of the said court. Whenever, from the accumulation of causes and other demands upon the court a clerk shall become necessary, the city recorder, or clerk, shall be the clerk of the superior court, and shall receive such compensation for his services as the city council may from time to time allow; and he shall perform the duties in said court provided by law for the clerk of the circuit [district] court, and shall give bonds as required of the said judge.

775. Marshal. 16 G. A., ch. 143, § 12. The city marshal shall be the executive officer of said court and his duties and authority in court and in

executing process shall correspond with those of the sheriff of the county in the circuit [district] court, and with process from that court, and he shall receive the same fees and compensation as the sheriff for like services. But the process of said court may be also served by the sheriff.

776. Compensation of judge. 16 G. A., ch. 143, § 13. The judge of said court shall receive in full compensation for his services the sum of two thousand dollars per annum, to be paid to him quarterly; the first two quarters of the municipal year shall be paid from the city treasury, and the last two quarters from the county treasury wherein said city is located. The costs and fees of said court in civil actions shall be the same as in the [circuit and] district courts except herein otherwise provided, and the clerk of the superior court shall account for and pay over to the city all fees that may be paid into the said court, and also for all fines for the violation of city ordinances. Of all other fines he shall render the same account as is provided for justices of the peace. In actions for the violation of city ordinances, if unsuccessful, the city shall pay all costs, the same as provided by law for the county in other criminal actions prosecuted in the name and behalf of the state. The fees in criminal actions shall be the same as in justices' courts, and shall be paid and accounted for as hereinbefore stated, and as otherwise provided by law for justices of the peace and their courts.

777. Jury. 16 G. A., ch. 143, § 14; 19 G. A., ch. 24, § 5. When causes are assigned for trial, any party desiring a jury shall then make his demand therefor, or the same shall be deemed to have been waived. Causes in which a jury has been demanded shall be tried first in their order, and when a disposition shall have been made of such causes, the jury shall be discharged from further attendance at that term. No juryman shall be detained longer than one week, except upon trial commenced within the first week of his attendance.

778. Selection of jurors. 16 G. A., ch. 143, § 15. In order to provide jurors for said court, the judge, mayor, and recorder shall immediately after qualifying and every three months thereafter, make out a list of twelve names of persons from the body of the county in which the city is situated, qualified to serve as jurors in the district court, which list shall be furnished to the clerk of said superior court, and from this list there shall be drawn by the clerk and marshal nine persons in the same manner as jurors are drawn in the district court, and a precept from the court shall issue accordingly five days before the first day of next term, as provided by law in like cases in the district court.

779. Juries, how constituted; costs. 16 G. A., ch. 143, § 16; 19 G. A., ch. 24, § 6; 22 G. A., ch. 40, § 3. The jury shall consist of six qualified jurors, unless, when a jury is demanded as provided in section three of this act [§ 777], the party at that time shall demand a jury of twelve, and in all civil cases the party requesting a jury of twelve shall at the time of making such demand deposit with the clerk the entire additional expense of the additional jurors, which sum shall be fixed by the court and paid to the clerk at the time of making such demand. If the judge shall deem proper, he shall cause a special venire to issue for said extra jurors, or for any number not exceeding twenty-four, or he may order the marshal to complete the same from the by-standers. The pay for all jurors shall be two dollars per day and mileage, to be taxed with the costs, which in all civil cases shall be paid by the county in the same manner as in [circuit and] district court[s]. All such deposits of additional expense for jurors shall be paid into the county treasury at the close of each term of such superior court, and the county treasurer shall give duplicate receipts therefor, one receipt to be held by said clerk, and the other to be

presented by him to the county auditor, who shall charge the treasurer with the amount thereof in the proper account.

[The reference to "section three of this act" is evidently a mistake, section five of 19 G. A., ch. 24, which is the act in which the words are used, being probably intended. That section is § 777 above.]

As a party may have a trial by a jury of twelve by depositing the amount necessary to cover the additional expense caused thereby, the provisions of this section are not unconstitutional: *Conners v. Burlington, C. R. & N. R. Co.*, 74-383.

780. Challenges. 22 G. A., ch. 40, § 5. In all civil cases where the jury shall consist of six jurors the challenges allowed to either party shall be limited to three each, but where the jury shall consist of twelve jurors the same number of challenges shall be allowed to either party as is now or may hereafter be allowed in the district court.

781. Appeals. 16 G. A., ch. 143, § 17; 19 G. A., ch. 24, § 7. All appeals from judgments or orders of said court or the judge thereof in civil actions shall be taken to the supreme court in the same manner and under the same restriction, within the same time, and with the same effect as appeals are taken from the circuit [district] to the supreme court.

782. Judgments made liens. 16 G. A., ch. 143, § 18; 19 G. A., ch. 24, § 8. Judgments in said court may be made liens upon real estate in the county in which the city is situated, by filing transcripts of the same in the circuit [district] court, as provided in sections three thousand five hundred and sixty-seven and three thousand five hundred and sixty-eight of the code [§§ 4816, 4817], relating to judgments of justices of the peace and with equal effect, and from the time of such filing it shall be treated in all respects as to its effect and mode of enforcement as a judgment rendered in the circuit [district] court as of that date, and no execution can thereafter be issued from the said superior court on such judgment, and no real property shall be levied on, or sold on process issued out of the court created under the provisions of this act; and judgments of said superior court may be made liens upon real estate in other counties in the same manner as judgments in the [circuit and] district courts.

783. City attorney. 16 G. A., ch. 143, § 19. It shall be the duty of the city attorney or solicitor to file informations in the superior court for violation of city ordinances and prosecute the same, and for such services he shall receive such compensation as the city council shall allow.

784. Judge as magistrate. 16 G. A., ch. 143, § 20; 19 G. A., ch. 24, § 9. The said judge shall be *ex officio* a magistrate and in preliminary examinations the proceedings and practice shall be the same as before any other magistrate, and all warrants issued in criminal proceedings under the seal of the court, may be used in any other part of the state without further attestation, in like manner as if issued by the district court.

785. Short-hand reporters. 21 G. A., ch. 44, § 1. The judges of the several superior courts in the state may appoint, whenever in the judgment of either of them it will expedite the public business, a short-hand reporter, who shall be well skilled in the art and competent to discharge the duties required, for the purpose of recording the oral testimony of the witnesses, in all civil cases, upon the request of either party thereto.

786. Appointment and compensation. 21 G. A., ch. 44, § 2. All of the provisions of section three thousand seven hundred and seventy-seven of the code [§ 5029] shall apply to the appointment and compensation of such short-hand reporter, and to the testimony so taken, so far as the same shall be applicable, except that the compensation of such short-hand reporter shall not exceed five dollars per day for the time actually employed.

OF CITIES OF THE SECOND CLASS.

787. Mayor. 531; 18 G. A., ch. 120. The mayor of cities of the second class shall be the presiding officer of the city council, and shall constitute a member of such council and shall have a casting vote where there is a tie in all cases including the election of officers and passage of ordinances, and all other matters provided for in sections four hundred and eighty-nine and four hundred and ninety-three of the code [§§ 669, 673]. [12 G. A., ch. 188.]

788. Election of officers and terms. 532. The qualified electors of each city of the second class shall elect a city treasurer, who shall hold his office for one year, and a city solicitor, who shall hold his office for two years; each of said officers shall have such powers and perform such duties as are prescribed in this chapter, or by any ordinance of the city council not inconsistent therewith. In all such cities, the marshal, deputy-marshal, and police, shall be elected by the city council, and shall hold their offices during its pleasure. [R., § 1103; 7 G. A., ch. 24; 14 G. A., ch. 7.]

[In the sixth line "therewith" is "herewith" in the printed Code. As to marshals in cities of the first class, see §§ 798-801, and in cities under special charter, see § 915.]

Where neither the duties nor the compensation of city solicitor are fixed by the council, he should, unless otherwise instructed, perform such duties within the usual scope of the authority of such officer as the interests of the city may require; and he may recover reasonable compensation therefor: *Kinnie v. Waverly*, 42-437; *Kinnie v. Waverly*, 42-486.

789. Officers elected biennially. 21 G. A., ch. 141, § 1. The mayor, treasurer, assessor, solicitor, shall be elected biennially in cities of the second class, by the qualified electors of the city. They shall be qualified electors and shall reside within the limits of the city and they shall hold their respective offices for the term for which they have been elected and qualified.

790. Terms of office. 21 G. A., ch. 141, § 2. The terms of office for the mayor, treasurer, assessor, and solicitor shall be two years and the first election under this act shall be held on the first Monday of March, 1887.

791. Marshal. 533. The marshal of the cities of the second class shall execute and return all writs and processes to him directed by the mayor, and, in criminal cases, or cases in violation of city ordinances, he may serve the same in any part of the county; he shall suppress all riots, disturbances, and breaches of the peace, apprehend all disorderly persons in the city, and shall pursue and arrest any person fleeing from justice in any part of the state; he shall apprehend any person in the act of committing any offense against the laws of the state or ordinances of the city, and forthwith bring such person before the mayor, or other competent authority for examination and trial; he shall have, in the discharge of his proper duties, like power, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases. [R., § 1104.]

[As to marshal in cities of first class, see § 801.]

792. Erection of jail. 19 G. A., ch. 154, § 1. Any city of the second class shall have the power to erect and maintain a city jail, and to purchase the necessary grounds therefor, and to appropriate out of its general fund the amounts necessary for said purposes.

793. Water-works bonds. 22 G. A., ch. 10, § 1. In all cases when a city of the second class has determined or hereafter may determine to erect water-works to be owned and operated by the city as provided in section number four hundred and seventy-one of the code [§ 639], it shall be lawful for such city to issue its bonds to procure the money for such purpose to an amount not exceeding five per cent. upon the taxable property of such city; but in no case shall the aggregate indebtedness of the city by the issue of such bond[s] be increased beyond the limit of indebtedness fixed by the constitution

of the state; and no money procured upon the issue of such bonds shall be used for any other purpose than the erection of such water-works. No such bond shall bear a greater rate than six per cent. interest, nor be drawn to run more than twenty years.

OF CITIES OF THE FIRST CLASS.

794. Powers of mayor; appointment of police. 534. The mayor of the cities of the first class, shall, at the first regular meeting of the city council in the month of April of every year, and at such other times as he may deem expedient, report to the city council concerning the municipal affairs of the city, and recommend such measures as to him may seem advisable; he shall appoint one chief of police and as many subordinate officers and watchmen as the city council may deem necessary, who shall hold their appointments during the pleasure of the mayor; he shall have power, in cases of emergency, to appoint as many special watchmen as he may think proper, but such appointments shall be reported to and subject to the action of the city council at its next meeting. [R., § 1105.]

795. Election of officers by council. 16 G. A., ch. 33, § 1; 17 G. A., ch. 20, § 1. In all cities of the first class incorporated under the general incorporation laws of this state, whose population according to the census of 1875 was not less than nineteen thousand, the city council at the first regular meeting in April in each and every year thereafter shall elect one city marshal, one city solicitor, one city physician, one building commissioner, one city civil engineer, one superintendent of city markets, one street commissioner, and when deemed necessary by the council, one wharf-master, who shall hold their respective offices for the term of one year and until their successors are elected and qualified, they shall be responsible to the city council for the true and faithful performance of the duties of their respective offices and shall receive for their services such compensation as the city council shall by ordinance from time to time provide, and for the election of the officers provided for in this section it shall require an affirmative vote of a majority of all the members elected to the city council.

796. Other officers; bonds. 16 G. A., ch. 33, § 2; 17 G. A., ch. 20, § 2. The qualified electors of every such city shall elect one treasurer, one auditor, and one police judge, who shall hold their respective offices for the term of two years and until their successors are elected and qualified. Each of said officers shall have such powers and perform such duties as are prescribed by chapter ten, title four, of the code, and in any ordinance of the city not inconsistent with the code. The officers provided for in this and the preceding section shall each be required to give bonds with two sureties each in such sum for the faithful performance of their respective duties as the city council shall from time to time prescribe by ordinance, and the officers provided for in this act may be removed from their respective offices as is provided by section five hundred and thirty of the code [§ 729]; *provided*, that the provisions of this act shall not apply to cities organized under special charter.

797. 17 G. A., ch. 20, § 3. So much of section five hundred and thirty-four of the code [§ 794] as was superseded by chapter thirty-three of the sixteenth general assembly, is hereby revived, anything in subdivision one of section forty-five of the code [§ 49], to the contrary notwithstanding.

798. Officers; terms. 535. The qualified electors shall elect a marshal, a civil engineer, a treasurer, an auditor, a solicitor, police judge, and a superintendent of the market, who shall hold their offices for two years, and until their successors are elected and qualified; each of said officers shall have such powers and perform such duties as are prescribed in this chapter; or in any ordinance of the city, not inconsistent herewith. [R., § 1106; 13 G. A., ch. 12.]

799. Marshal. 20 G. A., ch. 7, § 1. The mayors of cities of the first class organized under the general incorporation laws of the state and having a population of not less than twenty-two thousand and three hundred by the United States census of 1880 shall, subject to the approval of the city council, appoint a marshal who shall be ex officio chief of police, and shall hold his office at the pleasure of the mayor. The marshal so appointed shall have all the powers conferred by the statutes of the state and ordinances of the city on the chief of police and the marshal, except the appointment of deputy-marshals, and shall perform the duties of both offices. He may designate one or more members of the regular police force of the city to act as deputy-marshals, and such designated policemen shall have all powers now conferred on deputy-marshals.

800. 20 G. A., ch. 7, § 2. All acts or parts of acts in conflict herewith are hereby repealed.

801. Powers and duties of marshal. 536. The city marshal shall execute and return all process to him directed by the mayor or judge of the police court, and shall attend on the sittings of said court; he shall have power to execute any such process, by himself or deputy, in any part of the county; he shall suppress all riots, disturbances, and breaches of the peace, apprehend all persons committing any offense against the laws of this state or the ordinances of the city, and forthwith bring such persons before the proper authority for examination or trial; he shall have power to pursue and arrest any person fleeing from justice in any part of the state, and to receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states, and to appoint one or more deputies for whose official acts he shall be responsible; he shall have, in the discharge of his proper duties, like powers, be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases. [R., § 1107.]

[The marshal may be given a fixed salary in lieu of fees: See § 813.]

The county is not liable to the city marshal for fees for services in criminal cases, notwithstanding the last clause of this section. He is a city officer, and is presumed to be payable by the city: *Christ v. Polk County*, 48–302.

In cases where for the same services the fees allowed to sheriffs are greater than those allowed to constables, the marshal can only recover fees allowed constables: *Bryan v. Des Moines*, 51–590.

The marshal not being charged with any duty in respect to streets and sidewalks, notice to him of defective condition of a sidewalk will not be notice to the city: *Cook v. Anamosa*, 66–427.

A city marshal who has properly seized stock running at large within the city limits may keep it in such manner as he sees fit, and will not lose jurisdiction thereof by placing it in a pound beyond the city limits: *Pierce v. Evans*, 36–495.

802. Police; width of tires; hack stands; rates. 537; 21 G. A., ch. 92. The city council shall, by a general ordinance, direct the number of officers of the police and watchmen to be appointed. They shall also provide, in addition to the regular watch, for the appointment of a reserve watch, to consist of a suitable number of persons in each ward, to be called into duty as the council may prescribe, and by the mayor or officers of police under his direction, in special cases of emergency. The duty of the chief and other officers of the police, and of the watchmen, shall be, under the direction of the mayor and in conformity with the ordinances of the city, to suppress all riots, disturbances, and breaches of the peace; to pursue and arrest any person fleeing from justice in any part of the state; to apprehend any and all persons in the act of committing any offense against the laws of the state or the ordinances of the city, and forthwith to bring such person or persons before the police court or other competent authority for examination and at all times to diligently and faithfully enforce all such laws, ordinances, and regulations for the preservation of good order and public welfare as the city council may ordain, and for such purposes they shall have all the power of

constables. The mayor, marshal, chief of police, and watchmen of the city may, upon view, arrest any person who may be guilty of a breach of the ordinances of the city, or of any crime against the laws of the state, and may, upon reasonable information, supported by affidavits, procure process for the arrest of any person who may be charged with a breach of any of the ordinances of the city. The city council shall have the power to prescribe by ordinance the width of the tires of all wagons, drays, and other vehicles habitually used in the transportation of persons and articles from one part of the city to another, or in the transportation of coal, wood, stone, or lumber into the city; to establish stands for hackney-coaches, cabs, and omnibusses, drays and express wagons, and enforce the observance and use thereof; and to fix the rates and prices for the transportation of persons and property in such coaches, cabs, and omnibusses from one part of the city to another.

[Chief of police and police officers may be given a fixed salary: See § 813.]

INFIRMARY — HOUSE OF REFUGE — WORKHOUSE — POLICE COURT.

803. Infirmary. 538. The city council shall have power to establish and maintain an infirmary for the accommodation of the poor of the city, either within or without the limits of the city, and to provide for the distribution of outdoor relief to the poor. [R., § 1111.]

804. House of refuge. 539. The city council shall have power to establish and maintain, either within its limits or within the county in which it is situated, a house of refuge or a house of correction, and a workhouse, or either of them, and place the same under the management and control of such directors, superintendents, and other officers as the council may, by ordinance, provide. All children under the age of sixteen years, who shall be convicted of any offense made punishable by imprisonment under any ordinance of the city, or who shall be liable to be committed to prison under any such ordinance, may be confined in such house of refuge, and may be there kept, or apprenticed out, under such rules as the directors of the house of refuge may prescribe, until they arrive at the age of eighteen years. Any person over the age of sixteen years convicted of the violation of any ordinance, and liable to be punished therefor by imprisonment, may, in lieu thereof, be committed to the house of correction, or to the workhouse, as may be provided by ordinance. [R., § 1112.]

805. Directors. 540. The board of directors of any house of refuge established by any city, are authorized to appoint a committee of one or more of their own number, with power to execute and deliver, on behalf of said board, indentures of apprenticeship for any inmate of said institution whom they may deem a proper person for an apprenticeship to a trade or occupation, to such person as said committee or the board may select; and said indentures shall have the like force and effect as other indentures of apprenticeship under the laws of this state, and said indentures shall be filed and kept in said institution by the superintendent thereof, and it shall not be necessary to file the same in any other place or office. [R., § 1113.]

806. Recommitment. 541. When any inmate of said institution shall have been apprenticed and proved untrustworthy and unreformed, he or she shall be recommitted to the said institution to be held in the same manner as before said apprenticeship. [R., § 1115.]

807. City prison; station houses; police court and clerk. 542. The city council shall have power to erect, establish and maintain a city prison, which shall be in the keeping of the city marshal under such rules and regulations as the city council shall provide. They shall provide one or more watch or station houses; they shall also provide suitable rooms for holding police court;

they shall provide, by ordinance, for the election by the qualified electors of the city, or for the appointment by the police judge, of a clerk of such police court, and for the selection, summoning, and impaneling its juries, and for all such matters touching said court as may tend to its efficiency, and the dispatch of business. No clerk of said court shall be in any way concerned as counsel or agent in the prosecution or defense of any person before such court. [R., § 1116.]

[The city prison must be provided with a separate apartment for the detention of females: See § 6126, 6127.]

808. Police judge. 543. The police judge shall have, in all criminal cases, the powers and jurisdiction vested in justices of the peace; he shall also have power to take the acknowledgment of deeds and other writings, and shall have jurisdiction of all violations of the ordinances of the city. Every such police court shall be deemed a court of record, shall have a seal, to be provided by the city council, with the name of the state in the center, and the style of the court around the margin. [R., § 1117; 13 G. A., ch. 12.]

While exercising the powers and jurisdiction of justices of the peace, juries may be necessary (§ 6070), and under the preceding section the council may provide for impaneling them; but in the trial of offenses against an ordinance of the city the defendant has no right to a trial by jury, nor a change of venue: *Zelle v. McHenry*, 51–572.

The provisions of the Code relating to police courts, so far as they differ from the corresponding provisions of the Revision, are not applicable to cities under special charter: *Weir v. Allen*, 47–482.

809. Fees of police judge. 544. The police judge holding the police court shall be entitled to receive, in all criminal cases prosecuted in behalf of the state, the same fees, to be collected in the same manner, as a justice of the peace in like cases; and in cases prosecuted in behalf of the city, such fees, not exceeding those for services of the like nature in state prosecutions, as the council may, by ordinance, prescribe; and shall also receive such salary or compensation as the city council may in like manner prescribe. [R., § 1118; 13 G. A., ch. 12.]

[The police judge may be given a fixed salary in lieu of fees: See § 813.]

It seems that it would not be proper for the council to provide that the police judge should only have fees in cases where judgment should be rendered in favor of the city: *Crane v. Des Moines*, 47–105.

The statute (§ 813) allowing judges of police courts a fixed salary in lieu of fees, *held* to authorize the allowance to a police judge of a salary in lieu not only of fees from the city, but from any source whatever, so that the city might recover from the judge fees received by him from the state in prosecutions under state laws: *Des Moines v. Hillis*, 55–643.

Where, by ordinance, the police judge is given a salary in lieu of fees, the city becomes entitled to his fees in state cases, and the judge may bring action for such fees and account for them to the city: *Labour v. Polk County*, 70–568.

810. Court open; jurors. 545. The police court shall always be open for the dispatch of business; and the jurors in said court shall have the qualifications of jurors in the district court. [R., § 1119; 13 G. A., ch. 12.]

811. Appeal. 546. An appeal may be taken from the police court, in like manner as from a justice of the peace, on the trial whereof the appellate court shall take judicial notice of the ordinances of the city. [R., § 1120; 13 G. A., ch. 12.]

[As to courts taking judicial notice of city ordinances, see § 662 and notes.]

812. Mayor to act. 547. Until a police judge shall be elected and qualified, the mayor of any such city shall have all the powers and jurisdiction of such judge, and shall hold the police court in such manner as required of the police judge, and shall be entitled to demand and receive the same fees and compensation as may be provided for the police judge or police court. [R., § 1121.]

[The superior court, where there is one, exercises the jurisdiction of the police court: See § 763, 769.]

COMPENSATION OF OFFICERS.

813. Salaries in lieu of fees. 17 G. A., ch. 56, § 1. All cities of the first class, organized under the general incorporation law, and all cities organized under special charter, may provide by ordinance that all judges of police courts or other city courts, city marshals, chiefs of police, police officers, and all other officers elected or appointed, shall receive, in lieu of all fees now allowed by law or ordinance, such fixed salary, in monthly or quarterly instalments as may be provided by ordinance, when not provided by law, which salary, when it shall have been fixed, shall not be increased or diminished during their terms of office.

An ordinance changing the compensation of the officers named from fees to salary, as contemplated by this act, cannot affect such as are in office at the time of the passage of the act, during their term of office: *Bryan v. Des Moines*, 51–590.

This statute is not unconstitutional as delegating legislative authority to the city council: *Des Moines v. Hillis*, 55–643.

814. No other compensation. 17 G. A., ch. 56, § 2. No such officer of any such city shall receive, for his own use, any fees or other compensation for his services of such city, than that which shall be provided as contemplated in section one of this act [§ 813]; but all such fees as are now or may hereafter be allowed by law for such services, shall, by such officer, when collected, be paid into the city treasury, at such time and in such manner as may be prescribed by ordinance.

An officer having received a salary under an ordinance in pursuance of the preceding section is estopped from claiming fees: *Bryan v. Des Moines*, 51–590.

It is immaterial that he has collected fees and paid them into the city treasury under protest: *Christ v. Des Moines*, 53–144.

The city may recover from the police judge fees received by him in criminal cases prosecuted in behalf of the state, whether received from defendants in such case or from the county: *Des Moines v. Hillis*, 55–643.

But the police judge may sue the county for such fees: *Labour v. Polk County*, 70–568.

815. Repealing clause; proviso. 17 G. A., ch. 56, § 3. All acts and parts of acts in conflict herewith are hereby repealed; *provided*, that the intent of this act is not to abolish any fees now allowed by law, but to require the same to be paid into the city treasury.

816. Compensation of councilmen. 22 G. A., ch. 24, § 1. There shall be paid to members of the city council of cities of the first class, an amount prescribed by ordinance not in excess of two hundred and fifty dollars per annum, and this amount shall be in full compensation of all services of such councilmen of every kind and character whatsoever, connected with their official duties.

817. 22 G. A., ch. 24, § 2. All acts and parts of acts in conflict herewith are hereby repealed.

MISCELLANEOUS PROVISIONS.

818. Fire regulations. 22 G. A., ch. 21, § 1. Cities of the first class, shall have power to make regulations against danger or accidents by fire, to establish fire limits and to prohibit the erection thereon of any building or addition to any building unless the outer walls and roof thereof be made of brick and mortar or of iron and stone and mortar or of other non-combustible material and to provide for the removal of any building or addition erected contrary to such prohibitions.

819. 22 G. A., ch. 21, § 2. The provisions of section four hundred and fifty-seven of the code of 1873 [§ 616] shall not apply to cities of the first class.

820. Library tax. 22 G. A., ch. 18, § 1. All cities of the first class organized as such since January first, 1885, that have accepted the benefits of the provisions of section four hundred and sixty-one of the code of

Iowa [§ 620], shall in addition to the powers conferred by said section have power to levy and collect a tax not to exceed three mills on the dollar of the assessed valuation of such city or town to pay the interest on any indebtedness heretofore contracted or that may hereafter be contracted or incurred for the purchase of land and the erection of buildings for a public library or the hiring of rooms or buildings for such purposes or for the compensations of the necessary employees as provided in section four hundred and sixty-one of the code [§ 620] and to create a sinking fund for the extinguishment of such indebtedness.

821. Improvement of alleys. 22 G. A., ch. 13, § 1. So much of section one, chapter fifty-one, acts of the fifteenth general assembly [§ 625] as requires cities of the first class to provide by ordinance for the improvement of alleys after presentation of petition by owner of property to be assessed, is hereby repealed and such cities of the first class organized under the general incorporation laws of the state may provide by ordinance how such improvements shall be made; and hereafter said cities of the first class may order an alley to be improved, graded or macadamized by resolution passed by an affirmative vote of two-thirds of such council and on voting on such resolution the yeas and nays shall be recorded.

822. Appropriations. 22 G. A., ch. 4, § 1. All cities of the first class shall make their appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for the city council or any officer, agent or employee of the city, to issue any warrant, enter into any contract, or appropriate any money in excess of the amount thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made, and any such city shall not appropriate in the aggregate, an amount in excess of its annual legally authorized revenue, but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation was made, or from bonding or refunding their outstanding indebtedness, *provided*, that this section shall not apply to cities of the first class organized since 1881.

823. Bids for supplies. 22 G. A., ch. 4, § 2. Such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions each week for bids for furnishing all supplies of every kind, for the several departments of [the] city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year. Each officer or board in charge of any department in said cities, shall furnish and file in the city clerk's office, thirty days before the beginning of each fiscal year, a sworn, detailed statement of the supplies necessary for his or their department during the next fiscal year.

STREET IMPROVEMENTS IN CITIES OF FIRST CLASS.

824. Special assessments. 20 G. A., ch. 20, § 1. Cities of the first class, that have been or may be so organized since January first, 1881, shall have power to open, widen, extend, grade, construct permanent sidewalks, curb, pave, gravel, macadamize and gutter, or cause the same to be done in any manner they may by ordinance deem proper, any street, highway, avenue or alley within the limits of such city, and may open, extend, widen, grade, park, pave or otherwise as aforesaid, improve part of any such street, highway, avenue or alley, and levy a special tax as hereinafter provided, on the lots and lands fronting and abutting on such street, highway, avenue or alley, and where said improvements are proposed to be made to pay the expenses of the same. But unless the owners, resident in such city, of a majority of the front feet owned by them, of the property subject to assessment as hereinafter provided, for such improvements, shall petition the council of such city to make the

same, such improvements shall not be made until three-fourths of all the members of such council shall by vote, assent to the making of the same: *Provided*, that the construction of permanent sidewalks, curbing, paving, graveling or macadamizing of any such street, highway, avenue or alley, shall not be done until after the bed of the same shall have been brought so near to the grade as established by the ordinances of such city, as that said sidewalks, curbs, paving or other improvements as aforesaid, when fully completed, will bring said streets, highways, avenues or alleys fully up to said established grade.

825. Contract. 20 G. A., ch. 20, § 2. It shall be the duty of the council of said city to require all of the work necessary to the making of any improvements authorized by section one hereof [§ 824], to be done under contract thereof, to be entered into with the lowest responsible bidder, and bonds with good and sufficient surety for the faithful performance of such work, shall be required to be given by the contractors; *provided*, that all bids for such work, or any part thereof, may be rejected by such council, and new bids ordered.

826. Improvement districts; taxes; collection. 20 G. A., ch. 20, § 3. Any such city shall, for the purpose of effectuating the objects enumerated in section one hereof [§ 824], have power, by ordinance, to create improvement districts, which shall be consecutively numbered. The cost of opening, extending, widening, grading, constructing permanent sidewalks, curbing, paving, graveling, macadamizing and guttering any street, highway, avenue or alley, within any improvement district, except spaces in front of city property, and any other property exempt from special taxes except the intersections of streets, highways or avenues and space opposite alleys, and except as to paving, graveling or macadamizing between and outside the rails of railways and street railways, shall be assessed upon the lots and lands abutting the same, in proportion to the front feet so abutting upon such street, highway, avenue or alley, where said improvements are proposed to be made. The assessment of the special taxes herein provided for shall be made as follows: The total cost of the improvement, except spaces in front of city property and any other property exempt from special taxation, and except as to intersections of streets, highways or avenues, and space opposite alleys, and except as aforesaid, as to the paving, graveling or macadamizing between and outside the rails of any railway or street railway, shall be levied upon the property as aforesaid, and become delinquent as herein provided; one-fifth shall become delinquent in ninety days after such levy, one-fifth in two years, one-fifth in four years, one-fifth in six years, and one-fifth in eight years, after the levy is made. Such special taxes shall be payable by the owners of the property upon which they are levied as aforesaid, at or before the times they become delinquent, as hereinbefore provided and in the instalments herein mentioned; and shall also be a lien upon the lots and lands so assessed, and shall draw interest at the rate of six per cent. per annum from the time of the levy aforesaid, until the same shall be paid or become delinquent, whichever shall first happen, said interest to be payable semi-annually, or annually as the council of such city may deem best. The property so assessed may be sold for the payment of any instalment of said tax or interest as aforesaid, which is payable and delinquent at the time in the same manner, at any regular or adjourned sale or special sale called therefor, with the same forfeitures, penalties and right of redemption, and certificates and deeds on such sales shall be made in the same manner and with like effect as in case of sales for non-payment of the ordinary taxes of such city, as now or hereafter provided by law in respect thereto: *Provided*, however, that the sale of any property for the non-payment of any instalment as aforesaid, either of tax or interest, shall not be taken or construed as in any manner affecting the validity of the lien on the same for any instalment thereof, with interest as aforesaid, which may

subsequently become delinquent and payable. Such city council may provide by ordinance for the mode of making and returning the assessment hereinbefore authorized; and payment of such assessment after they become delinquent, and if [of] interest as aforesaid, may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided by sections four hundred and seventy-eight and four hundred and eighty-one of the code [§§ 649, 652]. In case of omissions, errors, or mistakes in making such assessment or levy, in respect of the total cost of the improvement, or in case of deficiencies or otherwise, it shall be competent for the council to make a supplemental assessment and levy to support such deficiencies, omissions, errors or mistakes; said supplemental assessment and levy shall be a lien on the lots and lands as aforesaid, shall be payable in the same manner and in the same instalments, shall draw interest at the same rate, and shall be capable of enforcement in the same manner as hereinbefore provided, with respect to the original assessment and levy. Said taxes shall constitute a sinking fund for the payment of the costs of the opening, extending, widening, grading, or any other improvements herein specified, of the street, highway, avenue or alley, on which the property abuts, upon which the same are levied, and shall be used and appropriated to no other purpose than the payment of the costs of said improvements, and any bonds which may be issued as hereinafter provided, until the whole cost of said improvement, and all of said bonds, with interest, shall be fully paid and satisfied.

827. District tax bonds. 20 G. A., ch. 20, § 4. For the purpose of paying the costs of the improvements mentioned and specified in section three hereof [§ 826], and which costs are to be assessed and levied as aforesaid, upon the lots and lands as aforesaid, the council of any such city shall have power and may by ordinance cause to be issued bonds of such city, to be called "Improvement Bonds of District No. —," said bonds to be issued in four series, the first series in the aggregate to be for an amount not exceeding one-fifth of the total cost of the expense of the opening, extending, widening, grading or other improvement as aforesaid of the particular street, highway, avenue or alley, to defray the costs at which said bonds are issued, and to be payable in not exceeding two years from date thereof; the second series to be for a like aggregate amount and payable in not exceeding four years from date thereof; the third series to be for a like aggregate amount and payable in not exceeding six years from date thereof, and the fourth series to be for a like aggregate amount and to be payable in not exceeding eight years from date thereof; all of said bonds to bear not exceeding six per cent. per annum interest, payable annually or semi-annually as said council may provide, with interest coupons attached, to express on their face the name of the street, highway, avenue or alley to defray the costs for which they are issued, and also that the last four instalments of the special taxes and assessments assessed and levied or to be assessed and levied as aforesaid on the lots and lands abutting on the street, highway, avenue or alley so as aforesaid opened, extended, graded, or in any other manner as aforesaid improved, shall be and constitute a sinking fund for the payment of said bonds and interest thereon, and to be used and appropriated to no other purpose until the whole of said bonds with interest thereon shall have been paid and fully discharged. Said bonds shall not be negotiated or sold for less than their par value and may be respectively for amounts ranging from one hundred dollars to one thousand dollars as said council may provide by ordinance. The proceeds arising from said bonds shall be applied exclusively to and appropriated and used for no other purpose than the liquidation of the costs of the improvements as aforesaid to and upon the particular street, highway, avenue or alley, to defray the cost of which said bonds are issued.

828. City bonds. 20 G. A., ch. 20, § 5. Whenever the council of any such city shall deem it expedient they shall have power for the purpose of paying the costs of opening, extending, widening, grading, paving, curbing, guttering, graveling or macadamizing spaces in front of city property and of other property exempt from special taxation, the intersections of any streets, highways, avenues or alleys and the space opposite alleys, to issue bonds of the city to run for not exceeding twenty years and to bear interest payable semi-annually at a rate not exceeding six per cent. per annum, with coupons attached, to be called "City Improvement Bonds," and which shall not be sold for less than par, and the proceeds of which shall be used for no other purpose than paying for the cost of the improvements aforesaid and upon the particular streets, highways, avenues or alleys, the intersections of which and spaces opposite which are improved as aforesaid; *provided*, that no bonds can be issued to pay for any such improvements as aforesaid except when the same become a part of and are necessary to fully complete the improvements as aforesaid of any street, highway, avenue or alley undertaken to be made or made under section three hereof [§ 826].

829. Paving tracks. 20 G. A., ch. 20, § 6. All railway companies and street railway companies in cities of the first class as provided in section one of this act [§ 824], shall be required to pave, or repave between rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails, shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails, up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue or alley is paved upon which the track is laid, or such other material as said council may order. In the event of the neglect or refusal of such railway companies to pave, or repave, or repair as aforesaid, when so ordered and directed as aforesaid by the council of such city, such city shall have power to pave, repave or repair between and outside of said rails as herein required of such railway companies, and the cost and expenses of the same to assess and levy as a special tax upon any of the real estate or personal property of such railway company, within the corporate limits of said city, which tax shall be a lien upon said property, shall become delinquent in sixty days after it is levied, shall draw interest at the rate of seven per cent. per annum, and said city shall have power to enforce the payment of the same in the same manner and by the same means and with and under the same penalties as is provided herein with reference to special taxes upon the abutting property on the streets, highways, avenues or alleys, ordered to be improved as aforesaid, as hereinbefore provided.

830. City may open or grade. 21 G. A., ch. 160, § 2. Any city of the first class organized as such since January first, A. D. 1886 in addition to the requirements of chapter twenty of the laws of the twentieth general assembly of Iowa [§§ 824–829] may provide by ordinance that any part of the expense of opening, widening, extending and grading only of any street, highway, avenue or alley in front of or alongside of abutting property that is, under said act, subject to special assessment therefor shall be paid by the city instead of assessing the whole cost to such abutting property as therein required and in such case the same may be paid for in the same manner as street inter-

sections and spaces in front of city property under section five of said chapter twenty [§ 828] and this section shall be deemed a part of said chapter twenty.

831. Special improvement tax. 21 G. A., ch. 160, § 3. Such cities of the first class organized as such since January first, 1883, for the purpose of paying the city improvement bonds, authorized under section five of said chapter twenty of the laws of the twentieth general assembly [§ 828] or of paying for such improvements themselves and those authorized by section two hereof [§ 830], are hereby authorized and required to levy annually until the same is paid for, a special city improvement tax upon all the property within the city not exceeding three mills on the dollar to be collected the same as other taxes and the money so arising therefrom shall constitute a special fund for the payment of said bonds and interest and improvements to be used and appropriated to no other purpose. In issuing such city improvement bonds in such city under said section five and section two hereof [§§ 828 and 830] such city may make any of the same become due at periods as soon as such levy will provide sufficient funds for the payment of the same and such bonds shall be deemed issued in anticipation of the revenue herein provided for their payment.

832. Diversion of tax. 21 G. A., ch. 160, § 4. Any officer of such city or member of the city council who shall participate in or assist in any diversion of said tax or the moneys collected thereunder to any other purpose than those provided in this act shall be guilty of the crime of embezzlement and be punished accordingly.

833. Paving fund tax. 22 G. A., ch. 12, § 1. All cities of the first class that have been, or may be organized under the general incorporation laws of cities in this state since January first, 1881, shall have power to levy not exceeding five mills on the dollar on the assessed valuation of all taxable property in such cities for the purpose of creating a fund to pay the costs and expenses incurred by such cities in the building of pavement or other city street improvement now authorized by law to be made by cities at the intersections of streets, highways, avenues, alleys or other places when the costs and expenses of such street improvements are not assessable against the fronting or abutting property and such cities may anticipate the collection of said tax and issue city improvement bonds to run for a period not exceeding twenty years and may create a sinking fund to pay the accrued and accruing interest and principal of said bonds at their maturity as the council shall provide by ordinance.

834. Re-assessment of special taxes. 22 G. A., ch. 44, § 1. In cities of the first class and cities organized under special charter, whenever, by reason of an alleged non-conformity to any law or ordinance, or by reason of any omission or irregularity, any special tax or assessment is either invalid or its validity is questioned, the city council may make all necessary orders and ordinances and may take all necessary steps to correct the same and to re-assess and to re-levy the same, including the ordering of work, with the same force and effect as if made at the time provided by law or ordinance relating thereto; and may re-assess and re-levy the same with the same force and effect as an original levy. Whenever any apportionment or assessment is made and any property is assessed too little or too much, the same may be corrected and re-assessed for such additional error as may be proper, or the assessment may be reduced even to the extent of refunding the tax collected.

835. Re-levy and collection. 22 G. A., ch. 44, § 2. Any special tax upon re-assessment or re-levy shall, so far as is practicable, be levied and collected as the same would have been if the first levy had been enforced.

836. Time waived. 22 G. A., ch. 44, § 3. Any provision of any law or ordinance specifying a time when or the order in which acts shall be done in

a proceeding which may result in a special tax, shall be taken to be subject to the qualifications of this act.

837. Legalizing. 22 G. A., ch. 44, § 4. Any and every ordinance or part thereof of any such city heretofore passed in substantial conformity with this act is hereby legalized.

SEWERS IN CITIES OF FIRST CLASS.

838. Construction; districts; tax. 17 G. A., ch. 162, § 1; 21 G. A., ch. 34. All cities of the first class in the state may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed in any one year, two mills on the dollar of the assessed value of the property within such district, or may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

The city may create one sewerage district, comprising all its territory. An ordinance having been duly passed providing for the construction of sewers, the city may, by resolution, exercise the authority, and apply it to any particular sewer. A call of yeas and nays is not essential on passage of such resolution: *Grimmell v. Des Moines*, 57–144.

Sewerage in a populous city is not merely a private matter for the convenience of a few persons, but is a matter of public concern affecting the health and lives of the inhabitants, and a city or town may, in pursuance of law, assess the expense of the construction of a sewer upon abutting property, without regard to the benefits conferred upon such property: *Gatch v. Des Moines*, 63–718.

The ordinance should provide for notice to the property owner and opportunity to appear and object to the assessment on his property: *Ibid.*

The city cannot assess the expense of constructing a sewer upon abutting property belonging to the state: *Polk County Savings Bank v. State*, 69–24.

The construction of one sewer leading through two or more connecting streets may be ordered in one proceeding, and the assessment made upon abutting property for the whole work: *Grimmell v. Des Moines*, 57–144.

Where a city had, prior to the passage of this act, levied a tax for, and commenced the construction of, a sewer, which constitutes a main artery in the system of sewerage of the city, *held*, that it could not change the mode of paying for further improvements, and require the adjacent property to pay the whole expense thereafter to be incurred; and further, *held*, that the legislature could not, by a legalizing act, render valid such improper action of the city: *Independent School Dist. v. Burlington*, 60–500.

Where the resolution of the council ordering a sewer adopts the plat of the engineer by reference thereto, and thus furnishes a means of obtaining precise knowledge of the tax assessed to each tract and individual and the total cost of the sewer, it is sufficiently definite: *Dittoe v. Davenport*, 74–66.

839. Bids. 17 G. A., ch. 162, § 2. It shall be the duty of such city council to require the work of constructing such sewers to be done under contract therefor, to be entered into with the lowest responsible bidder, and bonds with surety for the faithful performance of such work shall be required to be given by the contractors; *provided*, that all bids for such work may be rejected by such council if by them thought to be exorbitant, and new bids ordered.

840. Collection of tax. 17 G. A., ch. 162, § 3. All special tax levied for the construction of sewers under this act shall be payable by the owners personally at the time of such assessment, and shall also be a lien upon the lots and lands so assessed and shall bear such rate of interest, and the said property assessed may be sold for the payment thereof, in the same manner at any regular or adjourned sale or special sale called therefor, with the same forfeitures, penalties and right of redemption and certificates and deeds on such sales shall be made in the same manner and with like effect as in case of

sales for non-payment of the ordinary annual taxes of such cities respectively, as now or hereafter provided by law in respect thereto, or the city council may provide by ordinance for the sale of such assessed property at a special tax sale to be called therefor, after giving notice therefor three consecutive weeks in one of the newspapers published in said city; the last of which publications shall be at least ten days before the day of sale.

841. Mode of assessment. 17 G. A., ch. 162, § 4. Such city council may provide by ordinance for the particular mode of making and returning the assessments hereinbefore authorized, and payment of such assessments may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided for by sections four hundred and seventy-eight, four hundred and seventy-nine and four hundred and eighty-one of the code [§§ 649, 650, 652].

842. Powers under other provisions. 17 G. A., ch. 162, § 5. Nothing in this act contained shall take away, impair or interfere with the powers conferred by section four hundred and sixty-five of the code [§ 624], for the construction of sewers, and payment therefor in whole as therein provided.

843. Cross-sewers. 17 G. A., ch. 162, § 6. The city council shall have power to provide, by ordinance, terms and conditions on which cross-sewers may be attached to, or connected with main sewers; and in cases where sewers have been constructed in whole or in part by special assessment, may pay unto the parties who have been so assessed, the money, or a part thereof charged and collected for the privilege of attaching such cross-sewers.

844. 17 G. A., ch. 162, § 7. *Provided*, that nothing in this section shall be held or taken to repeal, impair or in any manner affect chapter fifty-four, acts of the sixteenth general assembly [§§ 943-947], or any provision thereof.

845. Sewer tax. 20 G. A., ch. 25, § 9. In case the council of any city of the first class that has been or may be so organized since January first, 1881, shall assess the cost, in whole or in part, of the construction of sewers on the adjacent property, it may, instead of making said special tax payable at the time of such assessment, levy the whole of such special tax on said property at one time, and provide by ordinance that the same shall become payable and delinquent as follows, viz: One-fifth in sixty days, one-fifth in two years, one-fifth in three years, one-fifth in four years, and one-fifth in five years after the levy is made. Said special tax shall be payable by the owners of the property on which it is levied at or before the time it becomes delinquent and in the instalments hereinbefore mentioned, and shall be a lien upon the lots and lands so assessed and upon which it is levied, shall draw interest at the rate of seven per cent. per annum from the time of the levy thereof until the same shall be paid or become delinquent whichever shall first happen. The payment of each and every instalment of such tax may be enforced in the same manner, under the same penalties, and by the same methods as is provided in section three or section four of the act to which this is amendatory [§§ 840, 841]: *Provided*, however, that the sale of any property for the non-payment of any instalment as aforesaid shall not be taken or construed as in any manner affecting the validity of the lien on the same for any instalment thereof which may subsequently become delinquent. Said taxes shall constitute a sewerage fund for the payment of the cost of constructing sewers in front, rear or through the property upon which they are levied, and shall be used for and appropriated to no other purpose than the payment in whole or in part, as the case may be, of the cost of constructing said sewers so located or any bonds which may be issued as hereinafter provided.

846. Bonds. 20 G. A., ch. 25, § 10. Whenever any such city exercises the powers granted in section nine hereof [§ 845], it may, for the purpose of

anticipating the collection of said special taxes, and it may for the purpose of anticipating the collection of any sewerage taxes it has power to levy under section one of the act to which this is supplementary [§ 838], by ordinance cause to be issued its bonds, to be called "sewerage bonds;" said bonds to be issued in four series, each series, in the aggregate respectively, to be for an amount not exceeding the amount of special taxes, as provided in section nine hereof [§ 845] which become delinquent respectively in two, three, four and five years after their levy; and for such further amount as said city may propose to levy and have the power to levy for each of the respective years aforesaid under the provisions of section one [§ 838] of the act to which this is amendatory, on the property within the sewerage district in which said sewer or sewers are to be or have been constructed, the first series to be payable in not exceeding two years from the date of their issue; the second series to be payable in not exceeding three years from the date of their issue; the third series to be payable in not exceeding four years from the date of their issue; and the fourth series to be payable in not exceeding five years from the date of their issue; all of said bonds to bear interest not exceeding six per cent. per annum, interest payable annually or semi-annually, as said council may provide, with interest coupons attached, to express on their face the name of the street, highway, avenue, or alley, on which the sewer is located, to defray the cost of which they are issued, and also that the last four instalments of the special taxes assessed and levied as aforesaid on property abutting on the particular part of the street, highway, avenue or alley on which said sewer or sewers are located, as also the sewerage tax levied, or to be levied, on the property in the sewerage district to defray the cost of the particular sewer or sewers named as aforesaid in said bonds, shall be and constitute a sinking fund for the payment of said bonds and interest; and to be used and appropriated to no other purpose until the whole of said bonds, with interest, shall have been fully paid and discharged. Said bonds shall not be negotiated or sold for less than their par value, and may be respectively for amounts ranging from one hundred dollars to one thousand dollars, as said council may by ordinance provide. The proceeds arising from said bonds shall be applied exclusively to, and appropriated and used for, no other purpose than the liquidation of the costs of constructing the sewer or sewers upon the particular street, highway, avenue or alley, to defray the cost of which said bonds are issued.

847. Other provisions applicable. 21 G. A., ch. 160, § 1. All the provisions of chapter one hundred and sixty-two of the laws of the seventeenth general assembly of the state of Iowa and amendments and acts supplementary thereto [§§ 838–844] shall be applicable to and hereby conferred upon cities of the first class, organized as such since January first, A. D. 1886, notwithstanding the fact that any such city may have, prior to the time of becoming such city of the first class, commenced a general system of sewerage by the levy and expenditure of any tax therefor, under the provision of chapter one hundred and seven of the acts of the sixteenth general assembly of Iowa [§§ 746–748].

848. Additional power. 22 G. A., ch. 6, § 1. All cities of the first class containing according to the census of 1885 a population of over thirty thousand authorized by section one of chapter one hundred and sixty-two of the acts of the seventeenth general assembly [§ 838] to provide by ordinance for the construction of sewers, shall have the power and be subject to the conditions and requirements hereinafter provided.

849. Notice of resolution. 22 G. A., ch. 6, § 2. Whenever cities subject to the provisions of this act shall deem it necessary to construct any sewer the council shall declare by resolution the necessity therefor and shall state the kind, size, location and designate the terminal points thereof and no-

tice for twenty days of the passage of such resolution shall be given not less than two weeks nor more than four weeks in some newspaper of general circulation published in such city and by handbills posted in conspicuous places along the line of the proposed sewer. Said notices shall state the time and place when and where the property owners along the line of said proposed sewer can make objections to the necessity of the construction thereof.

850. Plan and specifications. 22 G. A., ch. 6, § 3. If the council shall thereafter determine to construct such sewer it shall declare the same by resolution stating the kind, size, terminal points thereof and location. The city engineer shall at once file the plans and specifications therefor in the office of the board of public works for public inspection and the proposals for bids and letting the contract shall be in compliance with the provisions of chapter one hundred and sixty-eight, laws of the twenty-first general assembly and chapter one hundred and sixty-two, laws of the seventeenth general assembly and acts amendatory thereto [§§ 838–844 and 859–880].

851. Assessment of cost. 22 G. A., ch. 6, § 4. When the contract is awarded for the construction of said sewer, the board of public works, in connection with the city engineer shall constitute the board of assessors and shall at once proceed to make the assessment on the various lots to be charged therewith in proportion, as nearly as may be to the benefits which in their opinion shall result from such sewer and such lots respectively and file the same with the city council as soon as practicable after the awarding of the contract and in estimating the benefits to result from such sewer no account shall be taken of improvements and each lot shall be considered as wholly unimproved.

852. Publication. 22 G. A., ch. 6, § 5. Before adopting the assessments so made, the council shall publish notice for two consecutive weeks in some newspaper of general circulation in the corporation stating the time and place, when and where said assessments will be confirmed by the city council and if any person object to his assessment he shall file his objections in writing with the city clerk on or before such date and when the assessment is confirmed by the council it shall be complete and final.

853. Vote necessary. 22 G. A., ch. 6, § 6. The concurrence of two-thirds of the members of the city council shall be necessary to confirm the assessment made by the board of assessors.

854. Assessment. 22 G. A., ch. 6, § 7. When it shall appear to the council that a special assessment is invalid by reason of informality or irregularity in the proceedings or when any assessment shall be adjudged to be illegal by a court of competent jurisdiction, the council may order a re-assessment and the proceedings upon a re-assessment shall be conducted in the same manner as provided in respect to the original assessment.

855. Limit. 22 G. A., ch. 6, § 8. There shall not be assessed to the lots or land adjacent to the line of any sewer an amount in excess of three dollars per lineal foot, and whenever any assessment shall be made to the limit herein prescribed and the board of assessors and city council shall determine that certain lots or land adjacent to the line of such sewer is not benefited in whole or in part, the council shall order and deliver to the contractor a warrant drawn on the sewer fund for the amount that cannot be assessed on the property not benefited.

856. 22 G. A., ch. 6, § 9. Chapter one hundred and sixty-six, laws of the twenty-first general assembly, the same being entitled, "An act supplementary to chapter one hundred and sixty-two of the laws of the seventeenth general assembly," is hereby repealed.

857. Tax. 22 G. A., ch. 7, § 1. All cities of the first class that have been organized under the general incorporation laws of the state since the first day

of January, 1881, shall have power to levy a tax not exceeding five mills on the dollar of the assessed valuation of all taxable property within such cities for the purpose of creating a fund to pay the cost and expense incurred by such cities for the purpose of constructing sewers at the intersections of streets, highways, avenues, alleys or other places, where the costs and expenses incurred are not assessable against the fronting, abutting, or adjacent property as now provided by law, and to enable such cities to make such sewer improvements at intersections as aforesaid or to include and pay a part of the costs assessable against private property as is provided in section one of chapter one hundred and sixty-two, acts of the *twenty-ninth* [seventeenth] general assembly [§ 838].

858. Bonds. 22 G. A., ch. 7, § 2. Such cities shall have the power to anticipate said sewer tax and the collection of the same and to issue city sewerage bonds based on the anticipated levy and collection of said tax, which said bonds when so issued, to run for a period not exceeding twenty years and to create a sinking fund for the payment of said bonds with accrued and accruing interest and principal by the levy of such taxes therefor as now authorized by law a part of the revenue of which to be appropriated for the payment of said bonds out of said sinking fund as the city council shall provide by ordinance.

CONTRACTS, BONDS AND ASSESSMENTS FOR PAVING, CURBING AND SEWERING IN CERTAIN CITIES OF THE FIRST CLASS.

859. What cities. 21 G. A., ch. 168, § 1. All cities of the first class in this state, containing according to any legally authorized census or enumeration a population of over thirty thousand shall have the powers and be subject to all of the provisions of this act.

860. Contracts. 21 G. A., ch. 168, § 2; 22 G. A., ch. 5, § 1. When the council of any such city shall direct the paving, curbing or sewering of any street or streets the board of public works of such city shall make and enter into contracts for furnishing materials and for curbing and paving or sewering, as the case may be, of any such street or streets either for the entire work in one contract or parts thereof in separate and specified sections as to them may seem best; *provided* that no work shall be done under any such contract until a certified copy shall have been filed in the office of the city clerk.

861. Proposals. 21 G. A., ch. 168, § 3; 22 G. A., ch. 5, § 2. All such contracts shall be made by the board of public works in the name of the city upon such terms of payment as shall be fixed by the council and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than three weeks in at least two newspapers of said city which notice shall state the kind and amount of work to be done and specify the different kinds of material for which bids shall be received.

862. Bond of contractor. 21 G. A., ch. 168, § 4. Each contractor shall be required to give a bond to the city with sureties to be approved by the council for the faithful performance of the contract, and the council shall have power to institute suit in the name of the city to enforce all such contracts.

863. Duty of city engineer. 21 G. A., ch. 168, § 5; 22 G. A., ch. 5, § 3. It shall be the duty of the city engineer to furnish the board of public works with proper grades and lines and see that the work is done in accordance with the ordinances and regulations of the city with respect to such grades and lines.

864. Bonds. 21 G. A., ch. 168, § 6; 22 G. A., ch. 5, § 4. For the purpose of providing for the payment of the cost and expense of any such improvement or improvements, the council shall be authorized from time to time, as

the work progresses, upon estimates to be furnished by the board of public works, to make requisitions upon the mayor of the city for the issue of bonds of the city in such sums as shall be deemed best, and it shall be the duty of the mayor to make and execute bonds accordingly in the name of the city to an amount not exceeding the amount of the contract price of any such improvement, and the incidentals attending the same. Said bonds to bear the name of the street or streets improved, to be signed by the mayor, and countersigned by the city clerk, and sealed with the corporate seal of the city, and shall all bear the same date, and be payable seven years after date, and redeemable at any time at the option of the city, and shall bear interest at the rate of not exceeding six per cent. per annum, payable semi-annually.

865. Issuance. 21 G. A., ch. 168, § 7. When said bonds shall have been issued by the mayor, and sealed with the corporate seal of the city, they shall be delivered to the clerk, who shall register them in a book to be kept for that purpose, and countersigned and deliver them to the committee or person authorized to negotiate the same, taking receipts therefor.

866. Negotiation. 21 G. A., ch. 168, § 8. Said committee or person authorized to negotiate said bonds shall negotiate the same in such manner as they or he may think best, and for such prices as may be obtainable for the same, not less than par, and shall pay all moneys received therefrom to the treasurer of the city, and report to the city clerk the number of bonds sold, and the amount received therefor, and before delivering the same to the purchaser they shall be countersigned by the said committee or other person so authorized to negotiate the same.

867. Proceeds. 21 G. A., ch. 168, § 9. All moneys received by the city treasurer from the sale of said bonds, shall be kept by him in a separate fund and paid out on requisition of the council, accompanied by affidavit of the city engineer, that work has been done or material furnished to the amount of said requisition and that it is required for payment of the same, and all moneys received by said treasurer shall be kept in the same manner, and subject to all the regulations regarding other money of the city, except that he shall keep a separate account of the same and all interest received upon the same shall be credited to such fund.

868. Assessment against property. 21 G. A., ch. 168, § 10; 22 G. A., ch. 5, § 5. When any such improvement shall have been completed it shall be the duty of the council to ascertain the entire amount of the bonds sold and the interest thereon to the date of completion which shall be taken to be the costs of such improvement and the entire amount of such cost, including the intersection of streets and alleys shall then be assessed by the board of public works and city engineer, constituting the board of assessors, upon the property fronting or abutting upon said improvement: *provided* that nothing in this act shall be construed as authorizing the council to assess a greater amount than three dollars per lineal foot on account of the construction of sewers: and *provided* further that the cost of any such improvement shall not be assessed on property belonging to the state.

869. Notice. 21 G. A., ch. 168, § 11; 22 G. A., ch. 5, § 6. The board of public works shall cause a plat of the street or streets on which any improvement shall be made showing the separate lots of ground and the name of all such owners and the amount assessed against each lot or piece of ground and shall give two weeks' notice in two newspapers of the city and by handbills posted in conspicuous places on the line of such street or streets of the time and place where for the period of twenty days thereafter the same may be seen for the correction of errors, and after having corrected such errors as may be made known to them, said board shall file the same in the office of the city clerk and shall deliver a copy of said plat and schedule to the auditor of the county in which said city is situated.

870. Collection. 21 G. A., ch. 168, § 12; 22 G. A., ch. 5, § 7. Said assessment shall be placed on the tax duplicate or list of the county and shall be payable at the office of the county treasurer in seven equal instalments with interest at six per centum from the date of the assessment upon the unpaid portion thereof, the first of which with interest on the whole amount at six per cent. shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is placed on said duplicate and the others annually thereafter, and said assessment shall be collected in the same manner and bear the same penalties when delinquent as now provided by law for the collection of other taxes.

871. Lien. 21 G. A., ch. 168, § 13. Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid and shall have precedence over all other liens excepting ordinary taxes and shall not be divested by any judicial sale, *provided* that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet.

872. Payment in instalments. 21 G. A., ch. 168, § 14. The owner of any property against which an assessment shall have been made for the cost of any such improvement, shall have the right to pay the same in full with interest thereon at six per cent. from the time said assessment was made, or after having paid one or more of said seven instalments and interest, he may at any time pay in full the balance of his assessments remaining unpaid with interest thereon at six per cent. from the time when the preceding payment became due, and such payment in full shall satisfy and discharge the lien upon said property, and any owner of such property who shall divide the same so that the feet front on any such improvement are divided into separate lots or parcels may discharge the lien in like manner upon any one or more of such lots or parcels, by payment of the amount unpaid thereon calculated by the ratio of feet front of such lot or lots or parcel or parcels to the feet front of the whole lot.

873. Bonds paid. 21 G. A., ch. 168, § 15. All moneys received from assessments shall be appropriated to the payment of the interest and redemption or payment of the bonds, or of the certificates hereinafter provided for as the case may be that shall be issued for said improvements, and if any interest shall become due on any of said bonds, when there is no fund from which to pay the same, the council shall be authorized to make a temporary loan for the payment thereof.

874. Certificates. 21 G. A., ch. 168, § 16. If by reason of the prohibition contained in section three, article eleven of the constitution of this state it shall at any time be unlawful for any such city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments made against an owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected every such assessment embraced in any such certificate, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

875. Waiver of objections. 21 G. A., ch. 168, § 17. Whenever the owner or owners of any lot or lots, the assessment or assessments against

which is or are embraced in any such certificate shall severally promise and agree in writing endorsed on such certificate that, in consideration of having the right to pay his or their assessment or respective assessments in instalments, they will not make any objection of illegality or irregularity as to their respective assessments, and will pay the same with interest thereon at such rate not exceeding six per cent., as shall by ordinance or resolution of the city council of such city be prescribed and required, he or they shall have the benefit and be subject to all of the provisions of this act authorizing the payment of assessments in annual instalments relating to the lien and collection and payment of assessments so far as applicable.

876. Assessment collectible. 21 G. A., ch. 168, § 18. Any owner of any lot or lots assessed for payment of the cost of any such improvement who will not promise and agree in writing as provided by section seventeen hereof [§ 875], shall be required to pay his assessment in full, when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

877. Mistake in description. 21 G. A., ch. 168, § 19. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien.

878. When improvements authorized. 21 G. A., ch. 168, § 20. The council of any such city shall not have the right to authorize any improvement under this act unless the owners of two-thirds of the feet front of the property abutting upon the street or streets to be improved shall petition therefor, or unless the same shall be voted for by three-fourths of the members of the council.

879. Part of street. 21 G. A., ch. 168, § 21. Any part or section of any street may be improved under this act as well as an entire street.

880. 21 G. A., ch. 168, § 22. All acts and parts of acts in conflict with this act are hereby repealed.

BOARD OF PUBLIC WORKS.

881. How constituted. 22 G. A., ch. 1, § 1. There shall be established and created in every city of the first class, having a population according to any legally authorized census of more than thirty thousand inhabitants, a board of public works, which shall consist of two members, residents of such city, to be appointed by the mayor, by and with the approval of the city council, on or before the first Monday of April, 1889. One member shall be appointed for the term of two years, and the other for the term of three years, and they shall hold their office until their successors are duly appointed and qualified, and their successors shall be appointed in the manner hereinbefore provided for the term of three years. The mayor shall fill all vacancies occurring in said board by and with the approval of the city council but no member of the city council or city officer shall be appointed a member of said board.

882. Salary. 22 G. A., ch. 1, § 2. The salary of each member of such board of public works shall be not less than fifteen hundred dollars and not more than twenty-five hundred dollars per year, as may be fixed by the city council, but the salary shall not be reduced during the term of office of any member. Each member of said board before entering upon the discharge of his duties, shall take an oath to faithfully discharge the duties of his office, and enter into a bond with the city with two or more good and sufficient sureties to be approved by the city council, in a sum not less than twenty thousand dollars. The conditions of said bond shall be for the faithful performance of the duties of such members, and no member of said board shall

ever be directly or indirectly interested in any contract entered into by them, on behalf of such city, nor shall they be interested either directly or indirectly in the purchase or sale of any material to be used or applied in or about the uses and purposes contemplated by this act.

883. Consultation with city engineer. 22 G. A., ch. 1, § 3. Said board shall consult the city engineer of such cities in regard to the plans, specifications and advisability of making any improvements, or doing any work contemplated by the provisions of this act, and the city engineer shall furnish said board, from time to time, estimates of the cost of material for any improvement to be ordered or advertised for by said board together with the plans and specifications therefor.

884. Contracts. 22 G. A., ch. 1, § 4. Contracts for all public improvements made by said board of public works, shall be drawn by the city solicitor of such cities and he shall charge not less than three nor more than ten dollars for each contract, and said money shall be collected by him from the contractors, and pay the same monthly to the city treasurer for the use of such cities, and said charge shall include a copy of said contract and specifications to be furnished to such contractors.

885. Bids. 22 G. A., ch. 1, § 5. Said board of public works shall advertise for bids and make all contracts on behalf of the city, for all material and work for public improvements in excess of two hundred dollars, whenever the same shall be ordered by the city council, or voted for at some general or special election, by the voters of such cities, and proposals for bids shall be published, at least two weeks, in two of the daily newspapers in such cities, and said publication shall be completed at least two weeks before the making and entering into any contract by said board. The proposals for bids shall state the amount and different kinds of material to be furnished and kind of improvement, and the time and conditions upon which bids shall be received. The board shall have power to reject any or all bids. All such contracts shall be made with the lowest bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. All contracts made and entered into by said board shall be subject to the approval of the city council.

886. For what purposes. 22 G. A., ch. 1, § 6. Said board shall advertise for bids and make contracts for the lighting of streets, alleys and public places of such cities and for the removal of all garbage.

887. Superintend public works. 22 G. A., ch. 1, § 7. Said board shall superintend the performance of all public work, and the erection or construction of all improvements contemplated by this act. It shall approve the estimates of the city engineer, which may be made from time to time, of the cost of work as the same progresses, to accept any work done or improvement made, when the same shall be fully completed, according to contract, subject to the approval of the city engineer, and they shall perform such other duties, as may be devolved upon them by ordinance or resolution of such city.

888. Disapproval of plans. 22 G. A., ch. 1, § 8. Whenever said board shall disapprove of the plans, specifications or estimates furnished by the city engineer, they shall report said fact at once in writing to the city council and state their reasons for such disapproval.

889. What works. 22 G. A., ch. 1, § 9. Said board shall take special charge of the construction, repairing and superintendence of all streets, alleys, highways, sidewalks, public grounds, cleaning streets and alleys, lamps and light for lighting the streets, alleys, highways, parks, public places and public buildings of such cities.

890. 22 G. A., ch. 1, § 10. It shall take special charge of the construction, repairing and superintendence of all paving, sewers, bridges, viaducts, public

buildings and grading of streets and alleys, subject to the approval of the city engineer.

891. Expenditures. 22 G. A., ch. 1, § 11. Said board of public works shall control and direct all expenditures to be made by its department, and sign and draw orders for the same, and all orders given, bills and accounts created by said board of public works, shall first be endorsed by each of the members thereof, and approved by the city council, or they shall state their reasons in writing why they have not endorsed the same, before the same shall be ordered paid.

892. Extra work. 22 G. A., ch. 1, § 12. Said board shall not order any extra work in excess of that contained in any contract, or pay out any money for any extras whatsoever, without submitting and recommending the same to the city council and receiving its authority therefor.

893. Appointing powers. 22 G. A., ch. 1, § 13. It shall have power to appoint agents and employees, subject to the approval of the city council, absolutely necessary for the doing of the work of said board, but such agents or employees shall be actually engaged in the construction or improvement of the public works of such city, and shall not include any assistants, superintendents, book-keepers or secretaries, but said last-named offices shall be filled and duties connected therewith performed by said board of public works, without extra compensation.

894. Plans for improvements. 22 G. A., ch. 1, § 14. It shall require all plans and specifications for all buildings costing over five thousand dollars, according to the estimate of the contractor or builder, to be submitted to them for the joint approval of said board, and the city engineer, and no such building shall be erected until the above requirements have been complied with. It shall require any person before erecting any building or improvement within said city to first obtain a permit from said board of public works, and said board shall charge not more than one mill on the dollar of the cost of the construction of any such building or improvement, to be based on the architect's or builder's estimate, and the money derived and collected by said board for such purpose shall be by them monthly paid to the city treasurer for the benefit of the city.

895. Fire protection. 22 G. A., ch. 1, § 15. Said board shall have the power to require fire-proof roofs to be used on all buildings erected in squares or blocks of such cities, when the outer walls thereof are constructed of non-combustible materials, and to require non-combustible material to be used in the outer walls of all buildings built or erected in such squares or blocks within the fire limits of such cities.

896. Mains. 22 G. A., ch. 1, § 16. It shall have power and be required by and with the advice of the city engineer to superintend the laying of all water, gas, and steam-heating mains and all connections therefor, and laying of telephone, telegraph, district telegraph and electric wires in the manner provided by the ordinances of such city.

897. Fire-escape. 22 G. A., ch. 1, § 17. It shall be the duty of such board to regulate the size, number and manner of construction of fire-escapes, doors and stairways of theaters, tenement houses, audience rooms and all public buildings, whether now built or hereafter to be built, used for the gathering of a large number of people, so that there may be convenient, safe and speedy exit in case of fire.

898. Semi-annual report. 22 G. A., ch. 1, § 18. Said board shall on the first day of April and the first day of December in each year, and at the expiration of the term of office of any member of said board, submit a full, complete and detailed statement to the city council of all work done by it, giving the amount of expenditures, and the names of the persons who have

received any pay on account of such public work, and the amount of such pay, and for what the same was paid, and the number of permits issued, and the amounts received therefor. Such report shall further state that since the last report no member of said board has been directly or indirectly interested in any contract let by said board, or work ordered or superintended by them; that they have not been interested in the sale or purchase of any material used in the construction of said work or improvements, and that they have not received, or expect to receive any presents or compensation from any contractor, or other person interested in said work or improvement, and said report shall be duly sworn to by each member of said board.

899. Record. 22 G. A., ch. 1, § 19. Said board shall keep a full and complete record and copies of all contracts, plans, maps, specifications, plats, and record of every kind whatsoever, growing out of any work or improvement made or superintended by said board, and the number of all building permits issued, and the location and cost of such buildings and improvements, and shall keep a full account of all expenditures made by it since its last report. No member of said board shall purchase any material of any kind whatsoever, without giving a written order therefor, signed by at least one member of said board.

900. Removal of members. 22 G. A., ch. 1, § 20. Any member of such board may at any time be removed from office by a vote of two-thirds of the city council for sufficient cause, and the proceedings in that behalf shall be entered in the records of the council; *provided* that the council shall previously cause a copy of the charges against such member or members sought to be removed to be served upon him or them, together with a notice of the time and place of hearing the same at least ten days previous to the time assigned and opportunity to be given him or them to make his or their defense.

901. Office. 22 G. A., ch. 1, § 21. Said board shall be provided with a suitable office with fuel, lights, stationery, apparatus, utensils, etc., at the expense of the city.

902. Further powers. 22 G. A., ch. 1, § 22. Said board shall have such further powers and perform such duties as the city council may lawfully from time to time prescribe by ordinance not inconsistent with the provisions of this act.

AMENDMENT OF SPECIAL CHARTERS.

903. Mode of procedure. 548. On the presentation of a petition signed by one-fourth of the electors, as shown by the vote at the next preceding charter election, of any city or town acting under a special charter or act of incorporation, to the governing body thereof, asking that the question of the amendment of such special charter or act of incorporation be submitted to the electors of such city or town, such governing body shall, immediately, propose sections amendatory of said charter or act of incorporation, and submit the same, as requested, at the first ensuing charter election. At least ten days before such election, the mayor of such city or town shall issue his proclamation setting forth the nature and character of such amendment, and shall cause such proclamation to be published in a newspaper published therein; or, if there be none, he shall cause the same to be posted in five public places in such city or town. On the day specified, the amendment shall be submitted to the electors thereof for adoption or rejection, and the form of the ballots shall be "for the amendment," or "against the amendment." [R., § 1141.]

This provision allowing cities to amend their charters, *held* not in conflict with the constitution, article 3, section 30, forbidding local or special laws for the incorporation of cities and towns: *Von Phul v. Hammer*, 29-222.

904. Proclamation. 549. If a majority of the votes cast is in favor of said amendment, the mayor, or chief officer, shall issue his proclamation ac-

cordingly; and the said amendment shall thereafter constitute a part of said charter. [R., § 1142.]

905. Submission at special election. 550. The legislative body of said city or town, may submit any amendment to the vote of the people as aforesaid at any special election; *provided*, one-half the electors as aforesaid petition for that purpose, and the proceedings shall be the same as at the general election. [R., § 1143.]

STATUTES APPLICABLE ONLY TO CITIES UNDER SPECIAL CHARTER.

906. Statutes prior to code. 551. All acts and parts of acts passed subsequent to the fourth day of July, A. D. 1858, and prior to the taking effect of this code, relating to cities of the first and second class and incorporated towns, or to any or either of said classes of municipal corporations, and applicable, both to such corporations as are acting under special charter, and to such as are incorporated under the general act of which this chapter is an amendment, are repealed by the code only so far as they affect the latter, and not as they affect corporations acting under special charters. All rights, powers, privileges, duties, directions, and provisions whatever, contained in and enacted by such acts and parts of acts, shall remain in full force and effect so far as municipal corporations acting under special charters are concerned, and the provisions of this chapter shall not apply to any city or town incorporated prior to the eighteenth day of July, A. D. 1858, unless the same be adopted as hereinbefore provided.

This section does not abrogate the last clause of § 580, making that section applicable to cities acting under special charters: *Burlington v. Leebrick*, 43–252.

Applied: *Keokuk v. Dressell*, 47–597, 589.

907. Severance of territory. 17 G. A., ch. 117, § 1. When any city, incorporated under a special charter, and having, according to the returns of the census taken under and by authority of the state of Iowa in the year 1875, a population of not less than ten thousand, nor more than twelve thousand inhabitants, shall desire to have any portion of the territory embraced within its limits severed from or stricken out of the limits of such city, the city council of said city may, upon a vote of two-thirds of the whole number of members of such council, present to the circuit [district] court of the county in which such city is situated a petition setting forth the facts and describing the territory that is desired to have severed, with the names of each overseer of any portion of such territory, so far as shown by the assessment list of such city, which petition shall have attached thereto a map or plat of such territory. A notice of the filing of such petition shall be served by publication in one of the daily newspapers published in such city, for the period of four weeks prior to the meeting of the circuit [district] court in which said petition is filed. And the city shall be plaintiff, and said overseers defendants, and issues joined, and the cause tried in the same manner as other causes so far as applicable, except that no judgment for costs shall be rendered against the defendants. If the court finds the allegations of the petition to be true and that justice and equity require that said territory, or any part thereof, should be severed from such city, a decree shall be entered accordingly, and from the time of entering such decree the territory therein described shall be severed from and no longer be a part of such city.

908. Additional powers. 21 G. A., ch. 93, § 1. Sections four hundred and fifty-four to four hundred and sixty-three inclusive [§§ 613–622], and section three thousand seven hundred and twenty of the code of Iowa, 1873 [§ 4971], and all the provisions of chapter eighty-nine of the nineteenth general assembly [§§ 731–738] are hereby made applicable to the cities acting

under special charters, the same as if such cities were therein specially enumerated.

909. Cumulative. 21 G. A., ch. 93, § 2. Nothing in section one of this act [§ 908] shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charters but wherever authority on any of the subjects mentioned in foregoing laws is now in existence the provisions of said section shall be deemed merely cumulative thereto.

910. Election of officers. 21 G. A., ch. 93, § 3; 22 G. A., ch. 27. All cities organized under special charters are hereby authorized to provide by ordinance for the election of mayor and city marshal, recorder, assessor, treasurer, collector, auditor and city attorney for such terms as the city council may deem expedient. *Provided*, that no such term of office shall exceed two years.

911. Wood or lumber yards. 21 G. A., ch. 93, § 4. Cities organized under special charters are hereby authorized to prohibit, or regulate, the piling or depositing of any kind of wood, lumber, or timber upon any lot or property within the city limits within a distance of one hundred yards of any dwelling-house.

912. Repairing dangerous building. 21 G. A., ch. 93, § 5. Cities organized under special charters, are hereby authorized to provide by ordinance, for the repair of any building which is dangerous, or which may be liable to fall, and to levy and collect a special tax, against the property and owner thereof for the expense thereof as other special taxes are levied and collected.

913. Prohibiting dogs. 17 G. A., ch. 25, § 1. All cities existing and acting under special charters, which do not now have the powers herein enumerated, shall have power to regulate, restrain, license or prevent the running at large of dogs within said cities, and to require dogs to be kept upon the premises of the owners thereof, unless licensed to run upon streets, alleys, and other places other than the premises of the owner, and to provide for the destruction of the same when found in said cities contrary to and in violation of the provisions of any ordinance or by-laws passed pursuant to the powers herein granted.

914. Mayor to sign ordinances. 22 G. A., ch. 2, § 1. The provisions of chapter one hundred and ninety-two of the acts of the twentieth general assembly [§§ 710–713] relating to the powers and duties of mayors of cities of the first and second class, shall be and are hereby made applicable to cities organized under special charters.

915. Election of city marshal. 18 G. A., ch. 24, § 1. All cities in this state organized and existing under special charters, shall have power to provide by ordinance for the appointment of a city marshal by the council of such city, or for the election of such officer by the electors thereof, or may dispense with such officer, and confer the duties pertaining thereto upon any other officer or person.

916. City assessor. 16 G. A., ch. 90, § 1. The qualified electors of all cities organized and existing under special charters, shall, at their regular annual election, elect one city assessor, who shall hold his office for the term of one year and until his successor is elected and qualified.

917. Additional assessor. 20 G. A., ch. 74, § 1. The qualified voters of all cities organized and existing under special charters having a population of not less than twelve thousand nor more than thirteen thousand as shown by the census of Iowa 1880 shall, at their regular annual election, in addition to the city assessor elected in accordance with chapter ninety of the acts of the sixteenth general assembly [§ 916], also elect an assessor whose duty it shall be to assess the property within said city, for state and county purposes,

in the manner provided by law. Such assessor shall hold his office for the term of one year from the first day of January next ensuing after their election.

918. Equalization. 20 G. A., ch. 74, § 2. The assessment made as aforesaid shall be equalized by the city council of such city, who shall have the same powers in relation thereto as are delegated by law to the township trustees.

919. Policemen. 22 G. A., ch. 23, § 1. In all cities in this state organized under special charters all policemen shall be appointed and may be removed by the mayor of such city.

920. Fire department. 21 G. A., ch. 171, § 1. All cities acting under special charter, are hereby authorized in addition to the taxes now authorized by law, to levy and cause to be collected a special tax on the taxable property of such cities, sufficient to pay the expense of organizing, keeping and maintaining a paid fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor, *provided*, however, that said tax shall not exceed the sum of two mills on the dollar in any one year.

921. Improvements. 22 G. A., ch. 14, § 1. All cities in this state organized and existing under special charters, are hereby vested with all the power and authority conferred by chapter twenty of the acts of the twentieth general assembly of the state of Iowa [§§ 824–829] upon cities of the first class therein named.

922. Cumulative. 22 G. A., ch. 14, § 2. Nothing in section one of this act [§ 921] shall be construed or considered as repealing any law now in existence granting authority to any cities incorporated under special charter but whatever authority upon any of the subjects in the foregoing law, is now in existence shall be deemed cumulative to the provisions of said section one hereof.

923. Railway tracks in streets. 18 G. A., ch. 96, § 1. Section four hundred and sixty-four of the code of 1873, as amended by chapter six of the public laws of the fifteenth general assembly [§ 623], shall be applicable to cities and towns organized and acting under special charters, and such cities and towns shall have all the powers conferred by said section on cities and towns incorporated under the general incorporation law.

924. Bridges over boundary rivers. 21 G. A., ch. 98, § 1. The provisions of an act passed at the present session of this general assembly, entitled "An act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa" [§§ 751–754], shall apply to cities incorporated and acting under special charters as well as to cities incorporated under the general incorporation of law, and wherever the words city clerk are used in said act they shall be construed and understood to mean city recorder in any case where a city has not a city clerk but has a city recorder.

925. Public grounds for school purposes. 18 G. A., ch. 80, § 1. All special chartered cities or towns, having a population not exceeding five thousand inhabitants, situated on the Mississippi or Missouri rivers, having within their limits public grounds heretofore set apart or dedicated for levee or warehouse purposes, and in which the use of such grounds for such purposes has ceased or been abandoned, may use such grounds for school purposes, and the city council or other governing body of such city or town may authorize the use of such grounds by any school district on such terms and conditions as said council or governing body may determine.

926. Filling or draining lots. 19 G. A., ch. 90, § 1. All cities acting under special charters shall have power to cause any lot or piece of land within their limits, on which water at any time becomes stagnant, to be filled up or

drained in such manner as may be directed by a resolution of the city council, and the owner, or his agent, of such lot or piece of land shall, after service of a copy of such resolution, or after a publication of the same in some newspaper of general circulation in such city for two consecutive weeks, comply with the directions of such resolution within the time therein specified, and in case of a failure or refusal so to do it may be done at the expense of such city, and the amount of money so expended shall be a debt due from the owner of said lot or piece of land to said city, and shall also be a lien on said lot or piece of land from the time of the adoption of said resolution.

927. Special assessment. 19 G. A., ch. 90, § 2. Any such city may, in addition to the means provided by section one, of this act [§ 926], if by ordinance it so elects, cause the expense of such filling to be levied as a special tax on such lot or piece of land, and may collect the same by tax-sale in such manner as may be provided by such ordinance.

928. Change of grade. 16 G. A., ch. 116, § 8. When the grade of any street or alley shall have been established, and any person shall have built or made improvements on such streets or alley according to the established grade thereof, and such city shall alter said established grade in such a manner as to injure or diminish the value of said property, said city shall pay to the owner or owners of said property so injured the amount of such damage or injury.

929. Damages assessed. 16 G. A., ch. 116, § 9. Said damage or injury shall be assessed by three commissioners, who shall be disinterested freeholders, to be appointed by the city council. They shall, before entering upon their duty, be sworn to execute the same according to the best of their ability. Before entering upon their duty the city shall cause notice to be given, which notice shall be signed by the commissioners and published for three weeks in one or more newspapers printed in such city, of the time and place of their meeting for the purpose of viewing the premises and making their assessments. They shall view the premises, and, in their discretion, receive any legal evidence, and may adjourn from day to day; either one of whom shall have the power, in the presence of the others, to administer an oath or oaths to any witness or witnesses to be examined before them.

930. Confirmed, appeal; costs. 16 G. A., ch. 116, § 10. When the appraisement shall be completed the commissioners shall sign and return the same to the city council within thirty days of their appointment. The city council shall have power, in their discretion, to confirm or annul the appraisement, and if annulled, all proceedings shall be void; but if confirmed, an order of the confirmation shall be entered. Any person interested may appeal from the order of confirmation to the [circuit or] district court of the county in which such city is situated, by notice in writing to the mayor, at any time before the expiration of twenty days after entering the order of confirmation. Upon the trial of the appeal, all questions involved in the proceedings, including the amount of damages shall be open to investigation. The cost of any proceedings incurred prior to the order of such city council confirming or annulling the appraisement, shall in all cases be paid by such city.

931. Removal of commissioners. 16 G. A., ch. 116, § 11. The city council shall have power to remove commissioners, and from time to time appoint others in the place of such as may be removed, refuse, neglect, or be unable from any cause to serve.

932. Improvement of alleys. 16 G. A., ch. 116, § 12. So much of section one, chapter fifty-one, acts of the fifteenth general assembly [§ 625] as requires cities to provide by ordinance for the improvement of alleys after presentation of petition by owners of property to be assessed, is hereby repealed, and such cities organized under special charters, may provide by ordinance how such improvements shall be made, and thereafter may order any

alley to be improved, graded or macadamized, by resolution passed by the affirmative vote of two-thirds of such council, and on voting on such resolution the yeas and nays shall be recorded.

933. Condemning property. 16 G. A., ch. 116, § 13. All property taken and condemned by virtue *or* [of] any power heretofore conferred or herein granted may be so taken and condemned and such power may be exercised and pursued without resorting to proceedings in court in the first instance to enforce the same, anything in any law to the contrary notwithstanding.

934. Transient merchants. 16 G. A., ch. 116, § 14. The city council of any such city may regulate and license sales by transient merchants, bankrupt and dollar stores and the like. *Provided*, that the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors, or other persons, required by law to sell real or personal property.

935. Annual tax; road tax. 16 G. A., ch. 116, § 15. The city council of all cities acting under special charters, with a population of not more than fifteen thousand inhabitants, as shown by the last state census, shall have power to levy an annual tax of not to exceed three per cent. of the assessed value of all taxable property within its limits, for the purpose of defraying the annual current expenses of the city, carrying on its municipal affairs and paying its bonded indebtedness; *provided*, that no other or greater assessment shall be made in any one year than the amount herein authorized, anything in any law to the contrary notwithstanding; while all other cities acting under special charters may levy the taxes now authorized by law, and when such city constitutes a road district, may levy a road tax in addition to the road tax now allowed by law of two mills on the dollar of the assessed valuation, which road tax shall in no case exceed five mills; *provided*, however, the city council may provide by ordinance that all property lying within the corporate limits of any city acting under a special charter, and which is not now subject to tax for city purposes, by reason of the said property being used for agricultural, horticultural or gardening purposes, shall be subject to a road tax not exceeding the sum of forty cents for each one hundred dollars of the valuation thereof, for the purpose of keeping in repair the roads, streets and bridges lying within that part of any such city where the property is not subject to taxation for city purposes.

936. Collection. 16 G. A., ch. 116, § 16. When, by the provisions of special charters, taxes or revenue of any kind are required to be collected by the marshal or any other designated officer, the city council of any such city shall have the power to provide by ordinance for the collection of such taxes or revenue, and the discharge of all other duties relating thereto by any other officer or person.

937. Numbering houses. 16 G. A., ch. 116, § 17. Cities acting under special charters shall have power to provide by ordinance for the numbering of houses by the owners or lessees thereof.

938. Drainage. 16 G. A., ch. 116, § 18. All such cities shall have power to require the owner or lessee of any lot or tract of ground extending into, across, or bordering on any hollow or ravine which constitutes a drain for surface water, or a water-course of any kind, who shall by grading or filling such lot or tract of ground obstruct the flow of water through such water-courses, to construct through such lot or land such a drain or passage-way for water as the council may designate, and to enforce the same by proper penalties, or the city may construct such drains at the expense of the owners, and assess the cost thereof on the lots or tracts of ground.

939. Poll tax. 16 G. A., ch. 116, § 19. All such cities shall have power to enforce the payment of poll tax in such manner as it may determine by suit, penalties or otherwise, as may be provided by ordinance.

940. Police power. 16 G. A., ch. 116, § 20. In regard to the police powers, sanitary regulations, and regulations for the prevention and spread of fires, and of contagious diseases, the enumerated powers shall not be construed as a limitation of the general powers.

941. General laws. 16 G. A., ch. 116, § 21. No general law as to powers of cities organized under the general incorporation act, shall in any manner be construed to affect the charter or laws of cities organized under special charters, and while they continue to act under such charters, unless the same shall have special reference to such cities.

See *Bartemeyer v. Rohlfs*, 71-582.

942. 16 G. A., ch. 116, § 22. Section seven, chapter two hundred and thirty-eight, acts of the sixth general assembly of the state of Iowa, approved January twenty-seventh, A. D. 1857, is hereby repealed.

SEWERS IN CITIES UNDER SPECIAL CHARTER.

943. Sewer districts; tax. 16 G. A., ch. 54, § 1. All cities in this state organized and existing under special charters, having a population of not less than ten thousand as shown by the last preceding state census, may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts in such manner as the council may determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed in any one year, two mills on the dollar of the assessed value of the property within such district. Or may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

944. Contract. 16 G. A., ch. 54, § 2. It shall be the duty of such city council to require the work of constructing such sewers to be done under contract therefor to be entered into with the lowest responsible bidder, and bonds with surety for the faithful performance of such work shall be required to be given by the contractors. *Provided*, that all bids for such work may be rejected by such council, if by them thought to be exorbitant and new bids ordered.

945. Special tax. 16 G. A., ch. 54, § 3. All special tax levied for the construction of sewers under this act shall be payable by the owners, personally at the time of such assessment, and shall also be a lien upon the lots and lands so assessed and shall bear such rate of interest, and the said property assessed may be sold for the payment thereof in the same manner at any regular or adjourned sale or special sale called therefor, with the same forfeitures, penalties and right of redemption and certificates, and deeds on such sales shall be made in the same manner and with like effect as in case of sales for non-payment of the ordinary annual taxes of such cities respectively as now or hereafter provided by law in respect thereto, or the city council may provide by ordinance for the sale of such assessed property at a special tax sale to be called therefor, after giving notice therefor three consecutive weeks in one of the newspapers published in said city; the last of which publications shall be at least ten days before the day of sale.

946. Assessment. 16 G. A., ch. 54, § 4. Such city council may provide by ordinance for the particular mode of making and returning the assessments

hereinbefore authorized, and payment of such assessments may, if so directed by said council, be enforced by suit in court, in the manner and by the proceedings provided for by sections four hundred and seventy-eight, four hundred and seventy-nine, and four hundred and eighty-one of the code [§§ 649, 650, 652].

947. Other provisions. 16 G. A., ch. 54, § 5. Nothing in this act contained shall take away, impair, or interfere with the powers conferred by section four hundred and sixty-five of the code [§ 624] for the construction of sewers, and payment therefor in whole as therein provided.

948. Cross-sewers. 16 G. A., ch. 54, § 6. The city council shall have power to provide, by ordinance, terms and conditions on which cross-sewers may be attached to or connected with main sewers; and in cases where sewers have been constructed in whole or in part by special assessment, may pay unto the parties who have been so assessed, the money, or a part thereof charged and collected for the privilege of attaching such cross-sewers.

949. Special provisions. 22 G. A., ch. 8, § 1. All cities in this state organized and existing under special charters having a population of not less than ten thousand nor more than fifteen thousand as shown by the now last preceding state census, shall have power to construct, reconstruct and repair sewers or to authorize the construction, reconstruction and repair of the same.

950. Sewer districts. 22 G. A., ch. 8, § 2. All cities in this state organized and existing under special charters having a population of not less than ten thousand, nor more than fifteen thousand, as shown by the now last preceding state census may provide by ordinance for the construction, reconstruction and repair of sewers or may divide the city into sewerage districts in such manner as the council may determine and pay the cost of the construction, reconstruction and repairing the same out of the general revenue of the city or assess the cost upon the adjacent property or may levy a certain sewerage tax within the sewerage district out of which to pay for the construction, reconstruction and repair of the same, or may pay a part of the cost of such construction, reconstruction and repair out of the general revenue, a part by the assessment of adjacent property and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named.

951. Tax. 22 G. A., ch. 8, § 3. The whole of the sewerage tax to pay for the cost of constructing, reconstructing and repairing sewers in any of the methods provided in the last section may be levied on the property at one time and the city council of any such city may provide by ordinance that such tax shall become payable and delinquent, part in the year in which same shall be levied and other parts in subsequent years, apportioning the same into as many parts and payable in as many years as the city council may by ordinance determine.

952. Contracts. 22 G. A., ch. 8, § 4. In making contracts with contractors for the construction, reconstruction or repair of sewers the contracts promising to pay the contractors may be made in negotiable form and the city may therein agree to levy and order the collection of such tax therefor at such time or times as may have been provided by ordinance and to pay for such construction, reconstruction or repair from the proceeds of such tax when collected.

COLLECTION OF TAXES BY CITIES UNDER SPECIAL CHARTERS.

953. Mode. 16 G. A., ch. 116, § 1. All cities in this state organized and existing under special charters, may provide by ordinance when taxes both general and special shall become delinquent, and the rate of interest which

they shall thereafter bear, which rate shall not exceed twenty-five per cent. per annum; and for the sale of delinquent, special and general taxes, on such terms and at such a rebate of the principal or interest, or both, as the city council may determine; and in the notice required by law to be given it will be sufficient to state the description of the lot or parcel of real estate to be sold for delinquent taxes of the current year, and also the lot or parcel of real estate on which the delinquent taxes for previous years remain due and unpaid, and the amount of taxes delinquent for previous years without naming such previous years, and the amount of interest and costs, if any, against each lot or parcel of real estate, in which may be included special taxes delinquent, at such rate of interest as the city council may determine, not to exceed the rate allowed by law at the time the taxes were assessed, and the total amount of taxes, interest and cost against such lot or parcel of real estate.

954. Sales. 16 G. A., ch. 116, § 2. In all advertisements for the sale of real property for taxes, and in entries required to be made in any manner connected with the assessment or collection of taxes, letters and figures may be used to denote numbers, fractions of numbers, and amounts, as are commonly used in other business transactions, and no irregularity or informality in the advertisement shall affect the legality of any sale, or the title of any property conveyed if it shall appear that said property was subject to taxation for the year or years for which the same was sold, and that the tax was due and unpaid at the time of sale; and in all cases the advertisement shall be sufficient notice to the owners and persons having an interest in or claiming title to any lot or parcel of real estate, of the sale of their property for delinquent taxes, and a failure of the collector to make a personal demand of taxes shall not affect the validity of any sale or the title to property acquired under such sale.

955. Collecting special taxes. 16 G. A., ch. 116, § 3. The city council may provide by ordinance that all special taxes hereafter assessed and levied shall bear the same rate of interest as the annual taxes from and after the same becomes due and delinquent, which rate shall not exceed twenty-five per cent. per annum; and all special taxes remaining due and delinquent at the date when the annual taxes become delinquent, shall be collected at the time and in the manner the annual delinquent taxes are collected, and the same shall be included with the annual delinquent taxes, if any remain delinquent, and the city council may provide by ordinance that all special taxes or assessments which shall become due and delinquent prior to the delinquency of the annual taxes, shall be collected by a sale of the real estate so taxed or assessed specially called therefor, and the kind of notice to be given, and may also provide for the collection of such tax by suit, such as is authorized by sections four hundred and seventy-eight and four hundred and seventy-nine of chapter ten, title four, of the code [§§ 649, 650].

956. Receipt. 16 G. A., ch. 116, § 4. The collector shall in all cases, make out and deliver to the tax payer a receipt, which receipt shall contain the description and assessed value of each lot or parcel of real estate, and the assessed value of personal property; and in case the property has been sold for taxes and not redeemed, the date of such sale and to whom sold, also, the amount of the tax, interest and costs, if any, giving a separate receipt for each year, whereupon he shall make the proper entries of such payments on the books of his office. And the council may provide by ordinance, that no person shall be permitted to pay the taxes of any one year until the taxes for the previous years shall be first paid; and provide that the receipt herein contemplated shall be conclusive evidence that all taxes, and the costs of every kind against the property described in such receipt, are paid to the date of such receipt; and provide that for any failure or neglect on the part of the collector, or on the part of any one acting as a collector, he and his bondsmen

shall be liable to an action on his official bond for the damages sustained by any person or the city through such neglect.

957. Certificate of purchase. 16 G. A., ch. 116, § 5. The collector of taxes, or person authorized to act as collector, shall make, sign and deliver to the purchaser of any real property sold for the payment of any taxes authorized by the provisions of this act, or by any law applicable to cities acting under special charters, a certificate of purchase, which shall have the same force and effect as certificates issued by county treasurers for the sale of delinquent county taxes.

958. Redemption. 16 G. A., ch. 116, § 6; 17 G. A., ch. 174, § 1. Real property sold under the provisions of this act, or by virtue of any power heretofore given, may be redeemed at any time — before the right of redemption is cut off, as hereinafter provided — by payment to the collector, or to the person authorized to act as collector, to be held by him subject to the order of the purchaser on surrender of the certificate, or in case the same is lost or destroyed, on his making affidavit of such fact, and of the further fact that it was not assigned, of the amount for which the same was sold, and twenty per centum of such amount immediately added as a penalty, with ten per cent. interest per annum on the whole amount thus made from the day of sale, and also the amount of all taxes, either annual or special, with interest and cost, paid at any time by the purchaser subsequent to the sale, and a similar penalty of twenty per cent. added as before on the amount of the payment made at any subsequent time, with ten per cent. interest per annum on the whole of such amount or amounts from the day or days of payment. *Provided*, that such penalty for the non-payment of the taxes at any such subsequent time or times, shall not attach unless such subsequent tax or taxes shall have remained unpaid for thirty days after they become delinquent. The collector, or person authorized to act as collector, shall, upon the application of any party to redeem real property sold as aforesaid and being satisfied that such person has a right to redeem the same, and on the payment of the proper amount issue to such party a certificate of redemption, in substance and form as provided by section eight hundred and ninety-one of chapter two, title six, of the code [§ 1376], and shall make the proper entry thereof in the sale book, which redemption shall thereupon be deemed complete without further proceedings. The provisions of section[s] eight hundred and ninety-two, eight hundred and ninety-three, and eight hundred and ninety-four, of chapter two, title six, of the code [§§ 1377–1379], shall so far as the same are applicable, and not herein changed or modified, apply to sales of real estate for delinquent taxes herein contemplated, *provided*, that where the words "treasurer of the county," or "treasurer" are used in said sections, the words "collector of the city," or "collector," or person authorized to act as collector shall be substituted.

959. Deed. 16 G. A., ch. 116, § 7. Immediately after the expiration of ninety days from the date of service of the notice, as prescribed by section eight hundred and ninety-four of chapter two, title six, of the code [§ 1379], the collector or person authorized to act as collector then in office, shall make out a deed for each lot or parcel of land remaining unredeemed, and deliver the same to the purchaser, upon the return of the certificate of purchase. Any number of parcels of real estate bought by one person, may be included in one deed, if required by the purchaser. Deeds executed by the collector or person authorized to act as collector, may be in form substantially as provided by section eight hundred and ninety-six, chapter two, title six, of the code [§ 1381], and shall be signed and acknowledged by him in his official capacity, and all deeds and conveyances hereafter made and executed on account of any general or special tax sales shall have the same force and effect as deeds made by county treasurers for delinquent county taxes, and the purchaser, as well as

the owner of any real property sold on account of such general or special delinquent tax, shall be entitled to all the rights and remedies which are granted and prescribed by sections eight hundred and ninety-seven, eight hundred and ninety-eight, eight hundred and ninety-nine, nine hundred, nine hundred and one, nine hundred and two, nine hundred and three, nine hundred and four and nine hundred and five, of chapter two, title six, of the code [§§ 1382–1391]; *provided*, that wherever the words "county" or "county treasurer" are used, the words "city" or "city collector" or person authorized to act as collector shall be substituted.

960. Taxes certified to auditor. 17 G. A., ch. 99, § 1. The council of each municipal corporation, acting under a special charter may, if they deem it expedient, provide by ordinance for certifying to the auditor of the county in which such city is situated on or before the first Monday of September of each year, or such other time as may be fixed by law for the levy of state and county taxes, the percentage or number of mills on the dollar of tax levied for all city purposes by them on the taxable property within the corporation for the year then ensuing, as shown by the assessment roll of said city for said year, and the county auditor when such certification is made, is required to place the same on the tax books of the county in the same manner as state and county taxes are placed thereon, which tax for municipal purposes shall be collected and paid over to the proper officer by the county treasurer, with the same restriction, powers and liabilities, and under the same regulations as to power, mode and manner of proceeding in every respect as in relation to state and county taxes, and in all things relating to the sale of real and personal property, he is authorized and required to proceed according to the provisions of the statutes regulating the sale of property for delinquent state and county taxes, and in all sales for such or any delinquent taxes for municipal purposes, if there be other delinquent taxes due from the same person, or a lien on the same property, the sale shall be for all the delinquent taxes, and such sales and all sales made under or by virtue of this act, shall be of the same validity, and in all respects be deemed and treated as though such sales had been made for delinquent state or county taxes exclusively.

BOARDS OF HEALTH IN CITIES UNDER SPECIAL CHARTERS.

961. Appointment. 19 G. A., ch. 168, § 1. The mayor and alderma[e]n of each city in this state acting under a special charter shall have full power and authority to appoint a local board of health consisting of three or five members, a majority of whom shall be members of the city council. The mayor of the city shall be *ex officio* one of said members of the board of health, and the chairman thereof. The manner of the appointment and duration of office of said board shall be determined by the ordinances of said city.

962. Physician; clerk; quorum. 19 G. A., ch. 168, § 2. The board of health may appoint a physician to the board, who shall hold office during the pleasure of the board. The city clerk shall be the clerk of said board, unless some other clerk may be provided by the ordinances of said city. The said board of health may regulate all fees and charges of the physician and clerk and all persons employed by them in the execution of the health laws, and the rules, regulations, and orders of said board. A majority of the members of said board shall constitute a quorum for the transaction of all business and the exercise of the powers conferred upon said board.

963. Reports. 19 G. A., ch. 168, § 3. It shall be the duty of such clerk and physician to report at least once a year to the state board of health the proceedings of such board, and such other facts as may be required, on blanks in accordance with instructions received from the state board. They shall also make special reports whenever required so to do by the state board.

964. Rules and regulations. 19 G. A., ch. 168, § 4. Said local board of health may make such regulations, rules, and orders respecting nuisances, sources of filth, and cases of sickness within their jurisdiction, and on any boats in their ports and harbors, and for the prevention of nuisances and the preservation of the public health, as said board may judge necessary for the public health and safety.

965. Punishment of violations. 19 G. A., ch. 168, § 5. Said cities shall have the power and may provide by ordinance for the punishment by fine and imprisonment of any person who shall knowingly violate or fail to comply with any rule, regulation, or order of such local board of health, but the fine shall not exceed one hundred dollars, or the imprisonment thirty days. The prosecutions for the violation of any rule, regulation, or order of such board of health shall be in the name of the city appointing such board of health; and shall be conducted in the same manner and before the same tribunals as other prosecutions for the violation of other ordinances of such city.

966. Abatement of nuisances. 19 G. A., ch. 168, § 6. Any such board of health may order the owner or occupant of any property, place, or building, at his own expense, to remove or abate any nuisance, source of filth, or cause of sickness found on such property, within twenty-four hours, or such time as is deemed reasonable, after personal notice shall have been served upon such owner or occupant; and said board of health may, in its discretion, specify in its notice the manner of such removal or abatement of said nuisance, cause of sickness, or source of filth, and if such owner or occupant neglects to comply with such order he may be punished in accordance with the provisions of section five hereof [§ 965].

967. Abatement by board. 19 G. A., ch. 168, § 7. Whenever the owner or occupant fails to comply with such order, said board may cause the nuisance, source of filth, or cause of sickness to be removed, and all expenses incurred thereby shall be paid by the owner, occupant, or other person who caused or permitted the same to be, and the same shall be a lien upon the said property whereon said nuisance, source of filth, or cause of sickness existed. And the said expenses may be recovered and the lien enforced by a civil action in the name of said city in any court of competent jurisdiction.

968. Action without notice. 19 G. A., ch. 168, § 8. Whenever the owner or occupant of such property, place, or building shall not be found in said city, or whenever the said board of health may deem immediate action necessary, the said board may, without notice to such owner or occupant, immediately proceed to remove said nuisance, source of filth, or cause of sickness, and the expense thereof shall be a lien upon such property, place, or building, and the same may be enforced in any court having jurisdiction by an action in the name of the city.

969. Prevention of nuisances. 19 G. A., ch. 168, § 9. Whenever any person or persons are engaged in a work, or doing things, or threatening to do things which, in the opinion of the board of health, will result in a nuisance, or in danger to the public health, the said board of health may order said work or the doing of such things to be discontinued, or not to be done, and in case any such person or persons shall fail to comply with any such order after personal service of a notice thereof, such person or persons may be proceeded against and punished under the provisions of section five hereof [§ 965].

970. Publication of rules. 19 G. A., ch. 168, § 10. Whenever any such board of health shall establish any general regulations for the public health, under section four hereof [§ 964], the same shall be published daily for two consecutive weeks in some newspaper of general circulation in such city, and upon the completion thereof the same [shall] be and remain binding and obligatory during the term of office of said board, unless sooner revoked or changed by

said board. And no notice of such general regulations shall be necessary other than said before-mentioned publication.

971. Officer to serve notice. 19 G. A., ch. 168, § 11. Whenever it is necessary, under this act, that any notice be served, the same may be served by any city officer, or by any other person whom the board of health may appoint or designate.

972. Tenements; regulation. 19 G. A., ch. 168, § 12. The board when satisfied upon due examination that any cellar, room, tenement, or building in said city, occupied as a dwelling-house, has become, by reason of the number of inhabitants, or want of cleanliness, or other cause, unfit for such habitation and the cause of nuisance or sickness to the occupants thereof or the public, may issue a notice to the occupants or any of them, requiring the premises to be put into a proper condition as to cleanliness or health, or, if such board see fit, requiring the occupants to quit or remove from the premises within such time as said board deems reasonable. If the persons so notified neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners, and such expense shall be a lien on said property, and may be enforced in any court having jurisdiction; or said board may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling-house without permission of the board. And the persons notified and failing to comply with the order of the board may be punished in accordance with the provisions of section five hereof [§ 965].

973. Congregation of people; vaccination. 19 G. A., ch. 168, § 13. Whenever by reason of the prevalence of small-pox or other contagious or infectious disease in any such city, or the vicinity thereof, the board of health may deem it dangerous to permit the congregation together of large crowds of people, the said board of health may, with the consent of the city council, by public proclamation published once in some newspaper of general circulation in said city, prohibit the congregation of people in schools, churches, theaters, and *in* all other buildings in said city, and it shall thereupon become the duty of the principals, teachers, or other persons in charge of said schools, and of the persons in charge of such churches, theaters, or other buildings specified in said publication, to keep the same closed, and to prevent the congregation of people therein; and when small-pox is prevalent in said city or its vicinity, the said board of health may, with the consent of the city council, by notice served upon the teachers or persons in charge of any of the public or private schools, prevent the admission therein of any pupils, until such pupils shall have proved to the satisfaction of the board of health, or the persons by it selected for that purpose, that such pupils have been vaccinated within the past five years or such time as the board may designate. And said board may in like manner prevent the admission of persons not furnishing satisfactory proof of vaccination, into churches, theaters, or other buildings, by notifying the persons in charge thereof not to admit such persons.

974. Right to enter. 19 G. A., ch. 168, § 14. Whenever the board of health shall think it necessary for the preservation of the lives or the health of the inhabitants to enter a place, building, or vessel, within its jurisdiction, for the purpose of examining into and destroying, removing, or preventing any nuisance, source of filth, or cause of sickness, and shall be refused such entry, any member of the board may make complaint, under oath, before any justice of the peace, or any tribunal having jurisdiction to enforce the ordinance of such city, whether such judicial officer be a member of said board or not, stating the facts of the case so far as he has knowledge thereof. Such tribunal shall thereupon issue a warrant directed to the sheriff or any constable of the county, or the city marshal, commanding him to take sufficient aid,

and, being accompanied by two or more members of said board of health, between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth, or cause of sickness may be, and the same destroy, remove, or prevent under the direction of such members of the board of health.

975. Isolation of contagious diseases. 19 G. A., ch. 168, § 15. When any person coming from abroad or residing within such city shall be infected, or lately shall have been infected, with small-pox or other sickness dangerous to the public health, the board of health shall make provision in the manner by them deemed best for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without damage to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other person liable for his support, if able; otherwise at the expense of the county to which he belongs.

976. Same. 19 G. A., ch. 168, § 16. If any afflicted person cannot be removed without danger to his health, the board of health shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and take such other means as may be deemed necessary for the safety of the inhabitants.

977. Removal. 19 G. A., ch. 168, § 17. Any justice of the peace, or tribunal having jurisdiction to enforce the ordinance of such city, on application under oath, showing cause therefor, by any member of said board of health, shall issue his warrant directed to the sheriff or constable of the county, or city marshal, commanding him under the direction of the board of health to remove any person infected with contagious disease, or to take possession of condemned houses and lodgings, and to provide nurses and attendants and other necessaries for the care, safety, and relief of the sick.

978. Meetings; report. 19 G. A., ch. 168, § 18. Every such board of health shall meet for the transaction of business on the first Monday of May and the first Monday of October in each year, and at such other times as occasion may require, and the clerk of said board shall transmit his annual report to the secretary of the [state] board within two weeks after the October meeting. Said report shall embrace a history of any epidemic disease which may have prevailed within his district. The failure of the clerk to prepare or have prepared, and forward, such report shall be considered a misdemeanor, for which he shall be subject to a fine of not more than twenty-five dollars.

979. Powers of cities. 19 G. A., ch. 168, § 19. This act shall not in any way limit the powers of the cities embraced therein, in relation to matters affecting the public health; and the city councils of said cities may by ordinance provide for the manner of the exercise of the powers herein conferred by said boards of health; and said city councils may at all times require said boards of health to report to them their doings, and may supervise, modify, or rescind their actions, orders, rules, or regulations.

REFUNDING BONDS OF CITIES UNDER SPECIAL CHARTERS.

980. May refund. 22 G. A., ch. 19, § 1. All cities in this state having a population of more than two thousand, organized and existing under special charters are hereby authorized and empowered if, by a vote of two-thirds of the city council it be deemed for the public interest, to refund the indebtedness of any such city evidenced by the bonds thereof, heretofore issued, and outstanding at the time of the passage of this act and to issue the coupon bonds of such city in denominations of not less than one hundred dollars and not more than one thousand dollars and having not more than twenty years to run, redeemable in lawful money of the United States at maturity and bear-

ing interest payable semi-annually at a rate not exceeding six per cent. per annum. The principal of such bonds shall be made payable at the office of the treasurer of the city, but the interest upon such bonds may be made payable either in the city of New York, state of New York or the city of Boston, state of Massachusetts, or the city of Chicago, state of Illinois or at the office of the treasurer of the city. Such bonds as well as the coupons, shall be canceled when paid and destroyed in the presence of the city council, which shall cause to be kept a register of all such bonds issued and also of all bonds or coupons which are canceled or destroyed. Such bonds shall be signed by the mayor of the city and attested by its clerk with the seal of the city attached and shall be so signed and attested in open session of the city council and a register shall be then made and kept thereof and such bonds so executed shall be at once delivered to the city treasurer of the city, who shall be liable on his official bond for the safe keeping thereof and the proceeds thereof until he parts therewith under the direction of the city council.

981. Form of bond. 22 G. A., ch. 19, § 2. The bonds issued under this act shall be substantially in the following form:

"No. ——.

"The city of —— in the state of Iowa for value received promises to pay —— —— or —— order at the office of the treasurer of —— in —— on the first day of —— the sum of —— dollars, with interest thereon from date until paid at the rate of —— per cent. per annum payable semi-annually at the —— in the city —— of ——, state of ——, on the first days of —— in each year on presentation and surrender of the interest coupons hereto attached.

"This bond is issued by the city council of said city under and in accordance with the provisions of chapter —— of the session laws of the twenty-second general assembly of the state of Iowa and in conformity with a resolution of said city council dated —— day of ——, 18—.

"In testimony whereof the said city council of the city of —— has caused this bond to be signed by the mayor of said city and attested by its city clerk with the seal of said city attached thereto, this —— day of ——, 18—."

And the interest coupons on each bond shall be in substantially the following form:

"The city of ——, in the state of Iowa, will pay to the holder hereof on the —— day of ——, 18—, at the —— in the city of ——, in the state of ——, —— dollars for interest on —— bond No. ——, issued under the provisions of chapter —— of the session laws of the twenty-second general assembly of the state of Iowa;" and such coupons shall be signed by the city clerk or recorder.

982. Negotiation. 22 G. A., ch. 19, § 3. The city council of any such city is hereby authorized to sell and dispose of the bonds issued under this act at not less than their par value and to apply the proceeds thereof to the redemption of the outstanding bonded debt or may exchange such bonds for outstanding bonds par for par, but the bonds hereby authorized shall be issued for no other purpose whatever; *provided*, however, that the city council of such city may, if deemed advisable, appropriate not to exceed two per centum of the bonds herein authorized to pay the expenses of preparing, issuing, advertising and disposing of the same and may employ a financial agent therefor.

983. Tax for interest. 22 G. A., ch. 19, § 4. The city council of any such city shall cause to be assessed and levied each year upon the taxable property of such city in addition to the levy authorized for other purposes a sufficient sum to pay the interest on all outstanding bonds issued in conformity with this act accruing before the next annual levy and also such proportion of the principal as shall fall due before such next annual levy, and such

city council may at its option, in addition to the levy hereinbefore authorized, levy an amount not exceeding two mills on the dollar of the assessed valuation of such city in any one year for the purpose of purchasing and canceling any of its bonds issued under this act before the maturity of the same. And the money arising from such levies shall be known as the bond fund and shall be used for the payment of the bonds and interest coupons and for the purchase and canceling of the bonds and for no other purpose whatever. And the treasurer of such city shall open and keep in his book a separate and special account thereof which shall at all times show the actual condition of such bond fund.

984. Purchase of bonds. 22 G. A., ch. 19, § 5. The city council of any such city shall have power to purchase any of the bonds issued under this act before the maturity of the same and to this purpose may at its option appropriate any moneys in the bond fund not required to pay bonds or interest coupons maturing before the next annual levy, provided that in the purchase of such bonds there shall be paid in no case a premium to exceed five per centum of the face value of the bond above the amount actually due thereon.

985. Enforcement of payment. 22 G. A., ch. 19, § 6. If the city council of any such city which has issued bonds under the provisions of this act shall fail to make the levy necessary to pay such bonds or interest coupons at maturity and the same shall have been presented to the treasurer of any such city and payment thereof refused the owner may file the bond together with the unpaid coupons with the auditor of state taking his receipt therefor and the same shall be registered in the auditor's office and the executive council shall at their next session as a board of equalization and at each annual equalization thereafter add to the state tax to be levied in such city a sufficient rate to realize the amount of principal or interest past due and to become due prior to the next levy and the same shall be levied and collected as a part of the state tax and paid into the state treasury and passed to the credit of such city as bond tax and shall be paid by warrant as the payments mature to the holder of such obligation as shown by the register in the office of the state auditor until the same shall be fully satisfied and discharged provided that nothing herein shall be construed to limit or postpone the right of the holder of any such bonds to resort to any other remedy which such holder might otherwise have.

986. Other provisions. 22 G. A., ch. 19, § 7. Nothing in this act shall take away, impair or interfere with the powers conferred by chapter fifty-eight of the session laws of the seventeenth general assembly of the state of Iowa entitled "An act to authorize counties, cities and towns to refund outstanding bonded debt at a lower rate of interest and to provide for the payment of the same" as amended by chapter one hundred and forty of the session laws of the eighteenth general assembly of the state of Iowa [§§ 383–388], making the same applicable to cities organized under special charters.

CHAPTER 11.

OF GENERAL REGULATIONS AFFECTING COUNTIES, TOWNS, AND CITIES.

987. Sectarian schools. 552. Public money shall not be appropriated, given, or loaned by the corporate authorities, supervisors, or trustees of any county, township, city, or town, or municipal organization of this state, to, or in favor of, any institution, school, association or object, which is under ecclesiastical or sectarian management or control. [14 G. A., chs. 57, 134.]

988. Cannot take stock. 553. No county, city, or incorporated town in this state, shall, in their corporate capacity, or by their officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder, or otherwise, in any banking institution, whether the same be a bank of issue, deposit, or exchange, nor in any plank road, turnpike, or railway, or in any other work of internal improvement; nor shall they be allowed to issue any bonds, bills of credit, scrip, or other evidences of indebtedness for any such purposes — all such evidences of indebtedness for said purposes being hereby declared absolutely void; *provided, nevertheless*, that this section shall not be so construed as to prevent, or in any wise to embarrass, the counties, cities, or towns, or any of them, in the erection of their necessary public buildings, bridges, laying off highways, streets, alleys, and public grounds, or other local works in which said counties, cities, or towns may respectively be interested. [R., § 1345.]

[As to voting taxes in aid of railways, see §§ 2081–2089.]

989. Bonds in aid of railways. 554. All bonds or other evidences of debt, hereafter issued by any corporation to any railway company as capital stock shall be null and void, and no assignment of the same shall give them any validity. [R., § 1346.]

990. Recovery on coupons. 555. In all actions now pending or hereafter brought in any court in this state, on any bond or coupon issued, or purporting to be issued, by any county, city, or incorporated town for railway purposes, a former recovery against such corporation on any one or more, or any part of such bonds or coupons, shall not bar or estop any defense such corporation has made, or can make to such bonds or coupons in the action in which such former recovery was had; but the corporation sought to be charged in any such action now pending or hereafter brought, may allege and prove any matter of defense in such action to the same extent, and with the same effect, as though no former action had been brought or former recovery had. [Ex. S., 9 G. A., ch. 34.]

991. Officers cannot discount warrants. 556. No officer of any county or other municipal corporation, or any deputy or employee of such officer shall, either directly or indirectly, be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of the indebtedness of such corporation, or any demand against the same, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand. [R., § 2186.]

992. Indorsement of warrants. 557. The treasurer of every county, or other municipal corporation, when he shall receive any warrant, scrip, or other evidence of indebtedness of such corporation, shall indorse thereon the date of its receipt, from whom received, and what amount. [R., § 2187.]

993. Penalty. 558. Any officer of any county or other municipal corporation, or any deputy or employee of such officer, who violates any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, and not more than five hundred dollars for each offense. [R., § 2188.]

[Provision as to bonds of counties, cities and towns are found in §§ 383–388.]

CHAPTER 12.

OF PLATS.

994. In town or city. 559. Every original owner or proprietor of any tract or parcel of land, who has heretofore subdivided, or shall hereafter subdivide the same into three or more parts for the purpose of laying out any town or city, or any addition thereto or any part thereof, or suburban lots, shall cause a plat of such subdivision, with references to known or permanent monuments, to be made, which shall accurately describe all the subdivisions of such tract or parcel of land, numbering the same by progressive numbers, and giving the dimensions and length and breadth thereof, and the breadth and courses of all the streets and alleys established therein. Descriptions of lots or parcels of land in such subdivisions, according to the number and designation thereof on said plat contained, in conveyances or for the purposes of taxation, shall be deemed good and valid for all intents and purposes. The duty to file for record a plat as provided herein, shall attach as a covenant of warranty in all conveyances of any part or parcel of such subdivision by the original owner or proprietors against any and all assessments, costs, and damages paid, lost, or incurred by any grantee, or person claiming under him, in consequence of the omission on the part of said owner or proprietors to file such plat.

995. Statement on plat. 560. Every such plat shall contain a statement, to the effect that the above or foregoing subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the undersigned owners and proprietors, which shall be signed by the owners and proprietors, and shall be duly acknowledged before some officer authorized to take the acknowledgment of deeds; and when thus executed and acknowledged, said plat shall be filed for record and recorded in the office of the recorder of the proper county. [13 G. A., ch. 77.]

As the survey establishes the lines of a street, etc., while the plat is but a record of such survey, in case of any conflict the actual survey will govern: *Bradstreet v. Dunham*, 65-248.

996. Dedication to public use. 561. The acknowledgment and recording of such plat, is equivalent to a deed in fee-simple of such portion of the premises platted as is on such plat set apart for streets or other public use; or as is thereon dedicated to charitable, religious or educational purposes. [R., § 1021; C., '51, §§ 561, 637.]

Rights acquired by the city: The title to land dedicated for streets, public squares, etc., is in the city, being in trust for the public, and such property cannot be taken on execution against the city, or for any other than trust purposes: *Ransom v. Boal*, 29-68.

The purchaser of city or town property acquires no ownership of or interest in the streets adjoining such property other than that which is given to the whole public, the right of way over them; and he cannot object to the construction of a railroad over such streets on the ground that compensation for the right of way is not made to him: *Milburn v. Cedar Rapids*, 12-246.

In the cities of Keokuk and Dubuque, which were laid out by the United States, the fee in the streets is in the adjacent property owners, subject to the public use: *Haight v. Keokuk*, 4-199; *Dubuque v. Maloney*, 9-450.

There is no substantial difference between the streets in which the legal title is in individuals and those in which it is in the public as to the rights of the public therein. The construction of a permanent freight depot so as to obstruct the street is subversive and repugnant to the dedication, but not the occupation of the streets by tracks, pipes, etc., subject to the reasonable control of the state and city: *Barney v. Keokuk*, 94 U. S., 324 (affirming *S. C.*, 4 Dillon, 593).

The fee of the streets is in the city for the use of the general public, not the people of the city alone, and the legislature may authorize them to be used by a railroad company for the construction of its road without the consent of the city and without compensation: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

But a city has no authority to control or grant rights and privileges to, or in, its streets,

unless it has so been authorized: *Stanley v. Davenport*, 54–463; and as to the right of railway companies to construct their tracks upon the streets of cities, see notes to § 623.

The city acquires as against adjoining owners and the original proprietor control over the whole street and not simply over the surface; and it may maintain an action for material, as coal, etc., removed therefrom, whether such material be superficial or subterraneous: *Des Moines v. Hall*, 24–234.

The nature of the property which a city acquires in its streets is different from that which it may have in real estate, such as it is authorized to acquire for other purposes: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24–455.

Rights of adjacent property owners: Although under the provisions as to statutory dedication the owners of lots do not own the fee of the adjacent street, yet they have a peculiar interest in the street, which neither the local nor general public can pretend to claim. This interest is an easement appurtenant to their lots and partakes of the nature of property: *Cadle v. Muscatine Western R. Co.*, 44–11.

Therefore, where a railway company having the right to construct its road over the streets of a city does so in a careless and negligent manner, the adjoining property owners may recover special damages resulting therefrom: *Ibid.*

Purchasers of lots in the portion platted acquire a right of way over the streets and alleys therein: *Yost v. Leonard*, 34–9.

Where a party filing a plat reserved therein the right to construct a mill-race across one of the streets, *held*, that he became bound to erect and maintain a bridge across the race at his own expense: *Waterloo v. Union Mill Co.*, 59–437.

Where the fee in the street is in the adjoining property owner, neither the city nor any individual has a right, against the will or consent of the owner of the adjoining lot, to construct a cistern under the street or sidewalk: *Dubuque v. Maloney*, 9–450.

An adjacent property owner cannot excavate areas under the sidewalk except with the consent of the city authorities: *Davis v. Clinton*, 50–585.

Platting of streets: Where a plat shows the dedication of two streets at right angles to each other, the square formed by their intersection will be presumed to be included in the dedication: *Yost v. Leonard*, 34–9.

To make out a dedication of a street appearing on a plat, it is necessary to show, not only that the plat was laid out, but also that the party laying it out had title thereto: *Porter v. Stone*, 51–373.

Dedication in a town plat *held* sufficient, in a particular case, to convey the fee in a street indicated thereon: *Stange v. Hill & West Dubuque St. R. Co.*, 54–669.

Evidence in a particular case, *held* not sufficient to establish a dedication of a street which was shown by the last of three plats filed, but not by the first two, under which the rights of the parties attached: *Manchester v. Hoag*, 66–649.

When lots are sold on a plat bounded by a street or highway, that fact raises a strong presumption of the intent to pass the soil to the center of the street or highway, and it will so pass unless the highway be expressly excluded: *Dubuque v. Maloney*, 9–450.

But this rule is not applicable to land reserved for public use on the opposite side of the highway from the lots thus sold, and the lot purchaser acquires no title to the land thus reserved: *Cook v. Burlington*, 30 94.

Where the owner of land on both sides of a section line platted the portion on one side, locating a street on such line, *held*, that the dedication covered the entire width of the street: *McDunn v. Des Moines*, 34–467.

The existence of a plat, even though defective, and the sale of lots, bounded according to its descriptions, by the persons platting the land, establish the *animus dedicandi* as to the streets laid out on such plat, which, when shown, is sufficient to establish a way or street, even though there be no record of such plat made in the form prescribed by law: *Shea v. Ottumwa*, 67–39.

Dedication: A proprietor laying off an addition to an incorporated town or city, though he may grant only the use of or easement in the streets, or reserve minerals therein (*Dubuque v. Benson*, 23–248), cannot confer upon some other public corporation rights in and control over the streets and alleys: therefore, *held*, that the entry upon a plat that the proprietors "do hereby convey to Polk county for the use of the public the streets and alleys as marked on this plat, and dedicate the same to the public," was inoperative, and the platting, acknowledgment, recording, etc., being sufficient to constitute a statutory dedication, the fee of the streets vested in the city: *Des Moines v. Hall*, 24–234.

A grantor filing a plat and procuring the proper certificate thereto cannot afterwards object that it was not in accordance with law and that the requirements of the statute have not been complied with: *Scott v. Des Moines*, 64–438.

And the grantor, or those claiming under him, cannot defeat a dedication made in such plat, on the ground that it was not recorded at once nor until after the grantor's death: *Ibid.*

Where a strip of land between a street and a river was not included in the plat, *held*, that it could not be considered as dedicated to the public: *Cowles v. Gray*, 14–1.

In order to show a dedication apart from the plat there must be an act of dedication within the prescribed limit of time and an acceptance thereof by the public: *Ibid.*

Where the plat of a town contained a square designated "public square," and lots were sold on the faith of such plat, and afterwards another plat was duly made and recorded changing the designation of the square, with the representation to prior lot purchasers that it was for the public use and control, and the city took possession of the square as public property, *held*, that the corporation had the title to such square for the use of the public and in trust for it: *Pella v. Scholte*, 21–463.

Marking a square on the plats as "garden square" *held* not necessarily to express or imply a dedication to the public: *Pella v. Scholte*, 24–283.

Where a square was marked upon a plat as "market square," and thereafter treated by the city as public, and was for that reason omitted from taxation, which facts were known to the dedicator and those claiming under him, *held*, that the circumstances showed an intention to dedicate such square to the public: *Scott v. Des Moines*, 64-438.

Also *held*, in such case, that the designation of the square as "market square" did not show an intention to impose on the dedication a condition that it be used only for market purposes and that a market building be erected thereon: *Ibid.*

A dedication of a portion of land covered by a city plat for public purposes, as by marking it "public square," which dedication is accepted by the city, imposes upon the city an obligation to hold the property in trust for the uses and purposes expressed, and the city cannot divert it to another and different use, as by selling it to private owners: *Warren v. Mayor of Lyons City*, 22-351.

Where a plat contained a square marked "church square," *held*, that such designation did not constitute a dedication to any particular church association, although but one such association existed at the time in the town: *Christian Church v. Scholte*, 2-27.

Under the evidence in particular cases, *held*, that subdivisons of plats marked as "square," or "public square," were dedicated to the public: *Livermore v. Maquoketa*, 35-358; *Bayliss v. Supervisors*, 5 Dillon, 549.

Where lots are sold with reference to a town plat, upon which certain land is dedicated to public use, the purchasers acquire, as appurtenant to their purchases, a vested right to the use of the land dedicated to public use, of which they cannot be divested by the owner who made the dedication or by the town in its corporate capacity: *Leffler v. Burlington*, 18-361.

Where lots were sold in accordance with a plat upon which a certain square was marked "public square," and afterwards "garden square," and with the representation that the square was for the public and was to remain forever an open and unoccupied space, and the value of lots sold was increased thereby, *held*, that a purchaser could enjoin the grantees of such square from platting lots and erecting buildings thereon: *Fisher v. Beard*, 40-625.

Where the general government as owner laid off land into lots, streets, squares, etc., for a city and sold lots according to such plan, *held*, that the sale and conveyance implied that a grant or covenant to the purchasers of the lots that the streets and public squares should forever be open to the public, free from all claims of proprietors inconsistent with such use, but that the dedication did not operate as a grant to the city of the fee in the streets, and that such fee-title passed to the adjoining property owners, subject to the easement of the public, with the power in the city to regulate the public use of such streets and squares, as the representative of the public, for the purpose of vindicating the public right: *Dubuque v. Maloney*, 9-450.

Where, by act of congress, certain land in front of a street leading to a navigable river was reserved from sale for public use, with the declaration that it should remain forever free for highways and other purposes, *held*, that such dedication was in the nature of a contract which could not be afterwards abrogated or repealed, and that the municipal corporation, succeeding to the title of the land thus reserved, held it for the same purposes and could not divert it for other purposes: *Cook v. Burlington*, 30-94.

Where the owner of land laid out an addition to a city and by the plat donated and granted the "streets, alleys and public grounds, etc., for public purposes," and designated a tract of ground next to the river as "Reserved Landing," *held*, that the city did not by such donation acquire the right to the property so reserved: *Grant v. Davenport*, 18-179.

Acceptance of dedication: By accepting a charter making a platted addition to the city limits, *held*, that the city thereby accepted the addition and the dedication of the streets therein laid out: *Des Moines v. Hall*, 24-234.

Where, in the plat of an addition to the city, a street was laid out ninety feet in width, but was only opened to a width of sixty feet, fences being erected by lot owners upon the line of the street as thus improved and used, and the strip not used being thus inclosed for twenty-five years, *held*, that the city could not claim the strip thus inclosed, and that it would be presumed that the city had only accepted the dedication to the extent that the street had been opened: *Bell v. Burlington*, 68-296.

Action of the city council in adopting the report of a committee recommending an acceptance of streets as dedicated on a plat not yet filed, *held* not to amount to an acceptance of such streets upon the subsequent filing of such plat: *Laughlin v. Washington*, 63-652.

Where a plat was filed for record, and the streets as designated thereby remained open to the public for two or three weeks, and were to some extent passed over and used by the public, but were afterwards closed, *held*, such facts did not constitute an acceptance by the city of the proposed dedication. Mere *user* will not be sufficient to constitute an acceptance; it must be shown to have been open and notorious, and continued for such a length of time that an acceptance can be presumed: *Ibid.*

Non-user: The right of the public in the streets and alleys accrues upon the acknowledgment and recording of the plat, and continues until it is either divested by some act of the public authorities, or lost by adverse possession, and it is immaterial as to the rights of the public whether such streets and alleys are improved or not. Therefore, a railway company has no right to fence its track where it crosses streets and alleys thus laid out, although they are not improved and used: *Lathrop v. Central Iowa R. Co.*, 69-105.

The occupation by a party dedicating, for ten years thereafter, will not bar the rights of the public, unless it appear that he held under claim of right adverse to the public: *McDunn v. Des Moines*, 34-467; *Livermore v. Maquoketa*, 35-358.

Diversion of streets or public grounds: The title to streets is vested in the city for the use of the public, and such use is to be controlled by the legislative power of the state. The city cannot grant the use of the streets for any purpose not thus authorized: *Stanley v. Davenport*, 54–463.

A city taking public lands which have been already dedicated to public use cannot devote the same to private uses, or convey them to others for such private use; and in an action by an adjoining lot owner having an interest in the preservation of the land for the uses for which it was originally dedicated, the city may be enjoined from making a conveyance thereof: *Cook v. Burlington*, 30–94.

Purchasers of lots abutting upon land dedicated by the original owner to a public use acquire such rights therein as will enable them to enjoin a diversion of it by the corporation to uses and purposes foreign to and inconsistent with the objects of the grant: *Ibid.*

Therefore, *held*, that while the grant of the right of way to a railway might not be inconsistent with the public use of lands reserved to the corporation for public purposes, yet a legal conveyance thereof in fee to a railway company was inconsistent with such use: *Ibid.*

But it does not follow that abutting owners may maintain an action for an obstruction in the street which does not affect them differently from the public generally: *Ingram v. Chicago, D. & M. R. Co.*, 38–669.

The city takes title to such portions of its territory as are dedicated for public purposes, subject to a trust to hold and use it for the purpose expressed, and cannot dispose it for other purposes: *Warren v. Mayor of Lyons*, 22–351.

A former statute attempting to confer upon cities and towns the power to sell and convey squares and parks therein laid off and dedicated by individuals, *held* void as authorizing a perversion of a trust. Whether the corporation might not be given power to part with whatever interest it possessed in the property, *quære: Ibid.*

Public squares dedicated to a city are held in trust for the public, and cannot be sold on execution to satisfy the debts of the city: *Ransom v. Boal*, 29–68.

Property dedicated as public grounds may be used for purposes varying according to the circumstances, to be judged by the proper legal authorities, but such property cannot be applied to private purposes: *Platt v. Chicago, B. & Q. R. Co.*, 74–127.

The fact that the use of a street is interrupted by an improper obstruction will not show an abandonment where the use is such as the public wants at the time require, nor will the city be estopped by virtue of such improper use from asserting its rights in the streets: *Waterloo v. Union Mill Co.*, 72–437.

The statute of limitations will not run to defeat the exercise by a city of its municipal powers in establishing and maintaining a street: *Ibid.*

Grants dedicated to public use can be used for the purposes expressed in the act of dedication only, and the grantor and even the proprietor of lots abutting may, by injunction, restrain a diversion to any other purpose resulting in an injury to him: *Pettingill v. Devin*, 35–344.

Reversion: It does not follow that the title reverts to the grantor upon a failure to use the land for the purposes indicated. Such a dedication passes the fee from the grantor without the contingent right of reversion, and any person injuriously affected may prevent the diversion from the purposes designated by injunction: *Ibid.*

Upon the vacation by the city of a street in the city plat the title of the property covered thereby does not revert to the original owner: *Day v. Schroeder*, 45–546.

997. Altering or vacating streets. 562. Streets and alleys so platted and laid out, or which have been platted or laid out under any prior law of this state regulating private plats, may be altered or vacated in the manner provided by law for the alteration or discontinuance of highways. [R., § 1029.]

Upon the vacation of the streets in a plat the title of the land occupied by them does not revert to the grantor: *Day v. Schroeder*, 46–546; *Pettingill v. Devin*, 35–344, 355.

This section does not limit the power given to the city council by § 623 to vacate streets and alleys. It is to be presumed that it was enacted to cover cases not included in the other, and as it contains provisions applicable to streets and alleys in incorporated villages to which the other section is not applicable, it will be limited to such cases: *Dempsey v. Burlington*, 66–687.

998. Vacating plat. 563. Any such plat may be vacated by the proprietors thereof, at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged, or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds laid out or described in such plat. And in cases where any lots have been sold, the plat may be vacated, as herein provided, by all the owners of lots in such plat joining in the execution of the writing aforesaid. [9 G. A., ch. 78, § 1.]

The term "proprietors" as used in this and the following sections indicates the owners of the land and not alone the persons who originally plat the land. Owners who have acquired title from such original proprietors may exercise the powers conferred: *McGrew v. Lettsville*, 71–150.

999. Part of plat vacated. 564. Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter, provided such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat, and provided further, that nothing contained in this section shall authorize the closing or obstructing of any public highways laid out according to law. [Same, § 2.]

The fact that the vacation of a portion of a plat will close streets therein, and thus abridge the number of ways of access to the property of the proprietor of another portion of the plat, will not be ground for objecting to such vacation, if one or more ways are left reasonably convenient, so that no substantial right is abridged: *Lorenzen v. Preston*, 53-580.

The proper steps having been taken for the vacation of a street, such vacation becomes effective as against the city, subject only to the judicial determination as to whether the rights of private persons are affected. The city council cannot, by subsequently directing such street to be opened, affect the validity of the vacation: *Conner v. Iowa City*, 66-419.

This section contemplates the case of separate proprietors having distinct and separate interests, and they may vacate part of the town plat. The instrument of vacation, in a particular case, *held* certain as to the part affected. The authority conferred to vacate a part of the plat does not have the effect to limit the boundaries of an incorporated town and to take that part of which the plat is vacated out of the corporation. It therefore, does not affect the authority of the corporation over the lands covered by the part of the plat vacated. As to streets and alleys that were never opened, such vacation does not destroy any of the rights of any owner of land within the town: *McGrew v. Lettsville*, 71-150.

1000. Streets inclosed. 565. When any part of a plat shall be vacated as aforesaid, the proprietors of the lots so vacated may inclose the streets, alleys, and public grounds adjoining said lots in equal proportions. [Same, § 3.]

1001. Recording. 566. The county recorder, in whose office the plats aforesaid are recorded, shall write in plain, legible letters across that part of said plat so vacated, the word "vacated," and also make a reference on the same to the volume and page in which the said instrument of vacation is recorded. [Same, § 4.]

1002. Replatting. 567. The owner of any lots in a plat so vacated, may cause the same and a proportionate part of adjacent streets and public grounds to be platted and numbered by the county surveyor; and when such plat is acknowledged by such owner, and is recorded in the record office of the county, such lots may be conveyed and assessed by the numbers given them on such plat. [Same, § 5.]

1003. Public squares used for school purposes. 21 G. A., ch. 75, § 1. It shall be lawful for the people of any incorporated town, located wholly within an independent school district in which is situated a public square or plat of ground, deeded or dedicated to the said town or the public, by the proprietor of the town, or of any addition thereof, to transfer or re-dedicate such plat or square, to the purpose of a public school-house lot, to be used either for the erection thereon of a public school-house, or as school grounds, in connection with such school-house.

1004. Manner of transfer. 21 G. A., ch. 75, § 2. The manner of procedure to effect the change or transfer of the purpose for which such lot or square shall be used, as is authorized in section one, of this act [§ 1003], shall be as follows: When a plat or lot of the character described in section one, of this act [§ 1003], is located in such incorporated town, and one-half of the resident voters of such town, according to the last census thereof, national or state, shall petition the mayor and town council of such town, asking said city authorities to submit to the voters of the town at a general or special election the question whether or not such public square, lot or plat shall be transferred, dedicated and used for the purposes of a public school-house lot, for the use of the independent district in which the same is situated, said mayor and town council shall submit the question to the voters of the town, in accordance with the prayer of said petitioners after giving ten days' notice thereof, by written or printed notices, in which the proposition submitted, shall be

clearly set forth, and signed by said mayor three of which notices shall be posted in public and conspicuous places in the town, and one shall be published in the last two issues, preceding such election in a weekly newspaper published in the town, or if there be no such newspaper published in the town then in the weekly newspaper published elsewhere in the county, having the largest circulation in said town. Such notice shall state the manner of voting, which shall be by ballot, and substantially as follows: The ballot shall contain in print, ink or pencil the words "For transferring lot or block or square (as the case may be, describing it) to the purposes of a public school-house lot:" or "Against transferring lot or block or square (as the case may be, describing it) to the purposes of a school-house lot." And such election shall be held as per notice given and be conducted as ordinary town elections are, under the supervision of the town authorities, who shall canvass the vote as by law provided in other cases. If it shall appear that two-thirds or more, of all the legal votes cast at such election, for and against the proposition submitted, have been cast in favor of the transfer of such lot or block or square, to the purposes of a public school-house lot, then such transfer shall be held to have been completed, and the lot or block or square may be appropriated and used for the purposes so indicated, by said vote and shall be no longer held for any other purpose. If less than two-thirds of the votes cast at such election are found to be in favor of the transfer then it shall be held that the proposition failed and no transfer shall be effected.

1005. Plat by auditor. 568. Whenever the original owner or proprietor of any subdivision of land, as contemplated in section five hundred and fifty-nine of this chapter [§ 994], have sold or conveyed any part thereof, or invested the public with any rights therein, and have failed and neglected to execute and file for record a plat as provided in section five hundred and fifty-nine of this chapter, the county auditor shall notify some, or all, of such owners and proprietors by mail or otherwise, and demand the execution of said plat as provided; and if such owners or proprietors, whether so notified or not, fail and neglect to execute and file for record said plat for thirty days after the issuance of such notice, the auditor shall cause to be made the plat of such subdivision and any surveying necessary therefor. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed [it] by reason of the failure of the owners or proprietors named to do so, and filed for record; and, when so filed for record, shall have the same effect for all purposes as if executed, acknowledged, and recorded by the owners or proprietors themselves. A correct statement of the costs and expenses of such plat, surveying, and recording, verified by oath, shall be by the auditor laid before the first session of the board of supervisors, who shall allow the same, and order the same to be paid out of the county treasury, and who shall, at the same time, assess the said amount, pro rata, upon all the several subdivisions of said tract, lot, or parcel so subdivided; and said assessment shall be collected with and in like manner as the general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county before any court having jurisdiction, to recover of the said original owners or proprietors, or either of them, the said cost and expense of procuring and recording said plat.

1006. Platting for assessment and taxation. 569. Whenever any congressional subdivision of land of forty acres or less, or any lot or subdivision is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate, for the purposes of assessment and taxation without noting the metes and bounds of the same, the auditor shall require and cause to be made and recorded, a plat of such tract or lot of land with its several subdivisions in accordance with the pro-

visions of this chapter; and he shall proceed in such cases according to the provisions of section five hundred and sixty-eight [§ 1005], and all the provisions of said section in relation to plats of towns, cities and so forth, shall govern as to the tracts and parcels of land in this section referred to.

1007. Insufficiency of description in deed. 570. Every conveyance of land in this state, shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required by law to be kept; and when there is presented to be entered on the transfer book, any conveyance in which the description is not, in the opinion of the auditor, sufficiently definite and accurate, he shall note said fact on said deed with that of the entry for transfer, and shall notify the person presenting the same that the land therein not sufficiently described must be platted within thirty days thereafter. Any person aggrieved by the opinion of the auditor, may, within said thirty days, appeal therefrom to the board of supervisors, by claiming said appeal in writing, and thereupon no further proceeding shall be taken by the auditor, and at their next session the board of supervisors shall determine said question and direct whether or not said plat shall be executed and filed and within what time; and if the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat of said land and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or in case of appeal as directed by the board of supervisors, then the auditor shall proceed as is provided in section five hundred and sixty-eight of this chapter [§ 1005], and cause such plat to be made and recorded, and thereupon the same proceedings shall be had and rights shall accrue, and remedies had, as are in said section provided. Such plat shall describe said tract of land and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, and number of acres, and such other memoranda as are usual and proper; and descriptions of such lots or subdivisions according to the number and designation thereof on said plat shall be deemed good and sufficient for all purposes of conveyancing and taxation.

1008. Plats legalized. 571. None of the provisions of this chapter shall be construed to require replatting in any case where plats have been made and recorded in pursuance of any law heretofore in force; and all plats heretofore filed for record, and not subsequently vacated, are hereby declared valid, notwithstanding irregularities and omissions in the manner or form of acknowledgment or judge's certificate; but the provisions of this section shall not affect any action or proceeding now pending.

1009. Penalty. 572. Any person who shall dispose of or offer for sale, or lease any lots in any town, or addition to any town or city, until the plat thereof has been duly acknowledged and recorded as provided in this chapter, shall forfeit and pay fifty dollars for each lot and part of lot sold or disposed of, leased, or offered for sale. [R., § 1027.]

As this section only imposes a penalty on the person selling and not on one buying lots, the plat of which is not acknowledged and recorded, the vendee may enforce against the vendor a contract for the sale of such lots, and as to such vendee the contract will not be void: *Watrous v. Blair*, 32–58. The contract of sale is not illegal; the vendor may recover the consideration of the sale, and the vendee may enforce specific performance thereof: *Pangborn v. Westlake*, 6–546.

CITY AND TOWN LOTS.

1010. Certificate that land is unincumbered. 18 G. A., ch. 53, § 1. Whenever any person or corporation shall lay out any parcel of land into town or city lots in accordance with chapter twelve, title four, of the code, such person shall procure from the treasurer of the county in which the land lies a

certified statement that the land thus laid out into lots, streets and alleys is free from taxes, and shall also procure a certified statement from the recorder of such county, that the title in fee to said land is in such proprietor and that the same is free from every incumbrance which certified statements shall both be filed with the recorder before the plat of said town or city lots shall be admitted to record or of any validity; *provided*, however, that if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which will fall due not more than two years after the making of the affidavit hereinafter provided for, and which the creditor will not accept with accrued interest to the day of proffered payment, if it draws interest, or with a rebate of interest at the rate of six per centum per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and if a corporation its proper officer or agent, may file with the recorder of such county his affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest or with a rebate of interest, as the case may be, and that such creditor would not accept the same, or that such creditor cannot be found, whereupon such proprietor may execute a bond double the amount of such incumbrance with three sureties who shall be freeholders of the county, to be approved by the recorder and clerk of the county, which bond shall run to the county, and shall be for the benefit of the purchasers of any of such town or city lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due and for the holding of all such purchasers and those claiming under them forever harmless from such incumbrance, and when such affidavit and bond shall have been filed with the recorder, together with a certificate of the treasurer that said land is free from taxes, and the certificate of the recorder that the title in fee to said land is in such proprietor, and that the same is free from all incumbrance except that secured by said bond, said plat shall be admitted to record, and be equally valid as if such proprietor had filed with the recorder the certificate of such recorder that said land was free from all incumbrance.

1011. Recording. 18 G. A., ch. 53, § 2. All the certificates, affidavits and bonds provided for in the preceding section shall be recorded in connection with the plat to which they relate in the office of the recorder before the said plat or the record thereof shall be of any validity.

1012. Bearings and distances. 18 G. A., ch. 53, § 3. The record and plat of every town or city, or addition thereto, which may be thus laid out shall give the bearing and distance from some corner of a lot or block in said town or city or part thereof, to some corner of the congressional division of which said town, city or addition is a part.

1013. Not to affect annexation. 18 G. A., ch. 53, § 4. The provisions of this act shall not prevent the annexation of contiguous territory to cities and towns under sections four hundred and twenty-six, four hundred and twenty-seven, four hundred and twenty-eight and four hundred and twenty-nine of chapter ten, title four of the code [§§ 574–577], and chapter forty-seven of the laws of the sixteenth general assembly, as amended by chapter one hundred and sixty-nine of the laws of the seventeenth general assembly [§§ 583–586].

1014. 18 G. A., ch. 53, § 5. Chapter twenty-five of the laws of the fifteenth general assembly, and chapter sixty-three of the laws of the sixteenth general assembly are hereby repealed.

RESURVEY OF TOWN PLATS.

1015. In case of loss. 15 G. A., ch. 54, § 1. In all cases where the original town plat of any city, town, or village, of this state, or any of the additions

to any such city, town, or village, shall have been heretofore or may hereafter be lost, mislaid, or destroyed after the sale and conveyance of any subdivision, block, or lot thereof, by the original owner or proprietor, to any person or persons, before the same shall have been recorded, it shall be lawful for any three persons interested in such city, town, village, or addition thereto, to have such original city, town, village, or addition to any such city, town, or village resurveyed and replatted, and such plat made a matter of record, as hereinafter set forth; *provided*, that in no case shall such replat be made a matter of record without the consent in writing, indorsed thereon, of the original owner or proprietor of such city, town, village, or addition thereto, if he be alive and his residence known to those who desire such replat recorded.

1016. How made. 15 G. A., ch. 54, § 2. The county surveyor of any county of this state in which is situated any such city, town, village, or addition thereto as contemplated in section one of this act [§ 1015], is hereby authorized, empowered, and, upon payment to him of his legal fees by the persons interested, required to resurvey any such city, town, village, or addition thereto, and shall make out a plat of such city, town, village, or addition so resurveyed, which plat shall in all respects, as near as possible, conform to the original lines of said city, town, village, or any addition thereto, that may be resurveyed, and it shall in all respects be made out as required by section five hundred and fifty-nine of the code [§ 994.] And in order to the perfect completion of such resurvey and plat, the said surveyor is empowered and authorized to subpœna witnesses, administer oaths, and *to* take evidence touching said original plat, lines, subdivisions of said city, town, village, or addition thereto sought to be surveyed and replatted; also as to whether the original proprietor be dead or living, and touching all things necessary to enable him to accurately establish the lines and boundaries of said city, town, village, or addition thereto, and the various subdivisions thereof: *provided*, that in all cases, before any such resurvey shall be made, the county surveyor of the proper county shall give four weeks' notice *of* in some newspaper published in the county, if there be any, of such contemplated resurvey, and, in case there is no such paper published in the county, then by posting up four written notices in four of the most public places in the county, one of which shall be in said district proposed to be resurveyed.

1017. Plat certified and filed; contesting. 15 G. A., ch. 54, § 3. When the surveyor shall have completed said plat, as hereinbefore contemplated, he shall attach his certificate thereto, to the effect that said plat is a just, true, and accurate plat of said city, town, village, or addition so surveyed by him; and the said plat and certificate thereto shall be filed for record in the office of the recorder of deeds of the proper county, and from the date of such filing it shall be regarded and treated, in all courts of law and equity in this state, as though the same had been made by the original owners or proprietors of said lands so resurveyed and replatted: *provided*, that any person or persons deeming themselves aggrieved by said resurvey or replatting may at any time, within six months from the date of filing said plat for record, commence action by bill in chancery in the [circuit or] district court against the persons employing the surveyor as aforesaid and setting up their causes of complaint, and asking that said record be canceled.

1018. Adjudication. 15 G. A., ch. 54, § 4. If it shall appear on the trial of said cause that the said city, town, village, or addition thereto was originally laid out and platted, that the original owner or proprietor had sold any or all of the lots of such city, town, village, or addition, or that he intended to dedicate to the public the streets, alleys, or public squi[a]res of such city, town, village or addition, that the plat thereof had never been recorded, but was lost or mislaid, that the owner or proprietor is dead, or his residence unknown, and that the resurvey and replat so filed for record is a substantially

accurate survey and plat of the original plat of such city, town, village, or addition thereto, then the said bill shall be dismissed at the costs of the complainants; otherwise the court shall set aside said replat and cancel the same of record at the costs of defendants.

VACATION OF TOWN PLATS.

1019. Manner. 15 G. A., ch. 61, § 1. Whenever the owners of any piece of land, not less than forty acres in amount, which has been platted into town lots, and the plat of which has been recorded, shall desire to vacate said plat or part of plat, it may be done in manner following: A petition signed by all the owners of the town or part of the town to be vacated shall be filed in the clerk's office of the district court of the district in which the land so platted lies, and notice of such petition shall be given, at least four weeks before the meeting of the court, by posting notices in three conspicuous places in the town where the vacation is prayed for, and one upon the court-house door of the county. At the term of court next following the filing of petition and notice, the court shall fix a time for hearing the petition, and notice of the day so fixed upon shall be given by the clerk of the court in some newspaper published in the county at least one week before the day appointed for the hearing. At the hearing of the petition, if it shall appear that all the owners of lots in the town or part of town to be vacated desire the vacation, and that there is no valid objection thereto, a decree shall be entered vacating such portion of the town, and the streets, alleys, and avenues therein, and for all purposes of assessments such portion of the town shall be as *it* [if] it had never been platted into lots; *provided, however*, that, if any street as laid out on the plat shall be needed for the public use, it shall be excepted from the order of vacation, and shall remain a public highway; *and further provided*, that this act shall not affect cities of the first and second class.

TITLE V.

OF ELECTIONS AND OFFICES.

CHAPTER 1.

OF THE ELECTION OF OFFICERS, AND THEIR TERMS.

1020. General election. 573; 19 G. A., ch. 115. The general election for state, district, county and township officers shall be held throughout the state on the second Tuesday of October in each odd-numbered year, and in each even-numbered year said general election shall be held on the Tuesday next after the first Monday of November. [R., § 159; C., '51, § 237.]

[By an amendment to the constitution which will be found at the end of art. 2 of the constitution, the general election is to be held in each year on the Tuesday next after the first Monday in November.]

1021. Special election. 574. Special elections authorized by any law, or held to supply vacancies in any office to be filled by the vote of the qualified voters of the entire state, or of any district, county, or township, may be held at the time designated by such law, or by the officer authorized to order such election. [R., § 460.]

1022. Vacancies filled. 575. All vacancies in office created by the expiration of a full term, shall be supplied at the general election next preceding the time of expiration. [R., § 461.]

1023. Term of office. 576; 16 G. A., ch. 72. The term of office of all officers except highway supervisors, chosen at a general election for a full term, shall commence on the first Monday of January next thereafter, except when otherwise provided by the constitution. The term of office of highway supervisors shall commence fifteen days after the date of the general election. The term of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor. [R., § 462.]

See Const., art. 4, § 15.

1024. Proclamation. 577. At least thirty days before any general election, the governor shall issue his proclamation designating all the offices to be filled by the vote of all the electors of the state, or by those of any congressional, legislative, or judicial district, and transmit a copy thereof to the sheriff of each county. [R., § 462.]

1025. Notice. 578. The sheriff shall give at least ten days' notice thereof, by causing a copy of such proclamation to be published in some newspaper printed in the county; or, if there be no such paper, by posting such a copy in at least five of the most public places in the county. [R., § 463.]

Where the time of the regular election is fixed by law such time is to be taken notice of judicially: *Davis v. Best*, 2-96.

Failure to give proper notice of an election will not invalidate it. In matters of such public nature the observance of the particular requirement is not a prerequisite to validity, and the statutes as to notice are to be deemed directory. The people are not to be disfranchised or deprived of their voice by the omission of some duty by an officer: *Dishon v. Smith*, 10-212.

If an election has in fact been held at the proper time, and it is not alleged or shown that any portion of the electors failed in knowledge of the pendency of the question submitted at such election, or to exercise their franchise, it will not be held void on account of want of notice: *Ibid.*

1026. Same when special election. 579. A similar proclamation shall be issued before any special election ordered by the governor, designating the time at which such special election shall be held, and the sheriff of each county in which such election is to be held, shall give notice thereof as above provided. [R., § 464.]

1027. In odd-numbered years. 580. The governor, lieutenant-governor, and superintendent of public instruction, shall be chosen at the general election in each odd-numbered year. [R., § 465; 10 G. A., ch. 52, § 2.]

See Const., art. 4, § 15.

1028. In even-numbered years. 581. The secretary of state, auditor of state, treasurer of state, register of state land office, and attorney-general, shall be chosen at the general election in each even-numbered year, and their term of office shall be two years. [R., § 466.]

As to secretary, auditor and treasurer, see Const., art. 4, § 22. As to attorney-general, see Const., art. 5, § 12.

1029. Judges supreme court. 582. One judge of the supreme court shall be chosen at the general election in each odd-numbered year, and a judge of said court shall also be chosen at the general election in the year 1876, and each sixth year thereafter.

1030. Additional judge. 16 G. A., ch. 7, § 2. The regular term of the additional judge of the supreme court, provided for by this act [§ 177] shall commence on the first Monday of January, 1879, and he shall be chosen at the general election in the year 1878, and every six years thereafter.

See Const., art. 5, §§ 3, 11.

1031. Clerk and reporter of supreme court. 583. The clerk and reporter of the supreme court shall be chosen at the general election in the year 1874, and each fourth year thereafter, and their terms of office shall be four years. [10 G. A., ch. 22, § 1; 11 G. A., chs. 88, 89.]

[Sections 584, 585 and 586 of the Code are in effect repealed as to election of district and circuit judges by §§ 233 and 236, and as to election of district attorneys by § 267.]

The act [§ 233] which abolished the circuit court also abolished the office of circuit judge: *Crozier v. Lyons*, 72-401.

1032. Representatives. 587. Members of the house of representatives shall be chosen by the qualified voters of the respective representative districts in each odd-numbered year. [R., § 470.]

See Const., art. 3, § 3.

1033. Senators. 588. Senators in the general assembly, to succeed those whose term of office is about to expire, shall be chosen by the qualified voters of the respective senatorial districts in each odd-numbered year, for the term of four years. [R., § 471.]

See Const., art. 3, § 5.

1034. County officers. 589. Each county shall elect at the general election in each even-numbered year, a clerk of the district [and circuit] court[s], and a recorder of deeds; and in each odd-numbered year, an auditor, a treasurer, a sheriff, a coroner, a county superintendent, and a surveyor; and each of said officers shall hold his office for the term of two years. [R., §§ 224, 472, 473; C., '51, § 96; 9 G. A., ch. 172, § 62; 10 G. A., ch. 100; ch. 129, §§ 3, 4; 12 G. A., ch. 160, § 1.]

[Women are by § 2828 made eligible to school offices, and by § 471 to the office of county recorder.]

1035. Justices and constables. 590. Two justices of the peace and two constables shall be chosen by the qualified voters of each township at the general election of each even-numbered year, and shall hold their offices for the term of two years. [R., § 474.]

[Section 591 of the Code is superseded by §§ 1038-1041 below.]

1036. Additional justices and constables. 592. One or two additional justices of the peace, and one or two additional constables may be elected in each township if the trustees so direct, by posting up notices of the same in three of the most public places in the township, at least ten days before election. [R., § 477.]

1037. How voted for. 593. Justices of the peace and constables shall be considered as county officers under the provisions of this title, but they shall be voted for by the voters of their respective townships. [R., § 478; C., '51, § 243.]

1038. Township trustees. 17 G. A., ch. 12, § 1. There shall be three trustees elected in each township, who shall hold their office for the term of three years, except as hereinafter provided.

1039. One trustee each year. 17 G. A., ch. 12, § 2. At the general election in 1878 there shall be elected in each township of the state, three trustees, one of whom shall hold his office for one year, one for two years, and one for three years, their respective terms to be determined by lot by the board of canvassers of said township; and annually thereafter there shall be one trustee elected, who shall continue in office for three years and until his successor is elected and qualified.

1040. 17 G. A., ch. 12, § 3. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

1041. Township clerk, assessor, highway supervisor. 18 G. A., ch. 161, § 1. At the general election in the year 1880, and biennally thereafter, there shall be elected in each civil township of the state by the qualified electors thereof in the manner prescribed by law, one township clerk, one assessor, and one highway supervisor for each highway district, who shall hold their offices for the term of two years and until their successors are elected and qualified.

1042. 18 G. A., ch. 161, § 2. All acts and parts of acts inconsistent herewith are hereby repealed.

[As to method of voting for road supervisors and township assessors, see §§ 1082–1084.]

The ballots for justice of the peace should be canvassed by the board of supervisors under the provisions of § 1098: *Lynch v. Vermazen*, 61–76.

The constable is properly a township officer although he is to be voted for under this section like a justice of the peace as a county officer by the voters of his township: *State v. Bevans*, 37–178.

CHAPTER 2.

OF THE REGISTRATION OF VOTERS.

1043. Repeal. 21 G. A., ch. 161, § 1. Chapter two, title five of the code, is hereby repealed and the following sections of this act enacted in lieu thereof.

[The repealed chapter embraces Code, §§ 594–602.]

1044. Election precincts in cities. 21 G. A., ch. 161, § 2. For all purposes of elections known to the laws of the state of Iowa after July fourth, 1886, no city of the state shall have attached to its jurisdiction for the purpose of voting at such elections any part of a township or territory outside of the corporate boundaries of such city and the voting precincts in such city for all elections now provided by law whether township, city, county, state, national or special elections, shall be the wards of such city or if a ward or wards are divided into voting precincts in any city, then for such city or cities such divisions shall be the voting precincts and all territory of a township or townships in which such city may be situated and outside of the corporate limits of such city shall be divided into one or more voting precincts for all election purposes, as may be determined by the board of supervisors as now provided by law. All acts or parts of acts that might seem to be in conflict with this section of this act are hereby changed to the extent of being made to conform herewith.

1045. Board of registers. 21 G. A., ch. 161, § 3; 22 G. A., ch. 48, § 12. In all incorporated cities of this state having a population of twenty-five hun-

dred or more, as determined by the last preceding state or national census, the city council shall on or before the sixth Monday next preceding the general election in November of each year, appoint one suitable person from each of the two opposing political parties which cast the greatest number of votes at the then next general preceding election, from three names handed in by the chairman of the city central political committee of each of such parties, to be registers for such election precinct, in such cities, for the registration of votes therein; said registers shall be electors of the election precincts in which they shall act; shall be temperate, of good habits, and of good reputation and character, and of generally recognized clerical ability, and able to speak the English language understandingly; shall hold their offices for one year and shall take an oath or affirmation, to discharge their duties according to law. If for any cause, such registers, or any of them, shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation as above provided, make such appointments, and shall also fill all vacancies, and persons so appointed by the mayor shall have the same qualifications, shall hold their offices for the same time, and shall be subject to the same duties as if appointed by the city council, except that all appointments, in cases of vacancies, shall be for the unexpired terms of office. Should the mayor, upon the request of five freehold electors, fail for a period of three days to perform the duties aforesaid, he shall forfeit and pay, at the suit of any such electors, to be prosecuted in any court of competent jurisdiction, the sum of one hundred dollars per day, for the equal benefit of the city and suitor.

1046. Registration. 21 G. A., ch. 161, § 5. Any person to be entitled to vote, at any of the elections mentioned in the preceding sections, shall appear before the registers of the election precinct where he is entitled to vote, at the time and place designated for registration of voters, and make and subscribe a statement, under oath, in a suitable registration book to be provided for the purpose by the city clerk and furnished to the registers at the equal expense of the city and county, and by them kept open for public inspection and examination during the time fixed for the registration, which statement shall contain the following in the following form:

Register of Voters. —— Precinct; —— Ward.

No.	Residence.	Name.	Nativity.	Color.	TERM OF RESIDENCE.			Naturalized.	Date of papers.	Court.	By act of congress.	Qualified voter.	Date of application.	Last preceding place of residence.	Signature.
					Precinct, street, number.	County.	State.								
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The signature of the applicant shall be made at the right-hand end of the line under the column "signature," one of the registers having first administered to him this form of oath: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, and your right, as such, to register and vote under the laws of this state." After which the registers or either of them shall propound questions to the applicant for registration in relation to his name; his then place of residence, street and number; how long he has resided in the precinct where the vote is offered; what was the last place of his residence before he came into that precinct and also as to his citizenship, and whether a native or naturalized citizen, and, if the latter, when, where, and in what court, or before what officer he was naturalized, or whether by act of congress; whether he came into the precinct for the purpose of voting at that election; how long he contemplates residing in the precinct; and all such other questions as may tend to test his qualifications as a resident of the precinct, citizenship and right to vote at the poll; then, if the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, whereupon the applicant shall sign as aforesaid, and thus his statement for registration shall be complete under oath.

Former provisions for registry were held not in conflict with constitution, art. 2, § 1, prescribing the qualification of electors: *Edmunds v. Banbury*, 28-267. And an election without registry, where such was required by law, was held void, the provisions of the law being mandatory and imperative: *Nefzger v. Davenport & St. P. R. Co.*, 46-642.

1047. Statements filed; return. 21 G. A., ch. 161, § 6. Such statements shall be dated and numbered consecutively, beginning with number one each time for registration aforesaid. No person shall register at any other place than as above designated, or at any other time, except as hereinafter provided. At the close of each day's registration, the registry shall be ruled off to prevent fraudulent entries, and after the completion of the final registration and the certified copy provided for in section eight hereof [§ 1049], the registers shall forthwith return the registration to the city clerk, who shall keep the same at all times open to public inspection.

1048. List of voters. 21 G. A., ch. 161, § 7; 22 G. A., ch. 48, § 12. The registers shall within three days after the registration for each general annual election has been made, prepare an alphabetical list for their respective voting precincts of the names of all persons so registered; their residences; their last preceding places of residence, and the dates of removal when removals occur within one year; their nativity; their color; their term of residence in precinct, county and state; whether naturalized, date of papers, the naturalizing court, or place of naturalization if court is not known; whether naturalized by act of congress; and date of application for registration; which list they shall forthwith post or cause to be posted up conspicuously at the usual place of holding elections at such precinct for inspection of the public.

1049. Correction of lists; challenges. 21 G. A., ch. 161, § 8. The registers shall be in attendance again at their respective places for the registration of voters on the Wednesday of the week preceding the day of each election, in the state, provided by law for township, city, county, state, national or special elections, for the purpose of revising or correcting the lists aforesaid, and for this purpose they shall meet at nine o'clock A. M. and remain in session until eight o'clock P. M., of that day; and they shall there revise, correct, add to, and strike from, and complete the said lists, and shall on that day receive and add to the said lists the names of any persons who would on said election days, be entitled, under the provisions of the constitution and the laws of this state to exercise the right of suffrage in their election precincts. Upon the revision and completion of each of said lists, the registers shall make

a copy thereof, which duly certified by the registers, with the proper number and date of registry in each case added, the registers shall deliver or cause to be delivered to the judges of election of the proper precinct on every such election day, before the opening of the polls. The judges of election shall carefully preserve the said lists for their use on election day; no vote shall be received at any election aforesaid unless the name of the person offering the vote be on such registry made and completed as before provided, preceding the election; a person whose name is on the registry may be challenged, and the same oath shall be put, and the same proceedings had as are prescribed by law for all such cases. This section shall be taken and held by every judicial and other tribunal as mandatory and not as directory. The judges of election shall designate one of their number, or one of the clerks, at the opening of the polls, to check the name of every voter voting in such precinct whose name is on the registry. Any vote which shall be received by the judges of election in contravention of any provisions of this act shall be void, and shall be rejected from the count in any legislative or judicial proceeding wherein any result of the election is involved. The judges of election shall deliver the lists aforesaid to the official as by law provided to whom they shall deliver the returns of the elections. The registers under their duties aforesaid shall register every male applicant who would be twenty-one years of age on the day of the next election, if otherwise qualified, and every applicant who has commenced to reside in such precinct, at least the legal time before such election, now required by law, down to the date of the election, in order to be a legal voter in such precinct, according to the character of the election about to take place, shall be entered in such registry, but unless, on the day of election, he shall have resided for the legal time in such election precinct, he cannot vote therein, although otherwise qualified.

1050. Appearance and hearing. 21 G. A., ch. 61, § 9. The proceedings of said registers shall be open, and all persons entitled to vote in said precinct shall have the right to be heard by such registers in reference to corrections or additions to said lists. No name shall be placed upon any such lists of the name of persons, nor shall any name be added thereto, except of one who shall have appeared in person before said registers, and shall have furnished, upon demand, and to the satisfaction of the registers, the same proofs of his right to register as may by law be required by judges of election of any person desiring to vote. *Provided:* that if an elector is, on account of sickness, which confines him to his residence in his precinct, unable to go to the registers on any day they shall be in session, it shall be the duty of the registers, on the affidavit made before them, of a registered elector to visit such sick elector at his place of residence in the precinct and place the name of such sick person on the registration list if he be found entitled to be registered. Such visits by the registers for the registration of such invalids shall be at no time during any registration day except between the hours of seven A. M. and eight A. M. or between nine P. M. and ten P. M. Any one of the registers, on the points hereinbefore provided, may at any time administer an oath or affirmation to any applicant, that he shall true answers make to all questions put to him touching his qualifications as an elector.

1051. Penalty. 21 G. A., ch. 161, § 10. If any register shall fail to perform any duty in any of the preceding sections of this act prescribed, he shall be liable to a penalty of one hundred dollars, to be recovered on the complaint of any person, before any court of competent jurisdiction; and if any register or judge of election shall wilfully neglect or disregard any duty imposed in any of said sections, or make or permit to be made any registration, statement or list, except at the time and place and in the manner in said sections prescribed, or shall knowingly make or permit to be made any false statement, as aforesaid, or if any person shall wilfully make, or authorize to be made any

statement in said section required, false in any particular, or shall violate any provisions thereof, every such register or judge of election, and every such person or persons, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty nor more than two hundred dollars, or be imprisoned in the county jail not less than twenty days nor more than six months or both at the discretion of the court.

1052. Notice. 21 G. A., ch. 161, § 12. The times and places of making registrations of voters shall be published by the mayor in the two leading political party daily newspapers published in every such city for a period of three days prior to the opening of the registry book, or if there are no daily papers of the two leading political parties published in such city, then the notice shall be published one week before the date for the opening of the registry book, in the weekly paper of each of such political parties, inviting the voters to present themselves for registration at their respective precincts within the proper time, under the risk of being debarred the privilege of voting at such election.

1053. Regulation of elections. 21 G. A., ch. 161, § 13; 22 G. A., ch. 48, § 9. During the receiving and counting of the ballots in any voting precincts of such cities, and in any voting precinct made up of the township outside of the city limits, whose polling place is within the corporate limits of said city, as hereinafter provided, it shall be unlawful for persons to congregate or loiter within one hundred feet of the voting place, or to hinder or delay in any manner any elector in reaching or leaving the place fixed for casting his ballot. It shall be unlawful for any person within said distance of one hundred feet, to give or offer to give any ticket or ballot to any one not a judge of election, or to fold or unfold, or display any ballot which he intends to cast so as to reveal its contents or to solicit the vote of any elector, or attempt in any way to influence him in the matter of casting his vote. The judges of election shall so far as practicable, prevent any violation of this section, by having printed copies of this section conspicuously posted within one hundred feet of the voting place and in other ways, and they and each of them shall order the arrest of any person guilty of violating any of its provisions, or guilty of any breach of the peace, or disorderly conduct, and all special policemen and all other persons are authorized and required to obey the lawful orders and commands of said judges of elections, given to prevent violations of this section. But orders for the arrest of such persons shall not prevent them from properly casting their votes. The city council is authorized and required to detail and employ on the nomination of the principal political committee of each political party recognized as the two leading parties from citizens or the police force of the city, from two to four special policemen for each precinct, and duly empower them for the special occasion of each election, who shall be men of good character and reputation, in equal numbers from each of the leading political parties, to prevent the violation of any of the terms, provisions or requirements of this section, or of any order or command made in pursuance of any provision hereof, and any person violating or attempting to violate any of such terms, provisions, requirements, orders or commands shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished as provided in the last penal clause of section ten of this act [§ 1051], and no other peace officer for preserving order, shall exercise his authority at or near such voting places than those above named unless called in by an unexpected, dire emergency: *Provided*, that nothing in this section shall be construed to prohibit the presence at the polls, of any persons who are authorized by law to perform or charged likewise, with the performance of official duties at the election, or of any persons not exceeding three from each political party having candidates to be voted for, at such elections, to act as challenging committees who are duly appointed and accredited

by the principal committee of such political parties, or organizations, respectively or of persons not exceeding three from each such political parties, appointed and accredited in the same manner, as before prescribed, for challenging committees to witness the counting of ballots.

1054. Polling places for country precincts. 21 G. A., ch. 161, § 14. Voting precincts made up of the townships outside of the city limits of the city which is situated in such township or townships may, if preferred for the convenience of the voters therein, have their polling places for all election purposes, at some room or rooms in the court-house, or other buildings within the corporate limits of such city as the board of supervisors may provide. Section six hundred and eighteen, chapter three, title five of the code is hereby repealed.

1055. Time and place of registry. 22 G. A., ch. 48, § 1. The place for the registration of voters in and for every election precinct in the cities mentioned in section three of the act of which this is amendatory [§ 1045] shall be the usual places of holding elections therein. The registers shall be in attendance at their respective places for registration on the second Thursday next preceding every general annual election, for the purpose of registering voters, copying registry lists and correcting the same, and performing such other duties as are required of them in order to properly prepare the necessary lists for the ensuing election. They shall be in attendance from eight o'clock A. M. until nine o'clock P. M.; shall personally supervise all registration, and shall be in constant attendance during the hours designated for the discharge of their duties. For the general annual election in 1888, and that of every fourth year thereafter, they shall remain in attendance three days, and for every other general annual election they shall remain in attendance two days.

1056. How often. 22 G. A., ch. 48, § 2. The registers shall make a complete new registry of voters for the general annual election of 1888, and for that of every fourth year thereafter. For all other general annual state elections they shall prepare a new registry list, based on that of the last preceding general annual election, and every person whose name appears upon such registry list of the last preceding general annual election shall be entered upon the new registry list as also the facts showing his qualification as a legal voter, as they appear upon such last preceding registry list.

1057. Other elections. 22 G. A., ch. 48, § 3. For all other general or special elections, whether state, county, city or township, the registry list for the last preceding general annual election shall be used, and every person registered thereon shall be considered as registered to vote at such election, except as such list may be corrected and changed by the registers, as by law provided. Said registers shall meet upon the Saturday preceding every election, whether general or special, township, city, state or national, instead of upon Wednesday as provided in section eight of said chapter one hundred and sixty-one [§ 1049], and except as to said change of meeting from Wednesday to Saturday preceding said election, all of the provisions of said section eight shall remain unimpaired and in full force.

1058. Certified lists. 22 G. A., ch. 48, § 4. Upon the revision and completion of said registry lists they shall be duly certified by the registers, who, after making the same corrections upon and additions to the alphabetical lists, shall deliver the registry and alphabetical lists to the judges of election for the proper precinct, on every such election day, before the hour for the opening of the polls.

1059. Compensation. 22 G. A., ch. 48, § 5. During the days when the registers are in session, they shall, when not actually engaged in registering voters, prepare the alphabetical lists and complete their labors with all reasonable dispatch. They shall receive as compensation two dollars and fifty

cents per day, for each calendar day, upon which they shall be employed, for all services required of them under the provisions of this act. They shall be paid their compensation by the county, except that in case of city elections they shall be paid by the city.

1060. City clerk. 22 G. A., ch. 48, § 6. The city clerk shall carefully preserve all registry and alphabetical lists and poll books and other papers pertaining to the last preceding election for eighteen months after the election at which they were first issued, and may then destroy them unless a contest be then pending over the election of a person voted for at such election, in which case he shall preserve those so bearing upon such contest until after the same has been finally disposed of. He shall on the application of the registers, deliver to them, prior to their first meeting for each election, the registry and alphabetical lists and poll books which they require in order to properly prepare the necessary lists for the next ensuing election, all of which shall be returned to him by them when they have completed their work for such election, except such as they are required to deliver to the judges of election.

1061. Registration on election day. 22 G. A., ch. 48, § 7. The registers shall also be in session on the day for the holding of each and every election, at some place convenient to, but not within one hundred feet of the voting place, and during all the hours in which, by law, the polls are required to be kept open, for the purpose only of granting certificates for registration to persons who, being electors, are not registered; but no such certificate shall be granted except to a person who was absent from the city during all the days fixed for the registration of voters for that election, or to a person who, being a foreigner, has received his final papers since the last preceding day for the registration of voters for that election; or to a person whose name was on the preceding Saturday, and in the absence of such person, stricken from the registry list, and who, on said day of election, shall prove to the satisfaction of said registers that he is a lawfully qualified elector of said voting precinct. These certificates shall contain all the data showing the qualification of the voter as is required for regular registration, and in addition, the special matter showing the voter's right to a certificate under this section. The proper statement shall be signed and sworn to by the voter before one of the registers, and it shall be supported by the affidavit of a freeholder who is a registered voter in that precinct, who shall make oath to the qualification of the applicant as a voter in that precinct; and if the applicant be one whose name was stricken from the registry list, said affidavit of such freeholder shall contain the fact showing the right of said applicant to vote in that precinct. The certificate shall be handed in to the judges of election with the voter's ballot. The data therefrom, showing the voter's name and his qualification as a voter, shall be entered on the registry lists by the judges and clerks of the election, under the appropriate headings, and the original certificate shall be returned to the city clerk, who shall carefully preserve it, in the same manner, and for the same time as the registry lists and poll books. The certificate, before delivery to the applicant, shall be certified by the registers to the effect that the person therein named is a qualified voter in that precinct, and that he is entitled to be registered as such, under this section.

1062. School elections. 22 G. A., ch. 48, § 10. This act, and the act to which it is amendatory, are hereby declared inapplicable to elections held under and in accordance with the school laws of the state.

1063. 22 G. A., ch. 48, § 11. So much, and so much only, of chapter one hundred and sixty-one, acts of the twenty-first general assembly of the state of Iowa [§§ 1043–1054], as is in conflict herewith, is hereby repealed.

CHAPTER 3.

OF THE GENERAL ELECTION.

1064. Election precincts. 603. At the general elections, each township shall be an election precinct, and a poll shall be opened at the place of election therein. But the board of supervisors may, in their judgment, divide any township in their county into two or more precincts. [R., § 480; C., '51, § 245; 9 G. A., ch. 23, § 11; 14 G. A., ch. 86.]

[As to election precincts in cities, see § 687.]

1065. Notice. 604. In that case they shall number or name the several precincts and cause the boundaries of each to be recorded in their minute book, and notice thereof to be published in some newspaper of general circulation in the county for three consecutive weeks at least once a week, the last publication to be made at least thirty days before the next election. [9 G. A., ch. 23, § 2.]

1066. Place of voting. 605. No person shall vote in any other precinct than that in which he resides at the time. [Same, § 7.]

By going into a township and remaining there for the sole purpose of voting, with no intention of remaining longer, one will not acquire sufficient residence to entitle him to vote; but if the removal is in good faith, no length of residence is necessary: *State v. Minnick*, 15–123.

Where the time, place and manner of holding elections are not prescribed by the constitution, but committed to the legislature, the reception of votes out of the precinct or the county of elector's residence may be constitutionally authorized: *Morrison v. Springer*, 15–304.

If no requirements as to the length of residence were contained in the constitution, the legislature might fix such length of residence as it should see fit: *Ibid.*

The residence of a voter is the place of his domicile or place of abode, as distinguished from the residence acquired as a sojourner for business, education or other temporary purpose. Therefore, *held*, that a student in the university at Iowa City, sent there and supported by his father, and making his father's home his "headquarters" during vacation, was not entitled to vote in Iowa City, though he had been there the requisite length of time and had no present intention of leaving there when he ceased to attend the university: *Vanderpoel v. O'Hanlon*, 53–246.

If the ballot of a voter is received it is no ground of complaint that an improper oath has been administered to him touching his qualifications: *State ex rel. v. O'Day*, 69–368.

Persons in military service: A soldier serving in the volunteer forces of the federal government does not thereby lose nor change his place of residence, which remains that of the county of his residence at the time of entering the service; and if he should be in such county on the day of election he would unquestionably have the right to vote, if otherwise qualified: *Morrison v. Springer*, 15–304.

And *held*, that the legislature may authorize the casting of ballots by soldiers at points where they are stationed outside the state: *Ibid.*

Under the statute authorizing persons absent from the state in military service to vote at general elections, *held*, that the submission of a proposition for the disposition of swamp lands at a special election at which persons in the military service could not vote was not illegal: *Cedar Rapids & M. R. R. Co. v. Boone County*, 34–45.

1067. Judges and clerks. 606. There shall be three judges of election in each precinct, who shall be appointed by the board of supervisors at their meeting in September; and there shall be two clerks of the election, one of whom shall be the township clerk, and the other some elector named by him, and if the township clerk does not attend, then the two clerks shall be chosen by the judges of election; *provided*, that the township trustees and township clerks shall be judges and clerks of election in those precincts where they respectively reside. [R., § 481; C., '51, § 246; 9 G. A., ch. 23, § 3.]

1068. Vacancies. 607. If any judge does not attend in time, or refuses to be sworn, his place shall be filled by an elector appointed by those who do attend; and if no judge is present at the time for opening the polls, the electors present shall choose three qualified persons to act as judges of election. [R., § 482; C., '51, § 247; 9 G. A., ch. 23, § 4.]

1069. Clerks. 608. If the clerks, or either of them, are not present at the opening of the polls, or, being present, refuse to be sworn, the judges of election shall fill their places from the electors present. [R., § 483; C., '51, § 248.]

1070. Oath. 609. Before opening the polls each of the judges and clerks shall take the following oath: I, A. B., do solemnly swear that I will impartially, and to the best of my knowledge and ability, perform the duties of judge (or clerk) of this election, and will studiously endeavor to prevent fraud, deceit, and abuse in conducting the same. [R., § 484; C., '51, § 249.]

These provisions are directory. A failure of the officers mentioned to be sworn will not vitiate the election, and in a case in court involving the validity of an election, the fact that the officers were sworn may be proved *aliunde*. The return is not conclusive: *Dishon v. Smith*, 10-212.

1071. How administered. 610. Any one of the judges or clerks present may administer the oath to the others, and it shall be entered in the poll books, subscribed by the person taking it, and certified by the officer administering it. [R., § 485; C., '51, § 250; 9 G. A., ch. 23, § 5.]

1072. Polls open; proclamation. 611. The polls shall be opened at nine o'clock in the forenoon, unless vacancies shall have to be filled as above, in which case they are to be opened as soon thereafter as may be, and they shall be kept open until six o'clock in the afternoon; and if the judges deem it necessary for receiving the ballots of all the electors, they may keep them open until nine o'clock in the evening. Proclamation thereof shall be made at or before the opening of the polls, and half an hour before closing them. [R., § 486; C., '51, § 251.]

1073. Preservation of order. 612. Any constable of the township who may be designated by the judges of election is directed to attend at the place of election, and he is authorized and required to preserve order and peace at and about the same; and if no constable be in attendance, the judges of the election may appoint one or more specially, by writing, who shall have all the powers of a regular constable. [R., § 487; C., '51, § 252.]

1074. Disturbance. 613. If any person conducts in a noisy, riotous or tumultuous manner at or about the polls so as to disturb the election, or insults or abuses the judges or clerks of election, the constable may forthwith arrest him and bring him before the judges, and they, by a warrant under their hands, may commit him to the jail of the county for a term not exceeding twenty-four hours; but they shall permit him to vote. [R., § 488; C., '51, § 253.]

1075. Boxes. 614. The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box with lock and key. [R., § 489; C., '51, § 254.]

1076. Poll books. 615. The county auditor shall prepare and furnish to each precinct two poll books, having each of them a sufficient column for the names of the voters, a column for the number, and sufficient blank leaves to contain the entries of the oaths, certificates, and returns; and also all books, blanks, and materials necessary to carry out the provisions of the chapter on registration of voters. [R., § 490; C., '51, § 255; 12 G. A., ch. 171, §§ 1, 9.]

1077. Ballots. 616. The ballots shall designate the office for which the persons therein named are voted for. [R., § 491; C., '51, § 256.]

1078. Voting. 617. In voting, the electors shall deliver their ballots to one of the judges, and he shall deposit them in the ballot-box. [R., § 492; C., '51, § 257.]

[Section 618 of the Code is repealed by § 1054.]

1079. Challenge. 619. Any person offering to vote, whether his name be on the register or not, may be challenged as unqualified by any judge or

elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. [R., § 493; C., '51, § 258; 13 G. A., ch. 174, § 3.]

1080. Oath. 620. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him as to his qualifications, and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear that you are a citizen of the United States, that you are a resident of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election." And if he takes such oath his vote shall be received. [R., § 494; C., '51, § 259.]

1081. Name entered. 621. The name of each person, when his ballot is received, shall be entered by each of the clerks in the poll-book kept by him, so that there may be a double list of voters. [R., § 495; C., '51, § 260.]

ELECTION OF ROAD SUPERVISOR AND TOWNSHIP ASSESSOR.

1082. Who may vote for. 17 G. A., ch. 71, § 1. No person shall vote for supervisor of highways of any highway district other than that in which he resides at the time of election, nor shall any person living in a city or incorporated town, which constitutes a part of a township, and which has a corporate assessor, vote for a township assessor.

1083. Road supervisors. 17 G. A., ch. 71, § 2. The township trustees of each township or election precinct, shall cause to be prepared a separate ballot-box to receive the votes for supervisors of highways, with as many different compartments as there are highway districts in the township, or election precincts, and numbered accordingly, and each person voting shall at the time he gives in his vote for supervisor of highways, which shall be on a separate ballot, state to the judges of election the number of the highway district in which he resides, and his vote shall be placed in the corresponding compartment of said ballot-box.

1084. Township assessor. 17 G. A., ch. 71, § 3. Where any township or election precinct embraces the whole or any part of any city or incorporated town having a corporate assessor, a separate ballot-box for township assessor shall be prepared by the township trustees, and the vote for township assessor shall be in such township on a separate ballot, and every person voting for such officer, shall, at the time, if required, prove to the judges of election that he resides outside of the limits of such city or incorporated town, and his vote for such officer shall be placed in the ballot-box made for that purpose.

CANVASS BY JUDGES OF ELECTION.

1085. Canvass. 622. When the poll is closed, the judges shall proceed to canvass and ascertain the result of the election. [R., § 496; C., '51, § 261.]

1086. Compare lists; double ballots. 623. The canvass shall be public, and shall commence by a comparison of the poll-lists from the beginning, and a correction of any errors which may be found therein until they agree. If two or more ballots are found so folded together as to convince the

If the ballot expresses a certain intent by the elector, for instance if it bears the name of a person that is eligible to the office balloted for, it affords the most satisfactory evidence that it was the elector's intention to vote for that person; but when it is apparent that the intent of the elector is imperfectly expressed by the ballot, as when the person intended to be voted for is not identified by it, extrinsic evidence is admissible in aid of such imperfection. In such cases resort may be had to the circumstances surrounding the election. Therefore, *held*, that ballots cast for F. Wimmer might be counted for E. Wimmer, it appearing that there was no person of the name of F. Wimmer eligible to the office, and that the name was printed on the ballots in the belief that it was the name of the person who was a candidate. Whether an elector who has cast a defective ballot can be permitted to testify as to his intent, *quære: Wimmer v. Eaton*, 72–374.

judges that they were cast as one, they shall not be counted, but they shall have the words "rejected as double" written upon them, be folded together again, and kept as herein directed. [R., § 497; C., '51, § 262.]

1087. Ballot rejected. 624. If, at any stage of the canvass, a ballot, not stating for what office the person therein named is voted for, is found in the box when officers of different kinds are to be elected, it is to be rejected. [R., § 499; C., '51, § 264.]

1088. Excess of names. 625. If a ballot be found containing the names of more persons for an office than can be elected to that office, and such ballot form an excess above the number voting, it shall be rejected as to that office, the cause of rejection being indorsed thereon, and disposed of as hereafter directed; and if it does not form such excess, so many of the names first in order as are required shall be counted. [R., § 500; C., '51, § 265.]

1089. Tally-list. 626. As a check in counting, each clerk shall keep a tally-list. [R., § 501; C., '51, § 266.]

1090. Excess of ballots. 627. If the ballots for any officer are found to exceed the number of the voters in the poll-lists, that fact shall be certified with the number of the excess in the return, and if it be found that the vote of the precinct where the error occurred would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurs and a new election ordered therein, providing that no person or persons residing in another precinct at the time of the general election shall be allowed to vote at such special election; but if the error occur in relation to a township officer, the trustees may order a new election or not, in their discretion. If the error be in relation to a district or state officer, the error and the number of the excess are to be certified to the state canvassers, and if it be found that the error would affect the result as above, a new vote shall be ordered in the precinct where the error happened, and the canvass be suspended until such new vote is taken and returned. When there is a tie vote and such an excess, there shall be a new election as above directed. [R., § 498; C., '51, § 263; 14 G. A., ch. 12.]

The meaning of the word "error" as here used would be more accurately expressed by the use of the word "excess." The supervisors should not order a new election for a county officer unless it appears that there is an excess of ballots as to that office: *Rankin v. Pitkin*, 50-313.

Evidence as to a mistake in a count of the ballots as to one candidate is immaterial upon the question as to whether there was a mistake in the count as to another candidate: *McIntosh v. Livingston*, 41-219.

1091. Return each poll. 628. A return in writing shall be made in each poll-book, setting forth in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office, which return shall be certified as correct, signed by the judges, and attested by the clerks. Such return shall be substantially as follows:

At an election at the house of —— ——, in —— township, or in —— precinct of —— township, in —— county, state of Iowa, on the —— day of ——, A. D. —— there were —— ballots cast for the office of (governor) of which

A—— B—— had —— votes.
C—— D—— had —— votes.

(and in the same manner for any other officer.)

A TRUE RETURN: L—— M——, N—— O——, P—— Q——, } Judges of the election.

ATTEST: R—— S——, T—— U——, } Clerks of election.

[R., § 502; C., '51, § 267.]

It is not fatal to the certificate that it does not contain full particulars of time and place. The caption and the certificate may be taken together: *Dishon v. Smith*, 10-212.

While the canvassers cannot adjudicate upon the sufficiency of returns, where the case comes into a court of justice, the court or jury trying it may go behind the returns and even behind the ballot-box in some cases. *Ibid.*

1092. Disposition of poll-books. 629. One of the poll-books containing such return, with the register of election attached thereto, in cases where such register is required by law, shall be delivered to the township clerk, and be by him filed in his office. The other poll-book, with its return, shall be inclosed, sealed, superscribed, and delivered by one of the judges of election within two days to the county auditor, who shall file the same in his office. [R., §§ 333, 503; C., '51, § 268; 9 G. A., ch. 23, § 6; 12 G. A., ch. 171, § 11; 14 G. A., ch. 74.]

[The words between "thereto" in the second line and "shall" in the third line are erroneously omitted in the printed Code.]

1093. Ballots and tally-lists. 630. When the result of the election is ascertained, the judges shall cause all the ballots, including those rejected, with the tally-list, to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed which is allowed for contesting the election of any officer voted for. [R., § 504; C., '51, § 269.]

1094. Result certified. 631. In townships constituting a single precinct, the judges of the election shall certify the result as to township officers immediately after the canvass above directed; but where there are two or more precincts in a township, the trustees and clerk thereof shall meet on the day after the election, and canvass the votes given for township officers as shown by the returns from the precincts.

The board of supervisors and not the township trustees have authority to canvass the ballots for justice of the peace: *Lynch v. Vermazen*, 61-76.

1095. Tie vote. 632. When there is a tie between two persons for a township office, the clerk shall notify them to appear at his office at a given time to determine the same by lot before one of the trustees and the clerk, and the certificate of election is to be given accordingly. If either party fail to appear or to take part in the lot, the clerk shall draw for him. [R., § 547; C., '51, § 316.]

1096. Township officers notified. 633. The ballots for township officers having been canvassed, the clerk shall, within five days thereafter post up in three public places in the township written notices containing the names of persons elected to township offices at such election, and requiring each of them to appear before the proper officer and qualify according to law. [R., § 548; C., '51, § 317; 9 G. A., ch. 89.]

COUNTY CANVASS.

1097. Returns not made. 634. If the returns from all the precincts are not made to the county auditor by the third day after the election, on the fourth day he shall send messengers to obtain them from those precincts whose returns are wanting, the expense of which shall be paid out of the county treasury. [R., § 505; C., '51, § 270.]

1098. Supervisors to canvass. 635. At their meeting on the Monday after the general election, at twelve o'clock noon, the board of supervisors shall open and canvass the returns and make abstracts, stating in words written at length the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office. [R., §§ 335, 506; C., '51, § 271.]

Returns: The action of the board in canvassing returns is ministerial rather than judicial. Nor is there any discretion to be exercised. The board has no authority to judge

of the validity of returns or of votes. Its duty is to receive the returns and count them, provided they are sufficiently proved to be such, although irregular. (So *held* in regard to the canvass of votes at special election as to the relocation of a county seat under 5 G. A., ch. 46): *State ex rel. v. County Judge*, 7-186; *State v. Bailey*, 7-390.

The canvassers may reject improper returns, such as are not properly signed, or have not been in the proper custody, or have been mutilated or changed; and after they have declared the result they may, by *mandamus*, be compelled to re-assemble and recanvass the vote to correct a mistake in improperly rejecting returns: *Price v. Harned*, 1-473; or in counting improper returns: *State ex rel. v. County Judge*, 13-139.

Where an officer was authorized to examine the returns of an election for a county seat, and, on being satisfied that either place voted for had a greater number of votes than the other, the record of such result was to be made, *held*, that he had no authority to inquire into the legality of the votes cast, but was bound by the returns as made to him: *United States ex rel. v. Commissioners*, Mor., 31.

In a case involving the validity of votes cast at an election the court is not precluded by the return, but he may receive evidence as to the compliance with the law on the part of the officers of the election, and may therefore receive evidence that the officers were duly sworn, although such fact does not appear on the face of the return: *Dishon v. Smith*, 10-212.

Where two corresponding returns were made out by the judges of election, one of which was on its face informal and unauthenticated, and the other was formal and on its face duly authenticated, *held*, that the county board of canvassers could not refuse to receive evidence *aliunde* to establish the former, and yet receive such evidence to defeat the latter, but must count the votes as returned: *State v. Cavers*, 22-343.

Mandamus is the proper remedy to compel the canvassers to declare elected and certify to the election of the party receiving the highest number of votes: *Bradfield v. Wart*, 36-291.

Where the canvass of votes at an election was to be made by the county judge calling to his assistance two justices of the peace, and an action by *mandamus* was instituted to compel a recanvass, *held*, that such *mandamus* properly issued to the judge alone and not to the board as originally constituted: *State ex rel. v. County Judge*, 7-186: *Rice v. Smith*, 9-570.

Where a writ of *mandamus* was granted to compel a re-assembling of the canvassing board of the county by the county judge for the purpose of recanvassing the returns, *held*, that the primary writ should issue to such county judge in his individual name, and that upon failure of the other members of the board summoned by him, in pursuance of law, to constitute such board and canvass such returns to comply with the writ, an *alias* writ might be directed to such other members and a proper canvass compelled: *State ex rel. v. Smith*, 9-334.

The duties imposed upon the members of the board of supervisors in relation to canvassing votes cast at elections may be enforced by *mandamus*, but an action of damages for their non-performance will not lie: *Jayne v. Drorbaugh*, 63-711.

Injunction: Although *mandamus* may have issued to compel a board of canvassers to count and record the votes contained in certain returns, yet an injunction restraining any action under the count as thus recorded will not be improper or inconsistent with the *mandamus* if it appears that the votes which the board is directed to canvass should not be counted owing to matters existing outside of the returns: *Dishon v. Smith*, 10-212.

Certificate: It is not fatal to the certificate that it does not contain full particulars as to the time and place of the election. The caption and the certificate may be taken together: *Ibid.*

Where it was required that a certificate of the election, at which a railroad aid tax was voted, should be certified by the clerks of the election, *held*, that a certificate signed by the judges and attested by the clerks was sufficient: *Casady v. Lowry*, 49-523.

1099. Form of abstracts. 636. The abstract of the votes for each of the following classes shall be made on a different sheet:

1. Governor and lieutenant-governor;
2. All state officers not otherwise provided for;
3. Representatives in congress;
4. Senators and representatives in the general assembly from the county alone;
5. Senators and representatives in the general assembly by districts comprising more than one county;
6. Judges of the district court, district [county] attorneys, [and judges of the circuit court;]
7. County officers. [R., § 507; C., '51, § 272; 14 G. A., ch. 22, §§ 1, 2.]

1100. Duplicates. 637. Two abstracts of all the votes cast for any state or judicial district officer shall be made, and one forwarded to the secretary of state, and the other filed by the county auditor. [R., § 507; C., '51, § 272.]

1101. Result. 638. The person having the greatest number of votes for any office is to be declared elected. [R., § 508; C., '51, § 273.]

Mandamus is the proper remedy to compel the canvassers to declare elected and certify to the election of the party receiving the highest number of votes: *Bradfield v. Wart*, 36-291.

1102. Declaration. 639. Each abstract of the votes for such officers as the county alone elects, shall contain a declaration of whom the canvassers determine to be elected, except when two or more persons receive an equal and the greatest number of votes. [R., § 509; C., '51, § 275.]

1103. Returns filed. 640. When the canvass is concluded, the board shall deliver the original returns to the auditor to be filed in his office, and shall cause each of the abstracts mentioned in the preceding section to be recorded in a book to be kept for recording the result of county elections, and to be called the "election book." [R., §§ 335, 510; C., '51, § 276.]

1104. Certificate. 641. When any person thus elected has appeared and given bond, and taken the oath of office as directed in this title, there shall be delivered him a certificate of election, under the official seal of the county, in substance as follows:

STATE OF IOWA, }
—— COUNTY. }

At an election holden in said county on —— day of ——, A. D. ——, A. B. was elected to the office of —— of the said county, for the term of two years from the first Monday of January, A. D. —— (or if he was elected to fill a vacancy, say for the residue of the term ending on the —— day of ——, A. D. ——), and until his successor is elected and qualified, and he has qualified by giving bond and taking the oath of office as required by law.

[L. S.] A. B.,
President of the board of canvassers.

WITNESS: E. F., county auditor.

Which certificate shall be presumptive evidence of his election and qualification. [R., §§ 511, 514; C., '51, § 277; 9 G. A., ch. 36.]

1105. Of senators and representatives. 642. The certificates of senators and representatives in the general assembly may vary from the foregoing according to the nature of the case, and the requirements of law, and shall be made out in duplicate, one copy to be forwarded to the secretary of state, and the other to be delivered to the member on request. [R., § 512; C., 51, § 278.]

1106. Tie vote. 643. When two or more persons receive an equal and the highest number of votes for an office to be filled by the county alone, the auditor shall issue a notice to such persons of such tie vote and require them to appear at his office on a day named in the notice, within twenty days from the election day, and determine by lot which of them is to be declared elected. [R., § 515; C., '51, § 281.]

1107. Lot. 644. The county auditor shall notify the board of canvassers, or, in case of their absence or inability, the recorder and sheriff, of such lot and on the day fixed, the parties interested, or such of them as may appear, shall determine, by a lot fairly arranged by the three officers, which of them is to be declared elected; and the three officers shall certify such lot and its result under their official names and the seal of the county, to be affixed by the county auditor, and the certificate shall be recorded in the election book, and the auditor shall deliver to the person elected his certificate of election on the terms prescribed in this chapter. [R., § 516; C., '51, § 282.]

1108. Abstracts for governor and state officers. 645. Within ten days after the election day, the county auditor shall envelope and seal up by itself, one of the abstracts of votes for governor and lieutenant-governor, and indorse upon it in substance "abstract of votes for governor and lieutenant-governor, from ——— county," and address it to the speaker of the house of representatives. The abstract of votes for other state officers, and for such

district officers as are to be returned to the secretary's office, are to be enveloped, sealed, and indorsed in like manner, and directed to the secretary of state. The several packages shall then be placed in one envelope and transmitted to the secretary by mail. [R., §§ 517, 518; C., '51, §§ 283-4.]

1109. For senator or representative for district. 646. When a senator or representative in the general assembly is elected by a district composed of more than one county, the board of county canvassers shall, at the time of canvassing the vote of the county, make and certify an abstract of the votes cast in their county for such office, similar to the abstract required by section six hundred and thirty-six of this chapter [§ 1099], and the auditor shall seal up, direct, and transmit such abstract to the secretary of state as provided in section six hundred and forty-five of this chapter [§ 1108]. He shall also transmit a similar abstract to the county auditor of each other county in the district, who shall file the same in his office. [10 G. A., ch. 20, §§ 1, 2.]

1110. State canvassers. 647. The board of state canvassers shall open the abstracts transmitted to the secretary of state, as provided by the last section, and canvass the votes therein returned at the time of canvassing the state vote, or at such other time as they may fix, and in all cases at least twenty days prior to the time fixed by law for the meeting of the next general assembly; and in case of a special election, within five days after the receipt of such abstracts, and shall immediately make out, certify, and transmit by mail to the county auditor of each county in such district, to be by him filed in his office, an abstract of such canvass similar to the abstract required by section six hundred and forty-five of this chapter [§ 1108]. [Same, § 3.]

1111. Certificate. 648. They shall, also, make and sign a certificate showing who is elected to the office of senator or representative in such district, designating it by its number and similar to the certificate required by section six hundred and fifty-five of this chapter [§ 1108], and the secretary of state shall deliver it to the person appearing by it to be elected to such office on his demanding it. [Same, § 4.]

STATE CANVASS.

1112. Returns procured. 649. If the abstracts from any county are not received at the office of the secretary of state by the fourth Monday after the day of election, the secretary is authorized to send a messenger to the auditor of such county, who shall furnish such messenger with the abstracts, or, if they have been sent, with a copy of them, and he shall return them to the secretary without delay. [R., § 519; C., '51, § 285.]

1113. Abstracts opened. 650. The abstracts, when received by the secretary, shall be kept in his office unopened until the day appointed for opening them, and shall be opened only in the presence of the board of canvassers. [R., § 520; C., '51, § 286.]

1114. Board of canvassers. 651. The executive council constitute a board of canvassers for the state, but no member thereof shall take part in canvassing the votes for any office, for which he himself is a candidate. [R., § 521; C., '51, § 287.]

1115. Time of canvass. 652. On the Thursday following the fourth Monday after the day of election, the board of state canvassers shall open and examine the returns if they are received from all the counties, and if not all received, they may adjourn, not exceeding twenty days, for the purpose of obtaining the returns from all the counties, and when these are received shall proceed with the canvass. [R., § 522; C., '51, § 288.]

1116. Abstracts. 653. They shall make an abstract stating the number of ballots cast for each office, the names of all the persons voted for, for what

office they respectively received the votes, and the number of votes each received, in words at length, and stating whom they declare to be elected to each office; which abstract shall be signed by the canvassers in their official capacity, and as state canvassers, and have the seal of the state affixed. [R., § 523; C., '51, § 289.]

[The word "each" in the fourth line is "the" in the printed Code.]

1117. Record of canvass. 654. The secretary shall record the abstract in a book to be kept by him for recording the result of state elections, and to be called the election book, and also file the abstract. [R., § 524; C., '51, § 290.]

1118. Certificate. 655. A certificate shall be prepared for each person elected, in substance as follows:

STATE OF IOWA.

At an election holden on the —— day of —— A. B. was elected to the office of —— of said state, for the term of —— years from the first Monday, (or day, as the case may be) of January, A. D. ——, (or, if to fill a vacancy, say, for the residue of the term ending on the —— day of ——, A. D. ——.)

Given at Des Moines, this —— day of ——, A. D. ——.

Which certificate shall be signed by the governor, if present, if not by the secretary, with the seal of the state affixed in either case, and be attested by the other canvassers, but in the absence of the governor the secretary's certificate shall be signed by the auditor. [R., § 525; C., '51, § 291.]

1119. Delivery. 656. Such certificate shall be delivered to the persons elected when he has qualified as provided in chapter five of this title. [R., § 526; C., '51, § 292.]

1120. Notice. 657. The governor shall cause the persons elected to be notified thereof immediately, either by mail or by a sheriff or constable, who shall return his doings to the secretary's office. [R., § 527; C., '51, § 293.]

1121. Representative in congress. 658. The certificate of the election of a representative in congress shall be signed by the governor, with the seal of the state affixed, and be countersigned by the secretary of state, and the governor shall cause it to be delivered to the person elected. [R., § 528; C., '51, § 294.]

ELECTION OF REPRESENTATIVES IN CONGRESS.

[The act apportioning the state into representative districts, as given in the appendix, contains, also, the following sections:]

1122. How elected. 19 G. A., ch. 163, § 13. Each of said districts shall be entitled to one representative in congress, and the first election of members of congress under this act shall be at the general election in the year 1882. Members of congress shall be elected at the general election held every two years thereafter.

1123. Returns; canvass. 19 G. A., ch. 163, § 14. The returns of elections for members of congress under this act shall be made to the secretary of state; and the canvass shall be made by the board of state canvassers; which return and canvass shall be made as required by law for the return and canvass of auditor of state.

CHAPTER 4.

OF ELECTORS OF PRESIDENT AND VICE-PRESIDENT.

1124. Election of. 659. On the Tuesday next after the first Monday in the month of November, in the year eighteen hundred and seventy-six, and every four years thereafter, or on such day as the congress of the United States may direct, a poll shall be opened in each precinct for the election of electors of president and vice-president of the United States. [R., § 535; C., '51, § 301.]

See U. S. Const., art. II, § 1

1125. Ballots. 660; 16 G. A., ch. 23. The names of all the electors to be chosen shall be written or printed on each ballot, and each ballot shall contain the name of at least one inhabitant of each congressional district into which the state may be divided, and against the name of each person shall be designated the number of the congressional district to which he belongs. [R., § 536; C., '51, § 302.]

1126. How conducted. 661. This election shall be conducted, and the returns made, as directed in relation to the election of state officers and representatives in congress, except as herein otherwise expressed. [R., § 537; C., '51, § 303.]

1127. Duty of county canvassers. 662. The board of county canvassers shall examine the returns, make, sign, envelope, and seal up the abstracts, and indorse and direct them as provided in other cases, and the county auditor shall transmit them to the secretary of state by mail. In case of his failure so to do, or if they are not received by the secretary of state within fifteen days after the election, he may send a special messenger for them as in other cases. [R., §§ 538, 539; C., '51, §§ 304, 305.]

1128. Time of state canvass. 663. On the twentieth day after the day of election, or before that time, if the returns are received from all the counties, the board of state canvassers shall open and examine the returns and make an abstract as directed in regard to the general elections, which shall be recorded by the secretary in the election book. [R., § 540; C., '51, § 306.]

1129. Method. 664. The canvass shall be public, and in canvassing the returns, the persons having the greatest number of votes are to be declared elected; and if more than the requisite number of persons are found to have the greatest and an equal number of votes, the election of one of them shall be determined by lot, to be drawn by the governor in the presence of the other canvassers. [R., § 541; C., '51, § 307.]

[The word "an," before "equal" in the fourth line, is erroneously omitted in the printed Code.]

1130. Certificate. 665; 22 G. A., ch. 50. After the expiration of ten days from the day the canvass is completed the governor shall issue a certificate of election under his hand and the seal of the state and cause it to be served on each person elected, notifying him to attend at the seat of government at noon on the second Monday in January next following their appointment and report himself to the governor as in attendance; but in case of a contest of election of an elector the governor shall withhold the certificate until the contest is determined. [R., § 542; C., '51, § 308.]

1131. Meeting; filling vacancies. 666; 22 G. A., ch. 50. The electors so attending shall meet at noon of said Monday and the governor shall provide them a list of all the electors, and in case of the absence of any elector or if the proper number of electors shall, for any cause, be deficient, those

present shall forthwith elect from the citizens of the state, so many persons as will supply the deficiency. [R., § 543; C., '51, § 309.]

1132. Notice. 667. Such choice being certified to the governor, he shall cause the person chosen to be notified immediately. [R., § 544; C., '51, § 310.]

1133. Election; certificate. 668; 22 G. A., ch. 50. The college of electors, being full, shall meet at the capitol at noon of the said second Monday in January or as soon thereafter on that day as practicable, and proceed to the election in conformity with the constitution of the United States and the laws of congress enacted by authority thereof: And it shall be the duty of the governor, as soon as practicable, to communicate under the seal of the state to the secretary of state of the United States, a certificate or certificates complying with the requirements of section three of the act of congress entitled An act to fix the day for the meeting of the electors of president and vice-president and other purposes approved February third, 1887. [R., § 545; C., '51, § 311.]

[As to method of contesting election, see §§ 1212–1216.]

1134. Compensation. 669. The electors shall receive a compensation of five dollars for every day's attendance, and the same mileage as members of the general assembly. [R., § 546; C., '51, § 312.]

CHAPTER 5.

OF QUALIFICATION FOR OFFICE.

1135. Must qualify. 670. No civil officer shall enter on the duties of his office until he has qualified himself as required in this chapter. [R., § 549; C., '51, § 319.]

See Const., art. 11, § 5.

1136. Governor and lieutenant-governor. 671. The governor and lieutenant-governor, by taking an oath in the presence of the general assembly in convention assembled, administered by a judge of the supreme court, to the effect that he will support the constitution of the United States and the constitution of the state of Iowa, and will faithfully, impartially, and to the best of his knowledge and ability, discharge the duties incumbent upon him as governor, or lieutenant-governor, of this state. [R., § 550; C., '51, § 320.]

1137. Members of general assembly. 672. Members of the general assembly, by taking the oath prescribed for them in the third article of the constitution. [R., § 551; C., '51, § 321.]

1138. Judges. 673. The judges of the supreme, district, [and circuit] courts, by taking and subscribing an oath in writing to the effect that they will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law equally to the rich and the poor, and, unless elected by the people, shall be commissioned by the governor. [R., § 552; C., '51, § 322; 9 G. A., ch. 172, § 76.]

1139. Bond. 674. County supervisors and township trustees, with the officers already named in this chapter, are not required to give bond. All other civil officers elected by the people, with those specified hereafter in this chapter, are required to give bond with a condition in substance as follows:

That as —— (naming the office) in —— township, county (or state of Iowa) he will render a true account of his office and of his doings therein to the

proper authority when required thereby or by law; that he will promptly pay over to the person or officer entitled thereto, all money which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud or oppression, discharge all duties now or hereafter required of his office by law. [R., § 5534; C., '51, §§ 323-4.]

A bond given by an officer when not required by statute, where no benefit or advantage accrues to him by reason of its execution, cannot be enforced: *State v. Heisey*, 56-404.

The county treasurer is only held to a reasonable degree of care and diligence, and if, notwithstanding such care, moneys of the county are stolen from him, he is not liable: *Ross v. Hatch*, 5-149.

But where a county treasurer deposited the county funds in a bank, by the failure of which they were lost, *held*, that he was liable therefor, although no suitable place was in fact provided by the county for keeping the funds: *Lowry v. Polk County*, 51-50.

As to liability of treasurers of school districts, see notes to § 2846.

The sureties of a sheriff are liable for trespass committed by him in attempting to discharge the duties of his office: *Charles v. Haskins*, 11-329.

The sureties on the official bond of a constable are liable for damages resulting from an unauthorized sale by him of property exempt from execution: *Strunk v. Ocheltree*, 11-158; also, for unlawful acts in making an arrest in excess of his duty: *Clancy v. Kenworthy*, 74-740.

Where an officer assumes to act under a warrant or order which is unauthorized, and his acts under which are illegal, his sureties will be liable for damages sustained: *Tieman v. Haw*, 49-312.

Sureties on the coroner's bond are liable for his acts while serving as *ex officio* sheriff: *Ibid.*

A justice of the peace and his sureties are liable on his bond for his failure to deliver to his successor or to the owner notes placed in his hands as justice for collection: *Latham v. Brown*, 16-118; *Bessinger v. Dickerson*, 20-260.

Sureties upon a new bond are not liable for moneys coming into the principal's hands before the execution of such bond: *Ibid.*

As between sureties on different bonds, the liability for money coming into the hands of the officer is not dependent upon the time of making demand upon him therefor by the person entitled thereto, and his refusal to pay; but the proper inquiry is, when was the money received: *Thompson v. Dickerson*, 22-360.

Sureties are holden only for the term for which their bond was given, even though the bond does not express the limit of such term. The fact that the officer holds over beyond his term on account of failure to fill his office will not extend the liability of the sureties beyond the original term of office: *Wapello County v. Bigham*, 10-39.

Sureties on a treasurer's bond are not liable for money received prior to its execution, unless the defalcation took place after that time: *Warren County v. Ward*, 21-84.

The sureties for each term are liable for the deficit of that term, and the officer cannot during one term pay off deficiencies of a preceding term so as to throw the entire deficiency on the sureties on his bond for the second term: *Myers v. Farmer*, 52-20.

Sureties on an additional bond are not liable for any default occurring before they became sureties, unless the bond is so specially drawn as to cover past as well as prospective delinquencies: *Bessinger v. Dickerson*, 20-260.

The sureties in a new or additional bond of a county treasurer, which is not retrospective in its terms, will be bound for public moneys in the hands of their principal at the time of its execution, although a previous bond then existed with different sureties; but not for past derelictions of duty or misconduct: *Mahaska County v. Ingalls*, 16-81.

Sureties are not liable for money received by the officer and appropriated to his own use or otherwise disposed of prior to the execution of the bond on which they are sureties, so that at the time such bond is executed the money is not in the hands of the officer: *Independent School Dist. v. McDonald*, 39-564.

In an action on the official bond of a county treasurer, *held*, that it sufficiently appeared that the defalcation for which recovery was sought occurred subsequently to the giving of the bond sued on: *Carroll County v. Ruggles*, 69-269.

Where it appeared that at the semi-annual settlement preceding the giving of the bond there was no deficiency in the treasurer's account, *held*, that the sureties of the treasurer, insisting that a defalcation existed at the time of the giving of the second bond, had the burden of proving such fact: *Ibid.*

Where a holding-over officer executed a bond with sureties for the entire term under the mistaken belief that he was entitled to hold for the entire term, but at the next election he was duly elected to fill the vacancy, *held*, that the sureties on the first bond were not co-sureties with those on the bond given in pursuance of the last election for the period subsequent to the last election, and could not be compelled to contribute for a defalcation occurring during that time: *Boone County v. Jones*, 58-373.

Sureties on the bond of a public officer are not liable for defalcations occurring prior to the execution of the bond upon which they become sureties: *Held v. Bagwell*, 58-139.

The sureties on an official bond will not be relieved of liability on the ground that blanks, existing in the bond at the time of its signature by them, were subsequently filled, if it appears that such bond was executed by them in the expectation that such blanks would be properly filled, which was afterwards done: *Wright v. Harris*, 31-272.

Where an official bond to which the names of several sureties are procured is signed by them, while the blank in which the names of the sureties are to be entered remains unfilled, and such blank is afterwards filled with the names of those who actually sign the bond, and it is delivered in this form, the sureties cannot avoid it by proof that they signed it upon condition that before delivery other names were to be procured as sureties which were not in fact procured: *Carroll County v. Ruggles*, 69-269.

The fact that the name of one of the persons signing as surety is not filled into the blank left for that purpose will not charge the officer accepting the bond with notice of any condition affecting the liability of other sureties: *Ibid.*

A bond signed by a surety will be binding upon him although his name is not filled into the blank left for that purpose in the body of the bond: *Moore v. McKinley*, 60-367.

Where persons, intending to become sureties for an officer upon his bond, signed different blank bonds, and afterward upon the amount of the bond which was required of him being determined he filled up one of such blanks with the proper amount, *held*, that the sureties thereby became bound, they having constituted him their agent and vested him with absolute power to do all that was necessary to make and deliver a binding official bond: *Lee County v. Welsing*, 70-198.

Where the sureties on the bond leave it with a third person with the direction that it shall be delivered only on certain conditions, such as securing additional sureties, etc., but such third person delivers the bond to the principal without the performance of such condition, and the principal delivers it to the board who approve it without knowledge of the conditions, the sureties are bound: *Taylor County v. King*, 73-153.

Where an officer being elected and failing to qualify was afterwards appointed to the same position, and filed a bond which had been previously prepared and signed to enable him to qualify under his election, *held*, that the sureties on such bond were not liable thereunder: *Winneshiek County v. Maynard*, 44-15.

In an action against the sureties it is not necessary to aver and prove in the first instance that they have been approved as required by law: *State v. Fredericks*, 8-553.

The fact that judgment is recovered against the officer on his bond will not bar the right to sue the sureties thereon. The action against principal and sureties may be joint, but need not necessarily be so: *Charles v. Haskins*, 11-329.

Where the estate of the principal obligor is insolvent there is no obligation upon the county for whose benefit the bond is given to file a claim for the amount due on the bond against the estate of the deceased obligor, but action may be brought at once against the sureties: *Pottawattamie County v. Taylor*, 47-520.

Where an officer is authorized to receive money in his official capacity he will be liable on his bond for failure to pay the same over to the parties entitled thereto: *Wright v. Harris*, 31-272.

Money received by the clerk of a court upon a judgment rendered thereunder comes into his hands by virtue of his office and his sureties are liable on his bond for failure to pay such money over to the proper parties: *Morgan v. Long*, 29-434.

The clerk of a court is liable upon his official bonds for money paid into court as a tender and transferred to him by his predecessor, and the question whether the money so paid was legally tendered or not is immaterial: *Billings v. Teeling*, 40-607.

Under a statute directing redemption from execution sale to be made by payment of money to the clerk, *held*, that the sureties on the bond of the sheriff were not liable for money paid to him for the purpose of effecting redemption: *Sample v. Davis*, 4 G. Gr., 117.

The county treasurer and his sureties are liable on his bond for money received by him from tax payers as part payment for taxes: *Warren County v. Ward*, 21-84.

Where an officer executed a bond for the disposition of certain public money for a specified purpose, *held*, that the sureties were liable on such bond, although the money had been paid over to him for that purpose in violation of law, that is, contrary to the requirements of law, the purpose for which it was to be used being lawful: *Muscatine County v. Carpenter*, 33-41.

Judgment and satisfaction thereof for official delinquencies prior to the execution, during the same term of office, of a second bond, will not bar recovery upon such second bond for delinquencies occurring after its execution, and the satisfaction will not bar contribution by sureties on the second bond against sureties on the first: *Warren County v. Ward*, 21-84.

As to the effect of a settlement in case of an officer holding over, see notes to § 1156.

1140. Oath. 675. Every civil officer who is required to give bond, shall take and subscribe on the back of his bond, or on a paper attached thereto, to be certified by the officer administering it, an oath that he will support the constitution of the United States and that of the state of Iowa, and that to the best of his knowledge and ability he will perform all the duties of the office of (naming it) as provided by the condition of his bond within written. [R., § 561; C., '51, § 331.]

1141. Form. 676. The oath of office provided by article eleven of the constitution for all civil officers not otherwise expressly provided for, may be substantially in the following form: I, —— ——, do solemnly swear that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially, to the best of my ability, discharge all the duties of the office of —— (naming it) in —— (naming the township, county, district, or state, as the case may be), as now or hereafter required by law. [R., § 562; C., '51, § 332.]

1142. Bonds. 677. The bonds of state and district officers shall be given to the state, those of county and township officers to the county. [R., § 555; C., '51, § 325.]

Whether the state can maintain an action on the county treasurer's bond, *quære: State v. Henderson*, 40-242.

The members of the board of supervisors are not liable for damages resulting from the approval of insufficient bond, when their action results from an honest mistake or error of judgment, whether of law or fact, but they are personally liable for neglect, carelessness and official misconduct in such matters: *Wasson v. Mitchell*, 18-153.

1143. Penalty of bond. 678. The bond of the secretary of state shall be in the penal sum of not less than five thousand dollars.

Of the auditor of state, in the sum of not less than ten thousand dollars.

Of the treasurer of state, in the sum of not less than three hundred thousand dollars.

Of the state printer, in the sum of not less than five thousand dollars.

Of the state binder, in the sum of not less than two thousand dollars.

Of the attorney-general, in the sum of not less than ten thousand dollars.

Of the register of the state land office, in the sum of not less than five thousand dollars.

Of the reporter of the supreme court, in the sum of not less than ten thousand dollars.

Of the clerk of the supreme court, in the sum of not less than ten thousand dollars.

[Of each district attorney, in the sum of not less than ten thousand dollars.]

Of the superintendent of public instruction, in the sum of not less than two thousand dollars.

The bonds of county treasurers, clerks of the district [and circuit] courts, county recorders, coroners, county surveyors, township assessors, auditors, county superintendents, sheriffs, and of justices of the peace and constables, shall each be in a penal sum to be fixed by the board of supervisors; but those of the treasurer, clerks of the district [and circuit] courts, auditors, and sheriffs, shall not be in a less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each. [R., §§ 128, 135, 165, 377, 556, 557; C., '51, §§ 326-7; 10 G. A., ch. 22, § 2; ch. 52, § 3; ch. 129, § 5; 12 G. A., ch. 160, § 4.]

[As to bond of county attorney, see § 267.]

1144. Sureties. 679. Every official bond shall be given with at least two sureties, and all sureties shall be freeholders within the state; the bonds of the state printer and binder shall be given with at least three sureties, and those of the treasurer of state and each county treasurer with at least four sureties. [R., §§ 135, 165, 558, 559; C., '51, §§ 328-9.]

[As to fidelity company being accepted as surety, see §§ 339-334. As to liability of sureties, see notes to § 1139.]

1145. Approval. 680. The bonds of state officers must be approved by the governor before being filed; those of district [county] attorneys, by the district judges of their respective districts; those of county officers and township clerk, by the board of supervisors, and of township officers, by the

township clerk. The approval shall in all cases be indorsed upon the bond and signed by the officer approving, or the president of the board. But in case the board of supervisors should decide that a bond which is to be approved by them is insufficient, or such bond is not approved the first day of the session, then a reasonable time, not to exceed five days, is to be allowed the officer elect to supply a sufficient bond, or to approve the same. [R., §§ 377, 560; C., '51, § 330; Ex. S., 9 G. A., ch. 27, § 2.]

[As to approval of bond of county attorney, see § 267.]

The provisions of § 1156 that the bond of an officer who is re-elected shall not be approved until such officer qualifies and has accounted for public funds and property which have been under his control, imposes upon the officer authorized to approve the bond a duty to the public only, and neglect thereof will not render him liable to sureties on the new bond: *Held v. Bagwell*, 58-139; *District T'p v. McCord*, 54-346.

It is not necessary in an action on the bond to aver and prove in the first instance that the sureties have been approved as required by law: *State v. Fredericks*, 8-553.

The fact that approval of an official bond by the proper officer does not appear of record, or that it does not appear that the proper certificate was made as required by law that the officer had properly accounted for funds in his hands during a preceding term, cannot be urged as a defense to the bond: *Boone County v. Jones*, 54-699.

The board of supervisors being vested with the power to require an officer to give a bond or additional bond when deemed requisite, a bond required of an officer holding over, there being a doubt as to whether he was holding over by virtue of his former election and was still liable on his old bond, or was holding by virtue of a new election in pursuance of which the bond was required, *held* valid, irrespective of whether the new election was valid or not: *Ibid.*

Want of approval of a bond of a county officer by the board of supervisors does not render the bond invalid: *Moore v. McKinley*, 60-367.

1146. Failure of board to approve. 681. If the board of supervisors refuse or neglect to approve the bond of any county officer elect, he may present the same for approval to the judge of the circuit [district] court, who shall fix a day for the hearing. Notice of such hearing shall be served upon the board of supervisors as provided by law for the service of original notice; and due proof of such service being made to the judge at the time fixed, he shall, unless good cause for postponement be shown, proceed to hear and determine the sufficiency of the bond, and, if satisfied that the same is sufficient, he shall approve the same, and such approval shall have the same force and effect as an approval by the board of supervisors at the time the same was presented to them for approval, would have had. [14 G. A., ch. 16.]

1147. Where filed. 682. The bonds and oaths of state officers shall be filed in the office of the secretary of state, except those of the secretary, which shall be filed and recorded in the office of the auditor; those of county and township officers in the county auditor's office, except those of the county auditor, which shall be kept in the county treasurer's office, and those of justices of the peace, which shall be filed by the auditor in the office of the clerk of the district court, after the same have been approved and recorded. [R., § 553; C., '51, § 333; Ex. S., 9 G. A., ch. 27, § 2; 12 G. A., ch. 160, §§ 4, 5.]

1148. Recording. 683. The auditor of each county shall keep in his office a book to be known as the record book of officers' bonds, and record in said book, the official bonds of all county officers, including justices of the peace and constables, filed in his county; and also keep an index to said book, in which, under the title of each office, shall be entered the names of each principal and his sureties, and the date of the filing of the bond. [9 G. A., ch. 25, §§ 1, 2, 4.]

1149. Penalty for not recording. 684. Any county officer who shall enter upon the discharge of the duties of his office, without first having caused his official bond to be recorded, shall forfeit to the county of which he is an officer, the sum of five dollars for each official act by him performed prior to the recording of said bond, and the chairman of the board of supervisors of each county is hereby required to bring suit for, or collect such penalty in

the name of his county; and it shall be considered a misdemeanor for any officer who is required to give bond to act in such official capacity without giving such bond as is provided by law, and he shall be liable to a fine for an amount not exceeding the amount of the bond required of him. [Same, § 5.]

1150. When to qualify. 685. The governor and lieutenant-governor shall qualify within ten days after the result of the election shall be declared by the general assembly; judges of the supreme, district [and circuit] courts, by the first day of January following their election; and all other officers by the first Monday of January following their election. [R., § 564; C., '51, § 334.]

1151. Time extended. 21 G. A., ch. 54, § 1. All county and township officers who have been or may be prevented by sickness, the inclement state of the weather or other unavoidable casualty from qualifying for their respective offices by the first Monday of January following their election shall be held to have legally qualified if they do so qualify within ten days thereafter.

1152. Effect of failure. 686. A failure to qualify within the time prescribed shall be deemed a refusal to serve. [R., § 564; C., '51, § 334.]

1153. Election contested. 687. When any election is contested, the person elected shall have twenty days in which to qualify after the day of the decision. [R., § 565; C., '51, § 335; 10 G. A., ch. 34, § 4.]

1154. Effect of bonds. 688. The bonds of officers shall be construed to cover duties required by law subsequent to giving them. [R., § 566; C., '51, § 336.]

Where, subsequently to the giving of a treasurer's bond, he was by law made custodian of the school fund, *held*, that his sureties were liable for his default in the management of that fund: *Mahaska County v. Ingalls*, 14–170.

1155. Want of compliance. 689. No official bond shall be void for want of compliance with the statute, but it shall be valid in law for the matter contained therein. [R., § 567; C., '51, § 337.]

A bond which is not good as a statutory obligation may be good as a bond at common law: *State v. Fredericks*, 8–553.

The fact that the bond of a public officer was acknowledged and sworn to before a person not qualified to administer oaths, *held* a mere irregularity which was waived by the acceptance and approval of the bond: *State v. Minton*, 49–591.

The giving of a bond to the "people of Woodbury county," instead of to the county, *held* not such a mistake as to vitiate the security: *Charles v. Haskins*, 11–329.

Where a bond was given by a county treasurer "unto the county of Warren and state of Iowa," *held*, that it was for the security of the county and not the state: *State v. Henderson*, 40–242.

Irregularity in the election in pursuance of which the officer claims the office and executes the bond cannot be urged as a defense to the bond, either on behalf of principal or surety: *Boone County v. Jones*, 54–699.

1156. Accounting before approval. 690. When the incumbent of an office is re-elected, he shall qualify as above directed; but when the re-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor; and the officer or board approving the bond shall indorse upon the bond before its approval the fact that the said officer has fully accounted for and produced all funds and property before that time under his control as such officer; and when it is ascertained that the incumbent holds over another term by reason of the non-election of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew within a time to be fixed by the officer who approves of the bonds of such officers. [R., § 568; C., '51, § 338.]

An officer when he enters upon a subsequent term must be presumed, in the absence of evidence to the contrary, to have on hand all the funds with which he is chargeable, and proof of the amount which should have been on hand at that time will be *prima facie*

proof that it was on hand. The fact that his bond is approved without his having produced and accounted for all funds and property, as here required, will not exempt his sureties from liability: *District T'p v. McCord*, 54–346.

The settlement with the county provided for by § 1401, in case of an officer holding over, is conclusive against him and the sureties on his new bond that he has the amount of money on hand which is shown by such settlement: *Boone County v. Jones*, 54–699.

But if such settlement is procured upon the production of checks, certificates of deposit, etc., without any effort to ascertain whether they really represent money, it is not binding upon the sureties, and they may show that the defalcation had taken place prior to the giving of their bond. But the treasurer himself is estopped from showing that he did not have the money on hand as he represented he had, even though the board knew of his fraud and participated therein: *Webster County v. Hutchinson*, 60-721. This estoppel, however, does not apply in a criminal prosecution for embezzlement, and the treasurer may, notwithstanding his statements to the board, show that the embezzlement occurred during a previous term, and at such time as that the prosecution therefor is barred by the statute of limitations: *State v. Hutchison*, 69–478.

The provision of § 1401, for indorsement upon the bond of an officer, that he has accounted for public funds previously coming into his hands, is directory; and where it appeared that there was no defalcation at the previous semi-annual settlement, *held*, that the sureties insisting that such defalcation had taken place before the acceptance of the bond signed by them, had the burden of proving that fact: *Carroll County v. Ruggles*, 69–269.

The term for which an incumbent holding over is to occupy the office and qualify is not a full term, but only until the vacancy can be legally filled by election: *Dyer v. Bagwell*, 54–487; *Boone County v. Jones*, 58–373.

Where a holding-over officer executed a bond with sureties for the entire period of the term of the person in whose place he held over, under a mistaken belief that he was entitled to hold for the entire term of such officer, and at the next election was duly elected to fill the vacancy in such office, and executed a new bond, *held*, that the sureties on the first-named bond were not co-sureties with those on the second bond for the period subsequent to the last election, and could not be compelled to contribute for a defalcation occurring during that time: *Boone County v. Jones*, 58–373.

The duty of an officer not to approve the bond until the person qualifying has accounted as required in this section is a duty to the public only, and neglect thereof will not render such officer liable to the sureties on the new bond: *Held v. Bagwell*, 58–139.

Surety is not liable for defalcation prior to the giving of the bond on which he becomes surety: *Ibid.*

An officer holding over after re-election and failing to file a new bond is still an officer *de facto*, and not a person falsely assuming to be an officer under § 5270, at least until his office is declared vacant: *State v. Bates*, 23–96.

As to liability of sureties upon the original bond of an officer holding over after the expiration of his term, see note to § 1139.

1157. Temporary officer. 691. Any person temporarily appointed to fill an office during the incapacity or suspension of the regular incumbent, shall qualify in the manner required by this chapter for the office so to be filled.

CHAPTER 6.

OF CONTESTING ELECTIONS.

1158. Causes for. 692. The election of any person to a county office may be contested by any elector of the county:

1. When malconduct, fraud, or corruption on the part of the judges of election in any precinct, or of any board of canvassers, or any member of either board, sufficient to change the result;

2. When the incumbent was not eligible to the office at the time of the election;

3. When the incumbent has been duly convicted of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the incumbent pardoned at the time of the election;

4. When the incumbent has given or offered to any elector, or any judge, clerk, or canvasser of the election, any bribe or reward in money, property, or thing of value for the purpose of procuring his election;

5. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result;

6. For any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would affect the result;

7. For any other cause which shows that another was the person legally elected. [R., §§ 569, 571; C., '51, §§ 339, 341.]

[The word "when," at the beginning of the first subdivision, is "for" in the corresponding section of the Revision and in the bill as reported by the Code commissioners. The change to "when" was doubtless an oversight.

Where before election a candidate for a county office offered and held out as an inducement to obtain votes that he would perform the duties of the office for a less amount than the fees provided by law, and turn the balance of the fees into the county treasury, *held* that this was the offer of a bribe by the officer to the electors, and his election might be contested under this section: *Carrothers v. Russell*, 53–346.

It does not constitute bribery at an election to relocate a county seat for persons interested in the location at a particular place to agree to give or furnish facilities for the convenience of the whole county, such as to agree to give property or money which will be for the advantage of the whole country, as, for instance, land on which to erect buildings, money for the erection of a bridge and high school building, etc.: *Dishon v. Smith*, 10–212; *Hawes v. Miller*, 56–395.

Where an agent authorized to represent a railway company in securing the adoption of a proposition to levy a tax in behalf of such railway held out as an inducement to voters to vote the tax that the company would pay them fifty per cent. on the dollar for their certificates when issued, and thereby influenced the action of some of the voters at such election, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where, at an election to pass upon a contract for the sale of swamp land, improper inducements by way of personal advantage were held out to the electors of the county, *held*, that the contract thus ratified by them could not be enforced: *Palo Alto County v. Harrison*, 68–81.

To constitute a fraud in the submission of a proposition at a special election there must be some showing of artifice to conceal material facts within the knowledge of the persons submitting the proposition to vote, and which are not open and obtainable by others. There cannot be deemed to be a fraudulent concealment of matters which are public, and can be as well known to the people and voters as to the officers submitting the question to vote: *Starr v. Board of Supervisors*, 22–491.

1159. Incumbent. 693. The term "incumbent" in this chapter, means the person whom the canvassers declare elected. [R., § 570; C., '51, § 340.]

1160. Change in result. 694. When the misconduct complained of is on the part of the judges of election in a precinct, it shall not be held sufficient to set aside the election, unless the rejection of the vote of that precinct would change the result as to that office. [R., § 572; C., '51, § 342.]

1161. Court, how constituted. 695. The court for the trial of contested county elections, shall be thus constituted: The chairman of the board of supervisors shall be the presiding officer, and the contestant and incumbent may each name a person who shall be associated with him. [R., § 573; C., '51, § 343.]

1162. Clerk. 696. The county auditor shall be clerk of this court, and keep all papers and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court. But when the county auditor is a party, the court shall appoint a suitable person as clerk, whose appointment shall be recorded. [R., § 571; C., '51, § 344.]

1163. Statement of contest. 697. The contestant shall file in the office of the county auditor, within twenty days after the day when the votes were canvassed, a written statement of his intention to contest the election, setting forth the name of the contestant and that he is an elector of the county, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest, which statement shall be verified by the affidavit of the contestant, or some other elector of the county, that the causes set forth are true as he verily believes. The contestant must also file with the county auditor a bond, with security to be approved by said auditor, conditioned to pay all costs in case the election be confirmed, or the statement be dismissed, or the prosecution fail. When the auditor is a party, the clerk of the district court shall receive such statement and approve such bond. [R., § 575; C., '51, § 345.]

1164. Names of voters. 698. When the reception of illegal or the rejection of legal votes is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the precinct where they voted or offered to vote, shall be set forth in the statement. [R., § 576; C., '51, § 346.]

1165. Trial; notice. 699. The chairman of the board of supervisors shall thereupon fix a day for the trial, not more than thirty, nor less than twenty days thereafter; and shall cause a notice of such trial to be served on the incumbent, with a copy of the contestant's statement, at least ten days before the day set for trial. [R., §§ 577, 579, 580; C., '51, §§ 347, 349, 350.]

1166. Judges. 700. The contestant and incumbent shall each file in the auditor's office, on or before the day of trial, a written nomination of one associate judge of the contested election, who shall be sworn in manner and form as trial jurors are in trials of civil action. If either the contestants or the incumbent fail to nominate, the presiding judge shall appoint for him. When either of the nominated judges fails to appear on the day of trial, his place may be filled by another appointment under the same rule. [R., §§ 577–8; C., '51, §§ 347–8.]

1167. Postponement. 701. The trial shall proceed at the time appointed unless postponed for good cause shown by affidavit, the terms of which postponement are in the discretion of the court. [R., § 583; C., '51, § 353.]

1168. Powers of court. 702. The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court, which shall have all the powers of the district court necessary to the right hearing and determination of the matter, to compel the attendance of witnesses, swear them and direct their examination; to punish for contempt in its presence or by disobedience to its lawful mandate, to adjourn from day to day, to make any order concerning intermediate costs, and to enforce its orders by attachment. It shall be governed by the rules of law and evidence applicable to the case. [R., §§ 584, 588, 591; C., '51, §§ 354, 358, 361.]

[The word "intermediate" in the seventh line is erroneously printed "immediate" in the Code.]

1169. Testimony. 703. The testimony may be oral or by depositions, taken as in an action at law in the district court. [R., § 581; C., '51, § 351.]

1170. Subpœnas. 704. Subpœnas for witnesses may be issued at any time after the notice of trial is served, either by the clerk of the district court, or by the county auditor. The command to a witness may be, to appear at ——, on ——, to testify in relation to a contested election, whereby A. B. is contestant and C. D. is incumbent. [R., §§ 582, 586; C., '51, §§ 352, 356.]

1171. Sufficiency of statement; amendment. 705. The statement shall not be dismissed for want of form, if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real grounds of contest. If any part of the causes are held insufficient, they may be amended, but the incumbent will be entitled to an adjournment if he state on oath that he has matter of answer to the amended causes, for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court deem reasonable; but if all the causes are held insufficient, and an amendment is asked, the adjournment shall be at the cost of contestant. If no amendment is asked for or made, or in case of entire failure to prosecute, the proceedings may be dismissed. [R., §§ 585, 591; C., '51, §§ 355, 361.]

1172. Process; fees. 706. The style, form, and manner of service of process and papers, and the fees of officers and witnesses, shall be the same as

in the district court, so far as the nature of the case admits. [R., § 586; C., '51, § 356.]

1173. Trial. 707. The trial of contested county elections shall take place at the county seat, unless some other place within the county is substituted by the consent of the court and parties. [R., § 587; C., '51, § 357.]

1174. Sheriff to attend. 708. The court, or the presiding judge, may direct the attendance of the sheriff or a constable when deemed necessary. [R., § 589; C., '51, § 359.]

1175. Voters testify. 709. The court may require any person called as a witness who voted at such election, to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to answer for whom he voted; and if the witness answers such questions, no part of his testimony on that trial shall be used against him in any criminal action. [R., § 590; C., '51, § 360.]

1176. Compensation of judges. 710. The judges shall be entitled to receive four dollars a day for the time occupied by the trial. [R., § 593; C., '51, § 363.]

1177. Costs. 711. The contestant and the incumbent are liable to the officers and witnesses for the costs made by them respectively. But if the election be confirmed, or the statement be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the judgment be against the incumbent, or the election be set aside, it shall be against him for costs. [R., § 594; C., '51, § 364.]

1178. How collected. 712. A transcript of the judgment, filed and recorded in the office of the clerk of the circuit [district] court as provided in relation to transcripts from justices' courts, shall have the same effect as there provided, and execution may issue thereon. [R., § 595; C., '51, § 365.]

1179. Certificate withheld. 713. If notice of contesting the election of an officer is filed before the certificate of election is delivered to him, it shall be withheld until the determination of the contest. [R., § 597; C., '51, § 367.]

1180. Judgment. 714. The court shall pronounce judgment whether the incumbent or any other person was duly elected, and the person so declared elected will be entitled to his certificate on qualification. If the judgment be against the incumbent, and he has already received the certificate, the judgment annuls it. If the court find that no person was duly elected, the judgment shall be that the election be set aside. [R., § 592; C., '51, § 362.]

1181. How enforced. 715. When either the contestant or incumbent shall be in possession of the office, by holding over or otherwise, the presiding judge shall, if the judgment be against the party so in possession of the office and in favor of his antagonist, issue an order to carry into effect the judgment of the court, which order shall be under the seal of the county, and shall command the sheriff of the county to put the successful party into possession of the office without delay, and to deliver to him all books and papers belonging to the same, and the sheriff shall execute such order as other writs. [10 G. A., ch. 34, § 1.]

1182. Appeal. 716. The party against whom judgment is rendered may appeal within twenty days to the circuit [district] court, but if he be in possession of the office, such appeal shall not supersede the execution of the judgment of the court as provided in the preceding section, unless he give a bond with security, to be approved by the circuit [district] judge, in a sum to be fixed by the judge, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he

will prosecute his appeal without delay, and that if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. [Same, § 2.]

Whether notice of appeal in such case should be in writing, *quœre;* but where verbal notice was given at the time the judgment of the court of contest was rendered, and the parties then agreed as to disposition to be made of the ballot-box, *held*, that the notice was sufficient under the circumstances: *McIntosh v. Livingston*, 41-219.

The fact of good faith and claim of right on the part of the officer *de facto* will not affect the right of the officer *de jure* to the emoluments of the office: *McCue v. Wapello County*, 56-698.

1183. Judgment on appeal. 717. If, upon appeal, the judgment be affirmed, the circuit [district] court may render judgment upon the bond for the amount of damages against the appellant and his sureties on the bond. [Same, § 3.]

OF CERTAIN STATE OFFICERS.

1184. By whom. 718. The election of any person to any state office, except that of governor or lieutenant-governor, or to the office of district judge, [circuit judge], or district [county] attorney, may be contested by an eligible person who received votes for the same office, for any of the causes before mentioned. [R., § 598; C., '51, § 368.]

1185. Court. 719. The court for the trial of contested state elections shall consist of three judges, not interested, of the supreme, district, [or circuit] court, or any of them, as may be convenient. [R., § 599; C., '51, § 369.]

1186. Clerk. 720. The secretary of state shall be the clerk of this court. But if the person holding that office is a party to the contest, the clerk of the supreme court, or in case of his absence or inability, the auditor of state shall be clerk. [R., § 600; C., '51, § 370.]

1187. Statement filed. 721. The statement must be filed with such clerk within thirty days from the day when the votes are canvassed. [R., § 601; C., '51, § 371.]

1188. Time of trial; notice. 722. The clerk shall as soon as practicable, ascertain which three of the judges residing nearest the seat of government can attend the trial, fix a time therefor, and notify the judges, and cause a copy of the statement and a notice of the time fixed for trial to be served upon the incumbent, and a notice of the time to be served upon the contestant at least twenty days before the day of trial, and returns thereof to be made to him. When convenient, the service of the above papers may be made by the clerk of this court. The time for the trial shall not be set beyond the last Monday of January following the election. [R., § 601; C., '51, §§ 371-2.]

1189. Subpœnas; depositions. 723. The secretary of state, the several clerks of the supreme and district courts, under their respective seals of office, and either the judges of the supreme, district, [or circuit] courts, under their hands, may issue subpœnas for witnesses to attend this court; and disobedience to such process may be treated as a contempt. Depositions may also be taken as in the case of contested county elections. [R., § 603; C., '51, § 373.]

1190. Process. 724. Process and papers may be issued to and served by the sheriff of any county. [R., § 604; C., '51, § 374.]

1191. Place of trial. 725. The trial shall take place at the seat of government, unless some other place be substituted by consent of the court and both parties. [R., § 605; C., '51, § 375.]

1192. Compensation of judges. 726. The judges shall be entitled to receive for their travel and attendance, the sum of six dollars each per day,

with such mileage as is allowed to members of the general assembly, to be paid from the state treasury. [R., § 606; C., '51, § 376.]

1193. Judgment filed; execution. 727. A transcript of the judgment rendered by such court, filed in the office of the clerk of the supreme court, shall have the force and effect of a judgment of the supreme court, and execution may issue therefrom in the first instance, and against the party's property generally. [R., § 607; C., '51, § 377.]

1194. Power of judge. 728. The presiding judge of this court shall have authority to carry into effect any order of the court after the adjournment thereof, by attachment or otherwise. [R., § 608; C., 51. § 378.]

1195. Other provisions. 729. The provisions of this chapter in relation to contested county elections, are applied to contested state elections when applicable, except as herein otherwise directed. [R., § 609; C., 51, § 379.]

OF MEMBERS OF THE GENERAL ASSEMBLY.

1196. By whom. 730. The election of any person to a seat in either branch of the general assembly may be contested by any qualified voter of the district to be represented. [R., § 610; C., '51, § 380.]

1197. Statement served. 731. The contestant shall, within thirty days after the canvass, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes, which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken, then twenty days before the first day of the next session. [R., § 611; C., '51, § 381.]

1198. Subpœnas. 732. Any judge or clerk of a court of record may issue subpœnas in the above cases as in those before provided, and compel the attendance of witnesses thereunder. [R., § 612; C., '51, § 382.]

1199. Depositions. 733. Depositions may be taken in such cases in the same manner and under the same rules as in an action at law in the district court; but no cause for taking the same need be shown. [R., § 613; C., '51, § 383.]

1200. Return of depositions. 734. A copy of the statement, and of the notice for taking depositions with the service indorsed, and verified by affidavit, if not served by an officer, shall be returned to the officer taking the depositions, and then with the depositions shall be sealed up and transmitted to the secretary of state with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before which the contest is to be tried. [R., § 614; C., '51, § 384.]

1201. Statement and depositions; notice. 735. The secretary shall deliver the same unopened to the presiding officer of the house in which the contest is to be tried, on or before the second day of the session, regular or special, of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession. [R., § 615; C., '51, § 385.]

1202. Power of general assembly. 736. Nothing herein contained shall be construed to abridge the right of either branch of the general assembly to grant commissions to take depositions, or to send for and examine any witness it may desire to hear on such trial. [R., § 616; C., '51, § 386.]

OF GOVERNOR.

1203. By whom. 737. The election of any person declared duly elected to the office of governor or lieutenant-governor, may be contested by an eli-

gible person who received votes for the office contested. [R., § 617; C., '51, § 387.]

See Const., art. 4, § 5.

1204. Notice of contest. 738. The contestant shall, within thirty days after the proclamation of the election, deliver to the presiding officer of each house of the general assembly a notice of his intent to contest, and a specification of the grounds of such contest as before directed. [R., § 618; C., '51, § 388.]

1205. Notice to incumbent. 739. As soon as the presiding officers have received the notice and specifications, they shall make out a notice directed to the incumbent, including a copy of the specifications, which shall be served by the sergeant-at-arms. [R., § 619; C., '51, § 389.]

1206. To each house. 740. The presiding officers shall also immediately make known to their respective houses that such notice and specifications have been received. [R., § 620; C., '51, § 390.]

1207. Court, how chosen. 741. Each house shall forthwith proceed, separately, to choose seven members of its own body in the following manner:

1. The names of members of each house, except the presiding officer, written on similar paper tickets, shall be placed in a box, the names of the senators in their presence by their secretary, and the names of the representatives in their presence by their clerk;

2. The secretary of the senate in the presence of the senate, and the clerk of the house of representatives in the presence of the house, shall draw from their respective boxes the names of seven members each;

3. As soon as the names are thus drawn, the names of the members drawn by each house shall be communicated to the other, and entered on the journals of each house. [R., § 621; C., '51, § 391.]

1208. Powers and proceedings of committee. 742. The members thus drawn shall constitute a committee to try and determine the contested election, and for that purpose shall hold their meetings publicly at the place where the general assembly is sitting at such times as they may designate; and may adjourn from day to day, or to a day certain, not more than four days distant, until such trial is determined; shall have power to send for persons and papers, and to take all necessary means to procure testimony, extending like privileges to the contestant and the incumbent, and shall report their judgment to both branches of the general assembly, which report shall be entered on the journals of both houses. [R., § 622; C., '51, § 392.]

1209. Testimony. 743. The testimony shall be confined to the matters contained in the specifications. [R., § 623; C., '51, § 393.]

1210. Judgment. 744. The judgment of the committee pronounced in the final decision on the election shall be conclusive. [R., § 624; C., '51, § 394.]

1211. Other provisions. 745. The provisions of this chapter in relation to other contested elections are applied to a contested election for governor, when applicable, except as herein otherwise directed. [R., § 626; C., § '51, § 396.]

OF PRESIDENTIAL ELECTORS.

1212. By whom. 22 G. A., ch. 49, § 1. The election of any presidential elector may be contested by any eligible person who received votes for the same office for any of the causes enumerated in chapter six title five of the code of 1873.

1213. Court. 22 G. A., ch. 49, § 2. The court for the trial of contested elections for presidential electors shall consist of the chief justice of the supreme court who shall be presiding judge of the court and the four judges of

the district court, not interested, being nearest the capital of the state — two of whom with the chief justice shall constitute a quorum for the transaction of the business of the court. If the chief justice should for any cause be unable to attend at the trial the next senior judge or the one longest on the supreme court bench if of equal rank shall preside in place of the chief justice and any question arising as to the membership of the court shall be determined by the members of the court not interested in the question. The secretary of state shall be the clerk of the court or in his absence or inability to act, the clerk of the supreme court shall be the clerk. Each member of the court before entering upon the discharge of his duties, shall take an oath before the secretary of state or some officer qualified to administer oaths that he will support the constitution of the United States and that of the state of Iowa and that without fear, favor, affection or hope of reward he will, to the best of his knowledge and ability administer justice according to law and the facts in the case.

1214. Statement. 22 G. A., ch. 49, § 3. The contestant shall file the statement provided for in this chapter in the office of the secretary of state within ten days from the day on which the returns are canvassed by the state board of canvassers, and within the same time serve a copy of the same, with a notice of the contest, on the incumbent.

1215. Trial. 22 G. A., ch. 49, § 4. The clerk of the court shall immediately after the filing of the statement notify the judges specified in section two of this act [§ 1213], and fix a day for the organization of the court within three days thereafter and also notify the parties to the contest. The judges shall meet on the day fixed and organize the court and make and announce such rules for the trial of the case as they shall deem necessary for the protection of the rights of each party and a just and speedy trial of the case and commence the trial of the case as early as practicable thereafter and so arrange for and conduct the trial that a final determination of the same and judgment shall be rendered at least six days before the second Monday in January then next following.

1216. Judgment. 22 G. A., ch. 49, § 5. The judgment of the court shall determine which of the parties to the action is entitled to hold the office of presidential elector and shall be authenticated by the presiding judge and clerk of the court and filed with the secretary of state and the judgment so rendered shall constitute a final determination of the title to the office and a certificate of appointment shall be issued to the successful party as an elector.

1217. Other provisions. 22 G. A., ch. 49, § 6. Sections seven hundred and twenty-three, seven hundred and twenty-four and seven hundred and twenty-five of the code [§§ 1189–1191] shall apply to this act.

CHAPTER 7.

OF REMOVAL AND SUSPENSION FROM OFFICE.

1218. Causes. 746. All county and township officers may be charged, tried, and removed from office for the causes following:

1. For habitual or wilful neglect of duty;
2. For gross partiality;
3. For oppression;
4. For extortion;
5. For corruption;

6. For wilful maladministration in office;
7. Upon conviction of a felony;
8. For a failure to produce and fully account for all public funds and property in his hands at any inspection or settlement. [R., § 628; C., '51, § 397.]

[The word "partiality" in the second subdivision is erroneously printed "impartiality" in the Code.]

1219. By whom made. 747. Any person may make such a charge, and the district court shall have exclusive original jurisdiction thereof by the service of original notice. [R., § 629; C., '51, § 398.]

1220. Proceedings. 748. The proceedings shall be as nearly like those in other actions at law as the nature of the case admits, excepting where otherwise provided in this chapter. [R., § 630; C., '51, § 399.]

1221. Petition. 749. The petition shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them and be verified by any elector. [R., § 631; C., '51, § 400.]

1222. Notice. 750. It will be sufficient that the notice require the accused to appear and answer the petition of A. B. (naming the accuser), for "official misdemeanors;" but a copy of the petition must be served with the notice. [R., § 632; C., '51, § 401.]

1223. Clerk of court. 751. If the person who holds the office of clerk of the district [and circuit] court is the accused in either of those capacities, his removal or suspension shall operate in both courts and the petition may be filed with the county auditor, and both he and the clerk may issue subpœnas for witnesses, and the county auditor shall deliver the papers to the judge of the district court, on its sitting. [R., § 634; C., '51, § 403.]

1224. Suspension. 752. If a continuance of the action take place beyond the return term, the court may suspend the accused from the functions of his office until the determination of the matter, if sufficient cause appear from testimony, or affidavits then presented; and if such suspension take place, the board of supervisors shall temporarily fill the office by appointment. [R., § 635; C., '51, § 404.]

In case of suspension of sheriff the person appointed by the board, as here provided, and not the deputy-sheriff (as provided by § 1239 in the case of disability of the sheriff), is authorized to act: *McCue v. Circuit Court*, 51-60.

The board may so appoint in case an officer is suspended, under § 1228, although the petition provided for in § 1229 be not filed at the term: *Ibid.*

1225. Filling place. 753. When the accused is an officer of the court and is suspended, the court may supply his place by appointment for the term. [R., § 638; C., '51, § 407.]

1226. Trial; judgment. 754. The question of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant; and a copy thereof shall be certified to the county auditor, who shall cause it to be entered in the election book. [R., § 636; C., '51, § 405.]

1227. Costs. 755. The accuser and the accused are liable to costs as in other actions. [R., § 637; C., '51, § 406.]

1228. Suspension of clerk or sheriff. 756. The judges of the district [and circuit] courts in their respective districts, shall have authority, on their own motion, to suspend from office any clerk of those courts, or sheriff of a county, for any of the causes mentioned in this chapter coming to their own knowledge, or manifestly appearing from the papers or testimony in any proceeding in court. [R., § 639; C., '51, § 408.]

The action is commenced by the district court taking cognizance of the matter and entering an order requiring the district attorney to file a petition, and such action operates as a suspension, although the petition be not filed at that term. The vacancy so caused may be filled by the board of supervisors under § 1224: *McCue v. Circuit Court*, 51-60.

1229. Petition filed. 757. Upon such suspension the court may direct the district [county] attorney to file a petition in the name of the county; but it need not be verified. [R., § 640; C., '51, § 409.]

1230. Suspension certified. 758. Such order of suspension shall be certified to the county auditor and be by him entered in the election book. [R., § 641; C., '51, § 410.]

SUSPENSION OF STATE OFFICERS.

1231. Accounts examined. 759. Whenever, in the judgment of the governor, the public service requires it, he shall appoint a commission of three competent accountants, who shall examine the books, papers, vouchers, moneys, securities, and other documents in the possession or under the control of any state officer, shall make out a full, complete and specific statement of the transactions of said officer, with, for, or on behalf of the state, showing the true balances in each case and report the same to the governor with such suggestions as they may deem proper. [R., §§ 46, 47, 55, 56.]

1232. Defalcation; suspension. 760. Whenever any commission appointed as aforesaid, or under the provisions of section one hundred and thirty-two, of chapter nine, of title two of this code [§ 167], shall report that any officer has been guilty of any defalcation or misappropriation of the public money, or that his accounts, papers, and books are improperly or unsafely kept, and that the state is liable to suffer loss thereby, the governor shall forthwith suspend such officer from the exercise of his office, and require him to deliver all the money, books, papers, and other property of the state to the governor to be disposed of as hereinafter provided. [R., § 48.]

The provisions of this statute contemplate suspension and not an entire removal of the officer, and the section is therefore not unconstitutional as applied to officers whose election and term of office are provided for by Const., art. 4, sec. 22: *Brown v. Duffus*, 66-193.

1233. Consequences. 761. After such suspension, it shall be unlawful for such officer to exercise or attempt to exercise any of the functions of his office until such suspension shall be revoked, and any attempt to exercise said office after such suspension, shall be deemed a misdemeanor, and shall subject the offender for each offense to the penalty of not more than one year's imprisonment in the county jail, and not more than one thousand dollars fine, to be recovered and enforced as provided by law. [R., § 49.]

1234. Temporary appointment. 762. In every such case of suspension, the governor shall appoint some suitable person to fill, temporarily, the office, and such person having qualified as required by law, shall perform all the duties and enjoy all the rights to the said office belonging, until the removal of the suspension of his predecessor or the election of a successor. [R., § 51.]

1235. Duty of governor. 763. Whenever the governor shall suspend any such public officer, he shall direct the proper legal steps to be taken to indemnify the state from loss. [R., § 52.]

1236. Compensation of commissioners. 764. The commissioners provided for in this chapter shall each receive the sum of three dollars per day, for the time actually employed in the performance of their duties. [R., § 53.]

1237. Powers. 765; 16 G. A., ch. 20. Said commissioners shall have power, when in session to administer oaths, to issue subpœnas, to call any person before them to testify in reference to any fact connected with their investigation; also to require such person to produce any papers or books which the district court might require to be produced. [R., § 54.]

CHAPTER 8.

OF DEPUTIES.

1238. What officers may appoint. 766; 19 G. A., ch. 117; 22 G. A., ch. 36, § 1. The secretary, auditor, and treasurer of state, the superintendent of public instruction, the register of the state land office, clerk of the supreme court, county auditor, treasurer, sheriff, surveyor, and recorder may appoint a deputy and each clerk of the district court may appoint one deputy or in counties having a population in excess of thirty thousand inhabitants more than one if so ordered by the court, for whose acts he shall be responsible, and from whom he shall require bonds; which appointment must be in writing and be approved by the officer who has the approval of the principal's bond, and shall be revocable by writing under the principal's hand, and both the appointment and the revocation shall be filed and kept in the office of the secretary of state and county auditor respectively. [R., §§ 421, 643, 645; C., '51, §§ 411, 414; 9 G. A., ch. 5; 12 G. A., ch. 115; ch. 134, § 2; 14 G. A., ch. 38.]

The sheriff is responsible for acts of his deputy, and when the latter collects money on execution and fails to pay it over to the party entitled thereto, an action should be brought against the sheriff himself. The bond of the deputy is for the protection of his principal: *Brayton v. Town*, 12–346.

The deputy-sheriff has no original power, but acts simply as a representative of the sheriff, who is his principal, and who is responsible for the manner in which he performs the duty assigned to him: *Headington v. Langland*, 65–276.

Where a deputy treasurer and book-keeper was employed by the board of supervisors, *held*, that for defalcation of such officer, without fault on the part of the treasurer, the latter was not liable: *Scott County v. Fluke*, 34–317.

1239. Powers of deputy. 767; 16 G. A., ch. 4. In the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office; but when any officer is required to act in conjunction with or in the place of another officer, his deputy cannot supply his place; *provided*, that in counties having two county seats, the deputy may hereafter perform any and all acts of the principal. [R., § 643; C., '51, § 412.]

During the absence or disability of the principal the deputy stands in his place, and any official acts performed by him are regarded as having been performed by the principal. Therefore, *held*, that service of notice of appeal upon the deputy clerk, evidenced by an acceptance of such notice signed in the name of the clerk by the deputy, was sufficient: *Sanxey v. Iowa City Glass Co.*, 68–542.

The statutory provision that the deputy shall perform the duties of the principal pertaining to his office in the absence or disability of the principal was not designed to withhold from the deputy the power to perform such duties except in the absence or disability of such principal. The deputy may act in the presence of the principal as well: *Moore v. McKinley*, 60–367.

The sheriff is not bound by service of notice which is accepted by his deputy, acceptance of service not being an official act: *Chapin v. Pinkerton*, 58–236.

Where the duties of a public officer are of a ministerial character they may be discharged by deputy; duties of a judicial character cannot be so discharged. The deputy has the right to subscribe the name of his principal, and the act of the deputy in the name of his principal, within the scope of his authority, is the act of his principal. And *held*, that a deputy clerk had authority in the name of the principal to certify to the acknowledgment of a deed under § 3128: *Abrams v. Ervine*, 9–87; or to a copy of a judgment record: *Greasons v. Davis*, 9–219.

The deputy clerk has the same power to administer oaths as his principal: *Wood v. Bailey*, 12–46. And it is not necessary that the absence or inability of the principal should be stated: *Finn v. Rose*, 12–565.

The deputy county treasurer has, *prima facie*, authority to sign the name of his principal to a certificate of redemption from tax sale: *Byington v. Allen*, 11–3.

As to action of deputy in place of sheriff in drawing jurors, see § 318 and notes.

The suspension from office of a sheriff, as provided in § 1228, is not such disability on his part as will authorize the deputy to act in his place. In such case his duties are to be performed by the person appointed under §§ 1224–5: *McCue v. Circuit Court, etc.*, 51–60.

Where acts required by law to be performed by certain officers are not performed by them, but by unauthorized persons, it is as if such acts were not done at all. So *held* in regard

to the action of a deputy-sheriff in connection with the selection of the grand jury, the statute at that time in force providing for the performance of such acts by the sheriff only: *State v. Brandt*, 41-593.

1240. Who may be appointed. 768. The secretary, treasurer, and auditor of state can neither of them appoint either of the others his deputy; nor can either the clerk of the district court, auditor, recorder, treasurer, or sheriff of a county, appoint either of the others. [R., § 644; C., '51, § 413.]

1241. Sheriff. 769. The sheriff may appoint such number of deputies as he sees fit. [R., § 646; C., '51, § 415.]

1242. Oath. 770. Each deputy shall take the same oath as his principal, which shall be indorsed upon and filed with the certificate of his appointment. [R., § 647; C., '51, § 416.]

1243. Compensation. 771. When a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the board of supervisors may make a reasonable allowance to such deputy. [R., § 648; C., '51, § 417.]

The allowance to the deputy may be fixed, at the time he is appointed, in the form of a stipulated salary, and in such case the amount fixed will limit the recovery: but where no allowance is fixed the county must pay a reasonable compensation for the necessary services rendered, and the payment is not left discretionary: *Bradley v. Jefferson County*, 4 G. Gr., 300; *Harvey v. Tama County*, 46-522; *Washington County v. Jones*, 45-260, 265. But a deputy employed merely for the personal accommodation of the officer cannot recover compensation from the county: *Harvey v. Tama County*, 46-522.

The officer himself cannot recover against the county for money paid as compensation for a deputy. The county is liable to the deputy and not to the principal: *Mahaska County v. Ingalls*, 14-170.

The deputy clerk may recover compensation under this section in addition to the salary allowed the clerk as provided by § 5036: *Washington County v. Jones*, 45-260, 265.

Where an officer accepts his position with a knowledge of the work to be done and the remuneration promised, while he may employ assistants, he cannot recover compensation for them: *Benton v. Decatur County*, 36-504.

The county is under no legal obligation to reimburse the county auditor an amount paid out by him for services of a deputy: *Ibid.*

CHAPTER 9.

OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

1244. Additional security. 772. Whenever the governor shall deem it advisable that the bonds of any state officer should be increased and the security enlarged, or a new bond given, he shall notify said officer of the fact, the amount of new or additional security to be given, and the time when the same shall be executed, which said new security shall be approved and filed as provided by law. [R., § 660.]

1245. New bond. 773. Any officer or board who has the approval of another officer's bond, when of opinion that the public security requires it, upon giving ten days' notice to show cause to the contrary, may require him to give such additional security by a new bond, as may be deemed requisite, within a reasonable time to be prescribed. [R., §§ 349, 350; C., '51, §§ 418, 419.]

1246. Effect. 774. If a requisition made under either of the foregoing sections be complied with, both the old and the new security shall be in force; and if not complied with, the office shall become and be declared vacant, and the proceeding be certified to the proper officer to be recorded in the election book or township record. [R., §§ 651, 661; C., '51, § 420.]

1247. Sureties relieved. 775. When any surety on the bond of a civil officer conceives himself in danger by remaining surety, and desires to be re-

lieved of his obligation, he may petition the approving officer or board above referred to for relief, stating the ground of his apprehension. [R., § 652; C., '51, § 421.]

1248. Notice. 776. The surety shall give the principal at least twenty-four hours' notice of the presenting and filing of the petition, with a copy thereof. At the expiration of this notice, the approving officer may hear the matter or may postpone the hearing as the case permits or requires. [R., § 653; C., '51, § 422.]

1249. Hearing; order; effect. 777. If, upon the hearing, there appears substantial ground for apprehension, the approving officer or board may order the principal to give a new bond and to supply the place of the petitioning surety within a reasonable time to be prescribed; and upon such new bond being given, the petitioning surety upon the former bond shall be declared discharged from liability on the same for future acts; which order of discharge shall be entered in the proper election book, but the bond will continue binding upon those who do not petition for relief. [R., § 655; C., '51, § 424.]

Sureties upon the new bond are not liable for moneys coming into the principal's hands before such new bond was executed: *Thompson v. Dickerson*, 22–360.

1250. Failure to comply. 778. If the new bond is not given as required, the office shall be declared vacant, and the order to that effect entered in the proper election book. [R., § 656; C., '51, § 425.]

1251. Justice of the peace. 779. If the proceedings relate to a justice of the peace and he is removed from office, the county auditor shall notify the proper township trustees or clerk of the removal. [R., § 657; C., '51, § 426.]

1252. Subpœnas. 780. The approving officer may issue subpœnas in his official name for witnesses, compel their attendance and swear them. [R., § 658; C., '51, § 427.]

CHAPTER 10.

OF VACANCIES AND SPECIAL ELECTIONS.

1253. Civil office, when vacant. 781. Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

1. The resignation of the incumbent;
2. His death;
3. His removal from office;
4. The decision of a competent tribunal declaring his office vacant;
5. His ceasing to be a resident of the state, district, county, or township in which the duties of his office are to be exercised, or for which he may have been elected;
6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provision relating thereto;
7. A forfeiture of office as provided by any law of the state;
8. Conviction of an infamous crime, or of any public offense involving the violation of his oath of office;
9. The acceptance of a commission to any military office, either in the militia of this state or in the service of the United States which requires the in-

cumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days. [R., § 662; C., '51, § 429; 9 G. A., ch. 54.]

A resignation in writing made to the proper officer creates a vacancy without any formal acceptance on the part of such officer: *Gates v. Delaware County*, 12-405.

The acceptance by an officer of another office which is incompatible with that which he holds would vacate the one first held; but the incompatibility must be such as arises from the nature of the offices or their relation to each other; and *held* that the office of captain in the military service of the United States was not so incompatible with that of district attorney as that an acceptance of the one should necessarily make a vacancy in the other. (Decided before the passage of 9 G. A., ch. 54, being subd. 9 of this section): *Bryan v. Cattell*, 15-538.

The legislature may add to or change the methods in which vacancies may occur, and make such changes applicable to existing officers and those holding them: *Ibid.*

1254. Resignations. 782; 17 G. A., ch. 107, § 1. Resignation of civil officers may be made as follows:

1. By the governor to the general assembly, if in session; if not, to the secretary of state;

2. By senators and representatives in congress, and by all officers elected by the qualified voters of the state or chosen by the general assembly, and by judges of courts of record, and district [county] attorneys, to the governor;

3. By senators and representatives in the general assembly, to the presiding officer of their respective bodies, if in session, who shall immediately transmit information of the same to the governor; if such bodies are not in session, to the governor;

4. By all county officers to the board of supervisors, and by members of the board of supervisors, to the county auditor;

5. By all township officers, to the township clerk; and by the township clerk to the township trustees, or any one of them;

6. By all officers holding by appointment, to the officer or body by whom they were appointed. [R., § 663; C., '51, § 430; 10 G. A., ch. 69; 13 G. A., ch. 148, § 6.]

1255. Vacancies. 783. Vacancies shall be filled as follows:

In the offices of clerk and reporter of the supreme court, by the supreme court;

In all other state offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor;

In county offices by the board of supervisors; and in the membership of such board by the county clerk, auditor, and recorder;

In township offices by the trustees, but where the offices of the three trustees are all vacant, the clerk shall appoint, and if there be no clerk, the county auditor shall appoint. [R., § 664; C., '51, § 436; 11 G. A., ch. 88; 12 G. A., ch. 86, § 2; ch. 137, § 3; 13 G. A., ch. 47; ch. 148, § 6.]

See Const., art. 4, § 10.

The governor has no power to create a vacancy for the purpose of filling it. There must be a vacancy before the right or power to fill it can exist: *Bryan v. Cattell*, 15-538.

Where an elective officer is appointed by the board of supervisors to fill a vacancy he is not subject to removal by such board at pleasure, but is entitled to hold for the residue of the unexpired term unless removed for cause: *State ex rel. v. Chatburn*, 63-659.

In case of failure of an officer to enter upon his office at the time provided by law there is a vacancy which should be filled by appointment. The incumbent is not entitled to hold over, and the sureties on his bond are not liable if he hold over after the term for which they are bound has ceased: *Wapello County v. Bigham*, 10-39.

1256. Term continues. 784. Every officer elected or appointed for a fixed term, shall hold office until his successor is elected and qualified, unless the statute under which he is elected or appointed expressly declares the contrary; *provided*, that this section shall not be construed in any way to prevent

the removal or suspension of such officer during or after his term, in cases provided by law. [C., '51, § 241; 9 G. A., ch. 172, § 75.]

An officer who holds over after his term on account of a failure to elect a successor only holds until the vacancy in the office can be legally filled by election: *Dyer v. Bagwell*, 54-487.

See Const., art. 3, § 3; art. 4, §§ 2, 15, 22; art. 5, §§ 3, 5, 12, 13.

1257. Appointments. 785. Appointments under the provisions of this chapter shall be in writing, and continue until the next election at which the vacancy can be filled and until a successor is elected and qualified, and be filed with the secretary or proper township clerk, or in the proper county office, respectively. [R., § 667; C., '51, § 439.]

1258. Qualification. 786. Persons appointed to office as herein provided, shall qualify in the same manner as those elected, within a time to be prescribed in their appointments, and the provisions of the chapter relating to qualification for office are extended to them. [R., § 668; C., '51, § 440.]

1259. Removed. 787. A person appointed as herein contemplated, may be removed by the officer appointing, and no person can be appointed who has been removed from office within one year. [R., § 669; C., '51, § 441.]

Where an elective officer is appointed by the board of supervisors to fill a vacancy he is not subject to removal by such board at pleasure, but is entitled under Const., art. 11, § 6, to hold for the residue of the unexpired term unless removed for cause: *State ex rel. v. Chatburn*, 63-659.

1260. Possession of office. 788. When a vacancy occurs in a public office, possession shall be taken of the office room, and of the books, papers, and all things pertaining to the office, to be held until the election or appointment and qualification of a successor, as follows:

Of the office of the county auditor, by the clerk of the district court;

Of that of the clerk or treasurer, by the county auditor;

Of any of the state officers, by the governor; or in his absence or inability at the time of the occurrence, as follows:

Of the secretary, by the treasurer;

Of the auditor, register of the land office, or superintendent of public instruction, by the secretary;

Of the treasurer, by the secretary and auditor, who shall make an inventory of the money and warrants therein, sign the same, and transmit it to the governor if he be in the state; and the secretary shall take the keys of the safes and desks after depositing the books, papers, money, and warrants therein, and the auditor shall take the key of the office room. [R., § 671; C., '51, § 444.]

1261. Election to fill vacancies. 789. Vacancies occurring in the township offices, ten days; in county offices, fifteen days; and in all other public elective offices, thirty days prior to a general election, shall be filled thereat. When a vacancy occurs in the office of representative in congress, or senator or representative in the general assembly, and the body in which such vacancy exists will convene prior to such election, the governor shall order a special election to fill such vacancy at the earliest practicable time, and ten days' notice of such election shall be given. [R., § 672; C., '51, §§ 35, 431–5.]

1262. Members of general assembly. 790. Whenever a vacancy shall occur in the office of a senator or representative in the general assembly the auditor of the county in which such vacancy occurs shall notify the governor of such fact and the cause of the vacancy; and if more than one county is represented in the district in which such vacancy may occur, then such notice shall be given by the auditor of the county in which the late member resided. [11 G. A., ch. 138.]

1263. Vacancy in board. 17 G. A., ch. 107, § 2. In case of a vacancy from any cause, other than resignation or expiration of term, occurring in any of the boards of trustees or directors of state institutions, it shall be the duty of the secretary of the board wherein the vacancy shall happen, to notify the governor thereof immediately; *provided*, that this section shall not apply to vacancies in the board of regents of the state university.

1264. Duty of governor. 17 G. A., ch. 107, § 3. Upon receiving notice of vacancies which are required to be filled by the general assembly, the governor shall at once notify that body thereof, if it be in session, and immediately upon its next convening if it be not. He shall also notify the board of regents of all vacancies occurring therein by resignation.

SPECIAL ELECTIONS.

1265. Provisions for. 791. The provisions relating to general elections, shall govern special elections except where otherwise provided by law. [R., § 673; C., '51, § 26.]

1266. Canvass. 792. In all cases where special elections are held to fill vacancies in the offices of senator or representative in the general assembly, or representative in congress, the board of county canvassers shall meet at twelve o'clock M., on the second day after said election, to canvass the votes cast at such election, and the auditor, within four days after such election, shall transmit to the secretary of state an abstract of the votes cast at said election, if there be more than one county in the district. [9 G. A., ch. 88, §§ 1, 3.]

1267. State canvass. 793. Within fifteen days after said election, in the case last mentioned, the board of state canvassers shall meet and canvass the votes cast to fill such vacancy, and if the returns have not been received from all the counties composing said district, they may adjourn to such day as they deem necessary, not exceeding ten, for the purpose of receiving said returns. [Same, § 4.]

1268. In office of justice. 794. Whenever a vacancy occurs in the office of a justice of the peace or constable more than thirty days prior to any general election, the county auditor shall immediately notify the clerk of the township in which the vacancy exists, and the township clerk, within five days after receiving such notice, shall notify each of the trustees of his township in writing, fixing the time and place that they shall meet for the purpose of filling such vacancy by appointment. Such notice may be served by any constable of the township, and shall be served at least five days prior to such meeting. [11 G. A., ch. 137, §§ 1, 2.]

1269. Trustees to appoint. 795. The trustees shall meet in accordance with such notice and fill such vacancy, and in five days after such appointment has been made, the township clerk shall record it in the township record book, and shall cause a notice to be served upon the person so appointed, informing him of his appointment, by any constable in the township in the manner prescribed by law for the service of notices, and any person so appointed and notified, shall qualify within ten days after such notice has been served upon him. The auditor may approve of the bond of a justice of the peace and constable so appointed, by the recommendation of the sufficiency of the sureties upon such bond, signed by any member of the board of supervisors. [Same, §§ 3, 4, 5.]

TITLE VI.

OF REVENUE.

CHAPTER 1.

OF THE ASSESSMENT OF TAXES.

1270. Levy; amount of. 796; 15 G. A., ch. 28; 18 G. A., ch. 13; 20 G. A., ch. 182; 22 G. A., ch. 43. The board of supervisors of each county shall, annually, at their September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, one and a half mills on a dollar, or such rate as may be directed by the executive council, not exceeding two mills on a dollar;

2. For ordinary county revenue, including support of the poor, not more than four mills on a dollar and a poll tax of fifty cents; *provided*, however, that in counties having a population of twenty thousand and less, excepting counties having an area exceeding nine hundred square miles, such levy may be six mills or less; *provided*, however, that in any county in which the levy is herein limited to four mills, the board of supervisors may submit the question of increasing the same to six mills or less to a vote of the electors at any general election, and if at such election a majority of the electors declare in favor of such increase, the board of supervisors may levy the same for the year following such election at the next meeting at which the general levy is made;

3. For support of schools, not less than one, nor more than three mills on a dollar;

4. For making and repairing bridges, not more than three mills on a dollar. [R., § 710; C., '51, § 454; Ex. S., 8 G. A., ch. 24; 11 G. A., ch. 87, § 1.]

As to what action of the board is sufficient to constitute a levy, see *West v. Whitaker*, 37–598.

These provisions contain and confer the only power given by law to the board of supervisors to levy county taxes for any purpose, except under §§ 430 and 433. Section 4274 does not authorize the levy of a tax in excess of the limit here imposed: *Iowa R. Land Co. v. Sac County*, 39–134.

The board have power to use the bridge tax in the erection of bridges within city limits: *Oskaloosa Steam-Engine Works v. Pottawattamie County*, 72–134.

EXEMPTIONS.

1271. Property exempt. 797; 21 G. A., ch. 97. The following classes of property are not to be taxed, and they may be omitted from the assessments herein required:

1. The property of the United States and of this state, including university, agricultural college and school lands, and all property leased to the state; the property of a county, township, city, incorporated town or school district, when devoted entirely to the public use and not held for pecuniary profit; public grounds, including all places for the burial of the dead; fire-engines, and all implements for extinguishing fires, with the grounds used exclusively for their buildings and for the meetings of the fire companies; all public libraries, grounds and buildings of literary, scientific, benevolent, agricultural, and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding six hundred and forty acres in

extent, and not leased or otherwise used with a view to pecuniary profit; and all property leased to agricultural, charitable institutions, and benevolent societies, and so devoted during the term of such lease; *provided*, that all deeds by which such property is held shall be duly filed for record before the property therein described shall be omitted from the assessment;

2. The books, papers, and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution, used for their education;

3. Money and credits belonging exclusively to such institutions and devoted solely to sustaining them, but not exceeding in amount or income the sum prescribed by their charter;

4. Animals not hereafter specified, the wool shorn from sheep belonging to the person giving the list, his farm produce harvested within one year previous to the listing, private libraries not exceeding three hundred dollars in value, family pictures, kitchen furniture, beds and bedding requisite for each family, all wearing apparel in actual use, and all food provided for the family; but no person from whom a compensation for board or lodging is received or expected, is to be considered a member of a family within the intent of this clause;

5. The polls or estates, or both, of persons who by reason of age or infirmity may, in the opinion of the assessor, be unable to contribute to the public revenue; such opinion, and the facts on which it is based, being in all cases reported to the board of equalization by the assessor, or any other person, and subject to reversal by them;

6. The farming utensils of any person who makes his livelihood by farming, and the tools of any mechanic, not in either case to exceed three hundred dollars in value;

7. Government lands entered or located, or lands purchased from this state, shall not be taxed for the year in which the entry, location or purchase is made;

8. The homestead, not to exceed five hundred dollars in value, of the widow of any federal soldier or sailor who died during the late war while in service or who has since died of wounds received or disease contracted while in such service. *Provided*, that the provisions of this act [subdivision] shall only apply to persons who do not own other real estate than such homestead. [R., § 711; C., '51, § 455; 9 G. A., ch. 31, § 1; 10 G. A., ch. 79, § 1.]

[As to the taxation of lands granted to railroads, see § 1282.]

Public property: Lands held by the United States in trust for grantees are subject to taxation as property of such grantees. A valid legal title is not necessary to authorize taxation: *Stockdale v. Treasurer of Webster County*, 12–536.

Prior to the expiration of five years from the filing of a declaratory statement in case of an entry of public lands under the homestead law, a person seeking to avail himself of the provisions of the homestead act acquires no taxable interest in the land: *Moriarty v. Boone County*, 39–634.

Where public lands were entered by forged scrip, and the entry subsequently canceled on that account and a new entry allowed, *held*, that the lands were not taxable in the hands of the pre-emptor prior to the valid entry: *Reynolds v. Plymouth County*, 55–90.

If a party gets a land warrant from the government which, because of his own fraud, is canceled, but afterwards by a proper application gets a warrant giving him an equity in the land, he is not liable for taxes on the land from the time between the issue of the first and second warrants: *Bronson v. Kukuk*, 3 Dillon, 490; *Pitts v. Clay*, 27 Fed. Rep., 635.

In such a case the second warrant cannot be regarded as a substitute for the first, nor is there any estoppel against the party obtaining the warrant towards a purchaser under a tax sale from asserting the invalidity of the first warrant: *Ibid.*

A tract of land omitted by mistake in making entry under a certificate, and which was subsequently, by compromise, entirely omitted from such location, another tract being substituted in its place, *held* not subject to taxation: *Scott v. Chickasaw County*, 46–253.

The provisions of the act of congress admitting Iowa into the Union, exempting bounty lands granted for military services from taxation for a term of three years from the date of the patent, *held* not applicable to lands entered upon military land warrants by the assignees thereof: *Sands v. Adams County*, 11–577.

Under similar provisions, *held*, that the

actual date of the patent when issued, and not the date of the entry under which title vested in the grantee, was to be considered in determining the time when the land became taxable in the hands of patentees: *Fisher v. Wisner*, 34–447.

Where lands granted by the United States to aid in the improvement of the Des Moines river were conveyed to the state, to be conveyed by it to the parties entitled thereto as the work should progress, *held*, that until such conveyance was actually made by the state the lands were not subject to taxation: *Des Moines Nav. & R. Co. v. Polk County*, 10–1.

Under the railroad land grant acts, by which, upon the completion of a twenty-mile section of road, the company became entitled to certain sections of public land as therein provided, *held*, that such land was taxable in the hands of the company from the time of the completion of the section of road, although certificates for it were not obtained until afterward: *Iowa Homestead Co. v. Webster County*, 21–221; *Dubuque & P. R. Co. v. Webster County*, 21–235.

Facts in a certain case *held* not to show that the lands were reserved and the title withheld by competent authority, and therefore *held* that the lands were taxable: *Iowa R. Land Co. v. Fitchpatrick*, 52–244.

But where at the time the railroad became entitled to land under the grant it was occupied by a party claiming a homestead entry thereon, *held*, that it did not thereupon become subject to taxation, the United States holding it in trust for one or the other of the parties, and having still a duty to perform with reference thereto: *Dickerson v. Yetzer*, 53–681.

The fact that during nearly a month there was no adverse claim, and during that time the railroad company neglected to procure title, *held* not to render the land taxable to the company, in the absence of any showing that the neglect to procure title was for the purpose of escaping taxation: *Ibid.*

Railroad lands earned by the construction of the road, but not certified, and held by the government on account of conflicting claims, are not taxable while so withheld, and a tax title acquired at the sale thereof during such time is void: *Doe v. Iowa R. Land Co.*, 54–657; *Grant v. Iowa R. Land Co.*, 54–673.

Land which is held by the government to which a company or individual may ultimately acquire title by reason of a grant, but which has never been certified or set apart, and is incapable of identification, is not subject to taxation: *Cedar Rapids & M. R. R. Co. v. Woodbury County*, 29–247.

Under a grant of land to a state to aid in the construction of a railway, which lands were by the state granted to the company, *held*, that a patent by the governor to the company was evidence that the lands conveyed thereby were then earned by such company, and that the patent issued as soon as the lands were earned, and that parol evidence was only admissible to show that the company had fraudulently presented the issuance of a patent at the proper time for the purpose of avoiding payment of taxes upon the land earned: *McGregor & M. R. R. Co. v. Brown*, 39–655.

Where a railroad land grant provided that the property be patented by the governor to the company entitled to the same upon the completion of its road, *held*, that, in the absence of any showing of fraud upon the part of the company in causing a delay in the conveyance of title, the land became subject to taxation only upon actual conveyance by the governor, although such conveyance was delayed beyond the time when the company was entitled to the same: *Iowa Falls & S. C. R. Co. v. Plymouth County*, 40–609.

The property of the state is not subject to special assessment for improvement of streets: *Polk County Savings Bank v. State*, 69–24.

Agricultural college lands leased for a term of years, with a provision for forfeiture on non-payment of rents, and with the privilege to lessee of purchasing at the expiration of the lease, *held* not subject to taxation: *Trustees of Agl. College v. Webster County*, 34–141.

Property of counties: The statutory provision that property of a county shall be exempt from taxation when devoted entirely to the public use, and not held for pecuniary profit, amounts to a declaration that before there was such statutory provision lands held by one county situated within another were not subject to taxation: *Guthrie County v. Carroll County*, 34–108.

Taxes levied by the county upon lands to which it has an equitable title are void, and the purchaser thereof at tax sale, being affected with notice of such fact, acquires no title: *Gibson v. Howe*, 37–168.

Land acquired and held by a county in order to secure to it an amount due from a defaulting officer is not taxable: *Ibid.*

Where a county repudiates a contract of sale made by it, it cannot subject the land to taxation: *Moore v. Morledge*, 42–26.

Swamp lands owned by the county at the time of an assessment of real property are not subject to taxation as against a subsequent purchaser thereof: *Iowa R. Land Co. v. Story County*, 36–48.

And where the sale of such land did not embrace the entire amount thereof held by the county, and the portions of the land sold were not yet determined upon, *held*, that the portions afterwards conveyed in pursuance of such sale were not subject to taxation until they were designated: *Ibid.*

Swamp land is not liable to taxation so long as it is held and owned by the county. Where it is conveyed by the county after the close of the assessment, it should be passed as not subject to taxation for that year: *Sully v. Poorbaugh*, 45–453.

Swamp lands belonging to one county situated in another would be exempt from taxation were it not for the provision inserted in § 1274 declaring such lands taxable: *Guthrie County v. Carroll County*, 34–108.

Property devoted to public use: Property devised to trustees of a town in trust for the improvement of a public park, to be held as a perpetual fund for that purpose, interest and revenues only to be used, is not exempt

from taxation in the hands of such trustees. To be exempt, the property in such case must be devoted entirely to public use and not held for pecuniary profit: *Mitchellville v. Board of Supervisors*, 64–554.

The exemption of the property of a school district, used for school purposes, from taxation, by reason of its being property devoted to a public use, extends only to general taxes and does not relieve it from a special tax assessed by a municipal corporation within which it is situated for building sidewalks: *Sioux City v. Independent School Dist.*, 55–150.

The property of a water company which is authorized to furnish water to a city and its citizens, its rates being under the control of the council and its property being subject to be bought by the city at a certain price, is not public property in such sense as to be exempt from taxation: *Appeal of Des Moines Water Co.*, 48–324.

Property of educational and religious institutions: The residence of a professor owned by a college, and a parsonage owned by a church, are so devoted to the appropriate objects of such institutions as to be exempt from taxation: *Trustees of Griswold College v. State*, 46–275.

Where the officiating pastor of a church held the legal title to certain lots in his own name, and allowed the same to be used by such church and the school connected therewith, without charge, *held*, that the property was not exempt from taxation: *Laurent v. Muscatine*, 59–404.

Property conveyed to a religious society as a gift, with no conditions as to the use to which it shall be devoted, remaining vacant and unimproved at the time of taxation and sale, is not exempt: *Kirk v. St. Thomas Church*, 70–287.

Where property was acquired by a religious institution under such circumstances as to be exempt from taxation, but had already been subject to taxation for seven months of the year, *held*, that its acquisition by such association did not relieve it from liability for the taxes of the year in which it was thus procured: *First Cong. Church v. Linn County*, 70–396.

The exemption from taxation in such a case was not intended to act retrospectively, and exempt from prior taxes or prior liability for taxes, but only to exempt the property from future liability: *Ibid.*

Church property leased for other purposes is subject to taxation: See § 3092.

Burying grounds: As to a certain portion of property in controversy, which it was shown was used as a burying ground, *held*, that it was exempt from taxation and a tax sale thereof was void; but as to the balance of the property, which was held in trust for a church but was not used as church property, *held*, that it was not exempt: *Mulroy v. Churchman*, 52–238.

Property of charitable and benevolent societies: Where a charitable society invested its "widows' and orphans' fund" in real property, which was leased for business purposes, the proceeds being strictly applied to the proper objects of the fund, *held*, that such property was not exempt from taxation: *Fort Des Moines Lodge v. Polk County*, 56 34.

Tools: The term "tools" in this section, *held* to include the press, types, imposing stones and other implements of a printer necessary to carry on his business: *Smith v. Osburn*, 53–474.

Property of insane persons: Where the assessor omits to assess the land of an insane person on the ground that it is within the exemption of this section in favor of persons who, by reason of age or infirmity, are unable to contribute to the public revenue, the treasurer has no authority to enter such land for taxation, the act of the assessor being only reversible by the board of equalization: *Ordway v. Smith*, 53–589.

Construction of exemptions: The legislature having declared the liability of property to taxation, courts are not justified in indulging in fine distinctions in defeating the legislative will. The exemption must rest upon some clear and just ground: *Morseman v. Younkin*, 27–350.

A statute exempting property from execution or order of sale upon a judgment or decree of court cannot be construed to exempt it from taxes, or sale therefor: *Slane v. McCarroll*, 40 61.

If property taxable under a previous general statute is afterwards claimed to be exempted by a later statute, the exemption must be shown to be clearly and unequivocally expressed: *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361.

An exemption from taxes being an exception is strictly construed; therefore, *held*, that such exemption applied only to general taxes and not to special assessments for local improvements: *Cassady v. Hammer*, 62–359.

Taxation is the rule, exemption the exception, and the statute under which exemption is claimed should therefore be strictly construed: *Trustees of Griswold College v. State*, 46–275; *Sioux City v. Independent School Dist.*, 55–150.

Exemption from taxation is not in the nature of a contract between the state and the property owner, and does not prevent subsequent legislation altering the law and removing the exemption: *Shiner v. Jacobs*, 62–392.

Therefore, *held*, that an exemption to the owner of land by reason of the planting of trees thereon might be limited by a subsequent statute applicable to land planted before the passage of the later act: *Ibid.*

Tax sale of exempt property: The purchaser at tax sale of property exempt from taxation acquires no lien thereon for taxes voluntarily paid for subsequent years, although the property had passed to a third person who could not claim the exemption: *Byington v. Wood*, 12–479.

Lands purchased from state or U. S.: The terms "entry" and "location" when applied to acquisition of lands from the government have a fixed and certain meaning, and cannot be applied to the grant of land by a congressional act, and therefore lands acquired by a congressional grant operating *in præsenti* to pass the title without conveyance or other assurance are not exempt from taxation under

subd. 7 of this section: *Goodnow v. Wells*, 67-654; *Goodnow v. Litchfield*, 67-691.

It has not been decided by the courts of Iowa, in such cases, that government lands are not taxable until a year after they are patented. The time of patenting does not affect the question as to their taxability: *Ibid.* (Criticising *Litchfield v. Webster County*, 101 U. S., 773.)

Therefore, *held*, that lands claimed by railroad companies under grants from the state in 1858, by virtue of a supposed grant from congress, which grant was made effectual by act of congress in the year 1861, were taxable for the year 1861. *Ibid.*

It was *held*, however, in a similar case by the supreme court of the United States, that such lands were not taxable until the year 1862: *Litchfield v. Webster County*, 101 U. S., 773.

Although the technical title to lands above the Racoon forks, claimed under the Des Moines river grant, did not pass from the United States until the passage of the additional act of 1861, yet the claimants to such lands under the original grant had such title that the lands in their hands were subject to taxation before the passage of the later act. The confirmatory act of 1861 related back to the first grant and perfected the title from that date: *Stryker v. Polk County*, 22-131; *Litchfield v. Hamilton County*, 40-66.

The latter case was reversed, however, in the supreme court of the United States: *Litchfield v. Hamilton County*, 101 U. S., 781.

Prior to the enactment of subd. 7 of this section, *held*, that such lands acquired after the close of the assessment for the current year were not liable to taxation for that year: *Des Moines Nav. & R. Co. v. Polk County*, 10-1; *Tallman v. Treasurer*, 12-531; *Sully v. Poorbaugh*, 45-453.

1272. Forest and fruit trees. 798; 17 G. A., ch. 50, § 1; 18 G. A., ch. 190. For every acre of forest trees planted and cultivated for timber within the state, the trees thereon not being more than twelve feet apart and kept in a healthy condition, the sum of one hundred dollars shall be exempted from taxation upon the owner's assessment, for ten years after each acre is so planted; *provided*, that such exemption be applied only to the realty owned by the party claiming the exemption, not to exceed each one hundred and sixty acres of land, upon which the trees are grown and in a growing condition. For every acre of fruit trees planted and suitably cultivated within the state, the trees thereon not being more than thirty-three feet apart and kept in a healthy condition, the sum of fifty dollars shall be exempted from taxation upon the owner's assessment, for five years after each acre is planted. Such exemption shall be made by the assessor at the time of the annual assessment, upon satisfactory proof that the party claiming the same has complied with this section; and the assessor shall return to the board of equalization the name of each person claiming exemption, the quantity of lands planted to timber or fruit trees, and the amount deducted from the valuation of his property. *Provided*, that the amount so deducted shall not exceed one-half of the valuation of the realty on which such exemption is claimed. [12 G. A., ch. 92, §§ 1, 2, 3.]

An exemption from taxation is not in the nature of a contract between the state and the property owner, and does not prevent subsequent legislation altering the law and removing the exemption. Therefore, *held*, that 18 G. A., ch. 190, limiting the amount of exemption under this section, was applicable to timber land planted before the passage of the act: *Shiner v. Jacobs*, 62-392.

[Section 799 of the Code is repealed by 17 G. A., ch. 50, § 2.]

The action of the board in granting exemptions could only be reviewed upon appeal or by *certiorari*, and not by an injunction: *District Tp v. Brown*, 47-25.

1273. Rebate in case of loss. 800; 15 G. A., ch. 66. The board of supervisors shall have power to rebate in whole or in part the taxes of any person whose buildings, crops, stock, or other property has been destroyed by fire, tornado, or other unavoidable casualty, if said property has not been sold for taxes or if said taxes have not been in default for thirty days at the time of destruction. But the loss for which such rebate is allowed shall be such only as is not covered by insurance. [R., § 818; Ex. S., 8 G. A., ch. 12.]

Where a tax payer makes application, after he has paid his taxes, to have them refunded under this section, the treasurer may refuse to pay such rebate on a simple order by the board that it be refunded without a direct order upon him to that effect: *Crosby v. Floete*, 65-370.

1274. What taxable. 801. All other property, real and personal, is subject to taxation in the manner directed. Ferry franchises and toll-bridges, for the purposes of this title, are considered as real property. Horses, cattle, mules, asses, sheep, swine, and money, whether in possession or on deposit, and including bank-bills, money, property, or labor due from solvent debtors on contract or on judgment, mortgages and other like securities, and accounts bearing interest, property situated in this state belonging to any bank, or company, incorporated or otherwise, whether incorporated by this or any other state, public stocks or loans, household furniture, including gold and silver plate, musical instruments, watches, and jewelry, private libraries, for their value exceeding three hundred dollars, carriages, threshing machines, and every description of vehicle, farm utensils, machines and machinery, mechanic tools, and professional libraries for their aggregate value over three hundred dollars, boats and vessels of every description, wherever registered or licensed, and whether navigating the waters of this state or not, if owned either wholly or in part by inhabitants of this state, to the amount owned in this state. Any and all lands in this state which are owned or held by any other county or counties claiming title under locations with swamp land indemnity scrip, or otherwise, shall be taxed the same as other real estate within the limits of the county. [R., § 712; C., '51, § 456; 13 G. A., ch. 187.]

[The words "mechanic tools," in the thirteenth line, are erroneously omitted in the printed Code.]

What property is taxable: A valid legal title is not necessary to authorize taxation. Lands held by the United States in trust for grantees are subject to taxation as property of such grantees: *Stockdale v. Treasurer, etc.*, 12–536.

Under the railroad land grant acts by which upon the completion of a twenty-mile section of road the company became entitled to certain sections of public land as therein provided, *held*, that such land was taxable in the hands of the company from the time of the completion of the section of road, although certificates for it were not obtained until afterwards: *Iowa Homestead Co. v. Webster County*, 21–221; *Dubuque & P. R. Co. v. Webster County*, 21–235.

Mortgages held by non-residents are not taxable in this state: *Davenport v. Mississippi & M. R. Co.*, 12–539.

A purchase money mortgage is not exempt from taxation. To tax such security is not, at least as to the person owning the mortgage, double taxation: *McGregor v. Vanpel*, 24–436.

The taxation of a mortgage debt in the hands of the mortgagee, and also of the property in the hands of the mortgagor, is not double taxation: *Meyer v. Dubuque County*, 49–193.

Where, under a bond for a deed or instrument of a similar nature, the vendee goes into possession as owner and becomes liable for the taxes, the grantor should be taxed for the unpaid purchase money as moneys and credits: *Ibid.*

Under particular facts indicating that conveyance of real property to a tax payer was intended as between the parties merely as security for a loan, *held*, that the board of equalization was authorized to assess the property to the former owner, and the purchase price to the presumed purchaser as moneys and credits: *Waller v. Jaeger*, 39–228.

Notes which are left in another state for safe keeping are still subject to taxation in this state to the owner residing here. The debts exist independently of the notes themselves and follow the owner, though as to moneys and credits under the control of an agent in another state for the purpose of investment for profit, the rule might be different. (See § 1296): *Hunter v. Board of Supervisors*, 33–376.

Where the owner of a farm had made an executory oral agreement to convey the same at a future time, a part of the consideration being paid, the balance to be paid at the time of conveyance, *held*, that the unpaid purchase money was a credit within the meaning of this section, although payment could not be demanded until conveyance was tendered: *Perrine v. Jacobs*, 64–79.

Railway property: The right of way of a railroad company, and land held by it for depot purposes, are subject to taxation. Although they are taken for public use they are the property of the corporation: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

Under the act of 1858, which made the property of a railway corporation taxable through its shares of stock only, it was held that real property inside a city, owned by the company and used as depot grounds, was liable for sidewalk tax: *Ibid.*

Under former statutes by which the property of corporations was taxable only through the shares of stock of its stockholders, *held*, that land owned by a railroad company was not taxable as real property: *Tallman v. Treasurer*, 12–531; *Dubuque & S. C. R. Co. v. Dubuque*, 17–120; *Faxton v. McCosh*, 12–527; *Davenport v. Mississippi & M. R. Co.*, 12–539. Also *held*, that the provision of the Code of '51, that stock owned by non-resident stockholders in railroad and similar corporations in this state should be taxable in the county where either terminus of the road was situated, was valid: *Faxton v. McCosh*, 12–527.

Under the Revision the property of railroads was to be assessed and taxed in the same man-

ner as the property of individuals: *Iowa Homestead Co. v. Webster County*, 21–221; *Dubuque & P. R. Co. v. Webster County*, 21–235.

As to whether the track, depot grounds, buildings, etc., of a railway corporation, situated within the limits of a city, were under 9 G. A., ch. 173, which imposed a tax of one per cent. per annum upon the gross earnings in lieu of all taxes for any and all purposes, subject to municipal taxation, the supreme court were equally divided: *Davenport v. Mississippi & M. R. Co.*, 16–348; *Dubuque & S. C. R. Co. v. Dubuque*, 17–120.

But under 12 G. A., ch. 196, similar to the act last referred to, it was held that such property was subject to taxation for municipal purposes and that the one per cent. was only in lieu of state and county taxes: *Dunleith & Dubuque Bridge Co v. Dubuque*, 32–427; *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633; *Dubuque v. Chicago, D. & M. R. Co.*, 47–196; and that 14 G. A., ch. 26, § 9, by which it was sought to release railway companies from such taxes previously levied, was unconstitutional: *Dubuque v. Illinois Cent. R. Co.*, 39–56.

As to whether, under the acts of 1862 and 1868 above referred to, the rolling stock of a railway corporation was subject to municipal taxation in the city where the company had its principal place of business, see the cases of *Davenport v. Mississippi & M. R. Co.; Dubuque & S. C. R. Co. v. Dubuque; Dubuque v. Illinois Cent. R. Co., supra.*

As to taxation of railway property under present law, see §§ 1281, 1286, 2016–2022.

Corporate property and stocks: The real property of a private corporation for pecuniary profit is taxable as other property, and the shares of stock in such companies are also taxable under § 1289; as to whether both may be taxed at once, and whether that would be double taxation, *quære: Appeal of Des Moines Water-Works*, 48–324.

Although the taxation of the property of a corporation to the corporation, and the shares of its capital stock to its stockholders, may amount to double taxation, yet such a provision is not unconstitutional: *Cook v. Burlington*, 59–251.

Premiums received by an insurance company, being a gross income, are not taxable property so as to permit of a tax levy thereon by a municipal corporation under an authority to collect taxes upon "taxable property:" *Dubuque v. Northwestern L. Ins. Co.*, 29–9; *Burlington v. Putnam Ins. Co.*, 31–102.

Assets of a life insurance company, consisting of loans, notes taken for premiums, bonds, cash, etc., are subject to taxation as belonging to the class of moneys and credits, but the company is entitled to deduct therefrom (under § 1291) liability to its stockholders and policy-holders: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

The assessment of stock in a mutual loan and building association cannot be diminished by the deduction of the debts of the owner: *Bridgman v. Keokuk*, 72–42.

As to the taxation of bank stock, see §§ 1289, 1297.

Prior to the enactment in 1873 of the provision as to lands held by a county under the swamp land grant, such lands were not liable to taxation in another county: *Guthrie County v. Carroll County*, 34–108; *Callanan v. Wayne County*, 73–709.

1275. Credit. 802. The term "credit" as used in this title, includes every claim and demand for money, labor, or other valuable thing, and every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, mortgage, or otherwise; but pensions of the United States, or any of them, and salaries or payments expected for services to be rendered, are not included in the above term. [R., § 713; C., '51, § 457.]

As to what is included under the head of credits in case of a corporation, see note to preceding section; also notes to § 1291.

1276. How listed. 803. Every inhabitant of this state, of full age and sound mind, shall assist the assessor in listing all property subject to taxation in this state of which he is the owner, or has the control or management, in the manner hereinafter directed; the property of a ward is to be listed by his guardian, of a minor, by his father if living, if not, by his mother if living, and if not, by the persons having the property in charge; of a married woman, by herself or husband; of a beneficiary for whom property is held in trust, by the trustee, and the personal property of a decedent, by the executor; of a body corporate, company, society, or partnership, by its principal accounting officer, agent, or partner. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless it be listed by the mortgagee or lessee. [R., § 714; C., '51, § 458.]

It is the duty of the mortgagor of real property to pay the taxes thereon: *Porter v. Lafferty*, 33–254; *Dayton v. Rice*, 47–429.

While the property which is under mortgage or lease may be assessed to the mortgagor, the mortgage itself is to be assessed as personal property to the mortgagee, and if he be a non-resident it cannot be assessed in this state: *Davenport v. Mississippi & M. R. Co.*, 12–539.

Where a purchaser of real estate under contract for a deed takes possession thereof, he is

liable for the taxes thereon, and on subsequently taking the deed cannot require the vendor to covenant against such taxes: *Miller v. Corey*, 15–166.

The personal property of a decedent should, as a rule, be assessed in the county of which he died a resident, and not in the county where the executor resides: *McGregor's Ex'rs v. Vanpel*, 24–436.

Where the administrator is a resident of the same county where decedent died, but of another township, the personal property coming into possession of the administrator should be assessed in the township where the administrator resides: *Cameron v. Burlington*, 56–320.

As to the county in which personal property of decedent is to be assessed, see note to § 1288.

1277. Who deemed owners. 804. Commission merchants and all persons trading and dealing on commission, and assignees authorized to sell, when the owner of the goods does not reside in the county, are, for the purpose of taxation, to be deemed the owners of the property in their possession. [R., § 715; C., '51, § 459.]

1278. Listing property of another. 805. Any person required to list property belonging to another, shall list it in the same county in which he would be required to if it were his own, except as herein otherwise directed, but he shall list it separately from his own, giving the assessor the name of the person or estate to whom it belongs; but the undivided property of a person deceased, belonging to his heirs, may be listed as belonging to his heirs without enumerating them. [R., § 716; C., '51, § 461.]

1279. Where taxed; partnership. 806. When a person is doing business in more than one county, the property and credits existing in any one of the counties shall be listed and taxed in that county, and the credits not existing in or pertaining especially to the business in any county, shall be listed and taxed in that where the principal place of business may be. Any individual of a partnership is liable for the taxes due from the firm. [R., § 717; C., '51, § 463.]

[The word "in" in the fourth line, preceding "or," is erroneously omitted in the printed Code.]

1280. Insurance companies. 807. Every insurance company doing business in this state, except joint-stock and mutual companies organized under the laws of this state, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes, two and one-half per cent. of the gross amount of premiums received in this state during the preceding year, taking duplicate receipts therefor, one of which shall be filed with the auditor; and upon the filing of said receipts, and not till then, the said auditor shall issue the annual certificate as provided by law; and the said sum of two and one-half per cent. shall be in full for all taxes, state and local. [R., § 718; C., '51, § 464; 12 G. A., ch. 138, § 38; 14 G. A., ch. 106, § 6.]

1281. Real property of railways. 808. Lands, lots, and other real estate belonging to any railway company, not exclusively used in the operation of the several roads, and all railway bridges across the Mississippi and Missouri river, shall be subject to assessment and taxation on the same basis as the property of individuals in the several counties where situated. [14 G. A., ch. 26, §§ 8, 10.]

The right of the railway company to use the government bridge over the Mississippi river at Davenport, *held* not taxable, except as railroad property under § 2016: *Chicago, R. I. & P. R. Co. v. Davenport*, 51–451.

The provisions of this section relate to the bridges mentioned, while those of § 2018 apply to other railway bridges. This section is not unconstitutional on the ground that it is not of uniform operation: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

These bridges are to be taxed as bridges and not as a part of the railroad, whether owned by the railroad or by private individuals: *Chicago, M. & St. P. R. Co. v. Sabula*, 19 Fed. Rep., 177.

While the United States supreme court has decided that it is the duty of the Union Pacific Railroad Company to operate its whole line, including the bridge at Council Bluffs, yet so much of the bridge as is in Iowa may be taxed under the Code of Iowa as a bridge, and not merely the bridge as a part of the road, more especially since that railroad enjoys in relation thereto all the substantial franchises of a

bridge company: *Union Pacific R. Co. v. Pottawattamie County*, 4 Dillon, 497.

As to taxation of railway property in general, see notes to § 1274.

1282. Railroad land grants. 20 G. A., ch. 28, § 1. All lands lying within the state of Iowa, which have been heretofore granted or may be hereafter granted to any railroad company or corporation by the general government or by the general government to the state of Iowa and by the state granted to any such railroad company or corporation shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to, and the title of record was in such railroad companies or corporations. The fact that such lands are claimed by more than one such company or corporation shall in no way affect the liability of such lands to assessment and levy, *provided*, nothing herein contained is intended to subject any lands to taxation for the past that were not taxable prior to the passage of this act.

1283. Evidence. 20 G. A., ch. 28, § 3. Parol evidence shall be admissible to prove when said lands were earned.

1284. 20 G. A., ch. 28, § 4. All acts or parts of acts inconsistent with this act are hereby repealed.

1285. Road-beds and highways. 809. No real estate used by railway corporations for road-beds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be deemed to be the property of such companies for the purpose of taxation; nor shall real estate, occupied for and used as a public highway, be assessed and taxed as a part of adjacent lands whence the same was taken for such public purpose. [14 G. A., ch. 89.]

1286. Other railway property. 810. All railway property not specified in section eight hundred and eight of this chapter [§ 1281], shall be taxed upon the assessment made by the executive council as provided in chapter five of title ten, at the same rates, by the same officers, and for the same purposes as individual property under the provisions of this chapter; and all provisions of this title relating to the levy and collection of taxes shall apply to the taxes so levied upon railway property. [14 G. A., ch. 26, §§ 6, 7.]

Under the act of 1858, which made the property of railway corporations taxable through their shares of stock only, it was held that real property inside a city, owned by the company and used as depot grounds, was liable for sidewalk tax: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

As to taxation of railway property generally, see notes to § 1274.

1287. Telegraph and express companies. 811. All property, real and personal, including their franchises, owned by telegraph and express companies, shall be listed and assessed for taxation and shall be subject to the same levies as the property of individuals. [12 G. A., 180; 13 G. A., ch. 100.]

[Further as to taxation of telegraph companies, see § 2109–2116.]

1288. Assessment; bankers. 812; 15 G. A., ch. 63. All taxable property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January; except moneys and credits of associations, organized under the general incorporation laws of this state, for the purpose of transacting a banking business, and moneys and credits of private bankers, and others who have loaned money, bought notes, mortgages, or other securities within the year previous to the time of assessing; in every such instance the average value of the moneys and credits which have been in the possession or under the control of the person making the list during the year previous to the time of making said assessment, shall be listed for taxation. Real property shall be listed and valued in the year 1873 and each second year thereafter, and shall be assessed at its true cash value, having regard to its quality, location, and natural advantages, the

general improvement of the vicinity, and all other elements of its value; and in each year in which real estate is not regularly assessed, the assessor shall list and value any real property not included in the previous assessment. [R., §§ 719, 720; C., '51, §§ 460, 465.]

Personal property: A tax based upon an assessment of personal property to the person owning the same at the time of assessment, but who did not own it on January 1st preceding, is illegal and its collection may be enjoined. Personal property brought into the state after January 1st is not taxable for that year: *Wangler v. Black Hawk County*, 56–384.

A person should not be assessed for any year upon personal property not owned by him on the 1st day of January of such year: *Tuckaberry v. Keokuk*, 32–155.

The rule as to the place of taxing movable property is hard to fix, but it is not a correct rule that such property is to be taxed in the township where it is on the 1st of January: *Rhyno v. Madison County*, 43–632.

As a general rule personal property is taxed where the owner resides: *Ament v. Humphrey*, 3 G. Gr., 255.

Moneys and credits are assessable and taxable at the place of the owner's residence and not elsewhere, and an assessment at another place is void: *Barber v. Farr*, 54–57.

A debt of which a note is evidence is subject to taxation where the creditor resides, although the note itself is deposited in another state for safe keeping: *Hunter v. Board of Supervisors*, 33–376.

Where plaintiff had been residing with his family at Osceola, but afterwards went to Chicago, engaging in business there without removing his family, *held*, that he was still subject to taxation in Osceola: *Nugent v. Bates*, 51–77.

Facts in a particular case as to domicile and residence *held* sufficient to show that the property of plaintiff was not assessable in the township where he was assessed: *Babcock v. Township Board of Equalization*, 65–110.

Property *in transitu* from or through a state cannot be taxed. Hence, corn cribbed in Iowa as an incident to its shipment through or from the state is not taxable. If, however, it is put in cribs with no purpose of immediate shipment, but to await the future course of the markets, or for the purpose of avoiding taxation, the transit will be considered as at an end: *Ogilvie v. Crawford County*, 2 McCrary, 148.

A stock of merchandise located within a district should be taxed there for school purposes, although the owner resides in a different district: *Ament v. Humphrey*, 3 G. Gr., 355; *Lemp v. Hastings*, 4 G. Gr., 448.

If personal property has no established locality, and is used in doing business in a county or district in which the owner does not reside, it is to be listed and assessed at the place at which the owner resides; but if it has a known locality, and is used in doing business in that locality, it must be listed and taxed in the county or district where it is thus used: *Lemp v. Hastings*, 4 G. Gr., 448.

Where a tax payer sought by replevin to recover a horse seized for municipal taxes, *held*, that he could not recover in the absence of an averment that the personal property on which such tax was levied was not habitually used within the city: *Buell v. Schaale*, 89–293.

Where personal property within a city is owned by a non-resident the officer or agent who has control thereof stands in the place of the owner, and its *situs* as to taxation, unless otherwise prescribed, is his place of business: *Dubuque v. Illinois Cent. R. Co.*, 39–56, 67.

It is the province of the general assembly to determine what property actually in the state is taxable. Money loaned and invested within the state and under the control and management of an agent here may be taxed under the provisions of statute: *Hutchinson v. Board of Equalization*, 66–35.

Notes which are left in another state for safe-keeping are still subject to taxation in this state to the owner residing here. The debts exist independently of the notes themselves, and follow the owner, though as to moneys and credits under the control of an agent in another state for the purpose of investment for profit the rule might be different: *Hunter v. Board of Supervisors*, 33–376.

The clause of the section as amended, "the average value of the moneys and credits which have been in the possession or under the control of such person . . . shall be listed for taxation," does not authorize the assessor to assess against a bank the average of deposits during the preceding year: *Branch v. Marengo*, 43–600.

Capital employed by a banker, consisting of bonds and treasury notes of the United States, is not taxable, and the excess of his deposits and bills payable over his cash and bills receivable can be deducted from his moneys and credits: *Campbell v. Centerville*, 69–439.

Real estate: Real estate not liable to assessment at the time the assessment is closed should be passed without assessment that year: *Sully v. Poorbaugh*, 45–453; *Des Moines Nav. & R. Co. v. Polk County*, 10–1; *Tallman v. Treasurer*, 12–531.

The land, buildings, machinery or water-mains of a water company are all real estate and appurtenant to the lot on which the main works are located, and are to be assessed in that township although the mains extend into another township: *Appeal of Des Moines Water Co.*, 48–324.

Thus, also, gas-mains and pipes are appurtenant to the lots on which the gas-works are situated: *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51–31.

The entry by the assessor upon his list of town lots by number is a sufficient description to embrace not only the lots proper, but everything appurtenant thereto: *Ibid.*

Where a guardian under authority of court to make a sale of real property agreed with the proposed purchaser that the conveyance and purchase money mortgage should be dated back, and in such form the sale was confirmed by the court, *held*, that taxes on the property for the period between the date of the convey-

ance and the confirmance of the sale could not be assessed against such purchaser: *Ordway v. Smith*, 53–589.

There can be no new and independent valuation of real property by the assessor in even-numbered years, unless it be as to such as has been omitted in the previous assessment. Even as to such property it is doubtful whether the assessor has anything to do therewith. As a matter of convenience he might list it, but he is not required to do even this: *Snell v. Fort Dodge*, 45–564.

Improvements made upon real estate during the first year after an assessment cannot be taxed until the next regular assessment, although the personal property of the owner subject to taxation is decreased by that much. Notwithstanding the provision that "all taxable property shall be taxed each year," the enhanced value of real estate should not be regarded as taxable property until the real estate is assessed in the manner provided: *Richards v. Wapello County*, 48–507.

A party cannot complain that he is prejudiced in the fact that his land and improvements thereon, which constitute a part of the realty, are assessed separately: *Robertson v. Anderson*, 57–165.

Nursery stock is not personal property, but a part of the realty, and should be included with the realty in making the assessments: *Wilson v. Cass County*, 69–147.

However, the rate of taxation upon realty and personalty being the same, *held*, that the valuation of such stock as personalty instead of realty under an aggregate valuation was an irregularity which should have been corrected by an application to the board of equalization, and did not authorize an injunction against the collection of such taxes: *Ibid.*

Provisions as to the assessment of real estate are not applicable to the assessment of the right of way of a railroad company. The entire property of the railway company is to be assessed as personal property each year: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

The board of equalization has no authority to equalize assessments of real estate in the years when such assessments are not authorized to be made: *Goold v. Lyon County*, 74–95.

1289. Credits, annuities, bank-notes, stock. 813. Depreciated bank-notes and the stock of corporations and companies shall be assessed at their cash value; credits shall be listed at such sum as the person listing them believes will be received or can be collected thereon, and annuities, at the value which the person listing believes them to be worth in money. [R., § 721; C., '51, § 466.]

Although the taxation of the property of a corporation to the corporation, and the shares of its capital stock to its stockholders, may amount to double taxation, yet such a provision is not unconstitutional: *Cook v. Burlington*, 59–251.

The real property of a private corporation is to be assessed under § 1302. The shares of stock of such companies are, under this section, taxable in the hands of the owners thereof. Whether both shares and property may be taxed, and whether that would amount to double taxation, *quære: Appeal of the Des Moines Water Co.*, 48–324.

The stockholder is taxable upon his interest in the corporate property, including surplus, as well as upon his capital stock: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

The shares of stock of a stockholder in a bank incorporated under the general incorporation laws of the state are to be taxed to the owner as his individual property: *Henkle v. Keota*, 68–334.

Under the provisions of the Code of '51, *held*, that a banking corporation doing business within the limits of the state was subject to the payment of municipal taxes: *McGregor v. McGregor Branch of State Bank*, 12–79.

It seems that under this section, construed in connection with § 1815, with reference to taxation of savings banks, the stockholder in such a bank is to pay taxes on his stock, at least to the extent the same is not taxed to the bank: *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361.

1290. Stock in building associations. 16 G. A., ch. 163, § 1. The shares of stock of mutual loan and building associations shall be assessed at their cash value, but only the unredeemed shares of such stock shall be taxed and such unredeemed shares shall be listed to the individual owners thereof.

1291. Deducting debts. 814. In making up the amount of money or credits which any person is required to list, or have listed or assessed, he will be entitled to deduct from the gross amount, all debts in good faith owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of such person as security for another shall be deducted, as the person making the list believes he is equitably or legally bound to pay, and so much only as he believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to

contribute, then so much only as he in whose name the list is made will be bound to contribute; but no person will be entitled to any deduction on account of any obligation of any kind given to any insurance company for the premiums of insurance, nor on account of any unpaid subscription to any institution, society, corporation or company; and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds, or other non-taxable property. [R., § 722; C., '51, § 467; 13 G. A., ch. 181.]

This provision for the deduction of debts is not in conflict with the constitutional prohibition against local or special laws for the assessment or collection of taxes: *Macklot v. Davenport*, 17–379.

Where the tax payer having been acting as an agent for a non-resident for the loaning of money, and having been taxed as agent for such money, executed notes to the persons who had been principals, by which he became personally liable as borrower for the money in his hands for investment, and then set off, as against such money in his hands, the amount of his individual indebtedness on the obligations thus executed, *held*, that, it not appearing that there was any fraud nor want of good faith, he was not subject to assessment for such property, the amount of his indebtedness being greater than the amount of his moneys and credits as thus estimated: *Hutchinson v. Board of Equalization*, 67–37.

Whether a tax payer is entitled to have an acknowledgment of indebtedness entered into by him deducted from the amounts of moneys and credits which he is required to list for assessment depends upon whether it is founded upon an actual consideration. If it is founded upon such consideration, and evidences an actual indebtedness, he is entitled to have it deducted regardless of the motive which may have influenced him to incur the obligation: *Hutchinson v. Board of Equalization*, 67–182.

Where property of a non-resident was under the control and management of an agent in the state, within the provision of § 1296, *held*, that the fact that he gave a note to his principal for the amount of such notes for the purpose of exempting them from taxation, such note not representing any real indebtedness, would not entitle such agent to deduct from the amount of the notes under his control the amount of such fictitious indebtedness: *Hutchinson v. Board of Equalization*, 66–35.

Stock in a corporation is not to be classed as credits under this section in such a sense that debts of the owner can be set off against its value for purposes of assessment: *Bridgman v. Keokuk*, 72–42.

To the contrary it has been held that the holder of stock in a national bank may set off against it indebtedness owing by him: *Richards v. Rock Rapids*, 31 Fed. Rep., 505.

A corporation being bound to pay to its stockholders all its capital and profits upon the winding up of its affairs, the amount which the stockholders would receive were the corporation wound up is an indebtedness which may be deducted from the amount of moneys and credits belonging to the corporation. Therefore, *held*, that the assets of a life insurance company, consisting of securities, premium notes, cash, etc., were subject to deduction for the purpose of taxation, of the amount of liability of the corporation to its stockholders and also its liability to its policy-holders as determined by § 1743: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

So held, also, in case of a fire insurance company: *Hawkeye Ins. Co. v. Board of Equalization*, 75–770.

The moneys and credits of a corporation from which are to be deducted its liabilities do not include real estate and other property for which taxation is specifically provided: *Equitable L. Ins. Co. v. Board of Equalization*, 74–178.

1292. Who deemed merchant. 815. Any person owning, or having in his possession, or under his control, within this state, with authority to sell the same, any personal property purchased with a view of its being sold at a profit, or which has been consigned to him from any place out of this state to be sold within the same, shall be held to be a merchant for the purposes of this title; such property shall be listed for taxation, and in estimating the value thereof, the merchant shall take the average value of such property in his possession or under his control during the next year previous to the time of assessing, and if he has not been engaged in the business so long, then he shall take the average during such time as he shall have been so engaged, and if he be commencing, he shall take the value of the property at the time of assessment. [R., § 723; C., '51, § 468.]

A person engaged in buying and packing pork is a merchant within the meaning of this section, and the fact that the property is held with a view of selling it out of the state does not affect the liability of the owner to taxation upon such property. The fact that the property was purchased on credit or on borrowed capital will not relieve the owner from taxation thereon. His debts can only be deducted from his moneys and credits under § 1291: *McConn v. Roberts*, 25–152.

1293. Who a manufacturer. 816. Any person who purchases, receives, or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying, or by the combination of different materials, with a view of making gain or profit by so doing, and by selling the same, shall be held to be a manufacturer for the purpose of this title, and he shall list for taxation the average value of such property in his hands, estimated as directed in the preceding section; but the value shall be estimated upon those materials only which enter into the combination or manufacture. [R., § 724; C., '51, § 469.]

1294. Manufacturing companies. 18 G. A., ch. 57, § 1. Corporations organized under the laws of this state for pecuniary profit, and engaged in manufacturing as defined by section eight hundred and sixteen of the code [§ 1293], and which have their capital represented by shares of stock, shall, through their principal accounting officers, list their real estate, personal property, and moneys and credits, in the same manner as is required of individuals, and their machinery used in their manufacturing establishments shall, for the purposes of this act, be regarded as real estate.

1295. Stock exempt. 18 G. A., ch. 57, § 2. The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation.

1296. Agent personally liable. 817. Any person acting as the agent of another, and having in his possession, or under his control or management, any money, notes, credits, or personal property belonging to such other person with a view to investing or loaning, or in any other manner using the same for pecuniary profit, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same; and if he refuse to render the list, or to swear to the same, the amount of such money, property, notes, or credits, may be listed and valued according to the best knowledge and judgment of the assessor, subject to the provisions of section eight hundred and twenty-four of this chapter [§ 1303]. [R., § 725.]

[The word "and" is erroneously printed in the Code between "notes" and "credits."]

These provisions are not unconstitutional. The property involved being protected by the laws of the state to the same extent as any other property, and the rate of taxation being the same, it cannot be said that the property may, by such provision, be appropriated to public use without compensation: *Hutchinson v. Board of Equalization*, 66–35.

Although for some purposes the *situs* of moneys and credits is deemed to be where the owner resides, yet such property may be deemed within the state for the purpose of taxation and may be taxable as well as other kinds of personal property situated within the state under the control and management of an agent: *Ibid.*

An agent cannot escape taxation on the money thus under his management and control by executing to his principal a note for the amount of such money not representing any real indebtedness on the part of the agent. Such fictitious indebtedness would not be within the statutory provision allowing a setting off of debts as against moneys and credits: *Ibid.*

In a particular case, *held*, that the party did not have the possession, management and control of the property of another as agent in such sense as to make him liable for taxes thereon: *Hutchinson v. Board of Equalization*, 67–182.

Section applied: *Hunter v. Board of Supervisors*, 33–376.

NATIONAL BANKS.

1297. Shares taxed. 818. All shares of the banking associations organized within this state, pursuant to the provisions of the acts of congress to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate in the assessment of taxes in the township, incorporated town, or city, where such banking association is located and not

elsewhere, whether the holder thereof resides there or not, but not at a greater rate than is assessed on other moneyed capital in the hands of individuals.

[The word "provide" in the third line is erroneously printed "procure" in the Code.]

Previous statutory provisions as to taxation of shares in national banks *held* inoperative for the reason that the capital and not the shares of stock of state banking institutions were under the state statutes then existing subject to taxation, and therefore, under the national banking act, shares of stock in national banks could not be taxed: *Hubbard v. Board of Supervisors*, 23-130; *Olmstead v. Board of Supervisors*, 24-33; *Lauman v. Des Moines County*, 29-310.

But under subsequent state statutes, *held*, that shares in state banks became subject to taxation so that stock in national banks became taxable: *Morseman v. Younkin*, 27-350.

Under the act of congress with reference to the taxation of national banks, the shares of stock and the real estate of such banks are alone subject to taxation. Personal property belonging to such associations cannot be taxed: *National State Bank v. Young*, 25-311.

Although § 1815 provides a new method for the taxation of savings banks, yet the difference in such methods of taxation as to savings banks and national banks does not constitute a discrimination in taxation as against national banks so as to render the provisions as to taxation of such banks unlawful under the national banking act: *Davenport Nat. Bank v. Board of Equalization*, 64-140.

Until the supreme court of Iowa shall put a different construction upon § 1289, the federal courts hold that it does not exempt shares of stock in savings banks from taxation altogether, but that it and § 1815, in regard to savings banks, construed together, mean that the stockholder shall pay taxes on his shares of stock, at least to the extent that there is no taxation upon the same against the bank: *Davenport National Bank v. Mittelbuscher*, 4 McCrary, 361.

The fact that stock in a national bank is assessed to the shareholder, whilst savings banks are taxed upon their capital stock and their shares are not taxable, does not render the tax on the national bank stock illegal, it not appearing that the tax in one case is greater than in the other: *Davenport National Bank v. Board of Equalization*, 123 U. S., 83.

To render the assessment of shares of stock in national banks void, as in violation of R. S. of U. S., § 5219, it must be shown there is, in fact, a higher burden of taxation imposed upon the money thus invested than is assessed upon other moneyed capital. It is not sufficient to show that the method of taxation is different: *Richards v. Rock Rapids*, 31 Fed. Rep., 505.

1298. Listing; collecting tax. 819. The principal accounting officer of each of said associations, between the first and fifteenth days of January of each year, shall list the shares of the association, giving the assessor the name of each person owning shares, and the amount owned by each; and for the purpose of securing the collection of taxes assessed upon said shares, each banking association shall be liable to pay the same as the agent of each of its shareholders, under the provisions of section eight hundred and seventeen [§ 1296]; and the association shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares. [Same, § 2.]

The assessment against a shareholder does not authorize the seizure of property of the bank for its liquidation: *First Nat. Bank v. Hershire*, 31-18.

The bank is not absolutely liable for the taxes upon shares, but to render it liable it must be shown that it has, or has had, dividends or other money or property belonging to the delinquent shareholder: *Hershire v. First Nat. Bank*, 35-272.

1299. Further provisions. 820. If, at any time, congress shall amend the acts aforesaid, then each assessor shall assess the shares in any such national bank in such manner as to conform to such amended act of congress; *provided*, that such shares shall not be assessed at a greater rate than is imposed by law on other moneyed capital in the hands of individuals in this state. [Same, § 3.]

CLASSIFICATION OF PROPERTY.

1300. What to show. 821. The board of supervisors of each county, shall, at their meeting in January in each year, classify the several descriptions of property to be assessed, for the purpose of equalizing such assessment; and the county auditor shall deliver to each assessor in the county, on or before the fifteenth day of January in each year, a certificate of such classifica-

tion, together with a suitable plat of his township on which to check each parcel of land assessed, and suitable books in duplicate, properly ruled and headed, in which to enter the following items:

1. The name of the individual, corporation, company, society, partnership, or firm, to whom any property shall be taxable;

2. His or their lands, by township, range, section, or part of section, and when such part is not a congressional division or subdivision, some other description sufficient to identify it; and town lots, naming the town in which they are situated, and their proper description by number and block, or otherwise, according to the system of numbering in the town;

3. Personal property as follows: number of cattle, number of horses, number of mules, number of sheep, number of swine over six months old, number of carriages and vehicles of every description, with a separate column for the value of each, value of merchandise, amount of capital employed in manufacture, amount of money and credits, amount of taxable furniture, amount of stock or shares in any corporation or company, not required by law to be otherwise listed and taxed, amount of taxable farming utensils or mechanics' tools, amount of all other personal property not enumerated, and the number of polls; and a column for remarks. But no entry shall be made on said books of any animal under the age of one year, except as above provided. [R., §§ 732, 733; 9 G. A., ch. 173, §§ 4, 5.]

[A column is to be provided in the assessor's book for dogs: See § 2290.]

Classification: The obvious purport of this section is that like property should be put in the same class: *Cassett v. Sherwood*, 42–623.

The object of this classification by the board is for the benefit of the assessor: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283

Valuation of real property: It is the duty of the assessor to value different pieces of real property in accordance with his own judgment, and it is not proper for the county board of equalization to fix the values upon different classes of real property: *Burnham v. Barber*, 70–87.

Therefore it is not proper for the board to fix the valuation each assessor shall place upon the different classes of real property, such as improved, unimproved, etc.: *Ibid.*

The assessor is not required to examine each forty-acre tract, but of necessity must arrive at the value from information derived from others, having regard to the elements of value prescribed by statute: *Beeson v. Johns*, 59–166.

Description of real property: A description of property as the "N. W. part of the N. E. ¼ of the N. E. ¼, containing three acres," is not sufficient to support a tax title: *Roberts v. Deeds*, 57–320.

Where it is admitted that property is subject to taxation and lawfully assessed, mere insufficiency in the description under which it is assessed to enable a stranger to identify it will not defeat the tax: *Shaw v. Orr*, 30–355.

Under a previous statute, *held*, that the fact of non-assessment might be shown to defeat the tax title; and if the description of the property assessed did not cover the description of the property conveyed in the deed, there was no assessment in fact: *Immegart v. Gorgas*, 41–439.

A town lot entered upon the assessment books by description carries with it mains, pipes, etc., of water or gas works situated thereon as appurtenances, although such mains and pipes extend beyond such lot or even into another township: *Appeal of the Des Moines Water Co.*, 48–324; *Capital City G. L. Co. v. Charter Oak Ins. Co.*, 51–31.

As to taxation of shares of stock, see § 1289 and notes.

DUTY OF ASSESSOR.

1301. Listing property. 822. Each assessor shall enter upon the discharge of the duties of his office on the third Monday in January in each year, and shall, with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter in the books furnished him for that purpose, the several items specified in the preceding section; entering the names of the persons assessed in alphabetical order, so far as practicable by allotting to each letter its requisite number of pages in each of the said books. He shall note opposite each piece or parcel of property by him assessed, in a column of his book prepared for that purpose, the number of the highway, independent school districts, district township, or sub-district in which said property is situated. [R., § 733; C., '51, § 471; 9 G. A., ch. 173, § 15.]

[As to listing of dogs, see § 2288.]

Assessment essential: The assessment or recorded valuation of property by an officer having power to make such assessment or valuation is an indispensable step in the exercise of the taxing power. Such recorded valuation constitutes the basis of the levy, and without it there cannot properly be a levy. It is the tax payer's right to have the amount of his tax entered upon the record provided by law for the same, that he may know in advance the amount which can be collected and govern himself accordingly. It is not enough that the alleged tax is a proportionate part of the burden which the property may be called upon to bear: *Worthington v. Whitman*, 67–190.

Therefore, *held*, that where the assessor had failed to assess the personal estate of a person deceased the treasurer could not recover the taxes on the property of the estate by presenting a claim therefor to the executor for allowance: *Ibid.*

The county cannot recover from the estate of decedent under a claim that his property was not all assessed for taxation, the amount claimed not being based upon any actual assessment or levy: *Appanoose County v. Vermilion*, 70–365.

Time and manner: It is competent for the legislature to provide that one kind of property shall be assessed once in two years, and another kind assessed every year. It is also competent to provide that property belonging to railway companies shall be assessed in a different manner than the same kind of property belonging to other owners, or that the property of railway companies shall be assessed by a special tribunal provided by statute: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

Evidence: A book shown to be in fact the assessment book of the township is receivable in evidence, although it does not show the name of the assessor nor that he was sworn: *Brown v. Scott*, 34–575.

In the absence of any showing to the contrary, it will be presumed that the entry of taxes upon the tax list was made at the proper time and by lawful authority: *Silcott v. McCarty*, 62–161.

Where it was sought to show that a tax deed was void because the property had not been assessed for the year for which it was sold for taxes, *held*, that evidence that no assessment books for the year were found in the proper office twenty years afterward was not sufficient to overcome the presumption in favor of the regularity of the tax deed confirmed by the fact that the land appeared on the tax lists for that year: *Slocum v. Slocum*, 70–259.

By wrong assessor: Where an assessor, elected for an incorporated town, assessed land not situated within the town limits, *held*, that the assessment so far as it included land outside of the town was illegal, even though the officer was an assessor *de facto*, and that a sale for taxes based upon such assessment was void: *Bailey v. Fisher*, 38–229.

Irregularity: The tax payer will not be granted relief on account of irregularity in the assessment, where it does not appear that the assessment was excessive or unjust: *Litchfield v. Hamilton County*, 40–66.

The question as to what is a mere irregularity in exercising the taxing power is of such character that each case must be determined upon its own peculiar facts and circumstances: *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51–31.

Where personal property was owned jointly by several persons, the respective interest of each not being readily ascertainable, and was assessed to one of such owners alone, *held*, that no part of such assessment was illegal: *Meyer v. Dubuque County*, 49–193.

Curative act: *Held*, that a statute authorizing an assessment to be made in 1858 for the taxes of 1857 rendered valid an assessment made in that manner: *Peirce v. Weare*, 41–378.

The clerical duty of listing may be performed by a person employed by the assessor. See note to next section.

1302. Assessment; refusing to assist. 823. The assessor shall list every person in his township, and assess all the property, personal and real, therein, except such as is heretofore specifically exempted; and any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make the oath required by the next section, shall forfeit the sum of one hundred dollars, to be recovered in the name of the county for the use of common schools therein; and the assessor shall assess such person according to the best information he can get. [R., § 734.]

The assessment is not invalid, although the assessor employ another to make the valuations of property, if they are afterwards submitted to him for correction and approval; and it is no objection that the mere clerical duty of listening was performed by another: *Snell v. Fort Dodge*, 45–565.

The assessor should not assess and need not list real property assessed the preceding year: *Ibid.*

The real property of a private corporation for pecuniary profit is taxable as other property, and the shares of stock in such companies are also taxable under § 1289; whether both may be taxed at once, and whether that would be double taxation, *quære: Appeal of the Des Moines Water Co.*, 48–324.

As to the taxation of property of companies owning water-works, see same case under § 641.

The rule as to the place of taxing movable property is hard to fix, but it is not a correct rule that such property is to be taxed in the township where it is on the 1st of January; § 1288 applies only as to ownership: *Rhyno v. Madison County*, 43–632.

If a person is requested to make oath as provided, and refuses, he is liable for the forfeiture. It is not necessary that the oath be actually administered to him, and he cannot escape liability by showing irregularities in the qualification of the assessor, if the officer was such *de facto*. The fact that the assessor was such officer and was acting in that capacity may be established by his own testimony: *Washington County v. Miller*, 14-584.

The property which a party is required by law to assist in listing as distinguished from his own includes personal property which he holds in a fiduciary capacity as executor or trustee, and, therefore, property of decedent who was a resident of the county at the time of his death, in the hands of his executor, should be assessed in the township of the residence of such executor: *Cameron v. Burlington*, 56-320.

All property, personal and real, is subject to be listed for purposes of taxation except such as is exempted from taxation by statute: *Equitable L. Ins. Co. v. Board of Equalization*, 74-178.

Under particular facts, *held*, that the person assessed was a resident of the county in which the assessment was made: *King v. Parker*, 73-757.

1303. Oath. 824. The assessor shall administer an oath, or affirmation, to each person assessed, to the effect that he has given in a full, true, and correct inventory of all the taxable property owned by him, and all property which he is required by law to list, to the best of his knowledge and belief; and in case any one refuses to make such oath, or affirmation, the assessor shall note the fact in the column of remarks opposite such person's name, and should it afterwards appear that such person so refusing has not given a full list of his property, or that which he was by law required to list, any property so omitted shall be entered on the book at double its ordinary assessable value, and taxed accordingly. [R., § 735; C., '51, §§ 474-5.]

It is not required that the property owner subscribe to the oath. The statute being penal should be strictly construed. And *held*, that a party who simply refused to sign a printed affidavit did not render himself liable for the penalty provided: *Marion County v. Kruidenier*, 72-95.

1304. State valuation. 18 G. A., ch. 109, § 2. The assessor shall, before administering the oath or affirmation, as is provided in section eight hundred and twenty-four of the code [§ 1303], to the person assessed, inform him of the valuation put upon his property, and notify him if he feels aggrieved to appear before the board of equalization, and show why the assessment should be changed.

An assessor has no authority to require an oath or affirmation, or administer the same, until he has given information of the valuation placed upon the tax payer's property, and advised him, if he feels aggrieved, to appear before the board of equalization and show wherein the assessment should be changed. In an action to recover the penalty for refusing to make such oath or affirmation it must appear that the assessor gave such information and notice and had authority to administer the oath: *Marion County v. Galvin*, 73-18.

It seems that this section is unconstitutional for the reason that the subject-matter thereof is not embraced in the title of the act in which it is found: *Henkle v. Keota*, 68-334.

1305. Return of books. 825. Each assessor shall, on or before the first Monday in April of each year, deliver to the clerk of his township, one of the assessment books, to be used by the trustees for the equalization of assessments, and for the levy of taxes for township and highway purposes. Said book shall have the several columns of numbers and values correctly footed up and amount of personal property assessed to each person carried forward into a column under the head of "total personal property;" the other book he shall return to the office of the county auditor on or before the third Monday in May of each year, which book shall be a correct copy of the first, after the same has been corrected by the township board of equalization. [R., § 736; C., '51, § 478; 11 G. A., ch. 61, § 10.]

Where property is duly assessed to the owner, the omission of the name of the owner in transcribing the tax upon the tax list will not invalidate the assessment: *Parker v. Cochran*, 64-757.

Real estate not liable to assessment at the time the assessment is closed should be passed without assessment for that year: *Sully v. Poorbaugh*, 45-453; *Des Moines Nav. & R. Co. v. Polk County*, 10-1; *Tallman v. Treasurer*, 12-531.

1306. Owner unknown. 826. When the name of the owner of any real estate is unknown, it shall be lawful to assess such real estate without connecting therewith any name, but inscribing at the head of the page the words, "owners unknown" and such property, whether lands or town lots, shall be listed, as near as practicable, in the order of the numbers thereof; and no one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance with such surveys. [R., § 737.]

It is doubtful whether the assessor is required to look to the records for the purpose of ascertaining the state of the title in order to assess real property in the name of the owner thereof. The fact that he assesses a tract described as the smallest governmental subdivision to unknown owners, when in fact the record shows that it is owned in two parcels by different owners, will not render the sale in pursuance thereof void: *Corning Town Co. v. Davis*, 44-622.

Where the same tract is assessed to "unknown owner" and also in the name of the real owner, the former assessment is invalid and a sale thereunder void: *Nichols v. McGlathery*, 43-189.

Land of a known owner need not be assessed in forties, but may be assessed in a body: *Corbin v. De Wolf*, 25-124; *Bulkley v. Callanan*, 32-461.

It would be presumed from the fact that the name of the owner is not shown by the assessment that the intention of the assessor was to assess the property to an unknown owner: *Burdick v. Connell*, 69-458; *Griffin v. Tuttle*, 74-219.

1307. Penalty. 827. If any assessor shall fail or neglect to perform any of the duties required of him by this chapter, at the time and in the manner specified, he shall be liable to a fine of not less than twenty nor more than five hundred dollars, to be recovered in an action brought in the district court, in the name of the county, and the judgment shall be against him and his bondsmen. [R., § 738.]

1308. Publication of revenue laws. 828. The auditor of state is hereby authorized and required to cause to be published, in pamphlet form, the revenue laws of this state, for the benefit of township assessors; and shall cause the same to be distributed to the county auditors, who shall distribute the same to the township assessors of their respective counties. [11 G. A., ch. 61, § 11.]

TOWNSHIP BOARD OF EQUALIZATION.

1309. Powers. 829. The township trustees shall constitute a board of equalization for their respective townships, and have power to equalize the assessments of all tax payers within the same, except in such cities and incorporated towns as elect a township assessor, in which case the city council shall be the board of equalization, and shall perform such duties in substantially the same manner as is required of a township board of equalization, by increasing or diminishing the valuation of any piece of property, or the entire assessment of any tax payer, as they may deem just and necessary for an equitable distribution of the burden of taxation upon all the property of the township; *provided*, that such boards shall keep a record of their proceedings. [13 G. A., ch. 89, § 1.]

The township board possesses the power to equalize the assessments of persons to the same extent as it was possessed by the board of supervisors under Revision, § 739: *Keck v. Board of Supervisors*, 37-547.

The board is authorized to add to the assessment of the tax payer's moneys and credits and increase his assessment as based thereon: *King v. Parker*, 73-757.

The board has no authority to equalize assessments of real property in even-numbered years: *Goold v. Lyon County*, 74-95.

The provisions of this section as to cities do not apply to cities acting under special charter (*arguendo*): *State v. Finger*, 46-25.

Under statutes relating to cities acting under special charter, *held*, that the city council was authorized to act as a board of equalization as in cities under the general incorporation law: *Kinsey v. Sweeney*, 63-254.

The irregular exercise of the powers here conferred upon the city council will not deprive a party of the right of appeal under § 1312: *Ingersoll v. Des Moines*, 46-553.

Under Revision, § 739, which gave the board

of supervisors authority to equalize the assessments of individuals, *held*, that they might raise or lower the assessments of particular persons when they believed that the assessment was too low or too high; and that, while they might properly receive evidence before doing so, they were not required to receive evidence in all cases, and that their discretion in such matter could not be controlled by proceedings under writ of *certiorari*, but only upon appeal, if at all: *Smith v. Board of Supervisors*, 30–531.

A tax payer is bound to know that his property has been assessed, and if he feels aggrieved thereby to appear before the board of equalization. In case of an over-assessment the tax payer cannot first apply for its correction to the board of supervisors: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

Where the tax payer attacks the action of the board of equalization in raising his assessment on the ground that it has not jurisdiction, it is for him to prove the fact upon which the alleged want of jurisdiction rests, for instance, that there was not a quorum present, or that the majority did not concur, or that there was no proper evidence to act upon: *King v. Parker*, 73–757.

The fact that a particular class of property is assessed to owners thereof at less than is proper will not authorize the board to increase the assessment on such property in the case of one particular tax payer. Such a change would increase rather than diminish the irregularity of assessment: *Ingersoll v. Des Moines*, 36–553.

The provision as to the record of the action of the board is directory, and the fact that the record does not show any action on the part of the board will not prevent an appeal where there has been a controversy determined before them: *Hutchinson v. Board of Equalization*, 66–35.

1310. Time of meeting; duties. 830. Said board shall meet for that purpose at the office of the township or city clerk on the first Monday in April of each year, and continue from day to day until completed; and at such meeting they may also add to the assessment as returned by the assessor, any taxable property in the township, city, or incorporated town, not included therein, placing the same to the name of the owner, if known, and assessing the value thereof. [Same, § 2.]

Where, under previous statutes, the board of supervisors were given similar powers to be exercised at their "June meeting," *held*, that the provision specifying the meeting was directory only, and that the exercise of the power at a subsequent meeting was not void: *Easton v. Savery*, 44–654, 658; *Hill v. Wolfe*, 28–577.

1311. Raising assessments. 18 G. A., ch. 109, § 3. At the first meeting of the board of equalization of any township, town or city, they shall decide what assessment should in their opinion be raised and make an alphabetical list of names of the individuals whose assessment it is proposed to raise, and post a copy of the same in a conspicuous place in the office or place of meeting of said board, and also in each postoffice located in said township, town or city, and the board shall, if, in their opinion, some assessments should be raised, hold an adjourned meeting, with at least one week intervening after posting said notices, before final action thereon, which notices shall state the time and place of holding such adjourned meeting.

Where the property owner appears before the board and is heard on the matter in controversy, he cannot afterward object to want of the notice here provided for. It was intended by this provision to give the tax payer an opportunity to be heard before the assessment made by the assessor could be lawfully increased by the addition of supposed omitted property, or by an increase of the assessment, and such notice must be given before the board can act. A notice that the board has increased the assessment is not sufficient: *Henkle v. Keota*, 68–334.

The statute in which this section is found is not unconstitutional as embracing a subject-matter not in the title, at least so far as this section is concerned: *Ibid.*

If the tax payer is present at the time of the action of the board, and is heard as to matters in controversy, he cannot afterwards object to want of notice: *Hutchinson v. Board of Equalization*, 66–35.

1312. Correcting assessment; appeals. 831; 18 G. A., ch. 109, § 1. Any person who may feel aggrieved at anything in the assessment of his property, may appear before said board of equalization in person, or by agent, at the time and place mentioned in the preceding section, and have the same corrected in such manner as to said board may seem just and equitable, and the assessors shall meet with said board and correct the assessment books as they may direct. Appeals may be taken from all boards of equalization to the circuit [district] court of the county where the assessment is made, within sixty

days after the adjournment of such board of equalization, but not afterward. [R., § 740; 12 G. A., ch. 92, § 4; 13 G. A., ch. 89, § 3.]

Other remedies, when allowable: Where the assessment is erroneous merely as being excessive, the only remedy is an application to the board of equalization, and if necessary an appeal therefrom. The fact that the party has no knowledge of the assessment until too late to make such application makes no difference: *Nugent v. Bates*, 51–77.

A mere error of the assessor in assessing, as personalty, property which should properly be included with the realty is such an error as must be corrected, if at all, by application to the board of equalization: *Wilson v. Cass County*, 69–147.

Failure to appear before the board of equalization to have an over-assessment corrected will not defeat the action of a party against an assessor for maliciously making such over-assessment, when the fact of the over-assessment was not known: *Parkinson v. Parker*, 48–667.

Where land was sold for taxes, a part of which was the personal tax of one not the owner of the land, and which was not a lien upon the land, *held*, that the owner might, after redeeming from the sale, sue for the recovery from the county of the part erroneously included in the sale, and it was not necessary that he should have gone before the board of equalization: *Brownlee v. Marion County*, 53–487.

In case of erroneous assessment, as, for instance, where property properly assessable to a firm in one county is also assessed to one of the partners in another county, the only remedy is by a proceeding before the board of equalization. An action to recover back taxes erroneously assessed cannot be maintained in such case: *Harris v. Fremont County*, 63–639.

Replevin: The right to levy taxes may be questioned by an action of replevin to recover back property claimed to be illegally seized for such taxes: *Buell v. Ball*, 20–282.

But in such an action the property owner cannot contest the tax by showing that the ordinance under which the tax was levied was procured by fraud: *Ibid.*

In an action of replevin against a county treasurer for property seized under a tax warrant, plaintiff, though erroneously assessed, cannot inquire into the regularity of a tax levied by a board having authority and jurisdiction: *Bilbo v. Henderson*, 21–56.

The tax payer must apply for relief from erroneous taxation to the board of equalization, and without doing so cannot, in an action of replevin, recover for property seized for such taxes: *Buell v. Schaale*, 39–293.

Injunction: The proper remedy for an erroneous and excessive assessment is by application to the board of equalization and not by injunction. But in case the law authorizing the tax is unconstitutional or the levy is without authority or jurisdiction, other remedies may be pursued: *Macklot v. Davenport*, 17–379.

Injunction is not the proper remedy for determining the distribution of taxation among the several townships. The board of supervisors being a board of equalization for that purpose their action can only be reviewed by *certiorari* or upon appeal: *District T'p v. Brown*, 47–25.

A court of equity will not interfere by injunction to release the tax payer from a tax erroneously or irregularly levied, but may do so when the tax is wholly void, as, for instance, when it is levied upon exempt property or under an unconstitutional law: *Powers v. Bowman*, 53–359; *Smith v. Osburn*, 53–474.

But an assessment against personal property not taxable in the county, being without authority of law, is void, and equity will entertain jurisdiction to enjoin its collection. The jurisdiction of the board of equalization in such cases is not exclusive: *Barber v. Farr*, 54–57.

The collection of taxes which are illegal may be enjoined by action in equity: *Wangler v. Black Hawk County*, 56–384.

Equity will not interpose to prevent the collection of a tax on account of mere irregularities. If the tax is unauthorized by law, or is imposed upon exempt property, or is fraudulently assessed, equity will relieve: *Conway v. Younkin*, 28–295.

For mere irregularities in the apportionment of the taxes of a municipal corporation, the collection of its revenues cannot be enjoined by a tax payer: *Morrison v. Hershire*, 32–271.

A court of equity will not interfere to prevent the collection of taxes authorized by law, and to which the property is lawfully liable on account of errors or irregularities in the assessment: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

In such cases, if it does not appear that there is a want of power to levy the tax or that the property is not justly liable thereto or that the tax is excessive, equity will not grant relief: *Litchfield v. Hamilton County*, 40–66.

If a tax is illegal and not merely irregular, its enforcement may be restrained by injunction. So *held* where the county board of equalization had exceeded its powers in raising an individual assessment: *Rood v. Board of Supervisors*, 39–444.

Injunction may properly be granted to restrain the enforcement of an illegal tax. An action of replevin to regain possession of property distrained for the payment of the tax is not a full and complete remedy at law, such as will deprive the tax payer of his equitable remedy: *Spencer v. Wheaton*, 14–38.

A court of equity will not relieve a tax payer from the payment of proper and just taxes against his property on account of irregularities in the manner of placing the tax upon the tax-book: *Iowa R. Land Co. v. Soper*, 39–112.

It is not necessary in seeking relief from an unauthorized assessment to apply to the board of equalization in the first instance. The case is different from that of erroneous or excessive assessment. A proceeding to enjoin may be resorted to in such cases, and in such proceeding the county treasurer is a proper party defendant: *Hubbard v. Board of Supervisors*, 23–130.

In an action by tax payers against the county

officers to restrain the levying of a tax to pay railroad bonds the bondholders must be made parties to the suit in order to bind them, though they may not be absolutely necessary parties: *Ex parte Holman*, 28–88.

Residents and tax payers have such direct legal interest in the question of the validity of taxes that they are authorized to join in an action to declare them void: *Wilkinson v. Van Orman*, 70–230.

Mandamus: A party may by *mandamus* compel the board to act, but their discretion cannot be controlled by such action: *Meyer v. Dubuque*, 42–192.

Certiorari: Where the board orders a reduction of the taxation of an individual, but the assessor fails to make the correction in accordance with such order, and his books are turned over to the auditor, the tax payer may maintain an action of *certiorari* to have the error corrected: *Keck v. Board of Supervisors*, 37–547.

Where a county board of equalization acts in a case not within its jurisdiction *certiorari* is the proper remedy: *Royce v. Jenney*, 50–676.

But where the board has jurisdiction the exercise of its discretion cannot be reviewed in this manner: *Smith v. Board of Supervisors*, 30–531.

If the board has jurisdiction its action cannot be reviewed by *certiorari*, no matter what the motive is under which an assessment is changed: *Polk County v. Des Moines*, 70–351.

A tax payer is a proper party to maintain an action to question the validity of the proceedings of the city council acting as a board of equalization in reducing the taxes upon individual property: *Collins v. Davis*, 57–256.

Appeal: Where the board of equalization on its own motion raises the assessed value of a tax payer's property, no appearance before the board to have such action corrected is necessary to entitle the tax payer to appeal: *Ingersoll v. Des Moines*, 46–553.

This section does not prescribe the formalities to be pursued, and when proper notice of appeal is served the court to which the appeal is taken acquires jurisdiction and may properly overrule any motions to dismiss the appeal for irregularity: *Bremer County Bank v. Bremer County*, 42–394.

No bond is required upon the taking of such appeal: *Ingersoll v. Des Moines*, 46–553.

The amendment limiting the right of appeal to the time specified took away such right in cases in which that time had elapsed without any appeal being taken prior to the taking effect of the amendment: *Slocum v. Fayette County*, 61–169.

Upon such an appeal evidence may be introduced by the parties in addition to the matter shown by the record, and the court becomes an assessing tribunal clothed with authority to determine anew the sum in which the tax payer is to be assessed: *Grimes v. Burlington*, 74–123.

Upon appeal by a person seeking to have his assessment reduced the court has no authority to increase the assessment: *Appeal of Des Moines Water Co.*, 48–324; *German Am. Savings Bank v. Burlington*, 54–609.

In such an appeal the property owner has no right to a jury trial. The duty of the court is to do what it is claimed the board failed to do, that is, make a just and equitable assessment. On appeal to the supreme court that court has the same duty and must weigh the evidence as an original question, as is done in equity cases, and determine therefrom what is the just and equitable value of the property for the purpose of taxation: *Davis v. Clinton*, 55–549; *Dunlieth, etc., Bridge Co. v. Dubuque County*, 55–558.

A tax payer whose real property is assessed at more than its true cash value may still have redress, on appeal from the board of equalization, if his property is taxed as high as other property of greater value. And in a particular case, *held*, that under such circumstances the supreme court would, on appeal, reduce the valuation of plaintiff's real estate in order that it might correspond to other property: *Burham v. Barber*, 70–87.

Appearance cures any defect in the service of the notice of appeal: *Richards v. Rock Rapids*, 72–77.

The city council, while acting as a board of equalization, represents the city and may, if an appeal is taken from its action, support it in the appellate court, and the city solicitor may properly appear for the council in such matter: *Kinnie v. Waverly*, 42–437.

COUNTY BOARD OF EQUALIZATION.

1313. Powers. 832. The board of supervisors shall constitute a county board of equalization, and shall equalize the assessments of the several townships, cities and incorporated towns of their county, at their regular meeting in June of each year, substantially as the state board equalize assessments among the several counties of the state. [R., § 739; Ex. S., 8 G. A., ch. 24, § 3.]

The board may equalize by adding to, or deducting from, the valuation of different classes of property in the different townships, as well as by increasing or diminishing the aggregate valuation of all the property therein: *Harney v. Board of Supervisors*, 44–203.

After personal property has been classified by the board of supervisors, and assessments have been made and returned thereon, the board, as a board of equalization, may, if they believe that any class in one town or township is valued too high or too low, add or deduct the proper per centum for the purposes of equalization: *Ibid.*

While the township trustees have power to equalize assessments of tax payers within their township, yet the board of supervisors may overrule their action for the purpose of securing uniform taxation throughout the county upon the different classes of property. (See § 1300): *Cassett v. Sherman*, 42–623.

Therefore, *held*, that where bank stock was assessed at sixty per cent. of its par value in all townships except one, the county board of equalization might raise the assessment of bank stock of holders thereof in that township to the same per cent.: *Ibid.*

The action of the county board of equalization can only be reviewed upon appeal or by *certiorari*, not by injunction: *Macklot v. Davenport*, 17-379; *District T'p v. Brown*, 47-25.

The board has no power to raise or lower the assessment of an individual tax payer: *Royce v. Jenney*, 50-676; and a tax based thereon is void: *Rood v. Board of Supervisors*, 39-444.

A tax payer cannot apply to the board of supervisors for relief against an over-assessment: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74-283.

The board of supervisors have no jurisdiction to determine the right of a municipal corporation to assess taxes, and they cannot remit taxes on the ground of absence of such right: *District T'p v. Moore*, 39-605.

Where two townships, being included within the corporate limits of a city, constitute but one assessorial district, the board has no authority to increase the assessment of one of such townships. It may only equalize as between different assessorial districts: *Getchell v. Board of Supervisors*, 51-107.

1314. Abstract. 833. Each county auditor shall, on or before the third Monday in June in each year, make out and transmit to the auditor of state, an abstract of the real and personal property in his county, in which he shall set forth:

1. The number of acres of land in his county, and the aggregate value of the same, exclusive of town lots, returned by the assessors as corrected by the county board of equalization;

2. The aggregate value of real property in each town in the county, returned by the assessor as corrected by the county board of equalization;

3. The aggregate value of personal property in his county;

4. An abstract of the aggregate value and number of cattle, the aggregate value and number of horses, the aggregate value and number of mules, the aggregate value and number of sheep, the aggregate value and number of swine over six months old, as the same are returned by the assessors of his county. [R., § 741; 9 G. A., ch. 173, § 6.]

STATE BOARD OF EQUALIZATION.

1315. Organization; duties. 834. The executive council shall constitute the state board of equalization, and shall meet at the seat of government on the second Monday of July in each year in which real property is assessed. The auditor of state shall be clerk of the board by virtue of his office, and shall lay before it the abstracts transmitted to him by the county auditors, as required by the preceding section, and then the board shall proceed to equalize the valuation of real property among the several counties and towns in the following manner:

1. They shall add to the aggregate valuation of real property of each county, which they shall believe to be valued below its proper valuation, such percentage in each case as will raise the same to its proper valuation;

2. They shall deduct from the aggregate valuation of real property of each county, which they shall believe to be valued above its proper valuation, such percentage in each case as will reduce the same to its proper valuation. [R., § 742; C., '51, §§ 481-2.]

The state board has no power to equalize personal property: *Harney v. Board of Supervisors*, 44-203.

1316. Rate of state tax. 835. The state board shall also determine each year, at the same time, the rate of state tax to be levied and collected, not exceeding two mills on the dollar. [R., § 743; Ex. S., 8 G. A., ch. 24, § 1.]

1317. Record; change of valuation. 836. Said board shall keep a full record of their proceedings, and they shall finish their equalization on or before the first Monday of August, immediately after which the auditor of state shall transmit to each county auditor, a statement of the percentage to be added to, or deducted from the valuation of real property in his county, and a statement of the rate of state tax fixed as aforesaid. The county audi-

tor shall add to or deduct from the valuation of each parcel of real property in his county the required percentage; rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar. [R., § 743; C., '51, § 483.]

AUDITORS SHALL TRANSMIT ASSESSMENTS.

1318. Tax list. 837. After the equalization in June, hereinbefore provided, and before the first Monday in November, the county auditor shall transcribe the assessments of the several townships into a suitable book to be provided at the expense of the county, properly ruled and headed with distinct columns, in which shall be entered the names of tax payers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property, and each description of tax, with a column for polls and one for payments. [R., § 745; C., '51, § 486.]

Where the collection of a road tax was authorized, but owing to a change in the method of assessment of railway corporations no one was authorized to put the tax for a certain year upon the tax list, *held* (under Rev., § 745), that such duty devolved upon the clerk of the board of supervisors: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41–57, 66.

The auditor may correct errors found in the assessments upon transcribing them, and insert the name of an owner in the tax book: *Adams v. Snow*, 65–435.

1319. Consolidated tax. 838. All taxes which are uniform throughout any civil township or independent school district, shall be formed into a single tax, entered upon the tax list, in a single column, and denominated a consolidated tax; and each tax receipt shall show the percentage levied for each separate fund. [13 G. A., ch. 138, § 1.]

LEVY.

1320. Made and recorded. 839. At the regular meeting in September in each year, the board of supervisors shall levy the requisite tax for the current year in accordance with law, and shall record the same in the proper book, and the county auditor shall, as soon as practicable, complete the tax list by carrying out in a column by itself the consolidated tax, highway tax, polls, irregular tax, if any be levied, and total tax, and after adding up each column of said taxes, he shall, in his abstract at the end of each township, incorporated town, or city list, apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each of said funds, showing a summary of the total amount of each distinct tax. [R., § 746; C., '51, § 485; 13 G. A., ch. 138, § 2.]

[As to levy of dog tax, see § 2289. As to levy of road tax, see § 1464, 1467.]

When to be made: The statutory provisions as to the time for making the levy are only directory, and a levy at a meeting preceding that at which the levy should be made will not be void, no prejudice having resulted to the party complaining: *Easton v. Savery*, 44–654.

So where a school-house tax was not levied by the board of supervisors at the meeting at which it should have been levied, *held*, that it might be levied afterward with the annual levy of the next year: *Perrin v. Benson*, 49–325.

Upon a final adjournment of a meeting of the board of supervisors, the members have no power to assemble or to transact any business required to be transacted in session until the next regular meeting, unless they be convened in special session in the meantime, in the manner prescribed by statute, and any action taken by them by way of making a levy without being so convened will be void: *Scott v. Union County*, 63–583.

Record: The record of a levy need not be signed individually by the persons authorized to make the levy. An entry of the action upon the proper record is sufficient: *Martin v. Cole*, 38–141.

It is not competent to prove the fact of levy by parol evidence where none appears of record: *Moore v. Cooke*, 40–290.

Absence of all record of a levy will not conclusively show that none was made, but absence of the record is a circumstance tending to show that none was made, and may be sufficient to overcome the *prima facie* evidence in favor of the levy which is afforded by a tax deed: *Hintrager v. Kiene*, 62–605.

A previous statute directing that the levy should be recorded in the proper book, *held* directory, and that a record kept upon loose sheets of paper containing the essential facts of a levy and preserved in the proper office constituted a sufficient levy to support the tax: *Plouty v. Tallman*, 65–354.

The record of the action of the board in a

particular case showing a recommendation of the committee for the voting of a tax, and the adoption of such report, *held* sufficient to show a valid levy: *West v. Whitaker*, 37–598.

Where the records of a board of officers authorized to make a levy showed that they met on a certain date, forming a board to levy taxes for the year 1859, and "decided as follows," the number of mills of tax for special purposes being mentioned, *held*, that such record sufficiently showed the making of a levy for that year: *Tallman v. Cooke*, 43–330.

Actual levy required: Where a tax is authorized by special vote it must be actually levied, the act of the electors in authorizing the levy not being alone sufficient: *Iowa R. Land Co. v. Woodbury County*, 39–172.

Sufficiency of: A motion in a city council "to levy a tax," which is adopted, constitutes a present levy: *Snell v. Fort Dodge*, 45–564.

Where there is a sufficient levy of taxes, mere irregularities will not affect their validity: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Effect: After the levy of taxes by a county to which another county is attached for revenue, and the placing of the tax lists in the treasurer's hands, the county thus attached cannot by subsequent separation acquire any rights in such taxes: *Hilliard v. Griffin*, 72–331.

As to levy of taxes in aid of railroads, see § 2083.

1321. For bonded indebtedness. 840. It shall not be lawful for the board of supervisors of any county, to levy taxes in any one year for the payment of bonded indebtedness, except as provided in section two hundred and ninety-one, chapter one, title four of this code [§ 379], including judgments founded on such indebtedness, of more than three mills on the dollar upon the last corrected valuation. But this shall not be construed to reduce the rate of taxation below the rate fixed for one year, in any county in which a specific rate was fixed by the vote of such county authorizing the issue of such bonds. [10 G. A., ch. 124, § 1.]

The limit here imposed does not apply to a levy to pay bonds issued in satisfaction of a judgment: *Sioux City & St. P. R. Co. v. Osceola County*, 52–26.

1322. Errors corrected. 841. The county auditor may correct any clerical or other error in the assessment or tax book, and when such correction, affecting the amount of tax, is made after the books shall have passed into the hands of the treasurer, he shall charge the treasurer with all sums added to the several taxes, and credit him with all the deductions therefrom and report the same to the supervisors. [R., § 747.]

Where a correction of the rate of taxation was authorized, but, owing to a change in the method of assessment of railway corporations, no one was authorized to put the tax for a certain year upon the tax list, *held*, that such duty devolved upon the clerk of the board of supervisors (now the auditor): *Milwaukee & St. P. R. Co. v. Kossuth County*, 41–57.

The auditor is authorized to correct errors found in the assessment upon transcribing them, and the name of the owner may be inserted by him in the tax book: *Adams v. Snow*, 65–435.

Where the assessor omitted to insert in his list the name of one of two joint owners of property, *held*, that the assessment book might properly be corrected in that respect: *Conway v. Younkin*, 28–295.

To authorize a correction in the assessment or tax book as to the valuation of property there must be an error or mistake shown. An averment that the valuation was not fair or reasonable is not sufficient to justify a change: *Jones v. Tiffin*, 24–190.

Where it appeared that the assessment roll had been corrected by some one, and that as so corrected it had remained on file as a record in the auditor's office, and been regarded in subsequent proceedings as correct, *held*, that a party objecting to the correction as not made by proper authority had the burden of showing that it was incorrect and that the taxes assessed were inequitable or unjust, it appearing that unless covered by such correction the land had been entirely omitted from assessment: *Beeson v. Johns*, 59–166.

Where the lands of non-residents were not returned on the assessment rolls for a particular year, and at the time of transcribing the assessments such lands were entered on the tax list by the county auditor, who listed the lands and fixed the valuation thereof, and delivered the tax list, including such lands, to the county treasurer, upon which sales for delinquent taxes were made, *held*, that such assessment and sales thereunder were valid: *Robb v. Robinson*, 66–500.

The powers conferred upon the auditor to correct errors in the assessment include the power to insert property which has been omitted and is subject to taxation. The time within which the auditor may make this correction is not limited by statute, and it may be made after the levy of the tax: *Parker v. Van Steenburg*, 68–174.

The power here given to the auditor includes the power to determine when a mistake has been made: *Fuller v. Butler*, 72–729.

TAX BOOK AND LIST.

1323. Show sale. 842. The county auditor, when making up the tax book of the county and before said book is placed in the hands of the county treasurer for collection of the taxes therein, shall designate each piece or parcel of real estate sold for taxes and not redeemed, by writing in a plain manner opposite to each such piece the word "sold." [12 G. A., ch. 75, § 1.]

A failure of the officer to so designate a parcel as sold and not redeemed when he should do so does not affect the sale previously made: *Playter v. Cochran*, 37–258.

1324. Tax list delivered. 843; 21 G. A., ch. 132. The county auditor shall make an entry upon the tax list showing what it is, and for what county and year it is, and then shall deliver it to the county treasury on or before the thirty-first day of December, taking his receipt therefor; and such list shall be full and sufficient authority for the county treasurer to collect taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, or sales, or other proceedings for the collection of taxes under this title. [R., § 748; C., '51, § 487.]

The tax list is a complete protection to the treasurer in making distress and sale thereunder: See § 1339.

The tax warrant provided for under the corresponding section of the Revision was held not essential, the power of the treasurer to sell being derived from the statute directly: *Parker v. Sexton*, 29–421; *Johnson v. Chase*, 30–308; *Harley v. Powell*, 31–64; *Rhodes v. Sexton*, 33–540; *Madson v. Sexton*, 37–562; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 42–153; and therefore the provision in relation to the warrant is omitted in the Code: *Code Com'rs' Report.*

After the tax duplicate is made out and is placed in the treasurer's hands it constitutes the best and only evidence in whose name any particular tract of land is taxed, and it remains such at least until there is another assessment, which for the time, and until another tax duplicate is made out, becomes the evidence in whose name real estate is taxed: *Fuller v. Butler*, 72–729.

When tax books are placed in the hands of the county treasurer for collection he is charged with the taxes and is required to collect and account for them, and his duty to do so cannot be divested by separation of a portion of the territory over which the taxes have been assessed and levied: *Hillard v. Griffin*, 72–331.

1325. Aggregate valuation certified. 844. At the time of the delivery of said list to the treasurer, the auditor shall make to the auditor of state a certified statement showing the aggregate valuation of lands, town property, and personal property in the county, each by itself, and also the aggregate amount of each separate tax as shown by said tax book. [R., § 748.]

DUTY OF TREASURER.

1326. Entering previous delinquent taxes. 845. The treasurer, on receiving the tax book for each year, shall enter upon the same in separate columns, opposite each parcel of real property or person's name, on which, or against whom any tax remains unpaid for either of the preceding years, the year or years for which such delinquent tax so remains due and unpaid. And any sale for the whole or any part of such delinquent tax, not so entered, shall be invalid. [R., § 750; C., '51, § 488.]

Under this section a personal tax which is a lien upon realty, as well as a real property tax, is to be brought forward and entered as against the property: *Cummings v. Easton*, 46–183.

The treasurer should thus bring forward any personal tax which has become a lien upon real property and enter it opposite such real property, although the personal tax was not assessed against the person who was the owner of such property at the time the assessment was made, nor the person owning the property at the time of making the entry: *Ibid.*

Although under such provision any sale for the whole or any part of a delinquent tax not thus brought forward is declared to be invalid, the right to enforce a performance of the duty of entering upon the tax books taxes remaining unpaid for preceding years cannot be barred so long as the right to enforce the taxes exists. So *held* in an action to compel the treasurer to enter up and collect a railroad tax: *Harwood v. Brownell*, 48–657.

Where a person purchases land against which no delinquent taxes appear, the treasurer

cannot, by afterwards bringing forward delinquent taxes which had not been properly brought forward, make them a lien upon the property as against such purchaser. Taxes not thus brought forward cease to be a lien: *Jiska v. Ringgold County*, 57-630.

The provision of § 1352, for refunding to the purchaser at a tax sale taxes illegally exacted, are applicable to taxes not carried forward as thus required, and for which the sale is therefore illegal: *Parker v. Cochran*, 64-757.

The lien of previous taxes not included in the sale is divested by the sale, and such previous taxes cannot be enforced: See § 1353 and notes.

A tax sale for delinquent tax of previous years not carried forward on the tax books is invalid: *Gardner v. Early*, 69-42; *Barke v. Early*, 72-273; *Hooper v. Sac County Bank*, 72-280: *Buckley v. Early*, 72-289.

A sale for taxes not carried forward is not void but voidable, and advantage of the objection should be taken within five years under the provisions of § 1388: *Griffin v. Bruce*, 73-126; *Guthrie v. Harker*, 27 Fed. Rep., 586.

Where personal property taxes were never carried forward except that they were entered in a separate book showing the names of persons so taxed and the amount of such taxes and the page on which the tax appeared on the tax lists in the office, *held*, that such entries did not constitute a carrying forward of the taxes as required by this section and that a sale therefor was invalid: *Dows v. Dale*, 74-108.

1327. Penalty on taxes not brought forward. 15 G. A., ch. 29, § 1. In all cases where the county treasurer in any county in this state has neglected for the term of four years, or more, to bring forward the delinquent taxes on personal property, on the tax books, as required in section eight hundred and forty-five, chapter one, title six of the code [§ 1326], or has for four years or more neglected to collect said tax by distress and sale of personal property or real estate, upon which said tax is a lien, it shall be the duty of the board of supervisors of the county to remit all of the penalties and interest that may have accrued on such delinquent taxes, on the payment by the person liable for the same of the original amount of such tax.

This statute does not release the treasurer from liability for not collecting such taxes, and is not therefore void as impairing the obligation of contracts. Nor is the statute a special law for the assessment and collection of taxes within the meaning of article 3, § 30, of the constitution. Nor is the statute void as against public policy as encouraging delinquencies in the payment of taxes: *Beecher v. Board of Supervisors*, 50-538.

1328. Treasurer to collect. 846. The treasurer, after making the above entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years. [R., § 751.]

1329. Notice of previous sale. 847. Each county treasurer shall, when any person offers to pay taxes on any real estate marked "sold" notify such person that such property has been sold for taxes, and inform him for what taxes said property was sold, and at what time said sale was effected. [12 G. A., ch. 75, § 2.]

The neglect of the treasurer to thus notify a party paying taxes does not affect a sale already made nor authorize a redemption therefrom after the time for redemption has expired: *Playter v. Cochran*, 37-258.

1330. Certificate of taxes due. 848. The county treasurer shall certify, in writing, the entire amount of taxes and assessments due upon any parcel of real estate, and all sales of the same for unpaid taxes or assessments shown by the books in his office, with the amount required for redemption from the same, if still redeemable, whenever he shall be requested so to do by any person having any interest in said real estate, and paid or tendered his fees for such certificate at the rate of fifty cents for the first parcel in each township, incorporated town, or city, and ten cents for each subsequent parcel in the same township, town or city. Each description in the tax list shall be reckoned a parcel in computing the amount of such fees.

1331. Effect. 849. Such certificate, with the treasurer's receipt showing the payment of all the taxes therein specified, and the auditor's certificate of redemption from the tax sales therein mentioned shall be conclusive evidence

for all purposes and against all persons, that the parcel of real estate in said certificate and receipt described was, at the date thereof, free and clear of all taxes and assessments, and sales for taxes or assessments, except sales whereon the time of redemption had already expired, and the tax purchaser had received his deed.

1332. Treasurer liable. 850. For any loss resulting to the county, or any subdivision thereof, or to any tax purchaser, or tax payer, from an error in said certificate or receipt, the treasurer and his sureties shall be liable on his official bond.

1333. Assessment of omitted property. 851. The county treasurer shall assess any real property subject to taxation, which may have been omitted by the assessor, board of equalization, or county auditor, and collect taxes thereon, and in such cases he is required to note opposite the tract or lot assessed, the words, "by treasurer;" *provided*, that such assessment shall be made within two years after the tax list shall have been delivered to him for collection, and not afterwards. [R., § 752; C., '51, § 851; 11 G. A., ch. 104.]

The omission of the words "by treasurer" does not render the assessment so made by him invalid, in view of the duty imposed upon the owner by the following section: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

1334. Defective assessment; duty of owner. 852. In all cases where real property subject to taxation shall not have been assessed by the township assessor or other proper officer, the owner thereof, by himself or his agent, shall have the same properly assessed by the treasurer and pay the taxes thereon; and no failure of the owner to have such property assessed, or to have the errors in the assessment corrected, and no irregularity, error, or omission in the assessment of such property, shall affect in any manner the legality of the taxes levied thereon, or affect any right or title to such real property which would have accrued to any party claiming or holding under and by virtue of a deed executed by the treasurer as provided for by this title, had the assessment of such property been in all respects regular and valid. [R., § 753.]

An error in assessments does not affect the validity of a tax sale: *Eldridge v. Kuehl*, 27–160, 172.

An error of the assessor under § 1306, in assessing land to unknown owner, is cured by this section: *Corning Town Co. v. Davis*, 44–622, 632.

This section is applicable to taxes levied for construction of drains, etc., under § 1852: *Patterson v. Baumer*, 43-477.

As to effect of illegality of part of a tax upon the sale, see notes to § 1352.

1335. When liens. 853; 21 G. A., ch. 133. All taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the thirty-first day of December in each year. [9 G. A., ch. 110.]

Taxes are not, prior to the date specified, a lien against which the covenants of grantor's deed operate. Therefore, where a contract of sale was made prior to that date and a deed executed subsequently and in pursuance thereof, *held*, that such taxes were not covered by the covenants of the deed: *Sackett v. Osborn*, 26–146.

This provision does not necessarily relieve the vendor from personal liability for taxes upon property which is sold by him before the date specified. When a portion of the property on which the tax is levied remains undisposed of, the collector having no authority to apportion it, the vendor remains liable for all: *Shaw v. Orr*, 30–355.

Where land is conveyed after the date specified the grantor is liable under the covenants of his deed for the taxes assessed for that year, but is not liable to the purchaser of his grantee for personal taxes of the latter, for which, together with the realty tax due thereon, the land has been sold at tax sale and from which the last purchaser has redeemed: *Baldwin v. Mayne*, 42–131.

CHAPTER 2.

OF THE COLLECTION OF TAXES.

1336. What receivable. 854. Auditor's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be received at the treasury of the proper county for the ordinary county tax, but money only shall be received for the school tax. Highway taxes may be discharged and highway certificates of work done received as provided by law. [R., § 754; C., '51, § 489.]

1337. Legal tender; national bank notes. 855. The county treasurers are authorized and required to receive in payment of all taxes by them collected, together with the interest and principal of the school fund, treasury notes issued as legal tender by the government of the United States, and the notes issued by the banks organized under, and in accordance with, the conditions of the act of the congress of the United States entitled, "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the redemption thereof," approved February 25, 1863. [9 G. A., ch. 17, § 1; 10 G. A., ch. 43, § 1.]

1338. By treasurer of state. 856. The treasurer of state is hereby required to receive of the several county treasurers the above mentioned notes, in payment of any claims the state may have against any county for any part of the permanent school fund, or for any taxes due the state; and the said state treasurer shall pay out said notes in redemption of outstanding auditor's warrants. [9 G. A., ch. 17, § 5; 10 G. A., ch. 43, § 4.]

DISTRESS AND SALE.

1339. Payment by instalments; personal property liable. 857; 20 G. A., ch. 194, § 1. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, unless otherwise provided, at some time between the first Monday in January and the first day of March following, and pay his taxes in full; or, he may pay the one-half thereof before the first day of March succeeding the levy and the remaining half thereof before the first day of September following; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April succeeding the levy thereof, the whole amount of taxes charged against such entry shall become delinquent from the first day of March following such levy; and in case the second instalment of any taxes be not paid before the first day of October succeeding its maturity, penalty shall be computed on such instalment from the first day of September designating the maturity of such instalment; *provided also*, that in all cases where taxes are paid by instalment as herein provided, each of such payments, except road taxes, shall be apportioned among the several funds for which taxes have been assessed, in their proper proportions. And if any one neglect to pay his taxes at or before maturity, as herein provided, the treasurer may make the same by distress and sale of his personal property not exempt from taxation, and the tax list alone shall be sufficient warrant therefor. [R., § 756; C., '51, § 492.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884.]

The tax a debt: A tax lawfully levied becomes a debt which may be recovered by action at law, even though its collection is otherwise provided for, unless the special remedies provided by statute are made exclusive: *Dubuque v. Illinois Cent. R. Co.*, 39–56.

Equitable remedy: Where the statutory remedy for collection of taxes is plain, adequate and speedy, a court of equity will not

interfere to enforce their collection: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

Working out: The fact that a railroad has not been notified to work out the part of the road tax which might be paid in work will not authorize the restraining of the collection of the entire tax. Perhaps, upon a proper offer to work out the proportion which may be paid in work, the collection of that part might be enjoined: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Personal taxes: A tax upon personal property becomes a lien against the owner thereof from the time of his assessment at the place of his residence, and a subsequent removal before the payment of the tax will not relieve him from liability: *Toothaker v. Moore*, 9–468.

Payment by stranger: While a mere stranger has not the right to pay taxes, yet if payment be made by such an one, and received by the treasurer, the property cannot be afterward sold for such tax: *Iowa R. Land Co. v. Guthrie*, 53–383.

Payment by mortgagor: It is the duty of the mortgagor of real property to pay the taxes thereon: *Porter v. Lafferty*, 33–254; *Dayton v. Rice*, 47–429.

The mortgagor is the party primarily liable to pay the taxes on the mortgaged property, even after foreclosure sale, during the period of redemption, and any tax title acquired by the mortgagor during that time will be held as having been acquired by him in trust for the purchaser at the foreclosure sale, and he cannot set up such title in opposition to the title of such purchaser: *Dayton v. Rice*, 47–429.

Lienholder: A mortgagee is entitled to pay taxes on the mortgaged property, and upon redemption being made from him by the holder of the junior lien, is entitled to have such taxes reimbursed: *Strong v. Burdick*, 52–630.

A junior incumbrancer paying taxes due upon the premises acquires a first lien for the amount thereof: *Evans v. Burns*, 67–179.

Assignee for benefit of creditors: Where taxes were levied on property after an assignment for the benefit of creditors, *held*, that as by § 3308 the assignee was authorized to pay such taxes as a preferred claim, he should be required to pay to the mortgagee of lands upon which such taxes became a lien, and who had been required to redeem the land from sale for such taxes, the amount levied upon personal property covered by the assignment with six per cent. interest: *Brooks v. Eighmey*, 53–276.

No claim for taxes is required to be filed before the assignee, nor need any demand be made. The assignee must, at his peril, ascertain whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Albert*, 60–421.

Vendee: Where a purchaser of real estate under contract for a deed takes possession thereof, he is liable for the taxes thereon, and on subsequently taking the deed cannot require the vendor to covenant against such taxes: *Miller v. Corey*, 15–166.

While, as between vendor and vendee in possession under contract of sale, it is the duty of the latter to pay the taxes, yet the former may pay them to protect his title, and for any amount paid in removing tax incumbrances with six per cent. interest thereon, he is entitled to a lien upon the land after decree for a conveyance in performance of the contract: *Lillie v. Case*, 54–177.

The vendor is not necessarily relieved from personal liability for taxes upon property sold by him before November 1, which is the time when taxes become a lien upon real property, under § 1335. If a portion of the property on which a tax is levied remains undisposed of, the collector having no authority to apportion the tax, the vendor remains liable for all: *Shaw v. Orr*, 30–355.

The vendee being deemed in equity to be the owner and entitled to possession must pay his proportion of the taxes accruing upon the land from the date his right to possession arose: *Sherman v. Savery*, 2 McCrary, 107.

Where the title was wrongfully conveyed by the vendor to another, although he was held by a court of equity to be the trustee for the vendee proper, yet the payment of taxes by him was held not to be voluntary, and he was allowed to recover for taxes paid while the relation existed: *Ibid.*

Purchase subject to: The purchaser of land upon which taxes are due and unpaid takes subject to the lien of such taxes, but does not become personally liable therefor: *Ritchie v. McDuffie*, 62–46.

Under a lease providing that the tenant should pay all the taxes assessed against the property during the continuance of the lease, *held*, that he was liable for special assessments for local improvements, such as paving and curbing of adjacent streets: *Cassady v. Hammer*, 62–359.

A purchaser of land on which taxes are due does not become personally liable therefor: *Ritchie v. McDuffie*, 62–46.

The tax list is sufficient warrant, even when the tax is a special one, to protect the treasurer in his proceedings thereunder from liability for any irregular or illegal proceedings of the officers connected with the levy of tax, provided such levy is authorized: *Games v. Robb*, 8–193.

Where a tax has been legally ordered by officers *de jure* certainly, if not *de facto*, against a person liable to be taxed, and the officer has been duly chosen and qualified to collect such tax, he will, in the absence of fraud on his part, be protected, and is not answerable for any irregularity in the proceedings: *Hershey v. Fry*, 1–593.

This section does not make taxes upon personal property a lien thereon: *Jaffray v. Anderson*, 66–718.

1340. Notice of sale. 858. When the treasurer distrains goods, and the owner shall refuse to give a good and sufficient bond for the delivery of said goods on the day of sale, he may keep them at the expense of the owner, and shall give notice of the time and place of their sale within five days after the

taking, in the manner constables are required to give notice of the sale of personal property under execution; and the time of sale shall not be more than twenty days from the day of taking, but he may adjourn the sale from time to time, not exceeding five days in all, and shall adjourn at least once when there are no bidders, and in case of adjournment he shall put up a notice thereof at the place of sale. Any surplus remaining above the taxes, charges of keeping, and fees for sale, shall be returned to the owner, and the treasurer shall, on demand, render an account in writing of the sale and charges. [R., § 757; C., '51, § 493.]

1341. Collection by deputies. 859. Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent tax payers, in the manner prescribed in the preceding section, and for this purpose he shall, within sixty days after the taxes become delinquent, appoint one or more deputies to aid and assist him in collecting the delinquent taxes in his county. Each deputy so appointed, shall receive as a compensation for his services, and expenses, the sum of five per cent. on the amount of all delinquent taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and in the discharge of his duties as such assistant collector, should it become necessary to make the delinquent taxes by distress and sale, he shall be entitled to receive the same compensation, in addition to the five per cent. provided for in this section, as constables are entitled to receive for the sale of property on execution. But this section shall not apply, so far as it authorizes the appointment of deputies, to any county in which township collectors of taxes are elected, and the owners or agents of land that has been sold for delinquent taxes shall have the same privilege and extension of time for paying taxes as other tax payers whose land has not been so sold. [9 G. A., ch. 173, § 17; 12 G. A., ch. 137, § 6.]

The fact that lands have been advertised for sale for taxes does not prevent a sale of personal property to pay the same. If the lands, however, had been actually sold to pay the taxes, personal property could not be subjected to their payment: *Emerick v. Sloan*, 18-139.

A failure of the treasurer to collect the taxes by distress and sale of personal property, when he might do so, will not invalidate a subsequent sale of real property for such taxes: *Stewart v. Corbin*, 25-144.

The receipt of a deputy collector should have the same force and effect as that of the treasurer: *Jones v. Welsing*, 52-220.

A person appointed to collect taxes cannot recover from a private person additional fees for services performed under an alleged contract to pay such additional compensation in consideration of his remaining in office and performing the duties thereof: *Fawcett v. Eberly*, 58-544.

1342. Resistance. 860. If the treasurer, or his deputy, be resisted or impeded in the execution of his office, he may require any suitable person to assist him therein, and if such person refuse the aid, he shall forfeit a sum not exceeding ten dollars to be recovered by civil action in the name of the county, and the person resisting shall be liable as in the case of resisting the sheriff in the execution of civil process. [R., § 758; C., '51, § 494.]

1343. Taxes certified to other county. 861. In all cases of delinquent taxes, in any county where the person upon whose property the same were levied, shall have removed into another county of the state, leaving no property within the county where the taxes were levied, out of which the same can be made, the treasurer of the county where said taxes are delinquent, shall make out a certified abstract of said taxes as they appear upon the tax book, and forward the same to the treasurer of the county in which the person resides, or has property, who is owing said taxes, whenever the treasurer transmitting said abstract has reason to believe that said taxes can be collected thereby. [12 G. A., ch. 190, § 1.]

1344. Effect of. 862. The treasurer forwarding, and the one receiving, said abstract, shall each keep a record thereof, and upon the receipt and filing

of said abstract in the office of the treasurer to whom the same is sent, it shall have the full force and effect of a levy of taxes in that county, and the collection of the same shall be proceeded with in the same manner provided by law for the collection of other taxes. [Same, § 2.]

1345. Penalty. 863. The officer collecting taxes so certified into another county, shall, in addition to the penalties provided by law on delinquent taxes, assess and collect the further penalty of twenty per cent. on the whole amount of such taxes, inclusive of the penalties thereon. [Same, § 3.]

1346. Return. 864. The officer receiving said abstract, shall, whenever in his opinion the taxes are uncollectible, return the abstract with the indorsement thereon of "uncollectible," and in case said taxes are collected, the officer receiving the same shall transmit the amount to the treasurer of the county where said taxes were levied, less the penalty provided by section eight hundred and sixty-three of this chapter [§ 1345]. [Same, § 4.]

DELINQUENT — LIEN — PENALTY.

1347. When delinquent; liens. 865; 20 G. A., ch. 194, § 1. All taxes due and unpaid on the first day of March or the first day of September, shall become delinquent and draw interest as hereinafter provided; and taxes upon real property are hereby made a perpetual lien thereon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title; and the treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person to whom the taxes are assessed. [R., § 759; C., '51, § 495; Ex. S., 8 G. A., § 6.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884. As to priority of tax in case of assignment for benefit of creditors, see § 3308.]

A personal tax is not a mere personal claim against the person taxed, but is a charge upon his real property: *Garrettson v. Schofield*, 44–35; *Cummings v. Easton*, 46–183; *Paulson v. Rule*, 49–576.

Personal property taxes become a lien on land acquired subsequently to the assessment: *Cummings v. Easton*, 46–183.

Such taxes do not become a lien upon real property of the tax payer until such taxes are due, and they cannot be deemed due before a levy thereof is made: *Castle v. Anderson*, 69–428.

It is a general rule appertaining to the law of taxation that taxes are not a lien upon property of the tax payer, unless a lien is expressly created or provided for by statute; and as no lien upon personal property is provided for, taxes are not a lien thereon: *Jaffray v. Anderson*, 66–718.

Taxes are not a lien upon personalty until distraint therefor is made after the mode pointed out by statute; hence a person purchasing personal property before distraint has been made for taxes is protected against a subsequent distraint for taxes assessed against his vendor, and a mortgagee of personal property who takes possession under his mortgage and sells the property, either directly or through a decree or order of the court, before any distraint is made, is entitled to the proceeds so far as they may be necessary to pay his claim, as against the taxes assessed against the mortgagor: *Maish v. Bird*, 22 Fed. Rep., 180.

Taxes are not a lien upon personal property and therefore do not have priority over other claims against such property when in the hands of a receiver. The special statutory provisions with reference to assignments for the benefit of creditors (§ 3308) are not applicable in such case: *Howard County v. Strother*, 71–683.

Payment by person not the owner: Taxes paid by one claiming title adversely to the real owner without his consent cannot be recovered back from the owner after the adverse title is declared void. The mere fact that the real owner knew that the adverse claimant was paying the taxes under claim of title is not sufficient ground for inferring a promise to repay: *Garrigan v. Knight*, 47–525; *Read v. Howe*, 49–65.

A party who pays tax upon land without any right to do so, and having no claim whatever to the property, cannot recover the taxes paid from the rightful owner who has purchased the land since the payment of such taxes. No request to pay can be presumed in such a case: *La Rue v. King*, 74–288.

A party who pays taxes upon the land of another, whose title is of record, cannot claim that the owner is thereby estopped from asserting his title: *Merrill v. Tobin*, 30 Fed. Rep., 738.

Payment under supposed title: Where title to land was for a long time in litigation between parties claiming title under conflicting grants, and one of them paid the taxes, and it was finally decided that the title was in the other, *held*, that the one who paid the taxes might recover the amount so paid from the one adjudged owner of the land: *Goodnow v. Moulton*, 51–555; *Goodnow v. Plumbe*, 52–711; *Goodnow v. Wells*, 54–326; *Goodnow v. Stryker*, 61–261; *Goodnow v. Stryker*, 62–221; *Goodnow v. Wells*, 76–774.

Under such circumstances, *held*, that the payment of taxes voluntarily made by the person claiming title to the property, with full knowledge of the adverse claimant of the title, and made under belief on the part of the person making such payment, arising from a mistake of law, that he had such title, might be recovered back from the adverse claimant upon the title being determined to be in the latter: *Goodnow v. Litchfield*, 63–275; *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63–285; *Goodnow v. Chapman*, 64–602; *Goodnow v. Wolcott*, 65–201; *Goodnow v. Oakley*, 68–25.

Although where one of two parties holding the title to property has paid the taxes, and the other afterwards establishes his title to the property, the one who has made payment cannot claim the right to recover from the other on account of such payment, yet, if the successful party accepts the benefit of such payment, an action to recover the payments may be maintained against him by the party making them: *Goodnow v. Stryker*, 61–261.

Where a company to whom lands were certified under a railroad grant paid the taxes thereon, and subsequently the title was found to be in another under a swamp land grant, *held*, that the taxes paid by the former company under the belief that it had a legal title and in ignorance of the swampy character of the land, which fact alone defeated its title, could be recovered from the party holding the swamp land grant, who had made no offer to pay such taxes: *American Emigrant Co. v. Iowa R. Land Co.*, 52–323.

One who, while making an honest claim to be the owner of real estate, pays taxes thereon, it afterward being determined that the title is in another, is entitled to be reimbursed for such expenditure: *Fogg v. Holcomb*, 64–621; *Leather v. Ross*, 74–630.

In such case, the payments being made for the protection of the property and redounding to the benefit of the real owner, he ought and will be required to reimburse the person who made them for the amount paid: *Bradley v. Cole*, 67–650.

So *held* where the title to property was claimed under an execution sale and sheriff's deed which were afterwards held defective: *Ibid.*

Where the purchaser of property at execution sale makes redemption from a previous tax sale of the property he cannot recover from the former owner the amount paid: *Barr v. Patrick*, 59–134.

Where there are two claimants to property and each pays the taxes thereon, the one who is adjudged not to be the owner cannot recover from the other the amount of taxes thus paid. A request by him to the other to make payment, which is the basis of recovery in such case, cannot be inferred under the circumstances: *Montgomery County v. Severson*, 68–451.

Where recovery is had by one claimant of property who has paid the taxes, against another who has been adjudged to be the legal owner, interest on the amount paid by the unsuccessful claimant at the legal rate may be recovered, commencing at the date of payment: *Goodnow v. Litchfield*, 63–275; *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63–285; *Goodnow v. Stryker*, 63–569; *Goodnow v. Plumbe*, 64–672; *Goodnow v. Wells*, 67–654; *Goodnow v. Oakley*, 68–25; *Leather v. Ross*, 74–630.

The amount which a party making payment of taxes is entitled to recover should be made a lien upon all the land collectively for the gross amount of the payments made: *Goodnow v. Litchfield*, 63–275; *Goodnow v. Stryker*, 63–569; *Goodnow v. Plumbe*, 64–672; *Goodnow v. Oakley*, 68–25; *Leather v. Ross*, 74–630.

The grantee of a person who is entitled to recover taxes thus paid is not, in the absence of express assignment of the right thereof, entitled to recover them from the person who has been adjudged the rightful owner of the property: *Seymour v. Shea*, 62–708.

A recovery of taxes thus paid cannot be had as against one who was not the owner of the premises at the time the payments were made, but has subsequently become such owner: *Fogg v. Holcomb*, 64–621.

But the grantee of a person who has been adjudged to have been the real owner at the time the taxes were paid, and acquiring his title by quitclaim, stands in the shoes of his grantor, and the lands in his hands are subject to the claim or lien of the party thus paying the taxes; but such grantee is not to be held personally liable for taxes paid before the purchase of the property by him: *Bradley v. Cole*, 67–650.

The relief which may be had by a party paying taxes by reason of a mistake respecting the title as against the person benefited is not valid as against a third person purchasing the land without notice that there is any claim thereon for taxes so paid, and the taxes so paid will not be a lien as against such purchaser. *Bowen v. Duffie*, 66–88.

The statute of limitations as against an action by a party who has paid taxes on land on a claim of ownership, but has been held not to be the owner, to recover such taxes from the party adjudged to be the owner, commences to run from the time the title to the property as between the claimants is judicially determined: *Goodnow v. Stryker*, 62–221; *Goodnow v. Litchfield*, 63–275; *Bradley v. Cole*, 67–650; *Goodnow v. Oakley*, 68–25.

A party cannot recover from the owner of the title taxes which he has paid on land more than five years prior to the time of bringing action to recover the same: *La Rue v. King*, 74–288.

As to the claim made in some of these cases, that there had been a previous adjudication of the right to recover the taxes, see *Goodnow v. Wells*, 67–654.

1348. Penalty. 866; 20 G. A., ch. 194, § 1. The treasurer shall continue to receive taxes after they become delinquent until collected by distress and sale; and if the one-half of the taxes charged against any entry on the tax book in the hands of a county treasurer be not paid before the first day of April after the same has been charged; or if the remaining half of such taxes has not been paid before the first day of October after its maturity, he shall collect, in addition to the tax of each tax payer so delinquent, as penalty for non-payment, interest on such delinquent taxes, at the rate of one per cent. per month thereafter until paid; *provided*, that in all cases where the half of any taxes has not been paid before the first day of April after the same has been charged on the tax books, penalty as above shall be collected on the whole amount of taxes charged against such entry from the first of March succeeding the levy; and *provided also*, that the penalty prescribed by this section shall not apply upon taxes levied by any court to pay judgment on city or county indebtedness, but upon such taxes no other penalty than the interest, which such judgment draws, shall be collected; and *provided further*, nothing in this chapter shall be construed to alter the present rules governing the collection of road taxes, save that all such tax collected by the county treasurer shall be included in the first instalment, and *provided further*, that the penalties provided by this section shall not apply to or be collected upon any taxes levied in aid of the construction of any railroad in this state. [R., § 760; C., '51, § 497; 9 G. A., ch. 173, § 18; 13 G. A., ch. 90.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884.]

Interest and penalties on taxes should be computed only from the time such taxes are placed on the tax list, and not from the time when they should have been listed and were not: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

Where taxes, void when levied, are subsequently made valid by a curative act, penalties for non-payment attach for the period prior to the time that the act takes effect: *Iowa R. Land Co. v. Sac County*, 39–124; *Iowa R. Land Co. v. Carroll County*, 39–151.

If a valid tender is made of the amount due for any specified tax, such tender stops interest on that tax without reference to whether it is good as to other taxes or not: *Iowa R. Land Co. v. Carroll County*, 39–151.

Failure of the county to sell land for taxes when it may do so will not defeat its right to recover penalties thereafter accruing on the same taxes: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153.

The fact that the title to land is doubtful or in dispute will not be a ground for relieving a person asserting a right thereto from penalties for non-payment of taxes: *Litchfield v. Hamilton County*, 40–66.

Where the title of the owner to one portion of his estate is disputed by the state, and to the other by the United States, and the state in view of these facts assures him that no legal steps will be taken to enforce payment of taxes until his title is adjusted, he will not be compelled to pay more than the statutory interest allowed for the non-payment of ordinary debts, and not the penalty for the non-payment of taxes: *Litchfield v. Webster County*, 101 U. S., 773.

Where the state refuses payment for a series of years unless payment of taxes be made for the time between the entry and the quieting of the title by act of congress, penalties are not recoverable: *Ibid.*

Where a new revenue law was passed retrospective in its operations, *held*, that the method of collecting penalties already accrued should be in accordance with the previous law, and that penalties accruing under the new law on taxes previously levied should be enforced in accordance with such new law: *Bartruff v. Remey*, 15–257.

The repeal of a statute under which delinquent taxes have accrued, and the enactment of a new statute providing for the collection of taxes with interest, will not operate to remit the interest accrued, although the new law contains no express saving clause: *State ex rel. v. Stewart*, 11–251.

The right of a county to the penalty accrued on delinquent taxes is not impaired by the repeal of the statute providing for such penalties: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153; *Tobin v. Hartshorn*, 69–648.

But such repeal terminates the right to additional penalties: *Tobin v. Hartshorn*, 69–648.

So held in regard to the amendment of this section by 20 G. A., ch. 194: *Ibid.*; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed. Rep., 541 (overruling *Snell v. Campbell*, 24 Fed. Rep., 880).

The last clause of the section *held* unconstitutional as applied to contracts executed before that provision took effect: *Lansing v. County Treasurer*, 1 Dillon, 522, 528.

1349. Receipt. 867. The treasurer shall, in all cases, make out and deliver to the tax payer a receipt, stating the time of payment, the description and

assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each, and cost, if any, giving a separate receipt for each year; and he shall make the proper entries of such payments on the books of his office. Such receipt shall be in full of the party's taxes for that year, but the treasurer shall receive the full amount of any county, state or school tax whenever the same is tendered, and give a separate receipt therefor. [R., § 760; 12 G. A., ch. 140.]

[The word "cost," in the fourth line, is erroneously printed "costs" in the Code.]

The receipt of a deputy collector should have the same force and effect as that of the treasurer: *Jones v. Welsing*, 52-220.

Payment of taxes may be proved by parol. So *held*, even under a statute requiring the tax payer to take a duplicate receipt and file it with the county judge and obtain his indorsement upon the original, and providing that no receipt without such indorsement should be receivable in evidence: *Adams v. Beale*, 19-61.

Entry of payment by a county treasurer in his books does not operate to discharge the taxes, and only those misled by such entry, or who act upon the faith thereof, can in equity claim to be prejudiced by such entry, when the taxes are not in fact paid: *Amber v. Clayton*, 23-173.

Where a party in ignorance of a tax sale pays the taxes for which the sale was made and receives the treasurer's receipt therefor, such payment does not defeat the sale: *Jones v. Welsing*, 52-220.

A tax payer has the right to direct the application of any sums paid by him to the payment of such taxes as he sees fit: *Iowa R. Land Co. v. Carroll County*, 39-151.

The stub of a tax receipt is evidence showing payment of the tax such as to defeat a subsequent sale of the property: *Harrison v. Sauerwein*, 70-291.

In a particular case, *held*, that the evidence did not sufficiently show previous payment of taxes to render the sale void: *Slocum v. Slocum*, 70-259.

1350. Apportionment. 868. The treasurer of each county shall, on or before the tenth day of each month, apportion the consolidated tax of each civil township or independent school district in his county, collected during the preceding month, among the several funds to which it belongs, according to the number of mills levied for each fund contained in said consolidated tax, and having entered the amount of tax for each fund, including other taxes collected during the preceding month, upon his cash account, he shall report the amount of each distinct tax to the county auditor, who shall charge him up with the same. [13 G. A., ch. 138, § 3.]

1351. Separate funds. 869. The county auditor shall keep full and complete accounts with the county treasurer, with each separate fund or tax by itself, in each of which accounts he shall charge him with the amounts in his hands at opening of such account, whether it be delinquent taxes, notes, cash, or other assets belonging to such fund, the amount of each tax for each year when the tax book is received by him, and all additions to each tax or fund, whether by additional assessments, interest on delinquent taxes, amount received for peddlers' licenses or other items, and shall credit the treasurer on proper vouchers, for money disbursed, for double and erroneous assessments, including all improper and illegal assessments, the correction or remission of which causes a diminution of the tax, and for unavailable taxes, or such as have been properly and legally assessed, but which there is no prospect of collecting. [R., § 761; 9 G. A., ch. 173, § 7.]

1352. Refunding erroneous tax. 870. The board of supervisors shall direct the treasurer to refund to the tax payer any tax, or any portion of a tax, found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon, and in case any real property subject to taxation shall be sold for the payment of such erroneous tax, interest or costs as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale, or the right or title conveyed by the treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, and the property had not been redeemed from sale. [R., § 762.]

This section authorizes the refunding of illegal or erroneous taxes, though voluntarily paid, and even after they have been divided up and distributed among the state, school, road and other funds, and where the supervisors refuse to refund the same the sum may be recovered from the county: *Lauman v. Des Moines County*, 29–310; *Richards v. Wapello County*, 48–507; *Isbell v. Crawford County*, 40–102; *Tallant v. Burlington*, 49–543.

Where a tax is illegal through the erroneous action of the board in raising an assessment, it may be recovered back: *Dickey v. Polk County*, 58–287.

Failure to pursue remedies to arrest the collection of such taxes will not waive or forfeit the right to recover them: *Ibid.*

Taxes not brought forward as required by § 1326, and which are therefore erroneously included in the amount for which property is sold, may be recovered back by the tax purchaser from the county: *Parker v. Cochran*, 64–757.

Where relief is sought from a tax levy which is in excess of the limit imposed upon taxation, relief will be granted as against the excess of the tax over the constitutional limit, and the tax will be sustained to the extent to which it is valid. After the tax has been paid, such sums as are in excess of the limit, may be recovered back: *McPherson v. Foster*, 43–48.

Where property was sold for an amount of tax, part of which was not a lien thereon, *held*, that the owner might recover from the county the amount of such tax, with costs, interest and penalties, which he was compelled to pay in order to redeem: *Brownlee v. Marion County*, 53–487.

The statutory provision last above referred to does not apply when the tax payer has voluntarily redeemed from a sale absolutely void by reason of the taxes having been previously paid, and the money so paid in redemption cannot be recovered: *Morris v. Sioux County*, 42–416; *Sears v. Marshall County*, 59–603.

Where payment of taxes is voluntarily made with knowledge of all the facts, under the belief that by law the property belongs to the person paying the taxes, such person cannot afterward recover back the money so paid upon the title being adjudged to be in another. Such taxes cannot be deemed erroneous or illegal: *Dubuque & S. C. R. Co. v. Board of Supervisors*, 40–16.

Where a tax is not merely informal and irregular, but is illegal and void as being levied upon property not liable to taxation, and the owner of the property makes payment under protest, the rule is that he may recover it back, although there is no distraint or seizure of his property: *Winzer v. Burlington*, 68–279; *Thomas v. Burlington*, 69–140.

The holder of a tax title, which is adjudicated to be void, cannot recover from the county taxes paid by him upon the property subsequently to the acquisition of his tax title: *Scott v. Chickasaw County*, 53–47.

Where the purchaser of property at a tax sale paid taxes thereon for a subsequent year, but the sale was afterwards declared void for the reason that the property was not subject to taxation for the year for the taxes for which it was sold, *held*, that the subsequent tax was not erroneously or illegally exacted or paid in such sense that the county was under obligation to refund it: *Iowa R. Land Co. v. Guthrie*, 53–383.

The statutory provision for the recovery of illegal taxes paid is not applicable to a case of erroneous assessment made in the exercise of lawful authority. The only relief in such cases is by application to the board of equalization: *Harris v. Fremont County*, 63–639.

Where a tax payer had indebtedness which he might in a proper manner have offset against property for which he was taxed, but took no steps to have such deduction allowed, either by the assessor or by the board of equalization, and, about two years after the payment of the taxes under the assessment, applied to have refunded to him the amount thus paid in excess of what would have been his proper assessment *held*, that such application was too late, and that as there was no error or illegality in the assessment, the recovery of the amount could not be had: *Leonard v. Madison County*, 64–418.

Where an illegal tax has been collected for the benefit of the county and has been expended, it would be proper to refund it from other funds belonging to the county. So where an illegal tax has been collected for the state or for a school or road district, and has been paid over, it would be proper to refund it, if necessary to do so, from other funds belonging to the state or the school or road district which has thus received and enjoyed the benefit of the illegal tax: *District Tp v. District Tp*, 56–85.

Where it became necessary to refund a tax which had been paid over to a school district, and it appeared that the original school district was no longer in existence, the territory having been divided into three districts, *held*, that the treasurer should have apportioned the tax among the districts formed out of the original territory and repaid the tax *pro rata* from the funds coming to each, and that having repaid it entirely from the funds of one of the districts, that district was entitled to maintain an action for contribution against the others: *Ibid.*

The money which is to be returned to the tax payer should be taken from the particular fund or funds into which it went when the tax was collected: *Iowa R. Land Co. v. Woodbury County*, 64–212.

No judgment can be rendered against a county on account of taxes illegally or erroneously collected for any of the public organizations or corporations for whose benefit the county treasurer collects taxes, without proof that there remain in the treasury funds belonging to such organizations or corporations which might properly be applied to the extinguishment of such judgment: *Ibid.*

The board of supervisors has no authority to refund a road tax out of the county funds: *Stone v. Woodbury County*, 51–522.

Bridge taxes are to be collected and disbursed by the county and constitute a part of the county funds and should be refunded out of the county treasury: *Dickey v. Polk County*, 58–287.

Although a special tax cannot be refunded

out of other taxes, yet where it was shown that there remained a sufficient amount in the treasury to refund out of a particular fund the amount illegally paid going to such fund, *held*, that a recovery was proper: *Ibid.*

Under similar provisions in a city charter, *held*, that taxes illegally exacted might be recovered back, although they had been paid over to the contractor who had made the improvements for which the tax was levied: *Tallant v. Burlington*, 39-543.

A special tax in aid of a railroad which has been paid over by the treasurer to the company cannot be refunded: *Butler v. Board of Supervisors*, 46-326.

In such case the tax cannot be refunded out of the county treasury, nor can the county devote other taxes collected for such company, and still in the treasury, to the payment of that illegally collected: *Des Moines & M. R. Co. v. Lowry*, 51-186.

A special tax voted in aid of a railway company should, when paid, be kept as a distinct fund subject to the rights of the company and tax payer. In no event can the county acquire any beneficial interest therein, and the claim of the tax payer to have such taxes refunded to him is a claim against the treasurer who has received the tax, and not against the county: *Barnes v. Marshall County*, 56-20.

The supervisors being authorized to require the treasurer to refund taxes illegally collected, a suit against the county for the recovery of such taxes cannot be maintained, the proper proceeding being against the officers to compel the proper action by them: *Everly v. Jasper County*, 72-149.

The cause of action against the county for illegal or erroneous taxes paid accrues at the very moment of payment of taxes, if at that time the taxes are erroneous and illegal. The statute of limitations against such action commences to run then, and not from the time that the error or illegality is adjudicated: *Callanan v. Madison County*, 45-561; *Hamilton v. Dubuque*, 50-213; *Scott v. Chickasaw County*, 53-47.

A party cannot, by neglecting to demand the refunding of such tax, delay the running of the statute: *Beecher v. Clay County*, 52-140.

And the ignorance of plaintiff that the levy was illegal will not enable him to take advantage of the exception of the statute of limitations in case of fraud or mistake provided in § 3735: *Ibid.*

Where taxes have been paid but the land is sold by the treasurer for such taxes by mistake, the owner has five years from the discovery of the mistake in which to bring the action: *Storm Lake Bank v. Buena Vista County*, 66-128.

By the latter part of this section a sale for aggregate taxes, only a part of which are illegal and erroneous, is valid: *Eldridge v. Kuehl*, 27-160; *Parker v. Sexton*, 29-421; *Sully v. Kuehl*, 30-275; *Hurley v. Powell*, 31-64; *Rhodes v. Sexton*, 33-540; *Genther v. Fuller*, 36-604; *Madson v. Sexton*, 37-562.

A sale will be upheld if any portion of the tax for which the land is sold is valid: *Corning Town Co. v. Davis*, 44-622; *Parker v. Cochran*, 64-757.

As to recovery by person paying taxes on property, of which he is found not to be the owner, from the person who derives the benefit from such payment, see notes to § 1347.

TAX SALE.

1353. When and how made. 871; 20 G. A., ch. 194, § 2. On the first Monday in December in each year, the county treasurer is required to offer at public sale at his office, all lands, town lots, or other real property on which taxes of any description for the preceding year or years shall remain due and unpaid, and such sale shall be made for and in payment of the total amount of taxes, interests, and costs due and unpaid on such real property. [R., § 763; C., '51, § 496.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884.]

Whence power derived: The tax warrant provided for in the Revision was not essential to the power to sell, the power of the treasurer in that respect being derived from the statute directly: *Parker v. Sexton*, 29-421; *Johnson v. Chase*, 30-308; *Hurley v. Powell*, 31-64; *Rhodes v. Sexton*, 33-540; *Madson v. Sexton*, 37-562; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153.

The power to make a tax sale is not derived from the tax list but from the statute. Under previous statutes, *held*, that the tax warrant was a material step, and the legislature could not make a tax deed conclusive as to the existence of such warrant: *Corbin v. Hill*, 21-70.

Also, *held*, that the clerk could sign a tax warrant as acting county judge: *Ibid.*

Also, *held*, that it was not essential that it appear from the warrant when signed by the clerk in place of the county judge that the latter was absent or incapacitated from acting: *Ibid.*; *Sully v. Kuehl*, 30-275.

Under the act of 1847 sale for delinquent taxes could only take place in pursuance of a judgment in the district court against the land for taxes due and unpaid for the term of two years from the first of January next after the delinquent tax list had been filed in his office: *Bleidorn v. Abel*, 6-5.

Under the statutory provision of 1858 a sale for taxes delinquent less than two years was invalid: *Williams v. Gleason*, 5-284.

Further as to previous statutes on the same subject, see *Scott v. Babcock*, 3 G. Gr., 133.

Repeal of statute: Where a statute authorizing sale for taxes is repealed without any clause preserving the provisions at the time existing for the collection of taxes levied

and delinquent, and the new law contains no provision for selling land for taxes previously delinquent, a sale after such repeal for previous delinquent taxes will be invalid: *Bleidorn v. Abel*, 6–5.

A sale takes place under the law in force at the time it occurs, and the legislature may modify and change the provision as to sale for taxes already delinquent: *Sully v. Kuehl*, 30–275.

Taxes in fact paid: The delinquency of the owner to pay the taxes is an essential fact upon which the power of sale rests, and proof that the taxes were in fact paid may be made for the purpose of defeating the sale; but under statutes providing for the foreclosure of a tax title by action in court, *held*, that the owner was precluded by the decree from afterwards setting up and proving the fact of such payment: *Gaylord v. Scarff*, 6–179.

A tax deed made pursuant to a sale for taxes which had been paid prior to the sale conveys no title: *Walton v. Gray*, 29–440.

In such case the sale is void: *Morris v. Sioux County*, 42–416; *Patton v. Luther*, 47–256.

And this is so whether payment has been made by the owner or by one having no interest in the land; so where the taxes were paid by one holding under a tax sale subsequently declared void, and the tax thus paid for that year was refunded, *held*, that the property could not afterwards be sold for the taxes for that year: *Iowa R. Land Co. v. Guthrie*, 53–383.

In a particular case, *held*, that the evidence showed that the tax for which the sale was made had been paid and the deed was therefore held void: *Harber v. Sexton*, 66–211.

In such case, *held*, that the holder of the tax title should be repaid by the holder of the legal title for taxes paid by him as the holder of such tax title with six per cent. interest thereon from the time of payment, and that the right of recovery was not barred by the statutory limitation: *Ibid.*

Where a portion of the tax which should have been assessed upon certain real property was by mistake assessed as personal tax, and the part of the tax appearing as the part assessed against the property was paid, *held*, that a sale of such property for delinquent taxes due thereon was invalid: *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51–31.

The fact that the owner pays the taxes and takes receipt after sale of the property therefor does not invalidate the sale nor prevent a deed from issuing to the purchaser: *Jones v. Welsing*, 52–220.

That a deed in pursuance of such sale is void, see § 1382 and notes.

For taxes not brought forward: Failure of the treasurer to enter on the tax list the fact of previous taxes being delinquent and unpaid, as required by § 1326, will render the sale for such delinquent taxes invalid and void. Such a sale is without authority and void, and yet it may be true that it would by lapse of time ripen into a perfect title: *Gardner v. Early*, 69–42.

Failure to sell personal property: A failure of the treasurer to collect taxes by distress and sale of personal property, when he might do so, will not invalidate a subsequent sale of real property for such taxes: *Stewart v. Corbin*, 25–144.

The treasurer is not bound to seize and sell personal property for personal property tax, but he may sell real property therefor: *Garrettson v. Scofield*, 44–35.

Sale of personal property: The fact that lands have been advertised for sale for taxes does not prevent a sale of personal property to pay the same. If the lands, however, had been actually sold to pay the taxes, personal property could not be subjected to their payment: *Emerick v. Sloan*, 18–139.

Public sale: Where there is no offering for sale and no bidding, but the treasurer marked the land as sold, *held*, that there was no valid sale: *Besore v. Dosh*, 43–211.

A sale which is private instead of public is void, and is not such a one as is contemplated or required by the statute: *Chandler v. Keeler*, 46–596.

Where the treasurer on the date of the annual sale announced an adjournment from day to day, and posted notice of that fact, and several months afterward, without any intervening adjournment, and without further notice, sales were made to persons furnishing lists of land without publicly reading from the list or announcing the description, *held*, that the sale was not public and was void: *Butler v. Delano*, 42–350.

Where it appeared that lands were not bid off in separate parcels, nor publicly offered, but the sale was left open from day to day and not adjourned to any particular time, and there was no adjournment of the prior sale to the date at which the sale was claimed to have been made, which was not the legal date of sale, *held*, that the proof was sufficient to overcome the *prima facie* evidence of regularity presented by the deed, and that it sufficiently appeared that there was no sale and the deed was void: *Thompson v. Ware*, 43–455.

Where in such case it was shown that the agent of the purchaser applied at the treasurer's office and selected certain tracts of land which were marked and entered upon the books as having been sold to him and a certificate issued, *held*, that the sale was absolutely void, not being such a public sale as the statute requires: *Miller v. Corbin*, 46–150.

Where by arrangement between the treasurer and the land owner certificates were issued to the purchaser without any actual offering of the land or any payment of the taxes by the purchaser, *held*, that there was no sale: *Hogdon v. Green*, 56–733.

Where the sale was a public sale held in pursuance of law, and there was in fact a sale of the land in controversy without fraud, *held*, that an irregularity in the manner of sale and an error in the recital of the date on which it was made would not defeat the title acquired: *Phelps v. Meade*, 41–470.

Where there is something constituting a sale done at the proper time and place and in a public manner, the sale will not be deemed void, though irregular: *Slocum v. Slocum*, 70–259.

So *held*, where, at the proper time and place, the treasurer checked off to a party not

present, but who had previously authorized him to do so, tracts of land as sold to such person and afterward issued to him a certificate therefor: *Ibid.*

Therefore, *held*, that although the evidence tended to show that no sale had been advertised to be held on the first Monday in October, and that the sale in question was not an adjourned sale, but that it was advertised to take place at the time it did, it was not void: *Ibid.*

That fraud of the officers, or of the purchaser, will avoid the sale, see § 1382 and notes.

For what taxes: There must be but one sale for the total amount of taxes due and unpaid. A second sale for taxes which were due, and delinquent at the time of a previous sale, would be void. Such taxes cease to be a lien: *Preston v. Van Gorder*, 31-250; *Bowman v. Thompson*, 36-505.

By a sale the lien of taxes for previous years is extinguished: See notes to § 1382. And this is true as well in favor of the owner who redeems from such sale as the purchaser: *Hough v. Easley*, 47-330.

The same property cannot be twice sold at the same sale for the taxes of two different years: *Shoemaker v. Lacy*, 38-277; *S. C.*, 45-422.

The tax sale does not divest the owner of title, but it remains in him until the tax deed is executed: *Williams v. Heath*, 22-519; *Lake v. Gray*, 35-44.

Where taxes were levied by a county to which another county was annexed for taxing purposes, and afterwards the new county sold the land for the non-payment of such taxes, *held*, that the new county not having any right to collect the taxes, the sale was void, and the deed founded thereon conveyed no title: *Hilliard v. Griffin*, 72-331.

The fact that the land is not sold for all the delinquent taxes existing at the time of the sale is an irregularity merely which cannot defeat a sale after the execution and recording of the deed made in pursuance thereof: *Kessey v. Connell*, 68-430.

The provision of § 1361, for sale of land for a portion of the taxes due thereon, where, upon being offered for two years for the whole amount of the taxes due, it has remained unsold for want of bidders, does not imply that a sale in other cases for a portion of the tax delinquent at the time of the sale will be invalid: *Ibid.*

A subsequent sale for taxes subsequently becoming delinquent will not divest the rights of a previous purchaser unless a deed is issued in pursuance of such subsequent sale. If such sale is redeemed from, the rights of the prior tax purchaser remain unaffected: *Gray v. Coan*, 30-536.

Redemption from a subsequent tax sale will not defeat the lien of a prior sale: *Gray v. Coan*, 40-327.

Sale for taxes, a part of which are legal, is valid: See notes to § 1352.

Subsequent sale: The power to sell lands for delinquent taxes is not limited to the sale at which such lands are first subject to be sold for such taxes, but may be exercised at any subsequent sale: *Litchfield v. Hamilton County*, 40-66.

Where two tax sales are made of the same property for the same taxes, and the first is void on account of fraud committed at such sale, a second sale may be valid: *Mallory v. French*, 44 133.

A second sale for railroad taxes is legal: *Cowell v. Merrill*, 60-53.

A tax deed for property sold for state and county taxes does not convey to the purchaser a title free from the lien of unpaid city taxes, nor does the city tax deed, made in pursuance of a sale for city taxes of one year, divest the lien of the city for taxes for prior years: *Dennison v. Keokuk*, 45-266.

As to the tracts in which the sale shall be made, see § 1357 and notes.

1354. Notice. 872. The notice to be given of such sale shall state the time and place thereof, and contain a description of the several parcels of real property to be sold for the delinquent taxes of the preceding year, and such real property as has not been advertised for the taxes of previous years and on which the taxes remain due and delinquent, and the amount of taxes and amount of interest and costs against each tract, and the name of the owner, when known, or person, if any, to whom taxed. [R., § 764; C., '51, § 498; Ex. S., 8 G. A., ch. 24, § 5.]

Land should be advertised in the same tracts or parcels in which it is entered in the tax book and assessed: *Corbin v. De Wolf*, 25-124; *McClintock v. Sutherland*, 35-487; and should be sold and deeded by the same description as set out in the advertisement: *Martin v. Cole*, 38-141.

Town lots situated in the same block and lying contiguous may be assessed at a gross amount and advertised together: *McClintock v. Sutherland*, 35-487.

Under the provisions of a former statute requiring the treasurer in advertising lands taxed to unknown owners to embrace the largest quantity practicable in the description, *held*, that a sale in pursuance of advertising in that manner was valid: *Henderson v. Oliver*, 32-512.

The treasurer should so advertise as to incur as little expense as possible consistently with a due compliance with the law; therefore, *held*, that the whole or a part of a section of land in a contiguous body belonging to the same owner should be advertised as one tract and not in its smallest subdivisions: *Iowa R. Land Co. v. Sac County*, 29-124; *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153, 176.

This was formerly the provision also as to land assessed to unknown owners, but this provision was omitted in the Code, the Code commissioners saying that it "is entirely in-

consistent with the settled policy of our law in regard to such sales, under the decision of the supreme court 'that lands are to be advertised and sold under the descriptions and in the tracts or parcels in which they are entered in the tax book:'" See *Code Com'rs' Rep.*

Property is to be advertised but once, and the sale of such as is advertised may be made at a sale held any time thereafter pursuant to adjournments regularly made: *Hurley v. Street*, 29-429.

An omission to include certain lands in the advertisement, *held* not sufficient to defeat a deed made in pursuance of a sale thereof, the owner being bound to know that his taxes are delinquent: *Shawler v. Johnson*, 52-472.

The tax deed is conclusive as to fact of advertisement: See notes to § 1382.

1355. Publication. 873; 20 G. A., ch. 194, § 3. The county treasurer shall give such notice by causing the same to be published once in each week for three successive weeks, the last publication to be at least one week prior to the day of sale, in some newspaper printed in such county, if any such there be, or if not, then in the nearest newspaper in this state having a general circulation in such county; and also by causing a copy of such notice to be posted on the door of the county court-house at least four weeks before the day of sale. But no newspaper shall be selected unless it has two hundred regular weekly subscribers, and has been regularly printed and published for at least three months preceding the fifteenth of November of said year in the same county, and has at least twenty actual subscribers in the county wherein the delinquent property is situated, for at least three months preceding the fifteenth of November of that year. And in all cases where the treasurer may doubt the qualifications of any paper as above fixed, he shall require proof thereof by the affidavit of the publisher. [R., § 764; 10 G. A., ch. 115, § 2; 11 G. A., ch. 103; 14 G. A., ch. 11, § 2.]

[The word "had" is erroneously printed in the Code after "has" in the eleventh line of this section. By special provision the change made in this section by 20 G. A., ch. 194, took effect the second Monday in November, 1884.]

The publisher of a newspaper cannot by *mandamus* compel the publication of the advertisement of sales in his newspaper, though it be the only one in the county: *Welch v. Board of Supervisors*, 23-199.

1356. Costs. 874. The treasurer shall charge and collect, in addition to the taxes and interest, a sum not exceeding twenty cents on each tract of real property advertised for sale, which sum shall be paid into the county treasury, and the county shall pay the costs of publication, but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising, and if the treasurer cannot procure the publication of said notice for that sum, or, if for any other reason the treasurer is unable to procure the publication of said notice, he shall post up written notices of said sale in four of the most public places in his county four weeks before sale, and notice so given shall have the same force and effect as though the same had been published in a newspaper. In that case, he shall, before making such sale, file in the office of the auditor of his county, a copy of said notice with his certificate indorsed thereon, setting forth that said notice had been posted up in four of the most public places in his county four weeks before the sale, which said certificate shall be subscribed by him and sworn to before said auditor, and shall be presumptive evidence of the facts therein stated. [R., § 764; Ex. S., 8 G. A., ch. 24, § 4; 9 G. A., ch. 173, § 10; 10 G. A., ch. 115, § 2.]

1357. Time and place. 875. The county treasurer shall, at his office on the day of the sale, at the hour of ten o'clock in the forenoon, offer for sale, separately, each tract or parcel of real property advertised for sale, on which the taxes and costs shall not have been paid. [R., § 765; C., '51, § 499.]

The sale should be in the same tracts or parcels in which the land is assessed and advertised: *Martin v. Cole*, 30-141.

Where the owners of land are known its assessment in larger tracts than the smallest government subdivision is authorized, and a sale in the tract in which it is thus assessed will be valid: *Corbin v. De Wolf*, 25-124; *Stewart v. Corbin*, 25-144; *Eldridge v. Kuehl*, 27-160; *Bulkley v. Callanan*, 32-461; *Smith v. Easton*, 37-584.

Where the law authorizes the assessment of

land in larger subdivisions than forty-acre tracts it may be so sold: *Ware v. Thompson*, 29–65; *Johnson v. Chase*, 30–308.

Under a former statutory provision requiring the advertisement of land assessed to unknown owners to be made in the largest practicable quantities, *held*, that in such cases an entire section might be advertised, sold and deeded in one tract, the term parcel or tract being properly applicable to the whole section: *Martin v. Cole*, 38–141.

Where the use and nature of lots require them to be regarded as one parcel the law will so treat them, and the sale of such property as one lot will be held valid: *Weaver v. Grant*, 39–294.

Although a sale in gross of two separate tracts of land is *prima facie* void, and a deed made thereon showing such fact is also void upon its face, yet such sale and deed may be supported and shown to be valid by evidence that the two tracts were occupied and used as one parcel and for one purpose: *Greer v. Wheeler*, 41–85.

Where lands were sold *en masse*, *held*, that the objection that the sale was void on that account should not be considered upon appeal, where no objection was made in the petition attacking the tax title, and no relief was asked for upon that ground: *Wallace v. Berger*, 25–456.

As to deed of lands sold in gross, see notes to § 1382.

1358. Bid; purchaser; homestead. 876. The person who offers to pay the amount of taxes due on any parcel of land, or town lot, for the smallest portion of the same is to be considered the purchaser, and when such purchaser shall designate the portion of any tract of land or town lot for which he will pay the whole amount of taxes assessed against any such tract or lot, the portion thus designated shall, in all cases, be considered an undivided portion. In all cases where the homestead is listed separately as a homestead, it shall be liable only for the taxes thereon. [R., § 766; C., '51, § 501; 9 G. A., ch. 173, § 9.]

Purchase by county: A county cannot become the purchaser of lands at tax sale; *Bruck v. Broesigke*, 18–393.

Bid: Under this section the bid of a purchaser is to be for an undivided portion of the entire tract, if for less than the whole, and he acquires that undivided interest in the whole tract: *Brundige v. Maloney*, 52–218.

Therefore, *held*, that an offer to pay taxes on a forty-acre tract offered for sale for "fourteen acres" was so uncertain as to render void a deed executed in conformity with such bid, and a notice given in pursuance thereof: *Poindexter v. Doolittle*, 54–52.

An undivided interest cannot be sold for taxes on the whole property: *Cragin v. Henry*, 40–158.

The sale of an undivided interest in land on which the taxes remain unpaid, the taxes having been paid upon the other undivided interest, is competent and proper: *Peirce v. Weare*, 41–378.

Where it appears that the sale is not for the whole amount of the tax it will be presumed, in support of the deed, that the sale was made under the provisions of § 1361: *Griffin v. Tuttle*, 74–219

Description: Where the description of property to be sold was indefinite, *held*, that the owner of the land could not make objection, on that ground, to the sale of the premises for a valid tax: *Burlington & M. R. R. Co. v. Spearman*, 12–112.

Sale by a municipal corporation for taxes *held* invalid for the reason that the register of sales on the officer's certificate indicated that there was not a sufficient description of the property: *Vaughan v. Stone*, 55–213.

Sale of homestead: Under a law exempting the homestead from liability for any taxes except those due upon it exclusively, neither an officer making a tax sale nor the person purchasing thereat can extend the liability of the homestead by a sale and purchase of it in connection with other lands: *Penn v. Clemans*, 19–372.

Two or more lots jointly composing the homestead may be sold as one tract, and the sale will not be invalid as being in mass: *Weaver v. Grant*, 39–294.

Unless the homestead is listed separately all the taxes against the owner become liens thereon as upon any other real property: *Salter v. Burlington*, 43–531.

1359. Sale continued. 877. The treasurer shall continue the sale from day to day as long as there are bidders, or until the taxes are all paid. [R., § 767; C., '51, § 499.]

Whether it was illegal or even improper for the treasurer to regard all sales made under a continuance as of the date of the commencement of such sale, *quære: Phelps v. Meade*, 41–470; and the deed is conclusive that continuances were properly made, etc.: See notes to § 1382.

As to adjournments and sales on the first Mondays of subsequent months, see §§ 1368 and 1371.

1360. Resale. 878. The person purchasing any parcel or part thereof shall forthwith pay to the treasurer the amount of taxes and costs charged thereon, and on failure to do so, the said parcel shall at once again be offered as if no such sale had been made. Such payments may be made in the same fund receivable by law in payment of taxes. [R., § 768; C., '51, § 502.]

1361. Sale for portion of tax. 16 G. A., ch. 79, § 1; 20 G. A., ch. 194, § 6. It shall be the duty of the several county treasurers of this state, on the first Monday of December in each year, or [at] any adjourned sale thereafter, to offer and sell at public sale, to the highest bidder therefor, all lands and town lots which then remain liable to sale for delinquent taxes, and which have heretofore been advertised and offered at public sale and passed for want of bidders, for two or more years, by giving general notice of such sale for six weeks previous thereto in the official papers of each of their respective counties, which said notice shall refer to and embrace the general provisions of this act; and in case of redemption of any real estate sold under the provisions of this act, the purchaser shall only receive the amount paid and a pro rata proportion of the penalty, interest and costs.

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday of November, 1884.]

Under this section the owner in making redemption must pay the amount due on the real estate at the time of sale, and that amount must be regarded as the full amount of interest, taxes, penalties and costs as provided by the existing law: *Soper v. Espeset*, 63-326.

The deed being presumptive evidence that the sale was lawfully made it will be presumed that the sale was made under the provision of this act if it appears to have been for less than the whole amount of taxes due: *Griffin v. Tuttle*, 74-219.

1362. Apportionment on redemption. 16 G. A., ch. 79, § 2. In ascertaining the interest and penalties to be paid upon the redemption of such real estate from such sale, the sum due on any piece or parcel of real estate sold under and by virtue of the provisions of this act, shall be taken to be the full amount of taxes, interest and costs due on such parcel at the time of such sale; and all the provisions of the revenue laws of Iowa, not inconsistent with this act, shall apply to such sale, and to the redemption of any real estate sold by virtue of this act; and the amount so paid for any parcel of real estate shall be apportioned pro rata among the different funds to which it belongs.

1363. Unavailable tax. 16 G. A., ch. 79, § 3. The amount of taxes due on any real estate sold under the provisions of this act, in excess of the amount for which the same was sold, shall be credited, as unavailable tax, to the county treasurer, by the county auditor, apportioning the amount among the different funds to which the same belongs. The amount of such excess due to funds belonging to the state, shall be reported by the county auditor to the auditor of state as unavailable, who shall give the county credit for the same.

1364. Owner may pay before sale. 879. Any person owning or claiming lands, or town lots, advertised for sale as aforesaid, may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon with interest, cost of advertising, and all the costs which may have accrued up to the time of such payment. [R., § 769.]

1365. Advertisement. 880. In all advertisements for the sale of real property for taxes, and in entries required to be made by the county auditor, treasurer, or other officer, letters and figures may be used as they have been heretofore, to denote townships, ranges, sections, parts of sections, lots, blocks, date, and the amount of taxes, interest, and costs. And no irregularity or informality in the advertisement shall affect in any manner the legality of the sale, or the title to any real property conveyed by the treasurer's deed under this chapter, but, in all cases, the provisions of this chapter shall be sufficient notice to owners of the sale of their property. [R., § 770.]

1366. Certificate of publication. 881. The treasurer shall obtain a copy of said advertisement, together with a certificate of the due publication thereof, from the printer or publisher of the newspaper in which the same shall have been published, and shall file the same in the office of the county auditor, and such certificate shall be substantially in the following form:

I, A. B., publisher (or printer) of the ——, a —— newspaper printed and pub-

lished in the county of —— and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for three successive weeks, and the last of which publications was made on the —— day of ——, A. D. 18—, and that copies of each number of said paper in which said notice and list were published, were delivered by carrier or transmitted by mail to each of the subscribers to said paper, according to the accustomed mode of business in this office.

A—— B——,
Publisher (or printer) of the ——.

STATE OF IOWA, } ss.
—— County. }

The above certificate of publication was subscribed and sworn to before me by the above named A. B., who is personally known to me to be the identical person described therein, on the —— day of ——, A. D. 18—.

C—— D——,
County Auditor —— County, Iowa.

[R., § 771.]

A failure to comply with the provisions of this section does not invalidate the tax deed: *Hurley v. Powell*, 31–64.

1367. Record of sales. 882. The county auditor shall attend all sales of real property for taxes made by the treasurer, and make a record thereof in a book to be kept by him for that purpose, therein describing the several parcels of real property on which the taxes and costs were paid by the purchaser, as they are described in the list or advertisement on file in his office, stating in separate columns the amount as obtained from the treasurer's tax list, of each kind of tax, interest, and costs for each tract or lot, how much and what part of each tract or lot was sold, to whom sold, and date of sale. The treasurer shall also keep a book of sales in which, at the time of sale, he shall make the same records. He shall also note in the tax list, opposite the description of the property sold, the fact and date of such sale. [R., § 772.]

The record of sales is receivable in evidence: *McCready v. Sexton*, 29–356, 375; *Chandler v. Keeler*, 46–596.

A failure to make the record of the fact of sale as here required will not enable a subsequent purchaser at an execution sale to take title paramount to that of the tax purchaser, where the tax deed is recorded prior to the execution sale; but if such deed was not recorded, and the purchaser at execution sale had no notice, actual or otherwise, it would seem that he would be protected: *Negus v. Yancy*, 23–417.

1368. Sale adjourned. 883; 20 G. A., ch. 194, § 4. When all the parcels of real property advertised for sale shall have been offered, and a portion thereof shall remain unsold for want of bidders, the treasurer shall adjourn the sale to some day not exceeding two months from the time of adjournment, due notice of which day shall be given at the time of adjournment, and also by keeping a notice thereof posted in a conspicuous place in the treasurer's office; but no further advertisement shall be necessary. On the day fixed for the re-opening of the sale the same proceedings shall be had as provided hereby for the sale commencing on the first Monday of December. And further adjournments shall be made from time to time, not exceeding two months, and the sales shall be thus continued until the next regular annual sale, or until all the taxes shall have been paid. [R., § 773.]

[By special provision the changes made in this section by 20 G. A., ch. 194, took effect the second Monday of November, 1884.]

While it may not be essential to the validity of a sale made at an adjournment to show that a record of the adjournment has been made, still it is proper that such an entry should be made on the register of sales, and the fact that no such entry appears thereon is a circumstance tending to show that there was no such adjournment. It is proper, therefore, on such a question, to admit the register of sales in evidence: *Chandler v. Keeler*, 46–596.

A written memorandum of the adjournment of a sale kept by the treasurer is not a

record, and is incompetent to overthrow the presumption of regularity raised by the deed: *Clark v. Thompson*, 37–536.

An averment in an answer attacking the validity of a tax sale, that it was made on a day not authorized by law, precludes the supposition that it may have been made on a day authorized by reason of adjournment: *Plympton v. Sapp*, 55–195.

The tax deed is conclusive that continuances were properly made: See notes to § 1382.

As to sales on the first Monday of succeeding months, see § 1371 and notes.

1369. Penalty. 884. If any treasurer or auditor shall fail to attend any sale of lands as required by this chapter, either in person or by competent deputy, he shall be liable to a fine of not less than fifty nor more than three hundred dollars, to be recovered by an action in the district court against the treasurer or auditor, as the case may be, and his bondsmen. And if such officer or deputy shall sell, or assist in selling, any real property, knowing the same to be not subject to taxation, or that the taxes for which the same is sold have been paid, or shall knowingly and wilfully sell, or assist in selling, any real property for payment of taxes to defraud the owner of such real property, or shall knowingly and wilfully execute a deed for property so sold, he shall be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by any such wrongful act, and all such sales shall be void. [R., § 774; 9 G. A., ch. 17, § 11.]

1370. Fraud of officers. 885. If any county treasurer or auditor shall hereafter be, either directly or indirectly, concerned in the purchase of any real property sold for the payment of taxes, he shall be liable to a penalty of not more than one thousand dollars, to be recovered in an action in the district court, brought in the name of the county against such treasurer or auditor, as the case may be, and his bondsmen; and all such sales shall be void. [R., § 775.]

The act of the treasurer in bidding off land as the agent of another for compensation constitutes sufficient fraud to invalidate the deed: *Corbin v. Beebee*, 36–336.

And where a party sent a sum of money to the treasurer with instructions to bid off for him the amount sent, for which services he was to be paid a commission, and the sale was thus made, *held*, that the treasurer was "concerned in the purchase," and the sale was void: *Everett v. Beebee*, 37–452.

Where it appeared that land was marked on the record of the tax sale as sold to a party who was not present and did not bid, and did not have knowledge of nor consent to the sale, and the certificate of sale was issued in the name of that party, but retained by the deputy treasurer making the sale, and afterward an assignment of such party to him was procured, and it appeared that the name of the party was used to enable the officer to acquire title, *held*, that the sale was void for fraud: *Ellis v. Peck*, 45–112.

Where the deputy treasurer as guardian of a minor son caused property to be bought in at a tax sale, and paid the amount of the bid out of the funds of such minor, causing a certificate of purchase to be assigned to him, *held*, that he was so far concerned in the purchase as to render the sale void: *Kirk v. St. Thomas Church*, 70–287.

The act of an employee in the treasurer's office in bidding in land for another in which he afterwards acquired an interest, he being at the time of the bid not a deputy, but merely employed in clerical services, *held* not sufficient to render the sale invalid: *Lorain v. Smith*, 37–67.

In view of the lapse of time in a particular case and the expiration of the five-year limitation, *held*, that it was too late to question the right of the treasurer to buy in the certificate of a tax sale, and execute a deed to himself: *Guthrie v. Harker*, 27 Fed. Rep., 586.

Where the sale is void as provided in the last clause of this section, for fraud, the owner may set up and show such fraud to defeat the tax title in any action in which the holder thereof relies upon such title: *Corbin v. Beebee*, 36–336.

The word "void" is here used in the sense of voidable. A tax deed which might be void for fraud in the hands of the original purchaser will be good in the hands of a subsequent purchaser in good faith without notice of the fraud: *Ellis v. Peck*, 45–112.

And further as to fraud of officers or purchasers and the effect thereof, see § 1382 and notes.

1371. Subsequent sale. 886. If, from neglect of officers to make returns, or from any other good cause, real property cannot be duly advertised and offered for sale on the first Monday of October, the treasurer shall

make the sale on the first Monday of the next succeeding months in which it can be made, allowing time for the publication as provided in this chapter. [R., § 776.]

A deed reciting a sale as made on the first Monday of a subsequent month to that on which the regular sale is directed to be made by statute will not be deemed void as showing a sale at a time not authorized by law: *Eldridge v. Kuehl*, 27–160.

A tax sale held subsequently to the first Monday in October will not be void although there is no record of a sale being commenced on the date required by law, nor of an adjournment from that date to the actual date of sale: *Easton v. Savery*, 44–654.

Where it appears from the deed that the sale was made on the first Monday of some month subsequent to October, it will be presumed that a proper cause existed for holding the sale at such time. The reason therefor need not appear of record: *Ibid.*; *Sully v. Kuehl*, 30–275; *Love v. Welch*, 33–192.

If the non-existence of these conditions can in any event be shown to defeat the tax title, the burden of proof is upon the party who assails it: *Love v. Welch*, 33–192.

CERTIFICATE OF PURCHASE.

1372. How made; what contain. 887. The county treasurer shall make out, sign, and deliver to the purchaser of any real property sold for the payment of taxes as aforesaid, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in the records of sales, and also how much and what part of each tract or lot was sold, and stating the amount of each kind of tax, interest, and costs for each tract or lot for which the same was sold, as described in the records of sales, and that payment had been made therefor. If any person shall become the purchaser of more than one parcel of property, he may have the whole included in one certificate, but each parcel shall be separately described. [R., § 777; C., '51, § 503.]

The certificate does not pass the title to the purchaser, but it remains in the owner until the execution of a deed: *Williams v. Heath*, 22–519; *Lake v. Gray*, 35–44.

The purchaser of land at tax sale acquires no right or interest therein until he receives a deed. While the property is subject to redemption he has but a chattel interest, and such interest does not pass by an attempted conveyance of the property itself: *Rice v. Bates*, 68–393.

The certificate of purchase simply gives the purchaser a lien for the taxes, interest, costs and penalties, etc.: *Eldridge v. Kuehl*, 27–160: *Mallory v. French*, 38–131.

A certificate issued under a tax sale which omitted the name of the town or addition, but was correct in other particulars, *held* competent and sufficient to prove that said premises were redeemed, in an action of right based upon such redemption: *Rice v. Nelson*, 27–148.

The certificate is evidence of the facts recited therein, but in case it is found to be in conflict with the record of sales, the latter will prevail: *McCready v. Sexton*, 29–356, 374: *Henderson v. Oliver*, 32–512.

Where the holder of a certificate of purchase at tax sale brought action for waste in removing a building from the premises sold, and got judgment, which was made a lien upon the building and the premises to which it had been removed, *held*, that his lien upon the building thereby became junior to that of a mortgagee taking his mortgage subsequently to the sale but before judgment: *Phillips v. Myers*, 55–265.

The owner of the certificate may recover treble damages for waste or trespass: See §§4579, 4580.

1373. Assignment. 888. The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser; and the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence of such assignment. In case said certificate is assigned, then the assignment of said certificate shall be placed on record in the office of the county treasurer in the register tax sales. [R., § 778; 9 G. A., ch. 173, § 12.]

A certificate of purchase at tax sale possesses none of the peculiar characteristics of negotiable paper, and the transferee is not protected as the indorsee of such instruments: *Watson v. Phelps*, 40–482.

One who takes by assignment a certificate of purchase of property at a tax sale acquires no greater right than the purchaser at the sale, and as to all the infirmities thereof stands in the shoes of the purchaser: *Light v. West*, 42–138; *Besore v. Dosh*, 43–211.

An assignee by indorsement of the certifi-

cate without notice of a prior transfer thereof acquires a better title thereunder than one who had previously taken the assignment of such original certificate: *Griswold v. Wilson*, 36–156.

Where the purchaser at tax sale did not pay the amount bid, but such amount was subsequently paid by another, and an assignment of the certificate by the bidder was thereupon procured to be made to such third person, *held*, that the bidder had no interest in the sale, and the fact that prior to the assignment he had executed a deed for the property covered thereby under another title would not defeat the claim of the assignee of the certificate: *Lloyd v. Bunce*, 41–660.

Under the provision of the Revision of 1860, which did not require the recording of the assignment of a tax certificate, *held*, that the assignee from the tax purchaser after the assignment of such certificate to another was not protected: *Smith v. Stephenson*, 45–645.

Assignment of the certificate of purchase to a person who has purchased the property subsequently to the sale amounts to a redemption: *Bowman v. Eckstien*, 46–583.

The fact that a party who has no right to redeem procures an assignment of the certificate of purchase under the representation that he is entitled to and will redeem, but does not do so, will not entitle persons adversely claiming title to any relief: *Curtis v. Smith*, 42–665.

The statute does not make the record of the assignment constructive notice of the rights of the assignee. The owner of the property may effect redemption by contract with the holder of the certificate instead of in the mode pointed out by statute. But if he elects to take that course he must know at his peril that the person with whom he deals is the owner of the certificate: *Swan v. Whaley*, 75–623.

If the treasurer executes a deed to the person entitled to the certificate of purchase, it will be valid though no written assignment is recorded: *Ibid.*

1374. Payment of subsequent taxes. 889. The county treasurer shall also make out, sign, and deliver to the purchaser of any real property sold for taxes aforesaid, duplicate receipts for any taxes, interest, and costs, paid by said purchaser, after the date of said purchase for any subsequent year or years, one of which receipts said purchaser shall present to the county auditor, to be by him filed in his office, and a memorandum thereof entered on the register of sales. And if he neglect to file such duplicate receipt with the auditor before the redemption, such tax shall not be a lien upon the land, and the person paying such tax shall not be entitled to recover the same of the owner of such real estate. [10 G. A., ch. 100, § 1.]

Where the duplicate receipt for subsequent taxes paid by the tax purchaser is not filed, etc., the owner may redeem without paying such taxes: *Kennedy v. Bigelow*, 43–74.

This provision as to filing duplicate receipts does not apply to payment of taxes by purchaser or owner of the land after the execution of the tax deed: *Barke v. Early*, 72–273.

The purchaser cannot pay taxes for years previous to the sale which have not been included in the amount for which the property was sold, and thereby compel the owner, in redeeming, to pay such taxes: *Sheppard v. Clark*, 58–371.

These provisions as to filing the duplicate tax receipts are not applicable as to taxes paid after issuance of the deed: *Thode v. Spofford*, 65–294; *Elliott v. Parker*, 72–746.

Taxes paid by the purchaser after redemption is made by the owner cannot be recovered, and if he pays them upon the supposition that the redemption is illegal he does so at his peril: *Byington v. Allen*, 11–3; *Byington v. Walsh*, 11–27.

A purchaser of property exempt from taxation acquires no such interest by such purchase as will give him the right to a lien for taxes paid for subsequent years, though the property has passed to a third person who cannot claim the exemption: *Byington v. Wood*, 12–479.

As to recovery of taxes paid under a sale which is not valid, see notes to §§ 1382 and 1384.

REDEMPTION.

1375. How effected. 890; 19 G. A., ch. 45. Real property, hereafter sold under the provisions of this chapter, may be redeemed at any time before the right of redemption is cut off, as hereinafter provided, by the payment to the county auditor of the proper county, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and ten per centum of such amount immediately added as a penalty, with ten per cent. interest per annum on the whole amount thus made from the day of sale, and also the amount of all taxes, interest, and costs paid for any subsequent year or years, and a similar penalty of ten per centum added as before on the amount of the payment for each subsequent year, with ten per cent. interest per annum on the whole of such amount or amounts from the day or days of payment, unless such subsequent taxes shall have been paid by the person for whose benefit the redemption is made, which fact may be shown by the treas-

urer's receipt; and provided further, that such penalty for the non-payment of the taxes of any such subsequent year or years shall not attach, unless such subsequent tax or taxes shall have remained unpaid until the first day of March after they become due, so that they have become delinquent, nor shall any of said penalties apply in the cases mentioned in the last clause of section eight hundred and sixty-six of this chapter [§ 1348]. [R., § 779; C., '51, § 505; 13 G. A., ch. 90; ch. 173, § 13.]

[The act (19 G. A., ch. 45) which changed the penalty provided for by this section from twenty to ten per cent. contained a proviso that it should "not affect sales already made or penalties upon taxes hereafter paid upon sales made before the taking effect of this act.']

Redemption of whole: Where a party, by reason of owning any interest in the property, has a right to redeem, he may redeem the whole, and the purchaser may require him to redeem the whole, if any: *Curl v. Watson*, 25–35; *Rice v. Nelson*, 27–148.

Redemption of part: A sale of several distinct subdivisions or parcels of land in gross is irregular, and neither the officer who makes the sale nor the purchaser thereat will be permitted to take advantage of such wrongful act so as to defeat the right of redemption to a portion of the land so sold: *Penn v. Clemans*, 19–372.

In such case the purchaser or the officer has the right to receive only the amount *pro rata* paid at the sale with the penalty and interest thereon, and this, too, whether the property was assessed and taxed for more or less than its actual or relative value: *Ibid.*

The owner of an undivided interest in property cannot be required to pay the taxes due upon the whole property, and if a sale is made for taxes upon the whole he may redeem his interest: *Cragin v. Henry*, 40–158.

From sale for portion of tax: Under § 1361, providing that, where property has been offered two or more years and not sold for want of bidders, it shall be offered and sold to the highest bidder, and in case of redemption the purchaser shall only receive the amount paid and a *pro rata* proportion of the penalty, interest and costs, the owner in making redemption from such sale must pay the amount due on the real estate at the time of sale including the penalties, interest and costs accrued up to that time, no matter how much less than the amount due the land was sold for: *Soper v. Espeset*, 63–326.

Amount to be paid: Where the proper notice is not given of the expiration of the period of redemption, and the owner subsequently seeks to make redemption, the amount to be paid is the amount for which the land was sold and the penalties and interest provided by law. The fact that part of the taxes to be included in the amount to be paid in making redemption were paid more than five years before the time of redemption will not relieve the owner from the obligation to pay them. The redemption is from the sale and not from the claim for taxes: *Long v. Smith*, 67–22.

The owner in redeeming must pay the penalty upon the taxes paid by the purchaser, subsequently to the sale, as well as upon the amount paid at the sale: *Mulligan v. Hintrager*, 18–171.

Under former provisions, *held*, that the holder of a certificate of purchase was not entitled to receive repayment of city taxes upon the property paid by him, but that the provision as to repayment of taxes paid by the purchaser related only to state and county taxes: *Byington v. Rider*, 9–566.

Where land was sold for a portion only of the taxes delinquent at the time of the sale, and the purchaser immediately thereafter paid the balance of the delinquent taxes, *held*, that the party redeeming must pay to the purchaser the amount of such taxes paid by him with six per cent. interest: *Kessey v. Connell*, 68–430.

Where the duplicate receipt for subsequent taxes paid by the tax purchaser is not filed, etc., the owner may redeem without paying such taxes: *Kennedy v. Bigelow*, 43–74.

Redemption can only be made by payment of the amount required by law. The auditor cannot issue a certificate which shall have the effect to cut off the right of the holder of the certificate of purchase when no money is paid. Therefore, *held*, that where the board of supervisors directed the auditor to draw a warrant upon the county treasurer for a sum sufficient to redeem the property of a pauper from tax sale, and the auditor, without having issued such warrant or received any money for the redemption, issued a certificate of redemption of the land to the county, such certificate was not valid: *Reeves v. Bremer County*, 73–165.

The provisions of this section and of the preceding are simply that when a person entitled to redeem has paid to the auditor the amount necessary to effect the redemption as shown by the duplicate receipts on file in the auditor's office, the redemption is completed, and no other claim can be asserted against him or the land for taxes which have been paid by the purchaser of the property. But these provisions have no application to cases in which the redemption is effected by suit in equity, in which case the redemptioner is required to pay the interest and penalty provided by this section on each instalment of taxes which has been paid by the purchaser, although, such taxes being paid after the issuance of the deed, no certificate thereof has been filed with the auditor: *Slyfield v. Barnum*, 71–245.

Effect of redemption: The sale of land for taxes does not divest the title of the owner, and if redemption is made the title remains free from such lien in all respects as if the taxes had been paid before sale: *Lake v. Gray*, 35–44.

Redemption by one lienholder inures to the benefit of all, and after the redemption is made the title and liens stand in the same

manner as though no sale had taken place: *Ellsworth v. Low*, 62–178.

Redemption from a subsequent tax sale does not defeat the lien of a prior sale: *Gray v. Coan*, 30–536; *S. C.*, 40–327.

Certificate of purchase; rights of holder: Until the execution of a tax deed the title to the property remains in the original owner, even though the period of redemption has expired without redemption being made, and such owner may maintain ejectment against the holder of a tax certificate whose title has not been perfected by the issuance of a deed: *Williams v. Heath*, 22–519.

Assignment of certificate: The assignment of a certificate of purchase to a tenant in common, or the husband of such tenant in possession receiving rents and profits, and therefore under obligation to pay the taxes, amounts to a redemption: *Burns v. Byrne*, 45–285.

The assignment of a tax certificate during the period for redemption to one who has purchased the land subsequently to the sale amounts to a redemption, and such purchaser does not hold the land free from the lien of prior taxes not included in such sale: *Bowman v. Eckstien*, 46–583.

Where one of two tenants in common in real property bid off the same for much less than the amount of taxes due, and afterwards conveyed his interest to his co-tenant and assigned to him his tax certificate, *held*, that money paid by the latter in satisfaction of the amount paid by his co-tenant and subsequent taxes, with the purpose of making redemption, and paid back to him as holder of the certificate, could be recovered from him by the county: *Emmet County v. Griffin*, 73–163.

By agreement: It is competent for a tax purchaser and the land owner to agree that redemption may be made after the time when the right of redemption has expired, and as to the rate of interest to be paid upon making such redemption: *Shoemaker v. Porter*, 41–197.

Voluntary: Money paid in redeeming land from a tax sale which is entirely void for the reason that no taxes were due on the property at the time of sale is voluntarily paid and cannot be recovered back: *Morris v. Sioux County*, 42–416.

Construction: The most liberal and benign construction is to be given to the statutory provisions for the redemption of real estate sold for taxes: *Burton v. Hintrager*, 18–348; *Penn v. Clemans*, 19–372; *Rice v. Nelson*, 27–148; *Corning Town Co. v. Davis*, 44–622; *Foster v. Bowman*, 55–237.

1376. Certificate of redemption. 891. The county auditor shall, upon application of any party to redeem any real property sold under the provisions of this chapter, and being satisfied that such party has a right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale substantially as contained in the certificate of sale, the date of the redemption, the amount paid, and by whom redeemed, and he shall make the proper entries in the book of sales in his office, and shall immediately give notice of such redemption to the county treasurer. Such certificate of redemption shall then be presented to the treasurer, who shall countersign the same and make the proper entries in the books of his office, and no certificate of redemption shall be held as evidence of such redemption without such signature of the treasurer. [R., § 780.]

Who may redeem: In construing the redemption laws providing as to who may redeem from a tax sale, the word "owner" is held to be a generic term which embraces the different species of interest which may be carved out of a fee-simple estate: *Adams v. Beale*, 19–61.

A party having any right or interest in the property may redeem, but a mere stranger to the title cannot: *Byington v. Bookwalter*, 7–512.

A person having no interest in the property has no right to redeem, and if he pays money for that purpose the act neither vests title in him nor divests that of the tax purchaser, nor does it inure to the benefit of one having the right to redeem: *Penn v. Clemans*, 19–372.

A purchaser at a tax sale may disregard a redemption by a stranger to the title, and at the expiration of the period of redemption demand the execution and delivery of the proper treasurer's deed. If, however, the tax purchaser should consent to the redemption being made by a stranger, and should accept payment of the redemption amount from him, thereby intentionally giving up his claim to the land and receiving money paid in exchange therefor, this would in effect be a redemption and would inure to the benefit of the true owner of the property: *Wood v. Welpton*, 29 Fed. Rep., 405.

The wife has such an interest in the homestead belonging to the husband as to entitle her to redeem: *Adams v. Beale*, 19–61.

The right of the wife to redeem from a tax sale of the homestead continues until one year after she becomes discovert: *Pfiffner v. Krapfel*, 23–37.

Wherever the right of dower will be cut off by a tax sale, the widow is entitled to dower, or her assignee may redeem, although the dower has not yet been assigned or admeasured: *Rice v. Nelson*, 27–148.

A lessee under a lease made subsequently to a sale may redeem the leased premises, even without the knowledge or consent of the owner: *Byington v. Rider*, 9–566.

Purchase of property under execution against the owner, whether made before or after a tax sale, gives the purchaser such an interest as to entitle him to redeem: *Byington v. Walsh*, 11–27.

Where a party buys land at execution sale which has been sold for taxes, he cannot, after making redemption, recover the amount so paid from the former owner: *Barr v. Patrick*, 59-134.

The holder of the patent title may redeem although there is an outstanding tax title acquired under a prior sale: *Lancaster v. County Auditor*, 2 Dillon, 478.

A person coming into possession under color of title after a tax sale and before the expiration of the period for redemption has such an interest in the property as to be entitled to redeem: *Foster v. Bowman*, 55-237.

An heir of a mortgagee has sufficient equitable interest to be entitled to redeem: *Burton v. Hintrager*, 18-348.

Where the guardian of a minor had, by order of the court, sold lands of his ward, taking a mortgage to secure deferred payments of purchase money, *held*, that the ward had such interest in the land so sold as to be entitled to redeem from a tax sale: *Wilt v. Mewhirter*, 57-545.

The administrator of a party holding a mortgage upon real estate has a right to redeem: *Ellsworth v. Low*, 62-178.

An executor under the will of the deceased owner of real property, in which will disposition of the property is directed to be made by such executor, has a sufficient interest in the land to make redemption: *White v. Smith*, 68-317.

Title of party claiming right to redeem *held* sufficient: *Viele v. Van Steenbery*, 31 Fed. Rep., 249.

Act of officer in redemption: Failure of the treasurer to enter a memorandum of redemption on the list of sales will not make it invalid: *Byington v. Bookwalter*, 7-512.

If the owner pays the proper amount to redeem, such redemption is not defeated by error of the officer in issuing the certificate of redemption as to what sales or taxes are redeemed from: *Corbin v. Stewart*, 44-543.

Where land has been redeemed from sale, but by reason of failure of the officer to make proper entry thereof the fact of redemption does not appear, a deed issued in disregard of such redemption is void and passes no title to the purchaser: *Fenton v. Way*, 40-196.

The right of the auditor to allow a redemption cannot be questioned, nor the redemption set aside, in an action to compel the treasurer to make a deed. The treasurer cannot disregard the action of the auditor: *Hartman v. Anderson*, 48-309.

Discretion of officer: When one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, which the law provides shall support the right of redemption, the county officers must permit the redemption if they are satisfied he in good faith relies upon such equity or claim. The county officers cannot exercise judicial functions and cannot determine questions of title of this kind. Moreover, in cases wherein the county officers are authorized and required to permit redemption, the courts will allow and enforce the right. It cannot be possible that in a case wherein the officers would be required to permit redemption, the courts would deny the right: *Cummings v. Wilson*, 59-14.

Cancellation: A party who has taken the proper steps to make redemption is not bound by the action of the auditor in canceling the redemption certificate upon the stub thereof, unless he acquiesces therein and surrenders the certificate, and receives the money paid in making the redemption: *Ellsworth v. Low*, 62-178.

Stub as evidence: The stub of a redemption certificate is admissible in evidence to show the fact of redemption: *Ibid.*

Ratification: The acceptance by a tax sale purchaser of the amount of redemption money paid in to redeem operates as a ratification of the treasurer's act in issuing the certificate of redemption: *Byington v. Hampton*, 13-23.

1377. Minors and lunatics. 892. If real property of any minor or lunatic is sold for taxes, the same may be redeemed at any time within one year after such disability is removed, in the manner specified in the following section, or such redemption may be made by the guardian or legal representative under section eight hundred and ninety [§ 1375], at any time before the delivery of the deed. [R., § 779; 9 G. A., ch. 173, § 14.]

The right of a minor or lunatic to redeem, under this section, is limited to his own interest in the property, and does not extend to that of other owners or tenants in common: *Jacobs v. Porter*, 34-341; *Stout v. Merrill*, 35-47; *Miller v. Porter*, 35-166.

The simple production from the custody of the guardian of a minor, who was a near relative, of an acknowledged conveyance, *held* not to make out a *prima facie* case of ownership in the minor entitling him to redeem: *Walker v. Sargent*, 47-448.

Where a minor holds a mortgage upon land sold at tax sale, he may redeem to the extent of such interest: *Lloyd v. Bunce*, 41-660.

To entitle a minor to redeem after the general time of redemption has expired, he must have been the owner of the property sold at the time of the sale: *Burton v. Hintrager*, 18-348; *Tallman v. Cooke*, 39-402.

Where the rights of a minor in the property sold are acquired after the sale, whether by conveyance or descent, the time for redemption is not extended: *Stevens v. Cassady*, 59-113.

The grantee of a minor has only five years from his purchase of the property to bring the action: *McCaughan v. Tatman*, 53-508.

The extension of time for bringing the action in favor of the minor does not operate to the benefit of the purchaser as against such minor, and such purchaser must bring any action on his tax title within five years from the execution and recording of his deed: *Ibid.*

The disability of a minor is removed by his death, and the year within which redemption must be made commences to run from that time, and not from the time when he would have come of age: *Gibbs v. Sawyer*, 48-443.

The right of a minor to redeem is assignable

and will pass by conveyance: *Stout v. Merrill*, 35-47, 57.

Redemption by a guardian may be made before the execution of the tax deed, under the general provisions as to redemption, or after the execution of the deed, by equitable action: *Witt v. Mewhirter*, 57-545.

This section simply prescribes when the right to bring the action shall terminate, but does not provide that it can only be brought during the year after the minor comes of age. It may be brought by the guardian or the minor before the minor attains majority: *Ibid.*

The fact that a minor may redeem at any time within a year after the removal of disability will not entitle him to possession against the holder of a valid tax deed. His interest in the land is an equity to be enforced, if at all, in a court of equity: *McCaughan v. Tatman*, 53-508.

Where, in an equitable action to redeem on account of minority, plaintiff offers to redeem if he shall be required to do so, and defendant denies his right of redemption and claims to hold an absolute title, the costs should be taxed to defendant upon judgment being rendered in plaintiff's favor: *Strang v. Burris*, 61-375.

1378. Equitable action. 893. Any person entitled to redeem lands sold for taxes after the delivery of the deed, shall redeem the same by an equitable action in a court of record, in which all persons claiming an interest in the land derived from the tax sale, as shown by the record, shall be made defendants, and the courts shall determine the rights, claims, and interest of the several parties, including liens for taxes and claims for improvements made on the land by the person claiming under the tax title. And no person shall be allowed to redeem land sold for taxes in any other manner after the service of the notice provided for by the next section, and the execution and delivery of the treasurer's deed. [11 G. A., ch. 124, §§ 1, 2.]

Mistake and other grounds: The fact that the owner of property was a citizen in North Carolina, residing there during the civil war, *held* sufficient to entitle him to redeem property sold at tax sale after the period of redemption had expired: *Finley v. Brown*, 22-538.

Where, through mistake of the officer, the owner failed to redeem from a valid sale, but redeemed from a subsequent invalid one, which he supposed was the only sale, he was allowed to redeem after the deed had been executed, it being held that the mistake lying at the door of the officer was sufficient ground for equitable relief: *Noble v. Bullis*, 23-559.

Where the record showed two different sales of the same property for taxes for the same year, and it appeared that the land owner had in good faith redeemed from one of the sales believing that was the only one, *held*, that he might in equity maintain an action to redeem from the deed issued in pursuance of the other sale, and should be permitted to do so by paying the amount for which the land sold at the other sale, with the legal interest and penalties, but without costs of sale: *Shoemaker v. Lacey*, 38-277.

A party making redemption may rely upon the representations of officers as to the facts of the sale, and their mistake, error or negligence is sufficient ground to support a right of redemption by action after the execution of the tax deed: *Corning Town Co. v. Davis*, 44-622.

Where a person making redemption from a tax sale paid the amount of subsequent taxes given him by the auditor as having been paid by the tax purchaser, and received a certificate of redemption, and supposed that by such redemption all the taxes upon the land were satisfied, when in fact one item of tax for one of the years was not paid, and the land was afterwards sold therefor, *held*, that such owner might have the deed under the latter sale set aside and be allowed to redeem therefrom: *Iowa Falls & S. C. R. Co. v. Storm Lake Bank*, 55-696.

Mere mistake on the part of the land owner in failing to pay his taxes when they become due and omitting to redeem from the tax sale is not sufficient ground to entitle him to redeem in equity: *Playter v. Cochran*, 37-258.

Where the purchaser at the sale made inquiry as to taxes upon the property but not as to tax sales, *held*, that he was not entitled to redeem from a deed issued in pursuance of such a sale: *Moore v. Hamlin*, 38-482.

Where defendant had asked the treasurer to offer a certain tract of land for sale, and he had refused on the ground that no taxes were delinquent thereon, which was a mistake, and the land was subsequently offered and bid in by plaintiff, after which, with knowledge of the tax sale and within the time to redeem, defendant had bought the patent title to the property, *held*, that there was no ground for setting aside plaintiff's tax title at the suit of defendant: *Cow v. Tidrick*, 48-284.

In a particular case, where a party claimed the right to redeem in equity from a tax deed on the ground of certain unsuccessful offers to make redemption before the expiration of the time, consisting of visits to the auditor's office, which was found closed, etc., *held*, that the fact that twenty-six days elapsed after the making of such offer, and before the expiration of the time for redemption, without further steps being taken, precluded equitable relief: *Harrison v. Owens*, 57-314.

Inaccuracy of statement in a letter by the treasurer to a property owner as to the amount which would be necessary to redeem the property from the tax sale, *held* not sufficient to entitle such property owner to redeem in equity after the expiration of the statutory period: *Ellsworth v. Cordrey*, 63-675.

Where taxes are by mistake paid on other land than that intended, and the land of the

owner goes to sale without payment, such owner has no relief against his mistake: *Maxwell v. Hunter*, 65–121.

Where plaintiff sought to redeem from a tax sale after the time fixed by statute had expired, because of a mistake of the clerk in not stating such sale in response to a general offer to pay all taxes and redeem all property sold, *held*, that such general offer, without any request to redeem from the specific sale in question, and the mistake of the clerk or negligence of the owner in not having the sale in question redeemed from under such general offer, would not raise an equity in favor of plaintiff as against an innocent purchaser: *Bolinger v. Henderson*, 23–165.

Tender: In an action to redeem from a tax sale to avoid liability for the costs of the action tender should be made of the amount due defendant for taxes paid: *Curl v. Watson*, 25–35; *Poindexter v. Doolittle*, 54–52.

Where a party was allowed by equitable action to redeem from a tax sale after the deed had been issued, on the ground of a *bona fide* attempt to redeem in proper time, which was rendered unavailing by error of the officer, *held*, that he should pay in making redemption the amount which he should have paid at the time of the offer to redeem with six per cent. interest, and that as no offer to pay such amount had been made he should pay the costs of the action: *Corning Town Co. v. Davis*, 44–622.

Offer to pay: Where the party attacking a tax title at the same time offers to redeem therefrom, and afterwards succeeds in defeating such title on the issue made by the other party as to its validity, he should not be subjected to the costs of trial of that issue: *Broquet v. Sterling*, 56–357.

Amount to be repaid: Where a party seeks relief from a tax title under which the purchaser has procured a deed and is in possession, such redemption will be allowed only upon payment of a sum which would be sufficient to pay all taxes if they had not been paid by the purchaser: *Thode v. Spofford*, 65–294.

The rule that a party who succeeds in defeating a tax deed must pay to the person holding under such deed the amount which the owner would have had to pay if such purchaser had not paid the taxes at the sale is not applicable where a party seeks by equitable action to redeem from an illegal sale before the tax deed is issued. The treasurer's certificate of sale does not vest in the purchaser the title and interest of the state and county. The amount which plaintiff should be required to pay in such a case is the taxes which the owner was legally bound to pay, with six per cent. interest: *Roberts v. Merrill*, 60–166.

In an equitable action to redeem after execution of the deed the party seeking to redeem should be required to refund to the purchaser the amount of taxes paid by him subsequently to the execution of the deed, with interest and penalty thereon, whether duplicate receipts for such taxes have been filed with the auditor or not: *Elliott v. Parker*, 72–746.

Where a party holding a tax deed appearing to be valid on its face had in good faith paid taxes for fifteen years, *held*, that the owner of the land redeeming from such tax sale in an action in equity should be required to repay the tax thus paid by the holder of the tax title: *Buck v. Holt*, 74–294.

There is to be a *full equitable* adjustment of the rights of the parties; and rents and profits, as well as claims for improvements, are to be taken into consideration in the action to redeem in equity. Where such rents and profits have been more than sufficient to repay all the taxes, interest and penalty which the law imposes, the owner may have his title quieted against the holder of the tax title without further redemption: *Strang v. Burris*, 61–375.

Where the owner, prior to the expiration of the time of redemption, offers to redeem, and such offer is refused by the holder of the certificate, he may afterwards be allowed to redeem in equity by paying the amount due: *Butterfield v. Walsh*, 36–534.

Where the owner of an undivided one-half interest in property covered by a tax sale and deed was allowed to redeem therefrom in an equitable action, *held*, that such owner was properly required to pay one-half the value of improvements made by the tax purchaser, and entitled to be credited with the rental value of the property exclusive of the improvements while occupied by the tax purchaser; and in such case further *held* that as plaintiff could not have ascertained in advance and tendered the amount necessary to redeem, one-half the cost might properly be taxed to defendant: *Elliott v. Parker*, 72–746.

In an equitable action to redeem under this section the question of improvements is to be considered. It is not to be left to be determined under the occupying claimant law: *Serrin v. Brush*, 74–489.

Costs: Where in an equitable action to redeem on account of minority the plaintiff offers to redeem if he shall be required to do so, and defendant denies his right of redemption, and claims to hold an absolute title, the costs should be taxed to defendant upon judgment being rendered in favor of plaintiff: *Strang v. Burris*, 61–375.

The costs necessarily incurred in establishing plaintiff's right to redeem under this section constitute part of the expense of redemption and ought to be paid by the party who exercises such right: *Serrin v. Brush*, 74–189.

As to the right of the party whose tax title is declared void to recover the taxes paid by him, see notes to § 1382.

Equitable redemption from parties holding in trust: A party charged with the payment of taxes as agent cannot acquire a tax title to his principal's land; and under the facts of a particular case, *held*, that the party acquiring a tax title was the agent of the owner, and therefore that his title was void: *Ellsworth v. Cordrey*, 63–675.

Where the guardian of a minor purchased a tax title by quitclaim deed from the purchaser at the sale, which deed was made to him as guardian, *held*, that the conveyance inured to his ward's benefit and that a purchaser from him was chargeable with notice thereof and could not hold the lands as against the ward: *Rankin v. Miller*, 43–11.

A vendee taking possession under title bond and enjoying the rents and profits is, as between himself and the vendor, liable for the payment of accruing taxes, and cannot therefore acquire, or cause to be acquired, a tax title as against his vendor: *Hunt v. Rowland*, 22-53.

Neither can a third person bid in the land for taxes at the dictation of such vendee, with the proceeds of produce from the land, and hold it as against the vendor: *Ibid.*

A mortgagor cannot acquire a tax title to the prejudice of a mortgagee; neither can a vendee who is in possession under a title bond, with the agreement to pay taxes, acquire as against the vendor a tax title under a sale made prior to the bond for a deed. The duty of the vendee under such circumstances would be to redeem the property, and money so paid would be applied as a payment on the purchase money: *Cowdry v. Cuthbert*, 71-733.

It is the duty of the holder of a life estate to pay the taxes, and he cannot acquire a tax title against the reversioner: *Olleman v. Kelgore*, 52-38.

A purchaser of property at foreclosure sale cannot afterwards acquire a valid tax title as against a junior mortgagee, and the latter may be allowed to redeem upon payment of the taxes paid by such purchaser: *Anson v. Anson*, 20-55.

The obligation to pay taxes due before the sale or mortgage of the property is upon the vendor or mortgagor, and does not pass to one who purchases with an agreement to pay off the mortgage: *Porter v. Lafferty*, 33-254.

But the vendee having knowledge of the mortgage and its covenants, and therefore knowing that his vendor was under obligation to pay the taxes, undertaking to discharge the mortgage, cannot afterwards acquire a valid tax title by purchase at tax sale for such unpaid taxes so as to defeat the mortgage: *Ibid.*

The mortgagor or his grantee who assumes the payment of the mortgage cannot acquire a valid tax title as against the lien of the mortgagee: *Bowen v. Kurtz*, 37-239.

A mortgagee having the right to pay taxes for the protection of his security, a purchase by him at a tax sale of the property will be regarded merely as a payment of the taxes made for that purpose, by which neither he nor any person holding under him can acquire a tax title: *Eck v. Swennumson*, 73-423.

A person in possession of and claiming title to land can acquire no additional right to a tax deed if the taxes were a lien upon the land when he took possession. It is the duty of a person acquiring the title and possession of land to pay the taxes, and he can acquire no right or title against the mortgagee by neglect of such duty: *Stears v. Hollenbeck*, 38-550.

One purchasing land subject to the lien of taxes, and releasing his grantor from obligation to pay the same, is presumed to have assumed their payment: *Ibid.*

The mortgagor or his grantees with knowledge of the mortgage cannot acquire a tax title as against the mortgagee: *Ibid.*; *Fair v. Brown*, 40-209.

Although the mortgagee is under no obligation to pay the taxes upon the premises, yet he is authorized to redeem from a tax sale, and cannot, by acquiring title through such a sale, defeat the lien of prior mortgages: *Fair v. Brown*, 40-209.

A junior mortgagee who has paid taxes on the property, upon redemption being made from him can recover only, as to taxes, the amount paid with six per cent. interest. He is not entitled to recover statute penalties: *Garrettson v. Scofield*, 44-35.

Where a creditor takes a tax title to property of the debtor under the agreement that he is to hold the same as security, not only for advances before procuring it, but also for a judgment held by him against the debtor, such title will be deemed in equity as a mortgage, and the debtor will be allowed to redeem therefrom: *Jordan v. Brown*, 56-281.

In such cases, while the deed will not be absolute against the holder himself, it will be absolute against other claimants to the land who do not take advantage of the right to redeem: *Ibid.*

Tax deeds procured by fraud and collusion on the part of the mortgagor and the tax purchaser may be set aside at the suit of the mortgagee sought to be defrauded thereby: *Connolly v. Connolly*, 63-202.

Where plaintiff sought to subject lands occupied by defendant to a debt contracted by defendant's father, and defendant asked in a cross-bill to have the title quieted in her, it appearing that plaintiff had, pending litigation, redeemed the land from tax sale, *held* that, upon confirming defendant's title, the latter must pay to plaintiff the amount paid in such redemption: *Semple v. McCrary*, 46-37.

Persons not debarred from acquiring tax title: A person who is not in possession of real estate, but who claims title thereto under a void tax deed, can become a purchaser at a subsequent tax sale, procure a treasurer's deed, and thereunder claim title: *Neal v. Frazier*, 63-451.

While an owner of land, or one under obligation to pay taxes thereon, cannot acquire a tax title so as to defeat incumbrancers, or others setting up a title adverse to him, yet one who has no interest in the land and is under no obligation to pay the taxes, and is a stranger to the owner, may acquire a tax title thereon, even though he is in possession: *Curtis v. Smith*, 42-665.

Acquiring tax title by tenant in common: A tax title acquired by a tenant in common upon the common property will inure to the benefit of his co-tenants. He cannot thereby defeat their title: *Weare v. Van Meter*, 42-128; *Flinn v. McKinley*, 44-68; *Fallon v. Chidester*, 46-588; *Shell v. Walker*, 54-386; *Smith v. Smith*, 68-608; *Clark v. Browne*, 70-139.

The grantee of a tenant in common cannot acquire a tax title against co-tenants of his grantor: *Austin v. Barrett*, 44-488.

The husband of a tenant in common in possession with his wife in the enjoyment of the profits cannot, by neglecting to pay the taxes and purchasing the property at tax sale, acquire a valid title as against her co-tenants: *Burns v. Byrne*, 45-285.

A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest

of a co-tenant, even though the holder of the deed may have acquired the tax certificate before becoming tenant in common: *Tice v. Derby*, 59-312; *Flinn v. McKinley*, 44-68.

Under particular facts, *held*, that a tax purchaser was to be considered a tenant in common of the property, and therefore that the other party interested therein might make redemption from him upon payment of the proper amount: *Conn v. Conn*, 58-747.

A tenant in common not in possession may purchase an outstanding tax title for his own benefit: *Alexander v. Sully*, 50-192.

Under the circumstances of a particular case, *held*, that defendant having purchased from one whom he knew to have an undivided interest, and gone into possession, was a tenant in common with the owners of the remaining interest, and a tax title acquired by him would be presumed to be held for the benefit of all: *Shell v. Walker*, 54-386.

Relief against a tenant in common who has procured a tax title upon the common property is not barred by the statute of limitations as to actions on tax titles, the real ground of the remedy being fraud of the tenant in attempting to acquire a tax title against his co-tenant: *Austin v. Barrett*, 44-488.

Contribution as to taxes paid by co-tenant: The tenant in common acquiring a tax title will be regarded as holding the title thus acquired in trust for his co-tenants until the presumption is rebutted by their refusal to contribute, and the tenant holding the title thus acquired can enforce contribution by action: *Weare v. Van Meter*, 42-128.

Where a person purchased an undivided interest in real property without any notice or knowledge that any claim would be made for taxes previously paid by the owner of the other undivided interest, *held*, that the latter could not recover a portion of such taxes from the former, or make them a claim against the land: *Stover v. Cory*, 53-708.

Where a co-tenant pays the taxes upon the whole property he will be limited in his recovery of the proportionate share due from other co-tenants to the amount paid with legal interest: *Oliver v. Montgomery*, 39-601.

A tenant in common paying taxes upon the common property acquires a lien thereon for reimbursement: *Oliver v. Montgomery*, 42-36.

Amount to be paid in redeeming in such cases: In making redemption from a tax title acquired by one whose relations to the owner are such that he cannot acquire a valid tax title against such owner, and who has paid subsequent taxes on the premises, the owner should pay to the holder of the title the same amount he would have to pay to the treasurer in case the taxes had not been paid by the claimant under the tax sale: *Ellsworth v. Cordrey*, 63-675.

Where plaintiff bought certain land at a tax sale, and defendant, with fraudulent intent, procured from a former owner a quit-claim deed, and on the strength thereof redeemed the land from plaintiff just before the expiration of the period of redemption, it appearing that the property had passed from defendant to an innocent purchaser. *held*, that plaintiff, upon proving the fraudulent character of the transaction, might recover from defendant the value of the land at the time of redemption less the amount paid him to redeem: *Burgan v. Smith*, 47-286.

Estoppel: One who buys property at a tax sale cannot claim an estoppel against one who, holding a tax deed of the property sold, was present and bid against him and gave no notice of his title under the tax deed, unless the former can show that he was not fully aware of the latter's title, or that he relied upon his action, or was in some way deceived or injured thereby: *Case v. Albee*, 28-277.

Conclusive: A redemption by action to which all persons appearing of record to have an interest in the property are made parties is conclusive evidence, and will be binding upon an assignee of notes secured by a mortgage on the premises whose assignment is not recorded, although he is not a party: *Van Gorder v. Hanna*, 72-572.

EXECUTION OF DEED — NOTICE GIVEN.

1379. Notice of expiration of time for redemption. 894. After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices, a notice signed by him, his agent, or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon non-residents of the county by publishing the same three times in some newspaper printed in said county, and if no newspaper is printed in said county, then in the nearest newspaper published in this state. But any such non-resident may file with the treasurer of the county a written appointment of some resident of the county where his lands or lots are situated as agent upon whom service shall be made, and in such case, personal service of said notice shall be made upon said agent. Service shall be deemed completed when an affidavit of the

service of said notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent, or attorney, shall have been filed with the treasurer authorized to execute the tax deed. Such affidavit shall be filed by said treasurer, and entered upon the records of his office, and said record or affidavit shall be presumptive evidence of the completed service of notice herein required; and, until ninety days after the service of said notice, the right of redemption from such sale shall not expire. Any person swearing falsely to any fact or statement contained in said affidavit shall be deemed guilty of perjury and punished accordingly. The cost of serving said notice, whether by publication or otherwise, together with the cost of the affidavit, shall be added to the redemption money. [R., § 781; 14 G. A., ch. 124.]

Time for redeeming: The right to redeem is terminated after the expiration of ninety days from completed service of notice whether the deed be then executed or not: *Ellsworth v. Low*, 62–178.

Under former statutes, *held*, that redemption could not be made after the expiration of three years from the time of sale, although the deed had not been taken by the purchaser: *Pearson v. Robinson*, 44–413; *Scofield v. McDowell*, 47–129.

Under the same provisions, *held*, also, that the fact that the purchaser did not record his deed would not entitle the owner to redeem after the three years allowed, and that the fact that the purchaser went into possession and received rents and profits, before the recording of his deed, to an amount sufficient to satisfy the tax, interest and penalties, would not entitle the owner to redeem in an equitable action: *Spengin v. Forry*, 37–242.

The law in force at the time of sale regulates the time within which redemption may be made, and not that in force at the time of the assessment: *Negus v. Yancey*, 22–57.

Where the period allowed for redemption by the laws under which a tax sale was made was three years, *held*, that a statute enacted before the expiration of that time after the sale, extending the time to four years, was unconstitutional. Whether a statute reducing the time, or abrogating it entirely, would not likewise be unconstitutional, *quære: Adams v. Beale*, 19–61.

Where a statute gave to married women an extended time within which to redeem, *held*, that a repeal of such statute did not operate to take away the right of redemption from sales previously made: *Myers v. Copeland*, 20–22.

Persons under disability: Where a person has the right to redeem within a time given by the general clause of the statute, such person may, if within either of the classes of persons to whom, by reason of disability, a greater time is given, redeem within such additional time: *Adams v. Beale*, 19–61.

Further as to redemption by minors, lunatics, etc., see § 1377, and notes.

Notice of expiration of time for redemption; when necessary: The provision for service of notice of the expiration of the period of redemption is applicable only where such service is possible, and where it is impossible the time of redemption will expire without notice, as, for instance, where the property is assessed to an unknown owner and is not in the actual occupancy of any one, and in such cases a deed may issue in consummation of the sale after the expiration of the three years allowed for redemption: *Tuttle v. Griffin*, 64–455; *Chambers v. Haddock*, 64–556; *Meredith v. Phelps*, 65–118; *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65–563; *Burdick v. Connell*, 69–458.

In such cases the right of redemption expires at the end of three years, and redemption cannot afterward be made, although no deed has yet been executed: *Meredith v. Phelps*, 65–118.

When land is unoccupied and taxed to unknown owners, there is no person on whom notice can be served, and the authority of the treasurer to execute the deed is not dependent upon the service of notice: *Garmoe v. Sturgeon*, 65–147.

The fact that in an action based on such a sale the fact of giving notice is urged will not estop the tax title purchaser from showing that notice was not required: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65–563.

No notice is required to be served upon persons not in possession of the property and in whose names the property is not taxed: *Burdick v. Connell*, 69–458.

Person in possession: Where a timber lot not suitable for cultivation is used by a person in such way as such land is ordinarily used, he is to be deemed in possession, and is to be served with notice: *Ellsworth v. Low*, 62–178.

Notice is only required to be given to persons in actual possession, not to one who is merely in constructive possession: *Parker v. Cochran*, 64–757.

Where property is taxed to unknown owners, and the owner thereof is not in possession at the time of the sale, notice is not required to be given to such owner, although he has, after the expiration of three years but prior to the execution of the deed, gone into possession of the property: *Meredith v. Phelps*, 65–118.

Where a railway company is in possession of a portion of the premises, condemned for right of way, it has the right of redemption, and such right cannot be cut off without notice of the expiration of the period for redemption. A tax deed executed without such notice would not extinguish the right of the company: *Garmoe v. Sturgeon*, 65–147.

A person who, at the time of the service of notice, had no possession except such as had been exercised by ploughing two furrows on

the land in question, without any right to do so being made to appear, *held* not sufficiently in possession to be entitled to notice: *Stoddard v. Sloan*, 65–680.

Acts of the owner of city property, actually occupied as such, in causing weeds to be cut and hauled therefrom, *held* sufficient to show that he was in possession and entitled to notice: *Supp v. Walker*, 66–497.

Where a part owner of property was a member of the family of a brother residing upon the land, but had no control over it, *held*, that she was not in possession in such a sense that it was necessary to serve notice upon her. The possession contemplated by this section is actual and not constructive. It involves the occupying and controlling of the land and not mere residence upon it: *Rowland v. Brown*, 75–679.

That a person be in actual possession it is not necessary for him to live on the land or have some person representing him stay upon it. The owner of cultivated land who leases it, reserving part of the crop as rent, is in actual possession when it is surrendered to him, even though he does not remain on the land: *Whities v. Farsons*, 73–137.

Even though the petition of plaintiff asking to redeem on account of failure to give notice to him as the person in possession of the land does not aver that he was in possession, he may prove such fact under such allegation made by him in his answer to defendant's cross-petition: *Ibid.*

Subsequent changes: If the notice is served on the proper person, the right of the holder to a deed at the end of ninety days after the proof of such service is filed cannot be affected by any changes which may occur as to the taxation of the property or its ownership, between the time of such service and the proof of service or issuance of the deed, even though there is delay in making the proof of service: *Rice v. Bates*, 68–393.

Mortgagee: The notice required to be served before a tax deed can be made need not be served on the mortgagee unless he is in possession: *Hall v. Guthridge*, 52–408.

Person to whom taxed: Where land is not taxed in the name of the owner, the omission to serve notice upon such owner not in possession will not invalidate the deed: *Parker v. Cochran*, 64–757.

Where at the time of the service of notice the land was listed and assessed for taxation to a purchaser of the same holding by a deed not recorded, and the assessor's book so showing was in the auditor's office, *held*, that notice must be served upon him although the land was still in possession of his grantor, upon whom notice was properly served: *Heaton v. Knight*, 63–686.

A party cannot, by procuring a quitclaim to property on which he holds a certificate and having it assessed to himself and then collusively assigning his certificate to another, have valid notice served upon himself which shall entitle the assignee to a deed and give such assignee a title which he can then transfer to the original holder of the certificate: *Cummings v. Browne*, 61–355.

Where the junior mortgagee bid in the property at foreclosure, and then secured the purchase of the property at tax sale in the name of another for his benefit, and had notice of the expiration of the period of redemption served upon himself as the owner, *held*, that such notice was insufficient, and the tax deed should be set aside: *Frank v. Arnold*, 73–370.

The object of the law being to give notice to the owner of the land, it is the duty of a purchaser to examine the records and ascertain in whose name the land is taxed and give notice to such person. It may properly be considered that until it is listed for taxation it is taxed to the same person as in the previous year; but when it is listed for taxation in the name of another person and assessed to him, and the assessment returned to the auditor, then from the time of such listing it may properly be said to be taxed to that person: *Heaton v. Knight*, 65–434; *Adams v. Snow*, 65–435.

Where there is a conflict between the assessor's books and the tax duplicates placed in the treasurer's hands, the property is to be deemed taxed to the person whose name appears on the tax duplicate: *Fuller v. Butler*, 72–729.

Where no person is in possession of the land and it is taxed to an unknown owner, the tax purchaser is entitled to a deed without giving any expiration notice. He is not bound to look back of the assessment: *Griffin v. Tuttle*, 74–219.

Where the land was taxed to "H. Corlis," and the expiration notice was directed to "H. Corless," *held*, that the two names were substantially the same and the notice was sufficient: *Nycum v. Raymond*, 73–224.

Where a party owned land appearing on the treasurer's books as taxed to persons unknown, but the records showed his ownership and that he had been owner for several years, during which the land had been taxed in his name, *held*, that the taxation in the name of such party held good until a subsequent taxation of the land in the name of some other party, and the subsequent taxation of the property to an unknown owner would not relieve the holder of the certificate from the obligation to give notice to such owner: *Hartley v. Boynton*, 5 McCrary, 453.

In an action to redeem from tax sale on the ground that proper notice of the expiration of the time of redemption was not given before the issuance of the tax deed, plaintiff should aver that the land was taxed in the name of some one for the year when the notice should have been given. If not taxed in the name of any owner at the time notice is to be given, notice is not required: *Grove v. Benedict*, 69–346.

Where the notice was served upon the owner of the legal title, the land being assessed for that year to unknown owners, and it not appearing that any one else was in possession, *held*, that the owner of the legal title would be presumed to be in possession and that the service was sufficient: *Hall v. Guthridge*, 52–408.

Notice is to be given to the person in whose name the land is taxed, but it is not required that such person shall be the owner of the land: *Kessey v. Connell*, 68–400.

Actual knowledge of the publication of notice will not obviate the necessity of service of notice in cases where such service is required by statute: *Reed v. Thompson*, 56–455.

Uncertainty of notice: Where the bid on which a forty-acre tract of land was sold was for "fourteen acres" thereof, and the notice so described it, *held*, that the notice was void for uncertainty in the description: *Poindexter v. Doolittle*, 54–52.

A notice sufficiently describing the land except that it designates it as containing thirty acres instead of forty acres, where the description would be complete without any designation of the quantity, will not be rendered insufficient by reason of such mistake: *Rowland v. Brown*, 75–679.

Who to give notice: To constitute a person the holder of the certificate of purchase so as to authorize him to make affidavit as to the publication of notice to redeem, it is not necessary that he have physical possession of the instrument. By that term is meant the owner of it, or the one who at the proper time will be entitled to a deed under the sale; and where the holder of a certificate had surrendered it to the treasurer for cancellation upon the issuance of a treasurer's deed, which was without authority at the time, *held*, that he was not afterwards precluded from serving notice as holder of the certificate: *Rice v. Bates*, 68–393.

Also *held*, that the fact that such holder had executed a conveyance of the property covered by the certificate of purchase to a third person did not preclude his giving notice and receiving the deed, his right as purchaser before receiving a deed not being such an interest in the property as would pass by a conveyance thereof: *Ibid.*

By the expression "lawful holder" is meant one who in law is the holder of the certificate and entitled to the rights and benefits which may accrue under it. To make a person such lawful holder it is not necessary that he have the formal assignment of the certificate provided for in § 1373: *Swan v. Whaley*, 75–623.

Who may serve notice: Service made by the holder of the tax certificate in person is not prohibited and is sufficient: *Hall v. Guthridge*, 52–408.

The provision that the notice shall be served in the manner prescribed for the service of original notice relates to the mode of service and does not prescribe any rule as to the person or officer who shall make the service or as to the return. Service can be made only by the holder of the certificate, his agent or attorney, and the affidavit of one of these parties as to service by him is the only competent method of proving such service: *Ellsworth v. Van Ort*, 67–222.

Notice by publication; name: If land is taxed by mistake in the wrong name, and the case is a proper one for giving notice of the expiration of the period of redemption by publication, the published name should be that of the person in which the land is taxed and not that of the owner: *Hillyer v. Farneman*, 65–227.

The practice of writing only the initial letters of given names has become so common that a notice directed to a person in such manner should not be deemed on that account insufficient: *Stoddard v. Sloan*, 65–680.

Blanket notice: The statute evidently contemplates that a notice shall be given by the holder of each certificate of purchase, and a fair construction of it requires that a separate notice shall be given to each person in possession or to whom each tract of land is taxed. A mere blanket notice covering numerous pieces of land, directed to different owners collectively, is not sufficient: *White v Smith*, 68–313; *Adams v. Burdick*, 68–666.

Proof of service: The affidavit required by statute to constitute proof of completion of service of notice must be by the holder of the certificate, his agent or attorney, and an affidavit by the proprietor of the paper in which the notice was published, in case of service by publication, is not sufficient: *American Missionary Ass'n v. Smith*, 59–704; *Ellsworth v. Cordrey*, 63–675; *Sweeley v. Van Steenburg*, 69–696; *Viele v. Van Steenburg*, 31 Fed. Rep., 249.

A mere request by the holder of a tax certificate to the foreman of a newspaper in which publication of notice is made, to make an affidavit and return it to the treasurer, will not constitute such foreman an agent of the holder so as to render the proof of publication sufficient: *Chambers v. Haddock*, 64–556.

Where the affidavit of proof of service referred to another affidavit, not proper to be received in itself to show service, *held*, that such service was sufficient to incorporate the latter into the former, and that the papers together showed proper service: *Stull v. Moore*, 70–149.

Where proof of the service of a notice consisted of an unverified return made thereon and an affidavit of the holder of the certificate stating that service had been made as shown by the return, that was held sufficient: *Rowland v. Brown*, 75–679.

Where there was a mistake in the affidavit as to the name of the land-owner, but reference was therein made to the notice attached thereto, which was the notice served by publication, and in such notice the name was correctly inserted, *held*, that the proof was sufficient: *Rice v. Haddock*, 70–318.

The proof of service of the notice need not show the county in which the service was made, the place of actual service not being material: *Rowland v. Brown*, 75–679.

An affidavit of the holder of the certificate that the publication was made for three consecutive weeks, but which did not state when the publication was made, *held* not sufficient: *Ellsworth v. Cordrey*, 63–675.

Where the affidavit stated the date of the first publication, and stated that three publications in a weekly newspaper had been made, *held*, that it was sufficient: *Stoddard v. Sloan*, 65–680.

Where the affidavit of publication showed that the paper in which the publication was was made was "A weekly newspaper published in said county," *held*, that it sufficiently appeared that it was a newspaper printed in said county: *Nycum v. Raymond*, 73–224.

Affidavit in a particular case, *held* to suffi-

ciently refer to the paper containing the notice: *Johnson v. Brown*, 71–609.

Where the affidavit does not state where the newspaper in which such notice was inserted was published, nor the date of the publication of the notice, it is wholly insufficient to authorize the treasurer to issue the deed: *Kessey v. Connell*, 68–430.

It is the duty of a purchaser to make some showing which will authorize the treasurer to make a deed, and he should make such a record as upon its face shows authority for the treasurer to act: *Ibid.*

Failure to enter upon the record the affidavit showing service will not invalidate a deed. The notice itself as well as the record thereof is to be taken as evidence of the fact, and if the affidavit be lost it may be shown by copy duly proven, although not entered on the record: *Baker v. Crabb*, 73–412.

Failure to give notice: A deed issued without competent evidence being filed of the service of notice to redeem is without authority: *Rice v. Bates*, 68–393.

A treasurer's deed issued before expiration of ninety days from the filing of an affidavit of service of notice is invalid: *Swope v. Prior*, 58–412; *Cummings v. Wilson*, 59–14.

Where a deed is void because prematurely issued, the surrender and cancellation of the certificate is also void, and the certificate has the same force and effect as though it had never been surrendered. If, thereafter, proper notice is given, or the party is prevented by an injunction at the suit of the owner, to whom notice would be given, from giving such notice, the time of redemption will expire ninety days from the giving or attempting to give such notice: *Long v. Smith*, 62–329.

And if the person procuring an injunction against the giving of notice and procuring a deed by the tax payer neglects to make or offer to make redemption until after the time when a deed could have been procured if not prevented by such injunction, he will not be entitled to redeem at all: *Ibid.*

Evidence in a particular case *held* sufficient to justify the court in finding that the tax register showed, when examined by the agent or owner before making redemption, that the affidavit required by statute was filed at such a date as to make his redemption proper: *Ellsworth v. Green*, 59–622.

Effect of defective proof: Where there has been sufficient notice of the expiration of the time for redemption, but although there is an attempt to comply with the statute with reference to proof of service of notice, such proof is not in accordance with the statutory requirements by reason of not stating facts required to be stated, the period of limitation of five years will run in favor of the holder of a deed executed in pursuance of such defective notice. In such case the tax deed is not void in the sense that it is executed without authority. *Trulock v. Bentley*, 67–602.

Where the proof of notice is not such as is required, but the deed is nevertheless issued, although it shows on its face that the proof was improper, yet the deed is not to be deemed void, and the period of limitations of an action to attack the same commences to run from the time of its execution: *Bolin v. Francis*, 72–619.

Presumption as to notice: The statute does not require that the affidavit shall show the facts necessary to justify service by publication, as, for instance, that a person served was a non-resident. It is only required to show the service and mode thereof. If the facts are such that the mode of service was not justifiable, the deed can be impeached, but it is made presumptive evidence of its own validity in that respect, and the party asserting it has the burden of showing the impeaching facts: *Stoddard v. Sloan*, 65–680.

The deed is *prima facie* evidence that the notice has been properly and sufficiently served on the right person: *Ellsworth v. Low*, 62–178; *Baker v. Crabb*, 73–412.

The deed is at least *prima facie* evidence of the proper giving of notice, and the party attacking a deed for want of service of the required notice upon the owner must show that the land was assessed to some owner by name, and not to an unknown owner: *Fuller v. Armstrong*, 53–683.

Where the notice and proof of service on their face are regular, and a deed is issued in accordance therewith, the burden of overthrowing this *prima facie* evidence is upon the person attacking the deed: *Wilson v. Crafts*, 56–450.

In the absence of proof that the land was occupied or taxed to some person, it will be presumed in support of the deed that the facts were such as that service of notice was not required: *Chambers v. Haddock*, 64–556; *Garmoe v. Sturgeon*, 65–147.

Notice may be served personally or by publication; and where it appears that notice by publication is made, but is defective, a deed being presumptive evidence of sufficient service, it will be presumed in the absence of evidence to the contrary that personal notice was given: *Baker v. Crabb*, 73–412.

The presumption must obtain that the land was taxed to and notice served on a living person: *White v. Smith*, 68–313.

The tax deed is not conclusive evidence of the giving of notice as required: *Reed v. Thompson*, 56–455.

Where it appeared that the land was taxed to a known owner for the year for the taxes for which the sale was made, and that there was an attempt to serve notice of the expiration of the period of redemption upon such owner, which was insufficient, and an action to quiet title was brought against him, *held*, that it sufficiently appeared that the land was not taxed to an unknown owner to overcome the presumption in favor of the deed: *Ellsworth v. Cordrey*, 65–303.

Change of statute: Notice as required in this section is not necessary where the sale was made before its enactment, although the deed was not executed until after the Code took effect: *Robinson v. First Nat. Bank*, 48–354.

1380. Deed executed. 895. Immediately after the expiration of ninety days from the date of service of the written notice hereinbefore provided, the treasurer then in office shall make out a deed for each lot or parcel of land

sold and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase. The treasurer shall demand twenty-five cents for each deed made by him on such sales, but any number of parcels of land bought by one person may be included in one deed, if desired by the purchaser. [R., §§ 781–2; C., '51, §§ 503–4.]

When land has been redeemed: The treasurer has no authority to make a deed for land which has been redeemed, and such deed would be void: *Fenton v. Way*, 40–196.

Without notice to redeem: Unless a notice has been served on the person in whose name the land is taxed, the sheriff is not authorized to execute the deed. As long as the right of redemption exists there is no complete sale, and the period of limitation provided by § 1388 does not commence to run: *Slyfield v. Barnum*, 71–245.

If the notice to redeem, required by the statute, has not been served, or if the proof of the service of the notice required by law is not on file in the treasurer's office when the deed is executed, the land remains subject to redemption, but the deed is not void. It conveys title to the purchaser, who holds it subject to be defeated by the redemption of the land, when the right of redemption is established and exercised in the manner provided by law: *Ibid.*: *Bowers v. Hallock*, 71–218.

Second deed: When the first deed executed by the treasurer is so imperfect or informal as not to pass the title, he has the power and it is his duty to execute a second and corrected deed conveying the title: *McCready v. Sexton*, 29–356; *Parker v. Sexton*, 29–421; *Hurley v. Street*, 29–429; *Johnson v. Chase*, 30–308; *Gray v. Coan*, 30–536; *Genther v. Fuller*, 36–604.

If the sale is legal the purchaser has the right to be clothed with the legal title, which can only be done by the execution of a valid deed. If the deed executed is void from any cause existing in the form of the body of the deed, or of the acknowledgment, the treasurer has the right to execute a valid deed, provided he can do so in conformity with the actual facts of the sale: *Lorain v. Smith*, 37–67.

Where the treasurer has made a valid deed he has no authority to make a second one, and if a second one should be made it could have no effect upon the title conveyed by the first: *Bulkley v. Callanan*, 32–461; *Martin v. Cole*, 38–141.

The authority to execute a second deed is conferred upon the treasurer in order to enable him to correct errors committed in the first. A second deed not executed to correct either mistake, misdescription, incorrect recital, or other matter in the first deed in conflict with the facts, but for the object of perverting the truth and falsifying the tax record, will be void: *Gould v. Thompson*, 45–450.

A person who claims title to real estate of which he is not in possession, under a void tax deed, may become the purchaser at a subsequent tax sale and procure a treasurer's deed, and thereunder claim title: *Neal v. Frazier*, 63–451.

Description: The lot or parcel of land in which the property is to be described in the deed is to be the same as that under which it was advertised and sold: *Martin v. Cole*, 38–141.

Parol evidence is admissible to apply the description contained in the certificate of purchase to its subject-matter: *Judd v. Anderson*, 51–345.

Defective description in assessment and tax books, and deed, cannot be cured by extraneous evidence: *Roberts v. Deeds*, 57–320.

Uncertainty: Where the certificate of sale and the tax deed describe land having no necessary identity with that which has been taxed and is delinquent, they do not of themselves constitute sufficient evidence of a sale to uphold a tax deed, but rather negative it. Likewise, where the tax list shows that land is taxed by a description which is void for uncertainty, no title will pass under the sale or deed: *Blair Town Lot, etc., Co. v. Scott*, 44–143.

Where the purchaser at the sale offered to pay the tax on a forty-acre tract for "fourteen acres," and the land sold was thus described in the notice and deed, *held*, that the deed was void for uncertainty in its description, and in the notice required by statute to be served before its execution: *Poindexter v. Doolittle*, 54–52.

A description of property as the northwest part of the N. E. ¼ of the N. E. ¼, etc., containing three acres, *held* insufficient in an assessment and sale and tax deed to support a tax title, and that such title would be void for such defective description, although the sale was made for delinquent taxes of the owner of the property, which were a lien thereon. Such an objection goes to the validity of the tax title irrespective of the validity of the taxes: *Roberts v. Deeds*, 57–320.

A tax sale under an assessment of a certain number of acres in a certain corner of a subdivision can apply only to that number of acres in the form of a square, and a deed of the tract in any other form executed under such a sale will be valid only so far as the land conveyed therein is embraced in such square: *Immegart v. Gorgas*, 41–439.

Abbreviations: Abbreviations such as are in general and common use in the description of land, and are not misleading, may be used in the deed: *Jenkins v. McTigue*, 22 Fed. Rep., 148.

Where there was no word or mark prefixed to the figures representing the value of the property upon the assessor's book; but it was not shown or claimed that the omission of the dollar mark in any way actually misled plaintiff, or prevented him from paying whatever sum was properly assessed against his property, *held*, that the figures occurring in the column headed "value of land" rendered the assessment sufficient: *Ibid.*

Specific performance: In an action in the nature of a proceeding to enforce specific performance of tax sale by the execution of a tax deed, *held*, that the amount bid for the property being a grossly inadequate price therefor, equitable relief would not be granted: *Harper v. Sexton*, 22–142.

Undivided interest: The treasurer has no authority to deed an undivided interest in property for taxes due upon the whole: *Cragin v. Henry*, 40–158.

Delay: Where property was sold for a city tax claimed to have been levied fourteen years prior, and it did not appear upon the book of delinquent taxes which the city had adopted as a standard, *held*, that the city must be considered as having abandoned such taxes, and that the tax title was void: *Bradley v. Hintrager*, 61–337.

Where a tax deed was not taken for eleven years after the party claiming under the sale was entitled thereto, if at all, *held*, that as against those dealing with the owner of the land it must be presumed that the right to the deed had been abandoned: *Ockendon v. Barnes*, 43–615.

1381. Form of. 896. Deeds executed by the treasurer shall be substantially in the following form:

Know all men by these presents, that whereas the following described real property, viz: (here follows the description) situated in the county of ——, and state of Iowa, was subject to taxation for the year (or years) A. D. ——, and whereas the taxes assessed upon said real property for the year (or years) aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas the treasurer of said county did, on the —— day of ——, A. D. 18—, by virtue of the authority in him vested by law, at (an adjournment of) the sale begun and publicly held on the first Monday of ——, A. D. 18—, expose to public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and remaining unpaid on said property, and whereas, at the time and place aforesaid, A. B. of the county of —— and state of ——, having offered to pay the sum of —— dollars and —— cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property, for (here follows the description of the property sold) which was the least quantity bid for; and payment of said sum having been by him made to said treasurer, said property was stricken off to him at that price; and whereas, the said A. B. did, on the —— day of ——, A. D. 18—, duly assign the certificate of the sale of the property as aforesaid and all his right, title, and interest to said property to E. F., of the county of —— and state of ——; and whereas, by the affidavit of —— —— filed in said treasurer's office on the —— day of ——, A. D. ——, it appears that due notice has been given, more than ninety days before the execution of these presents, to —— —— and —— —— of the expiration of the time of redemption allowed by law; and whereas, three years have elapsed since the date of said sale, and said property has not been redeemed therefrom as provided for by law.

Now, therefore, I, C. D., treasurer of the county aforesaid, for and in consideration of said sum to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said A. B. [or E. F.] his heirs and assigns, the real property last hereinbefore described to have and to hold unto him the said A. B. [or E. F.] his heirs and assigns forever: subject, however, to all the rights of redemption provided by law. In witness whereof I, C. D., treasurer as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name on this —— day of ——, 18—. [R., § 783.]

STATE OF IOWA, }
—— County, } ss.

I hereby certify that before me —— —— in and for said county, personally appeared the above named C. D., treasurer of said county, personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county, and acknowl-

edged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand [and seal] this —— day of ——, A. D. 18—.

——— ———.

EFFECT OF DEED.

1382. Vests title; evidence. 897. The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds; and, when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, and also all the right, title, interest, and claim of the state and county thereto, and shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed;
2. That the taxes were not paid at any time before the sale;
3. That the real property conveyed had not been redeemed from the sale at the date of the deed;
4. That the property had been listed and assessed;
5. That the taxes were levied according to law;
6. That the property was duly advertised for sale;
7. That the property was sold for taxes as stated in the deed.

And it shall be conclusive evidence of the following facts:

1. That the manner in which the listing, assessment, levy, notice, and sale were conducted was in all respects as the law directed;
2. That the grantee named in the deed was the purchaser;
3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only.

And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed executed substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or, that there had been an entire omission to list or assess the property, or to levy the taxes, or to give notice of the sale, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid; *provided*, that in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's

books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; *provided further*, that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void. [R., § 784; C., '51, § 503.]

I. FORM.

Acknowledgment is essential to the validity of the tax deed, and any defect therein is not cured by a general act legalizing defective acknowledgments: *Goodykoontz v. Olsen*, 54–174.

Indexing: As to what is a sufficient indexing of the tax deed, see *Peirce v. Weare*, 41–378.

What law governs: The validity of acts affecting the assessment, levy and delinquency of taxes and tax sales is determined under the laws in force at the time the acts were done: *Penn v. Clemans*, 19–372.

II. WHAT VESTS IN PURCHASER.

Effect: The title conveyed by the tax sale is not derivative, but a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any incumbrances, claims or equities connected with the prior title: *Crum v. Cotting*, 22–411.

A tax title is a perfect title and extinguishes a patent title, and the fact that a person making a contract to convey has only a tax title will not constitute a breach of such contract: *Kramer v. Ricke*, 70–535.

It is the deed, and not the sale, that vests the title in the purchaser: *Lake v. Gray*, 35–44.

Until the deed is executed the title remains in the original owner: *Williams v. Heath*, 22–519.

A tax deed issued to a person as holder of the certificate of sale who is already deceased conveys no title to him or his heirs: *Butterfield v. Walsh*, 36–534.

Rights of purchaser under: When plaintiff claiming title under a bond for a deed against which the statute of limitations had run was seeking to redeem from a tax deed made during his minority, *held*, that the tax deed conveyed to the defendant the right of interposing the statute of limitations against such title bond, as the holder of the legal title himself might have done in an action by plaintiff against him: *Byington v. Stone*, 51–317.

Innocent purchaser: A purchaser under a tax deed which is void because of payment of the taxes before the sale cannot claim protection as an innocent purchaser as against the owner of the property: *Harrison v. Sauerwein*, 70–291.

Property assessed: The deed cannot be effectual as a conveyance beyond the property actually assessed: *Judd v. Anderson*, 51–345.

Lien of prior taxes: The purchaser takes all the interest of the state and county in the property, and therefore takes it free from the liens of all taxes unpaid at the date of sale: *Bowman v. Thompson*, 36–505.

Such prior taxes cease to be a lien, and a subsequent sale therefor would be void: *Preston v. Van Gorder*, 31–250.

But where a party purchased land subsequently to a tax sale thereof, and then procured the assignment to himself of the tax certificate, *held*, that the land was not in his hands discharged from the lien of taxes due prior to the sale, and by mistake omitted in making such sale, but that the assignment of the certificate operated merely as a redemption from the sale: *Bowman v. Eckstien*, 46–583.

In a city acting under a special charter, which authorized a separate sale by the city for city taxes, *held*, that a sale for state and county taxes did not divest the property of the lien of such city taxes, and that the purchaser took subject thereto: *Dennison v. Keokuk*, 45–266.

Recovery of subsequent taxes paid under a void tax title: Subsequent taxes paid in good faith by the holder of a void tax title may be recovered of the owner: *Claussen v. Rayburn*, 14–136.

The tax purchaser may recover such taxes, whether paid for and on account of the holder of the patent title or his assignor or grantor: *Guise v. Early*, 72–283.

A tax purchaser may maintain an action after eviction against the real owner for taxes paid on the property in good faith, and if by such payment he has relieved the land from the lien of such taxes he should have a lien thereon for the amount paid. This is especially true where the owner asks and obtains affirmative relief by cancellation of the tax deed. Where a party asks equity he should be required to do equity: *Orr v. Travacier*, 21–68.

A tax purchaser whose title is held void may recover of the property owner the taxes paid by him in good faith subsequently to the acquisition of his title: *Stewart v. Corbin*, 38–571.

In such case the party who has paid the taxes may, in an action in which the invalidity of his deed is declared, have a decree against the owner for taxes paid with six per cent. interest thereon: *Harrison v. Sauerwein*, 70–291.

Where a party seeks in an equitable action to set aside a tax deed which is valid on its face he should be required to pay the amount of the taxes paid by the purchaser in pursuance of such sale: *Gardner v. Early*, 69–42.

Where a party failed to recover the property under his tax title because equity would not sustain it, *held*, that he still might recover the amount expended in the acquisition of the title and for taxes paid on the land: *Hunt v. Rowland*, 28–349.

A party who, in a pleading asking the setting aside of a tax title, offers to repay to the holder of such title the amount paid by him, with interest, etc., should be required to pay that amount upon a judgment in his favor set-

ting aside the tax title: *Corbin v. Woodbine*, 33–297.

Where, until the answer was filed, the record failed to show that plaintiff had any knowledge of the tax title set up therein, *held*, that it was sufficient to make an offer to refund the taxes in a replication to such answer: *White v. Smith*, 68–313.

The purchaser cannot pay taxes for years previous to the sale which have not been included in the amount for which the property was sold, and thereby compel the owner, in redeeming, to pay such taxes: *Sheppard v. Clark*, 58–371.

Where a life estate was vested in the occupant of property with the provision that the owner of the fee should pay the taxes thereon, and the title of the owner of the fee was sold on foreclosure of a mortgage, *held*, that the purchaser at the foreclosure sale was under obligation to pay the taxes to the holder of the life estate who had paid them, and that upon failure of the purchaser to make such payment they might be recovered back from such purchaser: *Iowa Loan & Trust Co. v. King*, 66–322.

Where there are conflicting claims to property and one party allows the taxes to become delinquent, the other cannot, after enforcing his claim against the property and buying it in at execution sale, recover the amount of taxes which he is compelled to pay to redeem the property from the former owner: *Barr v. Patrick*, 59–134.

Taxes paid by the purchaser after redemption is made by the owner cannot be recovered, and if he pays them upon the supposition that the redemption is illegal he does so at his peril: *Byington v. Allen*, 11–3; *Byington v. Walsh*, 11–27.

A purchaser of property exempt from taxation acquires no such interest by such purchase as will give him the right to a lien for taxes paid for a subsequent year, though the title has passed to a third person who cannot claim the exemption: *Byington v. Wood*, 12–479.

A purchaser at tax sale who has in good faith paid the subsequent taxes on the property may, after eviction by the owner, recover the amount so paid: *Claussen v. Rayburn*, 14–136.

The fact that in an action upon a tax title such title is held void is not an adjudication defeating the tax purchaser's right to recover the taxes paid: *Stewart v. Corbin*, 38–571.

Where defendant acquiring title by assignment of a bond for a deed agreed to pay certain taxes, but bought the property in at tax sale for such taxes, and afterward at suit of the wife of the assignor, who did not join in the assignment, it was held void as being a conveyance of the homestead, *held*, that defendant could only recover the amount of taxes paid and interest at six per cent., and not a higher interest or penalty: *Stinson v. Richardson*, 48–541.

Amount of recovery: In recovering for taxes subsequently paid the tax purchaser is entitled to only six per cent. interest: *Orr v. Travacier*, 21–68; *Early v. Whittingham*, 43–162: *Thompson v. Savage*, 47–522.

Where it was found in a proceeding to redeem from tax sales that the first sale was invalid while the other two were valid, it was decided that plaintiff should pay the amount of legal taxes upon the land which defendant had paid under the first sale and six per cent. thereon; and should also pay the statute penalty and interest upon the other sales, and also the subsequent taxes paid by defendant: *Curl v. Watson*, 25–35.

As the tax deed vests in the purchaser all the right, title and interest of the state and county, the tax purchaser may, upon his deed being declared void on account of fraud or other defect in the sale for taxes due upon the property, recover from the owner the full amount which the owner would have to pay the treasurer to satisfy taxes for which the sale was made, and taxes subsequently paid, if they had not been paid by the purchaser: *Everett v. Beebe*, 37–452; *Light v. West*, 42–138; *Besore v. Dosh*, 43–211; *Sexton v. Henderson*, 45–160; *Miller v. Corbin*, 46–150; *Springer v. Bartle*, 46–688; *Crumb v. Davis*, 54–25; *Walker v. Beaver*, 50–504.

But this rule has no application where the land was not subject to taxation for the year for the taxes for which it was sold: *Sully v. Poorbaugh*, 45–453.

Nor does the rule apply where the title is void for the reason that there was no assessment, levy or sale: *Early v. Whittingham*, 43–162.

In cases where sales were or could have been lawfully made for taxes, but were rendered void by reason of fraud or other causes, the holder of the tax deed may recover the tax, interest and penalty provided by statute in the payment of delinquent taxes. Even if the taxes for which the land was sold were not a lien on the land, the purchaser may recover the taxes actually paid subsequently to the sale, with six per cent. interest thereon, and no more. The purchaser paying taxes due after the execution of the tax deed may recover on the ground that the land owner ought to reimburse him for the money he expended in good faith for the benefit of the land owner. Where the deed, assessment and other proceedings are void, the purchaser claiming under them cannot recover for subsequent taxes paid by him, for the reason that the taxes were not a lien, and the owner was under no obligation to pay them: *Barke v. Early*, 72–273.

The sale and deed convey the interest of the state and county in the property, but not the tax itself, and a tax purchaser is not entitled to recover from the owner the tax paid where the sale and deed, owing to defective description, are void: *Roberts v. Deeds*, 57–320.

A tax title being held void for the reason that no taxes were levied for the year for which the land was sold, *held*, that a tax purchaser could not recover from the owner the amount of taxes paid at the sale, but could only recover taxes paid by him for years subsequent to the sale and within five years next preceding the commencement of an action to recover the same: *Thompson v. Savage*, 47–522.

Where the sale is void the purchaser is only subrogated to the rights of the county, and therefore his action against the owner to re-

cover the taxes paid must be brought within five years after such taxes become delinquent: *Ibid.; Brown v. Painter*, 44–368; *Sexton v. Peck*, 48–250.

An action by the purchaser at a tax sale to recover for taxes paid by him is barred in five years; but *held* that where plaintiff, in an action to set aside tax deeds under which defendant claimed, offered to pay defendant the amount of all taxes paid by him which might be found legally due from plaintiff to defendant, the plaintiff could not set up the bar of the statute as to the claim for taxes thus paid: *Barke v. Early*, 72–273.

Payment of taxes made more than five years before bringing suit to recover them back, and not made for the protection of the title in behalf of the rightful owner, but for the purpose of depriving him of title, cannot be recovered back: *Thode v. Spofford*, 65–294.

The statutory provisions requiring the filing of a certificate of taxes by the purchaser do not apply to taxes paid by him as owner after he acquires a tax deed: *Ibid.*

Where a tax title is at the suit of the holder of the legal title declared void on the ground that the taxes for which the sale was made had in fact been paid, the holder of the legal title should be required to repay to the holder of the tax title all the taxes paid by him on the land with six per cent. interest thereon, and such repayment should not be limited to taxes paid within five years. The obligation to repay being merely an incidental equity is not subject to the bar of the statute: *Harber v. Sexton*, 66–211.

The rule in regard to recovery of taxes paid, in case the sale is irregular or the deed is void by reason of some inherent invalidity which limits the recovery to taxes paid within five years prior to the bringing of action, does not apply where the owner seeks to redeem from a tax sale which has not culminated in a deed by reason of the failure of the tax purchaser to give notice of the expiration of the period of redemption. In such case the amount paid at the sale with the taxes and interest as provided by law must be paid without regard to the length of time which may have expired after the sale: *Long v. Smith*, 67–22.

Purchaser not subject to: Where a tax sale was held void and the title declared to be in the original owner, and thereafter the tax purchaser commenced action for taxes paid by him subsequent to the purchase, *held*, that an innocent purchaser of the land from such original owner after the judgment would not be deemed to have notice of the claim for the recovery of taxes paid: *Thompson v. Savage*, 47–522.

The record showing the payment by the holder of the tax title will not constitute constructive notice to such purchaser so as to charge him therewith: *Forey v. Bigelow*, 56–381.

Recovery by claimant of property of taxes paid thereon from person afterwards adjudged owner: See notes to § 1347.

III. DEED AS EVIDENCE.

Presumption: The tax deed may be made presumptive evidence of the regularity and validity of all prior proceedings; and as to minor matters relating to the mode or manner of exercising the power of taxation, which may be dispensed with, it may be made conclusive, but there are some indispensable requisitions which must be observed, and as to these the deed cannot be made conclusive: *Allen v. Armstrong*, 16–508.

The corresponding section of the Revision (§ 784), which declared that the tax deed should be conclusive evidence of the regularity of all prior proceedings, *held* unconstitutional in so far as it attempted to make the deed conclusive as to the existence of the essential prerequisites of the taxing power, such as assessment, levy, sale, etc., as depriving a person of his property without due process of law; but it was held that as to non-essentials, or matters simply directory, the deed may be made conclusive. Also *held*, that it was competent for the legislature to make such deed *prima facie* evidence of its own validity and the regularity of prior proceedings: *McCready v. Sexton*, 29–356, 385.

Under the same statutory provision, *held*, that the deed was *prima facie* evidence of those things of which it was improperly declared to be conclusive: *Hurley v. Woodruff*, 30–260.

Whether the legislature can make a tax deed, which is false in fact, conclusive evidence of the matters therein recited, *quære: Adams v. Beale*, 19–61.

The provisions of this section as to the effect of the deed as evidence apply in equity as well as at law: *Clark v. Thompson*, 37–536.

It is competent for the legislature to declare that the acts of *de facto* officers shall be valid: *Allen v. Armstrong*, 16–508.

The presumption is in favor of the validity of a tax deed: *Grove v. Benedict*, 69–346.

As evidence: One asserting title under a tax deed has but to introduce it in evidence and the law puts upon his adversary the burden of showing its invalidity. He will not be guilty of fraud in asserting title under it, only as he has actual knowledge that it was invalid, or introduces it in evidence with intent to accomplish some unlawful purpose: *Brownell v. Storm Lake Bank*, 63–754.

The tax deed is competent evidence of the assignment of the certificate of purchase to the grantee of the deed: *Stahl v. Roost*, 34–475.

Where by city charter under ordinance the collection of taxes is made presumptive evidence of the regularity of prior proceedings, a party claiming that a deed is void because of irregular assessment of a special tax must allege and prove the same: *McNamara v. Estes*, 22–246.

Where the special charter of a city under which property was sold for taxes provided that its collector's deed should have the same force and effect as a treasurer's deed, and also that a demand of the tax must be made before sale, *held*, that although the deed might be *prima facie* evidence of the regularity of prior proceedings it was not conclusive as to the fact of demand, and might be overthrown by evidence on that point: *Lathrop v. Howley*, 50–39.

Prima facie evidence: The deed is *prima facie* evidence of assessment. The fact that

the assessment book does not show all the facts necessary to establish the assessment does not prove that such facts do not exist: *Genther v. Fuller*, 36-604.

The deed is *prima facie* evidence as to the fact of sale: *Leavitt v. Watson*, 37-93.

Also of the fact of assessment: *Madson v. Sexton*, 37-562.

A treasurer's deed is presumptive evidence of the fact that the property sold for taxes has been listed and assessed, and the introduction of the deed in the proper form casts upon the other party the burden of proving that in fact no legal assessment has been made: *Jenkins v. McTigue*, 22 Fed. Rep. 148.

The deed is presumptive evidence that the taxes for which the sale is made, if for prior years, have been properly brought forward, and if such objection is not made until the time within which the deed can be attacked has elapsed, the property owner cannot afterwards question the sale on that ground: *Guthrie v. Harker*, 27 Fed. Rep., 586.

The deed is *prima facie* evidence as to the fact of assessment, listing and levy, but it is conclusive as to the manner: *Robinson v. First Nat. Bank*, 48-354.

Where the tax deed shows a sale for less than the whole amount due it will be presumed that such sale was made under the provisions of § 1361: *Griffin v. Tuttle*, 74-219.

Where the deed shows on its face that it was made at a sale begun on the first Monday of a month subsequent to October, it is *prima facie* evidence that some of the reasons mentioned in § 1371 existed for commencing the sale at such subsequent day: *Lorain v. Smith*, 37-67.

A party attacking the deed on the ground that the sale was not made at the proper time must at least show that the facts which would have authorized a sale at the date when the sale appears to have been made did not exist: *Eldridge v. Kuehl*, 27-160; *Love v. Welch*, 34-192; *Bullis v. Marsh*, 56-744.

While the tax sale register is admissible in evidence, yet its failure to show the offering of the land on the first Monday of October, which is the regular day for tax sale, does not overcome the *prima facie* evidence of regularity arising from the deed itself: *Bullis v. Marsh*, 56-747.

The tax deed is at least *prima facie* evidence of the fact of service of notice of expiration of the period of redemption: *Ellsworth v. Low*, 62-178.

Even though the evidence of notice by publication shows that such publication was not sufficient it will be presumed that personal notice was given which was sufficient in the absence of evidence to the contrary: *Baker v. Crabb*, 73-412.

A party claiming adversely to the deed must prove that the land was assessed in some name in order to create a necessity for proof of service of notice on such person: *Fuller v. Armstrong*, 53-683; *Chambers v. Haddock*, 64-556.

Where such notice and proof of service appear on their face to be regular, and a deed is issued in accordance therewith, any person asserting the invalidity of the deed upon the ground that the service was not made as the proof shows, or that the person served was not the right person, has the burden of overcoming the *prima facie* evidence furnished by the papers: *Wilson v. Crafts*, 56-460.

May be rebutted: Where it appears that an essential step in the proceeding has not been complied with, the *prima facie* effect of the deed is overcome: *Rayburn v. Kuhl*, 10-92.

A failure to recite a certain fact in an attempt to recite the performance of all the requisite steps toward the execution of a tax deed is evidence by implication that such fact did not exist, and repels the *prima facie* effect of the deed: *Long v. Burnett*, 13-28.

Evidence of a failure, after search, to find any record of a tax sale for the year in which the sale is claimed to have been made, throws upon the holder of the tax deed the burden of proving such essential step, and overcomes the *prima facie* evidence of the deed: *Ibid.*

Facts in a particular case *held* sufficient to overcome the presumption as to assessment arising from the deed: *Easton v. Savery*, 44-654.

Where a record is required to be made of any fact essential to the validity of the tax, parol evidence of the existence of that fact cannot be substituted. So in regard to a levy, where the records being introduced were found not to contain any evidence of a levy, *held*, that the presumption of levy arising from the execution and recording of the deed was overcome, and the burden of proving a levy in fact was thrown upon the party claiming under the deed, which he could sustain only by showing that a record once existed which had been lost or destroyed: *Moore v. Cooke*, 40-290.

Where the evidence showed the entire absence of the records which would exist in case assessment of property, levy of tax, and sale for non-payment thereof, had been made, and it did not appear that such records had been lost or destroyed, *held*, that the *prima facie* evidence furnished by the deed was sufficiently overcome: *Early v. Whittingham*, 43-162.

When, upon the introduction of the assessment books, it appears that the description of the property is void for uncertainty, such evidence shows a want of assessment of the land described in the deed, and throws upon the party claiming under the deed the burden of proving that the property assessed was the same as that deeded: *Blair Town Lot, etc., Co. v. Scott*, 44-143.

A levy of the tax being essential to the validity of the sale, the deed is only presumptive evidence of such levy, and as a valid levy cannot be established by parol evidence, if no record of a levy can be found in the proper office, the presumption that there was a levy arising from the deed is overcome: *Prouty v. Tallman*, 65-354; *Williams v. Poor*, 65-410.

But in a particular case, *held*, that a sheet of paper containing an order of the properly authorized board making a levy was a sufficient record without having been recorded in a book: *Prouty v. Tallman*, 65-354.

Conclusive evidence: A deed reciting the fact of a lawful sale of the property is con-

clusive evidence of such sale: *Gould v. Thompson*, 45–450.

The fact that the treasurer does not proceed to collect the taxes by distress and sale will not render invalid a deed made in pursuance of a subsequent sale of land therefor; as to that matter the deed is conclusive: *Stewart v. Corbin*, 25–144.

Under the provisions of the Revision which authorized a warrant of sale being issued to the county treasurer under which the sale was to be made, *held*, that as such warrant was not an essential part of the taxing power and might have been dispensed with by the legislature, the tax deed might properly be held conclusive evidence of the regularity of such warrant: *Hurley v. Powell*, 31–64.

The tax deed is conclusive as to the notice or advertisement: *Allen v. Armstrong*, 16–508; *Madson v. Sexton*, 37–562; *Scofield v. McDowell*, 47–129; *Bullis v. Marsh*, 56–747.

That a certain tract of land, the taxes upon which are delinquent, is not contained in the advertisement will not render a sale thereof void. The owner being presumed to know that the taxes on his land were delinquent, and that such land was subject to be sold at the sale as advertised, cannot complain of want of notice: *Shawler v. Johnson*, 52–472.

The tax deed is conclusive as to the copy of the advertisement having been filed as required by statute: *Hurley v. Powell*, 31–64.

It is also conclusive as to the manner of assessment: *Easton v. Perry*, 37–681.

And as to the manner of sale: *Ware v. Little*, 35–234; *Smith v. Easton*. 37–584.

Where by the deed it appears that the sale was of an entire tract which might have been sold *en masse* if assessed to unknown owners, the deed will be conclusive evidence that the assessment was in such manner as that the proceedings were valid: *Easton v. Perry*, 37–381.

The deed is conclusive as to the regularity of prior proceedings: *Leavitt v. Watson*, 37–93; *Martin v. Cole*, 38–141.

And as to the regularity of the assessment, listing and levy: *Robinson v. First Nat. Bank*, 48–354.

It is conclusive that the sale was made at the proper time: *Clark v. Thompson*, 37–5 6; *Phelps v. Meade*, 41–470: *Shawler v. Johnson*, 52–472; *Slocum v. Slocum*, 70–259.

A mistake in the recital as to the date of sale will not invalidate the deed: *Hurlburt v. Dyer*, 36–474.

The assessment, levy and sale being admitted in fact, the deed is conclusive as to the manner thereof: *Bulkley v. Callanan*, 32–461.

Where a deed shows that a sale was made in a manner which, under some circumstances, would be proper, those circumstances are conclusively presumed to have existed and the deed is valid: *Ware v. Little*, 35–234.

If there has been a sale in fact the deed is conclusive as to the manner, for instance, as to the method of offering the lands for sale. So *held* where it appeared that lands were struck off to parties who had furnished written bids: *Leavitt v. Watson*, 37–93.

If there was a *bona fide* sale in substance and in fact, the tax deed is conclusive evidence that it was done at the proper time and manner, these being merely directory and not fundamental: *Phelps v. Meade*, 41–470; *Callanan v. Hurley*, 93 U. S., 387.

Where the assessor left off from the head of his book the words "owners unknown," but entered the lands without connecting them with any name, fixed the value of the land for the purpose of taxation, and entered it with the proper valuation upon the tax list, and entered the amount of the various taxes properly therein, *held*, that such entry related to the manner in which property of unknown owners was to be listed and assessed, and that, consequently, the treasurer's deed was conclusive: *Jenkins v. McTigue*, 22 Fed. Rep., 148.

The statutory provisions making a tax deed conclusive evidence as to certain facts is applicable in equity as well as at law, and a court of equity cannot set the deed aside for matters as to which it is properly made conclusive evidence: *Clark v. Thompson*, 37–536.

Not conclusive: The deed cannot be made conclusive as to the fact of assessment: *Powers v. Fuller*, 30-476.

Although the tax deed is conclusive as to the regularity of the assessment, yet where land was assessed in the name of the owner and also to owner unknown, *held*, that the latter assessment was entirely void, and a deed issued in pursuance of a sale thereunder was not valid: *Nichols v. McGlathery*, 43–189.

Recitals in the deed are not conclusive as to whether the property was in fact sold: *McNamara v. Estes*, 22-246.

A tax deed is not conclusive evidence that a sale, private in its nature, is a public sale such as is required. It is always competent to show fraud committed by the officers, or any arrangement between the officers and the purchaser which substitutes a private for a public sale such as the law contemplates. Such a purchase is a fraud upon the owner of the land and renders the sale invalid: *Butler v. Delano*, 42–350.

The deed is conclusive as to manner of sale to only a limited extent. It is always competent to defeat it by showing fraud of the officer or purchaser at such sale: *Ibid.; Thompson v. Ware*, 43–455; *Chandler v. Keeler*, 46–596.

The deed cannot be regarded as conclusive evidence of a sale which the treasurer had no power to make: *Gardner v. Early*, 69–42.

It is not conclusive evidence of the regularity of proceedings which are shown upon its very face to have been irregular, as, for instance, a sale in gross: *Boardman v. Bourne*, 20–134.

It is not conclusive evidence of the giving of notice of expiration of the time of redemption. The notice of which the statute makes a deed conclusive evidence is notice of sale: *Reed v. Thompson*, 56–455.

Sale in gross: A tax deed showing upon its face a sale of distinct tracts in gross is void: *Boardman v. Bourne*, 20–134; *Byam v. Cook*, 21–392; *Ferguson v. Heath*, 21–438; *Harper v. Sexton*, 22–442; *Ackley v. Sexton*, 24–320; *Hurlburt v. Dyer*, 36–474; *Gray v. Coan*, 30–536.

Where several distinct and separate tracts of land are sold *en masse*, the sale and deed thereunder are void: *Rankin v. Miller*, 43–11.

In a particular case, *held*, that the recitals of the deed showed a sale in a quarter-section tract, although it also recited the amount of tax due on each forty-acre subdivision thereof: *Clark v. Thompson*, 37-536.

But the deed is not conclusive that the sale was made in gross, and the sale may be valid although the deed is void: *Ware v. Thompson*, 29-65.

That a tax certificate shows the sale to have been made in parcels does not estop the treasurer who has executed the deed from denying its validity: *Byam v. Cook*, 21-392.

A sale in gross of tracts larger than forties if assessed to a known owner is not void, and unless it appears from the deed that the owner was unknown that fact will not be presumed: *Smith v. Easton*, 37-584; *Bulkley v. Callanan*, 32-461.

Where a deed shows a sale in parcels it is conclusive, and proof that the sale was actually in gross will not be received: *Rima v. Cowan*, 31-125; *Sibley v. Bullis*, 40-429; *Clark v. Thompson*, 37-536; *Chandler v. Keiler*, 44-371.

The legislature having authorized sales in tracts larger than the smallest government subdivision in certain cases a tax deed is conclusive evidence as to the regularity of the sale in that respect: *Martin v. Cole*, 38-141.

No objection to the validity of the tax title can, after the expiration of five years from the time of sale, be made on the ground that the deed shows upon its face that several tracts of land were sold for a gross sum: *Monk v. Corbin*, 58-503.

As to sales *en masse* see notes to § 1357.

IV. WHAT MUST BE SHOWN TO DEFEAT.

Party must show title: The provision of this section that no person shall question the title acquired under a tax deed without first showing that he or the person under whom he claims had title to the property at the time of the sale, etc., is intended to prevent a stranger from questioning the tax title, but the holder of a prior tax title is not thereby prohibited from questioning the title of a subsequent tax purchaser: *Adams v. Burdick*, 68-666.

It cannot be presumed that by this provision the legislature intended to deprive any person of a remedy for actual fraud existing independently of the statute. While the section gives a remedy only to the owner of the land, it cannot be held to deny a similar remedy to others. If fraud has been committed, and by it some one has been injured, a remedy is provided by the general principles of equity jurisprudence: *Singer Mfg. Co. v. Yerger*, 2 McCrary, 583.

Where defendant claims under a treasurer's deed, upon its face sufficient to convey title, the court cannot consider any evidence of the invalidity of the deed, without finding that plaintiff was holder of the patent title: *Foster v. Ellsworth*, 71-262.

A legal title, though not of record, is sufficient to entitle the holder to defend against a tax title: *Chandler v. Keeler*, 46-526.

No person can question the title acquired by tax deed without first showing that he or the person under whom he claims had title to the property at the time of sale. The title required to be shown is such a one that a party claiming thereunder, if plaintiff, could recover on the strength thereof: *Lockridge v. Daggett*, 54-332.

One who would question the validity of a tax title acquired under a treasurer's deed must show that he has a title or interest in the lands in dispute: *Robinson v. Bailey*, 26 Fed. Rep., 219.

Where a person attacking a tax sale fails to establish a patent title in himself, he cannot have relief against such tax title: *Varnum v. Shuler*, 69-92.

Where plaintiff failed to introduce any evidence tending in any manner to prove that he had title to the land at the time of sale, *held*, that he could not be allowed to prove fraud committed at the sale for the purpose of defeating a tax title: *Pitt's Sons Mfg. Co. v. Beed*, 69-546.

Where the person calling in question the title acquired by a tax deed testifies that he is the owner of the property claimed by him, and this testimony is admitted without objection, it is *prima facie* sufficient to show title to the property authorizing him to question the validity of the deed: *Hintrager v. Kiene*, 62-605.

A patent issued by the state, accompanied by a copy of the patent issued by the United States to the state, duly authenticated by the commissioners of the general land office, *held* sufficient evidence of title to warrant the person claiming such title in questioning the validity of a tax title: *Callanan v. Wayne County*, 73-709.

Proof of title in the party seeking to redeem *held* sufficient: *Bowers v. Hallock*, 71-218.

The word owner, used in an agreed statement of facts, *held* to mean a person having title as required by this section: *Frank v. Arnold*, 73-370.

Payment of tax must be shown: The provisions of this section, that a person questioning the title acquired by the treasurer's tax deed shall first show that all taxes due upon the property have been paid by him or the person under whom he claims title, is applicable as to any taxes remaining unpaid and due to the state or county, but it does not require that the property owner seeking to question a tax title must first pay to the holder of the title all the taxes which the latter has paid, with interest and penalties. It is sufficient in such case that the person seeking to set aside the tax title shall aver his readiness and willingness to pay any amount of taxes which shall be found to have been paid by the holder of the tax title: *Taylor v. Ormsby*, 66-109; *Adams v. Burdick*, 68-666.

A defendant who has a right to demand from plaintiff the payment of taxes which it is claimed are unpaid must raise the objection that it does not appear that all the taxes due upon the property have been paid, by demurrer, or such objection will be deemed waived: *Adams v. Burdick*, 68-666.

It is a sufficient compliance with this provision requiring that a person attacking a tax title shall show that taxes due on the land have been paid, that the party acting for the

plaintiff made a tender of the amount and an offer to pay taxes due on the land in controversy to the county auditor after the treasurer's deed was executed, and in his petition offers to pay whatever amount is found due: *Heaton v. Knight*, 63–686.

Tender of the sum due is equivalent to payment, and if for any reason the amount cannot be ascertained, plaintiff may ask the court to ascertain and determine it, averring his readiness to pay the amount so ascertained. But it is not sufficient to aver that complainant is unable to ascertain the amount due without stating facts showing such inability and without offering any proof upon the subject: *Lawler v. Brett*, 20 Fed. Rep., 219.

The defense of fraud contemplated in the last proviso of this section may be shown to defeat the title whenever it is resisted by the owner, and it is not necessary for the owner to show in such case that the taxes have been paid: *Corbin v. Beebee*, 36–336; *Miller v. Corbin*, 46-150.

Such proviso is not applicable where the party claiming adversely to the tax purchaser seeks to defeat the tax deed on a ground which will render it invalid. It does not apply where the tax title is defeated by an estoppel which would have been equally effective as against any other title: *Bullis v. Noble*, 36–618.

Under the corresponding provisions of the Revision, *held*, that a land owner might set up the fact that there was no assessment in fact without showing payment of the taxes: *Immegart v. Gorgas*, 41–439.

Where a tax title is asserted under a deed which is void, the owner is not required to show that the sum necessary to redeem the land was tendered: *Adams v. Snow*, 65–435.

The purpose of the provision that no person shall question the title acquired by a treasurer's deed without showing that all taxes upon the property have been paid by him or the person under whom he claims is to enforce the payment of taxes and stimulate land owners to discharge the duty imposed on all citizens to pay taxes levied upon their lands. It is not sufficient in the petition attacking a tax title to offer to pay taxes if plaintiff is found to be entitled to redeem. This requirement applies to all action in which it is sought to redeem from a tax sale on the ground that the tax deed was issued without notice of the expiration of the time for redemption: *Maxwell v. Palmer*, 73–595.

Prior payment of taxes: Proof of payment of taxes before the sale will overcome the deed and defeat the purchaser's title: *Gaylord v. Scarff*, 6–179.

In such a case the deed is void: *Patton v. Luther*, 47–236.

If it be shown that the land was in fact redeemed the deed will be void, notwithstanding a failure of the officer to make proper entry of redemption: *Fenton v. Way*, 40–196.

In a particular case, *held*, that the evidence showed that the taxes for which the sale was made had been paid, and the deed was therefore held void: *Harber v. Sexton*, 66–211.

Further to the effect that the deed is void when the taxes have in fact been paid, see notes to § 1353.

Fraud of officer: As to what constitutes fraud of officers and the effect thereof upon the sale, see § 1370 and notes.

As to what constitutes a public sale, see notes to § 1353.

Fraud of purchaser: A purchaser, either in person or by agent, at a sale where the bidders form themselves into a ring and take turns in bidding, is presumed to be a party to such unlawful proceeding, whether it is affirmatively shown that he entered into any agreement sanctioning it or not, and his title will be void: *Kerwer v. Allen*, 31–578.

Under the evidence in a particular case, *held*, that there had been such a combination at the sale as to render it void: *Easton v. Mawkinney*, 37–601.

A tacit understanding among bidders that they will not bid against each other will invalidate a sale: *Johns v. Thomas*, 47–441; *Singer Mfg. Co. v. Yarger*, 2 McCrary, 584; *Frank v. Arnold*, 73–370.

The fact that at the tax sale one person bids in property for two others, indicating the person for whom he bids, in each instance, does not amount to a combination constituting fraud in the absence of any fraudulent agreement between the purchasers for whom the bids are made, nor does the fact that at such sale two different agents made purchases for the same person constitute fraud: *Pearson v. Robinson*, 44–413.

The fact that the principal and his agent are both present at the tax sale bidding in the property will not render the purchase by the agent for the principal invalid: *Jury v. Day*, 54–573.

A tax title will not be affected by the fact that the agent who bought in the property for the principal himself stood in such relation to the property that he could not have purchased it: *Ibid.*

The fact that all the tracts sold at a tax sale were bought in for the full amount of the tract, *held* not to prove combination among the bidders: *Holsey v. Gordon*, 47–693.

It appearing that there were three bidders at a tax sale, and that they did not bid against each other, and this being the only evidence of a fraudulent combination, *held*, that it was not sufficient and that fraud could not be presumed: *Beeson v. Johns*, 59–166.

Facts in a particular case *held* not sufficient to show fraud in procuring a tax title so as to render it inferior to a prior mortgage: *Equitable L. Ins. Co. v. Wright*, 54–606.

Testimony of a witness in an action to defeat a tax sale, that the purchaser by his conduct prevented competition in reference to many pieces of land bid for by him, etc., *held* to be immaterial and properly excluded, there being no offer to connect it with the piece in controversy: *Eldridge v. Kuehl*, 27–160.

Effect of fraud: Where the sale is void for fraud, under the provisions of statute, the owner may set up and show such fraud to defeat the tax title in any action in which the holder thereof relies upon such title: *Corbin v. Beebee*, 36–336.

A ring sale, being voidable but not void, cannot be questioned after the lapse of the five-year period of limitation: *Bullis v. Marsh*, 56–747.

Innocent purchaser not affected with fraud: A tax title which is void for fraud, as provided by statute, will nevertheless be held good in the hands of a purchaser for value without notice of such fraud, the word "void" being construed as voidable: *Van Shaack v. Robbins*, 36-201; *Sibley v. Bullis*, 40-429; *Ellis v. Peck*, 45-112; *Huston v. Markley*, 49-162.

A purchaser in good faith from the tax purchaser, without notice of irregularities, will not be affected by the fact that the sale was in gross, or not publicly made: *Martin v. Ragsdale*, 49-589.

Where assessment has been made and other essential jurisdictional steps have been taken, the sale cannot be regarded as absolutely void although fraudulent, and the innocent purchaser is therefore protected; but where there is a fatal defect, as, for instance, a want of levy, the sale is absolutely void, and a good faith purchaser for value acquires no title. The defects of such a tax title appear of record, and the purchaser acquires no equity as against the land owner: *Ellis v. Peck*, 45-112.

Where the treasurer, in pursuance of a proposition made by a party before the sale opened, to take all lands not sold to others, made out certificates to such party after the sale was completed, there being no bids, such party not being present nor represented, and paying no money, but simply issuing receipts of the railroad company for whose benefit the tax was originally voted, *held*, that there was no sale, and that an innocent purchaser, under a tax deed issued in pursuance of such transaction, would not be protected: *Truesdell v. Green*, 57-215.

Purchaser by quitclaim: A grantee by quitclaim deed, of a party holding a tax title void for fraud, takes subject to all equities against his grantor: *Watson v. Phelps*, 40-482; *Besore v. Dosh*, 43-211, 212; *Springer v. Bartle*, 46-688.

Burden of proof: The holder of title under a fraudulent tax sale, claiming to be a *bona fide* purchaser, has the burden of proof as to that fact: *Light v. West*, 42-138.

Evidence in a particular case *held* sufficient to affect the purchaser of tax title without notice of fraud in the sale, both by circumstances sufficient to put him on his guard and by notice of the agent through whom the purchase was negotiated: *Crumb v. Davis*, 54-25.

The assignee of a certificate of tax sale takes it subject to all the infirmities by which it would have been affected in the hands of the tax purchaser: *Singer Mfg. Co. v. Yarger*, 2 McCrary, 584.

1383. Saving clause. 898. The provisions of this title shall not affect sales heretofore made, or tax deeds given in pursuance of sales made before the taking effect of this code.

Therefore, *held*, that notice as required in § 1379 was not necessary, although the deed was not executed until after the taking effect of the Code: *Robinson v. First Nat. Bank*, 48-354.

SALES WRONGFULLY MADE.

1384. Purchaser indemnified. 899. When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his bondsmen will be liable to the county to the amount of his official bond; or the purchaser, or his assignee, may recover directly of the treasurer, in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen; but the treasurer or his bondsmen shall be liable only for his own or his deputies' acts. [R., § 785; C., '51, § 509.]

This authorizes the purchaser to recover from the county in such cases the amount paid by him with interest, but not the penalties which would have accrued subsequently to the time of sale if the tax had been legal and the sale had not been made: *Corbin v. Davenport*, 9-239; *Coulter v. Mahaska County*, 17-92.

The purchaser at tax sale may thus recover from the county the portion of taxes included in the amount for which the sale is made which could not be rightfully included therein by reason of not having been brought forward by the treasurer: *Parker v. Cochran*, 64-757.

Where a tax title is void, the holder thereof cannot recover from the county taxes paid by him upon the property subsequently to the acquisition of such title: *Scott v. Chickasaw County*, 53-47.

The owner by voluntarily redeeming from such a sale does not become subrogated to the rights of the purchaser against the county: *Morris v. Sioux County*, 42-416, 418.

An action by the purchaser to recover from the county the taxes, interest and costs for which the sale is made in case the sale is void because no taxes were due by reason of mistake in the description, is not barred until five years from the discovery of the mistake: *Storm Lake Bank v. Buena Vista County*, 66-128.

[Sec. 900 was repealed by 16 G. A., ch. 145, enacting a substitute, which is repealed by 17 G. A., ch. 101, the following being enacted in its stead.]

1385. Sale of school lands. 17 G. A., ch. 101, § 1. Whenever any school or university land bought on credit, is sold for taxes, the purchaser at such tax sale, shall only acquire the interest of the original purchase in such lands, and no sale of any such lands for taxes, shall prejudice the rights of the state or the university therein, or preclude the recovery of the purchase money, or the interest due thereon, and in all cases, where real estate is mortgaged or otherwise incumbered to the school or university fund, the interest of the person who holds the fee alone, shall be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale of such incumbered real estate, made for taxes. [R., §§ 810, 811.]

1386. Other public lands. 17 G. A., ch. 101, § 2. The foregoing provisions shall be extended to, and shall include all lands exempted from taxation by the provisions of this title, including lands of the United States and of this state, or of any county, township, city, incorporated town or school district, including agricultural college lands, swamp lands, burial grounds, fair grounds, public squares, public groves, or public ornamental grounds, and to any legal or equitable estate therein held, possessed or claimed for any public purpose, and no assessment or taxation of such lands, nor the payment of any such taxes, by any person, or the sale and conveyance for taxes of any such lands, shall in any manner affect the right or title of the public therein, or prejudice the public thereto, nor shall any such payment or sale, confer upon the purchaser, or person who pays such taxes, any right or interest in such land, adverse or prejudicial to the public right, title or ownership thereto; *provided*, that this section shall not in any manner affect or prejudice the rights of any person or party to any action now pending, which was commenced prior to the fourth day of July, 1876.

As against a mortgage to the school or university fund, only the interest of the person holding the fee-title can be sold for taxes: *Crum v. Cotting*, 22-411.

Such purchaser takes subject to the mortgage: *Jasper County v. Rogers*, 17-254.

And acquires only the right to redeem from such mortgage: *State v. Shaw*, 28-67, 76.

The state purchasing at foreclosure sale under such mortgage takes free from the lien of delinquent taxes, and a conveyance from it passes title to the purchaser discharged from such liens: *Helphrey v. Ross*, 19-40; *Miller v. Gregg*, 26-75.

Any purchaser at a foreclosure sale under such mortgage, equally with the state, takes free from the lien of delinquent taxes: *Lovelace v. Berryhill*, 36-379.

A purchaser at tax sale of premises covered by a school-fund mortgage has a lien thereon junior to that of the mortgage, and in an action to foreclose the school-fund mortgage must be made a party or his right of redemption will not be extinguished: *Ayres v. Adair County*, 61-728.

Where real estate is mortgaged to the school fund, the interest of the person who holds the fee shall alone be sold for the taxes, and the lien or interest of the school fund is not affected by such sale: *Winnebago County v. Brones*, 68-682.

A mortgage designed to be a security to the university fund is within the provisions of the statute relating to the sales of land in such cases, whether made directly to the institution or to its proper officer: *Lovelace v. Berryhill*, 36-379.

Where the surety of a note given for the purchase of school lands, who has a mortgage thereon for security, buys in the land at foreclosure sale under such mortgage, he acquires a title free from claims of a purchaser at the tax sale: *La Rue v. King*, 74-288.

1387. Land not subject to taxation. 901. Whenever it shall be made to appear to the satisfaction of the county treasurer, either before the execution of a deed for real property sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of sales, that the same was erroneously sold, and such entry shall be evidence of the fact therein stated. And in such cases the purchase money shall be refunded to the purchaser as provided by this chapter. [R., § 789.]

LIMITATION OF ACTIONS.

1388. Period. 902. No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five

years after the treasurer's deed is executed and recorded as above provided; *provided*, that where the owner of such real property sold as aforesaid, shall, at the time of such sale be a minor or insane, or convict in the penitentiary, five years after such disability shall be removed shall be allowed such person, his heirs, or legal representatives to bring their action. [R., § 790.]

What statute applicable: A tax deed having been executed while the Revision was in force, *held*, that the provisions of the Revision and not of the Code of '73 should determine when the period of limitation against the tax title commenced to run: *Bailey v. Howard*, 65-290.

Constitutionality: This section is not unconstitutional: *Barrett v. Love*, 48-103.

In what cases applicable: The provision as to limitation of actions with reference to tax titles applies to a sale which is simply voidable but not void, and such sale cannot be questioned after the lapse of five years: *Bullis v. Marsh*, 56-747.

After the lapse of five years no objection to the validity of the tax title can be made on the ground that the deed shows upon its face that several tracts of land were sold for a gross sum: *Ibid.; Monk v. Corbin*, 58-503.

If the failure of the treasurer to make proper entry of the years for which taxes are delinquent is not taken advantage of, and a deed issues, then the statute of limitations begins to run in favor of such deed, and after five years it cannot be questioned on account of such defect: *Guthrie v. Harker*, 27 Fed. Rep., 586.

The statutory provision above referred to applies only to cases where real property has been "sold for the non-payment of taxes," and therefore the limitation does not run where there has been actually no sale whatever: *Case v. Albee*, 28-277.

Nor is the provision applicable where the taxes for which the sale was made had in fact been paid: *Patton v. Luther*, 47-236.

Nor where the tax title is void by reason of there having been no assessment, levy or sale: *Early v. Whittingham*, 43-162; *Nichols v. McGlathery*, 42-189.

But the fact that the deed shows on its face irregularities in the manner of assessment, levy or sale will not prevent the limitation from running against it: *Thomas v. Stickle*, 32-71; *Douglass v. Tullock*, 34-262; *Peirce v. Weare*, 41-378; *Bullis v. Marsh*, 56-747.

The limitation applies to an action by the holder of the deed as well as to one brought by the original owner of the land: *Brown v. Painter*, 38-456; *Laverty v. Sexton*, 41-435; *Barrett v. Love*, 48-103.

It is not intended by this section to secure to the owner five years within which to attack the tax title, and the holder of the tax deed may, within that time, institute proceedings to quiet his title against such owner: *Stevenson v. Bonesteel*, 30-286.

An action by a tax purchaser against the owner to recover taxes paid by the former upon his tax title is barred in five years from such payment: *Brown v. Painter*, 44-368; *Hamilton v. Dubuque*, 50-213.

The fact that the deed was executed and recorded more than five years before the commencement of the action does not constitute a valid objection to the introduction of the deed in evidence. Whether the party gains possession under such deed depends upon whether or not the owner of the patent title was in possession at the expiration of five years from the execution of the deed: *Monk v. Corbin*, 58-503.

Where the rights of the tax purchaser are barred he cannot assert any claim thereunder to have his tax title established as paramount to any other title, nor can he be permitted to redeem from a foreclosure sale: *La Rue v. King*, 74-288.

Where there is want of power to make a sale it is void and the limitation of this section does not apply, but where the sale is simply voidable it cannot be questioned after five years from the recording of the deed. A sale for taxes of past years not properly carried forward on the tax books is of the latter class: *Griffin v. Bruce*, 73-126.

Where the tax deed is improperly executed by reason of the proof of service of notice not being such as is required by statute by reason of a mere defect in such proof, the service of notice having been actually made and a deed issued in pursuance of such notice, the holder of the tax title is protected after the expiration of five years from the execution of such deed: *Trulock v. Bentley*, 67-602; *Rice v. Haddock*, 70-318; *Bolin v. Francis*, 72-619.

But where there has been no notice the deed is void and the limitation does not validate it: *Wilson v. Russell*, 73-395; *Slyfield v. Healy*, 32 Fed. Rep., 2.

Where action to recover property claimed by a tax purchaser under an invalid sale was brought before the expiration of the period of redemption, *held*, that the filing of an amendment in such action after the period of limitation had elapsed for the purpose of alleging tender of taxes paid by defendant would not render the action subject to the bar of the statute: *Barke v. Early*, 72-273.

In mandamus: The right of action by *mandamus* to compel the execution of a deed is barred in three years, and such period commences to run from the time when the holder of the certificate of purchase might, by proper steps on his part, become entitled to the execution of the deed. Therefore, *held*, that where by ordinance of a city a deed for property sold for municipal taxes might have been executed at a certain time by the giving of ninety days' notice, the failure to give such notice would not prevent the statutory period from commencing to run at the time when, by proper notice, the deed might have been procured: *Hintrager v. Traut*, 69-746.

When period commences to run: Under the Revision, which limited the action to five years from "the date of the sale," *held*, that the limitation did not commence to run until the sale was complete, that is, until the delivery and recording of the tax deed: *Eldridge v. Kuehl*, 27-160; *Henderson v. Oliver*, 28-20; *McCready v. Sexton*, 29-356, 373.

Under that provision the action of the purchaser for the recovery of the land was barred after five years from the time when the right of the purchaser to a deed became perfect: *Thornton v. Jones*, 47–397.

Also *held*, under that provision, that the purchaser could not, by his own act in failing to take a deed when he became entitled thereto, prevent the limitation commencing to run against him: *Hintrager v. Hennessy*, 46–600.

Under the provisions of the Code of '51 as to the limitation of actions to foreclose a tax deed, *held*, that the right of action accrued six months after the purchaser became entitled to his deed under the sale: *Atkins v. Paige*, 50–666.

The change in the language of this section from that of the corresponding section of the Revision in regard to the limitation of action in such cases was simply the adoption of the judicial construction put upon the law as it was contained in the Revision: *Griffith's Ex'r v. Carter*, 64–193.

Where it does not appear that the deed has been recorded the statute does not begin to run. The burden of showing the recording of the deed so that the statute has begun to run devolves upon the party relying upon the statutory bar: *Scroggs v. Garver*, 69–680.

The statute of limitations begins to run against the tax purchaser from the time he might have been entitled to a deed if he had pursued the course prescribed by statute: *La Rue v. King*, 74–288.

Although the limitation as against the holder of a tax deed commences to run from the time he becomes entitled to his deed, the same rule does not apply as against the owner, and he may assert his right to the land by taking possession within five years from the recording of the deed: *Griffith's Ex'r v. Carter*, 64–193; *Cassady v. Sapp*, 64–203.

Until some one is in actual possession of the land the purchaser at a tax sale is not required to bring an action to prove his right of possession. If the owner of the patent title takes possession within five years after the tax deed is executed and recorded, then if the holder of the tax title fails to bring action within five years from such time, his right of action is barred: *Adams v. Griffin*, 66–125.

Where the tax purchaser took his deed in 1876, but such deed was improperly issued for the reason that due proof of service of notice of expiration of the time of redemption had not been filed, and afterward, in 1883, such proof was filed, and in 1884 a deed was issued, and a few days thereafter the holder of the patent title took possession of the property which had before that time been unoccupied, *held*, that an action by the holder of the tax title to quiet his title being brought within five years from the filing of proper proofs, and the issuance of the second deed, was not barred: *Ibid.*

Where action was commenced by the holder of a tax title within five years after his deed was recorded, but more than five years after he was entitled to receive his deed, and after it was actually executed, and it appeared that defendant went into possession within five years after plaintiff was entitled to take it, *held*, that the action was not barred. The rule established is, that if the validity of a tax title is disputed within five years from the date when the treasurer's deed might have been taken, the one claiming thereunder must commence his action for the recovery of the land within that period. But this rule can have no application to a case where the validity of the title is disputed for the first time after the expiration of that period: *Francis v. Griffin*, 72–23.

The limitation commences to run at the execution and recording of the tax deed, irrespective of the question of possession, and if at that time the property is unoccupied, and during the five years the owner of the fee takes actual possession and holds it until the expiration of the period of limitation, the right of the holder of the tax title to recover under his deed is completely barred: *Barrett v. Love*, 48–103; *Barrett v. Holmes*, 102 U. S., 651.

But if the land remains unoccupied until the expiration of the period of limitation, the title of the holder of the tax deed becomes complete, and an action by him against the original owner taking possession after that time is not barred under the statute: *Moingona Coal Co. v. Blair*, 51–447; *Lewis v. Soule*, 52–11; *Bullis v. Marsh*, 56–747; *Goslee v. Tearney*, 52–455.

The holder of a tax deed to unoccupied land is presumed to have constructive possession thereof: *Rice v. Haddock*, 70–318.

And if the owner of the patent title does not, either by taking actual possession or by bringing action, question the validity of the tax deed within the period of limitation, the bar of the statute becomes complete in favor of the holder of the tax deed, and possession taken by the former owner after the period of limitation has expired will be ineffectual: *Moingona Coal Co. v. Blair*, 51–447; *Lewis v. Soule*, 52–11; *Goslee v. Tearney*, 52–455; *Zent v. Picken*, 54–535; *Maxwell v. Hunter*, 65–121.

Possession of land necessary to bar an action under a tax title is not required to be of the adverse, hostile and exclusive character required under the general statute of limitations. Its validity depends not so much on the extent and character of the improvements of the land as on the possession which would enable the holder of the tax title to commence his action for the land: *Griffith's Ex'r v. Carter*, 64–193.

If the tax deed is absolutely void it works no change in the constructive possession which is considered to be in the holder of the patent title, and after five years have elapsed without the taking of possession, such void deed is barred by the statute of limitations and no rights can be asserted thereunder: *Patton v. Luther*, 47–236.

Where the original owner has been continuously in possession of property by reason of the exercise of such ownership thereover as the nature of the property admits of, no acts of control on the part of the tax purchaser, such as taking wood therefrom and the like, will constitute adverse possession in him: *Brett v. Farr*, 66–684.

In such cases the fact that by diligence or otherwise the tax purchaser has succeeded in

paying the taxes on the property subsequently to the purchase before the owner has been able to do so will not constitute evidence of possession so as to support a plea of limitation under the statute: *Ibid.*

The holder of a tax deed has no occasion to take any action for the establishment of his right in the property until such right is disputed: *Francis v. Griffin*, 72–23.

As the right to redeem is not cut off until the service of notice required by § 1379, the period of limitation provided by this section does not commence to run, although the deed has been issued without the requirement as to notice being complied with: *Slyfield v. Barnum*, 71–245.

Quieting title: After the limitation has run against the tax title the original owner, remaining in possession, may maintain an action against the holder of such title to remove the cloud of the tax deed and quiet the title. Such action is not barred by the limitation provided in the statute: *Peck v. Sexton*, 41–566; *Laverty v. Sexton*, 41–435; *Wallace v. Sexton*, 44–257; *Patton v. Luther*, 47–236; *Tabler v. Callanan*, 49–362.

Where a party in possession under tax deed asks to have his title quieted against a party claiming adversely the latter cannot rely upon the limitation to bar the action: *Wright v. Lacy*, 52–248.

Where plaintiff, in possession under a tax deed more than five years old, brought action to quiet title against a defendant claiming under the patent title, *held*, that defendant in such action was barred by the statute of limitation from attacking the deed as fully as if it were attacking such deed in a direct action: *Shawler v. Johnson*, 52–472.

An action to quiet title as against a person holding under a tax deed on the ground that such deed is void, the holder of the title being in possession, cannot be maintained after the five years have expired: *Jeffrey v. Brokaw*, 35–505.

Where plaintiff, claiming under a tax title, brought action against the original owner to quiet his title, and the original owner, being then in possession, pleaded the limitation and also asked affirmative relief against the plaintiff's title, *held*, that the fact that defendant was barred affirmative relief would not prevent his defeating plaintiff's action by showing that plaintiff's title was void, and he was allowed thereupon to have his title quieted as against the plaintiff: *Miller v. Corbin*, 46–150.

In an action to quiet title, where defendant sets up a tax title, plaintiff may set up the bar of the statute: *Keokuk & D. M. R. Co. v. Lindley*, 48–11.

Where a licensee bought in a tax title more than five years after the execution of the tax deed, *held*, that as the possession of the licensee was that of his licensor, the holder of the patent title, and as the owner had thus been in possession more than five years, the tax title was barred and the licensee aquired no rights thereunder: *Ibid.*

A subsequent purchaser from the holder of a tax deed whose rights are barred, taking with notice of the possession of the owner, is bound thereby: *Thode v. Spofford*, 65–294.

The purchaser from a minor of land sold for taxes may avail himself of the exception of the statute limiting action to property sold at tax sale to five years from the execution and recording of the tax deed in favor of the minor, but such purchaser must bring his action within five years from the date of his purchase: *McCaughan v. Tatman*, 53–508.

But neither this extension nor the fact that the minor has a year after the removal of the disability in which to redeem from the sale will operate in favor of a person claiming under the tax title as against the minor, and such person must bring his action within five years as specified in the statute: *Ibid.*

Strangers to the title: The limitation as to the right of action applies only as between the tax purchaser and the owner at the time of sale or one deriving title from such owner. When a person not the owner and having mere color of title comes into possession, the holder of the tax title may have the same time as the holder of any other valid title to test the right of the occupant: *Lockridge v. Daggett*, 47–679; *S. C.*, 54–332.

A plaintiff who has failed to establish a competent title in himself cannot dispute the tax title, and have his title quieted upon the ground that the right of action of the holder of the tax title has become barred: *Varnum v. Shuler*, 69–92.

1389. Officers de facto. 903. In all suits and controversies involving the question of title to real property held under and by virtue of a treasurer's deed, all acts of assessors, treasurers, auditors, supervisors, and other officers *de facto* shall be deemed and construed to be of the same validity as acts of officers *de jure*. [R., § 786.]

See *Peirce v. Weare*, 41–387.

1390. When assessed to wrong person. 904. No sale of real property for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner, if the said property be in other respects sufficiently described. [R., § 787.]

1391. Certified copies of records. 905. The books and records belonging to the offices of the county auditor and county treasurer, or copies thereof, properly certified, shall be deemed sufficient evidence to prove the sale of any real property for taxes, the redemption thereof, or the payment of taxes thereon. [R., § 788.]

The stub of a redemption certificate is admissible in evidence under this section: *Ellsworth v. Low*, 62–178.

PEDDLERS.

1392. Amount of tax. 906; 15 G. A., ch. 62. A tax for state purposes shall be levied upon peddlers of merchandise not manufactured in this state, for a license to peddle throughout the state for one year as follows: upon each peddler of watches or jewelry, or either of them, thirty dollars; upon each peddler of clocks, fifty dollars; upon each peddler of dry goods, fancy articles, notions, or patent medicines, as follows: upon each peddler thereof, ten dollars; upon each peddler who pursues his occupation with a vehicle drawn by one animal, twenty-five dollars; if drawn by two and less than four, fifty dollars; if drawn by four or more animals, seventy-five dollars; *provided, however*, that nothing in this section shall apply to wholesale dealers in any of the above enumerated articles, who use wagons for the delivery of goods sold at wholesale prices and by the box or package. [R., § 791; C., '51, § 510.]

1393. License. 907. Such license may be obtained from the auditor of the county upon paying the proper tax to the treasurer thereof, and may issue for a less period than one year for the proportionate amount of tax, and all such licenses shall state the date of the expiration of the same; and any person so peddling without a license, or after the expiration of his license, is guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods or not. Upon conviction of peddling without a license as aforesaid, the offender shall forfeit and pay to the county treasurer, in addition to the fine imposed upon him for the misdemeanor, double the amount of license for one year as fixed by section nine hundred and six of this chapter [§ 1392]. [R., § 792; C., '51, §§ 511, 512.]

PUBLIC SHOWS.

1394. License to exhibit in county outside of city. 16 G. A., ch. 131, § 1. Before any person can exhibit any traveling show or circus, not prohibited by law, or show any natural or artificial curiosity or exhibition of horsemanship in a circus or otherwise, for any price, gain, or reward, in any county outside of the limits of any city or incorporated town, he shall obtain a license therefor from the county auditor, upon the payment to the county treasurer of such sum as may be fixed by the board of supervisors, not exceeding one hundred dollars for each and every place in the county at which such show or circus may exhibit.

1395. Penalty for exhibiting without license. 16 G. A., ch. 131, § 2. If any person shall exhibit any show above contemplated without having first obtained such license, he shall be deemed guilty of a misdemeanor and punished accordingly, and shall forfeit and pay double the amount fixed for such license, for the use and benefit of the school fund.

CHAPTER 3.

PROVISIONS FOR THE SECURITY OF THE REVENUE.

1396. County responsible to state. 908. Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double, or erroneous assessments, as hereinafter provided. [R., § 793.]

1397. Defaulting treasurer. 909. If any county treasurer prove to be a defaulter to any amount of state revenue, such amount shall be made up to

the state within the next three coming years by additional levies, in such manner as to annual amounts as the board of supervisors may direct. In such cases the county can have recourse to the official bond of the treasurer for indemnity. [R., § 794.]

Whether the state may have recourse to the treasurer's bond, *quœre: State v. Henderson*, 40-242.

1398. Interest on warrants. 910. When interest is due and allowed by the treasurer of any county, or the state treasurer, on the redemption of auditor's warrants, or county warrants, the same shall be receipted on the warrants by the holder of the same, with the date of the payment, and no interest shall be allowed by the auditor of state or board of supervisors except such as is thus receipted. [R., § 795.]

1399. Discounting warrants. 911. If the state treasurer, or any county treasurer, discount auditor's warrants at less than the amount due thereon, either directly or indirectly, or through third persons, they shall be liable to a fine not exceeding one thousand dollars, to be prosecuted as other fines. [R., § 796.]

The offense defined in this section and the following is different from that under § 5214. These sections are applicable to cases where no loss to the state or county occurs: *State v. Brandt*, 41-593, 612.

1400. Loaning or depositing public funds. 912; 17 G. A., ch. 155. County treasurers shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in their hands, except that whenever permitted by the boards of supervisors of their respective counties, by resolution entered of record, they may deposit any such funds in any bank or banks chartered by the laws of the state, or any national or private banks in this state, to any amount not exceeding an amount to be fixed by such resolution; *providing*, that before any such deposit is made the bank in which it is proposed to make the same, shall first file a bond with sureties to be approved by the treasurer and the board of supervisors in double the maximum amount permitted to be deposited as aforesaid, and conditioned to hold the treasurer making the deposits of the county, harmless from all loss by reason of such deposit or deposits. Said bond shall be filed with the county auditor, and action may be brought thereon either by said treasurer or the county, as the board of supervisors may elect. And the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney-general in the name of the state. But nothing done under the provisions of this act shall alter or affect the liability of the treasurer or the securities on his official bonds. [R., § 797.]

Under this section a county treasurer is prohibited from depositing county funds in a bank, and where such deposit was made and the funds lost by the failure of the bank the treasurer was held liable therefor. (Decided before the amendment of this section): *Lowry v. Polk County*, 51-50.

Where a bond is given under this section and allowed to stand it constitutes security not merely for the first deposit, but for other deposits which may subsequently be made: *Poor v. Merrill*, 68-436.

Demand upon the person in charge of the bank where the deposit is made is sufficient to show a breach of the bond: *Ibid.*

Where a certificate of deposit is issued for the repayment of the deposit when presented, but no objection to the payment of the money is made on the ground of the failure to return such certificate, the fact that it is not returned will not defeat the right to recover, it being afterwards surrendered: *Ibid.*

PAYMENTS BY COUNTY TREASURER.

1401. Settlement with treasurer. 913. At their regular meetings in January and June of each year, the board of supervisors shall make a full and complete settlement with the county treasurer, and they shall make and certify to the auditor of state, all credits to the treasurer for double or erroneous

assessments, and unavailable taxes, also all dues for state revenue, interest, or delinquent taxes, sales of land, peddler's licenses, and other dues, if any; also the amounts collected for these several items, and revenues still delinquent, each year to itself. Said reports shall be forwarded by mail. [R., § 798; C., '51, §§ 157-8.]

This settlement with the county is conclusive upon the treasurer and his sureties, and they cannot show that it was fraudulent for the purpose of showing that the defalcation subsequently appearing had really occurred before such settlement: *Boone County v. Jones*, 54-699. See, also, notes to § 1156.

1402. Payments to state treasurer. 914; 17 G. A., ch. 122, § 1; 20 G. A., ch. 194, § 5. The treasurer of each county shall, on or before the fifteenth day of each month, prepare a sworn statement of the amount of money in his hands on the first day of that month belonging to the state treasury, and forward the same by mail to the auditor of state, and he shall, each year, unless otherwise directed by the state auditor, pay into the state treasury, on or before the fifteenth day of April, all the money due the state remaining in his hands on the first day of April, and on or before the fifteenth day of December, all the money due the state remaining in his hands on the tenth day of December; he shall also, at any time when directed by the auditor of state, forthwith pay into the state treasury, or treasury of any county, any or all the money due the state and remaining in his hands. In case the treasurer of any county shall fail to prepare and forward the statement required in this section, he shall forfeit and pay for each and every failure a sum not less than one hundred nor more than five hundred dollars, to be recovered in an action brought in the name of the state auditor, against him and his bondsmen, in any court of record. [R., § 799.]

[By special provision the change made in this section by 20 G. A., ch. 194, took effect on the second Monday of November, 1884.]

[Sec. 915 is repealed by 17 G. A., ch. 122, § 2.]

1403. Account with state. 916. The state auditor shall make and transmit to each county auditor, on the first day of May of each year, a statement of the county treasurer's account with the state treasurer, which account shall be submitted by said auditor to the board of supervisors at their next meeting, and if they find the same to be incorrect in any particular, they shall forthwith certify the facts in relation to the same to the auditor of state. [R., § 801.]

1404. Settlement with county treasurer. 917. When a county treasurer goes out of office, he shall make a full and complete settlement with the board of supervisors, and deliver up all books, papers, moneys, and all other property appertaining to the office, to his successor, taking his receipt therefor. The board of supervisors shall make a statement, so far as state dues are concerned, to the auditor of state, showing all charges against the treasurer during his term of office, and all credits made, the delinquent taxes and other unfinished business charged over to his successor, and the amount of money paid over to his successor, showing to what year and to what account the amount so paid over belongs. They shall also see that the books of the treasurer are correctly balanced before passing into the possession and control of the treasurer elect. [R., § 802.]

The board of supervisors may accept from a treasurer who is in default a promissory note for the amount of his indebtedness; and such note will not be void for want of consideration: *Sac County v. Hobbs*, 72-69.

1405. Each fund kept separate. 918. The state treasurer shall keep each distinct fund coming into his possession as public money, in a separate apartment of his safe, and, at each quarterly settlement with the state auditor, he shall count each fund in the presence of the auditor to see if the same agrees

with the balance found on the books. The total amount acknowledged to belong to each fund shall be exhibited before the count. County treasurers shall account with such persons as the board of supervisors may direct in like manner, and a report of such accounting shall be made to the board at their next meeting, by the person so appointed by them. [R., § 804.]

1406. Penalty for official delinquency. 919. If any county auditor, or county treasurer, or other officer shall neglect or refuse to perform any act or duty specifically required of him by any provision of this title, such officer shall be deemed guilty of a misdemeanor and indicted therefor; and, being found guilty, shall be fined in any sum not exceeding one thousand dollars, for the payment whereof his bondsmen shall also be liable; and he and his bondsmen shall also be liable to an action on his official bond for the damages sustained by any person through such neglect or refusal. [R., §§ 744, 749, 805; 12 G. A., ch. 75, § 3.]

1407. Duty of auditor. 16 G. A., ch. 113, § 1. The auditor of the state is hereby authorized and empowered to draw his warrant on the state treasury, in favor of any county in this state for the amount of any excess in any fund or tax due the state from said county excepting the state taxes.

1408. Refund excess to county. 16 G. A., ch. 113, § 2. Whenever, it shall appear from the books in his office, that there is a balance due any county, and in excess of any revenue due the state, except state taxes, it shall be his duty to draw his warrant for such excess, in favor of the county entitled thereto, and forward the said warrant by mail or otherwise, to the county auditor of the county to which said money belongs, and charge the amount so sent to the said county.

1409. Duty of county auditor. 16 G. A., ch. 113, § 3. The county auditor to whom said warrant is sent, shall immediately upon receipt thereof deliver the same to the county treasurer of his county and charge the amount of the warrant to said county treasurer in the same manner as any other fund is charged on the books of his office, and the county auditor shall also, on receipt of said warrant from the auditor of state acknowledge receipt of the amount of said warrant to said state auditor.

TITLE VII.

OF HIGHWAYS, FERRIES AND BRIDGES.

CHAPTER 1.

OF ESTABLISHING HIGHWAYS.

1410. Jurisdiction over. 920. The board of supervisors has the general supervision over the highways in the county, with power to establish and change them as herein provided, and to see that the laws in relation to them are carried into effect. [R., § 819; C., '51, § 514.]

[The board of supervisors is given power to establish highways along streams where it is practicable to thus avoid bridging such stream: See §§ 404–406.]

Easement: A highway is nothing but an easement, comprehending the right of all the individuals in the community to pass and repass, with the incidental right of the public to do all acts to keep it in repair. The fee remains in the original owner: *Dubuque v. Maloney*, 9–450; *Overman v. May*, 35–89.

The prescriptive right to use material to keep the road in repair does not include the right to take material from the right of way for the repair of other public highways. Therefore, *held*, that the prescriptive right to span a river with a bridge, and use such bridge, did not include the right to quarry stone under the bed of the river under such bridge for general use in the repair of highways: *Overman v. May*, 35–89.

Nothing passes as incident to the grant of an easement but what is requisite to its fair and reasonable enjoyment. Therefore, where a party dedicating a street reserved the right to construct a mill-race across it, *held*, that the reservation should be construed in the same way as the grant of a like privilege, and that the party was under obligation to restore the street, as nearly as possible, to its former condition by the construction and maintenance of a bridge across it: *Waterloo v. Union Mill Co.*, 59–437.

Where the highway becomes impassable the public has the right to go upon adjoining premises for the purpose of passing, and such act will not constitute trespass upon such adjoining premises: *Irwin v. Yeagar*, 74–174.

What constitutes: Something more than the mere right to use land for the purpose of travel is necessary to constitute a highway. It must be traveled or at least capable of use in that way to make it such: *State v. Shinkle*, 40–131.

By § 1515, bridges are a part of the public highway, and are therefore under the general supervision of the board of supervisors. The board cannot be compelled by *mandamus* to build, that being discretionary: *State ex rel. v. Morris*, 43–192.

Public highways: It is the duty of the legislature to establish public highways for the passage and intercourse of the people of the state. It may properly provide for the establishment of such highways as are necessary to enable every citizen to discharge his duties to the state, have access to market, school, church, etc., and in that case it may properly provide for the taking of private property, although in a particular case but one person is primarily or principally benefited: *Bankhead v. Brown*, 25–540.

A citizen has the right to have access to the public roads, and the public has the right to have access to him, and a road which is the only one between a citizen and the public may properly be deemed a public road, although he is the only person reached: *Johnson v. Board of Supervisors*, 61–89; *Pagels v. Oaks*, 64–198.

Private ways: A former statute (11 G. A., ch. 127), providing for the establishment of roads which were denominated private, to be established on the petition of the applicant alone, and at his cost, and which the public was not bound to work or keep in repair, and over which the party securing their establishment might exercise exclusive control, *held* unconstitutional as authorizing the taking of private property for a private and not a public use: *Bankhead v. Brown*, 25–540.

Jurisdiction: All the jurisdiction in relation to roads and highways formerly exercised by county judges is now conferred upon the board of supervisors: *Kennedy v. Dubuque, C. & M. R. Co.*, 34–421.

Under particular statutes, *held*, that the power to establish a highway within the corporate limits of a city existed in the same tribunal which had authority to establish highways outside of such corporate limits: *Knowles v. Muscatine*, 20–248.

A county has power to grade and improve its public roads, and issue warrants in payment therefor: *Long v. Boone County*, 32–181.

Boards of supervisors have no authority to establish highways within the corporate limits

of cities or incorporated towns: *Gallaher v. Head*, 72–173.

Dedication: A highway may exist in this state arising from dedication and prescription, notwithstanding the provisions of the statute for the establishment of highways: *Mosier v. Vincent*, 34–478; *Baldwin v. Herbst*, 54–168.

A highway may be established by the dedication of land for that purpose and its acceptance by the public: *Casey v. Tama County*, 75–655

Where the dedication of right of way for a highway is claimed to have been made by the land owner, proof of use may be competent to show an acceptance, and the lapse of any particular period of time is unnecessary if the evidence is otherwise sufficient to show an intention to dedicate. If the owner of land knows for a series of years that the public are using and making a road thereon as a highway and expending money in its improvement, and he acquiesces in what they are doing, such facts will be considered evidence tending to show actual dedication: *State v. Birmingham*, 74–407.

1411. Width. 921. Highways hereafter established must be sixty-six feet in width, unless otherwise directed; but the board of supervisors may, for good reasons, fix a different width, not less than forty feet, and they may be increased or diminished within the limits aforesaid, altered in direction, or discontinued, by pursuing substantially the steps herein prescribed for opening a new highway. [R., §§ 820, 821; C., '51, §§ 515, 516.]

The auditor has no power to establish a highway of less width than sixty-six feet, and if he attempt to do so the board of supervisors may set aside his action: *State v. Wagner*, 45–482.

Although the road is established by the auditor, and is less than sixty-six feet in width, if the record of his action is read over to and approved by the board, such action becomes substantially the action of the board, and is proper: *State v. Barlow*, 61–572.

The fact that the road as established is wider than authorized does not render the order establishing it void. It is an irregularity which cannot be taken advantage of in a collateral proceeding: *Knowles v. Muscatine*, 20–248.

The statute (§ 1947) authorizing street railways to extend their lines beyond the city limits over highways which are of the width of one hundred feet or more contemplates and authorizes the establishment of highways more than sixty-six feet in width: *Linn County v. Hewitt*, 55–505.

A road supervisor may be enjoined from erecting a bridge at the side of the highway where it will cause injury to a hedge of an adjoining land owner, and render necessary the destruction of shade trees in front of his premises, when it might, with some additional expense, be constructed in the middle of the highway without causing such damage: *Quinton v. Burton*, 61–471.

There is no presumption that a highway originating by prescription is of the width required in case of highways laid out under the statute. The width of such highway is a question of fact for the jury, to be determined from the facts and circumstances. The court cannot, as a matter of law, say that a road acquired by prescription or use is of any particular width beyond such portion as is actually used by the public: *Davis v. Clinton*, 58–389.

Where, by agreement constituting dedication of a highway to public use, it was stipulated that the road should be established as it had been used, and the width as thus used was found to be twenty-six feet, *held*, that the highway as established by the dedication was properly determined to be of that width: *Hugh v. Haigh*, 69–382.

Where an order of the county court establishing a highway was based upon the plat of the commissioner, upon which plat it was described as thirty-three feet in width, *held*, that it must be presumed to have been intended to establish a highway of that width although not so specified in the order of establishment: *State v. Schilb*, 47–611.

As to width of bridges, see § 1515 and notes.

1412. Petition. 922. Any person desiring the establishment, vacation, or alteration of a highway, shall file in the auditor's office of the proper county, a petition in substance as follows: To the board of supervisors of —— county. The undersigned asks that a highway, commencing at ——, and running thence —— and terminating at —— be established, vacated, or altered (as the case may be).

Before a highway can be lawfully established a petition asking its establishment must be presented to the board of supervisors. Until this is done the board have no jurisdiction or power to establish a highway, and if it does so its action is absolutely void. And where the petition asked for the opening and reestablishment of a highway, *held*, that proceedings thereunder to establish were not authorized. Also *held*, that in such cases the county could not be estopped by the acts of its auditor, and the board, from setting up the illegality of the proceeding: *Curtis v. Pocahontas County*, 72–151.

The petition for a highway need not follow the precise language of the statute: *McCollister v. Shuey*, 24–362.

If it asks for the appointment of a commissioner to locate a highway, etc., instead of for the establishment of the highway, it is not so materially defective as to invalidate the proceedings: *State v. Pitman*, 38–252.

Where the notice was that a petition would be presented for a new road, and the petition

asked that a commissioner be appointed and the necessary steps taken to open the road, *held*, that there was a substantial compliance with the statute: *Stevens v. Board of Supervisors*, 41–341.

The petition need not specify the width of the proposed highway. Such specification is surplusage: *State v. Wagner*, 45–482.

A petition will not be insufficient to give the board jurisdiction merely because it runs to the county auditor, who is the clerk of the board, instead of to the board itself, or because it does not expressly ask for the establishment of the road, when its object is abundantly evident, in that it states that the road is needed and asks for the appointment of a commissioner: *State v. Barlow*, 61–572.

Under former statutes requiring that the petition for the establishment of a highway should be signed by at least twelve householders of the county, *held*, that the absence of an allegation that the petitioners were householders, or of are cital of such fact in the record, was not a fatal defect, if the road was otherwise a legal one: *Keyes v. Tait*, 19–123.

A proceeding to establish a public highway being in its nature public and for the benefit of the whole public, a contract by the party who has commenced such proceeding, for its abandonment, is contrary to public policy and void: *Jacobs v. Tobiason*, 65–245.

1413. Bond. 923. Before filing such petition the auditor shall require the petitioner to file in his office a bond, with sureties to be approved by such auditor, conditioned that all expenses growing out of the application will be paid by the obligors in case the contemplated highway is not finally established, altered, or vacated, as asked in the petition. [R., § 826; C., '51, § 521.]

A failure to require the bond here mentioned will not invalidate the proceedings: *Woolsey v. Board of Supervisors*, 32–130.

If the auditor allows the petition to be filed without a bond, and proceeds to act upon it, his action cannot be said to be without jurisdiction, the provision in regard to a bond being simply directory: *State v. Barlow*, 61–572.

1414. Commissioner. 924. If satisfied that the foregoing prerequisites have been complied with, the auditor shall appoint some suitable and disinterested elector of the county a commissioner to examine into the expediency of the proposed highway, alteration, or vacation thereof, and report accordingly. [R., § 828; C., '51, § 523.]

DUTY OF COMMISSIONER.

1415. What to consider. 925; 18 G. A., ch. 50. The commissioner is not confined to the precise matter of the petition, but may inquire and determine whether that or any highway in the vicinity, answering the same purpose and in substance the same, be required; but such highway must not be established through any burying ground which is exempt from execution; nor through any garden, orchard, or ornamental ground contiguous to any dwelling-house, nor so as to cause the removal of any building without the consent of the owner. [R., § 830; C., '51, § 525; 12 G. A., ch. 47.]

Under the corresponding section of Code of 1851, *held*, that the commissioner had no authority to lay out a highway beyond the *termini* fixed in the petition, and the proceedings as to any such portion would be void: *State v. Molly*, 18–525.

1416. Convenience. 926. In forming his judgment, he must take into consideration both the public and private convenience, and also the expense of the proposed highway. [R., § 831; C., '51, § 526.]

1417. Report. 927. After a general examination, if he shall not be in favor of establishing the proposed highway, he will so report, and no further proceedings shall be had thereon. [R., § 832; C., '51, § 527.]

An adverse report ends all proceedings under the petition, and the report of another commissioner appointed by the auditor would have no validity: *Cook v. Trigg*, 52–709.

A report against a road by the commissioner is an official determination, and the application cannot be considered as longer pending: *Morgan v. Miller*, 59–481.

Where it appeared that upon proper petition a commissioner was appointed to view and lay out a road, and that he made a survey and report, but that no further action was taken, *held*, that this was not sufficient to show the establishment of the highway: *Carey v. Weitgenant*, 52–660.

1418. To lay out highway. 928. If he deems such establishment expedient, he may proceed at once to lay out the highway as hereinafter

directed, and may report accordingly, if the circumstances of the case are such as to enable him to do so, without pursuing the course pointed out in the next section. [R., § 833; C., '51, § 528.]

1419. Survey made. 929. If the precise location of the highway cannot be otherwise given, he must cause the line of the highway to be accurately surveyed and plainly marked out. [R., § 834; C., '51, § 529.]

1420. Commissioner sworn. 930. Any commissioner, other than the county surveyor, must be sworn to faithfully and impartially discharge his duty as such commissioner, and, after being thus qualified, he shall have power to swear the assistants employed to a faithful and impartial performance of their respective duties in laying out the highway described in his commission. [R., § 835; C., '51, § 530; 14 G. A., ch. 27.]

That the officer by whom the commissioner was sworn was not qualified to administer oaths is no such irregularity that the proceedings will be set aside on that account: *Woolsey v. Board of Supervisors*, 32–130.

1421. Mile posts and stakes. 931. Mile posts must be set up at the end of every mile and the distance marked thereon, and stakes must be set at each change of direction, on which shall be marked the bearing of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie, not exceeding a quarter of a mile each; in the timber, the course must be indicated by trees suitably blazed. [R., § 836; C., '51, § 531.]

The provisions of this section and the one following are directory only, and the failure to comply with them will not render the proceedings illegal or void. Whether it is intended that they shall be followed when the commissioner proceeds to lay out the highway without the aid of a surveyor (under § 1418) may well be questioned: *McCollister v. Shuey*, 24–362.

1422. Bearing trees; monuments. 932. Bearing trees must, when convenient, be established at each angle and mile post, and the position of the highway relative to the corners of sections, the junction of streams, or any other natural or artificial monument, or conspicuous object, must, as far as convenient, be stated in the field-notes and shown on the plat. [R., § 837; C., '51, § 532.]

1423. Plat and field-notes. 933. A correct plat of the highway, together with a copy of the field-notes of the surveyor, if one has been employed, must be filed as part of the commissioner's report. [R., § 838; C., '51, § 533.]

1424. Report objections; claims for damages. 934; 19 G. A., ch. 80. Within thirty days from the day of his appointment, the commissioner must file his report in the auditor's office, and if it be in favor of the establishment of the highway, shall report the number of bridges required, if any, and the probable cost thereof on the proposed highway, the auditor must appoint a day, not less than sixty nor more than ninety days distant, when the matter will be acted upon; on or before which day, all objections to the establishment of the highway and claims for damages by reason of the establishment thereof, must be filed with the auditor. [R., §§ 840, 841; C., '51, §§ 535–6.]

Where final action appeared to have been had at a date subsequent to the one fixed, *held*, that it would be presumed that by proper resolution action was postponed to the day upon which it was had: *Woolsey v. Board of Supervisors*, 32–130.

The fixing of the date for final hearing less than sixty days distant is an irregularity which will not invalidate subsequent proceedings, nor render them subject to collateral attack: *State v. Kinney*, 39–226.

Where an auditor set a day for final hearing one day beyond the limit here fixed, and afterward, in a proceeding to enjoin the road supervisor from opening the road so laid out, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, *held*, that the same was a binding adjudication that no road had ever been established: *Dicken v. Morgan*, 59–157.

A party whose claim is not filed within the time fixed has no constitutional right to damages: See notes to § 1436.

1425. Day fixed. 935. The time for the commissioner to commence the examination shall be fixed by the auditor, and if he fails to so commence, or to report as prescribed in the preceding section, the auditor may fix another day or extend the time for making such report, or may appoint another commissioner. [R., § 829; C., '51, § 524.]

NOTICE — HIGHWAY ESTABLISHED.

1426. Notice served. 936; 19 G. A., ch. 109. Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notice in actions at law; and such notice shall be published for four weeks in some newspaper printed in the county, if any such there be, which notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or alter (as the case may be) a highway commencing at —— in —— county, running thence (giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books of the auditor's office) (describe in general terms all the points as in the commissioner's report), and terminating at —— has reported in favor of the establishment, vacation, or alteration thereof, and all objections thereto or claims for damages must be filed in the auditor's office on or before noon of the —— day of ——, A. D. ——, or such highway will be established, vacated, or altered without reference thereto.

I—— R——, County Auditor.

When notice is given to the persons appearing by the transfer books to be the unconditional owners of the land, and also by publication, the jurisdiction becomes complete. Notice to conditional owners, or others not shown by the transfer books (and not occupants), is not necessary: *Wilson v. Hathaway*, 42–173.

Such notice should be served personally upon the owner as shown by the transfer books, when he resides in the county, but if he be a non-resident, then upon the actual occupant of the land, although the name of such occupant does not appear from such books: *Alcott v. Acheson*, 49–569.

It is only residents of the state, in actual occupancy of land, who are entitled to personal notice. Notice need not be given to a foreign railway company across whose right of way the highway passes, by personal service upon its officers or agents. Publication of notice is sufficient in such case. Also *held*, that as the railway company did not appear from the transfer books to be owner of its right of way, it was not entitled to notice: *State ex rel. v. Chicago, B. & Q. R. Co.*, 68–135.

Error in the description of the starting point of the highway in the petition and notice, *held* sufficient to render the proceedings thereunder void, although such error was discoverable by careful examination on the face of the petition and notice: *Butterfield v. Pollock*, 45–257.

Under a previous statute, requiring thirty days' notice to be given of the filing of a petition for the highway, but containing no provision requiring the recording of such notice and proof of posting thereof, *held*, that the court would be warranted from the evidence of the appointment of commissioners, and the giving of notice, and the long lapse of time during which the right of the public had remained unchallenged, in inferring that the requisite proof had been made and lost: *Keyes v. Tait*, 19–123.

Under such statute, *held*, that proof of the method of posting the notice might be made to the board of supervisors by parol evidence, and it would be presumed that proof in that manner was made, although the affidavits filed showing proof were not sufficient: *Woolsey v. Board of Supervisors*, 32–130; *Carr v. Fayette County*, 37–608.

In order to enable the auditor to act it is not necessary that there be filed formal proof of publication of the notice required by statute; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon any one questioning his action the burden of proving want of publication: *Pagels v. Oaks*, 64–198.

Under the Revision *held*, that a recital in the record that due notice had been given was *prima facie* evidence of that fact: *State v. Pitman*, 38–252.

The failure to give notice as required renders the action in establishing the highway void, and notice will not be presumed from the fact of establishment alone: *State v. Anderson*, 39–274; *State v. Weimer*, 64–243; *McBurney v. Graves*, 66–314.

The statutory provision for vacation of highways requiring notice, etc., are not applicable to vacation of streets and alleys which by statute (§ 623) are under the control of the city council: *Dempsey v. Burlington*, 66–687.

1427. Auditor may establish. 937. If no objections or claims for damages are filed on or before noon of the day fixed for filing the same, and the

auditor is satisfied the provisions of the preceding section have been complied with, he shall proceed to establish such highway as recommended by the commissioner upon the payment of costs. If such costs are not paid within ten days, the auditor shall report his action in the premises to the board of supervisors at their next session, who may affirm the action of the auditor or establish such highway at the expense of the county.

The auditor has no power to fix the width of a highway established by him at less than sixty-six feet: See § 1411 and note.

Under 12 G. A., ch. 160, *held*, that the action of the auditor was subject to review by the board: *Brooks v. Payne*, 38-263; and that an appeal from the action of the auditor did not lie, but only from the action of the board: *Newell v. Perkins*, 39-244.

In order to enable the auditor to act, it is not necessary that there be filed formal proof of publication of the notice required by the preceding section; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon any one questioning his action the burden of proving want of publication: *Pagels v. Oaks*, 64-198.

1428. New notice given. 938. If the auditor is satisfied the notice has not been served and published as provided in section nine hundred and thirty-six of this chapter [§ 1426], he shall appoint another day and cause such notice to be served or published as provided in said section, and thereafter proceed as provided in the preceding section.

1429. Objections or claims. 939. If objections to the establishment of the highway or claims for damages are filed, the further hearing of the application shall stand continued to the next session of the board of supervisors, held after the commissioners appointed to assess damages have reported.

The fact that the only claim for damages which is filed is paid will not authorize the auditor to establish the highway, but the hearing must be continued to the next meeting of the board: *Ressler v. Hirshire*, 52-568.

DAMAGES CLAIMED.

1430. Appraisers appointed. 940. When claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three suitable and disinterested electors of the county as appraisers to view the ground on the day fixed by him, and report upon the amount of damages sustained by the claimants; such report shall be made and filed in the auditor's office within thirty days after the day they are appointed. [R., §§ 843, 847; C., '51, §§ 538, 542; 9 G. A., ch. 141; 12 G. A., ch. 160, § 2.]

Timber growing upon the land appropriated for the purpose of a public highway remains the property of the former owner, and is not to be taken into account in estimating his damages: *Deaton v. Polk County*, 9-594.

Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, *held*, that, in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by *certiorari*: *Johnson v. Board of Supervisors*, 61-89.

1431. Claims and objections in writing. 941. All claims for damages and objections to the establishment, vacation, or alteration of the highway must be in writing, and the statements in the application for damages shall be considered denied in all the subsequent proceedings. [R., § 842; C., '51, § 537.]

This section and § 1436 do not provide in what cases damages shall be allowed, and do not authorize the recovery of damages, either by an adjacent property owner or any other person, for the vacation of a highway: *Brady v. Shinkle*, 40-576; *Ellsworth v. Chickasaw County*, 40-571.

1432. Appraisers notified. 942. The auditor shall cause notice of their appointment to be given to each of the appraisers, fixing the hour at which they are to meet at the office of the auditor, or of some justice of the peace therein named. [R., § 844; C., '51, § 539.]

1433. Vacancies filled. 943. If the appraisers are not all present within one hour of the time thus fixed, the auditor or justice, as the case may be, shall

fill the vacancy by the appointment of others. The appraisers must be sworn to discharge their duty faithfully and impartially. [R., §§ 845, 846; C., '51, §§ 540–1.]

Where, upon the absence of one of the appraisers, instead of his place being filled, action was postponed to another date, when he was present and acted, *held*, that in the absence of a showing of prejudice there was no error: *Johnson v. Supervisors*, 61–89.

1434. Time for final action. 944. Should the report not be filed in time, or should any other good cause for delay exist, the auditor may postpone the time for final action on the subject, and may, if expedient, appoint other commissioners. [R., § 848; C., '51, § 543.]

1435. Costs. 945. Should no damages be awarded the applicant therefor, the whole of the costs growing out of his application shall be paid by him. [R., § 850; C., '51, § 545.]

FINAL ACTION.

1436. Testimony received; damages determined; conditions. 946. When the time for final action arrives, the board of supervisors may hear testimony, receive petitions for and remonstrances against the establishment, vacation, or alteration, as the case may be, of such highway, and may establish, vacate, or alter, or refuse to do so, as in their judgment, founded on the testimony, the public good may require. Said board may increase or diminish the damages allowed by the appraisers, and may make such establishment, vacation, or alteration, conditioned upon the payment in whole or in part of the damages awarded, or expenses in relation thereto. [R., § 851; C., '51, § 546.]

Proceedings before the board: Where two applications are, in effect, for the same road, by different routes, they may be considered together: *Brown v. Ellis*, 26–85.

Where, in a proceeding before the board, one of the members refused to be sworn as a witness unless required to, but it appeared that his evidence, if given, would have been cumulative, and the action in the premises was not dependent upon it, *held*, that the discretion of the board in the matter would not be interfered with: *Ibid.*

Dismissal: The proceeding is not for the benefit of the person commencing it, but is by the state for the benefit and advantage of the public, and the petitioner acquires no rights or advantages by it. Therefore, an agreement by him for a consideration to abandon the proceeding is against public policy and void: *Jacobs v. Tobiason*, 65–245.

The fact that previous proceedings for establishment of a highway have been dismissed by the board will not bar their right to establish a highway over the same lines, upon a subsequent application: *Pagels v. Oaks*, 64–198.

Time for hearing: Where final action appeared to have been had at a date subsequent to the one fixed, *held*, that it would be presumed that, by proper resolution, action was postponed to the day upon which it was had: *Woolsey v. Board of Supervisors*, 32–130.

The fixing of the date for final hearing less than sixty days distant is an irregularity which will not invalidate subsequent proceedings, nor render them subject to collateral attack: *State v. Kinney*, 39–226.

Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, *held*, that, in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by *certiorari*: *Johnson v. Board of Supervisors*, 61–89.

Conditional establishment: Where the establishment is conditioned on the payment of the expenses thereof, it is not necessary that the time for such payment be fixed in the order: *Brown v. Ellis*, 26–85.

Where the proceedings did not definitely locate a portion of the highway upon the ground, but left it to be located by the petitioners, *held*, that such establishment as to the portion thus left to be located not being shown, the highway could not be deemed established in any part: *Barnes v. Fox*, 61–18.

Where a highway is established upon conditions, it is not to be regarded as fully established so as to become a legal highway until the conditions are complied with: *State v. Glass*, 42–56.

A final order once made as contemplated by statute acquires the character of an adjudication as to the establishment of the highway and the amount of damages, if any, and the parties cannot again litigate the question in a new proceeding. The judgment is conclusive until set aside: *Hupert v. Anderson*, 35–578.

Although the road is established on a different line from that requested and recommended, the action, while it may be erroneous, will not be void: *Davenport Mutual Savings, etc., Ass'n v. Schmidt*, 15–213.

If upon an appeal from the action of the board as to the amount of damages, the circuit court increase the amount allowed, the board may reconsider their action and refuse to establish the highway: *Nelson v. Goodykoontz*, 47–32.

An order for the establishment of the highway, conditioned upon payment of damages, etc., is such a final order as may be appealed from under § 1449. It is not necessary to wait for the unconditional order contemplated in the following section: *McNicols v. Wilson*, 42–385.

Consent to the establishment of a highway will not confer jurisdiction to establish a particular line contemplated, and in the absence of proper notice the proceeding will be void: *Barnes v. Fox*, 61–18.

Where a highway was established by consent in pursuance of a written contract executed through mistake of fact, *held*, that a court of equity might reform and correct the written contract, and enjoin the laying out of the highway as established: *Mastelar v. Edgarton*, 44-495.

Record: The record with reference to the establishment of a road is admissible in evidence where it shows substantially the same route as petitioned for, and the petition need not be offered to render the record admissible, if it appears that it was presented, filed and acted upon: *State v. Lane*, 26-223.

Vacation of highway: Where the auditor acts improperly in establishing a highway, the board may set aside his action and vacate the highway thus improperly established: *State v. Wagner*, 45-482.

The statutory provisions by which the same steps are required to vacate as to establish a highway are not applicable to the vacation of streets and alleys. The city council has authority to vacate streets and alleys by ordinance: *Dempsey v. Burlington*, 66–687.

Where two roads were established on the same line, and upon due notice one of them was vacated, *held*, that such order of vacation would not operate upon both but only upon the road as to which notice was given: *Larkin v. Harris*, 36–93.

Under the provisions of a former statute, that if money was advanced for the payment of damages caused by the location of a highway the highway could not be discontinued without repayment of such damages, and that the claim for the refunding of the damages was a lien on the land covered by the highway, *held*, that an action in equity to recover the amount paid to the land owner for a highway afterwards discontinued might be maintained: *Brown v. Bridges*, 36-279.

Damages: In estimating the damages resulting from the fact that the location of a highway will render the construction of fences by the adjoining property owner necessary, the jury may be limited to considering the cost of constructing such fence as is proper under the circumstances, and should not estimate the cost of a fence sufficient to turn sheep and hogs, they not being permitted to run at large. The fact that a fence which will become necessary upon the establishment of a highway will be of advantage to the owner cannot be taken into consideration in estimating his damages: *Bland v. Hixenbaugh*, 39–532.

It is improper in estimating the damages to allow the owner as part of his compensation a certain amount for fence thereby made necessary. If by the establishment of the road the land is thrown open and left unfenced, this fact may enter into the consideration in determining the depreciation in value of the remaining premises. But the owner should not be allowed for the cost of fence, as such: *Hanrahan v. Fox*, 47–102.

One of the owners in common of land may recover damages caused by the establishment of a highway to the extent of his ownership, although no claim for damages is made by the other one: *Ibid.*

If the land owner, after the assessment of damages and pending an application to establish the road, erects a fence upon the proposed highway, he cannot have damages for the removal thereof allowed to him on appeal: *Holton v. Butler*, 22–557.

Timber growing upon the land appropriated for the purpose of a public highway remains the property of the former owner, and is not to be taken into account in estimating his damages: *Deaton v. Polk County*, 9–594.

It is the duty of the jury assessing the compensation for real estate appropriated to the use of the public as a street to personally examine the premises: *Des Moines v. Layman*, 21–153.

Damages for relocation: The true rule for estimating damages in case of relocation of a highway over land of the same party is to determine the amount which the damages for the new or relocated line would exceed the damages sustained by reason of the old one: *Jewett v. Israel*, 35–261.

And this rule is applicable whether damages for the location of the first line were allowed or not. But the damages by reason of the location of the new line are not to be diminished by reason of advantages and benefits which tend to increase the value of the land to be set off against damages caused by the relocation: *Israel v. Jewett*, 29-475.

Damages for vacation: A party whose right to the use of a highway is simply that enjoyed by the general public cannot recover damages for its vacation, whether his land abuts upon a part of the highway not vacated or upon a portion of the highway actually vacated: *Ellsworth v. Chickasaw County*, 40–571: *Brady v. Shinkle*, 40–576; *Barr v. Oskaloosa*, 45–275.

A claim for damages cannot be considered after the final order of establishment: *Smiths v. Dubuque County*, 1-492.

Where no claim for damages is filed, or the claim is disallowed because not filed within proper time, or upon consideration of the claim no damages are allowed by the appraisers, a property owner cannot object to the establishment of the highway on the ground that his property is taken without compensation. While he has a constitutional right of compensation, it must be claimed and established in the manner pointed out by law: *McCrory v. Griswold*, 7-248; *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36–354.

The land owner may, by appeal from the appraisement, have the amount of his damages assessed by a jury of twelve. If he fails to take such appeal and have such assessment, he cannot afterwards complain that his property is taken for public use without due process of law: *Tharp v. Witham*, 65–566.

Review of proceedings by certiorari: The question as to the propriety of establishing the road, and the legality of the proceedings to that end, may be reviewed by *certiorari*: *McCrory v. Griswold*, 7-248.

An order establishing a highway is a matter affecting the public only, and an individual can have no interest in that question such as to warrant him in appealing from the order of establishment, but he may be entitled to an appeal from the action of the board in regard to the allowance of damages: *Ball v. Humphrey*, 4 G. Gr., 204; *Myers v. Simms*, 4-500.

Upon a writ of *certiorari* from the proceeding of the board, it is not proper to review its decision upon the question whether the public interests demand a proposed road, or whether it is practicable and expedient to establish it. The court can only determine whether the board is proceeding within its jurisdiction or not: *Tiedt v. Carstensen*, 61-334.

Where a *certiorari* proceeding is instituted against the board of supervisors, calling in question their action in establishing a highway, and such action is held to be illegal, the costs should be taxed, not against the board, but against the petitioners for the highway: *Tiedt v. Carstensen*, 64-131.

The action of the board in allowing or refusing damages can only be reviewed on appeal: See notes to § 1449.

Change of location by prescription: Where there have been proceedings to locate a highway and it has been established and used as such, pursuant to such proceedings, and by mistake the highway as used varies slightly from the one established, the use will not constitute a prescriptive right outside of the limits of the established highway: *State v. Welpton*, 34-144; *State v. Gould*, 40-372; *State v. Schilb*, 47-611.

Where by request of a land owner the supervisor, in opening an established highway, deflects therefrom upon the land of such owner, and the road so located is worked and used by the public, the action of the owner amounts to a dedication as to the portion outside of the established highway: *Ryan v. Kennedy*, 62-37.

Where the public have traveled and used a road different from the established highway for the period of prescription, it acquires a right by prescription in the road thus traveled: *Kelsey v. Furman*, 36-614.

A mistake as to the location of the line used, by reason of which it varies from the section line on which the land owner supposed he was allowing it to be used, will not give rise to a prescriptive right to the road as used, and the owner may correct the mistake and confine the travel to the intended line without being guilty of obstructing the highway: *State v. Crow*, 30-258.

The fact that a fence is built along a highway at the time it is laid out and thus remains for twenty years is sufficient evidence to show that it is not upon the highway, although by subsequent location from field-notes the fence appears to be within the limits of the highway: *Cattell v. Wilhelm*, 39-288.

A curative act to render valid defective proceedings for the establishment of highways is constitutional: *Bennett v. Fisher*, 26-497.

1437. Unconditional order. 947. In the latter case, a day shall be fixed for the performance of the condition, which must be before the next session of the board, and if the same is not performed by the day thus fixed, the board shall, at such session, make some final and unconditional order in the premises. [R., § 852; C., '51, § 547.]

1438. Record. 948. Any order made or action taken in the establishment of a highway, shall be entered in the highway record, distinguishing between those made or taken by the auditor and those by the board of supervisors.

1439. Plat and field-notes. 949; 15 G. A., ch. 19. After the highway has been finally established, the plat and field-notes must be recorded by the auditor, and he shall certify the same to the township clerk, and the township clerk shall certify to and direct the supervisor of highways to have the same opened and worked subject to the provisions of the next section. [R., § 855; C., '51, § 550.]

1440. Fences. 950. A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new highway; and when crops have been planted or sowed before the highway is finally established, the opening thereof shall be delayed until the crop is harvested. [R., §§ 856, 857; C., '51, §§ 551-2.]

A land owner is not liable to indictment for obstructing a highway in not removing the fences where a newly established highway crosses his land, at least until he has had reasonable notice from the supervisor to do so: *State v. Ratliffe*, 32-189.

1441. Minors; insane persons. 951. The rights and interests of minors and insane persons, in relation to the establishment, vacation, and alteration of highways, and all matters connected therewith, are under the control of their guardians. [R., § 860; C., '51, § 555.]

1442. Streets in villages. 952. All public streets of towns or villages not incorporated, are a part of the highway; and all supervisors of highways, or persons having charge of the same, in the respective districts of such towns or villages, shall work the same as provided by law. [12 G. A., ch. 148.]

1443. In cities or towns. 953. Such portions of all highways as lie within the limits of any city or incorporated town shall conform to the direction and grade and be subject to all regulations of other streets in such town or city. [R., § 916.]

There is a clear distinction between streets and highways in cities and incorporated towns and in unincorporated towns; the latter are regarded as a part of the highways of the county, while the former are subject to the exclusive control of the officers of the municipality: *Gallaher v. Head*, 72-173.

1444. Lands of state institutions. 954. Highways or streets shall not be established or opened across the lands reserved by the state for its various institutions lying adjacent thereto, without the express consent of the general assembly. [12 G. A., ch. 110, § 1.]

IN TWO OR MORE COUNTIES.

1445. Action of supervisors. 955. The establishment, vacation, or alteration of a highway, either along or across a county line, may be effected by the concurrent action of the respective boards of supervisors in the mode above prescribed; except that the auditor of neither county can make the final order in such case. The commissioners in such cases must act in concert, and the highway will not be deemed established, vacated, or altered in either county until it is so in both. [R., § 861; C., '51, § 556.]

1446. State and county roads; concurrent action. 956. Hereafter there shall be no distinction between highways heretofore known as state roads and county roads; both are alike subject to the provisions of this chapter. Highways established by the concurrent action of the board of supervisors of two or more counties, can only be discontinued by the concurrent action of the board of supervisors of the several counties in which the same may be situated, but such highways shall be treated in all other respects as provided in this title. [R., § 879.]

CONSENT HIGHWAYS.

1447. How established. 957. Highways may be established without the appointment of a commissioner, provided the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office; and if it is shown to the satisfaction of the board of supervisors, that the proposed highway is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a highway. [R., § 858; C., '51, § 553.]

1448. When survey necessary. 958. If a survey for the establishment of the highway named in the preceding section is necessary, the board of supervisors, before ordering such survey, may require the parties asking for the establishment of such highway to pay, or secure the payment of, the expenses of such survey. [R., § 859; C., '51, § 554.]

APPEALS.

1449. From what taken; how perfected. 959. Any applicant for damages claimed to be caused by the establishment of any highway may appeal from the final decision of the board of supervisors to the circuit [dis-

trict] court of the county in which the land lies; but notice of such appeal must be served on the county auditor within twenty days after the decision is made. If the highway has been established on condition that the petitioners therefor pay the damages, such notice shall be served on the four persons first named in the petition for the highway, if there are that many who reside in the county. [R., § 873.]

Appeal: The propriety of the action, with reference to the allowance of damages, can only properly be raised by appeal: *McCune v. Swafford*, 5–552; *Warner v. Doran*, 30–521.

Upon an appeal, not only the amount of damages, but also the right to any damages, may be determined: *Spray v. Thompson*, 9–40.

An appeal brings up nothing for determination except the claim for damages. The action of the board of supervisors in establishing the road cannot be reviewed: *Pollard v. Dickinson County*, 71–438.

An appeal lies from the action of the board entirely rejecting a claim for damages: *Vancleave v. Clark*, 37–184.

Therefore, *held*, that an appeal from the action of the board in disallowing a claim for damages on the ground that claimant was not the owner of the land, but in which it was expressly stated that no objection was made to the amount of the damages assessed by the jury, properly raised the question as to the correctness of the action of the board in rejecting the claim for damages: *Ibid.*

An order for the establishment of the highway conditioned upon the payment of damages is such a final order as may be appealed from. It is not necessary to wait for the unconditional order which follows the payment of the damages: *McNichols v. Wilson*, 42–385.

The fact that petitioners for the highway have renounced all right thereto that they might have by the action of the board in making the location conditional upon their payment of the damages assessed does not defeat the right of the claimant to prosecute his appeal from the assessment of damages, where petitioners do not entirely retire from the controversy and renounce all benefits which may arise from any action in the premises: *Ibid.*

Under previous statutory provisions allowing the county auditor to act in the matter of establishing highways, subject to the final approval of the board of supervisors, *held*, that an appeal would not lie from the orders of such auditor, but only from the final action of the board: *Newell v. Perkins*, 39–244.

As to reviewing the action of the board by *certiorari*, see notes to § 1436.

Notice of appeal: The twenty days within which notice of appeal may be served commences to run from the time of making the conditional order for the establishment of the highway, upon payment of damages, and not from the making of the final unconditional order, after such damages have been paid: *McNichols v. Wilson*, 42–385.

Where a claim for damages is disallowed by the commissioners, and its payment is not required by the order establishing the highway, it is not required that service of notice of an appeal by the claimant be made upon the petitioners: *Raymond v. Clay County*, 68–130.

There does not appear to be any express provision as to the time which shall elapse between the service of notice of appeal and the first day of the term at which the case shall be deemed triable, but it seems it should be at least ten days: *Scott v. Lasell*, 71–180.

Appearance: Where the notice is served within twenty days, and the only objection is as to the sufficiency of proof of such service, an appearance and objection to the service confers jurisdiction: *Libbey v. McIntosh*, 60–329.

If the notice is not served upon the applicant within proper time he may appear and move to dismiss the appeal, and such appearance will not confer jurisdiction nor waive his rights: *Spurrier v. Wirtner*, 48–486.

1450. By petitioner. 960. An appeal may also be taken by the petitioner for the highway as to amount of damages, if the establishment of the highway has been made conditional upon his paying the damages, by his serving notice of such appeal on the county auditor, and applicant for damages within twenty days after the decision of the board of supervisors, and filing a bond in the office of such auditor, with sureties to be approved by him, conditioned for the payment of all costs occasioned by such appeal unless the appellant fails to recover a more favorable judgment in the circuit [district] court than was allowed him by such board. [R., § 874.]

If the notice is not served upon the applicant within proper time he may appear and move to dismiss the appeal, and such appearance will not confer jurisdiction nor waive his rights (explaining *Robertson v. Eldora R. & Coal Co.*, 27–245): *Spurrier v. Wirtner*, 48–486.

1451. Transcript filed. 961. In the cases contemplated in the two preceding sections, the auditor shall, within ten days after the notices aforesaid are served and filed in his office, make out and file in the office of the clerk of said court, a transcript of the papers on file in his office and proceedings of the board in relation to such damages. The claimant for damages shall be plaint-

iff, and the petitioner for the highway defendant, except the damages have been ordered paid out of the county treasury, in which case the county shall be defendant. [R., § 873.]

Parties to the appeal: It is not proper to make the road itself defendant in the appeal: *Myers v. Old Mission, etc., Road*, 7–315.

The county is not a proper party to the appeal unless the damages have been ordered paid out of the county treasury, in which case the statute provides that the county shall be defendant: *Deaton v. Polk County*, 9–594.

Although a claim for damages is disallowed and no order for its payment made in establishing the road, the county should be made defendant on an appeal by the claimant: *Raymond v. Clay County*, 68–130.

Transcript: The fact that the transcript is made out and filed with the clerk of the court before the service of the notice of appeal upon the auditor is a mere irregularity, in no manner affecting the jurisdiction of the court: *Libbey v. McIntosh*, 60–329.

Failure of the appellant to file notice of appeal with the auditor after the service thereof, until there are not ten days remaining between the service of notice and the first day of the next term, will not prevent the cause being triable at such term. It is the duty of the appellant to file the notice in time to allow a transcript to be filed: *Scott v. Lasell*, 71–180.

Filing fee: A rule of court providing that, upon failure of appellant to pay the filing fee, appellee might pay it and have the appeal dismissed, *held* not applicable where the appellant had paid the fee before motion to dismiss by appellee was filed: *Cole v. Laub*, 35–590.

The proceeding in which an appeal is taken may be denominated a civil case within the rule providing for payment of filing fee by appellant on the first day of the term: *Scott v. Lasell*, 71–180.

1452. Proceedings in court. 962. The amount of damages the claimant is entitled to, shall be ascertained by said circuit [district] court in the same manner as in actions by ordinary proceedings, and the amount so ascertained shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk to the board of supervisors, who shall, thereafter, proceed as if such amount had been by them allowed the claimant as damages.

Trial of the appeal: The owner of the land is entitled to have his damages assessed anew upon appeal although no damages whatever were allowed by the appraisers: *Deaton v. Polk County*, 9–594.

The question as to the amount of damages may be tried *de novo* upon appeal: *Prosser v. Wapello County*, 18–327.

The appellant is entitled to a new assessment of his damages by jury upon the appeal: *Des Moines v. Layman*, 21–153.

It is not necessary, in order to secure a hearing, upon appeal, as to the amount of damages, that a motion should have been made before the board to set aside the report of the appraisers: *Sigafoos v. Talbot*, 25–214.

It is necessary that the party claiming damages on the appeal, if he seeks to recover damages to the tract out of which the right of way is taken, should show that he is owner thereof, and if the evidence fails to establish title in him he can recover only for such immediate and necessary damages as result to him as an occupant of the land: *Costello v. Burke*, 63–361.

The damages herein referred to must be estimated with reference to the extent of the interest of the claimant in the property from which the appropriation is to be made, and the claimant must therefore allege and prove the extent of his interest: *Ibid.*

Damages must be ascertained, on appeal, in view of the rights of the parties as settled by the supervisors; and where by subsequent action of the supervisors, after the determination of his damages, the amount of damages was increased, *held*, that the claimant might, by amended pleadings on the appeal, claim additional damages. The claimant may on appeal plead as in an action by ordinary proceedings, and therefore he is entitled to amend so as to ask more than was claimed before the board: *Pollard v. Dickinson County*, 71–438.

If, pending an application to establish a road, and after the damages have been assessed, a land owner erects a fence upon the proposed highway, he cannot have damages for the removal of such fence allowed on appeal: *Holton v. Butler*, 22–557.

Final action after determining damages on appeal: When the amount of damages has been fixed by the trial of the appeal, the board of supervisors may proceed to final action as if that amount had been originally allowed by them: *McNichols v. Wilson*, 42–385.

If the amount of damages is increased on the appeal, the board may reconsider their action and refuse to establish the highway: *Nelson v. Goodykoontz*, 47–32.

The county cannot be prejudiced by the recovery by claimant on an appeal of damages greater than allowed by the supervisors, for the reason that the road cannot be established until the trial of the appeal. The supervisors may make the establishment of the road conditioned on the payment of the damages: *Pollard v. Dickinson County*, 71–438.

1453. Costs. 963. If the appeal has been taken by the claimant, the petitioner for the highway, or the county must pay the costs occasioned by the appeal; but the county shall pay only when the damages have been ordered

to be paid out of the county treasury. If the petitioner for the highway appeals, he must pay the costs, unless the claimant recovers a less amount than was allowed him by the board, in which case the costs shall be paid by the claimant. Judgment shall be rendered in accordance with the foregoing provisions. [R., § 873.]

The recovery of costs by the claimant upon his appeal is not made contingent upon whether the amount of his damages is increased by the court: *Hanrahan v. Fox*, 47-102.

Neither the petitioner nor the county can be made to pay the costs of the appeal until the appeal has been determined and the costs have been adjudged. The appellant should advance the filing fee: *Scott v. Lasell*, 71-180.

LOST FIELD-NOTES.

1454. Resurvey. 964. When by reason of the loss or destruction of the field-notes of the original survey, or in cases of defective surveys or record, or in cases of such numerous alterations of any highway since the original survey, that its location cannot be accurately defined by the papers on file in the proper office, the board of supervisors of the proper county may, if they deem it necessary, cause such highway to be resurveyed, platted, and recorded as hereinafter provided. [R., § 913.]

Where the necessary steps were taken to establish a road, but the clerk failed to record the field-notes, and no record of the final order was found, *held*, a proper case for the supervisors to order a resurvey: *Balke v. Bailey*, 20-124. But where a highway has never been in fact established a resurvey thereof is of no effect: *Carey v. Weilgenant*, 52-660.

The board cannot vary the line of road as originally surveyed to conform it to a way acquired by prescription. The alterations referred to in the provisions as to resurvey have reference to such changes in the road as have occurred by orders or surveys made after the original survey, and which tend to such confusion that the location of the road is not accurately defined or pointed out by the record: *Blair v. Boesch*, 59-554.

But it is competent for the board to hear evidence as to where the original survey was actually made, and being satisfied from the evidence that the resurvey is upon the line as originally surveyed, to approve and confirm such survey, although it does not conform to the original field-notes: *Ibid.*

Proceedings for resurvey will be void where there was no original establishment of the highway sought to be resurveyed. It is not the office of such proceedings to cure original proceedings which were fatally defective: *Barnes v. Fox*, 61-18.

Where a portion of the record of the establishment of a highway was lost, and the resurvey showed the highway to be not on the section line, as indicated by a portion of the record remaining, and the evidence showed that the resurvey corresponded with the original survey, *held*, that the resurvey was properly confirmed: *Ackerson v. Van Vleek*, 72-57.

1455. Plat and field-notes filed; notice given. 965. A copy of the field notes, together with a plat of any highway surveyed under the provisions of the preceding section, shall be filed in the office of the county auditor, and, thereupon, he shall give public notice by publication in some newspaper published within the county, or, if no paper is published in his county, by posting such notice in five of the most public places in the vicinity of such survey, that such survey has been made, and that at some term of the board of supervisors, not less than twenty days from the publication, they will, unless good cause be shown against so doing, approve of such survey and plat and order them to be recorded as in cases of the original establishment of a public highway. [R., § 914.]

1456. Proceedings; record. 966. In case objection shall be made by any person claiming to be injured by the survey made, the board of supervisors shall have full power to hear and determine upon the matter, and may, if deemed advisable, order a change to be made in the survey. Upon the final determination of the board, or in case no objection be made at the term named in the notice of the survey, they shall approve of the same and cause the field-notes and plat of the highway to be recorded as in case of the establishment or alteration of highways, and thereafter such records shall be received by all courts as conclusive proof of the establishment and existence of such highway, according to such survey and plat. [R., § 915.]

1457. Highway plat book. 967. If the same has not been heretofore done in any other manner, the county auditor shall, within six months after this code takes effect, cause every highway in his county, the legal existence of which is shown by the records and files of his office, to be platted, in a book to be obtained and kept for that purpose, and known as the "highway plat book." Each township shall be platted separately, on a scale of not less than four inches to the mile, and such auditor shall have all changes in or additions to the highways legally established, immediately entered upon said plat book, with appropriate references to the files in which the papers relating to the same may be found.

1458. Copy furnished. 968. Within the time aforesaid, the auditor shall furnish to the township clerks a certified copy of said plat book, so far as the same relates to their respective townships, which shall be carefully preserved in the office of said clerks. The auditor shall notify said clerks of all changes made in the plat book relative to the highways, so far as the same relate to their townships respectively; on receipt of which, said clerks shall immediately make corresponding changes on the maps in their respective offices. [R., § 889.]

[Clerk to furnish supervisor with plat of his district: See § 1484.]

SIDEWALKS ON HIGHWAYS.

1459. By owner. 20 G. A., ch. 147, § 1. It shall be lawful for any owner of land adjoining or abutting on a public road or highway outside the limits of any city or town, to build and construct a sidewalk on and along said highway for his own use and for the use of the public traveling on foot; said sidewalk shall not exceed four feet in width and shall be located along the side of the highway and may be constructed of any material suitable for a foot walk, *provided*, that said sidewalk shall not be so constructed as to interfere with the proper use and employment of any lands or premises along which it passes, and *provided further*, that the persons building such walk shall keep the same in repair, and shall be liable for all injuries occasioned by his failure to keep the same in repair.

1460. Penalty for injury to. 20 G. A., ch. 147, § 2. Any person who shall destroy, injure, or drive or ride upon a sidewalk, so constructed or heretofore constructed, except at highway crossings, shall be deemed guilty of a misdemeanor and shall be fined not less than five dollars for each offense, and shall be liable to the party who has built or maintained said sidewalk for all damages.

CONSTRUCTION OF CATTLE-WAYS.

1461. Across highway. 16 G. A., ch. 111, § 1. Upon application by any person to the board of supervisors of any county for permission to construct a cattle-way across, over or under any public highway, the board may grant the same; *provided*, said cattle-way shall not interfere with the travel upon such highway; but the person who applied for such cattle-way shall construct the same at his own expense and be responsible for all damages that may arise from its construction or from the same not being kept in good condition, and that the grade of the highway over the cattle-way shall not exceed one foot in ten.

1462. Repairs. 16 G. A., ch. 111, § 2. If the person on whose land such cattle-way is constructed, fails to keep the same in good repair, then it shall be the duty of the road supervisor to make all repairs necessary and charge the same to the owner of the land upon which such cattle-way is constructed, and upon his refusal or failure to pay, the supervisor shall recover the same in

an action brought in his own name in any court having competent jurisdiction; which money when collected, shall be expended for improving or repairing the public highway, in the road district where such cattle-way is constructed. *Provided*, that no person shall construct any cattle-way so as to obstruct the freedom of the public in watering at any running stream.

1463. Township trustees. 22 G. A., ch. 92, § 1. Any person or persons desiring to build a cattle-way across a public highway under any township bridge may apply to the board of trustees of the township wherein such bridge is located at the regular April meeting of such board. The said board of trustees may grant such right upon such application and prescribe such conditions in regard to the maintenance of said bridge and cattle-way as they may deem just and proper.

CHAPTER 2.

OF WORKING HIGHWAYS.

1464. Powers and duties of trustees. 969. The township trustees of each township shall meet on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk, and on the first Monday in October in each year. At the April meeting said trustees shall determine:—

1. Upon the amount of property tax to be levied for highways, bridges, guide-boards, plows, scrapers, tools, and machinery adapted to the construction and repair of highways, and for the payment of any indebtedness previously incurred for highway purposes, and levy the same, which shall not be less than one nor more than five mills on the dollar on the amount of the township assessment for that year;

2. Whether any portion of said tax shall be paid in labor, and, if so, what portion may be so paid;

3. Upon the amount that will be allowed for a day's labor done by a man, and by a man and team, on the highway;

4. At the October meeting, said trustees shall divide their respective townships into such number of highway districts as they may deem necessary for the public good, and, at said meeting, they shall settle with the township clerk and supervisors of highways. [R., §§ 880, 891, 895; C., '51, § 568; 9 G. A., ch. 96, § 5; ch. 163, § 1; 12 G. A., ch. 100, § 2; 13 G. A., ch. 20.]

A road district cannot be sued: *White v. Road District*, 9-202; *Wilson v. Jefferson County*, 13-181.

The power of the trustees to divide the township into road districts does not extend to such portions as are embraced within a city. And they have no power to levy a road tax in such portions. The city council have control of the highways and streets of the city (§ 726): *Marks v. Woodbury County*, 47-455; *Hawley v. Hoops*, 12-506.

As incorporated towns are given power to provide for grading and repair of their streets (§ 624), they must have control over such streets, and the road supervisor and township trustees have no authority over them: *Clark v. Epworth*, 56-462.

Road tax may be levied upon the property of railway companies, although such property is not placed upon the assessor's book: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168, 177.

1465. General township fund; clerk to give bond; custody of implements. 970. The trustees shall set apart such portion of the tax specified in the preceding section of this chapter, as they deem necessary for the purpose of purchasing the tools and machinery and paying for the guide-boards mentioned in said section, and the same shall constitute a general township fund; and such trustees shall require the township clerk to give bond in such sum as they deem proper, conditioned as the bonds of the county officers, which bond, and

the sureties thereon, shall be approved by said trustees. Said clerk shall take charge of and properly preserve and keep in repair such tools, implements, and machinery as may be purchased with said general township fund, and shall have authority to determine at what time the supervisors of the several districts may have the custody and use of the same or any part thereof, and shall be responsible for the safe keeping of the same, when not in the custody of some one of the supervisors for use in working the highways in his district, and shall receive such compensation as the trustees shall provide to be paid out of such fund. [9 G. A., ch. 163, § 1; 12 G. A., ch. 100, § 6.]

The "general fund" is the money set apart for that purpose as here contemplated, and does not embrace money received by the clerk from the county treasurer under § 1488: *Henderson v. Simpson*, 45–519.

The trustees have no authority to contract indebtedness for the purchase of tools and machinery, until a tax is levied and set apart for that purpose. "Indebtedness previously contracted," in the preceding section, does not refer to such indebtedness for tools and machinery. The trustees may, after the tax is levied and set apart, anticipate the collection of the tax and purchase tools and machinery upon credit: *Wells v. Grubb*, 58–384; *Hanks v. North*, 58–396; *Revolving Scraper Co. v. Tuttle*, 61–423.

The clerk might maintain an action for funds belonging to his township in the hands of third persons. If he deposits such funds in his individual name, without notice to the banker of their character, such act amounts to a conversion; the deposit belongs to the clerk individually, and if seized by garnishee process under attachment on his individual debt, without notice of its character, cannot be recovered back as public funds: *Long v. Emsley*, 57–11.

The township clerk is the proper party to bring an action against a road supervisor for moneys received by him belonging to the general township fund which he fails to pay over: *Wells v. Stomback*, 59–376.

And it seems that in such case the clerk might sue on the supervisor's bond: *Kellogg v. Bare*, 62–468.

As to taxation of property within a city or town for road purposes, see § 677.

1466. Control of fund. 971. The trustees shall order and direct the expenditure of the general township fund.

ROAD TAXES.

1467. How levied and paid out. 20 G. A., ch. 200, § 1. The board of supervisors of each county may, at the time of leving taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in their county, which tax shall be collected at the same time and in the same manner as other taxes are collected and shall be known as the county road fund, and shall be paid out only on the order of the board of supervisors for work done on the highways of the county, in such places as the board shall determine, and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes; *Provided*, that the amount levied by the board of township trustees under section nine hundred and sixty-nine of the code [§ 1464] together with the amount thus levied shall not be in excess of five mills.

1468. Expenditure. 20 G. A., ch. 200, § 2. The board of supervisors shall, at their regular meeting in April of each year, determine from the auditor's and treasurer's books, the amount of money collected and credited to said road tax fund. They shall, also, determine the manner in which said tax shall be expended, whether by contract or otherwise.

1469. Consolidation of road districts. 20 G. A., ch. 200, § 4. The board of township trustees, may, at their regular meeting in April, 1884, or at any regular April meeting thereafter, on petition of a majority of the voters of said township consolidate the several road district[s] in the township into one highway district: *Provided*, however, that nothing herein contained shall be construed to prevent the trustees from again subdividing the township into subdistricts and returning to the present plan of road work, at any regular April meeting, after two years' trial of the plan provided by this act.

1470. Collection of tax. 20 G. A., ch. 200, § 5. The trustees may order the township highway tax for the succeeding year paid in money and have the same collected by the county treasurer the same as other taxes.

1471. Letting of work by contract. 20 G. A., ch. 200, § 6. In all cases where the township shall have organized into one highway district, as contemplated in section four of this act [§ 1469], the board of township trustees shall order and direct the expenditure of all the highway funds and labor belonging or owing to the township; and to this end the trustees may let by contract to the lowest responsible bidder (should they deem him competent to the proper performance of such work) any part, or all of the work on the highways for that year, in the township, or they may appoint a township superintendent of highways, with one or more assistants, should they deem it best so to do, to superintend all or any part of such work, subject always to the direction of the township trustees; *provided only*, the said trustees shall not incur any indebtedness for such purposes, unless the same has been, or shall at the time be, provided for by an authorized levy.

1472. Expenditure of tax. 20 G. A., ch. 200, § 7. The trustees shall cause both the property and poll road tax belonging to the township, to be equitably and judiciously expended for highway purposes in the township highway district, and shall cause the highways to be kept in as good condition as the means at their command will admit of.

1473. Noxious weeds. 20 G. A., ch. 200, § 8. The trustees shall cause the noxious weeds growing on the highways in their township to be cut twice a year, if deemed necessary to exterminate the same, and have them cut at such times as to prevent their growing to seed; and for this purpose, the trustees may allow any land owner a reasonable compensation for destroying such weeds on the highways abutting his lands and have him credited for the same on his road tax for that year.

1474. Term and compensation of superintendent. 20 G. A., ch. 200, § 9. The trustees shall fix the term of office and per diem of the superintendent of highways and his assistants, should such be employed; *provided*, the superintendent shall not be hired for more than one year at a time and his per diem shall not exceed three dollars; and that the contract shall be conditioned so that the trustees may dispense with his services at any time, when in their judgment it shall be for the best interests of the township so to do.

1475. Expenditure of tax. 20 G. A., ch. 200, § 10. The trustees shall cause at least seventy-five per cent of the township highway tax to be properly expended for highway purposes by the fifteenth day of July each year.

1476. Highway funds consolidated. 20 G. A., ch. 200, § 11. In all cases where the one highway district plan shall be adopted, the highway funds belonging to the several road districts in the township, prior to the change, shall be placed to the credit of the general township highway fund, and all claims for work done or material furnished for road purposes, and unsettled for prior to the change, shall be paid out of such funds.

1477. Qualification of officers. 20 G. A., ch. 200, § 12. The trustees shall require the township clerk, contractor, and superintendent, contemplated in this act, each to qualify, as other township officers, and to execute a bond with approved sureties, for twice the amount of money likely to come into their hands, respectively, by reason of this act.

1478. Compensation of trustees, treasurer and clerk. 20 G. A., ch. 200, § 13. The trustees shall receive the same compensation per day for time necessarily spent in looking after the highways, as they do for other township business; the county treasurer shall receive the per cent. for collecting the highway taxes contemplated in this act that he does for collect-

ing corporation taxes; and the township clerk shall receive two per cent. of all the money coming into his hands by reason of this act, and by him paid out for road purposes.

1479. Day's work. 20 G. A., ch. 200, § 14. Nine hours' faithful service for a man, or man and team, shall be required for a day's work on the road: *provided*, that except on extraordinary occasions no person shall be required to go more than three miles from his place of residence to work on the roads; and for the purposes of this act, the residence of a man with a family shall be construed to be where his family reside, and for a single man it shall be at the place where he is at work.

1480. Powers and duties of contractors and superintendents. 20 G. A., ch. 200, § 15. The powers, duties, and accountability imposed on highway supervisors, so far as consistent with this act, shall apply with equal force to contractors, superintendents and assistants contemplated in this act.

1481. Township system takes effect. 20 G. A., ch. 200, § 16. In all cases where the one highway district for the township shall have been adopted, it shall be competent for the township trustees to designate when the same shall take effect as to the working of the roads.

1482. Adoption of one district plan. 20 G. A., ch. 200, § 17. Sections four to fifteen inclusive, of this act [§§ 1469–1480] shall apply and be in force only in such townships as adopt the one highway district plan provided for in this act.

1483. 20 G. A., ch. 200, § 18. All acts and parts of acts so far as inconsistent with this act are hereby repealed.

TOWNSHIP CLERK.

1484. Furnish plat. 972. The township clerk shall furnish each supervisor, to be by him transferred to his successor in office, with a copy of so much of the map or plat furnished such clerk by the auditor as relates to the highways in the district of such supervisor, and, from time to time, mark thereon the changes in or additions to such highways as the same are certified to him by the auditor. [R., § 890; C., '51, §§ 573–74.]

This map is not essential to the authority of the supervisor and gives him no additional power: *Mosier v. Vincent*, 34–478. It is in no legal sense a process, and is no protection to him in opening a highway indicated thereon: *Campbell v. Kennedy*, 34–494.

Copy of plat book for the township to be furnished by the auditor to the township clerk: See § 1458.

1485. Make tax list; duty of auditor. 973. The township clerk shall, within four weeks after the trustees have levied the property tax, make out a tax list for each highway district in his township, which list shall be in tabular form and in alphabetical order, having distinct columns for lands, town lots, and personal property, and carry out in a column the amount of the tax on each piece of land and town lot, and on the amount of personal property belonging to each individual; and he shall carry out the amount of tax, to be paid in money, due from each individual in a column by itself; which list shall contain the names of all persons required to perform two days' labor upon the highway as a poll tax; and to enable the township clerk to make out such tax list, the assessor shall furnish the township clerk of each township, on or before the first day of April of each year, a correct copy of the assessment lists of said township for that year, which list shall be the basis of such tax list. The county auditor shall furnish the several township clerks of his county with printed blanks necessary to carry into effect the provisions of this chapter. [R., § 892; 9 G. A., ch. 96, § 6.]

1486. Collection of tax. 974. The township clerk shall make an entry upon such tax list showing what it is, for what highway district, and for what

year, and shall attach to the list his warrant under his hand, in general terms, requiring the supervisor of such district to collect the taxes therein charged as herein provided; and no informality in the above requirements shall render any proceedings for the collection of such taxes illegal. The clerk is hereby required to cause such lists to be delivered to the proper supervisors of his township within thirty days after the levy, and take receipts therefor; and such list shall be full and sufficient authority for the supervisor to collect all taxes therein charged against resident property holders in his district. [R., § 893.]

1487. Delinquent tax certified. 975. The township clerk shall, on or before the second Monday in October in each year, make out a certified list of all land, town lots, and personal property on which the highway tax has not been paid, and the amount of tax charged on each parcel of land, town lot, or personal property, designating the district in which the same is situated, and transmit the same to the auditor, who shall enter the amount of tax to each piece of land or town lot and person taxed for personal property, in the column ruled for that purpose, the same as other taxes, and deliver the same to the county treasurer, charging him with the same, which shall be collected by such treasurer in the same manner that county taxes are collected; and in case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the use of the township, for highway purposes, a sum equal to the amount of tax on said land, which may be collected by suit on his official bond before any court having competent jurisdiction. [R., § 898; 9 G. A., ch. 96, §§ 7, 8; 12 G. A., ch. 76.]

Irregularities in the making of returns by the township clerk, or in the manner of placing the taxes upon the treasurer's books, will not render the tax invalid: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41–153, 177; *Iowa R. Land Co. v. Sac County*, 39–124; *Same v. Carroll County*, 39–151, 154.

1488. Taxes paid to clerk. 976; 22 G. A., ch. 45. The county treasurer shall, on the last Monday in April and October in each year, pay to the township clerk all the highway taxes belonging to his township which are at such times in his hands, taking the duplicate receipts of such clerk therefor, one of which shall be delivered by such treasurer, on or before the first Monday in May and November in each year, to the trustees. [R., § 910.]

These taxes when collected become no part of the county fund and cannot be appropriated or disbursed by the county. If illegally collected, they cannot be refunded to the tax payers out of the county revenue, and the county is not liable in an action for their recovery: *Stone v. Woodbury County*, 51–522.

The clerk may maintain an action for funds belonging to his township in the hands of third persons. If he deposits the funds in his individual name without notice to the banker of their character, such act amounts to conversion and the deposit belongs to him individually, and if seized by garnishment process under attachment on his individual debt, without notice as to the character of the fund, it cannot be recovered back: *Long v. Emsley*, 57–11.

The township clerk is the proper party to bring suit on the supervisor's bond for failure to account for taxes. Such duty does not pertain to the trustees: *Wells v. Stomback*, 59–376; *Keller v. Bare*, 62–468.

Road taxes collected by the county treasurer and paid over to the township clerk, except as far as they belong to the general fund, are to be distributed in the same manner as other road taxes, without any special action of the township trustees: *Henderson v. Simpson*, 45–519.

A road supervisor who fails to pay over the proportion of the road taxes collected by him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stomback*, 59–376.

1489. Specify district. 18 G. A., ch. 36, § 1. It shall be the duty of the auditor to provide a column which shall show the road districts to which the highway taxes belong, as transmitted by the township clerks, according to section nine hundred and seventy-five of the code of 1873 [§ 1487].

1490. Statement. 18 G. A., ch. 36, § 2. It shall be the duty of the county treasurer, when he pays to the township clerks highway taxes, accord-

ing to section nine hundred and seventy-six [§ 1488], to furnish, at each time and to each clerk, a statement showing the road district or districts to which it belongs.

SUPERVISOR — POWER, DUTIES.

1491. Qualification; exemption. 977. The supervisor must reside in the district for which he is elected or appointed, and no person shall be required to serve as supervisor who is exempt from performing labor on the highway. [R., § 881.]

The township trustees may redistrict the township, and if by such redistricting the supervisor of the district becomes a resident of another district than that for which he was elected, his office becomes vacant: *Mauck v. Lock*, 70-266.

A supervisor is subject to the same liability for improper or careless exercise of his powers as a city or town is in relation to its streets; and *held* that he was personally liable for damages to an adjacent land owner resulting from the diversion of a stream of water from his land, by reason of alteration in the highway made by the supervisor: *McCord v. High*, 24-336.

A road supervisor may be guilty of trespass in removing an obstruction, as, for instance, a dwelling-house, if the act is not done for the purpose of opening the highway, but for the malicious purpose of injuring the owner: *Wilding v. Hough*, 37-446.

As incorporated towns are given power to provide for grading and repairing their streets, they must have control over such streets, and the road supervisors and township trustees have no power over them: *Clark v. Epworth*, 56-462.

A road supervisor may be restrained by injunction from repairing the highway in such a manner as to interfere with the rights or wishes of an adjoining owner: *Bills v. Belknap*, 36-583.

Further as to removing shade-trees, see § 1503.

1492. Bond; vacancy. 978; 16 G. A., ch. 167. Each supervisor shall be required to give bond in such sum and with such security as the township clerk may deem requisite, and conditioned that he will faithfully and impartially perform all the duties devolving upon him, and appropriate all moneys that may come into his hands by virtue of his office according to law, and in case of a vacancy occurring in any highway district within a township, the township clerk shall fill such vacancy by appointment. [R., § 884.]

The trustees have no authority to receive the taxes collected by the supervisor and are not the proper parties to bring suit on his bond for failure to account for such taxes. Such suit should be brought by the clerk: *Keller v. Bare*, 62-468.

1493. Notice to; penalty for refusal to serve. 979. The township clerk shall notify each supervisor within five days after his election or appointment, and if he shall fail to appear before said township clerk, unless prevented by sickness, within ten days, and give bond and take the oath of office, he shall forfeit and pay the sum of five dollars, and in case of his failing or refusing to pay the same, his successor in office shall collect the said amount by suit or otherwise, and apply the same to the repairing of highways in his district. [R., § 883.]

1494. To post notices. 980. The supervisors shall, within ten days after receiving the tax list specified in sections nine hundred and seventy-three and nine hundred and seventy-four [§§ 1485, 1486], post up in three conspicuous places within his district, written notices of the amount of highway tax assessed to each tax payer in said district. [R., § 894; 9 G. A., ch. 163, § 2; 12 G. A., ch. 100, § 3.]

1495. How tax expended. 981. The supervisor shall cause all tax collected by him to be expended for the purposes specified in section nine hundred and sixty-nine of this code [§ 1464], on or before the first day of October of that year, except the portion set apart for a general township fund as provided in said section, which shall be by the supervisor paid over to the township clerk from time to time as collected, and his receipt taken therefor. [9 G. A., ch. 163, § 3; 12 G. A., ch. 100, § 4.]

A road supervisor who fails to pay over the proportion of the road taxes collected by him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stomback*, 59-376.

1496. Expended in each district. 982. The money tax levied upon the property in each district, except that portion set apart as a general township fund, whether collected by the supervisor or county treasurer, shall be expended for highway purposes in that district, and no part thereof shall be paid out or expended for the benefit of another district. [C., '51, § 578; 9 G. A., ch. 163, § 4; 12 G. A., ch. 100, § 5.]

Road tax collected by the county treasurer and paid over to the clerk, except so much thereof as belongs to the general fund (under § 1464), is to be distributed in the same manner as other road tax, without any special action of the trustees: *Henderson v. Simpson*, 45-519.

1497. Who to perform labor. 983. The supervisor shall require all able-bodied male residents of his district between the ages of twenty-one and forty-five, to perform two days' labor upon the highway between the first day of April and September of each year. [10 G. A., ch. 76, § 2; 12 G. A., ch. 100, § 9.]

1498. Notice of time and place; receipts. 984. The supervisor shall give at least three days' notice of the day or days and place designated to work the highways to all persons subject to work thereon, or who are charged with a highway tax within his district, and all persons so notified must meet said supervisor at such time and place with such tools, implements, and teams as the supervisor may designate, and shall labor diligently under the direction of the supervisor for eight hours each day; and for such two days' labor performed, the supervisor shall give to the person a certificate, which certificate shall be evidence that such person has performed labor on the public highway, and shall exempt such person from performing labor in payment of highway poll-tax in that or any other highway district for the same year. And the supervisor shall give any person who may perform labor in payment of his highway tax, if demanded, a receipt showing the amount of money earned by such labor, which shall be evidence of the payment of said tax to the amount specified in the receipt. [R., §§ 886, 896; C., '51, § 588.]

[The provisions of this section are modified as to hours, etc., by § 1479.]

A failure to notify the tax payer to work out the portion of his tax which may be paid in work will not authorize the restraining of the collection of the entire tax: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168, 177.

A man who is not able-bodied is not liable to the penalty for not appearing to work on the highway when summoned. The fact that he does not make known his condition when summoned, or sends a substitute who is rejected as incompetent, will not deprive him of the benefit of his exemption: *Martin v. Gadd*, 31-75.

1499. Penalty for failure to attend or work. 985; 16 G. A., ch., 21. Each person liable to perform labor on the highway as poll tax, who shall fail or neglect to attend, either in person or by satisfactory substitute, at the time and place appointed, with the designated tool, implement, or team, having had three days' notice thereof, or having attended, shall spend his time in idleness, or disobey the supervisor, or fail to furnish said supervisor, within five days thereafter, some satisfactory excuse for not attending, shall forfeit and pay to said supervisor the sum of three dollars for each day's delinquency; and in case of failure to pay such forfeit within ten days, the supervisor shall recover the same by action in the name of the supervisor; and no property or wages belonging to said person shall be exempt to the defendant on execution; said judgment to be obtained before any justice of the peace in the proper township, which money, when collected, shall be expended on the public highway. [R., § 887.]

1500. Compensation of supervisor. 986; 20 G. A., ch. 200, § 3. The supervisor shall be allowed the sum of two dollars per day for each day's labor,

including the time necessarily spent in notifying the hands and making out his return, which sum shall be paid out of the highway fund, after deducting his two days' work. When there is no money in the hands of the clerk with which to pay the said supervisor, he shall be entitled to receive a certificate for the amount of labor performed, which certificate shall be received in payment of his own highway tax for any succeeding year. [R., § 888; C., '51, § 2547; 9 G. A., ch. 163, § 5; 10 G. A., ch. 76, § 1; 12 G. A., ch. 100, § 7.]

1501. Report. 987. The supervisors of the several districts of each township shall report to the township clerk on the first Monday of April and October of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public highway, and the amount performed by each;
2. The names of all persons against whom suits have been brought, as required by section nine hundred and eighty-five [§ 1499], and the amount collected of each;
3. The names of all persons who have paid their property highway tax in labor, and the amount paid by each;
4. The names of all persons who have paid their property tax in money, and the amount paid by each;
5. A correct list of all non-resident lands and town lots on which the highway tax has been paid, and the amount paid by each;
6. A correct list of all non-resident lands and town lots on which the highway tax has not been paid, and the amount of tax on each piece;
7. The amount of all moneys coming into his hands by virtue of his office, and from what sources;
8. The manner in which moneys coming into his hands by virtue of his office have been expended, and the amount, if any, in his possession;
9. The number of days he has been faithfully employed in the discharge of his duty;
10. The condition of the highways in his district, and such other items and suggestions as said supervisor may wish to make, which report shall be signed and sworn to by said supervisor and filed by the township clerk in his office. [R., § 897; C., '51, § 580; 9 G. A., ch. 163, § 2.]

1502. Tax certified and collected. 988. If it appears from such report, that any person has failed to perform the two days' labor required, or any part thereof, and that the supervisor has neglected to collect the amount in money required to be paid in case of such failure, the clerk shall add the amount required to be paid in case of such failure to such person's property tax, and certify the same as required in section nine hundred and seventy-five [§ 1487], and the auditor shall enter the same on the proper tax list, and the treasurer shall collect the same as required in said section nine hundred and seventy-five.

1503. Shade trees; timber; drainage. 989; 16 G. A., ch. 29, § 1; 21 G. A., ch. 87, § 1. The supervisor is not permitted to cut down or injure any tree growing by the wayside which does not obstruct the highway, and which stands in front of any town lot, inclosure, or cultivated field or any ground reserved for any public use, where such tree is intended to be preserved for shade or ornament, by the proprietor of the land, on or adjacent to which the tree is standing; and it shall not be lawful for the supervisor to enter upon any inclosed or unmclosed lands for the purpose of taking timber therefrom without first receiving permission from the owner or owners of said lands, nor to destroy or injure the ingress or egress to any property, or to turn the natural drainage of the surface water to the injury of the adjoining owners. [R., § 901; C., '51, § 587.]

Shade trees which do not obstruct the highway, and the removal of which is not necessary to properly improve it, are not to be removed in opposition to the wishes of an

adjoining owner on whose portion of the highway the trees are growing: *Bills v. Belknap*, 36–583; *Everett v. Council Bluffs*, 46–66.

Shade trees at the side of the highway which would not obstruct or interfere with the traveled track, if it were located in the middle of the highway, should be permitted to stand: *Quinton v. Burton*, 61–471.

Where a hedge was planted after a highway was in use, and for the purpose of fencing between a field and the highway, *held*, that the planting and maintenance of the hedge amounted to a dedication of the land outside of the hedge for the purpose of the highway, although at the time the hedge was planted a fence for its protection was maintained outside of the hedge: *Ibid.*

1504. Damages from unsafe bridge or highway. 990; 17 G. A., ch. 52. When notified in writing that any bridge or any portion of the public highway is unsafe, the supervisor shall be liable for all damages resulting from the unsafe or impassable condition of the highway or bridge, after allowing a reasonable time for repairing the same. And if there is in his district any bridge erected or maintained by the county, then, in that event, he shall, on such notice of the unsafe condition of such county bridge, as soon as he reasonably can, obstruct passage on such bridge and use strict diligence in notifying at least one member of the board of supervisors of his county in writing of the unsafe condition of such bridge; and if he fails so to obstruct and notify, he shall be liable for all damages growing out of the unsafe condition of such bridge, occurring between the time he is so notified and such time as he neglects in obstructing such passage; and any person who shall remove such obstruction shall be liable for all damages occurring to any person resulting from such removal. *Provided*, that nothing herein contained shall be construed to relieve the county from liability for the defects of said bridge. [R., § 902; C., '51, § 582.]

The road supervisor is required to build only such bridges as can be built from the limited means at his disposal. Other bridges are to be deemed county bridges: *Casey v. Tama County*, 75–655.

It is not the duty of the supervisor to build bridges requiring a large expenditure of money, nor is he liable for failure to keep such bridges in repair when such repair would involve a considerable expense. Such matters are under the control of the board of supervisors: *Wilson v. Jefferson Co.*, 13–181. And see § 402, ¶ 18 and notes.

1505. Extraordinary repairs. 991. For making such extraordinary repairs, the supervisor may call out any or all the able-bodied men of the district in which they are to be made, but not more than two days at one time without their consent, and persons so called out shall be entitled to receive a certificate from the supervisor, certifying the number of days' labor performed, which certificate shall be received in payment for highway tax for that or any succeeding year at the rate per day established for that year. [R., § 903; C., '51, §§ 583, 586.]

1506. Penalty. 992. If any able-bodied man, when duly summoned for any such purpose, fails to appear and labor diligently by himself or substitute, or send satisfactory excuse therefor, or to pay the value of such work in money at any time before suit is brought, he is liable to a fine of ten dollars, to be recovered by suit before any justice of the peace in the name of the supervisor, and for the use of the highway fund of the district. [R., § 904; C., '51, § 585.]

A man not able-bodied is not liable to the penalty here prescribed. The fact that he does not make known his condition when summoned, or sends a substitute who is rejected as incompetent, will not deprive him of the benefit of his exemption: *Martin v. Gadd*, 31–75.

1507. Obstructions removed. 993. The supervisor shall remove obstructions in the highways caused by fences or otherwise, but he must not throw down or remove fences which do not directly obstruct the travel upon the highway, until reasonable notice in writing, not exceeding six months, has been given to the owner of the land inclosed in part by such fence. [R., § 905; C., '51, § 594.]

The statutory provision as to notice regarding removal of obstructions is applicable in case of obstructions placed in a highway after it is opened, and a fence directly obstructing travel cannot be thrown down without notice, although the party maintaining it may be liable to indictment for obstructing the highway: *Mosier v. Vincent*, 34-478.

The reasonable notice required to be given by a supervisor in case of opening a highway is such notice and for such a length of time as, under all the facts and circumstances of the case, is reasonably proper to enable the party notified to perform the act which the notice is intended to give him opportunity to perform, and in the ordinary manner. It need not be six months in all cases: *Blackburn v. Powers*, 40-681.

The verdict in a particular case finding that a notice of three days for the removal of a fence was sufficient notice, *held* not reversible error in the absence of the evidence on which the jury acted: *Mosher v. Vincent*, 39-607.

The obstructions which the supervisor is authorized to remove in opening the highway are obstacles, impediments, or hindrances, or anything impeding progress thereon. They need not be such as to render the highway impassable: *Patterson v. Vail*, 43-142.

The supervisor may be compelled by *mandamus* to perform the duty of opening the highway as required by statute: *Ibid.*; *Larkin v. Harris*, 36-93.

Proof of a mutual mistake as to the line of a highway, as used, by which it varies from that intended, and that an obstruction in the highway, as used, is an attempt to correct such mistake, will make the obstruction legal: *State v. Crow*, 30-258.

If the right to use a way is acquired by the public, but its nature is such that the right cannot be exercised on account of natural obstacles, a person cannot be held guilty of the crime of obstructing such highway, as it cannot be said that the public are by his acts prevented from using it: *State v. Shinkle*, 40-131.

A party cannot be prevented by injunction from closing or obstructing a highway that is in such condition that it cannot be used by the general public: *Prince v. McCoy*, 40-533.

But where a highway was impassable as laid out, by reason of standing timber, and a track was used for the period of prescription, crossing the highway at different points, *held*, that the existence of such natural obstruction in the highway as laid out would not excuse the obstruction of the traveled track, whether upon the established highway or upon the line used by prescription: *State v. McGee*, 40-595.

Relief against unlawful obstruction: Equity will afford relief to one specially injured by the erection of an obstruction upon a highway, by directing and requiring its removal and enjoining its continuance. Such obstructions are public nuisances and will be abated and enjoined by a court of equity at the suit of a party aggrieved thereby: *Hougham v. Harvey*, 33-203.

An unlawful obstruction of a public highway is a public nuisance not generally actionable, and a private person has a right of action only when he suffers an injury distinct from the public as a consequence of the wrongful act: *Ingram v. Chicago, D. & M. R. Co.*, 38-669.

A party does not, in an action for *mandamus*, show himself entitled to have a public highway opened by showing that such highway is located near his lands, and that the public travel is upon his lands and not upon the highway. It would not follow that such travel would be upon the highway even if opened: *Moon v. Cort*, 43-503.

Criminal obstruction: The land owner is not liable to indictment for obstructing the highway by reason of his not removing fences where a newly established highway crosses his land, at least until he has had reasonable notice from the supervisor to do so: *State v. Ratliff*, 32-189.

Failure to remove an obstruction placed in a highway by another, for instance by a former owner, does not, at least in the absence of notice, constitute the offense of obstructing a highway: *State v. Robinson*, 52-228.

1508. Condition; guide-boards. 994. The supervisor shall keep the highway in as good condition as the funds at his disposal will permit, and shall place guide-boards at cross-roads and at the forks of the highways in his district; said boards to be made out of good timber, the same to be well painted and lettered, and placed upon good substantial hard-wood posts, to be set four feet in and to be at least eight feet above ground. [R., § 907; C., '51, § 577; 9 G. A., ch. 96, § 1.]

While the public have a right to the full width of the highway they cannot use it so as to injure adjoining property, and if the construction of a bridge at one side of the road would cause injury to the property on that side the supervisor may be required to build it in the center of the highway: *Quinton v. Burton*, 61-471.

The judgment of the road supervisor must govern as to the construction, etc., of the highway, and no one has a right to make a material change in his plans without being guilty of defacing the highway within the meaning of the statute (§ 5301): *State v. Hunter*, 68-447.

The acts of a supervisor in the exercise of his ministerial duties in the construction of bridges, etc., are subject to control by an action to enjoin the improper exercise of his powers: *Quinton v. Burton*, 61-471.

Threatened illegal action of a supervisor in opening a highway, removing fences, interfering with water-courses, etc., in the discharge of his official duty, may be restrained by injunction: *Bolton v. McShane*, 67-207.

1509. Canada thistles. 995. The supervisor of highways, when notified in writing that any Canada thistles are growing upon any vacant or non-resi-

dent lands or lots within his district, the owner, agent, or lessee of which is unknown, shall cause the same to be destroyed and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which shall be audited and allowed by said board and paid from the county fund; and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes and returned to the county fund. [14 G. A., ch. 66.]

[Supervisors or persons owning or occupying land, allowing Canada thistles to blossom or mature, punished: See § 5422.]

1510. Settlement. 996. The supervisors are required to meet the township trustees at their meeting on the first Monday in October in each year, at which time there shall be a settlement of the accounts of such supervisors connected with the highway fund, for putting up guide-boards and for any other services; and after payment of the supervisors, the trustees shall order such distribution of the fund in the hands of the township clerk, as they may deem expedient for highway purposes, and the clerk shall pay the same out as ordered by the trustees. [R., § 909; 9 G. A., ch. 96, § 2.]

The fund here referred to is the balance of the general fund provided by the trustees under § 1465, and does not include moneys coming into the clerk's hands from the county treasurer as taxes collected by the latter, except so far as such moneys properly belong to the general fund: *Henderson v. Simpson*, 45–519.

The clerk is the proper party to bring suit on the supervisor's bond for failure to account for taxes: *Keller v. Bare*, 62–468.

1511. Orders issued. 997. Should there be no money in the treasury on final settlement of the supervisors with the trustees, said trustees shall order the township clerk to issue orders for the amount due the supervisors. The orders so issued shall be numbered with the number of the district to which they belong and shall be received the same as money in the payment of highway tax in the district to which they are issued. [Same, § 3.]

Such orders are payable in money out of the general township fund. If such fund is not sufficient, the trustees may be compelled to levy a tax for their payment. The provision that they are receivable in payment of highway tax is merely an additional method of payment, and the supervisors cannot be compelled to secure payment in that way: *Tobin v. Township of Emmetsburg*, 52–81.

1512. Neglect to perform duty; penalty. 998. Any supervisor failing or neglecting to perform the duties required by this chapter, shall forfeit and pay for the use of the highway fund of his district the sum of ten dollars; the township clerk shall, in case of such failure or neglect, commence suit in his name for the collection of the same, before any justice of the peace within the proper township. [R., § 900; 9 G. A., ch. 96, § 4.]

1513. Hedges in highway. 999. Where any owner or occupant of land adjoining or abutting upon any highway may desire to plant a hedge upon the line of the same, he shall be allowed to build his fence upon such highway; but he shall not build the fence more than five feet within the outer line of said highway, and said fence may be built on both sides of all highways of fifty feet or more in width at the same time. Such owner or occupant shall not be allowed to occupy such highway as aforesaid for more than ten years, and not more than six months before such hedge shall be planted, and at the expiration of such time he shall remove such fence upon the order of the supervisor of the district where such highway is situated. [9 G. A., ch. 51.]

1514. Turning to right. 1000. Persons meeting each other on the public highways, shall give one-half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom, together with a fine, not exceeding five dollars, which fine shall be appropriated to repairing the highways in the district where the violation occurred; but no prosecution shall be instituted except on complaint of the person wronged. [R., § 908.]

CHAPTER 3.

OF FERRIES AND BRIDGES.

BRIDGES.

1515. Part of highway; width. 1001. Bridges erected or maintained by the public, constitute parts of the highway, and must not be less than sixteen feet in width. [R., § 822.]

Bridges are a part of the highway: *Brown v. Jefferson County*, 16-339; and are therefore under the general supervision of the board of supervisors, under § 1410. They cannot be compelled by *mandamus* to build: *The State v. Morris*, 43-192.

As to liability of county for defects in county bridges, etc., see notes to § 402, ¶ 18.

The statutory provision as to the width of bridges is not to be construed to mean that a bridge is not required to be constructed under any circumstances more than sixteen feet in width. If the circumstances require that it shall be of greater width, and it is so constructed, the liability for defects therein will not be limited to sixteen feet but extend to the whole width: *Rusch v. Davenport*, 6-443.

The act of a board of supervisors in contracting for a bridge of less than the statutory width, though erroneous, is not void, and such error will not defeat a recovery by the other parties to the contract in an action thereon: *Mallory v. Montgomery County*, 48-681.

Bridges in a public highway ought to be broad enough to permit all farm machinery to be drawn over them, and for the passage of all vehicles and machinery in use which are drawn upon the public highways: *Quinton v. Burton*, 61-471.

1516. Fast driving. 1002. Any person riding or driving faster than a walk across any bridge maintained at the public charge, shall be subject to pay the following penalties: When the bridge is twenty-five feet in length, and does not exceed one hundred, the sum of one dollar for each offense; when it is over one hundred, and does not exceed two hundred feet in length, the sum of three dollars for each offense; where it is over two hundred, and does not exceed three hundred feet in length, the sum of five dollars for each offense; and the further additional sum of one dollar for each offense for every hundred feet in length in excess of three hundred, to be recovered by civil action in the name and for the county in which the bridge is situated. If the bridge is situated in more than one county the action is maintainable in or by either. [R., § 823; 9 G. A., ch. 112, § 1.]

TOLL-BRIDGES.

1517. How established. 1003. The board of supervisors may grant licenses for the erection of toll-bridges across any water-courses or other obstruction which justifies the establishment of such bridge, and which calls for an expenditure that cannot be met without serious inconvenience to the revenues of the county. In granting such licenses, preference shall be given to the owner of the land on which the bridge is proposed to be located, if he applies for the privilege, and is, in other respects, a competent person to erect such bridge. [R., § 1214; C., '51, § 726.]

If a person is given authority or license from the county to erect a toll-bridge, his failure to compensate the land owner for damages sustained on account of the property taken for the purpose of such erection would not warrant the land owner in tearing down and removing the bridge so erected. The remedy to the land owner would be complete and ample by legal proceedings: *Beebe v. Stutsman*, 5-271.

1518. License; right of way. 1004. When any corporation or individual shall obtain from the board of supervisors, license for the construction of a toll-bridge across any of the streams of this state, such corporation or individual may take and appropriate so much private property as shall be necessary for a right of way therefor and all approaches thereto, in such width as such corporation or individual may desire, not exceeding sixty feet. [12 G. A., ch. 145, §§ 1, 2.]

1519. Damages assessed. 1005. If the owner of the property over which such way extends shall refuse to grant the same, and the damages therefor cannot be settled by agreement, all damages which the owner, or any person having an interest in or improvement upon the property to be taken, will sustain by reason of the appropriation of such property, shall be assessed, and the right of way taken on the application of either party under the provisions of chapter three, of title ten, of this code. [12 G. A., ch. 145, § 3.]

1520. Between different counties or states. 1006. Where the extremities of the bridge lie in different counties, a license must be procured from each of such counties, and if different rates of toll are fixed by the different boards of supervisors, each has power to fix the rates of travel which is going from its own county. A similar principle shall be observed where only one of the extremities of the bridge is within this state. [R., § 1216; C., '51, § 728.]

1521. Limitation of license; tolls. 1007. Such licenses may be granted to continue for any period not exceeding fifty years, and the rate of toll may be fixed, in the first instance, in such a manner as to be unalterable within any stipulated period not exceeding ten years; after that time it shall be under the control of the board of supervisors. [R., § 1217; C., '51, § 729.]

1522. Exclusive privilege. 1008. The board of supervisors is also authorized to stipulate in the license, that no other bridge or ferry shall be permitted across the same obstruction within any distance not exceeding two miles of such bridge, and for a period not exceeding ten years; any violation of the terms of such stipulation is a nuisance, and he who causes it is guilty of a misdemeanor. [R., § 1218; C., '51, § 730.]

1523. Failure of duty. 1009. When it is made to appear to the board of supervisors, after ten days' notice to the person licensed, that he fails substantially to perform his duties according to law, the board may revoke his license. [R., § 1212; C., '51, § 724.]

1524. Day or night; rate of toll. 1010. All toll-bridges must be so regulated as to allow persons to pass at any hour of the night or day, but the board of supervisors may, in its discretion, in fixing the rates of toll, permit a greater amount to be collected during certain hours of the night-time. [R., § 1222; C., '51, § 734.]

TOLL-BRIDGES OVER STREAMS DIVIDING COUNTIES.

1525. Purchase. 20 G. A., ch. 13, § 1. Boards of supervisors in adjoining counties each of which contains according to the last census a population exceeding ten thousand inhabitants shall have authority to purchase and acquire any toll-bridge erected across any stream dividing said counties at the place said bridge is erected and keep and maintain the same at joint expense as a free public bridge, provided that the total cost of such bridge shall not exceed the sum of ten thousand dollars.

1526. Proceedings for; compensation. 20 G. A., ch. 13, § 2. If said boards of supervisors are able to agree upon the terms upon which they will purchase such bridge and the proportion each will pay towards the purchase and maintenance of the same, such agreement shall be reduced to writing signed by the respective chairmen and recorded in the records of their proceedings. But if they are unable to thus agree the county desiring to purchase said bridge may institute a special proceeding in the circuit [district] court of either of said counties, and said cause shall be conducted as an equitable cause and the court shall determine whether there is any public necessity for said bridge, the relative benefit the same will be to the two counties

and based upon such benefit the proportion each county shall bear in the purchase and maintenance of said bridge, and shall enter decree accordingly, either or both parties having the right of appeal to the supreme court. Upon entering of a decree in favor of the purchase of such bridge it shall be the duty of said respective boards of supervisors at once to proceed to complete the purchase upon such terms as are determined on and to forthwith levy the necessary taxes to make the payments and said counties shall thereafter keep and maintain such bridge and be responsible for the safe condition thereof as provided by law.

FERRIES.

1527. License. 1011. The board of supervisors has power to grant such ferry licenses as may be needed within its county, for a period not exceeding ten years. [R., § 1200; C., '51, § 712.]

The rights of a riparian owner, at common law and under the statute, in relation to a ferry franchise, discussed; and *held* that a stranger has no right to land ferry-boats upon the soil of such owner, nor can he use a highway laid out across the land of such owner, without compensation to him: *Prosser v. Wapello County*, 18–327; *Prosser v. Davis*, 18–367.

A ferry franchise is not lost by the death of the party to whom it is granted, but passes to his personal representatives: *Lippencott v. Allander*, 27–460.

The revocation of a ferry license by a board of supervisors may be appealed from: *Lippencott v. Allander*, 25–445.

1528. Rates. 1012. The board may prescribe the rates of ferriage, as well as the hours of the day or night during which the ferry must be attended, both of which may, from time to time, be changed at the discretion of the board. [R., § 1201; C., '51, § 713.]

1529. Exclusive privilege. 1013. In granting a ferry license, the board of supervisors has power to make the privilege granted exclusive, for a distance not exceeding one mile in either direction from said ferry, in which case no person shall keep a public ferry within the prescribed distance, unless, after twenty days' notice to the person who has obtained such privilege, it is made to appear to the board that the public good requires both ferries, and a new license is issued for the second ferry accordingly. The notice herein required must be served personally on the owner, or on the person in charge of the ferry-boat. [R., § 1202; C., '51, § 714.]

Grants of exclusive ferry licenses, even over navigable streams as the Mississippi river, are upheld on grounds of public necessity or advantage: *Burlington, etc., Ferry Co. v. Davis*, 48–133; *United States ex rel. v. Fanning*, Mor., 348.

The grant of a ferry franchise necessarily implies the right to exclusive privileges within the prescribed limits: *Phillips v. Bloomington*, 1 G. Gr., 498.

If a ferry license does not purport to confer an exclusive privilege, an exclusive right cannot be inferred: *McEwen v. Taylor*, 1 G. Gr., 532.

The use of a navigable river for a public highway is of paramount importance and will prevail over a privilege granted for a ferry. If the mode of operating the ferry is such as to encroach upon the free navigation of the stream, the owner of the ferry must yield to such free navigation, although the owner of a boat navigating the stream would be liable for any wilful injury done to the ferry: *Steamboat Globe v. Kurtz*, 4 G. Gr., 433.

A person not possessing a franchise may, within the limits of an exclusive franchise granted to the owner of the ferry, transport his own teams and conveyances, for instance, where he is a carrier of the United States mails, but he cannot make such private individual right the medium or cover for carrying passengers whose transportation legally belongs to the owner of the franchise: *Weld v. Chapman*, 2–524.

1530. Preference. 1014. In granting a ferry license, preference must be given to the keeper of a previous ferry at the same point, and if it be a new ferry, preference shall be given to the owner of the land; but if there is no such, or if, after giving the same notice as is required by the last section, he fails to make application for such license, or if, in the opinion of the board, he is an improper person to receive the same, it may be conferred on any other proper applicant. [R., § 1203; C., '51, § 715.]

1531. Between different counties. 1015. Where the opposite shores of the stream are in different counties, a license from either is sufficient, and the board of supervisors first exercising jurisdiction by granting a license, retains that jurisdiction during the term of such license. [R., § 1204; C., '51, § 716.]

1532. Between different states. 1016. Where but one side of a river is within this state, the board of supervisors possesses the same power, so far as the shore of this state is concerned, as though the river lay wholly within this state. [R., § 1205; C., '51, § 717.]

In such case the grant of a franchise gives no rights beyond the limits of the state: *Weld v. Chapman*, 2–524; *Burlington, etc., Ferry Co. v. Davis*, 48–133.

1533. Bond. 1017. The board of supervisors, upon being satisfied that the requirements of this chapter have been complied with, and that a ferry is needed at such place, and that the applicant is a suitable person to keep it, must grant the license, which, however, shall not issue until the applicant files a bond, with sureties to be approved by the board or auditor, in a penalty not less than one hundred dollars, with the condition that he will keep the ferry in proper condition for ferrying, and attend the same at all times fixed by the board for running the same, that he will neither demand nor take any illegal tolls, and that he will perform all other duties which are, or may be enjoined on him by law, which bond shall be filed in the county auditor's office. [R., § 1207; C., '51, § 719.]

1534. Express and mail. 1018. Every ferryman must transport the public expresses of the United States and of this state, and also the United States mail, at any hour of the day or night. [R., § 1209; C., '51, § 721.]

A public ferryman is a common carrier and charged with the duties and liabilities of such: *Slimmer v. Merry*, 23–90.

PROVISIONS APPLICABLE TO BOTH FERRIES AND TOLL-BRIDGES.

1535. License recorded. 1019. All licenses for ferries and toll-bridges must be entered upon the records of the board of supervisors, and shall contain the rates of toll allowed. [R., § 1208; C., '51, § 720.]

1536. Posting rates. 1020. The rates of toll must be conspicuously posted up at each extremity of the bridge, or on the boat, door of the ferry house, or some other conspicuous place near the ferry. [R., §§ 1210, 1220; C., '51, §§ 722, 732.]

1537. Penalty. 1021. The failure to have such list posted up as aforesaid, justifies any person in refusing the payment of tolls, and where such failure is habitual, the proprietor of the bridge or ferry is liable to pay twenty-five dollars, and the action therefor may be brought in the name of the county against such proprietor, or on the bond of the proprietor of the ferry; the amount recovered in either case to be paid into the county treasury. [R., §§ 1211, 1220; C., '51, §§ 723, 732.]

1538. Notice of application. 1022. Before a license can be granted for either a bridge or ferry, notice of the intended application therefor must be posted up in at least three public places on each side of the river, if both are within the state, and in the township and neighborhood in which the proposed bridge or ferry is to be erected or kept, at least twenty days prior to the making of such application. [R., §§ 1206, 1219; C., '51, §§ 718, 731.]

1539. Penalty for taking illegal toll. 1023. The taking of illegal toll by the grantees of any of the licenses herein contemplated, subjects the offender to the penalty of twenty-five dollars for every such offense, to be recovered by suit on the bond of such licensee, or against him individually, by the person who paid the illegal toll for his own benefit, or he may bring suit

in the name of the county, in which case the proceeds shall go into the county treasury. [R., § 1236; C., '51, § 748.]

1540. Forfeiture. 1024. A failure in other respects to comply substantially with the terms fixed by the board, works a forfeiture of any of the licenses herein authorized, and also subjects the party guilty of such failure to damages for all the injury resulting therefrom, for which he is liable on his bond. [R., § 1237; C., '51, § 749.]

1541. Refusal to pay tolls; penalty. 1025. Any person who refuses to pay the regular tolls established and posted up in accordance with the provisions of this chapter, or who shall run through or pass around the toll gates with a view of avoiding the payment of just tolls or dues, forfeits the sum of five dollars for every offense, which, together with costs of suit, may be recovered by the person entitled to such toll by civil action; but nothing herein contained shall prevent a person from fording a stream across which a toll bridge or ferry has been constructed. [R., § 1238; C., '51, § 750.]

1542. Rules established. 1026. The proprietor of any bridge or ferry authorized by this chapter, may establish rules for the regulation of passengers, travelers, teams, and freight passing or traveling thereon, and may enforce those rules by penalties, not exceeding five dollars for any one offense, which penalties may be recovered by civil action in the name of the proprietor aforesaid; but such rules must be published by being conspicuously posted up before they can be thus enforced. [R., § 1239; C., '51; § 751.]

1543. Franchise sold. 1027. Any of the franchises contemplated in this chapter are subject to execution, and shall be sold as personal property, and be subject to the same rights and consequences, except that the purchaser may take immediate possession of the property. [R., § 1240; C., '51, § 752.]

1544. Carries what. 1028. The sale of any such franchise carries with it all the material, implements, rights of way, and works of whatever kind, necessary for or ordinarily used in the exercise of such franchise. [R., § 1241; C., '51, § 753.]

1545. Free ferry. 1029. Nothing in this chapter contained shall be so construed as to prevent any person, city, incorporated town, or village, from establishing a free ferry at any point where a license to keep a ferry has been granted under the provisions of this chapter; *provided*, that where said free ferry is established, said person or company shall pay a reasonable compensation to the persons owning said ferry for all boats, ropes, and other material, if the same be fit for use; and when said free ferry is established at a point at or near where a license has been granted to an individual, such individual shall be exonerated from any further obligation in relation to the ferry. Bond and security shall be given in like manner by the person or company establishing the free ferry as required in this chapter. [R., § 1245; C., '51, § 757.]

1546. Mill owners. 1030. Nothing in this chapter shall be so construed as to prevent owners of mills from crossing themselves or customers free of charge. [R., § 1246; C., '51, § 758.]

RAILWAY AND TOLL-BRIDGES.

1547. Supervisors to control location. 1031. Any railway or bridge company that now is, or hereafter may be, incorporated in pursuance of the laws of this state, or of the states of Wisconsin, Illinois, Kansas, Nebraska or Dakota, is authorized to construct a railway bridge across the Mississippi, Missouri or Big Sioux rivers, connecting with the eastern or western terminus, as the case may be, of any railway abutting on the Iowa bank of either of said rivers, at such place as shall be designated therefor by the board of supervisors of the county wherein such abutting is to be made and extending toward a point on the opposite bank that may be selected by such company. [10 G. A., ch. 130, §§ 1, 2, 4.]

1548. Plan to be approved. 1032. No bridge shall be built under the provisions of the preceding section, until the plan thereof has been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located. [Same, § 3.]

1549. For teams and passengers; toll for. 1033. Any such company may, with the consent of said board of supervisors, construct such bridge with suitable highways and foot ways for teams and foot passengers, and charge such rates of toll therefor as may be approved by said board. [Same, § 6.]

1550. Ferry established. 1034. Any such company may establish a ferry across said rivers at or near the termini of its road, for the sole purpose of crossing the freight and passengers of such highways, until the bridge is ready for use. [Same, § 7.]

1551. Navigation. 1035. No bridge erected under the provisions of this chapter shall be so located or constructed as to unnecessarily impede, injure, or obstruct the navigation of said rivers. [Same, § 11.]

1552. Bonds and stock. 1036. Any such company may issue its bonds or obligations for an amount not exceeding the cost of such bridge, and of its road in the state, and may secure the payment thereof by a mortgage on the same, and may issue certificates of common and preferred stock; the preferred stock to be issued only on condition that the holders of the common stock give their written consent thereto. [Same, § 5.]

1553. Resident director; process. 1037. Each company acting under the provisions of this chapter shall elect at least one director, who shall be a citizen of and reside in the state of Iowa, and such company shall be liable to be sued in any court of competent jurisdiction in the state, and service of the original notice on said resident director shall be sufficient notice to the company of the pendency of the action. [Same, §§ 8, 9.]

1554. Contract by city for use of bridge. 15 G. A., ch. 5, § 1; 21 G. A., ch. 173, § 2. All cities situated on any river in the state of Iowa or any river forming the boundary line of the said state, whether organized and existing under special charter or general law, and from which to the opposite shore of any of said rivers a bridge has been or may be constructed by any railroad or other private company, corporation or person, shall have power to contract with the company, co[r]poration or person owning such bridge for the use of the same as a public highway; which use may be jointly with any company, corporation or person having or desiring the right to use the same for the passage of cars propelled by steam or otherwise, or may be for the sole use of such portion of such bridge as may be devoted and adapted to highway travel, and in such contract may have the right to assume the sole or any portion of the liability for damage to persons or property by reason of their being on any portion of said bridge or on any approach to either end thereof caused by the running of cars or locomotives by any corporation, company or person entitled to use the said bridge, whether the damage results from the negligence of the persons engaged in running said cars or locomotives or otherwise, and to indemnify and save harmless the owners of said bridge, and any or all corporations, companies or persons entitled to use the same from all liability or damage so caused to the extent or proportion thereof assumed in the said contract. And the said city may cause to be assessed and levied, each year, upon the taxable property of said city a tax not exceeding ten mills on the dollar, each year, to raise a special fund to carry out the terms of the said contract. And the said city may thereafter and during the continuance of said contract manage and control the said bridge so far as necessary to regulate the highway travel thereon, and may regulate the same as a free or toll-bridge, and prescribe such rates of toll as to it, from time to time, shall seem proper, and make all necessary police regulations for the government of the highway travel on said bridge.

TITLE VIII.

OF THE MILITIA.

CHAPTER 1.

[This chapter (secs. 1038 to 1057), after being amended by 16 G. A., ch. 66, was repealed by 17 G. A., ch. 125, and a substitute enacted, which was in turn repealed by the following act.]

1555. Who constitute; exemptions. 18 G. A., ch. 74, § 1. All able-bodied male citizens of the state, between the ages of eighteen and forty-five years, who are not exempted from military duty according to the laws of the United States, shall constitute the military force of this state; *provided*, that all persons who have served in the United States service and have been honorably discharged therefrom, are exempt from duty under the military laws of the state; but nothing herein contained shall be construed to prohibit any person from becoming a member of any military organization, or holding any office in the militia of this state. [Const., Art. 6, § 1.]

1556. List returned. 18 G. A., ch. 74, § 2. Assessors in each township are required to make and return to the county auditor of their respective counties, at the time of making the annual assessment, a correct list of persons subject to military duty, which list may be revised and corrected by the board of supervisors, and the county auditor shall, in the month of June in each even-numbered year, or at such other time as the governor may direct, certify to the adjutant-general a true copy of said list, and in each odd-numbered year he shall certify to the number of names on said list.

1557. Governor to call out. 18 G. A., ch. 74, § 3. When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall, by his proclamation, order out for active service the militia of the state, or such portion thereof as may be necessary, designating the same by draft, if a sufficient number shall not volunteer, and may organize the same, and commission officers therefor; and when so ordered out for service, the militia shall be subject to like regulations, and receive from the state like compensation and subsistence, as are prescribed by law for the army of the United States.

1558. When. 18 G. A., ch. 74, § 4. The commander-in-chief shall have power, in case of insurrection, invasion or breaches of the peace, or imminent danger thereof, to order into the service of the state such of its military force as he may deem proper, and under the command of such officers as he shall designate.

1559. Sheriff may call. 18 G. A., ch. 74, § 5. In case of any breach of the peace, tumult, riot, or resistance to process of this state, or imminent danger thereof, it shall be lawful for the sheriff of any county to call for aid upon the commandant of any military force within his county, immediately notifying the governor of such action; and it shall be the duty of the commandant upon whom such call is made, to order out in aid of the civil authorities the military force, or any part thereof, under his command.

1560. Command. 18 G. A., ch. 74, § 6. The command of any force called into service under sections four and five [§§ 1558, 1559] shall devolve upon the senior officer of such force, unless otherwise specially ordered by the commander-in-chief.

1561. Compensation. 18 G. A., ch. 74, § 7. The military forces of this state, when in the actual service of the state in time of insurrection, invasion, or immediate danger thereof, shall, during their time of service, be paid, by an appropriation especially made therefor, the following sums each for every day actually on duty: To each general, field and staff officer, four dollars; to every other commissioned officer, two dollars and a half; to every non-commissioned staff officer, two dollars; to every other enlisted man, one dollar and a half.

1562. By county. 18 G. A., ch. 74, § 8. All officers and soldiers, while on duty or assembled therefor pursuant to the order of any sheriff of any county in cases of riot, tumult, breach of peace, or whenever called upon to aid the civil authorities, shall receive the same compensation as provided for in section seven [§ 1561], and such compensation shall be audited, allowed, and paid by the supervisors of the county where such service is rendered, and shall be a portion of the county charges of said county, to be levied and raised as other county charges are levied and raised.

1563. Iowa National Guard. 18 G. A., ch. 74, § 9; 20 G. A., ch. 65, § 1. The active militia shall be designated "The Iowa National Guard," and shall consist of six regiments of infantry, and shall be recruited by volunteer enlistments.

1564. Brigades; enlistments. 18 G. A., ch. 74, § 10. The entire state shall be composed of not more than two brigades, to be commanded by two brigadier-generals. The commander-in-chief shall assign all regiments, battalions and companies to such brigades as he shall think proper. All enlistments therein shall be for five years, and made by signing enlistment papers prescribed by the adjutant-general, and taking the following oath or affirmation, which may be administered by the enlisting officer, to wit:

"You do solemnly swear (or affirm) that you will bear true allegiance to, and that you will support the constitution of the United States and the state of Iowa, and that you will serve the state of Iowa faithfully in its military service for the term of five years, unless sooner discharged or you cease to become a citizen thereof; that you will obey the order of the commander-in-chief and such officers as may be placed over you, and the laws governing the military forces of Iowa—so help you God."

1565. Staff of commander-in-chief; adjutant-general. 18 G. A., ch. 74, § 11; 22 G. A., ch. 82, § 43. The staff of commander-in-chief shall consist of an adjutant-general, an inspector-general, a quartermaster-general, a commissary-general, and surgeon-general, and such other officers as he may think proper to appoint. The adjutant-general shall rank as a major-general. He shall issue and transmit all orders of the commander-in-chief, with reference to the militia or military organizations of the state, and shall keep a record of all officers commissioned by the governor, and of all general and special orders and regulations, and of all such matters as pertain to the organization of the state militia and the duties of an adjutant-general, and, except in times of war or public danger, he shall perform the duties of quartermaster general, as required by law, without additional compensation therefor. He shall have charge of the state arsenal and grounds, and shall receive and issue all ordnance stores and camp equipage on order of the commander-in chief. He may appoint, with the approval of the governor, an ordnance-sergeant, at a salary of not more than five hundred dollars per year, who shall, under the direction of the adjutant-general, take charge of the state arsenal and grounds, and shall aid and assist him in the discharge of his duties. He shall furnish, at the expense of the state, such blanks and forms as shall be approved by the commander-in-chief. He shall also, on or before the first day of December next preceding the regular session of the general assembly, and at such other times as the governor shall require, make out a full and

detailed account of all the transactions of his office, with the expense of the same for the preceding two years, and such other matters as shall be required by the governor. He shall reside at the state capital, and hold his office during the pleasure of the governor, and shall receive for his services one thousand five hundred dollars per year.

[Further as to reports, see §§ 117–121.]

1566. Generals; election and staff of. 18 G. A., ch. 74, § 12. The generals of brigades shall be elected by the officers and enlisted men of each brigade respectively, and shall hold their office for five years, or until removed by court-martial or resignation. On recommendation of brigade commanders, the governor shall appoint and commission the brigade staff, as follows: Assistant-adjutant-general, with rank of lieutenant-colonel; assistant-inspector-general, with rank of major; surgeon, with rank of major; quartermaster, with rank of captain; commissary, with rank of captain; and two aids-de-camp, with rank of first lieutentant; judge advocate, with rank of major.

1567. Regiments; officers of. 18 G. A., ch. 74, § 13; 20 G. A., ch. 65, § 2. A regiment shall consist of eight companies. The colonel and lieutenant-colonel and major of all regiments shall be elected as hereinafter provided. The regimental staff shall consist of a surgeon, with rank of major; assistant surgeon, with rank of captain; chaplain, with rank of captain; adjutant, with rank of first lieutenant; quartermaster, with rank of first lieutenant; who shall be appointed and commissioned by the governor, on recommendation of the regimental commander. The colonel of each regiment shall appoint by warrant, countersigned by the adjutant, a sergeant-major, quartermaster-sergeant, commissary-sergeant, hospital-steward, color-sergeant, ordnance-sergeant, drum-major, fife-major, and one bugler, who shall constitute the non-commissioned staff. All field officers shall hold their offices for five years. The commissions of all staff officers shall expire when the officer nominating them or his successor shall make new nominations to their respective offices, and such nominations shall be confirmed by the commander-in-chief.

1568. Band. 18 G. A., ch. 74, § 14. The generals of brigades and regimental commanders, may cause to be organized and enlisted a band, under the leadership of the principal musician of his command, not to exceed sixteen in number, who shall be subject to the orders of such leader, and shall be under the command of such brigade, or regimental commander, and shall be subject to the same regulations as are prescribed for other enlisted men.

1569. Company; officers of. 18 G. A., ch. 74, § 15. A company shall consist of a captain, a first lieutenant, a second lieutenant, five sergeants, four corporals, two musicians, and not less than forty nor more than sixty-four privates and non-commissioned officers. Company officers shall be elected by members of the company, and shall hold their offices for five years. All non-commissioned officers of companies, on recommendation of their captains, shall be appointed by the warrant of the regimental commander, countersigned by the adjutant. All elections of line officers shall be ordered by the regimental commander. All elections of field and general officers shall be ordered by the commander-in-chief. The orders for such election shall be sent to the commanding officer of the company in which said election is ordered, who shall in turn issue his special order for such election, giving at least six days' notice thereof, posting said order in three public places accessible to the members of his command, and where practicable, the same shall be published in one or more newspapers in the county where said company is located. All voting shall be by ballot, and no voting by proxy shall be legal; and a majority of all votes cast shall be necessary to elect. The senior officer present at such election shall preside. The returns of elections, properly attested,

shall be made promptly within five days from the date of election, to the commanding officer of the regiment, who shall promptly forward the result of said election to the brigade commander, who shall report the same to the adjutant-general of the state, by whose approval the commander-in-chief will issue commissions accordingly: *provided*, that at the organization of a new company the election shall be conducted under such regulations as the adjutant-general shall prescribe.

1570. By-laws. 18 G. A., ch. 74, § 16. Every company and regiment may make by-laws for its own government not in conflict with this act or general orders or regulations, which shall be binding upon the members.

1571. Term of service. 18 G. A., ch. 74, § 17. Every officer and soldier of the Iowa National Guard shall be held to duty for the full term of five years, unless regularly discharged for good and sufficient cause by the commandant of his regiment, approved by the commander-in-chief; *provided*, that said term of five years shall in all cases commence from the time such officer or soldier shall have become an active member of any band, company, regiment, or brigade organized or commissioned under the laws of this state, and now belonging thereto. All persons serving five years consecutively in the national guards shall, on application, be entitled to an honorable discharge, exempting them from military duty except in time of war or public danger.

1572. Discipline. 18 G. A., ch. 74, § 18. The organization, equipment, discipline and military regulations of the Iowa National Guard shall strictly conform to the regulations for the government of the army of the United States, in all cases except as herein otherwise provided, and all orders and regulations governing troops, not in conflict with the constitution of this state and the provisions of this act, shall be binding upon all the members of the Iowa National Guard.

1573. Exemptions of members and property. 18 G. A., ch. 74, § 19. Every officer and soldier in the Iowa National Guard shall be exempt from jury duty, from head or poll tax of every description, during the term he shall perform military duty. The uniforms, arms and equipments of every member of the state guard shall be exempted from all suits, distresses, executions or sales for debt or payment of taxes. The Iowa National Guard shall, in cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at drills, parades, encampments, and the election of officers, and in going to and returning from the same.

1574. Drills. 18 G. A., ch. 74, § 20. The commandant of each regiment shall order monthly or semi-monthly, day or evening drills, by the companies of his command, and the members thereof shall receive no compensation for their services while attending such drills.

1575. Parades; encampments. 18 G. A., ch. 74, § 21; 20 G. A., ch. 65, § 4. The Iowa National Guard may parade for drill not less than three nor more than five days annually, by company, regiment or brigade, as ordered by the commander-in-chief, and for the time spent in such encampment each soldier and officer shall receive as compensation therefor the sum of one dollar and fifty cents per day, to be paid under such provisions as the commander-in-chief may direct. The quartermaster-general shall provide transportation to and from all such parades or encampments. The commissary-general, under the direction of the commander-in-chief, shall provide the subsistence for all forces so encamped, such subsistence to conform as near as practicable to the ration prescribed by the general regulations of the army of the United States, and to be issued in kind.

1576. Field duty. 18 G. A., ch. 74, § 22. The commanding officer of any encampment may cause those under his command to perform any field or camp duty he shall require, and may put under arrest during such encamp-

ment or parade any member of his command who shall disobey a superior officer, or be guilty of disorderly or unmilitary conduct, and any other person who shall trespass on the parade or encampment grounds, or in any way interrupt or molest the orderly discharge of duty by members of his command; and he may prohibit the sale of all spirituous or malt liquors within one mile of such encampment, and enforce such prohibition by force, if necessary; *provided, however*, that nothing herein contained shall be construed to interfere with the regular business of any liquor dealer whose place of business shall be situated within said limits.

1577. Ammunition. 18 G. A., ch. 74, § 23. For the use of the Iowa National Guard in target practice, the adjutant-general shall issue to each infantry or cavalry company on the requisition of the commanding officer thereof, an amount not exceeding one thousand rounds of fixed ammunition in each year, and for the use of the artillery he shall issue in each year not exceeding fifty pounds of powder to each company.

1578. Stores. 18 G. A., ch. 74, § 24. Upon the organization of any company or regiment of the National Guard, on the requisition of its commanding officer, and the approval of the governor, the adjutant-general shall issue all necessary ordnance and ordnance stores; *provided, however*, that when any arms or munitions are delivered to any commander, he shall execute and deliver to the adjutant-general a bond, payable to the people of the state of Iowa, in sufficient amount, and with sufficient sureties, to be approved by the governor, conditioned for the proper use of such arms and munitions, and return of the same, when requested by the proper officers, in good order, wear, use and unavoidable loss and damage excepted. All arms shall be kept at the company or regimental armory.

1579. Inspection. 18 G. A., ch. 74, § 25. Such inspection of the Iowa National Guard shall be made as the commander-in-chief may from time to time direct.

1580. Embezzlement of state property. 18 G. A., ch. 74, § 26. Any officer or soldier of the Iowa National Guard knowingly making any false certificate, or false return of state property in his hands, or wilfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be guilty of embezzlement and fraud, and shall be punished in the manner as provided for like offenses in the criminal code of this state.

1581. Uniforms. 18 G. A., ch. 74, § 27. The several regiments of the Iowa National Guard shall adopt the present dress uniform of the army of the United States.

1582. Same. 18 G. A., ch. 74, § 28. The field, staff and line officers of the Iowa National Guard shall provide themselves with the uniform prescribed for officers of the same rank in the United States army within ninety days from the date of commission.

1583. Penalty for failure to return arms, etc. 18 G. A., ch. 74, § 29. Every officer or soldier who shall wilfully neglect to return to the armory of the company, or place in charge of the commanding officer of the company to which he belongs, any arms, uniform or equipment, or portion thereof, belonging to the state, within six days after being notified by said commanding officer to make such return, or to place the same in his charge, shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1584. Penalty for injuring or disposing of same. 18 G. A., ch. 74, § 30. Every person who shall wilfully or wantonly injure or destroy any uniform, arm, equipment, or other military property of the state, and refuse to make good such injury or loss, or who shall sell, dispose of, secrete, or re-

move the same, with intent to sell or dispose thereof, shall be fined not more than two hundred dollars, or imprisoned not more than six months, or both.

1585. Fines for absence or misconduct; suit for. 18 G. A., ch. 74, § 31. Every soldier absent without leave or sufficient excuse from any parade, drill or encampment, shall be fined two dollars for each day of absence; and for any unsoldierly conduct at drill, parade or encampment he may be fined not more than ten dollars, such fines to be collected by civil suit; and all suits for the collection of fines shall be brought in the name of the state of Iowa, for the use of the company to which the soldier fined belongs; but in no case shall the state pay any costs of such suits. Nothing herein shall be construed to prevent any company or band imposing such fines upon its members as it may think proper in its by-laws, which fines may be enforced in the same manner as hereinbefore provided for the collection of fines for absence from drill, parade or encampment.

1586. Judge-advocate. 18 G. A., ch. 74, § 32. A judge-advocate, with the rank of major, shall be appointed for each brigade, and hold office during the pleasure of the commander-in-chief, who shall perform the duties of such office in the court-martial held in his district; and no other person shall prosecute or defend in such courts; but, when he shall be unable to attend, from any cause, or shall be disqualified by interest or relationship, the commander-in-chief may designate the judge-advocate of another brigade to act in his place.

1587. Court-martial. 18 G. A., ch. 74, § 33. Commissioned officers, for neglect of duty, disobedience of orders or unsoldierly or ungentlemanly conduct, may be tried by court-martial, provided that no sentence of any court-martial shall affect the life, liberty or property of any citizen of Iowa, according to the regulations provided in like cases in the army of the United States. The commander-in-chief, by order, shall designate the time and place of holding such courts, and the names of officers composing it, consisting of not less than three nor more than six. The senior officer named shall preside, and shall be of superior rank to the officer on trial, when practicable. Witnesses for the prosecution and defense may be summoned to attend by subpœna signed by the judge-advocate. Any witness, duly summoned, who shall fail to appear and testify may be, by warrant of the president of the court, directed to the sheriff or any constable, arrested and treated as in like cases before civil courts. The fees of all witnesses shall be the same as allowed in civil cases, to be taxed with the necessary expenses of the judge-advocate and the court, by the president of the court, and paid by the state treasurer, on the auditor's warrant, to the judge-advocate, who shall pay all expenses of the trial, when received by him.

1588. Sentence. 18 G. A., ch. 74, § 34. The sentences of courts-martial shall be approved or disapproved by the commander-in-chief, who may mitigate or remit any punishment awarded by sentence of court-martial, when such sentence shall have been approved by the brigade commander. The record of all the proceedings and the sentence of a court-martial in every case, with the order approving or disapproving it, shall be deposited in the office of the adjutant-general.

1589. Military board. 18 G. A., ch. 74, § 35. Every brigade and regimental commander in the Iowa National Guard is hereby authorized to appoint a military board or commission, of not less than three nor more than five officers, whose duty it shall be to examine the capacity, qualifications, propriety of conduct and efficiency of any commissioned officer in his command, who may be reported to the board of commission; and upon the report of said board, if adverse to such officer, and if approved by the commander-in-chief, the commission of such officer shall be vacated; *provided, always*, that

no officer shall be eligible to sit on such board whose rank or promotion would in any way be affected by the proceedings; and two members, at least, shall be of equal or superior rank with the officer examined; and if any officer shall refuse to report himself, when directed, before such board, the commander in chief may, upon the report of such refusal by his commander, declare his commission vacated.

1590. Military organizations. 18 G. A., ch. 74, § 36. It shall not be lawful for any body of men whatever, other than the regularly organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill on parade within the limits of this state without the license of the governor thereof, which license may at any time be revoked; *provided*, that nothing herein contained shall be so construed as to prevent social or benevolent organizations from wearing swords.

1591. Soldiers to provide uniforms. 18 G. A., ch. 74, § 37. Every soldier of the Iowa National Guard shall provide and keep himself provided with a uniform, according to the rules and regulations prescribed by law, and subject to such restrictions, limitations and alterations as the commander-in-chief may direct.

1592. Payment for same. 18 G. A., ch. 74, § 38. In lieu of uniforms being furnished in kind by the state, there shall annually be paid to each soldier having complied with section thirty-seven [§ 1591], the sum of four dollars, to be paid under such provisions as the commander-in-chief may direct, unless a majority of the members of a company prefer to own their uniforms, in which case there shall be no payment to the members of said company, as herein contemplated, but the said uniforms shall be the property of the members of said company respectively furnishing the same; but in no event shall the state be liable for the payment of any money in lieu of uniforms, or for any purpose contemplated by this act, unless such payment can be made without exceeding the annual appropriation provided for by this act.

1593. To belong to state. 18 G. A., ch. 74, § 39. In all other cases except those provided for in the preceding section, all uniforms and other military property shall belong to the state and be used for military purposes only, and each soldier, upon receiving a discharge or otherwise leaving the military service of the state, or upon demand of his commanding officer, shall forthwith surrender the said uniform, together with all other articles of military property that may be in his possession, to said commanding officer.

1594. Expenses. 18 G. A., ch. 74, § 40. There shall be allowed annually for postage, stationery and office incidentals to each brigade headquarters, the sum of twenty-five dollars, to each regimental headquarters, the sum of twenty-five dollars, and to each company headquarters the sum of ten dollars.

1595. Same. 18 G. A., ch. 74, § 41. There shall be allowed annually to each company for armory rent, fuel, lights, and like necessary expenses, the sum of fifty dollars.

1596. Adjutant-general's office. 18 G. A., ch. 74, § 42. Such clerical assistance shall be employed in the adjutant-general's office, as shall in the opinion of the governor, be actually necessary, and any person so employed, shall receive, for the time they may be actually necessarily on duty, such compensation as the governor may prescribe.

1597. Regulations. 18 G. A., ch. 74, § 43. The commander-in-chief is authorized to make and publish regulations for the government of the Iowa National Guard in accordance with existing laws.

1598. Punishment for military offense. 18 G. A., ch. 74, § 44. Any soldier guilty of a military offense may be put and kept under guard by the

commander of a company, regiment or brigade, for a time not extending beyond the term of service for which he is then ordered.

1599. Companies may be disbanded. 18 G. A., ch. 74, § 45; 20 G. A., ch. 65, § 3. The commander-in-chief shall disband any company of the Iowa National Guard when it shall fall below a proper standard of efficiency, and he may order special inspections with a view to disbandment.

1600. Words construed. 18 G. A., ch. 74, § 46. In this chapter the word "soldiers" shall include musicians, and all persons in the volunteer or enrolled militia, except commissioned officers, and the word "company" shall include battery.

1601. Medical staff. 18 G. A., ch. 74, § 47. The medical staff of the Iowa National Guard shall have charge of that branch of the service under the supervision of the surgeon-general.

1602. Surgeon. 18 G. A., ch. 74, § 48. A surgeon in charge in the field or at a camp of instruction may draw, on requisition, such medical stores and supplies as in his judgment may be needed, and for which he shall account, on forms provided by the quartermaster-general.

1603. Surgeon-general. 18 G. A., ch. 74, § 49. The surgeon-general may prescribe the necessary forms and blanks for the work of his department; and all subordinate surgeons of the Iowa National Guard will obey his orders, and report, as often as he may prescribe, the transactions of their department.

1604. Term of enlistment. 18 G. A., ch. 74, § 50. Nothing in this act shall be construed to extend the time of any officer beyond the time for which he was elected, or that of any soldier beyond the time for which he was enlisted.

1605. Appropriation. 18 G. A., ch. 74, § 51. There is hereby appropriated the sum of twenty thousand dollars per annum, or so much thereof as may be necessary, out of the state treasury, not otherwise appropriated, for the purposes named in this act. And all warrants against said appropriation necessary to carry out the provisions of this act shall be drawn by the auditor of state upon the state treasurer, upon the certificate of the adjutant-general, approved by the governor. And no indebtedness shall be created under the provisions of this act not covered by the appropriation herein made.

1606. Additional appropriation. 20 G. A., ch. 65, § 5. For the purpose of carrying out the provisions of chapter seventy-four, laws of the eighteenth general assembly as herein amended, there is hereby made the additional appropriation of fifteen thousand dollars per annum, or so much thereof as may be necessary, out of any money in the state treasury not otherwise appropriated, and all warrants against said appropriation shall be drawn by the auditor of state upon the state treasurer upon the certificate of the adjutant-general approved by the governor.

1607. 18 G. A., ch. 74, § 52. Chapter one hundred and twenty-five, acts of the seventeenth general assembly, and all other acts or portions of acts in conflict herewith, are hereby repealed.

TITLE IX.

OF CORPORATIONS.

CHAPTER 1.

OF CORPORATIONS FOR PECUNIARY PROFIT.

1608. Who may incorporate. 1058; 22 G. A., ch. 86, § 2. Any number of people may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction, ownership, operation and maintenance of canals, railways, bridges or other works of internal improvement, and the purchase, ownership, operation and maintenance of any railroad sold or transferred under power of sale or foreclosure of any mortgage deed or trust; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided. [R., § 1150; C., '51, § 673.]

1609. Powers. 1059. Among the powers of such body corporate are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal, which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared;
6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;
7. To establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law. [R., § 1151; C., '51, § 674.]

Powers: A corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry out the purposes of its existence: *Home Ins. Co. v. Northwestern Packet Co.*, 32–223.

Therefore, *held*, that an insurance company had authority to acquire, by assignment, the claims of a shipper of goods insured by it against the common carrier in whose hands they were destroyed: *Ibid.*

Corporations are invested with such powers only as are expressly conferred upon them and such other powers as are necessary to carry out those powers expressly granted: *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75–722.

For the purpose of effecting the objects of a corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited: *Thompson v. Lambert*, 44–239.

Where an agricultural society was organized for the proper objects of such a corporation, the power to borrow money and execute notes and mortgages not being expressly assumed or prohibited, *held*, that it had by implication authority to exercise such powers as to indebtedness created for the necessary and proper purposes of carrying out the objects of the corporation: *Ibid.*

The simple act of going surety for another is out of the line of the prosecution of any business: *Lucas v. White Line Transfer Co.*, 70–541.

For a proper purpose it has power to borrow money by executing notes and mortgages: *Thompson v. Lambert*, 44–239.

The power to mortgage the property of the corporation is incident to the ordinary powers of such corporation: *Dunham v. Isett*, 15–284.

And where the power to borrow money may necessarily be implied, it may be exercised by issuance of negotiable bonds: *Des Moines Gas Co. v. West*, 50–16.

Under a charter by which a corporation had authority to purchase, etc., "any real estate or other property," etc., *held*, that it was not beyond its power to purchase its own stock: *Iowa Lumber Co. v. Foster*, 49–25.

Where the articles of incorporation of a college did not expressly give it power to raise and control funds by taking endowment notes

held, by a divided court, that it had the power to accept and enforce payment of such notes: *Simpson Centenary College v. Bryan*, 50-293.

Unless restrained by statute, a corporation may sell or dispose of its property, and one corporation may purchase property from another corporation, both possessing in this respect the same power as individuals. It will not, therefore, constitute fraud upon creditors that the property of the corporation is conveyed by it to another corporation in which its stockholders own stock: *Howell v. Marshall County Canning Co.*, 72-666.

A stockholder in a corporation may maintain an action to restrain the corporation from acts in excess of its corporate power: *Teachout v. Des Moines Broad Gauge St. R. Co.*, 75-722.

Corporations of all kinds may be bound by contracts not under seal. They may make a binding contract in writing not under seal, and may also be held liable under verbal contracts. So, also, they may ratify and adopt as their own a contract made by an officer out of the usual scope of his duties: *Merrick v. Burlington, etc., Plank Road Co.*, 11-74.

The recital as to the making of a contract, not entered on the record at the time it was originally written, by the secretary, but at a subsequent meeting directed to be entered on the record, will not be receivable as against the other party to such contract: *Colfax Hotel Co. v. Lyon*, 69-683.

Where a party with the knowledge and consent of the directors of a corporation borrowed money on his individual note for the use of the corporation, which money was used by it in paying its debts, *held*, that the corporation was bound to repay to such party the money so borrowed by him: *Humphrey v. Patrons, etc., Ass'n*, 50-607.

Corporations may ratify contracts made without their authority and thus become bound thereby like natural persons. Thus an acceptance of payment for services rendered under a contract and in accordance with its terms may amount to a ratification of such contract: *Athearn v. Independent Dist.*, 33-105.

Where a corporation became the successor to an individual in the manufacture and sale of buggies, *held*, that it had authority to accept from the individual whom it succeeded an order accepted by him upon particular terms: *Cook Mfg. Co. v. Randall*, 62-244.

Held, that a corporation organized for the manufacture and sale of musical instruments, and not having the power to engage in the business of loaning money, might still take from its agent, in payment of an indebtedness due from him, the note of a third party belonging to him: *Western Organ Co. v. Reddish*, 51-55.

Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals. A corporation has therefore the right to prefer one creditor to another, and the fact that the preference is exercised in favor of a shareholder or director is immaterial, although the shareholder or director may have voted for the proposition, and the security given was to secure an indebtedness to himself: *Warfield v. Marshall County Canning Co.*, 72-666.

Power as to real property: The power of a railway corporation to whom public lands are granted to hold such lands is a question between the corporation and the government, and cannot be raised as against the corporation by a third party in an action by the company for possession of the lands so granted: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

The grant, by the law under which a corporation is organized, of the power to make contracts gives it the power to make a sale of its real property and convey the same: *Buell v. Buckingham*, 16-284.

A limitation upon the power to sell operates also as a limitation on the power to convey: *Middleton Savings Bank v. Dubuque*, 15-394.

Exemption of property of members from liability for debts: The corporation may exempt the private property of its members from liability for corporate debts: *Spense v. Iowa Valley Const. Co.*, 36-407; *Larson v. Dayton*, 52-597.

The only case in which the private property of members becomes liable for corporate debts is that specified in the statute relating to failure to take proper steps in organizing (§ 1618): *First Nat. Bank v. Davies*, 43-424, 436.

A stockholder can be made liable to the creditors of a corporation only to the extent of his unpaid subscription to the capital stock: *Warfield v. Marshall County Canning Co.*, 72-666.

Where a statute exempted from liability for corporate debts stockholders in corporations organized under the general incorporation laws, *held*, that in order that the stockholders of the corporation should be exempt from liability it must appear that the corporation was organized under such general statute: *Kaiser v. Lawrence Savings Bank*, 56-104.

Where a corporation is stockholder in another corporation, the stockholders of the former are not thereby individually stockholders in the latter, and cannot be held liable as such: *Langan v. Iowa & M. Const. Co.*, 49-317.

The power to sue and be sued: A corporation must sue and be sued in its corporate name: *Chicago, D. & M. R. Co. v. Keisel*, 43-39.

Corporate name: A variance from the true style of a corporation will not have the effect to defeat its contract if it appears that the corporation was intended to be bound by and described in the instrument: *Athearn v. Independent Dist.*, 33-105.

Where a note was made payable to the order of "The Equitable Life Insurance Company of Iowa at its office," and was dated at the "Office of the Equitable Life Insurance Company, Des Moines, Iowa," *held*, that although the two names were not identical, yet it was reasonably apparent that they referred to the same corporation: *Equitable L. Ins. Co. v. Gleason*, 56-47.

Where the name of the corporation consists of a number of words, the omission, alteration or transposition of any of the words in the name used, if the words in the name used are synonymous with the true name of the cor-

poration, is not a misnomer: *Martin v. Central Iowa R. Co.*, 59–411.

The use of the word "railroad" instead of "railway" in naming a corporation in an indictment for embezzling the funds of such corporation, *held* not to be material: *State v. Goode*, 68–593.

A railroad company cannot, in a legal proceeding, be properly designated by the initial letters of the words constituting its name, even though it may be possible to show that it is popularly known by its initial letters: *Accola v. Chicago, B. & Q. R. Co.*, 70–185.

Change of name: Where a note given in aid of a corporation operating a college provided that upon the payment of a proportion of the note a scholarship in the college should be issued, and afterward the corporate name of the institution was changed, *held*, that the new corporation succeeding to the rights of the old might sue upon such note, and the maker would be entitled to a scholarship therein according to the same terms: *Trustees of Northwestern College v. Schwagler*, 37–577.

The corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing the articles, and the best evidence as to the contents of the articles is the articles themselves; therefore, *held*, that parol evidence of a change of name was not sufficient: *Chicago, D. & M. R. Co. v. Keisel*, 43–39.

1610. Articles adopted and recorded. 1060; 17 G. A., ch. 23. Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of secretary of state, in a book kept for that purpose. [R., § 1152; C., '51, § 675; 13 G. A., ch. 172, §§ 2, 3.]

A failure to file the articles of incorporation in the office of the secretary of state does not, under § 1618, render the stockholders individually liable (the section being discussed in the opinions of a divided court): *First Nat. Bank v. Davies*, 43–424; followed in *Eisfeld v. Kenworth*, 50–389.

As to change of articles see § 1615 and notes.

1611. Limit of indebtedness. 1061; 20 G. A., ch. 22; 21 G. A., ch. 57. Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock. *Provided*, that the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped. *Provided, further*, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon. [R., § 1153; C., '51, § 676.]

The incurring of liabilities greater than here provided does not render the stockholders individually liable: *Langan v. Iowa & M. Const. Co.*, 45–317.

A private corporation is liable, at least to the extent of the consideration received, for indebtedness contracted in excess of the limit imposed by the articles of incorporation. In such case the corporation is estopped from setting up the limit: *Humphrey v. Patrons', etc., Ass'n*, 50–607.

The debt of a corporation beyond the limits of its indebtedness is not invalid even though held by the director of the corporation. The director in this respect occupies no different position from that of any other creditor, if the debt was contracted in good faith: *Garrett v. Burlington Plow Co.*, 70–697; *Warfield v. Marshall County Canning Co.*, 72–666.

NOTICE PUBLISHED.

1612. For what time. 1062. A notice must also be published, for four weeks in succession, in some newspaper as convenient as practicable to the principal place of business. [R., § 1154; C., '51, § 677.]

It seems that acts of a corporation will not be valid as corporate acts unless publication of notice of the organization is made as required by law: *Eisfeld v. Kenworth*, 50–389.

1613. What to contain. 1063. Such notice must contain:

1. The name of the corporation and its principal place of transacting business;

2. The general nature of the business to be transacted;

3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;

4. The time of the commencement and termination of the corporation;

5. By what officers or persons the affairs of the corporation are to be conducted, and the times at which they will be elected;

6. The highest amount of indebtedness to which the corporation is at any time to subject itself;

7. Whether private property is to be exempt from corporate debts. [R., § 1155; C., '51, § 678.]

Where the articles of incorporation did not state the principal place of business, or the time of commencement of business, *held*, that the publication of such articles was not sufficient notice, and that there was such failure to comply with this section as to render the stockholders individually liable under § 1618: *Clegg v. Grange Co.*, 61–121.

As to contracts in excess of the limit of indebtedness, see notes to § 1611.

1614. May begin business. 1064; 17 G. A., ch. 23. The corporation may commence business as soon as the articles of incorporation are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and articles recorded in the office of the secretary of state within three months from such filing in the recorder's office. [R., § 1156; C., '51, § 679; 13 G. A., ch. 772, § 4.]

Failure to file articles in the office of secretary of state within three months does not render the acts of the corporation void, nor deprive it of its franchises without proceedings being instituted for that purpose: *First Nat. Bank v. Davies*, 43–424.

1615. Change of articles. 1065; 22 G. A., ch. 88. Any of the provisions of the articles of incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the articles need only be signed and acknowledged by the officers of said corporation. [R., § 1157; C., '51, § 680.]

A change in the articles made in the manner therein provided, and properly recorded and published, is as binding upon stockholders who do not as upon those who do consent thereto: *Burlington & M. R. R. Co. v. White*, 5–409.

If a corporation procures an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration will be absolved from liability on their subscriptions to the capital stock: *Ibid.*

But where a change in the charter merely related to the time of payment of instalments of subscriptions to stock, *held*, that by the subscription under the charter the subscriber assented to the change afterward made in pursuance of such provisions: *Ibid.*

Where the corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape liability upon the ground that such amended articles had not been recorded: *Humphrey v. Patrons', etc., Ass'n*, 50–607.

Articles of incorporation of a company organized for pecuniary profit can be amended only by an instrument signed and acknowledged by the person or persons duly authorized so to do and recorded: *Day v. Mill Owners' Mut. F. Ins. Co.*, 75–694.

A material or radical change in the objects of a corporation will release the subscriber of stock from liability thereon, but immaterial changes which cannot possibly prejudice such subscriber will not affect him: *Union Ag'l, etc., Ass'n v. Neill*, 31–95.

An amendment to a charter not materially changing the original purposes of the corporation, *held* not sufficient to excuse stockholder

from liability for stock subscribed: *Peoria & R. I. R. Co. v. Preston*, 35–115.

Amendments to the articles of incorporation of a college in accordance with provisions made therein for amendment, affecting the method in which trustees were to be appointed, but not the general purposes and objects of the corporation, *held* not sufficient to release the maker of a scholarship note from his liability thereon: *Washington College v. Duke*, 14–14.

1616. Dissolution. 1066. No corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles. [R., § 1159; C., '51, § 682.]

1617. Notice of. 1067. The same period of newspaper publication must precede any such premature dissolution of a corporation as is required at its creation. [R., § 1160; C., '51, § 683.]

1618. Individual property liable. 1068. A failure to comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of the stockholders liable for the corporate debts. But this section shall not be deemed applicable to railway corporations and corporators, and stockholders in railway companies shall be liable only for the amount of stock held by them in said companies. [R., §§ 1166, 1338; C., '51, § 689.]

Under this section, *held*, that a failure to file the articles did not alone render the stockholders individually liable: *First Nat. Bank v. Davies*, 43–424; *Eisfeld v. Kenworth*, 50–389; *Stokes v. Findlay*, 4 McCrary, 205.

In the clause "in relation to organization *and* publicity," the word "and" should be construed as "or." A failure in either respect will render the stockholders individually liable: *Eisfeld v. Kenworth*, 50–389.

So *held* in case of a failure to publish any notice whatever: *Ibid.*; *Marshall v. Harris*, 55–182.

Where the articles of incorporation did not state the principal place of business, or the time of commencement of business, *held*, that the publication of such articles was not sufficient notice, and that there was such failure to comply with the requirements as to notice as to render the stockholders individually liable: *Clegg v. Grange Co.*, 61–121.

Failure to comply with the statutory requirements as to posting a copy of the by-laws and a statement of the amount of capital stock subscribed, etc., will not render the stockholders liable: *Langan v. Iowa & M. Const. Co.*, 49–317; *McKellar v. Stout*, 14–359.

A failure to properly keep the books, as required by statute, does not render the stockholders individually liable. If the books are fraudulently kept, those guilty of participation in the fraud may be held liable: *Langan v. Iowa & M. Const. Co.*, 49–317.

Nor does the incurring of liabilities greater than allowed by statute render the stockholders individually liable: *Ibid.*

While there may be irregularities or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but are insufficient to sustain an action to enforce individual liability of a stockholder, yet if the attempt to incorporate is under a general law, and there is a material non-compliance therewith, then there is such want of incorporation that exemption from individual liability is not secured: *Kaiser v. Lawrence Savings Bank*, 56–104.

In case of suit against individuals claiming exemption from liability on the ground of their having become a corporation under a general statute, a stricter measure of compliance with the statutory requirements must be shown than in case the plea of *nul tiel corporation* is set up in a suit between the corporation and the stockholder or other individual, on liability contracted: *Ibid.*

Where a contract is made with an unincorporated association, or a part of the members thereof, the other contracting party is bound thereby: *Reding v. Anderson*, 72–498.

Stockholders in railway companies are, by express provision, not liable beyond the amount of stock held by them in such companies: *First Nat. Bank v. Davies*, 43–424.

A construction company having power under its articles to construct and operate a railway is a railway corporation within the meaning of the statute: *Ibid.*; *Langan v. Iowa & M. Const. Co.*, 49–317.

DURATION.

1619. How renewed. 1069. Corporations for the construction of any work of internal improvement, or for the business of life insurance, may be formed to endure fifty years; those formed for other purposes cannot exceed twenty years in duration; but in either case they may be renewed, from time to time, for periods not greater respectively than was at first permissible, if three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and if those wishing a renewal will purchase the stock

of those opposed to the renewal at its fair current value. [R., § 1158; C., '51, § 681; 12 G. A., ch. 173, § 26.]

Whether the provisions of this section as to renewal are applicable to such corporations as are described in § 1649, *quœre: Byers v. McCartney*, 62-339.

1620. For agricultural, horticultural, and cemetery purposes. 1070. Corporations for agricultural or horticultural purposes, and cemetery associations, may be formed to endure any length of time that may be provided in the articles of incorporation; but the general assembly may, at any session, fix a time when all such corporations shall be dissolved. Such corporations shall not own to exceed nine sections of land, and the improvements and necessary personal property for the proper management thereof; and the articles of incorporation shall provide a mode by which any member may, at any time, withdraw therefrom, and also the mode of determining the amount to be received by such member upon withdrawal and for the payment thereof to such member, subject only to the rights of the creditors of such corporation. [R., § 1185.]

FRAUD — CONSEQUENCES OF.

1621. Penalty for. 1071. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud, may also recover damages therefor against those guilty of participating in such fraud. [R., § 1163; C., '51, § 686.]

To render stockholders liable for fraud in deceiving the public as to the means or liabilities of the corporation, there must be something done with the fraudulent intention of deceiving. The intention to deceive is not sufficient. There must be some act fraudulently done: *Miller v. Bradish*, 69-278.

Fraud in such cases is not to be presumed. The fact that a person is a stockholder in an insolvent corporation does not, of itself, render him liable: *Spense v. Iowa Valley Const. Co.*, 36-407.

Where it is sought to recover from individual officers of a corporation the amount of a judgment against the corporation, under a claim that such officers have rendered themselves liable by fraud, proof of absence of intentional fraud and diversion of assets to their own use will relieve defendants from liability. This section applies only to officers or others guilty of intentional fraud: *Hoffman v. Dickey*, 54-135.

And *held* that, in an action for damages under this section, the particular respect in which there was a failure to comply with the articles, etc., resulting in damage to plaintiff, or the particular act of deception, etc., must be specified: *White v. Hosford*, 37-566.

The rule that, when there is no principal who can be made legally responsible, the agent who attempts to act for and bind the principal will himself be personally chargeable, applied to the case of officers of a bank illegally organized: *Allen v. Pegram*, 16-163.

1622. Diversion of funds. 1072. The diversion of the funds of the corporation to other objects than those mentioned in their articles and in the notices published as aforesaid, if any person be thereby injured, and the payment of dividends which leave insufficient funds to meet the liabilities of the corporation, shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, and such dividends, or their equivalent, in the hands of individual stockholders shall be subject to said liabilities. [R., § 1164; C., '51, § 687.]

To render officers liable for diversion of funds or paying dividends so as to leave insufficient funds to meet liabilities, it must appear that the entire property of the corporation is not sufficient to pay its indebtedness. A dividend may lawfully be declared although the corporation does not have cash on hand sufficient to pay all its liabilities: *Miller v. Bradish*, 69-278.

The word "liability" as used in this section means existing indebtedness the payment of which can be enforced, and does not include the corporate liability for payment of capital stock, such liability being remote and contingent. The amount of the capital stock is therefore not to be included in determining whether the liabilities of the corporation exceed its funds so as to render the declaration of a dividend illegal: *Ibid.*

If the corporation has sufficient assets to pay

all its debts at the time a dividend is paid, then the payment of such dividend cannot be held illegal, nor a diversion of the funds to objects other than those authorized: *Ibid.*

1623. Insurance companies. 1073. Dividends by insurance companies, made in good faith before their knowledge of the happening of actual losses, are not intended to be prevented or punished by the provisions of the preceding section. [R., § 1165; C., '51, § 688.]

1624. Forfeiture. 1074. Either such failure, or the practice of fraud in the manner hereinbefore mentioned, shall cause a forfeiture of all the privileges hereby conferred, and the courts may proceed to wind up the business of the corporation by an information in the manner prescribed by law. [R., § 1167; C., '51, § 690.]

1625. Keeping false accounts. 1075. The intentional keeping of false books or accounts by any corporation, whereby any one is injured, is a misdemeanor on the part of those concerned therein, and any person shall be presumed to be concerned therein whose duty it was to see that the books and accounts were correctly kept. [R., § 1168; C., '51, § 691.]

BY-LAWS, INDEBTEDNESS, TRANSFER OF SHARES, NON-USER.

1626. By-laws posted. 1076. A copy of the by-laws of the corporation, with the name of all its officers appended thereto, must be posted in the principal places of business, and be subject to public inspection. [R., § 1161; C., '51, § 684.]

1627. Amount of stock and indebtedness posted. 1077. A statement of the amount of capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness in a general way, must also be kept posted up in a like manner; which statement must be corrected as often as any material change takes place in relation to any part of the subject-matter of such statement. [R., § 1162; C., '51, § 685.]

A failure to comply with this, or with the preceding section, does not render the private property of stockholders liable: See notes to § 1618.

1628. Transfer of shares. 1078. The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by, and to whom transferred, the numbers or other designation of the shares and the date of the transfer; but such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto. The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same. [R., § 1169; C., '51, § 692.]

The provision of statute as to the transfer of shares is intended as a protection to the company, and only applies where the sale or transfer in some way conflicts with the interests of the corporation: *Moore v. Walker*, 46-164.

A provision of the by-laws of a corporation, that no transfer of stock shall be valid unless approved by the board of directors, may be enforced to protect the rights of the corporation, but cannot be used to defeat the rights of others and operate as a restraint upon the disposition of the stock. The transferee may hold the stock and enforce a transfer thereof in proper form in the absence of any right or lien of the company to or upon such stock: *Farmers', etc., Bank v. Wasson*, 48-336.

In the absence of any contract and provisions of the charter and by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness, and a transfer of stock by such stockholder to secure his individual debt will not be fraudulent as to the corporation in the event that he is indebted to it, and will be valid although not assented to and approved by its directors as required by its by-laws: *Ibid.*

Shares in the capital stock of the corporation are the property of and under the control of the shareholder. Even though the by-laws of the association require that in order to constitute a valid transfer the same must be entered upon the stock-book, yet this does not limit the absolute right of sale and alienation

by the stockholder: *Hershire v. First Nat. Bank*, 35-272.

The written assignment and delivery of the certificates of stock, coupled with authority to transfer the same upon the books of the company, is sufficient to vest in the transferee the right to the stock: *Courtright v. Deeds*, 37-503.

The transfer of stock on the books of a corporation upon surrender of a previous certificate, without the issuance of a stock certificate in conformity therewith, is sufficient to bind the corporation and third persons to such transfer: *First Nat. Bank v. Gifford*, 47-575.

Although a transfer not entered on the books of the company is valid as between the parties thereto, it will not be valid as against an attaching creditor, who proceeds in the manner provided by § 4181, to attach the stock as the property of the person who appears on the books to be the owner thereof. If the attaching creditor or a purchaser had knowledge of the transfer it may be that the court of equity would protect the tranferee's rights: *Ft. Madison Lumber Co. v. Batavian Bank*, 71-270.

A failure to properly keep the books, as here provided, does not render the stockholders individually liable. If the books are fraudulently kept those guilty of participation in the fraud may be held liable under § 1621: *Langan v. L. & M. Const. Co.*, 49-317.

1629. Non-user. 1079. Any corporation organized in accordance with the provisions of this chapter, shall cease to exist by the non-user of its franchises for two years at any one time, but such body shall not forfeit its franchises by reason of its omission to elect officers, or to hold meetings at any time prescribed by the articles of incorporation or by-laws, provided such act be done within two years of the time appointed therefor. [R., § 1170; C., '51, § 693.]

1630. Expiration. 1080. Corporations whose charters expire by their own limitation, or the voluntary act of the stockholders, may, nevertheless, continue to act for the purpose of winding up their concerns. [R., § 1171; C., '51, § 694.]

A corporation will be kept alive by statute for the purpose of discharging its contracts and disposing of its property: *Muscatine Western R. Co. v. Horton*, 38-33, 45.

The voluntary dissolution of a corporation does not take away its power to act for the purpose of winding up its affairs, nor affect the right of a creditor, in equity at least, to be released from the inequitable consequences of such dissolution: *Muscatine Turnverein v. Funk*, 18-469.

1631. Sinking fund. 1081. For the purpose of repairs, rebuilding, or enlarging, or to meet contingencies, or for the purpose of a sinking fund, the corporation may establish a fund which they may loan, and in relation to which they may take the proper securities. [R., § 1176; C., '51, § 699.]

PRIVATE PROPERTY LIABLE FOR CORPORATE DEBTS.

1632. Individual liability. 1082. Neither anything in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid instalments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual. [R., § 1172; C., '51, § 695; 13 G. A., ch. 172, § 6.]

Apportionment: In an action by a creditor of the corporation against a stockholder to compel payment of the balance due on stock, *held*, that under an allegation that the plaintiff was enforcing his claim unequally against different stockholders, and accepting settlements with others without crediting the payment thereof upon his claim, a receiver should be appointed and the prosecution of plaintiff's action be enjoined until the amounts due from all the stockholders could be ascertained and reported so that a *pro rata* apportionment might be made: *Hablitzel v. Latham*, 35-550.

Stock issued at less than par: The officers of the corporation cannot issue to a creditor stock of the corporation to be accepted by him at less than its par value in payment of his claim, with the agreement that it is to be paid-up stock, and the creditor thus accepting stock becomes liable as the holder of unpaid stock to the extent that the par value exceeds the debt for which it is taken: *Jackson v. Traer*, 64-469.

A creditor thus accepting stock becomes a stockholder although he has not subscribed for stock. A subscription for stock is only necessary to render a person a stockholder where the stock is not delivered: *Ibid.*

The fact that the stock was, at the time of its issuance and acceptance, worthless, would not relieve a stockholder, accepting it, from liability: *Ibid.*

The president and directors of an insolvent corporation may issue stock to a creditor in payment of his claim at less than its par value if such a transaction is for the benefit of the corporation, without rendering him liable for the balance of its par value: *Clark v. Bever*, 31 Fed. Rep., 670.

The officers of a corporation cannot, without express authority, sell the stock of the corporation at a less rate than its par value as fixed by the charter: *Oliphant v. Woodburn Coal, etc., Co.*, 63-332.

A creditor who accepts stock issued to him by the officers of the corporation below par in payment of his debt holds the same as unpaid stock to the extent that its par value exceeds his claim: *Jackson v. Traer*, 64-469.

The public has a right to assume, where the stock of a company has all been issued as full-paid stock, that it has been paid for in full, either in money or in property at a fair value; but while the fact that full-paid stock has been issued upon a partial payment of its face might be ground for proceeding in the interest of the public to wind up the company, it is not a ground upon which the stockholder who has received paid-up stock can object to the validity of the contract for the purchase of such stock: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

Unpaid instalments: Where all the capital stock of a corporation outstanding was such as had been issued to stockholders who had conveyed to the corporation the patent-right for an article which the corporation was authorized to manufacture, and such patent-right had become worthless, *held*, that such stockholders could not claim that their stock was paid up, and were liable for the amount of their stock: *Chisholm v. Forny*, 65-333.

Officers of a corporation cannot, by agreement with a stockholder, release him, to the prejudice of creditors, from his obligation to pay his subscription unless the transaction is characterized by the utmost fairness. Therefore, *held*, that conveyances of real estate made to a corporation by directors and other stockholders in full payment of their stock, at a price largely in excess of its real value, did not release such stockholders from liability for the excess of their subscriptions over the real value of the property conveyed, even to creditors becoming such after the conveyance: *Osgood v. King*, 42-478.

Where the president of a corporation gave a mortgage to the corporation in payment of shares of stock to the amount of such mortgage, and the same was included in the statement of the company's assets, *held*, that he could not afterwards surrender such stock and receive back the mortgage after insolvency of the company: *Burnham v. Northwestern Ins. Co.*, 36-632.

Although the mortgage in such case provided that it was payable in the capital stock certificates of the company, yet, *held*, that as those doing business with the company had not an opportunity to know the terms of the mortgage, it could not be discharged as to the creditors of the company by surrender of the identical shares of stock which had been issued therefor: *Ibid.*

Under the national banking act making stockholders liable, in case of failure of the bank, in an amount equal to the amount of stock held by them, a holder of stock at the time of the dissolution of the bank becomes liable for the indebtedness thus arising upon such stock, although he holds the shares as collateral security, or as a trustee: *Hale v. Walker*, 31-344.

Subscription payable in property: The fact that a subscription for stock was to be paid in property instead of money does not relieve the subscriber from liability, if the property was not turned over as agreed. The company cannot, by any arrangement or action upon its part, release the subscriber from his liability: *Singer v. Given*, 61-93.

Set-off: The subscriber cannot, as between himself and the creditor, set up claims for services, or for use of property, for which the corporation is indebted to him: *Ibid.*

Release of subscriber: A railroad corporation may make, if acting in good faith, a valid and binding contract, releasing a stockholder from liability upon his subscription to the stock of the corporation, either with or without the consent of the creditors and stockholders: *Gelpcke v. Blake*, 19-263.

Enforcement of liability: An execution against the company can only be levied on the private property of a stockholder after a judgment has been obtained against him as provided in § 1634: *Bayliss v. Swift*, 40-648; and see *Hampson v. Weare*, 4-13; *Bailey v. D. W. R. Co.*, 13-97.

Where there is a failure to comply with the requirements of the statute with reference to organization and publicity, such as to render the stockholder individually liable, he becomes primarily liable, and may be sued in the first instance. His relation to the creditor is not different from what it would have been if no attempt had been made at incorporation: *Marshall v. Harris*, 55-182.

1633. Corporate property exhausted. 1083. In none of the cases contemplated in this chapter, can the private property of the stockholders be levied upon for the payment of corporate debts, while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property. [R., § 1173; C., '51, § 696.]

The fact of demand and refusal may be shown by the official return upon the execution. Such return, as between the corporation and the creditor, must be regarded as conclusive. Evidence may be introduced to show that no such return was made, but it is not competent to dispute it by showing that no demand was made as therein stated: *Singer v. Given*, 61-93.

1634. Proceedings against stockholder. 1084. Before any stockholder can be charged with the payment of a judgment rendered for a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy; and upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued, or execution against him stayed, until the property can be levied upon and sold, and the court may subsequently render judgment for any balance which there may be after disposing of the corporate property; but, if a demand of property has been made as contemplated in the preceding section, the costs of said action shall in any event, be paid by the company or the defendant therein, but he shall not be permitted to controvert the validity of the judgment rendered against the corporation, unless it was rendered through fraud and collusion. [R., § 1174; C., '51, § 697.]

An execution against the company can only be levied on the private property of a stockholder after a judgment has been obtained against him as provided by statute: *Bayliss v. Swift*, 40–648; and see *Hampson v. Weare*, 4–13; *Bailey v. Dubuque Western R. Co.*, 13–97.

The action against the stockholder, here contemplated, is an ordinary action, followed by an ordinary judgment; after which an execution against the corporation may, to the extent of such judgment, be levied upon the private property of the stockholder, as provided in § 1632: *Bayliss v. Swift*, 40–648.

This section contemplates the rendition of a judgment against the stockholder, and not merely the awarding of an execution against him: *Singer v. Given*, 61–93.

A prior statute upon the same subject considered: *Donworth v. Coolbaugh*, 5–300.

To charge a stockholder it must appear that there was a valid claim against the corporation: *Corse v. Sanford*, 14–235.

1635. Indemnity; contribution. 1085. When the private property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution. [R., § 1175; C., '51, § 698.]

1636. Franchise sold on execution. 1086. The franchise of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement. [R., § 1177; C., '51, § 700.]

1637. Production of books. 1087. In any proceedings by or against a corporation, or against a stockholder, to charge his private property or the dividends received by him, the court is invested with power to compel the officers to produce the books of the corporation, on the motion of either party, upon a proper cause being shown for that purpose. [R., § 1178; C., '51, § 701.]

GENERAL PROVISIONS.

1638. Single person may incorporate. 1088. A single individual may entitle himself to all the advantages of this chapter, provided he complies substantially with all its requirements, omitting those which from the nature of the case are inapplicable. [R., § 1179; C., '51, § 702.]

1639. Estoppel. 1089. No body of men acting as a corporation under the provisions of this chapter, shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation; nor shall any person sued on a contract made with such a corporation, or sued for an injury to its property, or a wrong done to its interest, be permitted to set up a want of such legal organization in his defense. [R., § 1181; C., '51, § 704.]

A party contracting with a corporation cannot deny its corporate existence: *Howe Machine Co. v. Snow*, 32–433; *Courtright v. Deeds*, 37–503, 511.

A person sued upon such contract cannot set up want of legal organization, etc.: *Washington College v. Duke*, 14–14.

Among acts which would constitute acting as a corporation, such as by statute would prevent the corporation from denying its legal

existence, would be the adoption and use of a corporate seal, the taking of subscriptions and the issue of certificates of stock: but the acts of persons as members of a religious society in holding business meetings, and acquiring property, receiving and paying out money, appointing agents to make settlements, etc., *held* not sufficient to constitute such "acting as a corporation;" also *held*, that the passage of by-laws is not an assumption of distinctive corporate powers; nor is the attempt to incorporate: *Kirkpatrick v. United Presb. Church*, 63-372.

Where the corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape liability upon the ground that such amended articles had not been recorded: *Humphrey v. Patrons', etc., Ass'n*, 50-607.

The fact that a member of the board of directors has been irregularly elected constitutes no defense in an action against the corporation for indebtedness created: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

When a corporation seeks to enforce the bequests in a will, duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. Such objection can be taken only by a proceeding by *quo warranto: Quinn v. Shields*, 62-129.

The estoppel provided for by this section certainly applies only to a body of men acting as a corporation for pecuniary profit. Whether the section can be applied to persons acting as a corporation other than for pecuniary profit, *quære: Kirkpatrick v. United Presb. Church*, 63-372.

1640. Legislative control. 1090. The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation, may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

FOREIGN CORPORATIONS.

1641. Filing articles; permit. 21 G. A. ch. 76, § 1. Hereafter any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business organized under the laws of any other state or of any territory of the United States or of any foreign country desiring to transact its business, or to continue in the transaction of its business in this state shall be and hereby is required, on and after September, [first] A. D. 1886, to file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit in such form as he may prescribe for the general transaction of the business of such corporation. And upon the receipt of such permit such corporation shall be permitted and authorized to conduct and carry on its business in this state. *Provided* that nothing in this act contained shall be construed, to prevent any foreign corporations, from buying, selling, and otherwise dealing, in notes, bonds, mortgages, and other securities, or from enforcing the collection of the same, in the federal courts, in the same manner, and to the same extent, as is now authorized by law.

1642. Permit essential. 21 G. A., ch. 76, § 2. No foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise the power of eminent domain or exercise any of the rights and privileges conferred upon corporations until they have so complied herewith and taken out such permit.

1643. Removal of causes. 21 G. A., ch. 76, § 3. Any foreign corporation sued or impleaded in any of the courts of this state upon any contract made or executed in this state or to be performed in this state or for any act

or omission, public or private, arising, originating, or happening in the state, who shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a nonresident of this state or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this state; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is affected [effected], and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner.

This statute is unconstitutional for the reason that it makes the stipulation not to remove cases to the federal courts a condition for obtaining the permit to do business: *Barron v. Burnside*, 121 U. S., 186.

1644. Penalty. 21 G. A., ch. 76, § 4. Any foreign corporation that shall carry on its business and transact the same on and after September first, 1886, in the state of Iowa by its officers, agents, or otherwise, without having complied with this statute and taken out, and having a valid permit shall forfeit and pay to the state for each and every day in which such business is transacted and carried on the sum of one hundred dollars to be recovered by suit in any court having jurisdiction. And any agent, officer or employee who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offense shall be fined not to exceed one hundred dollars or imprisoned in the county jail not to exceed thirty days and pay all costs of prosecution.

1645. 21 G. A., ch. 76, § 5. All acts and parts of acts inconsistent with the provisions hereof are hereby repealed; *provided*, that nothing contained in this act shall relieve any company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon them or required of them or either of them by the laws now in force.

DOUBLE LIABILITY OF STOCKHOLDERS IN BANKS.

1646. When incurred. 18 G. A., ch. 208, § 1. Chapter one of title nine of the code of 1873, is hereby amended by adding thereto as follows: That all stockholders or shareholders in associations or corporations organized under said chapter one aforesaid, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits of money, or discounting notes, shall be individually and severally liable to the creditors of such association or corporation of which they are stockholders or shareholders, over and above the amount of stock by them held therein, to an amount equal to their respective shares so held for all its liabilities accruing while they remained such stockholders; and should any such association or corporation become insolvent, and its assets be found insufficient to pay its debts and liabilities, its stockholders may be compelled to pay such deficiency in proportion to the amount of stock owned by each, not to exceed the extent of the additional liability hereby created.

The provisions of the constitution, art. 8, § 9, rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, is held to apply to banks of issue, and not to banks merely of discount and deposit: *Allen v. Clayton*, 63-11.

Under such constitutional provisions the liability of a stockholder in a bank is not limited in an action against him by a creditor to the proportional sum that can be collected from another stockholder, nor is it affected by the fact of fraudulent acts of the receiver or officers of the bank, nor can such stockholder delay the collection of the amount for which he is liable in order to secure contribution from other stockholders also liable: *Stewart v. Lay*, 45-604.

1647. Distribution to creditors. 18 G. A., ch. 208, § 2. Should the whole amount for which the stockholders are made individually responsible as provided by section one of this act [§ 1646] be found in any case to be inadequate to the payment of all the debts of any such association or corporation, after the application of its assets to the payment of such debts, then the amount due from such stockholders on account of their individual liability created by this act, as such, shall be distributed equally among all the creditors of such corporation in proportion to the amount due to each.

1648. How measured. 18 G. A., ch. 208, § 3. The personal liability in this chapter provided for is over and above the stock owned by the stockholders in such corporations and any amount paid thereon.

CHAPTER 2.

CORPORATIONS OTHER THAN THOSE FOR PECUNIARY PROFIT.

1649. How created; endure how long. 1091; 21 G. A., ch. 71; 22 G. A., ch. 87. Associations for the establishment of seminaries of learning, churches, lyceums, libraries, lodges of odd fellows, or masons, and other institutions of a benevolent or charitable character; temperance societies and trades union and other organizations of labor, for the regulation, by lawful means of prices of labor, of hours work, and other matters pertaining to industrial pursuits, agricultural societies, subordinate granges of the patrons of husbandry, and associations for the detection of horse-thieves, and of other depredators upon property, may become incorporated in the manner directed in the preceding chapter, so far as applicable, and shall thereby become vested with all the powers and privileges, and subject to all the liabilities provided by that chapter, except as herein modified. Corporations organized under this chapter shall endure for the period of fifty years from and after their organization unless sooner dissolved by a vote of three-fourths of all the members thereof or by operation of law, and all corporations heretofore organized hereunder shall be extended for a like period unless sooner dissolved in like manner. [R., §§ 1187, 1190, 1191; C., '51, § 708; 13 G. A., ch. 151.]

For the purpose of effecting the objects of such corporation it has power to borrow money by executing notes and mortgages: *Thompson v. Lambert*, 44-239.

An agricultural society has not, in the absence of express authority in its articles, any power to employ persons to convey people to the fair held by such society, and is not liable for negligence of persons thus employed: *Bathe v. Decatur County Ag'l Soc'y*, 73-11.

The provisions of § 1659, which limit the power of associations or corporations not for pecuniary profit to take by will more than one-fourth of the estate of a person leaving a wife, child or parent surviving, are applicable to voluntary associations of that kind whether incorporated or not: *Byers v. McCartney*, 62-339.

Whether the provisions of § 1619, as to renewal of corporations, are applicable to corporations such as herein specified, *quære: Ibid.*

1650. Articles recorded. 1092. Their articles of incorporation shall be recorded by the recorder of deeds of the county where the principal place of business is kept only; but a newspaper publication is not requisite. [R., § 1188; C., '51, § 709; 13 G. A., ch. 172, § 7.]

1651. Dividend. 1093. No dividend, nor distribution of property among the stockholders, shall be made until the dissolution of the corporation. [R., § 1188; C., '51, § 710.]

1652. Degrees conferred. 1094. Corporations of an academical character are invested with authority to confer the degrees usually conferred by such institutions. [R., § 1189; C., '51, § 711.]

CHARITABLE, SCIENTIFIC, AND RELIGIOUS ASSOCIATIONS.

1653. How formed. 1095. Any three or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this state, who desire to associate themselves for benevolent, charitable, scientific, religious, or missionary purposes, may make, sign, and acknowledge before any officer authorized to take the acknowledgments of deeds in this state, and have recorded in the office of the recorder of the county in which the business of such society is to be conducted, a certificate in writing, in which shall be stated the name or title by which such society shall be known, the particular business and objects of such society, the number of trustees, directors, or managers to conduct the same, and the name of the trustees, directors, or managers of such society for the first year of its existence. [R., § 1193; 13 G. A., ch. 172, § 8.]

1654. Certificate; powers. 1096. Upon filing for record the certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors, shall, by virtue hereof, be a body politic and corporate by the name stated in such certificate, and, by that, they and their successors shall and may have succession, and shall be persons capable of suing and being sued, and may have and use a common seal, which they may alter or change at pleasure; and they and their successors, by their corporate name shall be capable of taking, receiving, purchasing, and holding real and personal estate; and of making by-laws for the management of its affairs, not inconsistent with law. [R., § 1194; 13 G. A., ch. 172, § 9.]

1655. Trustees or managers. 1097. The society so incorporated, may, annually, or oftener, elect from its members its trustees, directors, or managers at such time and place, and in such manner as may be specified in its by-laws, who shall have the control and management of the affairs and funds of the society a majority of whom shall be a quorum for the transaction of business; and whenever any vacancy shall happen among such trustees, directors, or managers, by death, resignation, or neglect to serve, such vacancy shall be filled in such manner as shall be provided by the by-laws of such society. When the body corporate consists of the trustees, directors, or managers of any benevolent, charitable, literary, scientific, religious, or missionary institution, which is or may be established in this state, and which is or may be under the patronage, control, direction, or supervision of any synod, conference, association, or other ecclesiastical body in such state, established agreeably to the laws thereof, such ecclesiastical body may nominate and appoint such trustees, directors, or managers according to usages of the appointing body, and may fill any vacancy which may occur among such trustees, directors, or managers; and when any such institution may be under the patronage, control, direction, or supervision of two or more of such synods, conferences, associations, or other ecclesiastical bodies, such bodies may severally nominate and appoint such proportion of such trustees, directors or managers as shall be agreed upon by those bodies immediately concerned. And any vacancy occurring among such appointees last named, shall be filled by the synod, conference, association, or body having appointed the last incumbent. [R., § 1195; 10 G. A., ch. 12.]

Where a corporation is organized for the purpose of holding and disposing of the property of a religious society, and its officers are elected by the members of the church, the courts will not interfere by *mandamus* to restore to membership in the corporation a person expelled from the church organization for an alleged offense where there are no property rights involved: *Sale v. First Regular Baptist Church*, 62–26.

The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with the action of such associations when rights of property or civil rights are involved: *Bird v. St. Mark's Church*, 62–567.

1656. Academical; meetings. 1098. Any corporation in this state of an academical character, the memberships of which shall consist of lay mem-

bers and pastors of churches, delegates to any synod, conference, or council, holding its annual meetings alternately in this and one or more adjoining states, may hold its annual meetings for the election of officers and the transaction of business in any adjoining state to this, at such place therein as the said synod, conference, or council shall hold its annual meeting; and the elections so held, and business so transacted, shall be as legal and binding as if held and transacted at the place of business of the corporation in this state. [14 G. A., ch. 48.]

1657. Election. 1099. In case an election of trustees, directors, or managers shall not be made on the day designated by the by-laws, said society for that cause shall not be dissolved, but such election may take place on any other day directed by such by-laws. [R., § 1196.]

1658. Name. 1100. The provisions of this chapter shall not extend or apply to any association or individual who shall, in the certificate filed with the recorder, use or specify a name or style the same as that of any previously existing incorporated society in the county. [R., § 1197; 13 G. A., ch. 172, § 10.]

1659. Devise or bequest. 1101. Any corporation formed under this chapter shall be capable of taking, holding, or receiving property by virtue of any devise or bequest contained in any last will or testament of any person whatsoever; but no person leaving a wife, child, or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his estate after the payment of his debts, and such devise or bequest shall be valid only to the extent of such one-fourth. [R., § 1198.]

The words "such institution" here used refer to the associations named in § 1649; and such associations, whether incorporated or not, cannot take by will more than one-fourth of the estate of a testator who leaves a wife, child or parent: *Byers v. McCartney*, 62–339.

1660. Re-incorporation. 1102. The trustees, directors, or stockholders of any existing benevolent, charitable, scientific, missionary, or religious corporation, may, by conforming to the requirements of section ten hundred and ninety-five of this chapter [§ 1653], re-incorporate themselves, or continue their existing corporate powers, and all the property and effects of such existing corporation shall vest in and belong to the corporation so re-incorporated or continued. [R., § 1199.]

1661. Changing name; amending articles. 15 G. A., ch. 40, § 1. Any corporation other than those for pecuniary profit may change the corporate name thereof, or amend the articles of incorporation or the original certificate thereto, by a vote of the majority of the members or stockholders of the said corporation in such manner as may be provided by the articles of incorporation thereof.

1662. How effected. 15 G. A., ch. 40, § 2. In case of the body corporate consisting of the trustees, directors, or managers of any benevolent, charitable, literary, scientific, religious, or missionary institution under the patronage of any synod, conference, association, or other ecclesiastical body in the state, or two or more of them, said amendment or change may originate with either of the said trustees, directors, or managers, or with either of the said patronizing bodies, but such change or amendment shall not be made without the vote of a majority of each of said trustees, directors, or managers, and of each of the said patronizing bodies, legally expressed and certified thereto by the secretary, clerk, or recording officer of such board of trustees, directors, or managers and each of the patronizing bodies.

1663. Record. 15 G. A., ch. 40, § 3. The change or amendment of the articles of incorporation shall be recorded by the recorder of deeds as the original articles of incorporation are required to be, and the recorder shall make upon the margin of such record a reference to the book and page of the

record of such original articles of incorporation; and from and after the date of such act of recording such change or amendment shall be in full force and effect as the original articles of incorporation so amended.

1664. Effect. 15 G. A., ch. 40, § 4. The corporation by its new name or with such amended articles of incorporation or certificate shall be entitled to all the rights, powers, immunities, and franchises that it possessed before such change or amendment, and shall be liable upon all contracts, obligations, liabilities entered into, incurred, or binding on such corporation by or under the old name or articles of incorporation to the same extent and manner as though no such change or amendment had been made.

CHAPTER 3.

OF STATE AND COUNTY AGRICULTURAL AND HORTICULTURAL SOCIETIES, AND THE STOCK-BREEDERS' ASSOCIATION.

1665. Meeting of agricultural society. 1103. There shall be held at the capitol of the state, on the second Wednesday of January in each year, a meeting of the board of directors of the Iowa state agricultural society, together with the president of each county society in the state, or other delegate therefrom duly authorized in writing, who shall, for the time being, be members of the board; and at such meeting, officers and directors shall be chosen, the place for holding the next annual exhibition shall be determined, premiums on essays and field crops shall be awarded, and all questions relating to the agricultural development of the state may be considered. [R., § 1701.]

1666. Officers; terms. 1104. The officers chosen at such meeting shall be a president, vice-president, secretary, treasurer, and five directors. The president, vice-president, secretary, and treasurer, shall serve one year, and shall be directors by virtue of their office. The other directors shall serve two years, so that the entire number of such directors in the board shall always be ten, one-half of whom shall be chosen annually. Any five members of the board shall constitute a quorum when regularly convened; and the president of the society shall have power to call meetings of the board whenever he may deem it expedient. [R., § 1700.]

[Sec. 1105 is repealed by 15 G. A., ch. 4.]

1667. Premium list. 1106. The premium list and rules of exhibition shall be determined and published by the board of directors prior to the first of April in each year. [R., § 1702.]

1668. Annual report. 1107. The said board of directors shall make an annual report to the governor, embracing the proceedings of said society and board of directors for the past year, and an abstract of the proceedings of the several county societies, as well as a general view of the condition of agriculture throughout the state, accompanied with such essays, statements, and recommendations as they may deem interesting and useful, which reports shall be published by the state under the supervision of the secretary of the society. The number of copies to be published shall be three thousand, all of which shall be bound in a manner and style uniform with those bound by the state for the years one thousand eight hundred and fifty-nine and one thousand eight hundred and sixty; but said binding shall not cost more than thirty cents per copy. [R., § 1703; 10 G. A., ch. 109, § 5.]

1669. Distribution of reports. 1108. The secretary of state shall distribute the reports as follows: Ten copies to the state university, ten copies

to the state library, ten copies to the state agricultural college, one copy to each member of the general assembly, the remainder to the secretary of the state agricultural society, by him to be distributed to the county agricultural societies; and one copy shall be sent to the board of supervisors of each organized county in which there is no agricultural society. [10 G. A., ch. 109, § 6; 12 G. A., ch. 136, § 2.]

DISTRICT AND COUNTY SOCIETIES.

1670. Premiums awarded. 1109. All county agricultural societies shall, annually, offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may deem proper. And they shall also so regulate the amount of premiums and the different grades of the same, that small as well as large farmers and artisans may compete therefor. [R., § 1697.]

[The word "so" in the fifth line, between "also" and "regulate," is erroneously omitted in the printed Code.]

Such societies may offer a premium to the winner at a horse-race held on its grounds during its annual fair. The provisions of § 1675 with reference to gambling and horse-racing does not apply to races controlled by the society: *Delier v. Plymouth County Ag'l Soc'y*, 57-481.

1671. List of awards. 1110. Each county society shall publish, annually, a list of the awards and an abstract of the treasurer's account, in one or more newspapers of the county or adjoining counties, and a report of their proceedings during the year, and a synopsis of the awards. They shall also make a report of the condition of agriculture in their county, to the board of directors of the Iowa state agricultural society, which shall be forwarded by mail or otherwise to the secretary of said society on or before the first of December of each year. And the auditor of state, before issuing his warrant in favor of said societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made. [R., § 1698.]

1672. Appropriation from county. 1111. Whenever any county agricultural society, organized according to law, shall have procured in fee-simple, free from incumbrance, land for fair grounds not less than ten acres in extent, the board of supervisors of said county may appropriate and pay to such society, a sum not exceeding one hundred dollars for every thousand inhabitants in said county, to be expended by such society in fitting up such fair grounds, but for no other purpose; but not more than one thousand dollars shall in the aggregate be appropriated to any one society. [11 G. A., ch. 128, § 1.]

1673. Aid from state. 1112. When any county or district agricultural society, composed of one or more counties, have made their report to the state society as provided in the preceding section, and raised during the year any sum of money for actual membership, they shall be entitled to an equal sum, not exceeding two hundred dollars, from the state treasury, upon affidavit of the president, secretary, or treasurer of said society, that such sum was raised for the legitimate purposes of the society during the current year, accompanied by the certificate of the secretary of the state agricultural society that they have reported according to law. [R., § 1704; 10 G. A., ch. 109, § 1; 12 G. A., ch. 136, § 1.]

1674. Report to supervisors. 1113. Each society receiving such appropriation, shall, through its secretary, make to the board of supervisors a detailed statement, with vouchers, showing the legal disbursement of all the moneys so received. [11 G. A., ch. 128, § 2.]

FAIRS.

1675. Regulations. 1114; 18 G. A., ch. 147. No person shall be permitted to sell any intoxicating liquors, wine, or beer of any kind, or be engaged in any gambling or horse-racing, either inside the inclosure where any county or district or state agricultural society fair is being held, or within one hundred and sixty rods thereof, during the time of holding such fair; and any person found guilty of any of the offenses herein enumerated, shall be fined in a sum not less than five nor more than fifty dollars for every such offense. [10 G. A., ch. 109, § 2.]

As to premiums for horse-races see notes to § 1670.

1676. Permits. 1115. The president of any district or county agricultural society may grant a written permit to such persons as he may deem necessary, to sell fruit, provisions, and other necessaries to such persons as may be in attendance at any such fair, under such regulations and restrictions as the board of directors may prescribe. [Same, § 3.]

1677. Police power. 1116. The president of any such society shall be empowered to arrest, or cause to be arrested, any person, or persons, engaged in violating any of the provisions contained in section eleven hundred and fourteen of this chapter [§ 1675], and cause them forthwith to be taken before some justice of the peace, there to be dealt with as provided for in said section; and he may seize, or cause to be seized, all intoxicating liquors, wine, or beer, of any kind, with the vessels containing the same, and all tools or other implements used in any gambling, and may remove, or cause to be removed, all shows, swings, booths, tents, carriages, wagons, vessels, boats, or any other nuisance that may obstruct, or cause to be obstructed, by collecting persons around or otherwise, any thoroughfare leading to the inclosure in which such agricultural fair is being held; and any person owning or occupying any of the causes of obstruction herein specified, who may refuse or fail to remove such obstruction or nuisance, when ordered to do so by the president of such society, shall be liable to a fine of not less than five and not more than twenty dollars for every such offense. [Same, § 4.]

HORTICULTURAL SOCIETY.

1678. Meeting of. 1117. There shall be held on the third Tuesday in January in each year, a meeting of the Iowa state horticultural society, for the transaction of business and the election of officers and directors, corresponding in numbers and titles to those of the Iowa agricultural society, and for like periods of time, at which the place of holding the next meeting, and the times and places of holding exhibitions shall be determined; premiums on essays may be awarded and all questions relating to horticultural development considered. [14 G. A., ch. 25, § 3.]

1679. District and county societies. 1118. Such society shall encourage the organization of district and county societies and give them representation therein, and in every proper way further the fruit and tree growing interests of the state. [Same, § 2.]

1680. Annual report. 1119. The secretary of said society shall make an annual report to the governor of the state, embracing the proceedings of the society, with a bill of items showing for what purposes the money hereinafter appropriated was paid out for the past year, the general condition of horticultural interests throughout the state, together with essays, statements of facts, and recommendations as he may deem useful, to be published by the state under the supervision of the society. [Same, § 4.]

1681. Printing and distribution of. 1120; 18 G. A., ch. 6. The number of copies of said report shall be five thousand, all of which shall be bound

in a style uniform with the reports of said society for the years 1869 and 1870, and shall be distributed by the secretary of state as follows: Twelve copies each to the governor, lieutenant-governor, secretary of state, auditor of state, treasurer, register of state land office, attorney-general, judges of the supreme court, and to each member of the general assembly; two hundred copies to the Iowa state agricultural college, five copies to the Iowa state university, five copies to the Iowa state horticultural society, two copies to each incorporated college in the state, one copy each to the auditor and clerk of the district court of each county to be kept in the office, and one copy to each newspaper published in the state; the remainder to be distributed by direction of said society. [Same, § 5.]

1682. Appropriation for. 1121; 20 G. A., ch. 128. The sum of twenty-five hundred dollars is appropriated, annually, for the use and benefit of said society, and shall be paid by the auditor of state upon the order of the president of said society, in such sums, and at such times, as may be for the interests of said society; but two hundred dollars of said amount shall be awarded in premiums for the growing of forest trees in this state. [Same, § 6.]

PUBLICATION OF PROCEEDINGS OF IMPROVED STOCK BREEDERS' ASSOCIATION.

1683. Annual proceedings. 20 G. A., ch. 134, § 1. The annual proceedings of the Iowa state association of improved stock breeders of which C. F. Clarkson is president and Fitch B. Stacy is secretary, including the accepted essays and addresses, together with the report of discussions, is hereby authorized and directed to be printed by the state, under the supervision of the association, as the reports of the state agricultural and horticultural societies are now published.

1684. Number; distribution. 20 G. A., ch. 134, § 2. The number of copies to be so published shall be limited to five thousand annually, not exceeding three hundred pages each, all of which shall be bound in pamphlet form. They shall be distributed as follows: To the governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, the state horticultural society, the state agricultural society, the state library, the Iowa state university and the Iowa state agricultural college, each twenty copies. To each county auditor to be kept in the office, to each public library, to each incorporated college in the state, to each president and secretary of each county and district fair, and to each president and secretary of each dairymen's or stock growers' association, two copies; the remainder to be distributed under the direction of the association.

CHAPTER 4.

OF INSURANCE COMPANIES.

1685. How formed. 1122. When any number of persons associate themselves together for the purpose of forming an insurance company, or for any other purpose than life insurance, under the provisions of chapter one of this title, they shall publish a notice of such intention, once in each week for four weeks, in some public newspaper in the county in which such insurance company is proposed to be located; and they shall also make a certificate, under their hands, specifying the name assumed by such company, and by which it shall be known, the object for which said company shall be formed, the amount of its capital stock, and the place where the principal office of said company

shall be located; which certificate shall be acknowledged before and certified by some notary public or clerk of a court of record, and forwarded to the auditor of state, who shall submit the same to the attorney-general for examination, and if it shall be found by the attorney-general to be in accordance with the provisions of this chapter, and not in conflict with the constitution and laws of the United States, and of this state, he shall make a certificate of the fact and return it to the auditor of state, who shall reject the name or title applied for by any company when he shall deem the same too similar to any one already appropriated by any other company, or likely to mislead the public. [12 G. A., ch. 138, § 1.]

1686. Certificate; powers. 1123. When the certificate of said company shall have received the approval of the attorney-general and auditor of state, the company shall cause the same to be recorded as required by law for recording articles of incorporation; and said persons, when incorporated, and, having in all respects complied with the provisions of this chapter, are hereby authorized to carry on the business of insurance as named in such certificate of incorporation, and by the name and style provided therein, and shall be deemed a body corporate with succession; they and their associates, successors, and assigns, to have the same general corporate powers, and be subject to all the obligations and restrictions of said chapter one of this title except as may be herein otherwise provided. [Same, § 2.]

CAPITAL REQUIRED.

1687. Amount; shares; notes. 1124. No joint-stock company shall be incorporated under the provisions of this chapter, with a smaller capital than fifty thousand dollars, or a larger one than one million dollars, as may be specified in the certificate of incorporation, which stock shall be divided into shares of one hundred dollars each, of which capital not less than twenty-five per cent., and in no case less than twenty-five thousand dollars, shall be paid up in cash. The balance of the capital of said company may consist of the bonds or notes of the stockholders; nor shall any company, on the plan of mutual insurance, commence business in this state until agreements have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars; of which at least five thousand dollars shall have been paid in actual cash, and for the remainder of which, notes of solvent parties, founded upon actual application for insurance made in good faith, shall have been received. No one of the notes received as aforesaid shall amount to more than five hundred dollars; and no two thereof shall be given for the same risk, or made by the same person or firm, except where the whole amount of such notes does not exceed the sum of five hundred dollars; nor shall any note be regarded or represented as capital stock, unless a policy be issued upon the same within thirty days after the organization of the company taking the same, upon a risk that shall be for no shorter period than twelve months. Each of said notes shall be payable, in whole or in part at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expenses as may be necessary for transacting the business of said company. And no note shall be accepted as part of such capital stock, unless the same shall be accompanied by a certificate of a justice of the peace, notary public, or clerk of the district court of the county in which the person executing such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same, in property not exempt from execution by the laws of their state; and no such note shall be surrendered while the policy for which it was given continues in force. [Same, § 3.]

1688. Subscriptions. 1125. Having published the notice, and filed the publisher's affidavit of the publication thereof with the auditor of state, to-

gether with the certificate required by section eleven hundred and twenty-two of this chapter [§ 1685], the persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription of stock to the company, at such times and places as to them may seem convenient and proper, and shall keep the same open until the full amount specified in the certificate is subscribed; or, in case the business of said company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions and enter into agreements in the manner and to the extent specified in section eleven hundred and twenty-four of this chapter [§ 1687]. [Same, § 4.]

DIRECTORS — OFFICERS.

1689. Election. 1126. The affairs of any company organized under the provisions of this chapter, shall be managed by not more than twenty-one, nor by less than five directors, all of whom shall be stockholders. Within thirty days after the subscription book shall have been filled, a majority of the subscribers shall hold a meeting for the election of directors — each share entitling the holder thereof to one vote; and the directors then elected shall continue in office until their successors have been duly chosen and have accepted the trust. [Same, § 5.]

1690. Annual meetings. 1127. The annual meetings for the election of directors, shall be holden during the month of January, at such time as the by-laws of the company may direct; *provided, however*, that if for any cause the stockholders shall fail to elect at any annual meeting, then they may hold a special meeting some day subsequent thereto for that purpose, by giving thirty days' notice thereof in some newspaper in general circulation in the county in which the principal office of the company shall be located, and the directors chosen at any such annual or special meeting, shall continue in office until the next annual meeting and until their successors, duly elected, shall have accepted. [Same, § 9.]

1691. Powers of directors; president. 1128. The directors shall choose, by ballot, a president from their own number, and shall fill all vacancies which shall arise in the board or in the presidency thereof; and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in them by this chapter. [Same, § 10.]

1692. Secretary; by-laws. 1129. The directors of any such company shall have power to appoint a secretary, and any other officers or agents necessary for transacting the business of the company, paying such salaries, and taking such securities as they may deem reasonable; they may ordain and establish such by-laws and regulations, not inconsistent with this chapter, or with the constitution and laws of the United States and of this state, as shall appear to them necessary for regulating and conducting the business of the company; and they shall keep full and correct entries of their transactions, which shall at all times, be open to the inspection of the stockholders, and to the inspection of persons invested by law with the right thereof. [Same, § 11.]

INVESTMENTS — EXAMINATION — INSURANCE.

1693. Funds invested. 1130. It shall be lawful for any insurance company organized under this chapter, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on unincumbered real estate within the state of Iowa, worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in

some responsible company, and the policy transferred to said company, and also in stocks of this state, or stocks or treasury notes of the United States,—in the stocks or bonds of any county or incorporated city in this state authorized to be issued by the legislature of this state; and to lend the same, or any part thereof, on the security of such stocks or bonds, or treasury notes, or upon bonds and mortgages as aforesaid and not otherwise; and to change and reinvest the same in like securities as occasion may, from time to time, require; but any surplus money over and above the paid-up capital stock of any such company organized under this chapter, or incorporated under any law of this state, may be invested in or loaned upon the pledge of the public stock or bonds of the United States, or any one of the states, or the stocks, bonds, or other evidences of indebtedness of any solvent, dividend-paying institutions incorporated under the laws of this state or of the United States, except their own stock; if the current market value of such stock, bonds, or other evidences of indebtedness, shall be at all times, during the continuance of such loans, at least ten per cent. more than the sum loaned thereon. [Same, § 6.]

1694. Examination by auditor. 1131. Upon receiving notification that the requirements of the preceding sections have been complied with, the auditor of state shall make an examination, or cause one to be made by some disinterested person officially appointed by him for that purpose; and if it shall be found that the capital herein required of the company named, according to the nature of the business proposed to be transacted by such company, has been paid in and is possessed by it in money, or in such stock, notes, bonds, and mortgages as are required by sections eleven hundred and twenty-four and eleven hundred and thirty of this chapter [§§ 1687, 1693], then he shall so certify; and if the examination be made by any other than the auditor, then the finding shall be certified under oath; or, if it is proposed to be a mutual insurance company, such certificate shall be to the effect that it has received and is in actual possession of the capital, premiums, or actual engagements of insurance or other securities, as the case may be, to the extent and value required by sections eleven hundred and twenty-four and eleven hundred and thirty of this chapter [§§ 1687, 1693]. The name and the residence of the maker of each premium note forming part of the capital of any such proposed mutual insurance company, and the amount of such note shall be returned to the auditor. The corporators or officers of any such company, or proposed company, shall be required to certify, under oath, to the auditor of state, that the capital exhibited to the person making the examination directed in this section, was, actually and in good faith, the property of the company so examined. The certificates above contemplated shall be filed in the office of said auditor, who shall thereupon deliver to such company a certified copy of the same, with his written permission for them to commence the business proposed in their written certificate of incorporation, which, being recorded by the recorder of the county in which the company is to be located, in a book prepared by him for that purpose, shall be their authority to commence business and issue policies; and such certified copy of said certificates may be used in evidence for or against said company with the same effect as the originals. [Same, § 7.]

1695. Kinds of insurance; limitation of risk. 1132. It shall be lawful for any company organized under this chapter, or doing business in this state:

1. To insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or on water, or any vessel or boat, wherever the same may be;

2. To make insurance on the health of individuals, and against the personal

injury, disablement, and death, resulting from traveling, or general accidents by land or water;

3. To insure the fidelity of persons holding places of private or public trust;

4. To receive on deposit and insure the safe-keeping of books, papers, moneys, stocks, bonds, and all kinds of personal property;

5. To insure horses, cattle, and other live stock against loss, or damage by accident, theft, or any unknown or contingent event whatever which may be the subject of legal insurance; to lend money on bottomry or respondentia, and to cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property, by means of any loan which it may have made on mortgage, bottomry, or respondentia, and generally to do and perform all other matters and things proper to promote these objects.

But no company shall be organized to issue policies of insurance for more than one of the above five mentioned purposes, and no company that shall have been organized for either one of said purposes, shall issue policies of insurance for any other; and no company organized under this chapter, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per cent. on its paid-up capital, unless the excess shall be re-insured by the same in some other good and reliable company. But the restrictions as to the amount of risk any company shall assume, shall not apply to any companies organized to guaranty the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guaranty the safe-keeping of books, papers, moneys, and other personal property. [Same, § 8.]

1696. Policies. 1133. All policies or contracts of insurance made or entered into by the company, may be made either with or without the seal of said company; but said policies shall be subscribed by the president, or such other officers as may be designated by the directors for that purpose, and shall be attested by the secretary thereof. [Same, § 12.]

1697. Transfer of stock. 1134. Transfers of stock may be made by any stockholder, or his legal representative, subject to such restrictions as the directors shall establish in their by-laws, except as hereinafter provided. [Same, § 13.]

CAPITAL INCREASED — REAL ESTATE.

1698. How. 1135. Whenever any company organized under this chapter, with less than the maximum capital limited in section eleven hundred and twenty-four hereof [§ 1687], shall, in the opinion of the directors thereof, require an increased amount of capital, they shall, if authorized by the holders of a majority of the stock to do so, file with the auditor of state a certificate setting forth the amount of such desired increase, not exceeding said maximum, and thereafter such company shall be entitled to have the increased amount of capital fixed by said certificate, and the examination of securities composing the capital stock thus increased, shall be made in the same manner as provided in section eleven hundred and thirty-one of this chapter [§ 1694] for the capital stock first paid in. [Same, § 14.]

1699. Dividends. 1136. The directors, trustees, or managers of any insurance company organized under this chapter, or incorporated under any law of this state, shall not make any dividends, except from the surplus profit arising from their business; and, in estimating such profits, there shall be reserved therefrom a sum equal to forty per cent. of the amount received as premiums on unexpired risks and policies, which amount, so reserved, is hereby declared to be unearned premiums; and there shall also be reserved all sums due the corporation on bonds and mortgages, bonds, stocks, and book account,

of which no part of the principal or interest thereon has been paid during the year preceding such estimate of profits, and upon which suit for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid; and, in case of any such judgment, the interest due or accrued thereon and remaining unpaid, shall also be reserved. Any dividends made contrary to these provisions, shall subject the company making it to a forfeiture of their charter. [Same, § 15.]

1700. May own real estate. 1137. No company organized under this chapter shall purchase, hold, or convey any real estate, save for the purposes and in the manner herein set forth:

1. Such as shall be requisite for its convenient accommodation in the transaction of its business;

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due;

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the company, or for money due;

4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debt; and it shall not be lawful for any such company to purchase, hold, or convey real estate in any other case, or for any other purpose, or acquired in any other manner, except that it may convey real estate which shall be found in the course of its business not necessary for its convenient accommodation in the transaction thereof; and all such last-mentioned real estate shall be sold and conveyed within three years after the same has been deemed by the auditor of state unnecessary for such accommodation, unless the company shall procure a certificate from the said auditor, that the interest of said company will materially suffer by a forced sale, in which event the sale may be postponed for such a period as the said auditor may direct in such certificate. [Same, § 16.]

DEPOSIT NOTES — LOSSES — POLICY.

1701. Mutual companies. 1138. All notes deposited with any mutual insurance company at the time of its organization, as provided in section eleven hundred and twenty-four hereof [§ 1687], shall remain as security for all losses and claims until the accumulation of the profits invested, as required by section eleven hundred and thirty of this chapter [§ 1693], shall equal the amount of cash capital required to be possessed by stock companies organized under this chapter, the liability of each note decreasing proportionately as the profits are accumulating; but any note which may have been deposited with any mutual insurance company subsequent to its organization, in addition to the cash premiums on any insurance effected with such company, may, at the expiration of the time of such insurance, or upon the cancellation by the company of the policy, be relinquished and given up to the maker thereof, or his legal representatives, upon his paying his proportion of losses and expenses which may have accrued thereon during such term. The directors or trustees of any such company shall have the right to determine the amount of the note to be given, in addition to the cash premium, by any person insured in such company; and every person effecting insurance in any mutual company, and also his heirs, executors, administrators, and assigns, continuing to be so insured, shall thereby become members of said company during the period of insurance, and shall be bound to pay for losses, and such necessary expenses as aforesaid, accruing to said company in proportion to his or their deposit note. But any person insured in any mutual company, except in the case of notes required by this chapter to be deposited at the time of its organization, may, at any time return his policy for cancellation, and, upon payment of the amount due at

such time upon his premium note, shall be discharged from further liability thereon. [Same, § 17.]

1702. Settlement of losses. 1139. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portion of such loss, and publish the same in such manner as they shall deem proper, or the by-laws shall have prescribed; but the sum to be paid by each member shall always be in proportion to the original amount of his deposit note, and shall be paid to the officers of the company within thirty days after the publication of said notice; and if any member shall, for the space of thirty days after personal demand, or by letter, for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note, with costs of suit; but execution shall issue for assessments and costs as they accrue only, and every such execution shall be accompanied by a list of losses for which the assessment was made. If the whole amount of deposit notes shall be insufficient to pay the loss occasioned, the sufferers insured by said company shall receive, toward making good their respective losses, a proportionate share of the whole amount of said notes, according to the sums to them respectively insured; but no member shall ever be required to pay for any loss more than the whole amount of his deposit note. [Same, § 18.]

1703. Kind of company. 1140. Every insurance company hereafter organized as provided in this chapter, shall, if it be a mutual company, embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt; and every company doing business as a cash stock company, shall, upon the face of its policies, express in some suitable manner that such policies were issued by stock companies. [Same, § 19.]

ANNUAL STATEMENT.

1704. What to show. 1141. The president, or the vice-president and secretary of each company organized under this chapter, or incorporated under any law of this state, or doing business in this state, shall, annually, on the first day of January of each year, or within thirty days thereafter, prepare, under oath, and deposit in the office of the auditor of state, a full, true, and complete statement of the condition of such company on the last day of the month preceding that in which such statement is filed, which last statement shall exhibit the following items and facts in the following form, to wit:

First — The amount of capital stock of the company;

Second — The name of the officers;

Third — The name of the company, and where located;

Fourth — The amount of capital stock paid up;

Fifth — The property or assets held by the company, specifying:

1. The value, as nearly as may be, of the real estate owned by such company;

2. The amount of cash on hand and deposited in banks to the credit of the company, and in what bank the same is deposited;

3. The amount of cash in the hands of agents, and in the course of transmission;

4. The amount of loans secured by first mortgage on real estate, with the rate of interest thereon;

5. The amount of all other bonds and loans, and how secured, with the rate of interest thereon;

6. The amount due the company on which judgment has been obtained;

7. The amount of stocks of this state, of the United States, of any incorpo-

rated city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock;

8. The amount of stock held by such company as collateral security for loans, with amount loaned on each kind of stock, its par and market value;

9 The amount of assessments on stock and premium notes, paid and unpaid;

10. The amount of interest actually due and unpaid;

11. All other securities and their value;

12. The amount for which premium notes have been given on which policies have been issued.

Sixth — Liabilities of such company, specifying:

1. The losses adjusted and due;

2. The losses adjusted and not due;

3. Losses unadjusted;

4. Losses in suspense and the cause thereof;

5. Losses resisted and in litigation;

6. Dividends, either in script or cash, specifying amount of each, declared but not due;

7. Dividends declared and due;

8. The amount required to re-insure all outstanding risks on the basis of forty per cent. of the premium on all unexpired risks;

9. The amount due banks or other creditors;

10. The amount of money borrowed and the security therefor;

11. All other claims against the company.

Seventh — The income of the company during the previous year, specifying:

1. The amount received for premiums, exclusive of premium notes;

2. The amount of premium notes received;

3. The amount received for interest;

4. The amount received for assessments, or calls on stock notes, or premium notes;

5. The amount received from all other sources.

Eighth — The expenditures during the preceding year, specifying:

1. The amount of losses paid during said term, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which losses were estimated in such statement;

2. The amount paid for dividends;

3. The amount paid for commissions, salaries, expenses, and other charges of agents, clerks, and other employees;

4. The amount paid for salaries, fees, and other charges of officers and directors;

5. The amount paid for local, state, national, internal revenue, and other taxes and duties;

6. The amount paid for all other expenses, expenditures, including printing, stationery, rents, furniture, etc.

Ninth — The largest amount insured in any one risk.

Tenth — The amount of risks written during the year then ending.

Eleventh — The amount of risks in force, having less than one year to run.

Twelfth — The amount of risks in force, having more than one, and not over three years to run.

Thirteenth — The amount of risks having more than three years to run.

Fourteenth — The following question must be answered, viz.: Are dividends declared on premiums received for risks not terminated?

Fifteenth — Each accident insurance company, or company insuring against accidents in this state, shall keep a register of tickets sold by its officers or agents, which register shall show the name and residence of the person in-

sured, the amount of such insurance, the date of issue of such ticket, and the time the same will remain in force, and every such company shall file in the office of the auditor of state, in January of each year, a report, sworn to by the president or secretary of the company, showing the above items of the business of such company during the preceding year, and the auditor of state shall withhold the certificate of authority from any such company neglecting or failing to comply with the provisions of this section. [Same, § 20.]

1705. Inquiry by auditor. 1142. The auditor of state is hereby authorized and empowered to address any inquiries to any insurance company in relation to its doings and condition, or any other matter connected with its transactions, which he may deem necessary for the public good, or for a proper discharge of his duties, and any company so addressed shall promptly reply in writing thereto. [Same, § 21.]

1706. Stock notes. 1143. The statement of any company, the capital of which is composed in whole, or in part, of notes, shall, in addition to the foregoing, exhibit the amount of notes originally forming the capital, and also what proportion of said notes is still held by such company and considered capital. [Same, § 22.]

FOREIGN COMPANIES — CAPITAL REQUIRED.

1707. Amount. 1144; 15 G. A., ch. 55; 16 G. A., ch. 60; 21 G. A., ch. 145. No insurance company, association, or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under, the laws of any other state or any foreign government, shall, directly or indirectly, take risks or transact any business of insurance in this state, unless possessed of two hundred thousand dollars of actual paid-up capital, exclusive of any assets of any such company deposited in any other states or territories for the special benefit or security of the insured therein; *provided*, that the foregoing provisions of this section shall not apply to foreign mutual hail insurance companies, issuing policies for a term of one year or less; *provided* further that foreign companies organized to insure plate glass exclusively shall not be required to have a greater capital than one hundred thousand dollars; and any such company desiring to transact any such business as aforesaid, by an agent or agents in this state, shall file with the auditor of state a written instrument, duly signed and sealed, authorizing any agent or agents of such company in this state, to acknowledge service of process for and in behalf of such company in this state, consenting that service of process, original, mean, or final, upon any such agent or agents, shall be taken and held as valid as if served upon the company according to the laws of this or any other state, and waiving all claim or right of error, by reason of such acknowledgment or service; and also a certified copy of their charter or deed of settlement, together with a statement, under oath, of the president or vice-president, or other chief officer, and the secretary of the company for which they may act, stating the name of the company and the place where located, the amount of its capital, with a detailed statement of the facts and items required from companies organized under the laws of this state, as per section eleven hundred and forty-one hereof [§ 1704]; also a copy of the last annual report, if any, made under any law of the state by which such company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by liabilities as stated in section eleven hundred and forty-one of this chapter [§ 1704], to the extent of twenty per cent. thereof, while such deficiency shall continue. Any mutual fire insurance company possessed of cash assets safely invested, amounting to at least two hundred thousand dollars over and above all its liabilities, including the reserve for reinsurance required by the laws of this state, shall be deemed to be "possessed

of two hundred thousand dollars of actual paid-up capital," within the meaning of this section, and may be authorized to take risks and transact the business of insurance in this state, on complying with the requisitions of said chapter four, relating to insurance companies incorporated by or under the laws of other states; subject, however, to all the provisions of said chapter, applicable to such insurance companies and all other acts and laws relating to insurance so far as applicable. [Same, § 23; 14 G. A., ch. 100, § 2.]

Service of process may be made upon any agent of the company within the state: *Niagara Ins. Co. v. Rodecker*, 47-162.

RISKS — AGENTS.

1708. Certificate of authority. 1145. No agent shall act for any insurance company referred to herein, directly or indirectly, in taking risks or transacting business of insurance in this state, without procuring from the auditor of state a certificate of authority, stating that such company has complied with all the requisitions of this chapter. [12 G. A., ch. 138, § 24.]

1709. Annual statements; premium notes. 1146. The statements and evidences of investment required of foreign companies as above, shall be renewed, annually, in such manner and form as required hereby and as said auditor may direct, with any additional statement of the amount of the losses incurred or premiums received in this state during the preceding period, so long as such agency continues. And the said auditor, on being satisfied that the capital, securities, and investments remain secure, as hereinbefore provided, shall furnish a renewal of his certificates as aforesaid. All notes taken for policies of insurance in any company doing business in this state, shall state upon their face that they have been taken for insurance, and shall not be collectible unless the company and its agents have fully complied with the laws of this state relative to insurance. [Same, § 25.]

A negotiable note which does not state upon its face that it has been taken for insurance will not be subject, in the hands of an innocent holder, to the defense here indicated. The maker must have that fact appear upon the face of the note if he desires to rely upon such defense: *Cook v. Weirman*, 51-561.

1710. Conformity; failure to comply. 1147. Every insurance company organized under the laws of, or doing business in, this state, shall conform to all the provisions of this chapter applicable thereto, and, when necessary, any existing company shall change its charter and by-laws, so as to conform hereto, by a vote of a majority of its board of directors; and any president, secretary, or other officer of any company organized under the laws of Iowa, or any officer or person doing, or attempting to do, business in this state for any insurance company organized without this state, failing to comply with any of the requirements of this chapter, or violating any of the provisions thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail for a period not less than thirty days nor more than six months. [Same, § 26.]

This does not prevent the officers of a company which has not complied with the law from re-insuring their risks in another company and transferring to such company the premium notes received therefor: *Davenport F. Ins. Co. v. Moore*, 50-619.

1711. Advertisements. 1148. Every agent of any insurance company, shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town, or village in which the company is located, and the state or government under the laws of which it is organized. The term agent, used in the foregoing sections, shall include any other person who shall, in any manner, directly or indirectly, transact the insurance business of any insurance company not incorporated by the laws of this state.

The provisions of the foregoing sections relative to foreign companies, shall apply to all such companies, partnerships, associations, or individuals, whether incorporated or not. [Same, § 27.]

EXAMINATION BY AUDITOR.

1712. Examiners. 1149. The auditor of state shall, whenever he deems it expedient so to do, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in this state, to examine into the affairs and condition of any insurance company incorporated or doing business in this state, or to make such examination himself; and the officers or agents of such company or companies shall cause their books to be opened for the inspection of the auditor or the person or persons so appointed, and otherwise facilitate such examination so far as may be in their power so to do; and for the purpose of arriving at the truth in such case, the auditor, or the person or persons so appointed by him, shall have power to examine, under oath, the officers or agents of any company, or others if necessary, relative to the business and condition of said company; and whenever the auditor shall deem it best for the interest of the public so to do, he shall publish the result of such investigation in one or more papers in this state; and whenever it shall appear to the auditor, from such examination, that the assets and funds of any company incorporated in this state are reduced or impaired by the liabilities of said company, as described under the head of liabilities in the statement required by this chapter, more than twenty per cent. below the paid-up capital stock required hereby, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency, within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney-general, who shall apply to the district [or circuit] court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed; and the court, or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court, or judge, that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, the said court, or judge, shall decree a dissolution of said company and a distribution of its effects. The said court, or judge, shall have power to refer the application of the attorney-general to a referee, to inquire into and report upon the facts stated therein. [Same, § 28.]

1713. Requisition on stockholders. 1150. Any company receiving the aforesaid requisition from the auditor, shall forthwith call upon its stockholders for such amounts as will make its paid-up capital equal to the amount fixed by this chapter, or the charter of said company; and in case any stockholder shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement in such time and manner as said auditor shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholder may be entitled to in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company; the value of such shares for which new certificates shall be issued to be ascertained under the direction of the said auditor, the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company. And in the event of any additional losses accruing upon new risks, taken after the expiration of the period limited by the said auditor in

the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof. [Same, § 29.]

1714. Mutual companies. 1151. If, upon such examination, it shall appear to the auditor, that the assets of any company, chartered upon the plan of mutual insurance under this chapter, are insufficient to justify the continuance of such company in business, he shall proceed in relation to such company in the same manner as herein required in regard to joint-stock companies; and the trustees or directors of such company are made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by the auditor for filling up the deficiency in the capital, and before such deficiency shall have been made up. Any transfer of the stock of any company organized under this chapter, made during the pending of any investigation required above, shall not release the party making the transfer from his liability for losses, which may have accrued previous to such transfer. [Same, § 30.]

1715. Revocation of certificate. 1152. The auditor of state shall be authorized to examine into the condition and affairs of any insurance company, as provided for in this chapter, doing business in this state, not organized under the laws of this state, or cause such examination to be made by some person or persons appointed by him, having no interest in any insurance company; and, whenever it shall appear to the satisfaction of said auditor that the affairs of any such company are in an unsound condition, he shall revoke the certificates granted in behalf of such company, and shall cause a notification thereof to be published in some newspaper of general circulation published in the city of Des Moines, and the agent or agents of such company are, after such notice, required to discontinue the issuing of any new policy, or the renewal of any previously issued. [Same, § 31.]

FEES.

1716. Amount of. 1153. There shall be paid by every company doing business in this state, except companies organized under the laws of this state, the following fees:

Upon filing declaration, or certified copy of charter, twenty-five dollars;

Upon filing the annual statement, twenty dollars;

For each certificate of authority, and certified copy thereof, two dollars;

For every copy of any paper filed in the department, the sum of twenty cents per folio, and for affixing the official seal to such copy, and certifying the same, one dollar;

For valuing policies of life insurance companies, ten dollars per million of insurance or for any fraction thereof;

For official examinations of companies under this act, the actual expense incurred.

And companies organized under the law of this state, shall pay the following fees:

For filing and examination of the first application of any company, and the issuing of the certificate of license thereon, ten dollars;

For filing each annual statement, and issuing the renewal of license required by law, three dollars;

For each certificate of authority to its agents, fifty cents. [Same, § 32.]

1717. Laws of other states. 1154. When, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed, or would be imposed, on insurance companies of this state, doing, or that might seek to do, business in such other state, or upon their agents therein, so long as such laws continue

in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, or upon their agents here.

1718. Certificate of auditor. 1155. Every insurance company of the kind provided for in this chapter, doing business in this state, organized under the laws of this state or any other state or country, shall publish annually, in two newspapers of general circulation, one of which shall be published at the capital of this state, and in case of any company organized in the state of Iowa, one of which shall be published in the county where the principal office is located, a certificate from the auditor of state that such company has, in all respects, complied with the laws of this state relating to insurance. Said certificate shall also contain a statement, under the oath of the president or secretary of such insurance company, of the actual amount of paid-up capital, the aggregate amount of assets and liabilities at the date of such certificate, together with the aggregate income and expenditures of such company for the year preceding the date of such certificate. [12 G. A., ch. 138, § 34.]

1719. Expenses. 1156; 16 G. A., ch. 37. The necessary expenditure of any examination made, or ordered to be made, by the auditor of state under this chapter, shall be certified to by him and paid on his requisition, by the company which is the subject of such examination. In case of the refusal by any company to pay the requisition of the auditor of state the necessary expenses, it shall be the duty of the auditor to suspend such company from doing business in this state until said expenses are paid; if not so paid, the same may be audited and allowed by the executive council and paid out of any money in the treasury not otherwise appropriated. [Same, § 12.]

STATEMENTS PUBLISHED.

1720. Printed forms. 1157. The auditor of state shall cause to be prepared and furnished to each company organized under the laws of this state, and to the attorney or agent of each company incorporated by other states and foreign governments, who may apply for the same, printed forms of statements required by this chapter, and he may, from time to time, make such changes in the forms of these statements as shall seem to him best adapted to elicit from the companies a true exhibit of their condition, in respect to the several points hereinbefore enumerated. [Same, § 36.]

1721. Auditor's report. 1158; 16 G. A., ch. 164. The auditor of state shall cause the information contained in the statements required of the companies organized or doing business in this state, to be arranged in a tabular form, and prepare the same in a single document for printing, which report shall be made on or before the first day of May of each year, and three thousand copies shall be printed for the use of the auditor, who shall furnish a copy to each member of the general assembly and one to each newspaper printed in the state. [Same, § 37.]

1722. Stock or mutual. 1159. No company organized upon the mutual plan, shall do business or take risks upon the stock plan; neither shall a company organized as a stock company, do business upon the plan of a mutual insurance company. [Same, § 39.]

1723. Mutual associations. 1160; 16 G. A., ch. 103; 17 G. A., ch. 104; 20 G. A., ch. 11; 22 G. A., ch. 93. Nothing in this chapter shall be so construed as to prevent any number of persons from making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire or death, or loss or damage by tornadoes, lightning, hail storms, cyclones or wind storms, but such association of persons shall in no case insure any property not owned by one of their own number, except such school-houses

or church buildings as the said companies deem proper to insure within the territory where they do business, and no life except that of their own members, nor shall the provisions of this chapter be applicable to such associations or companies. Each fire insurance company organized under the provisions of this chapter shall report in January of each year, to the auditor of state, which report shall show the following facts:

1. Name of company.
2. Place of doing business.
3. Names of president and secretary.
4. Address of secretary.
5. Date of commencing business.
6. Amount of risks in force at the beginning of the year.
7. Amount of risks written during the year.
8. Amount of risks canceled during the year.
9. Amount of risks in force at the end of the year.
10. Amount of losses paid during the year.
11. Amount of other expenses.
12. Total expenses during the year.

These reports to be tabulated by the auditor of state, and published by him in his annual report on insurance, and one copy shall by him be sent to each company reporting as above. But no foreign life insurance company, aid society, or association for the insurance of the lives of its members and doing business on the assessment plan, shall be allowed to do business in this state unless it has a guarantied capital of not less than one hundred thousand dollars in the state in which it is organized, and such companies shall pay the same fees for annual reports as are now paid by stock companies. And such companies organized under this section shall pay the same fees for annual reports as are now paid by stock companies, but such association or companies shall receive no premiums nor make any dividends; but the word premiums herein, shall not be construed to mean policy and survey fees, nor the necessary expenses of such companies. [Same, § 40; 13 G. A., ch. 108; 14 G. A., ch. 107.]

Mutual aid associations fall within the provisions of this section and not within those of the three following: *State ex rel. v. Iowa Mutual Aid Ass'n*, 59–125.

Under the constitution and articles of the association known as the Ancient Order of United Workmen, *held*, that such association was, in effect, a mutual insurance company, and that the supreme lodge of that organization, being incorporated under the laws of Kentucky, was not authorized to exercise any powers or do business in the state of Iowa without compliance with the provisions of this section: *State ex rel. v. Miller*, 66–26.

Even though the relation between such mutual association and a member thereof is a personal one not passing to the legal representative, yet the association may ratify and confirm it in the hands of the personal representative of the deceased member, and will be held to do so if it makes assessments of such personal representative as a member: *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 36 N. W. Rep., 880.

1724. Forms of policies. 17 G. A., ch. 39, § 1. The auditor of state shall have power, and it shall be his duty, to examine the form of all policy contracts hereafter issued, or proposed to be issued, by any fire insurance company, association, or corporation now authorized by law, or that may hereafter apply to be authorized to transact the business of fire insurance in this state, and the auditor shall refuse to authorize any such company, association, or corporation to do business in this state, and shall not renew the authority or certificates of any such company, association, or corporation authorized to do business in this state, whenever the form of policy contract, issued or proposed to be issued by any such company, association, or corporation does not provide for the cancellation of the same at the request of the insured upon equitable terms, and in case of any violation of this act, it shall be the duty of the auditor to revoke the authority of such company to do business within this state. The provisions of this act shall not apply until January first, 1879,

to any company now holding a certificate of authority from the auditor to do business in this state.

PUBLICATION OF FALSE STATEMENTS.

1725. False statement of assets. 17 G. A., ch. 111, § 1. It shall not be lawful for any company, corporation, association, individual or individuals, now transacting or now or hereafter authorized, under any existing or future laws of this state, to transact the business of fire insurance within this state, to state or represent either by advertisement in any newspaper, magazine, or periodical, or by any sign, circular, card, policy of insurance, or certificate of renewal thereof, or otherwise, any funds or assets to be in possession of any such company, corporation, association, individual or individuals, not actually possessed by such company, corporation, association, individual or individuals, and available for the payment of losses by fire and held for the protection of holders of policies of fire insurance.

1726. Statement of capital. 17 G. A., ch. 111, § 2. Every advertisement or public announcement, and every sign, circular, or card hereafter made or issued by any company, corporation, association, individual or individuals, or any officer, agent, manager or legal representative thereof, now, or hereafter authorized by any existing or future laws of this state to transact the business of fire insurance within this state, which shall purport to make known the financial standing of any such company, corporation, association, individual or individuals, shall exhibit the capital actually paid in, in cash and the amount of net surplus of assets over all liabilities of such company, corporation, association, individual or individuals, actually available for the payment of losses by fire and held for the protection of holders of their policies of fire insurance, and shall also exhibit the amount of net surplus of assets over all liabilities in the United States actually available for the payment of losses by fire and held in the United States for the protection of holders of their policies of fire insurance in the United States, including in such liabilities the fund reserved for re-insurance of outstanding risks; and shall correspond with the verified statement made by the company, corporation, association, individual or individuals making or issuing the same to the insurance department of this state next preceding the making or issuing the same. The provisions of this section shall not apply to companies, corporations or associations organized and doing business under the laws of this state.

1727. Statement of capital in policy. 17 G. A., ch. 111, § 3. Nothing in this act shall be construed to prohibit any insurance company or association from publishing in any policy or certificate of renewal thereof a single item showing the amount of their capital as set forth in their charter, act of incorporation, deed of settlement or articles of association under which they are authorized to transact the business of insurance.

1728. Penalty. 17 G. A., ch. 111, § 4. Any violation of any provision of this act shall, for the first offense, subject the company, corporation, association, individual or individuals guilty of such violation, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state, with costs and expenses of such prosecution by the district [county] attorney of any county in which the company, corporation, association, individual or individuals shall be located or may transact business, or in any county where such offense may be committed, and such penalty when recovered shall be paid into the treasury of such county for the benefit of the school fund of said county. Every subsequent violation shall subject the company, corporation, association, individual or individuals guilty of such violation to a penalty of not less than one thousand dollars, which shall be sued for, recovered and disposed of in like manner as for the first offense.

FORFEITURES OF POLICIES.

1729. How effected. 18 G. A., ch. 210, § 1. In every instance where a fire insurance company or association doing business in this state, shall hereafter take a note or contract for the premium on any insurance policy, or shall hereafter take a premium note or contract which, by its terms or by any agreement or rule of the company or association, is assessable for the premium due on the policy for which it was given, such insurance company or association shall not declare such policy forfeited or suspended for non-payment of such note or contract, except as hereinafter provided, anything in the policy or application to the contrary notwithstanding.

See *Lewis v. Burlington Ins. Co.*, 71-97.

1730. Notice. 18 G. A., ch. 210, § 2. Within thirty days prior to, or at any time after the maturity of any note or contract, whether assessable, or where the time of payment is fixed in the contract, given for the premium on any policy of insurance, such company or association may serve a notice, in writing, upon the insured, that his note, or an instalment thereof, is due, or to become due, stating the amount which will be due on the note or contract, and also the amount required to pay the customary short rates, including the expense of taking the risk up to the time the policy will be suspended under the notice in order to cancel the policy, and that, unless payment is made within thirty days, his policy will be suspended. Such notice may be served either personally or by registered letter addressed to the assured, at his postoffice address, named in or on the policy, and no policy of insurance shall be suspended for non-payment of such amount until thirty days after such notice has been served.

An insurance company seeking to declare a forfeiture of a policy by reason of the non-payment of the premium note must not only give the maker notice of the proposed suspension of his policy on account of such non-payment, but must also notify him of the amount necessary to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended, in order to cancel the policy: *Boyd v. Cedar Rapids Ins. Co.*, 70-325.

In a particular case, *held*, that an application by insured for extension of time, and the fact that it was not granted, did not waive the provision as to notice just referred to: *Ibid.*

It appears that the legislature intended to provide for constructive notice by mail, to be completed either when the registered letter is mailed or as soon thereafter as it shall be received at the office of its destination by due course of mail: *McKenna v. State Ins. Co.*, 73-453.

The condition in a policy that it shall be suspended on failure of assured to pay the premium note cannot be disregarded except as provided by statute. This statutory provision simply prevents such condition taking effect until thirty days after the specified notice has been given: *Harle v. Council Bluffs Ins. Co.*, 71-401.

1731. Cancellation; short rates. 18 G. A., ch. 210, § 3. The assured may, at any time after the maturity of the note, contract or instalment, pay to the insurance company or association the customary short rates, including the expense of taking the risk, and the cost of suit, in case suit has been commenced or judgment rendered on the note or contract, and upon such payment, if he so elect, his said policy shall be canceled, and any note or contract, or any judgment rendered thereon, shall be canceled and shall be actually void in whomsoever hands the same may be. *Provided*, that the assured may at any time before cancellation of the policy, pay to the insurance company or association the full amount due upon any note or contract, and from the date of such payment the policy shall be revived, and shall be in full force and effect. *Provided*, such payment is made during the time stated in the policy and before a loss occurs. *And provided further*, that where any insurance company or association shall bring suit upon such note or contract and shall collect the same, from the date of such collection the policy shall be revived and be in full force from the time of such collection. *Provided*, such collection is made during the time stated in the policy and before a loss occurs. The provisions of this act shall apply to and govern all contracts and policies

of insurance contemplated in this chapter, anything in the application or policy to the contrary notwithstanding.

The right of assured to cancel the policy and recover back premiums paid in excess of customary short rates cannot be exercised by assigning to another the right to cancel such policy and collect the unearned premium. The assignment would avoid the policy and terminate the right to recover. Nor can such unearned premium be recovered after the policy has been rendered void by taking other insurance: *Colby v. Cedar Rapids Ins. Co.*, 66-577.

SOLICITING AGENTS — APPLICATIONS — POLICIES.

1732. Solicitor deemed agent. 18 G. A., ch. 211, § 1. Any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.

1733. Copy of application. 18 G. A., ch. 211, § 2. All insurance companies or associations shall upon the issue, or renewal, of any policy attach to such policy, or indorse thereon, a true copy of any application or representation of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.

It is incompetent, in defense to an action upon a policy, to plead or prove statements made in the application, where such statements are not reduced to writing and a copy thereof is not attached to or indorsed upon the policy: *Ellis v. Council Bluffs Ins. Co.*, 64-507. And see *Wallace v. Council Bluffs Ins. Co.*, 66-139.

Where answers in the application are filled up by the agent taking such application from his own knowledge, the fact that a copy of the application is attached to the policy which is delivered to insured will not bind him to statements thus made, although he fails to notify the company of their falsity. The assured is not required to prove the statements made in the application to be true, and he is therefore not required to examine the copy of the application indorsed on the policy: *Donnelly v. Cedar Rapids Ins. Co.*, 70-693; and see *Bennett v. Council Bluffs Ins. Co.*, 70-600.

Where the insured fills the application in blank and leaves it with the soliciting agent of insurer, who fills up the application and writes out answers to questions contained therein, basing such answers upon his own investigation and knowledge, the insurer will be estopped by such act of its agent from setting up misstatements in such answers as a breach of warranty: *Ibid.*

This and the preceding section of this act apply to all kinds of insurance and not merely to fire insurance: *Cook v. Federal L. Ass'n*, 74-746.

1734. Evidence of value; proofs of loss. 18 G. A., ch. 211, § 3. In any suit or action brought in any court in this state on any policy of insurance against the company or association issuing the policy sued upon in case of the loss of any building so insured, the amount stated in the policy shall be received as *prima facie* evidence of the insurable value of the property at the date of the policy; *provided*, nothing herein shall be construed to prevent the insurance company or association from showing the actual value at the date of the policy and any depreciation in the value thereof before the loss occurred; *provided, further*, such insurance company or association shall be liable for the actual value of the property insured at the date of the loss, unless such value exceeds the amount stated in the policy, and in order to maintain his action on the policy, it shall only be necessary for the assured to prove the loss of the building insured, and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge,

and the extent of the loss; which notice shall be given within sixty days from the time the loss occurred; *provided, further*, that no action shall be begun within ninety days after notice of such has been given; all the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding.

Actions cannot be brought before the expiration of ninety days, even on the refusal of the company to pay: *Quinn v. Capital Ins. Co.*, 71-615.

Waiver of proofs of loss cannot be shown under an allegation that they have been furnished: *Welsh v. Des Moines Ins. Co.*, 71-337.

The time of limitation fixed by the policy is not extended where proofs are neither furnished nor waived: *Cornett v. Phenix Ins. Co.*, 67-388.

CHAPTER 5.

OF LIFE INSURANCE COMPANIES.

1735. Conditions. 1161. Every company formed for the purpose of insuring the lives of individuals, whether organized under the laws of this state or of any other state, or foreign country, shall, before issuing any policies on lives within this state, comply with the conditions and restrictions of this chapter. [12 G. A., ch. 173, § 1.]

This and the following sections do not apply to mutual aid associations organized to afford financial aid and benefit to the families of deceased members, and assistance to members personally in case of sickness or disability. The payment of membership fees, dues and assessments alone being required, and no permanent fund for any other purpose being accumulated, such associations are within the provisions of § 1723: *State ex rel. v. Iowa Mutual Aid Ass'n*, 59-125.

Under the constitution of the association known as the Ancient Order of United Workmen, *held*, that such association, notwithstanding its fraternal character, was in effect a mutual insurance company, and that the supreme lodge of that corporation, being incorporated under the laws of Kentucky, was not authorized to exercise any powers or do business in Iowa without compliance with the laws of Iowa with reference to life insurance companies: *State ex rel. v. Miller*, 66-26.

1736. Stock companies; capital. 1162. Joint-stock companies, organized under the laws of this state, shall have not less than one hundred thousand dollars of capital stock subscribed, twenty-five per cent. of which shall be paid up and invested in stocks of the United States, or of this state, or in bonds and mortgages upon unincumbered real estate in the state of Iowa, worth, exclusive of improvements, at least double the sum loaned thereon, which said securities shall be deposited with the auditor of state, and, upon said deposit, and satisfactory evidence to the auditor that the capital stock is all subscribed in good faith, he shall issue to said company the certificate hereinafter provided for. But no part of the twenty-five per cent. aforesaid, shall be loaned to any stockholder or officer of the company; the remainder of such stock shall be paid in such time as the directors or trustees of the company may direct, and the same shall be secured by the notes of the stockholders of said company. No note shall be accepted as part of such capital stock, unless the same shall be accompanied by a certificate of a justice of the peace, notary public, or clerk of the district court of the county in which the person executing such note shall reside, that the person making the same is, in his opinion, pecuniarily good and responsible for the same in property not exempt from execution by the laws of this state. [Same, § 2.]

1737. Mutual companies; conditions. 1163. Companies organized under the laws of this state upon the mutual plan, shall, before issuing any policies, have actual applications on at least two hundred and fifty individual lives, for an average amount of one thousand dollars each, a list of which applications, giving the name, age, residence, amount of insurance, and annual premium of each applicant, shall be filed with the auditor of state, and a de-

posit made with said auditor of an amount equal to three-fifths of the whole annual premium on said applications, either in cash or the securities required by the foregoing section, and, on compliance with said provisions, the auditor shall issue to said mutual company the certificate hereinafter prescribed. [Same, § 3.]

[As to mutual benefit associations, see §§ 1761–1783.]

AGENTS — RISKS.

1738. Foreign companies; prerequisites. 1164. No person shall act within this state as agent, or otherwise, in receiving or procuring applications for insurance, or in any manner to aid in transacting the business of insurance referred to in section eleven hundred and sixty-one hereof [§ 1735], for any company or association incorporated by, or organized under, the laws of any state or government, unless such company is possessed of the amount of actual capital required of any company in this state, and the same is invested in stocks or treasury notes of the United States, or this state, or of interest-paying bonds of the state in which said company is located, or where said deposits are made, or in bonds and mortgages on unincumbered real estate within the state where such company is located, but all mortgages deposited by any company under this section, shall be upon unincumbered real estate worth double the amount loaned thereon; which stock and securities shall be deposited with the auditor, controller, or chief financial officer of the state by whose laws said company is incorporated, or some other state, and the auditor of this state furnished with a certificate of such auditor, controller, or chief financial officer aforesaid, under his hand and official seal, that he, as such auditor, controller, or chief financial officer of such state, holds in trust and on deposit, for the benefit of all the policy-holders of such company, the security before mentioned, which certificate shall embrace the items of security so held, and that he is satisfied that such securities are worth one hundred thousand dollars; but nothing herein contained shall be construed to invalidate the agency of any company incorporated in another state, by reason of such company having from time to time exchanged the securities so deposited with the auditor, controller, or chief financial officer of the state in which such company is located for other stock or securities authorized by this chapter, or by reason of such company having drawn its interest and dividends from time to time for such stocks and securities. [Same, § 4.]

1739. Agent; process. 1165. Such company shall also appoint an attorney or agent in each county in this state, in which the company has an agency, on whom process of law can be served, and such company shall file with the auditor of state a certified copy of the charter or articles of incorporation of said company, and also a certified copy of the certificate of appointment of such agent, or agents, which appointment shall continue until another agent or attorney be substituted. And in case any such insurance corporation shall cease to transact business in this state according to the laws thereof, the agents last designated, or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this state; and service of such process for the causes aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation, and such company shall also file a statement of its condition and affairs in the office of the auditor of state, in the same form and manner required for the annual statements of similar companies organized under the laws of this state. [Same, § 5.]

1740. Agent's certificate; annual statement. 1166; 15 G. A., ch. 2, § 1. No agent shall act for any company referred to in the foregoing section,

directly or indirectly, in taking risks, collecting premiums, or in any manner transacting the business of life insurance in this state without procuring from said auditor a certificate of authority, stating that the foregoing requirements have been complied with, and setting forth the name of the attorney for each company, a certified copy of which certificate shall be filed in the county recorder's office of the county where the agency is to be established, and shall be the authority of such company and agent to commence business in this state, and such company, or its agent or attorney, shall, annually, by the first day of April, file with the auditor of state a statement of its affairs for the year terminating on the thirty-first day of December preceding, in the same manner and form provided for similar companies organized in this state. [Same, § 6.]

ANNUAL STATEMENT.

1741. By whom made; what to contain. 1167; 15 G. A., ch. 2, § 2. The president, or vice-president, and secretary or actuary, or a majority of the trustees or directors of each company organized under this chapter, shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the auditor of state, a statement showing: —

FIRST — NAME AND CAPITAL.

1. The name of the company and where located;
2. The name of the officers;
3. The amount of capital stock;
4. The amount of capital stock paid in.

SECOND — ASSETS.

1. The value of real estate owned by such company;
2. The amount of cash on hand;
3. The amount of cash deposited in bank, giving name of bank or banks;
4. The amount of cash in the hands of agents, and in the course of transmission;
5. The amount of bank stocks, with the name of each bank, giving par and market value of the same;
6. The amount of stocks and bonds of the United States, and all other bonds, giving names and amounts, with the par and market value of each kind;
7. The amount of loans secured by first mortgage on real estate;
8. The amount of all other bonds and loans, and how secured, with the rate of interest;
9. The amount of premium notes on policies in force;
10. The amount of notes given for unpaid stock, and how secured;
11. The amount of assessments unpaid on stock or premium notes;
12. The amount of interest due and unpaid;
13. All other securities.

THIRD — LIABILITIES.

1. The amount of losses due and unpaid;
2. The amount of losses adjusted but not due;
3. The amount of losses unadjusted;
4. The amount of claims for losses resisted;
5. The amount of money or evidences of investment borrowed;

6. The amount of dividends unpaid;
7. The amount required to safely re-insure all outstanding risks;
8. All other claims against the company.

FOURTH — INCOME DURING THE YEAR.

1. The amount of net cash premiums received;
2. The amount of premium notes received;
3. The amount of interest received from all sources;
4. The amount received from all other sources.

FIFTH — EXPENDITURES DURING THE YEAR.

1. The amount paid for losses;
2. The amount of dividends paid to policy-holders, and amount to stockholders;
3. The amount of commissions and salaries paid to agents;
4. The amount paid to officers for salaries and other perquisites;
5. The amount paid for taxes;
6. The amount of all other payments and expenditures.

SIXTH — MISCELLANEOUS.

1. The greatest amount insured on any one life;
2. The amount deposited in other states or territories as security for policyholders therein, stating the amount in each state or territory;
3. The amount of premiums received in this state during the year;
4. The amount paid for losses in this state during the year;
5. The whole number of policies issued during the year, with the amount of insurance effected thereby, and total amount of risk;
6. All other items of information necessary to enable the auditor to correctly estimate the cash value of policies, or to judge of the correctness of the valuation thereof. [Same, § 7.]

1742. Additional inquiries. 1168. The auditor of state is authorized to amend the form of annual statement, and to propose such additional inquiries as he may think necessary to elicit a full exhibit of the standing of companies doing business in this state. [Same, § 8.]

1743. Value of policies. 1169; 17 G. A., ch. 47; 21 G. A., ch. 169. As soon as practicable after the filing of said statement of any company organized and doing business under the laws of this state in the office of the auditor of state, he shall proceed to ascertain the net cash value of each policy in force upon the basis of the American experience table of mortality and four and one half per cent. interest; or actuaries' combined experience table of mortality and four per cent. interest. For the purpose of making such valuations, the auditor may employ a competent actuary to do the same, who shall be paid by the company for which the service was rendered; but nothing herein shall prevent any company from making said valuation herein contemplated, which shall be received by the auditor upon such proof as he may determine. Upon ascertaining the net cash value of all policies in force in any company organized under the laws of this state, the auditor shall notify said company of the amount, and within thirty days after the date of such notification, the officers of such company shall deposit with the auditor the amount of such ascertained valuation of all policies in force in the securities described in section one thousand one hundred and seventy-nine of this chapter [§ 1753]. But no joint-stock company organized under the laws of this state shall be required to make such deposit until the cash value of the policies in force as

ascertained by the auditor exceed the amount deposited by said company under section one thousand one hundred and sixty-two hereof [§ 1736]. [Same, § 9; 14 G. A., ch. 106, § 3.]

This section recognizes the existence of a debt from the company to its policy-holders: *Equitable L. Ins. Co. v. Board of Equalization*, 74-178.

1744. Annual certificate. 1170; 15 G. A., ch. 2, § 3. On receipt of the deposit and statement from any company as provided in the preceding sections, and the statement and evidence of investment according to law of foreign companies, which shall be renewed annually, the auditor shall issue a certificate setting forth the corporate name of the company; its principal office or agency in the state; that it has fully complied with the laws of this state in relation to life insurance companies, and is authorized to transact the business of life insurance for twelve months from the date of such certificate, or until the expiration of the thirty days' notice given by the auditor of the next annual valuation of its policies, said certificate to expire on the first day of April in the year following after it is issued. [12 G. A., ch. 173, § 10.]

1745. Penalty. 1171; 15 G. A., ch. 2, § 4. Upon the failure of any company organized in this state to make the deposit, or file the statement in the time stated herein, the auditor shall notify the attorney-general of the default, who shall at once apply to the district [or circuit] court if in session, or, if in vacation, to any judge thereof, for an order requiring said company to show cause why its business shall not be closed; and, if upon hearing, the company shall fail to show sufficient cause for neglecting to make the deposit, or file the statement required by this chapter, then the court shall decree its dissolution. Companies organized and chartered by the laws of any foreign state or country, failing to file the evidence of deposit and the statement within the time stated herein, shall be subject to the penalties prescribed in section one thousand one hundred and seventy-seven [§ 1751]. [Same, § 11.]

EXAMINATION BY AUDITOR.

1746. If insolvent, procure injunction. 1172. The auditor may at any time make a personal examination of the books, papers, and securities of any life insurance company doing business in this state, or may authorize or empower any other suitable person to make such examination, and for the purpose of securing a full and true exhibit of its affairs, he, or the person selected by him to make such examination, shall have power to examine, under oath, any officer or agent of said company, or others if necessary, relative to its business and management. If, upon such examination, the auditor is of opinion that the company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to the holders of its policies, he shall communicate the facts to the attorney-general, who shall at once apply to a judge of the supreme or district court to issue an injunction, restraining such company from transacting further business, except the payment of losses already ascertained and due, until a full hearing can be had. It shall be discretionary with the judge, either to issue the injunction forthwith or to give notice to the company, and cause a hearing to be had as in ordinary proceedings for an injunction. Upon the final hearing of the cause, he may dissolve or modify the injunction or make it perpetual, and, if made perpetual, shall also decree what disposition shall be made of the deposit of the company in the hands of the auditor, subject to the provisions of the following section. [Same, § 12; 14 G. A., ch. 106, § 1.]

In an action under this section to close the business of a corporation for failure to comply with the provisions of chapter 5, title 9, of the Code, it must be assumed that the corporation was duly organized: *State ex rel. v. Iowa Mutual Aid Association*, 59-125.

1747. Securities. 1173. The securities of a defaulting or insolvent company, on deposit with the auditor of state, shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, upon the order of the court, be divided among the holders of said policies in the proportions of the last annual valuation of the same, or applied to the purchase of re-insurance for the benefit of the policy-holders. [12 G. A., ch. 173, § 13.]

1748. Change of securities. 1174. Companies shall have the right at any time to change their securities on deposit, by substituting for those withdrawn a like amount in other securities of the character provided for in this chapter, and whenever the annual valuation of policies outstanding and in force against any company, is less than the amount of security then on deposit with the auditor, said company shall have the right to withdraw such excess; but twenty-five thousand dollars shall remain on deposit. [Same, § 14.]

1749. Interest collected. 1175. The auditor shall permit companies, having on deposit with him stock or bonds as security, to collect the interest accruing on such deposits, delivering to their authorized agents, respectively, the coupons or other evidences of interest as the same become due, but upon default by any company to deposit additional security as called for by the auditor, or pending any proceedings to close up or enjoin it, he shall collect the interest as it becomes due, and add the same to the securities in his hands belonging to such company. [Same, § 15.]

1750. Auditor's report. 1176. At the earliest practicable date after the returns are received from the several insurance companies, the auditor shall make a report to the general assembly, of the general conduct and condition of the corporations visited by him since his last annual report, and shall include therein an aggregate of the calculated value of all outstanding policies of life insurance, and in connection therewith, shall prepare an abstract of all the returns and statements made to him by insurance companies and agents. [Same, § 16.]

1751. Penalty for acting without certificate. 1177; 15 G. A., ch. 2, § 5. Any company doing business in this state without the certificate required by section eleven hundred and seventy of this chapter [§ 1744], shall forfeit one hundred dollars for every day's neglect to procure said certificate. Any agent making insurance, or soliciting applications for any company having no certificate from the auditor, shall forfeit the sum of three hundred dollars, and any person acting for a company authorized to transact business in this state, without having the certificate prescribed in section eleven hundred and sixty-six [§ 1740], issued by the auditor of state, in his possession, shall be liable to pay twenty-five dollars for each day's neglect to procure such certificate. [Same, § 17.]

1752. Recovery of penalties. 1178; 15 G. A., ch. 2, § 6. Suits brought to recover any of the penalties provided for in this chapter shall be instituted in the name of the state of Iowa by the district [county] attorney of the district, under the direction and by the authority of the auditor of state, and may be brought in the district [or circuit] court of any county in which the company proceeded against is engaged in the transaction of business, or in which the agent resides, in cases in which the proceeding is against the agent individually. Said penalties when recovered shall be paid into the state treasury for the use of the school fund. [Same, § 21.]

1753. Investment of funds. 1179; 17 G. A., ch. 47; 21 G. A., ch. 169; 22 G. A., ch. 94. No company organized under the provisions of this chapter shall invest its funds in any other manner than as follows: In bonds of the United States. In bonds of this state or of any other state if at or above par. In bonds and mortgages on unincumbered real estate within this state or in

any other state in which such company is transacting an insurance business, worth at least twice the amount loaned thereon, exclusive of improvements. In bonds or other evidences of indebtedness, bearing interest, of any county, incorporated city, town or school district within this state or any other state, in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of law, and are approved by the executive council. In loans upon its own policies, *provided* that the amount so loaned shall not exceed one-half of the reserve against said policy as provided in this chapter at the time such loan is made and that all policies upon which loans are made shall have been issued, and in force at least five years. And a sum not exceeding five per cent. of its assets may be invested in stocks of national banks, now or hereafter organized under the laws of the United States. [Same, § 22.]

1754. Real estate. 1180. No company organized under this chapter, shall be permitted to purchase, hold, or convey real estate, except for the purposes and in the manner herein set forth:

1. Such as shall be requisite for its immediate accommodation in the transaction of its business; or,

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for moneys due; or,

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

4. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts; and no company incorporated as aforesaid, shall purchase, hold, or convey real estate in any other case, or for any other purpose. [Same, § 23.]

1755. When to be sold. 1181. All such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the convenient transaction of its business, shall be sold and disposed of within five years after such company shall have acquired title to the same; no such company shall hold such real estate for a longer period than that above mentioned, unless the said company shall procure a certificate from the auditor of state, that the interests of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the said auditor shall direct in said certificate. [Same, § 24.]

1756. Policy exempt from execution. 1182. A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts. [Same, § 18.]

This section contemplates a case where the policy is payable to deceased, or his or her legal representatives, and not a case where the policy is payable to another person for his use and benefit, in which case it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

Where the contract of insurance provides the method by which insured may change the beneficiary entitled to the proceeds of the policy, and such method is not pursued, a direction in the will of the assured making such change will be without effect: *Stephenson v. Stephenson*, 64-534.

Where absolute power is given to a member of a mutual benefit association to designate who the beneficiary shall be, such direction cannot be disregarded, although the articles of incorporation of the association provide that its object shall be to provide for the widows and orphans of deceased members, and the beneficiary designated is not a widow or child of the deceased member: *Mitchell v. Grand Lodge*, 70-360.

The assured cannot by direction in his will provide for payment of the proceeds of a policy on his life to another beneficiary than the one mentioned in the policy. The contract with the company cannot thus be altered without its consent: *Wilmaser v. Continental L. Ins. Co.*, 66-417.

The assured cannot change the beneficiary by will unless it is so provided in the contract of insurance: *Wendt v. Iowa Legion of Honor*, 72-682.

Where a decedent left a wife but no chil-

dren, *held*, that under the statutory provision above referred to the proceeds should go to the wife alone, and not be divided among all the distributees of his estate: *Rhode v. Bank*, 52–375.

The proceeds of the policy, when realized by the person entitled thereto, are not exempt from execution for the debts of such person. The exemption exists only as to the debts of the person insured: *Smedley v. Felt*, 43–607; *Murray v. Wells*, 53–256.

In a particular case *held* that the evidence did not show a contract to subject the proceeds of a life policy to the payment of a debt: *Herriman v. McKee*, 49–185.

Where the proceeds of a policy of life insurance are used to release other property from a claim under which it is held, the property so released becomes subject to the payment of debts: *Friedlander v. Mahoney*, 31–311.

The proceeds of a life policy are assets of the estate, and only differ from other assets in the manner of their distribution: *Kelley v. Mann*, 56–625.

Further as to disposition of proceeds as assets of the estate, see § 3576.

1757. Fees. 1183. Each company contemplated in this chapter shall pay the same fees, and be liable to the same obligations as provided in sections eleven hundred and fifty-three, and eleven hundred and fifty-four of chapter four of this title [§§ 1716, 1717]. [Same, §§ 19, 20; 14 G. A., ch. 106, §§ 4, 5.]

DEFENSES TO ACTIONS ON POLICIES.

1758. Intoxication. 16 G. A., ch. 55, § 1. In all suits now or hereafter pending in any court of this state on policies of life insurance, wherein the defendant seeks to avoid liability upon the alleged ground of the intemperate habits or habitual intoxication of the assured, it shall be a sufficient reply for the plaintiff to show that such habits or habitual intoxication of the assured was generally known in the community or neighborhood where the agent of the defendant resided or did business, if thereafter the company continued to receive the premiums falling due on such policy.

1759. Physician's certificate. 16 G. A., ch. 55, § 2. In any case where the medical examiner, or physician acting as such, of any life insurance company doing business in this state, shall issue a certificate of health or declare the applicant a fit subject for insurance under the rules and regulations of such company, the company shall be thereby estopped from setting up in defense of suit on such policy, that the assured was not in the condition of health required by the policy, at the time of the issuing of such policy, except where the same is procured by or through the fraud or deceit of the assured.

1760. Misrepresentation of age. 16 G. A., ch. 55, § 3. In all cases where it shall appear that the age of the person insured has been misstated in the proposal, declaration or other instrument upon which any policy of life insurance has been founded or issued, then and in such case, the person or company issuing such policy, shall upon the discovery of such misstatement be permitted to demand and collect the difference of premium, if any, which would be due and payable on account of the true age of the assured, from year to year, according to the rates of premium of such person or company, upon which such policy was issued; or such person or company so issuing the policy may after the decease of the assured deduct from the amount payable by such policy the difference of premium, if any, which would so have been payable from year to year, by reason of any difference of age at time of issuance of such policy; and no other defense or deduction by such person or company issuing such policy, shall be permitted after the death of the person assured, on account of such misstatement of age of [the] assured, notwithstanding any warranty of such statement of age by terms of policy or otherwise, except when it be shown by the person or company insuring that the policy was procured by fraud in fact.

The provisions of §§ 1732, 1733 as to applications, etc., are applicable to life as well as fire insurance: See notes to § 1733.

MUTUAL BENEFIT ASSOCIATIONS.

1761. Comply with statute. 21 G. A., ch. 65, § 1. Every corporation or association organized under the laws of this state upon the mutual assess-

ment co-operative or natural pre[m]ium plan, for the purpose of insuring the lives of individuals, or of furnishing benefits to the widows, heirs, orphans or legatees, of deceased members, or of paying endowments or accident indemnity, shall, before commencing business, comply with the provisions of this act.

1762. Articles of incorporation. 21 G. A., ch. 65, § 2. The articles of incorporation of such organizations shall show the plan of business, and shall be submitted to the auditor of state, and attorney-general, and if such articles are found to comply with the provisions of this act they shall approve the same. When said articles are thus approved, they shall be recorded in the office of the recorder of deeds, in the county where such organization is located, and of the secretary of state, and a notice published as provided for under the general incorporation law of the state of Iowa. Nothing in this section shall be construed to require the incorporation of such companies already duly incorporated and operating under the laws of Iowa.

1763. Name. 21 G. A., ch. 65, § 3. No corporation or association organized under this act, shall take any name in use by any other organization or so closely resembling such name as to mislead the public as to its identity.

1764. Conditions for commencing. 21 G. A., ch. 65, § 4. Each association organized under this act, shall, before issuing any policy or certificate of membership, if said association has not membership sufficient to pay the full amount of the certificate or policy on an assessment it shall cause the application for insurance to have printed in red ink in a conspicuous manner along the margin of said application the words "It is understood and agreed that the amount to be paid, when the certificate or policy issued upon this application becomes a claim, shall be dependent upon the amount collected from an assessment made to meet such claim" and they must have actual applications upon at least two hundred and fifty individual lives for at least one thousand dollars each, and shall file, with the auditor of state, satisfactory proof that the president, secretary and treasurer, of said corporation or association have each given a good and sufficient bond for five thousand dollars, for the faithful discharge of their duties as such officers; sworn copies of which bonds shall be filed with the auditor of state, also a list of said applications giving the name, age, and residence of each applicant and the amount of insurance applied for by each, together with the annual dues and the proposed assessments thereon, which statement shall be verified under oath by the president and secretary of the association.

1765. Agent's certificate. 21 G. A., ch. 65, § 5. No person shall act, within this state as agent or otherwise in receiving or procuring applications for insurance for any assessment association (except for the purpose of taking applications for organization), unless the corporation or association for which he is acting, has received a certificate from the auditor of state as provided in this act, authorizing said corporation or association to transact business in this state, nor as general or traveling agent or traveling solicitor, until he shall have received from said auditor a certificate in substance the same as that provided for in section eighteen of this act [§ 1778], and certifying that said corporation or association has complied with the provisions of this act, and that said general traveling agent or traveling solicitor is authorized to act as such.

1766. Assessments. 21 G. A., ch. 65, § 6. The by-laws of any such corporation or association, and its notices of assessment, shall state the object or objects for which the money to be collected is intended, and no part of the proceeds of such assessment shall be applied to any other purpose than is stated in said notices and by-laws, and the excess beyond payment of the benefit provided for in such assessment, shall be set aside and applied only to such purposes as said by-laws and notices specify.

1767. Insurable age; beneficiary; assignment of policy. 21 G. A., ch. 65, § 7. No corporation or association organized or operating, under this act, shall issue any certificate of membership, or policy to any person under the age of fifteen years, nor over the age of sixty-five years nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured member, nor shall any such certificate be assigned, except an endowment certificate, and any certificate issued or assignment made in violation of this section shall be void. Any member of any corporation, association or society operating under this act shall have the right at any time, with the consent of such corporation, association or society, to make a change in his beneficiary without requiring the consent of such beneficiary.

1768. Report to auditor of state; examination. 21 G. A., ch. 65, § 8. The business year of each Iowa corporation or association organized or operating under this act, shall close on the thirty-first day of December, each year and such corporation or association, shall, within sixty days thereafter prepare under oath of its president and secretary and file in the office of the auditor of state a detailed statement of its assets, liabilities, receipts, from each assessment and all other sources, expenditures, salaries of officers, number of contributing members, death losses paid and amount paid on each death loss, death losses reported but not paid, and answer such other interrogatories as the auditor (who shall furnish blanks for that purpose) may require, in order to ascertain its true financial condition, and shall pay upon filing each annual statement, the sum of ten dollars. The auditor shall publish said annual statement in detail in his annual report, and for the purpose of verifying such statement, the auditor may make or cause to be made, an examination of the affairs of any Iowa association doing business under this act, at the expense of the association, which expense shall not exceed the necessary hotel and traveling expenses of the auditor or clerk. If the auditor appoints some person not employed in his office to make the examination, he shall in addition to actual expenses be allowed not to exceed five dollars per day for the time actually employed. If the said auditor shall deem it necessary for the security of the funds of the association, he may require the official bonds of the officers to be increased to an amount not to exceed double the sum for which they are accountable, and he may require supplemental reports from any such association at such time and in such form as he may direct.

1769. Trust funds; investments. 21 G. A., ch. 65, § 9. Any corporation or association accumulating any moneys to be held in trust for the purpose of the fulfillment of its policy or certificate, contract, or otherwise, shall invest such accumulations in bonds or treasury notes of the United States, or of this or other states, or in interest-bearing bonds of any municipal corporation in Iowa or in notes secured by mortgage on unincumbered real estate in the state of Iowa, not to exceed forty per cent. of the appraised value thereof exclusive of improvements and shall deposit such securities with the auditor of state, who shall furnish such corporation or association with a certificate, under his seal of office, of such deposit, showing the purpose of such deposit and to what fund the same is to be applied when paid out and also showing the aggregate liabilities of such corporation or association at the date of issuance of such certificate, *provided*, however, that such corporation or association may invest in real estate in Iowa, such a portion of said accumulation as is necessary for its accommodation in the transaction of its business to be owned by said corporation or association, and in the erection of any building for such purpose may add thereto rooms for rental.

1770. Change of securities. 21 G. A., ch. 65, § 10. Such association may have the right at any time to change its securities on deposit by sub-

stituting for those withdrawn a like amount in other securities of the character provided for in this act.

1771. Withdrawal. 21 G. A., ch. 65, § 11. The auditor shall permit corporations or associations having a deposit with him of such securities to withdraw the same upon filing with him by the president and secretary of such corporations and associations, satisfactory proof that they are to be used for the purpose for which they were originally deposited in his office.

1772. Collection of interest. 21 G. A., ch. 65, § 12. The auditor shall permit corporations or associations having on deposit with him such stocks and bonds, notes or other securities, to collect and retain the interest accruing on such deposits, delivering to them respectively the evidence of interest as the same becomes due, but on default of any corporation or association to make or enforce such collection, he may collect such interest and add the same to the securities in his possession belonging to such corporation or association, less the expense of such collection.

1773. Foreign companies. 21 G. A., ch. 65, § 13. Any foreign corporation or association organized under the laws of any other state to carry on the business of insuring the lives of individuals or of furnishing benefits to the widows, orphans, heirs or legatees of deceased members, or of paying accident indemnity, or surrender value of certificate of insurance upon the mutual assessment plan, may be licensed by the auditor to do business in this state by complying with the following conditions, to wit: Said corporation shall file with the auditor of state a copy of its charter or articles of incorporation duly certified by the proper officers of the state wherein organized together with a copy of its by-laws, application, and policy or certificate of membership. It shall also file with said auditor a sworn statement signed and verified by its president and secretary, which statement shall contain the name and location of the said corporation or association, its principal place of business, the name of its president, secretary and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby the amount paid to beneficiaries in event of death or accident, the amount collected of each member on each assessment, and the purposes for which assessments are made and the authority under which they are made; the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the company and association and how invested; and any information which the auditor may require. All said statements and papers thus filed shall show that death or surrender value of certificate of insurance or accident indemnity is in the main provided for by assessments upon or contributions by surviving members of such corporation or association and shall show to the satisfaction of said auditor that said corporation or association is legally organized and honestly managed, and that an ordinary assessment upon its members or other regular contribution to its mortuary fund, is sufficient to pay its maximum certificate to the full limit named therein. Such foreign corporation or association shall also designate to the said auditor an attorney or agent residing in this state on whom service of process or original notice may be made; and in the event of a failure to appoint or designate such attorney, such service may be made upon the auditor who shall at once notify said company by mailing a copy of said notice to the secretary of said corporation or association, directed to his last known postoffice address. Any action commenced in this state by service upon such attorney or auditor may be commenced in the county of the plaintiff's residence, regardless of the residence of said attorney or auditor, and every corporation or association coming into this state shall file with the auditor of state a contract or agreement that it will not transfer any action commenced against it in any court of this state to the United States courts, which contract shall contain the provision that if such transfer is made to the United States courts, the certificate of authority issued by said auditor to do

business shall be revoked or canceled, and it shall be the duty of the auditor to promptly revoke the certificate of such corporation or association as soon as such transfer is made; and such corporation or association shall not be permitted to do business again within the state. Upon complying with the provisions of this section, and upon payment of twenty-five dollars, the auditor shall issue to such foreign corporation or association so complying, a certificate of authority to do business in this state, provided the same right is extended by the state in which said corporation is organized, to similar corporations or associations organized in this state. After any such foreign corporation or association shall have been licensed to do business in this state, it shall make before the first day of March of each year, to the auditor, on blanks furnished by him, the same detailed statement as is provided in section eight of this act [§ 1768], which statement shall be published in the annual report of the auditor, and shall also pay to the auditor, on filing such statement, a fee of twenty dollars. Whenever the auditor of this state shall have reason to doubt the solvency of any such foreign corporation or association and the failure to pay the full limit named in its certificate or policy shall be such evidence that it is not solvent and to require the auditor to investigate, he must for this or other good cause, at the expense of such corporation or association cause an examination of its books and papers to be made, and publish and distribute his report as provided in section eight of this act [§ 1768], and if in his judgment such examination establishes the fact that such corporation or association is not financially sound and is not paying its policies to the full limit named therein or is conducting its business fraudulently, or if it should fail to make the statement required by this act, he may revoke the authority of such corporation or association and prohibit it from doing business in this state until it can again comply with the provisions of this act. If the auditor appoints some one not receiving a regular salary in his office to make the examination provided for in this section he shall be entitled to receive five dollars per day for his service in addition to his actual traveling and hotel expenses to be paid by the association examined or by the state on approval of the executive council, if the association fails to pay the same.

As to a similar provision to prevent removals of suits, see note to § 1643.

1774. Penalty for foreign company. 21 G. A., ch. 65, § 14. Any foreign corporation or association doing business in this state that shall refuse or neglect to comply with the provisions of this act after the space of ninety days after it takes effect shall be deemed and be held to be doing business unlawfully and any officer or agent of such corporation or association who shall do business in this state, or assist in, or knowingly permit the same in violation of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars, or be imprisoned in the county jail not more than six months, or both, in the discretion of the court. It shall be the duty of the county attorney to prosecute any violation of this section when sufficient evidence is presented to him to warrant a prosecution of any person charged with its violation.

1775. Penalty for agents. 21 G. A., ch. 65, § 15. Any solicitor or agent taking or soliciting applications for insurance within this state, for any corporation or association doing business on the mutual assessment or natural premium plan, after ninety days from the taking effect of this act without the certificate herein provided for, or shall take applications when the assessments will not pay the certificate or policy in full, without having the application form comply with the requirements of section four of this act [§ 1764] shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars for each offense, together with the costs of prosecution including attorneys' fee, and shall stand committed to the county

jail until the fine and costs are paid. And the county attorney in each county shall prosecute parties charged with a violation of this section.

1776. Violations by domestic companies. 21 G. A., ch. 65, § 16. Whenever any Iowa corporation or association shall fail to make its annual statement to the auditor on or before the first day of March, or is conducting its business fraudulently or not in compliance with this act, or is not carrying out its contracts with its members in good faith, then it shall be the duty of the auditor to promptly communicate the fact to the attorney-general, who shall at once commence action before the district [or circuit] court of the county in which said organization is located or any judge thereof, citing the officers to appear before said court or judge, and if upon a hearing of said cause, it is found to be [for] the best interests of the holders of the certificates of membership in said corporation, said court or judge shall have the power to remove any officer or officers of said corporation and appoint others in their place until the next annual election. If it is found to the best interests of said holders of certificates that the affairs of said corporation be wound up said court or judge shall so direct and for that purpose may appoint a receiver, who shall regard all proper claims for death benefit as preferred claims. Said receiver may also upon the approval of the court or judge transfer the members of said association who consent thereto to some solvent Iowa assessment or natural premium association or divide the surplus accumulated in proportion to the share due each certificate in force at the time.

1777. Fees. 21 G. A., ch. 65, § 17. The auditor shall receive from each foreign corporation or association doing business in this state for each certificate issued to its agents or solicitor, as provided in this act, the sum of two dollars and from each corporation or association organized under the laws of this state the sum of fifty cents. Any other fees to be paid to said auditor not provided for in this act shall be the same as provided for in the general insurance laws of this state, in relation to life insurance companies. All fees collected by the auditor by this act shall be accounted for and paid into the state treasury in the same manner as provided in section three thousand seven hundred and seventy-eight, code of 1873 [§ 5030.]

1778. Certificate. 21 G. A., ch. 65, § 18 On compliance with this act by any corporation or association the auditor shall issue a certificate setting forth: First: The corporate name of the association. Second: Its principal place of business. Third: The number of certificates or policies in force at the date of its last report. Fourth: The sum of money which an ordinary assessment for payment of a single certificate or policy would produce in each class. Fifth: The amount paid on its last death loss as evidenced by proof on file in his office and the date of such payment. Sixth: The amount of securities deposited in his office, and for what purpose deposited. Seventh: That it has fully complied with the provisions of this act, and is authorized to transact business for a period of one year from April first of the year of its issue, which certificate shall be published by said association for four weeks in a newspaper of general circulation published at the principal place of business of said association.

1779. Penalty for fraud in procuring insurance. 21 G. A., ch. 65, § 19. Any agent, physician, or other person who, shall knowingly and by means of concealment or false or fraudulent statements assist in securing from any such organization, or assessment association, a policy or certificate of membership on the life of any person shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding one thousand dollars or undergo an imprisonment of not more than one year in the county jail, or both, in the discretion of the court.

1780. Assessment company; life and accident. 21 G. A., ch. 65, § 20. Any corporation, or association doing business in this state which pro-

vides in the main, for the payment of death losses or accident indemnity by any assessment upon its members or upon the natural premium plan, shall for the purpose of this act, be deemed a mutual benefit association, and shall not be subject to the general insurance laws of this state, regulating life insurance. No corporation or association, operating upon the assessment plan, promising benefits upon any other event than that of the death or disability resulting from accident to the member shall be permitted to do business in this state. But this shall not prevent any assessment life association or organization authorized by this act, from providing for an equitable surrender value paid-up policy or endowment upon the cancellation of any policy or certificate provided the terms and conditions thereof are set forth in said policy or certificate of membership, and provided that such endowment or surrender value shall in the main be accumulated during the term of such policy or certificate. This act shall not relieve any corporation or assessment association, now doing business in this state, from the fulfillment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be released hereby from his or her part of said contract.

1781. Benevolent societies. 21 G. A., ch. 65, § 21. Nothing in this act shall be construed to apply to any secret fraternal society nor any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession, or religious denomination, provided that any such society or organization named above in this section, shall by complying with the provisions of this act be entitled to all the privileges and be amenable to the obligations of this act.

1782. Live-stock companies. 21 G. A., ch. 65, § 22. The provisions of this act shall be applied to all assessment or co-operative live-stock insurance companies or associations, now existing or hereafter organized in this or other states, so far as the same can be made to apply, and the auditor of state shall have the same power and authority in regard to such companies or associations as in regard to mutual benefit associations.

1783. 21 G. A., ch. 65, § 23. All acts or parts of acts conflicting with this act are hereby repealed, *provided* that nothing in this act shall be construed to affect insurance companies known as fixed or level premium companies, having a mathematical annual reserve.

CHAPTER 6.

OF MUTUAL BUILDING ASSOCIATIONS.

1784. How formed. 1184. Any number of persons, not less than five, may associate themselves and become incorporated as provided in chapter one of this title, for the purpose of raising moneys to be loaned to the members of the corporation, and to other persons, and for use in buying lots or houses, or in building or repairing houses or other purposes. [14 G. A., ch. 30, § 1.]

1785. Powers. 1185. Such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation by its by-laws shall adopt; also to acquire, hold, incumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in due course of its business; and the dues, fines, and premiums so paid by members, in addition to the legal

rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious; but no person shall hold more than twenty shares in any such association. [Same, § 2; 14 G. A., ch. 101.]

1786. Similar societies heretofore organized. 1186. When mutual loan societies, or other associations heretofore organized under the laws of this state, with objects similar to those contemplated in the preceding sections, and permitting not more than twenty shares of their stock to be owned by any one member, have loaned, or shall hereafter loan, their capital or funds, or any part thereof, to their members, and have taken, or shall take, notes or obligations therefor, secured by mortgages, or otherwise, in accordance with the terms of their articles of incorporation and by-laws, such notes, obligations, and securities shall not be construed or held to be usurious by reason of any dues, fines, or premiums for the right of preference in taking such loans paid in addition to the legal rate of interest, but the same shall be valid and binding in all respects, the payment of such dues, fines, or premiums in addition to a rate of interest not exceeding ten per centum per annum, payable, annually, or at any less period, notwithstanding. [14 G. A., ch. 30, § 3; ch. 101.]

This and the preceding section do not authorize the taking of interest upon the premium bid for the loan. If the interest charged is more than ten per cent. *per annum* upon the amount actually loaned the contract is usurious: *Hawkeye Benefit and Loan Ass'n v. Blackburn*, 48-385; *Burlington Mut. Loan Ass'n v. Heider*, 55-424.

1787. Earnings. 1187. So much of the earnings of such corporations as may be necessary, not exceeding ten per cent. per annum, may be set apart to defray the current expenses of said association, and for the purchase of such real estate as may be necessary for the convenient transaction of its business, and the residue of said earnings shall be transferred to the credit of the shareholders, and when said shares are fully paid, then to be paid ratably to the shareholders. [14 G. A., ch. 30, § 4.]

[As to the taxation of stock in such associations, see § 1290.]

CHAPTER 6*a*.

SAVINGS BANKS.

1788. How formed. 15 G. A., ch. 60, § 1. Corporations to be known as savings banks may be formed, under and in accordance with the provisions of this act, for the purpose of receiving on deposit the savings and funds of others, and preserving and safely investing the same, and paying interest or dividends thereon; and such corporations, and the stockholders thereof, shall be subject to all the conditions and liabilities herein imposed; and hereafter no association shall be formed under the general incorporation acts for the purpose of transacting such banking business; and all corporations now organized thereunder and doing business as savings banks, shall, on or before the first day of July, A. D. 1875, conform to and re-organize under the provisions of this act, as hereinafter provided, and any failure or neglect of the proper officers of such associations to comply with the provisions of this act, shall be regarded as a forfeiture of all rights and privileges of such associations.

1789. Organization; examination; capital. 15 G. A., ch. 60, § 2. It shall be lawful for any number of persons, not less than five, to organize savings banks under the provisions of this act, with a paid-up capital stock of not less ten thousand dollars in cities and towns of ten thousand inhabitants, or under; and a paid-up capital stock of not less than fifty thousand dollars in

cities of over ten thousand inhabitants; which said corporations shall be known as savings banks, and shall have power to transact the usual business of such institutions, but not to issue bank-notes to circulate as money; but no such association shall have the right to commence business until its officers elect, or its shareholders, shall have furnished to the auditor of state a sworn statement of the paid-up capital, and, when the auditor of state is satisfied as to the fact, he shall issue to such association a certificate authorizing it to commence business, a copy of which shall be published in some newspaper printed in the county where such association is located for four consecutive weeks, at the expense of such association. If the auditor of state should deem it necessary before issuing a certificate, he may make a personal examination of capital stock, or cause one to be made by some competent person appointed by him, the expense of which shall be paid by the association.

1790. Articles of incorporation. 15 G. A., ch. 60, § 3. Any five or more persons of full age, a majority of whom shall be citizens of this state, who may desire to form an incorporated company for the purposes hereinbefore specified, shall make, sign and acknowledge, before some officer competent to take acknowledgments of deeds, and file in the office of the recorder of the county wherein the principal place of business of the company is intended to be located, and a certified copy thereof in the office of the secretary of state, articles of incorporation, in which shall be stated, the corporate name of the corporation; the object for which the corporation shall be formed; the amount of its capital stock; the time of its existence not to exceed fifty years; the number of its directors or trustees, and their names, who shall manage the affairs of the association for the first year; and the name of the city, or town, and county in which the principal place of business of the company is to be located; and a notice must be published in some newspaper published in the county wherein said bank is located for four consecutive weeks, stating the substance of the above requirements.

1791. Certified copy evidence. 15 G. A., ch. 60, § 4. A copy of any articles of incorporation, filed in pursuance of this act and certified to by the recorder of the county in which it is filed, or by the secretary of state, shall be received in all courts, and in all actions and proceedings, as presumptive evidence of the facts therein stated.

1792. Enumeration of powers. 15 G. A., ch. 60, § 5. When the certificate of the auditor shall have been received, and the articles of incorporation shall have been filed and recorded, and publication shall have been made as hereinbefore provided, the persons who shall have signed and acknowledged the same, and such persons as thereafter become their associates, or successors, shall be a body politic and corporate, and by their corporate name shall have succession for the period limited, and power:

First. To sue and be sued in any court;

Second. To make and use a common seal, and to alter the same at pleasure;

Third. To purchase, hold, sell, convey, and release from trust or mortgage, such real and personal estate as hereinafter provided for in this act;

Fourth. To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation, and to require of them such security as may be thought proper for the fulfillment of their duties;

Fifth. To loan and invest the funds of the corporation; to receive deposits of money, and to loan and invest the same as hereinafter provided, and to repay such deposits without interest, or with such interest as the by-laws of the constitution may provide;

Sixth. To make by-laws, not inconsistent with the laws of this state, for the organization of the company, and the management of its property, the regulation of its affairs, the condition on which deposits will be received, the time

and manner of dividing the profits and of paying interest on deposits, and for carrying on all kinds of business within the objects and purposes of the company.

1793. Management. 15 G. A., ch. 60, § 6; 22 G. A., ch. 89. The business and property of such savings banks shall be managed by a board of directors or trustees, of no less than five nor more than nine, all of whom shall be shareholders and citizens of this state, the first board to be designated in the articles of incorporation; *and* who shall organize by taking an oath, diligently, faithfully, and impartially to perform the duties imposed upon them by this act, and not knowingly to violate, or willingly to permit to be violated, any of the provisions thereof; that said directors or trustees are the bona fide owners in their own right of the stock standing in their respective names on the books of the bank; and that the same are not hypothecated, or in any manner pledged as security for any loan obtained, or debt owing to said savings bank; a certificate of which oath, signed by each director, and certified to by the officers before whom it was taken, shall be filed and preserved in the office of the auditor of state. The call for the first meeting of directors or trustees shall be signed by one or more persons named as directors or trustees in the certificate, setting forth the time and place of meeting, which notice shall be delivered personally to each director, or published at least ten days in some newspaper published in the county in which is the principal place of business of the corporation, or, if no newspaper is published in the county, then in a newspaper nearest thereto. At their first meeting, and as often thereafter as their by-laws shall require, the directors or trustees shall elect from their number, a president and one or more vice-presidents for the ensuing year; and shall appoint a treasurer or cashier, and such other subordinate officers, agents, and servants as may be required, who shall hold their offices at the pleasure of the board, and who shall give such security for the faithful performance of their duties as may be required by the by-laws. All vacancies in the board of directors or trustees shall be filled, at the next regular meeting after such vacancy shall arise, from among the stockholders, and the person receiving a majority of the votes of the whole number of directors or trustees shall be duly elected. The directors or trustees, to hold office after the expiration of the term of those named in the certificate of incorporation, shall be annually elected at such time and place, and in such mode, and upon such notice as shall be provided by the by-laws of the company, and shall hold office for one year, or until their successors are elected and qualified. All such elections shall be by ballot, and each stockholder shall be entitled to one vote for every share of stock held by him, and the persons so receiving the greater number of votes, shall be directors *of* [or] trustees. Shareholders may vote by proxy duly authorized, and no shareholder shall be entitled to vote whose liability to said bank is past due and unpaid. If it should happen at any time that an election of directors or trustees shall not be had on the day designated in the by-laws of the company, it shall be lawful on any other day to hold such election, after giving due notice, and the directors or trustees shall be continued in office until their successors are elected and qualified. A majority of the directors or trustees shall constitute a quorum of said board for the transaction of business, but in no case shall a measure be declared carried, unless receiving three affirmative votes; but said bank may provide in the by-laws that a smaller number, not less than five, one of whom shall be the president *and* [or] vice-president, shall constitute a quorum, which number shall thereupon be authorized to transact business.

1794. Deposits. 15 G. A., ch. 60, § 7. All savings banks organized under this act may receive, on deposit, all such sums of money as shall from time to time be offered by tradesmen, merchants, laborers, servants, minors, and others. All such banks with a paid-up capital of ten thousand dollars may

receive deposits to the amount of one hundred thousand dollars; those with a paid-up capital of twenty-five thousand dollars may receive deposits to the amount of two hundred and fifty thousand dollars; those with a paid-up capital of fifty thousand dollars, deposits to the amount of five hundred thousand; those with a paid-up capital of one hundred thousand dollars, deposits to the amount of one million dollars; and no greater amount of deposits shall be received without a like proportionate increase of cash capital, *and* which capital shall be regarded a guaranty fund for the better security of depositors, and so invested in some safe and available securities. The deposits so received for the purpose of safe keeping, and invested as provided in this act, shall be paid to such depositor or his or her representatives when requested at such time or times, and with such interest, and under such regulations as the board of directors or trustees shall from time to time prescribe, not inconsistent with the provisions of this act, which regulations shall be printed and conspicuously exposed in some place, accessible and visible to all, in the business office of said bank, and no alteration, which may at any time be made in such rules or regulations, shall in any manner affect the rights of depositors in respect to deposits, or the interest thereon, made previous to such alteration. It shall be lawful for savings banks to require sixty days' written notice of the withdrawal of any deposits, but when there are sufficient funds on hand the officers of the bank may in their discretion waive this requirement. It shall be lawful for savings banks to close any accounts upon written notice, as may be provided for in the by-laws, to a depositor to withdraw his deposit, after which notice it shall cease to draw interest; *provided*, nothing in this act shall be so construed as to prevent such banks in their discretion from issuing certificates of deposits, payable on demand.

1795. Limitation as to interest. 15 G. A., ch. 60, § 8. All accounts upon which no deposit or drafts shall be made for a period of ten years in succession shall be so far closed that neither the sum deposited, nor the interest that shall have accrued thereon, shall be entitled to any interest after the expiration of the ten years from the date of the last deposit or draft. This provision, however, shall not apply to endowments for children, to trust estates, nor to other cases where special provision is made therefor at the time of the deposit thereof.

1796. Investment of funds. 15 G. A., ch. 60, § 9. It shall be lawful for the directors or trustees of any such savings bank to invest the funds or capital belonging to said bank, and all moneys deposited therein, and all the gains and profits thereof, only as follows, to wit:

First. In the stocks or bonds, or interest-bearing notes or certificates, of the United States.

Second. In the stocks or bonds, or evidences of debt bearing interest, of this state.

Third. In the stocks, bonds, or warrants of any city, town, county, village, or school-district of this state, issued pursuant to the authority of any law of this state, but not exceeding twenty-five per cent. of the assets of the bank shall consist of town, village, or school-district bonds or warrants.

Fourth. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, worth at least twice the amount loaned thereon.

Fifth. It shall be lawful for said banks to discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts or any other personal or public security; but said bank shall not purchase, hold, or make loans upon the shares of its capital stock.

Sixth. In all cases of loans upon real estate, all the expenses of searches, examinations, and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting, and recording papers, shall be paid by

such borrowers. Wherever buildings are included in the valuation of any real estate upon which a loan shall be made by said bank, they shall be insured by the mortgagor, for the benefit of the bank for at least two-thirds their value, in some reliable company, and the policy of insurance shall be duly assigned to the bank; and it shall be lawful for said bank to renew such policy of insurance from year to year, in case the mortgagor neglects to do so, and *may* charge the same to him. All the necessary charges and expenses paid by said bank for such renewals shall be paid by such mortgagor to the said bank, and shall be a lien upon the property so mortgaged until paid.

1797. Real estate. 15 G. A., ch. 60, § 10. It shall be lawful for savings banks to purchase, hold, and convey real estate only as follows, to wit:

First. The lot and building in which the business of the bank may be carried on.

Second. Such as shall have been purchased at sales upon foreclosure of mortgages owned by the bank, or upon judgment or decrees obtained or rendered for debts due it; and all such real estate as is described in this clause shall be sold by said bank within ten years after the title of the same shall be vested in it by purchases or otherwise.

1798. Interest; dividends. 15 G. A., ch. 60, § 11. It shall be the duty of the board of directors or trustees, from time to time, to regulate the rate of interest or dividends to be allowed to depositors, and to pay the same upon the presentation of the deposit-book or certificates; and after the payment of, or setting aside a sufficient amount to pay, the interest to depositors of said banks, and after deducting the necessary expenses of said banks, the board of directors or trustees may make from the surplus profits in hand in cash such dividends on the capital stock as in their discretion may seem best and proper.

1799. Shares; liability of shareholders. 15 G. A., ch. 60, § 12. The capital stock of all banks organized under this act shall be divided into shares of one hundred dollars each, and shall be deemed personal property, and shall be transferable on the books of the banks in such manner as shall be prescribed by the by-laws. No certificate representing shares of stocks shall be issued (nor shall such stock be considered as *re*[ac]quired) until the whole sum of money which such certificate purports to represent shall have been paid into the corporation. Shareholders in banks organized under the provisions of this act shall be individually and severally liable to the creditor[s] of the corporation of which they are shareholders, over and above the amount of stock by them held, to an amount equal to their respective shares so held, for all its liabilities accruing while they remained shareholders, and no transfer of stock shall affect such liability for the period of six months thereafter; and should any such bank become insolvent, and its assets be found insufficient to pay its debts and liabilities, its shareholders may, to that extent, be compelled to pay such deficiency, in proportion to the amount of stock owned by each.

1800. How voted. 15 G. A., ch. 60, § 13. Whenever any stock is held by any person as executor, administrator, trustee, or guardian, he may represent such stock, in person or by proxy, and any married woman holding stock in her own name, in any bank organized under this act, may cast her vote or appoint her own proxy to vote for her.

1801. Other associations. 15 G. A., ch. 60, § 14. Any person authorized thereto, by resolution of the board of directors or trustees of any corporation, association, or society, having funds deposited, or owning stock, in any bank formed under this act, shall be entitled to receive such deposit or to transfer such stock, and to cast the vote of such corporation, association, or society thereon.

1802. Deposits by executors, minors, etc. 15 G. A., ch. 60, § 15. Whenever any deposits are held by any person *or* [as] executor, administra-

tor, trustee, or guardian, he shall be entitled to receive the same; and whenever any deposit shall be made by any minor the directors or trustees shall pay to such depositor such sum as may be due to him or her, although no guardian shall have been appointed by or for such minor, or the guardian of such minor shall not have authorized the drawing of the same; and the check, receipt, or acquittance of such minor shall be as valid as if the same was executed by a guardian of said minor, or said minor was of full age, if such deposit was made personally by said minor; and whenever any deposit shall be made in her own name by any woman being or thereafter becoming married, said director[s] or trustees shall pay such sum as may be due to her on her receipt or acquittance.

1803. Cannot issue bills. 15 G. A., ch. 60, § 16. No bank organized under this act shall, by implication or construction, be deemed to possess the power of creating and issuing bills, notes, or other evidences of debt for circulation as money; nor shall it be lawful for such bank, or the directors or trustees thereof, to contract any debt or liability against the bank, for any purpose whatever, except for deposits and the necessary expenses of management and transacting its business; and the capital stock and the assets of the bank shall be security to depositors.

1804. Pay of and losses to officers. 15 G. A., ch. 60, § 17. No director or trustee of a saving[s] bank, shall, as such, receive any pay or emolument for his services; and no trustee, officer, or servant of such savings bank shall, directly or indirectly, in any manner, use the funds of the said bank, or its deposits, or any part thereof, except for regular business transactions, and all loans made to said trustees, officers, servants, and agents of the bank shall be upon the same security [as] required of others, and in strict conformity to the rules and regulations of the bank; and all such loans shall be made only by the board, and shall be acted upon in the absence of the party applying therefor; but such reasonable compensation may be paid to the officers of the bank as may from time to time be fixed in the by-laws.

1805. Limit of liabilities. 15 G. A., ch. 60, § 18. The total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of capital stock actually paid in; *provided*, that the discount of bona fide bills of exchange drawn against actually existing value and the discount of commercial or business paper actually owned by the person or persons, corporation, or firm negotiating the same shall not be considered money borrowed.

1806. Misnomer. 15 G. A., ch. 60, § 19. The misnomer of any such savings bank, in any instrument, shall not vitiate or impair the same if it be sufficiently described to ascertain the intention of the parties.

1807. Unauthorized use of name. 15 G. A., ch. 60, § 20. It shall not be lawful for any bank, banking association, or private bankers, to advertise or put forth a sign as a savings bank or savings institution; and any bank, banking association, or private banker, violating these provisions, shall forfeit and pay, for every such offense, the sum of one hundred dollars for every day such offense shall be continued, to be sued for, and recovered in the name of the people of the state, in any court having cognizance thereof, for the use of the school fund.

1808. Penalty. 15 G. A., ch. 60, § 21. Any person or persons who shall put up or cause to be put up or exhibited any sign, or who shall issue or circulate any card, circular, or advertisement purporting to be a savings bank not being organized under this act, shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine not exceeding fifty dollars for each offense or for each day such offense shall be continued.

1809. Quarterly statements. 15 G. A., ch. 60, § 22. All associations organized under the general incorporation laws of this state, for the purpose of transacting a banking business, buying, selling, exchange, receiving deposits, discounting notes, etc., shall make a full, clear, and accurate statement of the condition of the association as hereinafter provided, which shall be verified by the oath of the president or vice-president or cashier and two of the directors, which statement shall contain:

First. The amount of capital stock actually paid in.

Second. The amount of debts of every kind due to banks, bankers, or other persons other than regular deposits.

Third. The total amount due depositors including sight and time deposits.

Fourth. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such association.

Fifth. The amount of gold and silver coin and bullion belonging to such association at the time of making statement.

Sixth. The amount then on hand of bills of solvent banks.

Seventh. The amount of bills, bonds, and other evidences of debt, discounted or purchased by such association, and then belonging to the same, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful, and the amount in suit or judgment.

Eighth. The value of real or personal property held for the convenience of such association, specifying the amount of each.

Ninth. The amount of undivided profits if any then on hands.

Tenth. The total amount of all liabilities to such association on the part of the directors thereof:

Which statement shall be forthwith transmitted to the auditor of state and be by him filed in his office.

1810. Examination by auditor. 15 G. A., ch. 60, § 23. The auditor of state shall, at any time he may see proper, make, or cause to be made, an examination of any association, as here[in]after provided contemplated in this chapter, or he shall call upon any such association for a report of its state and condition as hereinbefore provided, upon any given day which has passed, as often as four times in a year, *and* which report the auditor shall cause to be published for one day in some daily newspaper published in the county where such association shall be located, or, if there be no such newspaper published in said county, then such report shall be published in some weekly newspaper printed in said county for one week, and the expenses of such publication shall be paid by such institution.

1811. Auditor to report. 15 G. A., ch. 60, § 24. It shall be the duty of the auditor of state to communicate to the legislature, at each session, a statement of the condition of every savings bank, from which reports have been received for the preceding year, and to suggest any amendments in the law relative to savings banks which in his judgment may be necessary or proper to increase the security of depositors.

1812. Proceedings against by state. 15 G. A., ch. 60, § 25. Whenever it shall appear to the auditor that any savings bank has been guilty of violating this act or the law, or is conducting its business in an unsafe manner, he shall, by an order under his hand and seal of office, addressed to the institution so offending, direct discontinuance of such illegal and unsafe practices, and he shall demand a conformity with the requirements of this act, and whenever any such savings bank shall refuse or neglect to comply with such order, he shall communicate the fact to the attorney-general of the state, whose duty it shall be to institute proceedings against such savings banks as are now, or may be hereafter, authorized in law in cases of insolvent corporations. The auditor of state may appoint, and the person or persons who may

be appointed by him, to examine the affairs of any savings banks, shall have power to administer oaths to any person whose testimony may be required on any such examination, and to compel the appearance and attendance of any such person, for the purpose of such examination, by summons, subpœna, or attachment, in the manner now authorized in respect to the attendance of persons as witnesses in the courts of this state, and all books and papers which it may be deemed necessary to examine by the auditor, on the examination so appointed, shall be produced, and their production may be compelled in like manner. The expenses of any examination, made in pursuance of this act, shall be paid by the savings banks so examined, in such amount as the auditor shall certify to be just and reasonable.

1813. Penalty for false statements. 15 G. A., ch. 60, § 26. Every officer, agent, or clerk of any savings bank organized under this act, who shall wilfully and knowingly subscribe or make any false statement or false entries in the books of such bank, or shall knowingly subscribe or exhibit false papers with the intent to deceive any person authorized to examine as to the condition of said institution, or shall wilfully or knowingly subscribe or make false reports, shall be deemed guilty of felony, and upon conviction thereof shall be fined not exceeding ten thousand dollars, and be imprisoned in the state prison not less than two nor more than five years, and be forever after incapable of holding any office created by this act.

1814. Intentional fraud. 15 G. A., ch. 60, § 27. Intentional fraud on the part of savings banks organized under this act, or in deceiving the public or individuals in relation to their means or their liabilities, or diversion of the funds of the bank to other objects than those mentioned in its certificate of incorporation, and the payment of dividends which leave insufficient funds to meet the liabilities of the bank, shall subject those guilty thereof to fine of not less than five hundred dollars, or imprisonment of not less than one year, or *by* both such fine and imprisonment at the discretion of the court, and shall cause a forfeiture of all the privileges herein conferred, and the court may proceed to close the bank by an information in the manner prescribed by law.

1815. Taxation of capital. 15 G. A., ch. 60, § 28. The paid up capital of all savings banks organized and doing business under this act shall be subject to the same rates of taxation and rules of valuation as other taxable property, by the revenue laws of the state, which taxes shall be levied on and paid by the banks and not the individual stockholders, and the general assembly shall never impose any greater tax upon property employed in banking under this act than is or may be imposed upon the property of individuals. The franchise of all such banks, the savings and funds deposited therein, and the mortgages and other securities, wherever the same are invested, are not to be taxed, but are expressly exempted therefrom, and may be omitted from assessments of the bank required by the revenue laws of this state.

So much of the capital stock of a savings bank as is invested in United States bonds is exempt from taxation by the state: *German Am. Savings Bank v. Burlington*, 54–609.
In general, see notes to § 1297.

1816. Increasing capital stock. 15 G. A., ch. 60, § 29. Whenever it is desired to increase the amount of capital stock of such banks, a meeting of stockholders may be called by a notice signed by the officers of said bank, and at least a majority of its directors, and published at least thirty days in every issue of some newspaper published in the county where the principal place of business of the bank is located, which notice shall specify the object of the meeting, the time and place when it is to be held, and the amount which it is proposed to increase the capital stock; and a vote of two-thirds of all the shares of stock of said bank shall be necessary to an increase of the amount of capital stock. If at any meeting so called a sufficient number of votes have been given in favor of increasing the amount of capital stock, a certificate of

the proceedings, showing a compliance with these provisions, the amount of capital stock actually paid in, and the amount to which the capital stock is to be increased, and the manner of such increase, shall be made out, signed, and verified by the affidavit of the chairman and secretary of the meeting, certified by a majority of the directors or trustees, and filed and recorded as required by the third section of this act. When this is done, the capital stock of the bank shall be increased to the amount specified in the certificate.

1817. Dissolution. 15 G. A., ch. 60, § 30. All savings banks organized under this act may be dissolved, prior to the period fixed upon in the certificate of incorporation, by the affirmative votes of stockholders holding three-fourths of the capital stock, at a meeting of stockholders to be called for this purpose and in the manner and after publication of notice as required in the preceding section. In all cases of dissolution of a bank hereunder, or the commencement of proceedings under this act to close the same, the receiver or receivers appointed thereunder shall not be required or permitted by forced sale to sell the securities of said banks, but shall proceed as expeditiously as possible to collect the same and make distribution of proceeds to those entitled thereto.

1818. Re-organization. 15 G. A., ch. 60, § 31. Any bank or association existing under and by virtue of any law of this state may be re-organized under the provisions of this act, and when duly organized all securities, real estate, or property may be transferred to such new organization; but no such re-organization shall have the effect to discharge the original bank, its directors or stockholders, from any liability to its depositors or any other person; but the same shall continue until legally discharged, and such new organization or bank shall be legally liable to pay every claim or demand existing against the bank whose assets or property, or any part thereof, it has received by reason of such re-organization. All such banks may avail themselves of the provisions [of] and become incorporated under this act, by filing with the recorder of the county in which the principal place of business is located, and a certified copy thereof in the office of the secretary of state, a certificate stating their intention and election to become so incorporated thereunder, which election and intention may be made and declared by the directors or trustees of such bank or association, or a majority of them. The certificate stating such intention may be signed by the president and secretary of such corporation, association, or bank, and shall be acknowledged before some officer competent to take acknowledgments of deeds; and in all other respects existing banks and associations re-organizing hereunder shall comply with, and conform to, all the provisions and requirements of this act with reference to the original organization of savings banks, so far as the same may be applicable, and as soon thereafter as the auditor's certificate is received and published, as hereinbefore provided, may proceed to transact business.

1819. False statement as to capital. 15 G. A., ch. 60, § 32. Any saving[s] bank organized under the provisions of this act is hereby prohibited from advertising in any way, either by publication or otherwise, any greater amount of capital than such banks *have* [has] actually paid in, and such bank shall be subject to a fine of twenty-five dollars for each and every violation of this section.

1820. 15 G. A., ch. 60, § 33. All acts, and parts of acts in conflict with this act, are hereby declared to be inoperative so far as they affect this act.

CHAPTER 6*b*.

STATE BANKS.

1821. Name. 21 G. A., ch. 72, § 1. All associations hereafter organized under the general incorporation laws of this state, for transacting a banking business, buying, or selling exchange, receiving deposits, discounting notes, etc.; other than savings banks, shall have the word "state" incorporated in and made a part of the name of such corporation, and no such corporation shall be authorized to transact business, unless the provisions of this act have been complied with.

1822. Change of name. 21 G. A., ch. 72, § 2. All such banking associations other than savings banks, incorporated at the time of the taking effect of this act may change their corporate name, by amendment of their respective articles of incorporation, so as to embrace the word "state" in their respective corporate names.

1823. Others not to use. 21 G. A., ch. 75, § 3. It shall be unlawful for any association, not incorporated, partnership, or individual engaged in banking business, buying or selling exchange, receiving deposits, discounting notes and bills etc.; to incorporate or embrace in the name of such associations, partnership, or individual the word "state" *provided* this act shall not apply to banking associations organized under the laws of the United States.

FRAUDULENT BANKING.

1824. Deposits not to be received by insolvent bank. 18 G. A., ch. 153, § 1. No bank, banking house, exchange broker, deposit office, or firm, company, corporation, or party engaged in the banking, broker, exchange, or deposit business, shall accept or receive on deposit, with or without interest, any moneys, bank bills, or notes, or United States treasury notes, or currency or other notes, bills or drafts circulating as money or currency, when such bank, banking house, exchange broker, or deposit office, firm, or party, is insolvent.

1825. Penalty. 18 G. A., ch. 153, § 2. If any such bank, banking house, exchange broker, or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer, director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year, or both fine and imprisonment, the fine not to exceed ten thousand dollars.

[As to double liability of stockholders in banks, see §§ 1646-1648.]

TITLE X.

OF INTERNAL IMPROVEMENTS.

CHAPTER 1.

OF MILL-DAMS AND RACES.

1826. Petition. 1188. Any person who owns land on one or both sides of a water-course, who desires to erect or heighten any dam thereon, or construct or enlarge a race therefrom, for the purpose of propelling any mill or machinery to be erected on such stream by the water thereof, may file a petition in the office of the clerk of the district [or circuit] court of the county in which such mill or machinery is to be erected. [R., §§ 1264, 1274; 10 G. A., ch. 31.]

The action here contemplated is to be commenced by the mill owner. The land owner is left to his common-law remedy or his remedy in equity. And the mill owner may, after proceedings are commenced, dismiss them without the consent of the other party: *Hunting v. Curtis*, 10–152.

The statute does not require that the petition should be sworn to: *Gammell v. Potter*, 2–562.

The dam, when erected in accordance with these provisions, will not be a nuisance, but may be so erected and maintained as to become such: *State v. Close*, 35–570.

This and the following sections are not unconstitutional: *Burnham v. Thompson*, 35–421; the *use*, though for private profit, is such a public one as to authorize the taking of public property therefor (*arguendo*): *Stewart v. Board of Supervisors*, 30–9.

Before the utilization of steam, the establishment of mills and manufactories and the use of water-power was deemed a public necessity for which private property might properly be condemned. If such statutes were now enacted for the first time it is possible, if not probable, that they would not be sustained: *Fleming v. Hull*, 73–598.

There is no limitation as to the purpose for which the mills and other machinery are to be used: *Burnham v. Thompson*, 35–421.

The proceedings need not necessarily be had before the work is commenced, but may be instituted while it is in progress: *Ibid.*

In the proceeding compensation for damages arising after the filing of the petition and before the assessment by the jury should be allowed: *Ibid.*

It is only injuries to lands which will be directly affected by the erection of the dam which are contemplated. And the owner of lands remote from the dam and not fronting upon the river need not be made party to the proceedings and cannot afterwards recover for injuries suffered, as, for instance, saturation by percolation: *Wilson v. Hanthorn*, 72–451.

1827. What to contain. 1189. Such petition shall describe with reasonable certainty the locality where such mill or machinery is to be erected, together with that of such dam or race, and also of the lands that will be overflowed or otherwise affected thereby, and the names of the owners thereof. The person filing the petition shall be known as plaintiff and the owners of the land as defendants. [R., § 1265.]

1828. Order for a jury; notice. 1190. The clerk shall thereupon issue an order, to which shall be attached a copy of the petition, directed to the sheriff, commanding him to summon a jury composed of twelve disinterested electors of his county to meet on a day fixed in said order upon the lands therein described, which order, including the copy of the petition, shall be served on the defendants in the same manner and for the same length of time previous to the day fixed in the order as is required for the service of original notices. If any of said defendants are non-residents of the state, they may be served by publication as original notices in like cases are required to be served. And if any defendant is a minor or insane person who has no guard-

ian, the clerk, at the time of issuing the order, may appoint a guardian to defend for him by indorsement on such order. [R., §§ 1266, 1270.]

Where the husband is made party to the proceeding as the owner of the land the fact that he afterwards has the title vested in his wife collusively will not enable him to bring action for damages in disregard of proceedings for condemnation: *Lummery v. Braddy*, 8–33.

If, upon motion, the writ is quashed, the court should award another, no original notice of such second writ being necessary: *Burnham v. Thompson*, 35–421.

1829. Lands in another county. 1191. If any of the lands are situate in a county other than that in which the petition is required to be filed, the proceedings herein referred to may take place to the same extent and in the same manner as if such lands were situated in the county where the petition is filed. [R., § 1270.]

1830. Action of jury. 1192. The jury shall be sworn to impartially and to the best of their skill and judgment view the lands described in the petition, and ascertain and appraise the damages each of the defendants will sustain by reason of such lands being overflowed or otherwise injuriously affected by the dam or race, or the heightening or enlarging the same, and whether the dwelling-house, outhouse, orchard, or garden of any defendant will be so affected, and if so, whether the same has been placed there for that purpose. [11 G. A., ch. 119, § 1.]

It is not necessary that the inquisition of the jury shall say how far the lands of the claimant may be affected by the overflow: *Gammell v. Potter*, 2–562.

The overflow of agricultural land and the consequent damage is not the only matter to be looked at in estimating the damages. The flooding of a coal-bed or stone quarry, or loss of a spring, or the destruction of a ford, should be taken into consideration: *Walters v. Houck*, 7–72.

1831. Evidence; report. 1193. The jury may, in addition to examining the premises, hear and examine witnesses. They shall report their findings in writing and attach the same to the order, which shall be returned by the sheriff to the clerk, and if it appears therefrom that the dwelling-house, outhouse, orchard, or garden of any defendant will be injuriously affected, and that the same was placed on the premises for that purpose, such fact shall not be considered any bar or hindrance to the construction or building of the race or dam. [Same, § 2.]

Failure of the jury to estimate damages which should be included must be taken advantage of either in an application to the court to set aside the verdict and award a new inquiry, or else under the provision giving a right of action to the applicant for any loss or damage resulting, but not actually foreseen by the jury, nor estimated by them on the inquest: *Gammell v. Potter*, 6–548.

1832. Appeal. 1194; 15 G. A., ch. 22. Either party may appeal from such assessment of damages to the court where the said proceedings are pending within thirty days after the assessment is made, in the manner, and the proceedings on such appeal shall be, as provided in chapter four of this title.

1833. Cause shown. 1195. When said report is filed, the clerk shall issue an order directed to the defendants, requiring them to appear at the next term of the court and show cause, if any they have, why a license should not be granted to construct the dam or race, which order shall be served in the same manner as hereinbefore directed. [R., § 1268.]

1834. Objections filed; pleadings; amendment of; another jury. 1196. On or before the day fixed in the order for the defendants to show cause, they may file any objections to the prior proceedings or to granting the license they see proper. The petition and objections filed thereto shall constitute the pleadings, and the same may be amended upon such terms as the court deems just, and if the proceedings of the jury are found informal or defective in substance, the court may order a new jury to be impaneled

upon such terms as to notice as it may direct. The return of the sheriff may be amended at any stage of the proceedings in accordance with the facts.

A defendant may plead and prove, by way of objection, facts tending to show that the granting of the license would be unreasonable or not for the public benefit; but he cannot thus set up matters legitimately involved in the question of damages submitted to the jury, and pertinent only to an application to set aside their finding and award a new inquiry. Until set aside their ascertainment must be considered conclusive: *Gammell v. Potter*, 6-548.

The overruling by the court of a motion to set aside the verdict of the jury and quash the writ may be appealed from, without any final judgment having been rendered: *Burnham v. Thompson*, 35-421.

1835. Written testimony. 1197. Testimony may be taken to be introduced on the final hearing before the court, in the same manner that testimony is taken in equitable actions triable on written testimony. [11 G. A., ch. 119, § 2.]

1836. License granted. 1198. If it shall appear to the court that neither the dwelling-house, outhouse, garden, or orchard of any defendant will be overflowed or injuriously affected, and the court shall judge it reasonable and for the public benefit, license shall be granted to construct such dam or race, on the plaintiff paying to the proper parties the damages found by the jury and decreed by the court. [R., § 1269.]

1837. Forfeiture of. 1199. If the plaintiff does not begin within one year thereafter to construct said dam or race, and finish and have in operation the mill and machinery in three years thereafter, and afterwards keep it in good repair for the accommodation of the public, or in case said dam, race, mill or machinery be destroyed, he shall not begin to repair or rebuild it within one year, and finish it in three years, then said license shall be forfeited. [Same.]

1838. Continuance. 1200. If the order shall not be executed by the sheriff on the day therein mentioned, he may, from time to time, appoint another day, notice thereof being given to the parties interested as hereinbefore provided; and if inquest cannot be completed in one day, the sheriff shall adjourn the jury, from day to day, until its completion. [R., § 1270.]

1839. No bar to action. 1201. No proceeding under this chapter shall bar an action which could have been maintained if this chapter had not been enacted, unless the prosecution or action was actually foreseen and estimated upon the inquest. [R., § 1271.]

This section does not bar an action for damages accruing before the proceeding. But where the jury found that certain land would be affected, but allowed no damages, *held*, that nevertheless, an action for damages subsequently suffered must have been foreseen and estimated, and that such action was therefore barred: *Watson v. Van Meter*, 43-76.

The fact that the land owner is entitled to recover damages not foreseen and estimated by the jury does not entitle him to maintain an injunction to restrain the maintenance of the claim: *Lummery v. Braddy*, 8-33.

1840. New party. 1202. Any owner of land affected by any proceedings under this chapter, who has not been made party by reason of want of notice, or from any other cause, may be made party thereto by proper proceedings at any time thereafter. [R., § 1272.]

1841. Costs. 1203. Costs and fees under this chapter shall be the same as in other cases for like services, and shall be paid by the plaintiff. [R., § 1273.]

1842. Right to repair. 1204. Where the water backed up by any dam belonging to any mill or machinery is about to break through or over the banks of the stream or race, or to wash a channel, so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mills or machinery, if he do not own such banks, or the lands lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as shall be necessary to prevent such water

from breaking through or over the banks of such stream or race, or washing a channel as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay any damages which the owner of the lands may actually sustain by the erection and repair aforesaid. [R., §§ 1275, 1276.]

1843. Penalty for injuring embankment. 1205. If any person shall injure, destroy, or remove any such embankment, or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason of such injury, destruction, or removal. [R., § 1277.]

1844. Fall below dam. 1206. Any person owning and using a water-power for the purpose of propelling machinery, shall have the right to acquire, maintain, and utilize the fall below such power for the purpose of improving the same, in like manner and to the same extent as provided in this chapter for the erection or heightening of mill-dams. After such right has been acquired, the fall shall be considered part and parcel of said water-power or privilege, and the deepening or excavating of the stream or tail-race as herein contemplated shall in no way affect any rights relating to such water-power acquired by the owner thereof prior thereto.

CHAPTER 2.

OF LEVEES, DRAINS, DITCHES, AND WATER-COURSES.

1845. Supervisors to locate. 1207; 16 G. A., ch. 140, § 1; 19 G. A., ch. 44, § 1. The board of supervisors of any county having a population of five thousand inhabitants, as shown by the last preceding census, may locate and cause to be constructed levees, ditches or drains, or change the direction of any water-course in such county, whenever the same will be conducive to the public health, convenience, or welfare. [14 G. A., ch. 120, § 1.]

The provisions of this chapter are constitutional: *Hatch v. Pottawattamie County*, 43-442.

The work is not to be undertaken for private advantage, but for the public good: *Patterson v. Baumer*, 43-477.

1846. Proceedings; bond; survey; notice. 1208; 19 G. A., ch. 44, § 2. A petition signed by a majority of persons resident in the county, owning land adjacent to such improvement, shall be first filed in the office of the county auditor, setting forth the necessity of the same, the starting point, route, and termini. A bond shall be filed in said office with sufficient sureties to be approved by the auditor, and conditioned to pay all costs and expenses incurred in case the supervisors refuse to grant the prayer of the petition. The auditor shall thereupon place a copy of said petition in the hands of the county surveyor, or a competent engineer, who shall take with him the necessary assistants and proceed to make a survey of the proposed levee, ditch, drain, or change in the direction of the water-course, and return a plat and profile of the same to the auditor; such return shall set forth a full and detailed description of the proposed improvement, its availability, necessity, and probable cost, with a description of each tract of land owned by different persons through which the proposed improvement is to be located, how it will be affected thereby, and its situation and level as compared with that of adjoining lands, together with such other facts as he may deem material. The county auditor shall, immediately thereafter, cause notice in writing to be served on the owner of each tract of land along the route of the proposed levee, ditch, drain, or change in the direction of such water-course, who is a resident of the county, of the pendency and prayer of said

petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session, in the same manner that original notices are required to be served; in case any such owner is a non-resident of the county, such notice shall be published for two consecutive weeks in some newspaper published in the county. [Same, § 2.]

A petition to the court signed by the residents interested in the improvements as prescribed in this section is a jurisdictional matter. Unless the requirements of the statute in this respect are complied with the supervisors can obtain no jurisdiction. In the absence of a showing by the record of the board or in some other manner authorized by law, no presumption will be exercised of the existence of the jurisdictional facts necessary to show that the supervisors acquired authority to act, such as that the petition was signed by the required number of residents: *Richman v. Board of Supervisors*, 70-627.

A person who signs a petition and afterwards a remonstrance must be regarded not as a petitioner but as a remonstrant: *Ibid.*

The petition must be signed by a majority of the persons residing in the county owning land adjacent to the proposed improvement, otherwise the board will not have the jurisdiction to levy taxes: *Shaw v. Supervisors of Johnson County*, 72-763.

Action by *certiorari* to review the action of the board of supervisors in levying a tax to pay for the construction of a ditch, the proceedings for the establishment of which are void, may be brought within one year after the levy of the tax: *Shepard v. Supervisors of Johnson County*, 72-258.

1847. Location; damages. 1209; 19 G. A., ch. 44, § 3. The supervisors, at the session set for the hearing of said petition, shall, if they find the preceding section to have been complied with, proceed to hear and determine said petition; and, if they deem it necessary, shall view the premises, and if they find such levee, ditch, drain, or change in the direction of the water-course to be necessary, and that the same will be conducive to the public health, convenience, or welfare, and no application shall have been made for compensation as provided in the next section, shall proceed to locate and establish such levee, ditch, drain, or water-course, on the route specified in the plat and return of said county surveyor or engineer. But, if any application for compensation has been made, further proceedings shall be adjourned to the next regular session; and the county auditor shall forthwith proceed to appoint appraisers to assess and determine the damages and compensation of such claimant, who shall proceed in the manner as provided by law for the assessment of damages in the opening of highways; and the compensation so found and assessed in favor of said claimant, shall be paid, in the first instance, by the parties benefited by such improvement, or secured to be paid upon such terms and conditions as the county auditor may deem just and proper; and the said supervisors shall, at the next regular session after such compensation shall have been assessed and paid, or secured as aforesaid, proceed to locate and establish such levee, ditch, drain, or water-course, as hereinbefore provided. [Same, § 4.]

1848. Compensation. 1210; 16 G. A., ch. 140, § 2; 19 G. A., ch. 44, § 4. Any person claiming compensation for land required for the purpose of constructing any such levee, ditch, drain, or water-course, or for damages sustained by the change of direction of any such water-course, shall make his application in writing therefor to the county supervisors on or before the first day of the session at which the petition has been set for hearing, and, on failure to make such application, shall be deemed and held to have waived his, her, or their right to such compensation. [Same, § 3.]

1849. Work divided. 1211; 19 G. A., ch. 44, § 5. Said supervisors, whenever they shall have established any such levee, ditch, drain, or water-course, shall divide the same into suitable sections, not less in number than the number of owners of land through which the same may be located, and shall also prescribe the time within which work upon each section shall be completed. [Same, § 5.]

1850. Letting work; payment. 1212; 16 G. A., ch. 140, § 1; 18 G. A., ch. 85, § 8; 19 G. A., ch. 44, § 6. The county auditor shall cause notice to be given of the time and place of letting, and of the kind and amount of work

to be done upon each section, and the time fixed for its completion, by publication for thirty days in some newspaper printed and of general circulation in said county, and shall let the work upon the sections respectively to the lowest bidder therefor; and the person or persons taking such work at such letting shall be paid in the following manner: The engineer in charge of the construction of the levee, ditch or drain shall furnish the contractors monthly estimates of the amount of work done on each section; upon the filing of such estimates with the county auditor, the auditor shall draw a warrant in favor of the contractor for eighty per cent. of the value of the work done, according to the estimate; and when said levee, ditch or drain is completed to the satisfaction of the engineer in charge, and when he so certifies the same to the county auditor, then the auditor shall draw a warrant in favor of said contractor upon the "levee or drainage fund" for the balance due the contractor, as provided in the following section. If any person to whom any portion of said work shall be let as aforesaid, shall fail to perform said work, the same shall be relet by the county auditor, in the manner hereinbefore provided. [Same, § 6.]

1851. Costs and fees; how paid. 1213; 16 G. A., ch. 140, § 3. The auditor and surveyor, or engineers, shall be allowed such fees for services under the preceding sections of this chapter as the supervisors shall in each case deem reasonable and allow; and all other fees and costs accruing under the preceding sections shall be the same as provided by law for like services in other cases; and all costs, expenses, cost of construction, fees, and compensation for property appropriated, or damages sustained by the change of direction of such water-course, which shall accrue and be assessed and determined, shall be paid out of the county treasury, from the fund collected for that purpose, on the order of the county auditor. [Same, § 8.]

A payment out of the general funds contrary to the provisions of this section does not render the tax provided by the next section invalid: *Patterson v. Baumer*, 43-477, 481.

1852. Assessment of costs and damages. 1214; 16 G. A., ch. 140, § 4; 19 G. A., ch. 44, § 7; 21 G. A., ch. 139. Whenever any such ditch, drain or change in the direction of any water-course, shall have been located and established, as provided in the preceding section, or when it shall be necessary, to cause any such ditches, drains or water-courses to be re-opened and repaired, the auditor shall commission and appoint six disinterested freeholders of the county, not interested in a like question, who shall within twenty days after such appointment, personally inspect and classify as "dry," "low," "wet" or "swamp," all the land benefited by the location and construction of such ditch, drain or water-course, or the repairing or re-opening of the same and shall make an equitable apportionment of the cost, expenses, costs of construction, fees and compensation for property appropriated or damages sustained by the construction of any such ditch, drain, change of direction of such water-course or of repairing and re-opening the same and make report thereof in writing to the board of supervisors, which apportionment shall accrue and be assessed among the owners of the land benefited by the location, construction or the re-opening and repairing of such ditch, drain or water-course, in proportion to the benefit to each of them through, along the line, or in the vicinity of whose lands the same may be located, constructed or re-opened and repaired respectively and the same may be levied upon the lands of the owner so benefited, in said proportions and collected in the same manner that other taxes are levied and collected for county purposes and the amounts so assessed and collected shall be paid out of the county treasury, from the funds collected for that purpose on the order of the county auditor and said commissioners shall receive for each day's service when so engaged, two dollars to be paid out of the funds so collected. Any such ditch, drain or water-

course, which is now or may hereafter be constructed, so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance and the same may be abated as provided in title twenty, chapter five, of the code of Iowa, and the diverting, obstructing, impeding or filling up of such drains, ditches, or water-courses in any manner by any person, without legal authority is hereby declared a nuisance and any person convicted of such crime, shall be punished as provided in title twenty-four, chapter fifteen, of the code for the punishment of nuisances. Nothing in this chapter contained shall be construed so as to prohibit any land owner from appealing from the order of the board in assessing his land, for any of the purposes mentioned in this section, to the circuit [district] court of the county, in the same manner that appeals are taken in the location of highways, nor shall the same be construed so as to prohibit the maintenance of an action for the recovery of any taxes erroneously or wrongfully assessed, for any of the purposes mentioned in this sectioned and in order to show that such assessment was erroneous or wrongful, it shall only be necessary to prove that such lands so assessed were not benefited by the location, construction or maintenance, of such ditch, drain or water-course.

[The section of the Code for which this is a substitute had previously been amended by 19 G. A., ch. 44, § 7, so as to apply to levees as well; but by the act repealing the Code section and substituting the foregoing, no reference is made to levees.]

"Vicinity," as used in this section, does not mean adjoining to or abutting on, but near by, close by, or neighboring country. The board being vested with the power to determine what land in the vicinity should be assessed has a large discretion as a local tribunal and may assess one parcel of land more, another less, and others not at all, and from the action of the board in this respect no appeal is provided for: *Lambert v. Mills County*, 58–666.

As the county has thus ample power to provide for the payment of a debt incurred for the construction of a ditch by the levy of a special tax therefor, a judgment may be rendered against it upon a warrant issued, payable out of the special fund for the construction of such improvement. Demand on the board to levy a tax to pay such warrant is not necessary before maintaining such action. It seems, however, that the creditor, after obtaining judgment on such warrant, could not by *mandamus* compel the treasurer to pay such judgment out of the general funds of the county, a method of raising amounts for the payment of such claims being provided by statute: *Mills County Nat. Bank v. Mills County*, 67–697.

Where the board of supervisors make an equitable apportionment of the cost of a ditch and levy a tax therefor, an original petition for an injunction to restrain its collection, when the only ground of complaint is that the ground is not benefited, is not the proper remedy: *Hatch v. Pottawattamie County*, 43–442.

By ordering payment the board of supervisors determine that the work has been completed, and this is a matter within their authority to determine, and their action cannot be reviewed in a proceeding to enjoin the collection of taxes: *Patterson v. Baumer*, 43–477.

Irregularity in letting of one contract should not render the tax levied by the county for payment of a ditch constructed void, when the tax levied was to pay for the entire work: *Ibid.*

Land owners in the vicinity of an improvement must be presumed to have notice of the action of the county in ordering the work and causing it to be prosecuted, and of any irregularities in the letting of the contracts therefor, and by failure to object before the expenditure of money and labor by the county and the contractors, they will be estopped from objecting to the collection of the taxes: *Ibid.*

1853. Record kept. 1215. The auditor shall keep a full and complete record of all proceedings had in each case. [Same, § 7.]

1854. Appeals. 1216; 16 G. A., ch. 140, § 5; 19 G. A., ch. 44, § 8. The petitioners or any of them, or the applicant for compensation for land taken or for damages sustained by reason of the change of direction of any water-course, may appeal from the order locating and establishing such levee, ditch or drain or changing the direction of such water-course or refusing so to do, and from the amount allowed as damages by pursuing the same method provided for appeals from assessment of damages in the location of highways and the auditor shall make out transcripts as provided in appeals taken from the assessment of damages in case of highways.

LEVEES OR DRAINS THROUGH TWO OR MORE COUNTIES.

1855. Location by commissioners. 17 G. A., ch. 121, § 1; 19 G. A., ch. 44, § 9. In all cases when it becomes necessary to construct a levee or drain through two or more contiguous counties or parts of counties, and a petition for such levee or drain has been presented to the board of supervisors of the counties through which such levee or drain is to constructed, it shall be the duty of the board of supervisors of each of such counties to appoint a commissioner to act with the commissioner or commissioners of such other counties in locating such levee or drain.

The provisions of this section do not dispense with the necessity for a petition signed by a majority of the residents interested in the improvement as required by § 1846: *Richman v. Board of Supervisors*, 70-627.

1856. Action. 17 G. A., ch. 121, § 2; 19 G. A., ch. 44, § 10. It shall be the duty of the commissioners appointed under section one of this act [§ 1855], to meet within twenty days after the appointment of the last commissioner by such board of supervisors, and at once locate such levee or drain through their respective counties.

1857. 18 G. A., ch. 85, § 1. Chapter one hundred and twenty-one of the acts of the seventeenth general assembly [§§ 1855, 1856] is amended by adding thereto the following sections:

1858. Engineer. 18 G. A., ch. 85, § 2; 19 G. A., ch. 44, § 11. The said commissioners shall appoint a competent engineer, who shall have charge of the construction of said levee, ditch, drain or change in said water-course.

1859. Survey; plat; report. 18 G. A., ch. 85, § 3; 19 G. A., ch. 44, § 11. Said commission shall continue until the levee, drain or ditch is fully completed. They shall, in connection with the engineer in charge, proceed to make a survey of the proposed levee, ditch, drain or change of water-course, and return a plat and profile of the same to the county auditor of each county through which the same may pass. Such return shall set forth a full and detailed description of the proposed improvement, its availability, necessity and probable cost, with a description of each tract of land owned by different persons through which the proposed improvement is to be located, or which may be benefited by reason of its construction, how it will be affected thereby, and its situation and level as compared with that of adjoining lands, together with such facts as they may deem material. The county auditor and the board of supervisors of each county shall then proceed in the same manner as though the levee, ditch or drain was all located in one county, as provided by sections one thousand two hundred eight, and one thousand two hundred nine, code of 1873 [§§ 1846, 1847].

1860. Appeal. 18 G. A., ch. 85, § 4; 19 G. A., ch. 44, § 11. Any person aggrieved by the action of the board of supervisors of any county in locating said levee, ditch or drain, or in fixing the number of acres of land benefited by reason of the construction of such levee, ditch or drain, shall have the right of appeal to the circuit [district] court of the county in which such person's land may be situated, by serving notice thereof to the first four petitioners, within twenty days after such action of the board of supervisors.

1861. Proportional tax. 18 G. A., ch. 85, § 5; 19 G. A., ch. 44, § 11. When a levee, ditch or drain has been located in two or more counties, the land benefited by the levee, ditch or drain shall be proportionally taxed, as provided in section twelve hundred and fourteen, code of 1873 [§ 1852], the same as though the levee or drain and land were all in one county.

1862. Excess and deficiency. 18 G. A., ch. 85, § 6; 19 G. A., ch. 44, § 11. When a greater amount of money is collected by the county treasurer of a county through which such levee, ditch or drain may pass than is needed

to pay for the work actually done in that county, and if in any county there should be more work done than the equitable tax in that county will pay for, then the boards of supervisors of the several counties shall confer together and ascertain where the excess and deficiency exist, and the county where the excess exists shall transfer the excess to the county or counties where the deficit exists.

1863. Additional levy. 18 G. A., ch. 85, § 7; 19 G. A., ch. 44, § 11. If the levy first made by the several boards of supervisors should be insufficient to pay for the construction of the levee, ditch or drain, then the several boards may make an additional levy in the same ratio as the first was made.

1864. Levees, ditches or drains in public highway. 20 G. A., ch. 186, § 1. Ditches or drains may be located and constructed within the limits of any public highway and on either or both sides thereof, and levees or embankments upon and along the same; *provided*, they are so constructed as not to prevent public travel thereon. The engineer or commissioner appointed to locate ditches, drains, levees or embankments, may recommend the establishment of a public highway upon and along the route of the same, and the board of supervisors may establish the same on such recommendation in the same manner as on the report of a highway commissioner. All levees built by taxation under the drainage laws shall be under the control of the board of supervisors of the county in which they are situated, and the board shall have the power to grant the right of way thereon to any railway company that will maintain the same while used for railway purposes: *provided*, the steps for condemnation and payment therefor, contained in chapter four, title ten, of the code, shall first be taken by said company; *provided further*, that nothing in this section shall be construed so as to require such ditches or levees to be kept up at the expense of the county.

1865. Petition for drain; proceedings. 20 G. A., ch. 186, § 2. Whenever the petition of one hundred legal voters of the county, setting forth that any body or district of land in said county, described by metes and bounds, or otherwise, is subject to overflow, or too wet for cultivation, and that in the opinion of petitioners the public health, convenience or welfare, will be promoted by draining or leveeing the same, and also a bond, conditioned as required by section one thousand two hundred and eight of the code [§ 1846], shall be filed with the county auditor, he shall appoint a competent engineer or commissioner, who shall proceed to examine said district of lands, and if he deem it advisable to survey and locate such ditches, drains, levees, embankments and changes in the direction of water-courses as may be necessary for the reclamation of such lands or any part thereof, and he shall make substantially the same report and the same proceedings shall be had as now provided by law for the location and construction of ditches, drains and changes in water-courses, and two or more counties may unite in such work of reclamation in the manner now provided by law.

1866. Drainage bonds. 20 G. A., ch. 186, § 3; 22 G. A., ch. 97. If the board of supervisors shall be of opinion that the estimated cost of reclamation of such district of lands is greater than should be levied and collected in a single year from the lands benefited, they may determine what proportion of the same should be levied and collected each year, and they may issue drainage bonds of the county bearing not more than eight per cent. annual interest, and payable in the proportion and at the times when such taxes so apportioned will have been collected, and may devote the same at par to the payment of such work as it progresses, or may sell the same at not less than par, and devote the proceeds to such payment; and should the cost of such work exceed the estimate, a new apportionment of taxes may be made and other bonds issued and used in like manner; but in no case shall any such bonds run

longer than fifteen years, and at least ten per cent. in amount of those issued on the first estimate shall be payable annually. The board of supervisors may divide the land to be benefited into drainage districts, which shall be accurately described and numbered, and such drainage bonds shall be in sums of not less than fifty dollars each, and shall be numbered consecutively and issued as other county bonds are, and shall specify that *that* they are drainage bonds, and designate by its number the drainage district on account of which they are issued. And in no case shall the amount of bonds issued exceed fifty per cent. of the value of the lands in such drainage districts as shown by the last assessment for taxation. *Provided* that each bond so issued shall express on its face, that the same shall only be paid by taxes assessed, levied and collected on the lands within the district so designated and numbered and for the benefit of which district such bond was issued: And *provided*, further, that in no case shall any tax be levied or collected for the payment of such bond or bonds, or the interest thereon, on any property outside of the district so numbered, designated and benefited.

1867. Tax to pay bonds. 20 G. A., ch. 186, § 4. It shall be the duty of the board of supervisors to levy each year on the lands benefited a tax sufficient to pay the interest on such bonds and so much of the principal as falls due in the succeeding year, and such tax shall be collected in the same manner as other county taxes, and shall be carried to the credit of the drainage district on account of which the bonds are issued, and shall be used to pay the principal and interest of said bonds as the same falls due: *provided*, that any surplus may be devoted to payment of works of reclamation in said district or repairs thereof.

DRAINAGE OF SWAMP OR MARSH LAND.

1868. Petition for. 1217. Any person owning any swamp, marsh, or wet land, desiring to drain the same by cutting a ditch through the land of others, and who is unable to agree upon the terms thereof with such other persons, may make application in writing to the township trustees of the township where such swamp or marsh land is situated, with a description of such land, the commencement and termini of the proposed ditch, and a description of the land belonging to others, with their names, through which it will pass. Such petition shall be filed by the township clerk. [13 G. A., ch. 159, § 1.]

The provisions of § 1878 authorizing proceedings by which a land owner may acquire the right to locate under-ground drains through the land of another in other cases than where such drainage is required in the interest of the public health by reason of land being wet or swampy are unconstitutional: *Fleming v. Hull*, 73-598.

1869. Notice. 1218. When the application is filed the clerk shall notify the trustees, who shall immediately determine upon the time and place they will meet to consider the application, and shall cause the applicant and all persons owning land through which said ditch is to pass, who are residents of the county, to be notified of the time and place of said meeting, which notice shall be served ten days previous to such day in the same manner as original notices, and if any of such owners of land are non-residents of the county, said notice shall be served on them by posting up copies thereof in three public places in the township, satisfactory proof by affidavit of such posting, and places where posted, shall be furnished said trustees and filed with the clerk. [Same, § 3.]

No appeal from the action of the board in assessing the cost of the improvement upon land in the vicinity is provided for in behalf of the party whose land is assessed: *Lambert v. Mills County*, 58-666.

1870. Hearing. 1219. Upon the day fixed for the hearing, the trustees, if satisfied that the requirements of the preceding section have been complied

with, may proceed to hear and determine the matter of the application, or they may adjourn the same to a future day, and, if necessary, may cause another notice to be served in the manner above required. But such adjournment shall not be for a longer period than twenty days. [Same, § 3.]

1871. Action of trustees. 1220. If the trustees are satisfied from a personal examination of the premises, or from evidence of witnesses, that such swamp or marsh lands are a source of disease, that the public health will be promoted by draining the same, that such ditch is necessary for the proper cultivation of such lands, that the permanent value thereof will be increased thereby, and that it is necessary, in order to drain said lands, that such ditch should pass through the lands of others, they shall determine the direction, depth, and width of such ditch, as near as may be, and, if necessary, may employ the county surveyor to assist them, and after such examination, or hearing such evidence, said trustees may order or refuse the construction of said ditch. All the findings and doings of the trustees shall be reduced to writing, and entered of record by the clerk. [Same, §§ 1, 3, 6.]

All the different facts enumerated as calling for a ditch should exist in a given case to justify its establishment; and where the record does not show that the township trustees found that the lands to be drained were a source of disease, and that their drainage would promote the public health, the establishment of the ditch will be invalid: *Hull v. Baird*, 73-528.

The presumption will be that there was not a finding by the trustees upon any fact not made of record: *Ibid.*

1872. Costs; bond. 1221. The applicant shall pay all costs of the proceedings before the trustees, and they may require, before fixing the day of meeting as above provided, such applicant to give bond with sureties, to be approved by the township clerk, conditioned to pay all such costs and expenses. [Same, § 9.]

1873. Assessment of damages. 1222. If the trustees are satisfied the ditch will damage the land of any person, other than the applicant for the ditch, through which it has been located, they shall assess the amount to be paid the owner, and after payment, or tender of the same, to the person entitled thereto within thirty days after the same is assessed or ascertained on appeal in the circuit [district] court, or, in case no damages are assessed, the applicant may enter upon the land through which the ditch passes, with the necessary implements to accomplish the work. [Same, §§ 4, 5.]

1874. Appeal. 1223. The applicant, or any person through whose land the ditch is located, may appeal from so much only of the order or action of the trustees as relates to the assessment of damages to the circuit [district] court, in the same manner as to bond, the conditions thereof, notice of appeal, and the time within which it is to be taken, as is provided by law in cases of appeals from the assessment of damages on the location of highways. The township clerk shall approve the bond and make out a transcript of the proceedings before the trustees within ten days after the bond is filed and approved, and file the same with the clerk. [Same, § 7.]

The owner of land in the vicinity to whom a part of the expense is assessed, but whose land is not crossed by the ditch, is not given the right to appeal: *Lambert v. Mills County*, 58-666.

1875. Trial of appeal. 1224. On the trial of such appeal, the person claiming damages shall be plaintiff and the applicant defendant, and if the appeal is taken by any person other than the applicant, judgment shall be rendered by the court for the amount found due such person as damages, which may be enforced as are other judgments; and if the appeal is taken by the applicant, no judgment shall be rendered for the amount found due any person as damages, but the amount thereof shall be certified to the township clerk, and the same shall thereafter be regarded as if the same had been assessed by the trustees at the time so certified. The court shall make such disposition

of the costs, as is required in similar cases in appeals from the assessment of damages on the location of highways. But the payment or acceptance of the damages assessed by the trustees shall bar the right to appeal.

[Sec. 1225 is repealed by 21 G. A., ch. 55, § 4.]

1876. Ditch repaired. 1226. If the ditch becomes out of repair, the applicant, or any one interested therein, may make application in writing to the township trustees for leave to repair the same, whereupon such trustees shall make such orders in relation thereto as they deem proper, and may empower such applicant or other interested person to enter upon the land of another for the purpose of repairing such ditch. [Same, § 8.]

1877. Penalty for obstructing. 1227. Any person who shall dam up, obstruct, or in any way injure any ditch or ditches so opened, shall be liable to pay to the person owning or possessing the swamp, marsh, or other low lands for the draining of which such ditch or ditches shall have been opened, double the damages that shall be assessed by the jury for such injury, and in case of a second or other subsequent offense by the same person, treble such damages. [Same, § 11.]

TILE OR OTHER UNDER-GROUND DRAINS.

1878. Application; notice. 20 G. A., ch. 188, § 1; 22 G. A., ch. 96, § 1. Whenever any person who is the owner of any swamp, wet or marsh land, which on account of its condition may endanger the public health, or is not for that reason in a proper condition for cultivation, shall desire to construct any tile or other under-ground drain through the land of another and shall be unable to agree with the owner or owners of such land as to the same, he may file with the clerk of the township where said land is situated an application therefor, giving a description of the land or lands through which he may desire to construct the same, and the township clerk shall forthwith notify the township trustees of said township of said application, who shall fix a time and place for the hearing of same, which time shall not be more than twenty days distant, and they shall cause said clerk to notify the applicant and land owner of the time and place of said hearing at least ten days before the time fixed for the hearing of same, which notice shall be in writing, signed by said clerk, and shall be served on said applicant and land owner, if within the county, and if not then upon his agent for said land, if within the county in the same manner as is now provided by law for the service of original notices, and in case that neither said party nor his agent are residents within said county, then the same shall be served by posting written notices in three public places in said township, one of which shall be upon said land, at least fifteen days before said hearing.

The original act (20 G. A., ch. 188) was not limited in its application to lands which were wet and swampy or to cases where the public health required that it should be drained, but was applicable to cases where the owner of land simply desired for his own advantage to construct a drain over the land of another, and therefore it was unconstitutional as providing for the taking of private property for other than public purposes: *Fleming v. Hull*, 73-598.

1879. Hearing. 20 G. A., ch. 188, § 2; 22 G. A., ch. 96, § 2. Upon the day fixed for hearing, if said trustees are satisfied that the provisions of the prior section have been complied with, they may proceed to hear and determine the same and shall have power to adjourn from time to time until same is completed. *Provided* that no adjournment shall be for more than fifteen days.

1880. Action of trustees. 20 G. A., ch. 188, § 3; 22 G. A., ch. 96, § 3. The said trustees may fix the point or points of entrance and exit or outlet of said tile or other under-ground drain on said land, the general course of same

through said land, the size and depth of same, when the same shall be constructed, how kept in repair, what connections may be made with same, what compensation, if any, shall be made therefor, and any other question arising in connection with same; and they shall reduce their findings to writing which shall be filed with the clerk of said township, who shall record it in full in his book of records of said township, and said finding and decision shall be final unless appealed therefrom as hereinafter provided for.

1881. Connecting drains. 20 G. A., ch. 188, § 4; 22 G. A., ch. 96, § 4. Wherever any water-course or natural drainage line crosses the boundary line between two adjoining land owners and both parties desire to drain the land along such water-course or natural drainage line, but are unable to agree upon the conditions as to the juncture or connection of the lines of tile or other drainage at the boundary line aforesaid, then and in such case the township trustees shall have full authority to hear and determine all questions arising relative thereto between such land owners and to render such judgment thereupon as shall to them seem just.

1882. Along highways. 20 G. A., ch. 188, § 5; 22 G. A., ch. 96, § 5. Any person shall have the right to go upon any public highway to construct an outlet to a drain provided he shall leave the highway in as good condition as it was before the drain was constructed, to be determined by the supervisor of highways in the district where the work is done.

1883. Across railroads. 20 G. A., ch. 188, § 6; 22 G. A., ch. 96, § 6. Whenever any railroad crosses the land of any person or persons who desire to drain their land for any of the purposes set forth in section one of this act [§ 1878], the party or parties desiring such drain or drains shall notify the railroad company by leaving a written notice with the nearest station agent, stating in such notice the starting point, route or termination of such drain or drains, and if the railroad company refuse or neglect for the space of thirty days to dig across their right of way a drain of equal depth and size of the one dug by the party who sishes [wishes] to drain his land, then the party who desires to drain the land may proceed to dig such drain and the railroad company shall be liable for the cost of the construction of such drain, to be collected in any court having jurisdiction.

1884. Appeal. 20 G. A., ch. 188, § 7; 22 G. A., ch. 96, § 7. Either party may appeal to the district court of the county from all the findings of the township trustees, within ten days after the findings have been filed with the clerk, and the party appealing shall cause a notice in writing of the taking of said appeal to be served upon the opposite party for the same time and in the same manner as now provided by law for service of original notice in the district court; and if the appellant is the party petitioning for the drain, he must furnish a bond conditioned to pay all the costs of appeal assessed against him, said bond to be approved by the township clerk; and the matter shall be tried *de novo* in said court; *provided* that if the appellant does not recover a more favorable finding or judgment in the district court than he did before the trustees, he shall pay all the costs of the appeal.

The original act (18 G. A., ch. 188) provided for an appeal only in case damages were awarded, and was therefore unconstitutional because it denied the land owner the right of trial by jury and deprived him of his property without due process of law: *Fleming v. Hull*, 73-598.

1885. Transcript. 20 G. A., ch. 188, § 8; 22 G. A., ch. 96, § 8. In case of appeal the township clerk shall certify to the district court a transcript of the proceedings before said trustees, which shall be filed in said court with the appeal bond, the party appealing paying for said transcript and the docketing of said appeal as in other cases, and upon appeal the party claiming damages shall be plaintiff and the applicant defendant.

1886. Costs. 20 G. A., ch. 188, § 9; 22 G. A., ch. 96, § 9. The applicant shall pay the costs of the trustees clerk and serving of notices on the hearing before the trustees, and shall pay all damages awarded before entering on the construction of said tile or other drain through the lands of the other.

1887. Repairs. 20 G. A., ch. 188, § 10; 22 G. A., ch. 96, § 10. In case any dispute shall arise as to repair of any tile or other under-ground drain the same shall be determined by said trustees in same manner as in the original construction of same.

1888. Drains across highways. 21 G. A., ch. 55, § 1. When any water-course or natural drain crosses any public highway in the state of Iowa, and the adjoining or abutting land owner wishes to cross said highway with an under-ground tile drain for an outlet, or to connect with another under-ground tile drain, they shall notify the road supervisor having supervision over that public highway to be crossed, in writing, specify the depth of drain and size of tile to be used in crossing said highway, and give the road supervisor twenty days' time to construct said under-ground tile drain.

1889. Supervisor shall construct. 21 G. A., ch. 55, § 2. When the road supervisor receive said written notice, he shall order said under-ground tile drain constructed across said highway, and pay for the tile and construction of the same out of any money or fund in his command.

1890. Construction by owner. 21 G. A., ch. 55, § 3. If the supervisor fails to construct said under-ground tile drain within the twenty days' time, then the abutting or adjoining land owner may go upon the highway and construct said under-ground tile drain across said highway, and he shall receive pay for constructing the same, including tile used in crossing said highway, out of any money or fund belonging to such road district, provided he shall leave the highway in as good condition as it was before the drain was constructed.

DRAINAGE OF COAL LANDS.

1891. How done; damages assessed. 1228. Any person, or corporation, owning or possessing any land underlaid with coal, who is unable to mine such coal by reason of the accumulation of water in such mine, may drain the same through, over, or under the surface of land belonging to another person, and if such person or corporation and the owner of the land cannot agree as to the amount of damages that will be sustained by such owner, the parties may proceed to have the necessary right of way condemned and the damages assessed under the provisions of chapter four of this title. [10 G. A., ch. 91; 11 G. A., ch. 66.]

DRAINAGE OF LEAD MINES.

1892. Compensation for. 1229. Any person or corporation, who, by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead-bearing mineral lands or lead mines of water, thereby enabling the miners and the owners of mineral interests in said lands to make them productive and available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken from said lands as compensation for said drainage. [10 G. A., ch. 37, § 1.]

The provision giving one-tenth of the lead mineral as compensation in such cases is not unconstitutional as depriving the owner of his property without due process of law: *Ahern v. Dubuque, etc., Mining Co.*, 48-140.

1893. Setting apart. 1230. The owners of the mineral interest in said lands, and persons mining upon and taking lead mineral from said lands, shall jointly and severally set apart and deliver from time to time, when demanded,

the said one-tenth part of said mineral taken from said lands to the person or corporation entitled thereto as compensation for drainage. The owners of the mineral interest in said lands, shall allow the party entitled to such compensation, and his agents, at any and all times to descend into and examine said mines and to enter any building occupied for mining purposes upon any of said lands and examine and weigh the mineral taken therefrom. [Same, § 2.]

1894. Penalty. 1231. Upon the failure or refusal of any owner of the mineral interest in said lands, or of any person taking the mineral therefrom, to comply with the provisions of the preceding section, the person or corporation entitled to said compensation for drainage may sue for and recover the value of said mineral in any court of competent jurisdiction. And upon the hearing of any such case, if it shall appear that the defendant obstructed the plaintiff in the exercise of the right to examine the said mines, and to weigh said mineral, or concealed or secretly carried away any mineral taken from said lands, the court shall render judgment for double the amount proved to be due from such defendant. [Same, § 3.]

1895. Notice to smelters. 1232. The person or corporation entitled to said drainage compensation, may, at any time, leave with any smelter of lead mineral in this state, a written notice stating that said person, or corporation, claim of the persons named in said notice, the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also authorize the said smelter to retain, for the use of the persons entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice; the payment or delivery of the one-tenth part of the mineral taken from any of said lands by any one of the persons whose duty it is made hereby to pay or deliver the same, shall discharge the parties liable jointly with him except their liability to contribute among themselves. [Same, § 4.]

1896. Right of way. 1233. Any person, or corporation, engaged as aforesaid, in draining such mines and lead-bearing mineral lands, whenever he or they shall deem it necessary for the prosecution of their work, shall have the right of way upon, over, or under the surface of such mineral lands and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races, or tunnels, and the right to construct and use shafts and air holes in and upon the same, doing as little injury as possible in making said improvements. [Same, § 5.]

1897. Damages for. 1234. If the said person, or corporation, engaged in draining as aforesaid, and the owner of any land upon which said right of way may be deemed necessary cannot agree as to the amount of damages which will be sustained by the owner by reason thereof, the parties may proceed to have the same assessed under the provisions of chapter four of this title. [Same, § 6.]

1898. Consent of owners. 1235. The foregoing provisions shall not be construed to require the owners of the mineral interest in any of said lands to take mineral therefrom, or to authorize any other person to take the mineral from said lands without the consent of the said owners. [Same, § 7.]

CHAPTER 3.

OF WATER-POWER IMPROVEMENTS.

1899. Taking land for. 1236. There is granted to any corporation hereafter organized in accordance with law, for the purpose of utilizing and im-

proving any water-power within this state, or in the streams lying upon the borders thereof the right to take and hold so much real estate as may be necessary for the location, construction, and convenient use of its canals, conduits, mains, and water-ways, or other means employed in the utilization of such water-power, and for the construction of such buildings and their appurtenances as may be required for the purposes aforesaid. Such corporation may also take, remove, and use for the construction and repair of its said canals, water-ways, buildings, and appurtenances, any earth, gravel, stone, timber or other materials, on or from the land so taken. Compensation shall be made for the lands and materials so taken and used by such corporation, to the owner, in compliance with and in the manner provided in chapter four of this title. [14 G. A., ch. 79, § 1.]

1900. Use of highways. 1237. Such corporations may use, raise, or lower, any highway for the purpose of having their said canals, water-ways, mains, and pipes, pass over, along, or under the same; and in such case shall put such highway, as soon as may be, in good repair and condition, for the safe and convenient use of the public. And such corporation may construct and carry their canals, conduits, water-ways, mains, or water-pipes, across, over, or under any railway, canal, stream, or water-course, when it shall be necessary for the construction or operation of the same, but shall do so in such manner as not to impede the travel, transportation, or navigation upon, or other proper use of, such railway, canal, or stream. But the powers conferred in this section, can only be exercised in cities and towns with the consent and under the control of the city council or trustees of said municipal corporations. [Same, § 2.]

1901. Public lands. 1238. Such corporations are authorized to pass over, occupy, and enjoy, any of the school, university, and saline, or other lands of this state, whereof the fee, or any use, easement, or servitude therein is in the public, making compensation therefor. But no more of such land shall be taken than is required for the necessary use and convenience of such corporations. [Same, § 3.]

1902. Powers. 1239. Such corporations, in addition to other powers, shall have the following: To borrow money for the purpose of constructing, renewing, or repairing their works, and to make, execute, and deliver contracts, bonds, notes, bills, mortgages, deeds of trust, and other conveyance, charging, or incumbering their property, including all and singular their franchises, or any part or parcel thereof; to erect, maintain and operate canals, conduits, mains, water-ways, mills, factories, and other buildings and machinery, including water-ways, sluices, and conduits, for the purpose of carrying waste water off from said premises to the stream from which the same was taken, or other convenient place; to let, lease, or sell, and convey any portion of their water supply, and any of the buildings, mills, or factories, or machinery aforesaid, for such sums, prices, rents, tolls, and rates, as shall be agreed upon between the parties; and to lay down, maintain, and operate, such water mains, conduits, leads, and service pipes as shall be necessary to supply any building, village, town, or city, with water; and the grantee of any such corporations, or purchaser of the said property, franchise, rights and privileges, under and by virtue of any judicial sale, shall take and hold the same as fully and effectually, to all intents and purposes, as the same were held and enjoyed by such corporations. [Same, § 4.]

[The word "prices" in the twelfth line is erroneously omitted in the Code.]

1903. Completion of work; legislative control. 1240. Such corporation shall take, hold, and enjoy the privilege of utilizing and improving the water-power, and the rights, powers and privileges aforesaid, which shall be specifically mentioned and described in its articles of incorporation; *provided*,

it shall proceed in good faith to make the improvements and employ the powers in its said articles of incorporation mentioned, and shall, within two years from the date of its organization, provide the necessary capital, complete the preliminary surveys, and actually commence the work of improving and utilizing the water-power, and furnishing the supply of water so mentioned in its articles of incorporation; and said water-works and canals shall be completed within five years from the time when said corporation has been organized; and, *provided further*, that the rights, powers, and privileges conferred by this chapter shall be at all times subject to legislative control. [Same, § 5.]

CHAPTER 4.

TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

1904. By railway; limit of. 1241; 17 G. A., ch. 126. Any railway corporation organized in this state, or chartered by or organized under the laws of the United States or any state or territory, may take and hold, under the provisions of this chapter, so much real estate as may be necessary for the location, construction, and convenient use of its railway, and may also take, remove, and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken; the land so taken otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment, or depositing waste earth. [R., § 1314.]

Provisions constitutional: The use for which land appropriated for a right of way is taken is a public one although it is for private profit, and the provisions authorizing the taking of private property for such purpose upon compensation being made are therefore constitutional: *Stewart v. Board of Supervisors*, 30–9.

Nature and extent of right: The railway company procuring the right of way is the owner of its right of way so long as it is used for railway purposes, and the owner of the land taken has no right to go thereon for the construction of fences or other purposes: *Heskett v. Wabash, St. L. & P. R. Co.*, 41–467.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62–11.

It would seem that the company may sink wells on its right of way, for the purpose of supplying its engines with water, and would not be liable in damages for thus diverting percolating water from a spring upon the adjoining land of the person granting the right of way: *Hougan v. Milwaukee & St. P. R. Co.*, 35–558.

Timber standing upon the property taken for right of way, other than that necessary for the construction of the railway, remains the property of the owner of the land: *Preston v. Dubuque & P. R. Co.*, 11–15.

The statute by express language authorizes the taking of material for the construction and use of the railway, but under a right of way deed granting an easement "for all purposes connected with the construction, use and occupation of the railway," *held*, that the railway company was not authorized to take sand for use in constructing a roundhouse, but the owner might take such sand so far as not interfering with the use of the land for railroad purposes: *Vermilya v. Chicago, M. & St. P. R. Co.*, 66–606.

By the condemnation proceedings a corporation requires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443; *Cummings v. Des Moines & St. L. R. Co.*, 63–397; *Clayton v. Chicago, I. & D. R. Co.*, 67–238.

The conveyance to a railway of a right of way conveys only an easement: *Brown v. Young*, 69–625.

Constitutes an incumbrance: The right of way over land for a railway is an incumbrance for which a grantee of the land may recover on a covenant against incumbrances, although he knew of the existence of such right of way at the time of purchasing: *Barlow v. McKinley*, 24–69; *Jerald v. Elly*, 51–321; *Flynn v. White Breast Coal, etc., Co.*, 72–738.

But the mere use and exercise of a right of way over the property is not sufficient to establish such right or raise a presumption of its existence: *Jerald v. Elly*, 51–321.

Subject to foreclosure proceedings: Where a railway company takes a deed for a right of way, and enters into possession pending foreclosure proceedings against the property, it is bound by decree and sale thereunder, though not made a party: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

Width which may be taken: Under the statutory provision allowing the condemnation of a strip of land one hundred feet in width, the company is not limited to fifty feet on each side of its track, but the track may be located anywhere on the tract taken: *Stark v. Sioux City & P. R. Co.*, 43–501.

Additional width: Where a company has the power to build an additional lateral road auxiliary to the original road, the construction and maintenance of which is possible only upon an independent right of way, the right of way statute, limiting the width of right of way to one hundred feet, does not prevent the condemnation of land for such additional road; and the same power may be exercised by another corporation, even though it derives all its means from the first, and builds the road with the express design of leasing it: *Lower v. Chicago, B. & Q. R. Co.*, 59–563.

Where a company entered into possession of and constructed its road over a right of way thirty feet in width acquired by deed, and subsequent proceedings to condemn a right of way seventy feet wide were instituted, *held*, that the subsequent proceedings must be considered as intended to secure a right of way in addition to that acquired by deed: *Gray v. Burlington & M. R. R. Co*, 37–119.

When a railway company applies for a hundred feet or less in width for a right of way, it must be conclusively presumed that the amount applied for is necessary, and the fact that the company owns land on one side of such right of way will not limit the amount which it may condemn: *Stark v. Sioux City & P. R. Co.*, 43–501.

Depot grounds: Under a previous statute, *held*, that a company had no right to condemn additional land for depot grounds, and that therefore any proceeding for that purpose might be enjoined: *Forbes v. Delashmutt*, 68–164.

Use by another road: Where right of way over land has been acquired by one railroad the owner cannot have an injunction against another road for using such right of way under agreement with the road to which it belongs: *Holbert v. St. Louis, K. C. & N. R. Co.*, 38–315.

Appropriation of right of way by another company: The easement acquired by a railroad company is acquired to public use, and is in the nature of a grant from the state for the uses and purposes provided by law, and when the company fails to carry out the purposes of the grant, the legislature may transfer the easement to another company upon making compensation to the former company: *Noll v. Dubuque, B. & M. R. Co.*, 32–66; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57–249.

Transfer to another road: Where a right of way has been deeded to one railway company in consideration of the benefit to be derived from the construction of its line, such right of way cannot be transferred by that company to another proposing to construct a different line not running in the same direction: *Crosbie v. Chicago, I. & D. R. Co.*, 62–189.

Who entitled to condemn: It is sufficient under the statute to allege that the party seeking to secure a right of way is a corporation duly organized, and engaged in building a railroad: *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36–299.

A foreign corporation could not, before the amendment of this section, procure right of way by condemnation proceedings, and might be restrained by injunction from using property for right of way until the right was in some other manner procured: *Holbert v. St. Louis, K. C. & N. R. Co.*, 45–23.

Before the change in the statute allowing foreign corporations to condemn land for right of way, *held*, that where nothing appeared to the contrary it would be presumed that the condemnation was properly made on behalf of a corporation duly authorized to institute the proceedings: *Kostendader v. Pierce*, 37–645.

Horse railways: The provisions for condemning right of way for the use of railway companies are applicable to railways operated by animal power as well as those operated by steam: *Clinton v. Clinton & L. H. R. Co.*, 37–61.

Railways in cities: By § 623 the method of assessing damages for right of way is made applicable to damages caused to abutting owners from the construction of a railway upon the streets of a city, and such proceedings can be instituted only by the company and not by the property owner, who may have an action for damages without regard to the method of assessment thus provided: *Mulholland v. Des Moines, A. & W. R. Co.*, 60–740.

Further as to the rights of railway companies to construct their tracks over the streets of cities and towns, see notes to § 623.

Parol license: Where the company by parol license enters upon ground to construct its railway the subsequent payment of the damages assessed gives it an easement by contract, which, though arising upon parol, cannot be revoked: *Slocumb v. Chicago, B. & Q. R. Co.*, 57–675.

In such case a subsequent purchaser takes subject to the right of way, whatever it is, if it does not exceed the statutory width, and cannot set up non-user by the company of a portion, and adverse possession thereof, to defeat its rights: *Ibid.*

Presumption: Where a railway company is conceded to be in rightful possession of a right of way it will be presumed that it has an easement acquired either by condemnation or purchase: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302.

Subsequent condemnation: Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

In an action against a railroad by an adja-

cent owner for damages for the occupation of a street in which such adjacent owner holds the fee, it is error to reject a deed from such owner to the company for right of way over his premises: *Frith v. Dubuque*, 45-406.

The occupation of premises taken for right of way cannot be enjoined for failure to pay therefor under proceedings which have been declared void where the company has a deed granting it a right of way substantially the same as that occupied: *Bentley v. Wabash, St. L. & P. R. Co.*, 61-229.

Where a railway company having a right of way thirty feet in width instituted proceedings to condemn a right of way seventy feet in width, *held*, that such proceedings must be considered as intended to secure an additional right of way, and that payment of the damages assessed in such proceedings did not cancel the obligation entered into by the company in accepting the deed: *Gray v. Burlington & M. R. R. Co.*, 37-119.

1905. For reservoirs. 1242. It may, also, take and hold additional real estate at its water-stations, for the purpose of constructing dams and forming reservoirs of water to supply its engines. Such real estate shall, if the owner requests it, be set apart in a square or rectangular shape, including all the overflowed land, by the commissioners as hereafter provided; but the owner of the land shall not be deprived of access to the water or the use thereof in common with the company on his own land. And the dwelling-house, outhouse, orchards, and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section. [12 G. A., ch. 117, § 1.]

1906. Pipes. 1243. Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not to a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its engines from any running stream; and shall, without unnecessary delay, after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which they may pass to its natural grade; and shall, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes; and the owner of the land through which the same may be laid, shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith; said pipes shall not be laid to any spring, nor be used so as to injuriously withdraw the water from any farm; *provided*, that such corporation shall be liable to the owner of any such lands for any damages occasioned by laying down, regulating, keeping open, or repairing such pipes, such damages to be recoverable from time to time as they may accrue in any ordinary action in any court of competent jurisdiction. [Same, § 2.]

1907. Depot grounds. 20 G. A., ch. 190, § 1. Any railway corporation owning or operating a completed railway in the state of Iowa, shall have power to condemn lands for necessary additional depot grounds in the same manner as is provided by law for the condemnation of the right of way: *Provided*, that before any proceedings shall be instituted to condemn such additional grounds, the railway company shall apply to the railway commissioners, who shall give notice to the land owner and examine into the matter and report by certificate to the clerk of the circuit [district] court in the city in which the land is situated, the amount and description of the additional lands necessary for the reasonable transaction of the business, present and prospective, of such railway company. Whereupon said railway company shall have power to condemn the lands so certified by the commissioners.

MANNER OF CONDEMNATION.

1908. Sheriff's jury; damages assessed. 1244. If the owner of any real estate, necessary to be taken for either of the purposes mentioned in the three preceding sections [§§ 1904–1906], refuse to grant the right of way, or

other necessary interest in said real estate required for such purposes, or, if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated, shall, upon the application of either party, appoint six disinterested freeholders of said county, not interested in a like question, who shall inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county, and if said corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to said sheriff for the use of said owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises. [R., § 1317; 12 G. A., ch. 117, § 3.]

Measure of damages: The damages contemplated are the "just compensation" provided for by Const., art. 1, § 18. The owner is to have a fair equivalent in money for the injury done him by the taking of his property. It is the right of way which is appropriated, not the fee in the land; but the right of way is such as is peculiar to a railroad, and is the right to all freedom in locating, constructing, using and repairing such road and its appurtenances, and taking and using for that purpose only, any earth, gravel, stone, timber, etc., on or from the land taken, and the right to make cuts, embankments, etc., and includes the rights incident to rapid locomotion as against the owner of the fee. It seems that the right of way is intended to be in perpetuity: *Henry v. Dubuque & P. R. Co.*, 2–288.

The question as to the proper measure of damages in such cases discussed and the true measure declared to be the difference between the market value of the land entire, and its market value after the right of way is carved out: *Ibid.*; *Sater v. Burlington, etc., Plank Road Co.*, 1–386.

The amount of damage to be allowed is what will compensate plaintiff for the appropriation of the right of way. It may be more or less than the value of the property taken: *Gear v. Chicago, C. & D. R. Co.*, 39–23.

Where the damages to a leasehold estate are to be assessed, the proper measure of damages is the difference in value of the annual use of the property, before taking and after: *Renwick v. Davenport & N. W. R. Co.*, 49–664.

The land owner is entitled to the full and fair value of the land appropriated, and, in addition thereto, to such sum as will compensate him for the depreciation in value of his adjoining land by reason of the right of way, irrespective of any benefits of the road to the land; but speculative, contingent or future damages, not affecting the market value, cannot be allowed: *Smalley v. Iowa Pacific R. Co.*, 36–571.

Increased danger of injury to or destruction of the property by reason of exposure to fire or other dangers incident to the operation of a railroad are elements of damage for which compensation should be made: *Small v. Chicago, R. I. & P. R. Co.*, 50–338, 344; *Dreher v. Iowa Southwestern R. Co.*, 59–599.

But it is error to take into account the value of specific property, such as a grove or house, which might be destroyed by fire: *Lance v. Chicago, M. & St. P. R. Co.*, 57–636.

The value of growing crops upon the right of way to be taken may be considered in assessing the compensation: *Ibid.*

The question whether, because of the construction of the road, the land is made more wet than it otherwise would be is a proper one, it not being sought to show that such damages were a result of the improper construction of the road: *Britton v. Des Moines, O. & S. R. Co.*, 59–540.

The fact that the road-bed is constructed in a cut is a proper fact to be shown in estimating damages: *Cummins v. Des Moines & St. L. R. Co.*, 63–397.

While the land owner is not entitled to prove the proximity of the depot or the number of tracks as independent elements of damage, yet such evidence may be admissible in determining the extent to which the company would probably use the ground taken in carrying on its business: *Ibid.*

As the company acquires the right to occupy and use the whole of the right of way, it cannot have the damages assessed on the theory that it will in fact use but part, and therefore that the occupation of buildings situated upon the right of way will not be disturbed: *Ibid.*

Unless it appears that the reversionary right of the land owner is of some value, as, for instance, by reason of the land being underlaid by coal or mineral, it is not error to disregard such reversionary interest and assess the damages at the market value of the property taken: *Ibid.*; *Hollingsworth v. Des Moines & St. L. R. Co.*, 62–443.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62–11.

Although the right of way taken is an easement and the fee remains in the owner, yet, unless it is made to appear that the fee burdened with the easement is of some determinative value, the assessment of damages should be based on the full value of the land actually taken, and it is not error to refuse to instruct the jury on the theory that the fee remains in the owner, and that at some time in the future the land may cease to be used

for railway purposes and revert to such owner: *Clayton v. Chicago, I. & D. R. Co.*, 67–238.

Where a railway company was seeking to condemn a right of way between the property of a riparian owner and the Mississippi river, *held*, that the owner was entitled to damages caused to an embankment constructed by him extending out to a crib in the river: *Renwick v. Davenport & N. W. R. Co.*, 49–664.

The owner is not invested with the right to cross the right of way after its appropriation at his pleasure. Whatever right he has in that respect is subservient to that of the company using the road for the running of its trains: *Ibid.*

The question of the right of passage, as affected by the taking of the right of way, may be shown as affecting the damages: *Bell v. Chicago, B. & Q. R. Co.*, 74–343.

Various items of damage *held* properly taken into account by a witness in testifying as to the market value of land after taking the right of way: *Smalley v. Iowa Pacific R. Co.*, 36–571.

The prices at which other lands in the vicinity of the premises had been sold about the time of the commencement of the proceedings is not receivable in the absence of evidence that there was any similarity between the lots in question and those which it was claimed had been sold: *Cummins v. Des Moines & St. L. R. Co.*, 63–397; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

It is proper for the court to state the law governing damages in such cases as found in the constitution and statutes of the state, no matter what evidence is introduced: *Ball v. Keokuk & N. W. R. Co.*, 74–132.

Market value: In determining the damages the proper rule is to first ascertain the fair market value of the premises over which the proposed improvement is to pass, irrespective of the improvement, and also the like value of the same in the condition in which the premises will be after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value will constitute the measure of compensation: *Sater v. Burlington, etc., Plank Road Co.*, 1–386.

The owner may be a witness generally as to the value of the land before and after appropriation, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises and what he takes into consideration in making up his judgment: *Ibid.*

In determining the amount of damage the witness may be allowed to testify as to the value immediately before the right of way was taken and immediately after, not taking into consideration the benefit to the land: *Harrison v. Iowa Midland R. Co.*, 36–323.

The opinion of a witness as to the value before taking is admissible: *Henry v. Dubuque & P. R. Co.*, 2–288, 311.

It is usual to take the testimony of the witness upon questions of the value of property when he states under oath that he knows its value or that he knows the value of like property: *Ball v. Keokuk & N. W. R'y Co.*, 74–132.

It is not proper in such proceedings to show by evidence at what price the purchase of right of way from adjoining tracts has been secured, unless it is shown that such tracts were of like character or that the right of way had a uniform and marketable value in that neighborhood: *King v. Iowa Midland R. Co.*, 34–458.

In ascertaining the damages to land used, improved and occupied together as one farm, witnesses cannot be asked as to the value of detached parcels: *Winklemans v. Des Moines N. W. R. Co.*, 62–11.

Witnesses who were jurors for the assessment of damages in the first instance cannot be required to state on a trial of the case on appeal whether their report of the assessment made to the sheriff correctly expressed their judgment as to the amount of damages sustained: *Ibid.*

The fact that on the prior assessment the land owner made no claim for damages which were afterwards assessed upon appeal, *held* not objectionable, as it did not appear on the original assessment that such damages would result from the taking of the right of way: *Ibid.*

While it is competent to show the situation and general surroundings of the land, its character, and the roads leading thereto, etc., yet where the land was situated beyond the limits of a city and was not in the market as residence property, *held*, that evidence as to the character of improvements being made upon the street leading toward the land, but which would not if extended come within eighty yards of it, was improper in determining the damages caused to the land: *La Mont v. St. Louis, D. M. & N. R. Co.*, 62–193.

The inquiry is not as to any special value of the property to the owner growing out of ownership of other distinct and separate property, nor that of the particular premises over which the road passes as intended to be put in the future to a particular use in connection with other distinct and separate pieces of land. Regard must be had to the immediate and not the remote damages of the appropriation: *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Evidence of increased fire risk in connection with the use of the premises intended to be made in the future cannot be taken into account: *Ibid.*

Entire premises: Damages to the entire premises necessarily and properly used by the owner in his business should be estimated, although such premises are divided by a street or highway: *Renwick v. Davenport & N. W. R. Co.*, 49–664.

Where the right of way passes through a farm the owner may show as damages depreciation in value of the whole farm, and is not limited to the damages to the governmental subdivision through which the road runs: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

Where two lots are improved and used as one property and a notice of proceedings to condemn a right of way to one lot only is given, and the right of way is taken entirely from such lot, nevertheless the commissioners

may properly include both lots in their assessment and return: *Cummins v. Des Moines & St. L. R. Co.*, 63–397.

In such cases it will be presumed that the title to both lots is in the owner against whom the proceedings with reference to one lot is instituted, without proof on his part of that fact, the finding of the commissioners as to the ownership of the property not having been questioned on appeal: *Ibid.*

If a railway company applies to have the damages assessed, and, in its application, designates the land known as the farm of the adverse party, or if the jury is called under an agreement of both parties, and it is therein specified that the damages to the land owner in consequence of the location across his farm shall be assessed, the railway company will afterwards be estopped from confining the assessment to the immediate portion of land over which the railroad crosses, and also from denying defendant's ownership of such land, the damages to which they have agreed shall be assessed: *Mississippi & M. R. Co. v. Byington*, 14–572.

Where different portions of land belonging to the same owner were adapted to different uses, and only one of such portions was crossed by the right of way, *held*, that the portion not crossed could not be taken into consideration in determining the damages: *Haines v. St. Louis, D. M. & N. R. Co.*, 65–216.

Cost of fencing: The cost of building additional fence and keeping the same in repair should not be allowed as part of the damages: *Henry v. Dubuque & P. R. Co.*, 2–288; *Kennedy v. Dubuque & P. R. Co.*, 2–521; *Hanrahan v. Fox*, 47–102.

Although the cost of fencing is not to be taken directly into account, yet, if the land was before fenced, and, by the taking of the right of way, it is thrown open and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises: *Henry v. Dubuque & P. R. Co.*, 2–288. 310.

Damages for improper construction: The damages to be awarded include those only from the appropriation and lawful use of the premises taken, and do not embrace injuries which may result from unlawful acts for which the company would be liable to the party injured: *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Damages consequent upon the negligent construction of the road are not to be considered. Only such damages are to be included as arise from its proper construction: *King v. Iowa Midland R. Co.*, 34–458; *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Obstruction of highway: The obstruction of a public highway is not a proper element of compensation to the owner of the property in this proceeding: *Gear v. Chicago, C. & D. R. Co.*, 43–83; *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Trespass: If a subcontractor in constructing the road, without authority from the company, goes outside of the right of way and commits trespass on land not condemned, the company is not thereby rendered liable. In order to render the company liable it must be made to appear, in some way, that it consented to the trespass or had such knowledge of it at the time it was done that its consent might be presumed: *Waltemeyer v. Wisconsin, I. & N. R. Co.*, 71–626.

Diversion of water-course, etc.: The right which the owner of land has to a water-course flowing over it is a freehold right which cannot be taken from him for public use either directly or by diminution or diversion from its natural channel, without adequate compensation: *McCord v. High*, 24–336.

The fact that a right of way is asked across land crossed by a stream of water does not authorize the assessment of damages for the diversion of the stream from its natural channel when such diversion would not be absolutely necessary. The mere fact that such diversion would be convenient or advantageous in the construction of the road will not authorize the implication that the company desires to acquire the right to make such diversion and pay the damage therefor rather than construct its road by bridging or otherwise, so as to render such diversion unnecessary: *Stodghill v. Chicago, B. & Q. R. Co.*, 43–26.

The right to obstruct the passage of surface water is not presumed to be acquired in a condemnation proceeding, and the damages assessed do not cover damages resulting from such stoppage. The owner is not presumed to have been paid therefor, upon the theory that the company preferred to protect him against this incidental injury, and the enjoyment of the easement carries with it from day to day the obligation to furnish this protection: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302. And see *S. C.*, 70–59.

Interference with wells: Where a railway company had acquired right of way over land, *held*, that in connection with such right of way it might dig wells and would not be liable for thereby interfering with the percolation of water supplying springs upon the premises of the land owner: *Hougan v. Milwaukee & St. P. R. Co.*, 35–558.

The fact that the construction of a railway destroys a valuable spring may be shown in evidence in determining the amount of damages. It will not be presumed that the spring was unnecessarily destroyed in the absence of evidence to that effect: *Winklemans v. Des Moines N. W. R. Co.*, 62–11.

Consequential damages: Regard must be had only to the immediate and not to the remote consequences of the appropriation. The value of the remaining premises is not to be depreciated by heaping consequence on consequence: *Sater v. Burlington, etc., Plank Road Co.*, 1–386.

Damages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken: *Kucheman v. Chicago, C. & D. R. Co.*, 46–366, 376.

Obstructing a view or interfering with the owner's privacy, and the noises of approaching trains, are matters for which the land owner may have compensation. As to such matters he is not injured merely as a member of the community in general: *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

Evidence in regard to how the railroad affects a farm over which it passes, aside from the mere value of the land taken, is admissible: *Dresher v. Iowa Southern R. Co.*, 59–599.

Incidental injury from smoke and dust and the noise of moving trains gives no right for the recovery of damages where there is no other injury to which the smoke, etc., is incident. So *held* where the land condemned had not yet been actually occupied or interfered with by the railway company: *Dimmick v. Council Bluffs & St. L. R. Co.*, 58–637.

Damages not connected with the taking of land: Whatever inconveniences a property owner may suffer by the construction of a railway upon the property of another, no carelessness or negligence in such construction appearing, such injuries will not entitle such property owner to compensation in damages: *Barr v. Oskaloosa*, 45–275.

When assessment proper: While the statute only contemplates an assessment where the owner refuses to grant the right of way, or when the parties cannot agree as to the compensation, yet where it appears that the land owner contests the right of the company to take his land on the terms fixed by the appraisers and attacks the regularity of the proceedings of such appraisers, and that the appraisers were only to assess damages in cases where the owners had refused to grant the right of way, *held*, that the refusal to grant the right of way sufficiently appeared to show the jurisdiction of the court: *Mississippi & M. R. Co. v. Rosseau*, 8–373.

Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

The phrase "owner of any real estate" includes a mortgagee, and if not made a party to the proceedings he is not bound thereby: *Severin v. Cole*, 38–463.

This section refers to land taken and appropriated for right of way. The provisions of § 623, with reference to assessing damages to the abutting property owner by reason of the construction of a railroad track along the streets of a city, do not authorize such abutting property owner to have his damages assessed in this manner: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Respective interests of joint owners: Where the respective interests of tenants in common appear of record or can be conveniently ascertained, the company, if it applies for the appointment of commissioners to assess damages, should by its application cause such damages to be assessed separately to each owner: *Ruppert v. Chicago, O. & St. J. R. Co.*, 43–490.

A sheriff's jury cannot apportion the damages between the owner and the person holding a mortgage upon the land. They are to estimate the right of way only, and where the mortgagee is not made a party he may voluntarily assert his right to the money in the hands of the sheriff: *Sawyer v. Landers*, 56–422.

Enforcement of payment: Where it had been agreed that the compensation to be paid for the right of way should be fixed by a third person, and under such agreement the railway company went into possession, but the amount of compensation was never fixed, *held*, that the land owner might, by condemnation proceedings, enforce payment of the compensation to which he was entitled: *Corbin v. Wisconsin, I. & N. R. Co.*, 66–269.

The agreement between the parties in such case as to the amount of damages might be interposed as a defense to the claim for damages in excess of the amount agreed upon, but such agreement need not be specially pleaded: *Ibid.*

New assessment: Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the land could not have another assessment of damages for the use of the premises by another railway company without a return of the money thus deposited: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

Even though the land owner is seeking to set aside a deed previously made, on the ground of fraud or otherwise, he cannot disregard the previous transaction and have a new assessment: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

A land owner who has received compensation which has not been refunded by him cannot recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64–635.

Homestead exemption: Damages assessed for a right of way over the homestead are exempt from execution to the same extent that the homestead is: *Kaiser v. Seaton*, 62–463.

Liability of commissioners: The commissioners should not be put to costs for doing in a regular and legal way what they are required to do, and in a *certiorari* proceeding to review their action an answer setting out the notice in the proceeding under which they are acting is sufficient: *Forbes v. Delashmutt*, 68–164.

Dismissal of proceedings: Where the company has not entered upon the land to construct the road, no right to the amount of damages assessed becomes vested in the land owner until the decision on the appeal, and pending the appeal the company may dismiss the proceedings: *Burlington & M. R. Co. v. Sater*, 1–421.

A proceeding for the condemnation of land for a railway simply fixes the price upon payment of which, within a reasonable time, the company may take the right of way. The company cannot be compelled to pay the damages and take the way, but may waive the rights acquired by the proceedings, being liable, however, for costs and for any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Judgment for the amount of damages, even though entered in the usual form of a judgment in an action of debt, passes no title to the company before payment, nor does it compel the acceptance of or payment for the land: *Ibid.*

Where, in proceedings to assess the damages for a right of way already occupied, the amount assessed is paid to the sheriff, and an appeal is afterwards taken, the railroad company cannot, by abandoning its right of way, defeat the land owner's right to the amount so paid, but such abandonment may be considered in determining the damages to which the land owner shall be entitled upon the trial of such appeal, and it would be error to enter a judgment for additional damages contingent upon the re-occupation of the land by the company; and *held*, that such re-occupation should not be made without a new assessment of damages: *Hastings v. Burlington & M. R. R. Co.*, 38-316.

A proceeding instituted by a railway company to condemn a right of way may be dismissed as any other action without prejudice, and will not defeat a subsequent proceeding of the same character to condemn the right of way over such property: *Corbin v. Cedar Rapids, I. F. & N. W. R. Co.*, 66-73.

Remedies of land owner: The proceedings may be instituted by the land owner after the railway is completed: *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The method provided for ascertaining and compelling the payment of the damages is exclusive, and none other can be pursued. But the owner is not deprived of his right to bring action for the possession of his property when taken without compensation: *Daniels v. Chicago & N. W. R. Co.*, 35-129.

A party has, by appeal, an adequate remedy against any irregularities which may occur in the proceedings or any injustice which may be done him in the award, and if he has personal notice this remedy is exclusive as to all such matters, and he cannot rely upon irregularities as a ground for restraining the construction of the road in accordance with such proceedings: *Phillips v. Watson*, 63-28.

If the company enters upon the land before the damages are paid it may be treated as a trespasser. The owner is not compelled to resort to an injunction or an action for the amount: *Henry v. Dubuque & P. R. Co.*, 10-540.

Where the occupancy of a right of way is commenced and continued without right, the company is a mere trespasser, and the land owner or his grantee may maintain an action for damages for the occupation of the land: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

If the company enters before payment of the damages assessed it may be held liable in damages as for a tort: *Dimmick v. Council Bluffs & St. L. R. Co.*, 62-409.

In an action to recover possession of land occupied without condemnation by the company, plaintiff may recover damages for the use of the premises. It is not necessary that such damages be assessed in a condemnation proceeding: *Birge v. Chicago, M. & St. P. R. Co.*, 65-440; *Rush v. Burlington, C. R. & N. R. Co.*, 57-201.

On failure of the company which is already in possession and use of the premises for right of way to pay the amount assessed, it may be restrained by injunction from further using the premises: *Henry v. Dubuque & P. R. Co.*, 10-540; *Richards v. Des Moines Valley R. Co.*, 18-259.

The same right to an injunction will accrue to the land owner in case he institutes proceedings for assessing the damages: *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The land owner is not estopped from maintaining proceedings to recover compensation for land taken for right of way by the fact that he has allowed the railway company to go upon and use his land for that purpose, and make improvements thereon: *Ibid.*

In such cases he may maintain an injunction restraining defendant from further using the right of way without making compensation, or maintaining ejectment for the possession of the premises, if it appears that damages have been assessed and nothing but payment is wanting to entitle the company to the continued use of its right of way. It is proper to provide that no execution for the possession of the premises under such circumstances shall issue in the action of ejectment if the damages are paid within a limited time: *Conger v. Burlington & S. W. R. Co.*, 41-419.

By agreement of parties an appeal was taken from the assessment of damages and judgment for the amount assessed was entered in such appeal, and execution thereon was stayed for two years, and the railroad was constructed through the property without objection. *Held*, that upon failure to pay the amount of the judgment at the time specified, the owner could proceed by injunction to restrain any further use of his property until compensation should be made: *Irish v. Burlington & S. W. R. Co.*, 44-380.

A railway company may be dispossessed of its right of way by a judicial sale in a proceeding to enforce the land owner's right. So *held* where the owner of land had agreed to give the right of way in consideration of the performance of certain conditions by the company which had not been performed, and action was brought by the owner to foreclose his vendor's lien. Also, *held*, that the vendor's lien in such case was superior to the title of the purchaser of the railroad at foreclosure sale: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

Deposit of damages assessed: The fact that the company deposits the sum found due with the sheriff will not prevent the land owner from recovering, on appeal, the actual damage to the property and interest thereon from the time it is taken, even though the amount of the original damages is found to be less than that assessed by the sheriff's jury: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

The sheriff, in receiving the money deposited as security cannot be regarded as the agent of the owner, but he is the agent of the railway company, and if, through the unfaithfulness or mistake of the sheriff, the money is lost before reaching the hands of the land owner, such loss does not fall upon him but upon the company making the deposit: *White v. Wabash, St. L. & P. R. Co.*, 64-281.

For moneys paid to a sheriff by the company the land owner may maintain action against him at any time after the expiration of the thirty days allowed for appeal. The statute of limitations, therefore, runs against

such an action from that time, and the fact that the land owner has refused the money and attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66–408.

1909. Application; notice. 1245. The application to the sheriff shall be in writing, and the freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein, may, at any time after their appointment, have the damages assessed in the manner herein prescribed by giving the other party five days' notice thereof in writing, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices. [R., § 1318.]

Where a mortgage upon the property appears of record, notice must be given to the mortgagee, or he will not be bound by the proceedings: *Severin v. Cole*, 38–463. And see *Cochran v. Independent School Dist.*, 50 663.

Where the proceedings are based upon the assumption that the owner is a non-resident and unknown, such assumption will be deemed true on *certiorari* unless the contrary is made to appear: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land is affected by the proceedings. It is not sufficient that it be directed to all persons having an interest in certain described property: *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

Where a right of way over agricultural college land in possession of a lessee was condemned in proceedings to which the college was a party, and afterwards, the lessee's right being forfeited, the premises were sold to another, *held*, that the condemnation proceedings were binding on the subsequent purchaser of the premises: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

1910. Minor or insane owner. 1246. If the owner of any lands is a minor, insane, or other person under guardianship, the guardian of such minor, insane or other person, may, under the direction of the circuit [district] judge, agree and settle with said corporation for all damages by reason of the taking of such lands for any of the purposes aforesaid, and may give valid conveyances of such land. [R., § 1316.]

1911. Non-resident owner. 1247. If the owner of such lands is a non-resident of the county in which the same are situate, no demand of the right of way or other purpose for which such lands are desired, shall be necessary, except the publication of a notice which may be in the following form:

NOTICE.— For the appropriation of lands for railway purposes. To (here name each person whose land is to be taken or affected), and all other persons having any interest in, or owning any of the following real estate (here describe the land by its congressional numbers in tracts not exceeding one sixteenth of a section, or, if the land consists of lots in a town or city, by the numbers of the lot and block). You are hereby notified that the —— has located its railway over the above described real estate, and desires the right of way over the same, to consist of a strip or belt of land —— feet in width, through the centre of which the centre line of said railway will run, together with such other land as may be necessary for bermes, waste banks, and borrowing pits, and for wood and water stations (or desires the same for the purposes mentioned in sections twelve hundred and forty-two, and twelve hundred and forty-three of this chapter [§§ 1905, 1906], as the case may be), and unless you proceed to have the damages to the same appraised on or before —— day of ——, A. D. 18— (which time must be at least four weeks after the first publication of the notice), said company will proceed to have the same appraised on the —— day of —— (which must be at least eight weeks after the first publication of the notice), at which time you can appear before the appraisers that may be selected. —— Railway Company.

By —— ——, attorney, or —— ——, agent.

[13 G. A., ch. 62, §§ 1, 2, 3.]

Where proceedings were based upon the assumption that the owner was a non-resident and unknown, *held*, on *certiorari*, that the contrary not being made to appear, the proceedings were not irregular: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land has been taken or affected. It is not sufficient that it is directed to all other persons having an interest in the property described: *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

1912. Notice published. 1248. Said notice shall be published in some newspaper in the county, if there be one; if there is none, then in a newspaper published in the nearest county through which the proposed railway is to run, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation. [Same, § 3.]

1913. Appraisement. 1249. At the time fixed in either aforesaid notices, the appraisement may be made and returned in tracts larger than forty acres, and all the lands appearing of record to belong to one person and lying in one tract may be included in one appraisement and return, unless the agent or attorney of the corporation, or the commissioners, has actual knowledge that the tract does not belong wholly to the person in whose name it appears of record; and in case of such knowledge, the appraisement shall be made of the different parcels, as they are known to be owned. [Same, § 4.]

That damages to the entire premises of a property owner, and not merely to the government subdivision through which the road passes, are to be assessed, see notes to § 1968.

1914. Dwelling-house, garden, or orchard. 1250. If it appears from the finding of the commissioners that the dwelling-house, outhouse, orchard, or garden, of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed under section twelve hundred and forty-two of this chapter [§ 1905], such dam shall not be erected until the question of such overflowing or other injury has been determined upon appeal in favor of the corporation. [12 G. A., ch. 117, § 3.]

1915. Talesmen. 1251. In case of the death, absence, neglect, or refusal, of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel. [R., § 1319.]

1916. Costs. 1252. The corporation shall pay all the costs of the assessment made by the commissioners, and those occasioned by the appeal, unless on the trial thereof a less amount of damages is awarded than was allowed by the commissioners. [R., § 1317; 14 G. A., ch. 119.]

Where the damages allowed on the appeal are less than those awarded in the assessment, in the absence of any showing that either party has made an offer, the costs should be apportioned: *Neale v. Des Moines & St. L. R. Co.*, 6–657.

If, on the trial of an appeal by the land owner, a less amount of damages is given than was awarded by the commissioners, the court is not bound to tax all the costs of appeal to him, but may distribute them according to the general rules of law without reference to this section: *Jones v. Mahaska County Coal Co.*, 47–354.

The purchaser of a railroad pending an appeal from allowance of damages for right of way becomes liable for the payment of costs incurred in such proceeding: *Frankel v. Chicago, B. & P. R. Co.*, 70–424.

1917. Report recorded. 1253. The report of the commissioners, where the same has not been appealed from, and the amount of damages assessed and costs have been deposited with the sheriff, or, if an appeal is taken and the amount of damages assessed on the trial thereof has been paid to the sheriff, may be recorded in the record of deeds in the county where the land is situate, and such record shall be presumptive evidence of title in the corporation to the property so taken, and shall constitute constructive notice of the rights of such corporation therein. [13 G. A., ch. 125, § 1.]

The company cannot be compelled to pay the damages assessed and take the right of way, but may waive the rights acquired by the proceedings, being liable, however, for costs, and any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

The recording of the award, if done by mistake, does not pass any title to the company so as to raise an implied contract to pay the amount of the award; certainly not until the fact of the mistake has become known to the company and it has had a reasonable time to correct it: *Limmick v. Council Bluffs & St. L. R. Co.*, 58–637.

Where a portion of plaintiff's land was in-

cluded in the right of way condemned, but the road was not actually constructed over any portion of his land, which remained fenced and was not entered upon, *held*, that an appropriation did not appear, and title to the right of way did not pass to the company until it had made payment: *Ibid.* And see *S. C.*, 62–409.

APPEALS.

1918. How taken. 1254. Either party may appeal from such assessment of damages to the circuit [district] court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff, notice in writing that such appeal has been taken; the sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall thereupon take jurisdiction thereof and try and dispose of the same as in actions by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant. [R., § 1317.]

Waiver: Objections to the jurisdiction of the sheriff's jury are not waived by appearance on appeal: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Exclusive remedy: The remedy by appeal is conclusive of all other remedies as to the manner and method of taking advantage of irregularities in the proceeding: *Phillips v. Watson*, 63–28.

An appeal is a plain, adequate and speedy remedy when the claim is that insufficient damages are given. Irregularities in the proceeding cannot be corrected by *certiorari*: *Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64–694.

Joint assessment: Where the damages are assessed jointly in favor of two owners, one of them cannot properly prosecute an appeal without joining the other as appellant or making him a party to the proceedings by notice. Upon failure to do so the appeal should be dismissed on motion: *Chicago, R. I. & P. R. Co. v. Hurst*, 30–73.

A subsequent settlement with a part of the owners in common, where the assessment is not apportioned, will not defeat an appeal by those not settled with: *Ruppert v. Chicago, O. & St. J. R. Co.*, 43–490.

By mortgagee: The owner may take an appeal without joining a mortgagee therein, although an award has been made in favor of the owner and mortgagee jointly: *Lance v. Chicago, M. & St. P. R. Co.*, 57–636.

By person not party: A person not a party to the proceedings, although interested in the property, cannot appeal. Such person might, perhaps, make himself a party before the commissioners, but he cannot make himself a party merely by appealing: *Connable v. Chicago, M. & St. P. R. Co.*, 60–27; *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R.Co.*, 60–35.

Whether, where publication of notice is authorized to be made to parties interested, all persons interested are to such extent parties as that they may appeal, *quære: Ibid.*

As to part of damages: Where the assessment covers the entire damage to two contiguous tracts used together and owned by the same person, an appeal cannot be taken from an assessment as to one tract only: *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60–35.

The sheriff is not a party to the condemnation proceedings, and is not disqualified from serving notice of appeal therein: *Ibid.*

Notice: Whether the giving of notice to the deputy-sheriff would be sufficient, *quære: Waltmeyer v. Wisconsin, I. & N. R. Co.*, 64–688.

But where it appeared that notice was brought to the sheriff's attention and he directed the deputy to accept service, *held*, that the notice was sufficient: *Ibid.*

Notice of appeal may be properly served on the engineer in charge of the survey and location of the railroad, and transacting business connected with securing the right of way in the county where the appeal is taken: *Jamison v. Burlington & W. R. Co.*, 69–670.

The time for taking the appeal begins to run from the time the assessment is in fact made, reduced to writing, and made public, or in some legitimate manner comes to the knowledge of the parties interested: *Ibid.*

Upon motion being made to dismiss the appeal because not taken in time, affidavits of jurors for making the assessment are receivable to show when the assessment was actually made: *Ibid.*

Filing papers: Where the appeal has properly been taken by notice, the appellant should not be prejudiced by a failure of the officer to file the papers at the time required by statute: *Robertson v. Eldora R., etc., Co.*, 27–245.

Change of venue may be had on the appeal the same as in civil actions: *Whitney v. Atlantic Southern R. Co.*, 53–651.

Assessment of damages on appeal: On appeal the question of damages is to be determined upon its merits, and the regularity of prior proceedings, such as the selection of commissioners, etc., is not to be called in question. That can only be done by *certiorari*: *Mississippi & M. R. Co. v. Rosseau*, 8–373. And see *Runner v. Keokuk*, 11–543.

The assessment of damages upon appeal is to be made without any reference to that appealed from: *Hahn v. Chicago, O. & St. J. R. Co.*, 43–333.

The notice of appeal is presumptive evidence of an assessment from which an appeal can be taken: *Ibid.*

An appeal by the land owner from the assessment of the commissioners cures any defect

in regard to giving notice of the assessment to such owner: *Borland v. Mississippi & M. R. Co.*, 8–148.

In the proceedings on appeal an offer to confess judgment may be made with the consequences provided in § 4109, with reference to costs: *Harrison v. Iowa Midland R. Co.*, 36–333.

The company may dismiss the proceedings at any time before judgment upon payment of costs: *Burlington & M. R. Co. v. Sater*, 1–421.

It would seem that a land owner appealing need not give bond; but even if that be necessary, the failure to give bond at the time the appeal is taken ought not to work the dismissal of the appeal: *Robertson v. Eldora R., etc., Co.*, 27–245.

Judgment: Where, under the provisions of a previous statute, general judgment was rendered against the company on the appeal, *held*, that it could have no greater effect than an assessment of damages: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Allowance of interest: In case of an appeal by the railway company, the proper measure of damages is the value of the land at the time of its appropriation, with interest thereon to the date of judgment: *Daniels v. Chicago, I. & N. R. Co.*, 41–52.

Interest may be allowed on the damages awarded from the time of condemnation, provided the damages are greater than those allowed by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613.

Interest on the assessment does not begin to run from the time of assessment, but only from the time of taking possession: *Haye v. Chicago, M. & St. P. R. Co.*, 64–753.

In estimating the damages upon appeal the jury may consider the injury as originally sustained, and the interest which the original sum would have borne during the delay: *Noble v. Des Moines & St. L. R. Co.*, 61–637.

Where the court simply directed the jury to allow plaintiff the market value of the land taken at the time that it was taken, *held*, that such instruction was proper, and that interest should be allowed on the amount of the verdict from the time of the appropriation: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

The damages are to be assessed as of the date of the assessment by the sheriff's jury, and then upon the rendition of the verdict the court should make the proper order touching the question of interest. Such order should fix the date when the interest begins to run, which should be when the company deprives the property owner of the use of his property: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed. Rep., 886.

1919. Deposit. 1255. An appeal shall not delay the prosecution of the work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed by the commissioners; said sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of an appeal, but shall retain the same until the determination thereof. [R., § 1317.]

If an appeal is taken to the lower court and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the additional amount with the sheriff, and is not relieved from the obligation to do so by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63–177.

The right of the owner to receive the amount so deposited is suspended until the appeal is decided. The property is not taken, in an absolute sense, until the final assessment is paid, and the section is, therefore, not unconstitutional: *Peterson v. Ferreby*, 30–327.

The sheriff holds the deposit not as agent of the owner, but as agent of the company, and if it does not come into the hands of the owner, or is for any reason lost or misappropriated, such loss must be sustained by the company: *White v. Wabash, St. L. & P. R. Co.*, 64–281.

For moneys paid to a sheriff the land owner may maintain action against him at any time after the expiration of thirty days allowed for appeal. The statute of limitations, therefore, runs against such action from that time, and the fact that the land owner has refused the money and has attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66–408.

1920. When barred. 1256. An acceptance by the land owner of the damages awarded by the commissioners shall bar his right to appeal.

So *held* before there was any such statutory provision: *Mississippi & M. R. Co. v. Byington*, 14–572.

1921. Trial; judgment. 1257. On the trial of the appeal, no judgment shall be rendered except for costs; the amount of damages shall be ascertained and entered of record, and, if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises.

Under the Revision (which contained no similar provision), *held*, that where a general judgment was rendered against the company on appeal, it could have no greater effect than an assessment of damages as contemplated by the statute: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Interest may be allowed on the damages awarded from the time of condemnation, provided such damages are greater than as found by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613.

Further as to interest, see notes to § 1918.

1922. Additional deposit. 1258. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or, in any manner whatever, using or controlling the premises. And said sheriff, upon being furnished with a certified copy of such assessment, may remove said corporation, its agents, servants, or contractors, from said premises unless the amount of the assessment is forthwith paid or deposited with him.

Where the amount of damages awarded by the commissioners is paid to the sheriff and the company enters upon the land, if upon appeal by the land owner a larger sum is awarded, the company may be enjoined from further use of the property until it pays such further sum: *Richards v. Des Moines Valley R. Co.*, 18–259.

The federal court will not order its marshal to oust the railway company from the possession of the premises for non-payment of damages for the right of way fixed in that court on appeal, when the remedy of the statute, by application to the sheriff, is open to the property owner: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed. Rep., 886.

If appeal is taken from the award and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the amount with the sheriff, and is not relieved from the obligation by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63–177.

1923. Damages reduced. 1259. If the amount of the damages awarded by the commissioners is decreased on the trial of the appeal, the amount assessed on the trial of such appeal only shall be paid the land owners.

RIGHT OF WAY FOR CHANNELS AND DITCHES.

1924. May be condemned. 18 G. A., ch. 191, § 1. In all cases where any railroad corporation, organized under the laws of this state or any other state, owning or operating a line of railroad within this state, would have the right at this time, by procuring the right of way from the land owner, to dig a channel or cut a ditch in such manner as to change and straighten the course of a stream too frequently crossed by its road, or to protect the right of way and road-bed, or promote the safety and convenience of the operation of the road, such railroad company may condemn the right of way as provided in the next section.

This statute, at least in so far as it applies to cases where the right of way is taken, as provided for the purpose of promoting the safety of the traveling public, is not unconstitutional as authorizing the taking of private property for other than a public purpose: *Reusch v. Chicago, B. & Q. R. Co.*, 57–687.

1925. Method of procedure. 18 G. A., ch. 191, § 2. Any such railroad corporation desiring the right of way for any of the purposes contemplated in the preceding section, where its officers and the land owner cannot agree upon the compensation to be paid him, or when he refuses to grant the right of way, may cause to be condemned, of land belonging to such person a strip or belt of such reasonable width as may be necessary for the channel or ditch so desired, by pursuing in all respects, as near as may be, and so far as applicable, the provisions of law for the condemnation of real estate for right of way for said railroads, as provided in sections 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252 and 1253 of the code of 1873 [§§ 1904–1917].

1926. Appeal. 18 G. A., ch. 191, § 3. Either party may appeal from such assessment in the manner provided for appeals from the assessment of the sheriff's jury in the condemnation of real estate for right of way for railroads, and sections 1254, 1255, 1256, 1257, 1258, and 1259 of the code [§§ 1918–1923] shall be applicable to such appeal.

1927. Intent of statute. 18 G. A., ch. 191, § 4. The true intent of this act is not to create in favor of a railroad corporation any additional right to divert a water-course from its natural channel, but simply to give the right to condemn the land necessary for the right of way in all cases where by con-

veyances to the railroad corporation it would have the right to dig such channels or ditches; *provided*, that nothing herein shall permit any railroad company to turn the channel of any stream off of any cultivated or pasture or meadow lands, when said stream only touches said lands at one point, unless it be by the consent of the owner of said land.

NON-USER.

1928. Effect of. 1260; 15 G. A., ch. 65; 18 G. A., ch. 15. In any case where a railway constructed in whole or in part, has ceased to be operated or used for more than five years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased and has not been in good faith resumed for more than five years, and the same remains unfinished, or where any portion of such railway has not been operated for four years last past, and the rails and rolling stock have been wholly removed therefrom, it shall be deemed and taken that the corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, or from which the rails and rolling stock have been wholly removed, as aforesaid, in favor of any other corporation or person which may enter upon such abandoned work, as provided in section twelve hundred and sixty-one of the code [§ 1929]; *provided, however*, that if said road-bed or right of way, or any part thereof, shall not be used or operated for a period of eight years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased and has not been in good faith resumed by any corporation or person for a period of eight years, the land and the title thereto shall revert to the owner of the section, subdivision, tract or lot from which it was taken; *and provided, further*, that the provisions of this act shall not apply to any railroad having a portion of its track laid with a wooden rail. [13 G. A., ch. 91, § 1.]

The easement being acquired by express grant is not barred by a failure to use the same for ten years, and a possession of the property, during that time, by the original owner, in the absence of any act of his preventing the use: *Barlow v. Chicago, R. I. & P. R. Co.*, 29–276; *Noll v. Dubuque, B. & M. R. Co.*, 32–66.

A land owner who has received damages for a right of way and has entered into an agreement by which another company has taken and used such right of way is not in position to rely on an abandonment by the first company: *Harling v. Chicago, C. R. & N. R. Co.*, 67–531.

A portion of a line may become abandoned. Whether it is so or not is a question of fact: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57–249.

1929. Condemning abandoned way. 1261. In every such case of abandonment, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same and the right to any unfinished work or grading found thereon and the title thereto, by proceeding in the manner provided, and conforming in all particulars as near as may be to the provisions of this chapter; but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time, but the value of such road-bed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed to the former company or its legal representative. [Same, § 2.]

Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the agricultural college could not have another assessment of damages for the use of the premises by another railway company: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

A land-owner who has received compensation which has not been refunded by him can not recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64–635.

CROSSINGS.

1930. Raising or lowering highways. 1262; 15 G. A., ch. 47; 19 G. A., ch. 122. Any such corporation may raise or lower any turnpike, plank-road, or other highway, for the purpose of having its railway cross over or under the same; and in such cases said corporation shall put such highway, as soon as may be, in as good repair and condition as before such alteration. [R., § 1321.]

This section as it originally stood, authorizing a railway corporation to raise or lower a highway "for the purpose of having its railway pass over or under the same," was construed to confer upon railway companies the right to construct their tracks upon the public highways, including the streets of a city, without compensation to an abutting property owner, where he did not own the fee in the highway or street: *Milburn v. Cedar Rapids*, 12-246; *Gear v. Chicago, C. & D. R. Co.*, 39-23.

But as now amended, by substituting "cross" for "pass," it cannot be construed as authorizing such use of highways or streets without other express legislative authority: *Stanley v. Davenport*, 54-463.

The objection imposed by the statute upon a railway company constructing and operating its railway, to construct at all points where the highway crosses it sufficient and safe crossings, is binding upon all corporations using railways in the state: *Farley v. Chicago, R. I. & P. R. Co.*, 42-234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing and the company is required to keep it in repair: *Ibid.*

The company is bound to keep crossings in a safe condition, and this obligation extends to the approaches to a bridge: *Newton v. Chicago, R. I. & P. R. Co.*, 66-422.

The company is under obligation to build and keep in repair an overhead crossing and the approaches thereto, provided the grade crossing is unsuitable and the overhead crossing is necessary to put the street in proximately as good repair and condition as before the railroad was built: *Ibid.*

As the railway has the right to raise or lower highways at crossings, an indictment charging the company with obstructing the public highway with digging, plowing and scraping such highway, throwing up embankments and making excavations, etc., at points where the railway crosses such highway, does not state facts sufficient to constitute the crime of obstructing the highway: *State v. Chicago, B. & P. R. Co.*, 63-508.

In an action for personal injuries received at a public crossing, the fact that the crossing is not as good as the highway was before the construction of the railway is admissible for the purpose of showing what vigilance was required of the railway as to the use of signals and the operation of trains in approaching such crossing: *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

The railway has no right to fence its track where it crosses streets or alleys properly laid out, whether they have been improved and used by the public or not: *Lathrop v. Central Iowa R. Co.*, 69-105.

And see notes to § 1972.

1931. Further repairs. 1263. If the supervisor, trustees, city council, or other person having jurisdiction over such highway require further or different repairs or alterations made thereon, or, if the same, in their opinion, is unsafe, they shall give notice thereof in writing to any agent or officer of the corporation, and if the parties are unable to agree respecting the same, either may apply by petition, setting out the facts, to the circuit [district] court, or judge thereof, and such court or judge shall cause reasonable notice to be given the adverse party of the application; the petition shall be filed in the clerk's office, and may be answered as in other cases. The court shall determine the matter in a summary way and make the necessary orders in relation thereto, giving such corporation a reasonable time to comply therewith, and upon failure to do so, said court may enjoin the corporation from using so much of its road as interferes with any such highways, and the court may award costs in favor of the prevailing party. [R., §§ 1322-3.]

1932. Temporary ways. 1264. Every such corporation when employed in raising or lowering any highway, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions. [R., § 1324.]

1933. Crossing railways, canals, etc. 1265. Any such corporation may construct and carry its railway across, over, or under any railway, canal, or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct its crossings as not un-

necessarily to impede the travel, transportation, or navigation upon the railway, canal, or stream so crossed; said corporation shall be liable for the damages occasioned by any corporation or party injured by reason of said crossing. [R., § 1325.]

The requirement of § 2005, that trains shall come to a full stop at crossings of other railroads, necessarily renders crossings on grade an impediment, to some extent, to travel and transportation, but the inconvenience and delay arising from their use must be borne by the company. The company constructing an intersecting line is required to so construct the crossing as not to unnecessarily interfere with the crossing of the other road. Whether such crossing shall be made at grade, or over or under the other, must depend upon circumstances; and under particular facts, *held*, that a requirement that an under-crossing be constructed was not unreasonable: *Humestone & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 74-554.

1934. Bridges. 1266. Every such corporation shall maintain and keep in good repair all bridges, with their abutments, which it may construct for the purpose of enabling its railway to pass over or under any turnpike, highway, canal, water-course, or other way. [R., § 1326.]

1935. Damages. 1267. Every such corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this chapter. [R., § 1327.]

The provisions of this section do not extend the liability of the corporation to the acts of those not its agents or servants: *Callahan v. Burlington & M. R. R. Co.*, 23-562.

1936. Private crossings. 1268. When any person owns land on both sides of any railway, the corporation owning the same, shall, when requested so to do, make and keep in good repair one cattle-guard and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner. [R., § 1329.]

When required: The company need not provide a crossing unless the land owner requires it: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

The duty of the company to construct a private crossing may be enforced by *mandamus*: *Boggs v. Chicago, B. & Q. R. Co.*, 54-435.

And in the particular case, *held*, that a request of the person owning land on both sides of the railway track, for an open crossing at a particular point, was not unreasonable, and compliance therewith might be enforced: *Ibid.*

The owner of land is authorized to designate the place where the crossing for his benefit shall be made, and the limitation put upon his choice of location is that the place designated shall be a reasonable one: *Van Vrankin v. Wisconsin, I. & N. R. Co.*, 68-576.

Where the only means a citizen has of reaching a highway is across the railway, he may insist that an open crossing be provided for him by means of which he may reach the highway without stopping to open gates or remove bars: *Gray v. Burlington & M. R. R. Co.*, 37-119.

Where a party owning land on opposite sides of a highway maintains a lane and fences in such manner as to indicate that he prefers an open crossing instead of one closed by gates, the company will not be liable to him for failure to maintain such gates: *Tyson v. Keokuk & D. M. R. Co.*, 43-207.

Where a railroad passes through a pasture the owner is not, as a matter of course, entitled to an open crossing for his stock, regardless of any other means of crossing. To entitle him to such a crossing it must appear that there is no provision for passing from one part of the field to the other, which is adequate under the circumstances: *Curtiss v. Chicago, M. & St. P. R. Co.*, 62-418.

A company required to maintain and construct proper cattle-guards cannot by contract with another company, whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Gates and bars at private crossings: If the company undertakes to and does construct fences, gates, crossings and cattle-guards, etc., for a private owner, a request for their construction may be presumed, and the company will be required to keep them in repair: *Miller v. Chicago, R. I. & P. R. Co.*, 66-546.

Under the provisions of a previous statute, differing from the present one as to private crossings, *held*, that a company had a right to construct fences at such crossings, but must provide the same with gates: *McKinley v. Chicago, R. I. & P. R. Co.*, 47-76, 78.

The duty to maintain gates at private crossings is a part of the duty to fence, and the company will be liable for damages to stock injured by reason of failure to construct such gates or keep them in repair: *Ibid.*; *Mackie v. Central R. of Iowa*, 54-540.

As to the liability for failure to fence in general, see § 1972.

The obligations imposed upon the company to fence and to provide private crossings are correlative, and if it does each as well as it can consistently with the other it is not liable: *Henderson v. Chicago, R. I. & P. R. Co.*, 39-220.

Where the company is required to put in a private crossing and erect proper gates and

bars, it will not be liable for negligence of a person for whom the crossing is constructed in habitually leaving such gates or bars open, further than that it must use reasonable diligence and care in keeping them closed: *Ibid.*

But the company is not responsible in the absence of negligence, although it knows that the land owner or other persons are in the constant or usual habit of leaving the gates open: *Henderson v. Chicago, R. I. & P. R. Co.*, 43–620.

Where the company nailed up the gates at a private crossing for the reason that they had been habitually left open, and the land owner tore down the fence so that the gates should be open, *held*, that it was error to instruct the jury as to the effect of the abandonment by the land owner of his crossing: *Ibid.*

The sufficiency of the gates provided at a private crossing is a question of fact for the jury; and *held*, that it was error to instruct the jury that such gates were sufficient in view of the fact that the land owner gave no notice to the company of objection thereto, and himself believed them sufficient: *McKenly v. Chicago, R. I. & P. R. Co.*, 43–641.

Under particular facts, *held*, that it was not sufficiently shown that injury to stock resulted from defect in the gate through which they escaped upon the track: *Bothwell v. Chicago, M. & St. P. R. Co.*, 59–192.

In an action for injuries to stock from failure to maintain a gate at a private crossing in good condition, evidence of the condition of the gate two or three days after the accident, it not being shown that its condition as to security was different from what it was at the time of the accident, was held proper: *Mackie v. Central R. of Iowa*, 54–540.

Where the company constructs a gate at a private crossing without fastenings, and in such manner that it may be blown open by the wind, it is not proper to charge the jury that the responsibility for keeping the gate closed is upon the person for whose convenience it is constructed, and that he cannot recover for injuries to his stock coming upon the track through such gate: *Hammond v. Chicago & N. W. R. Co.*, 43–168.

Where it appeared that a gate at a private crossing had been constructed without fastenings and the wind had sometimes blown it open, *held*, that it was improper to exclude from the jury the question as to whether the company was guilty of negligence in thus constructing it, and that the proof of the habit of an adjoining owner to leave the gate open would not preclude recovery on account of such negligence in the original construction, it not appearing that it had been left open by such owner in the particular instance when the damage occurred: *Ibid.*

A company may be liable without knowledge of the defect in the fence if, in the exercise of reasonable care, such knowledge would have been acquired. If the fence was originally defective the company is chargeable with knowledge thereof without express notice: *Ibid.*

The company is only liable for negligence in failing to put up the bars at a private crossing, which have been left down, after acquiring knowledge of their condition, or in not ascertaining their condition, and the burden of proving such negligence is upon the plaintiff: *Perry v. Dubuque Southern R. Co.*, 36–102.

Proof of the mere fact that bars have been left down by some person, and that through them cattle have strayed upon the track and been injured, does not make a *prima facie* case of liability on the part of the company. Such liability, if it exists at all, arises from the conduct of the company after the bars have been left down, either in failing to put them up after acquiring knowledge that they were down, or in neglecting to use reasonable diligence to ascertain such condition: *Ibid.*

And as to a like rule in regard to failure to repair fences, see notes to § 1972.

It is erroneous to instruct the jury that a person whose stock has been injured upon the track makes a *prima facie* case against the company by showing that the gate through which stock came upon the track was out of repair previous to the accident. Proof of such fact does not cast upon defendant the burden of showing that the accident did not result by reason of the gate being open. Such fact would be a circumstance tending to show that it was open through defendant's fault, which might have much or little weight according to circumstances; but the burden of proof would remain upon plaintiff to show negligence of defendant causing the injury: *Johnson v Chicago, R. I. & P. R. Co.*, 55–707.

The fact that the bars are left down by the land owner will not as to third persons discharge the company from its obligation to keep them closed: *Bartlett v. Dubuque & S. C. R. Co.*, 20–188.

But the land owner could not recover for injuries resulting therefrom, and might be liable to a third person injured by such bars being open: *Russell v. Hanley*, 20–219.

If, by reason of the act of the land owner in wrongfully removing a gate at a private crossing on his land, stock of a third person gets upon the track and is injured, and the company is held liable therefor, it may recover from such land owner the amount which it has been compelled to pay: *Chicago & N. W. R. Co. v. Dunn*, 59–619.

VIADUCTS IN CITIES.

1937. When required. 22 G. A., ch. 32, § 1. The council of any city of the first class and cities organized under special charter or cities of the second class having a population of seven thousand or over, shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of such city to erect, construct, reconstruct, complete and keep in repair to the extent

hereinafter provided any viaduct or viaducts upon or along such street or streets and over or under such track or tracks including the approaches thereto as may be deemed and declared by ordinances of such city necessary for the safety and protection of the public: *provided*, that the approaches to any such viaduct which any railroad company or companies may be required to construct, or reconstruct and keep in repair shall not exceed for each viaduct a total distance of eight hundred feet, and *provided* further that no such viaduct shall be required on more than every fourth street running in the same direction and that no railroad company shall be required to build or contribute to the building more than one such viaduct with its approaches in any one year. Nor shall any viaduct be required until the board of railroad commissioners shall, after due examination determined said viaduct to be necessary in order to promote the public safety and convenience, and the plans of said viaduct prepared as provided in section three hereof [§ 1939], shall have been approved by said board.

1938. Assessment of damages. 22 G. A., ch. 32, § 2. Whenever any such viaduct shall be deemed and declared by ordinances necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages, if any, which may be caused to any property, by reason of the construction of such viaduct and its approaches. The proceedings for such purpose shall be the same as provided by law for taking possession of streets by railroad companies, except that the damages assessed shall be paid by the city.

1939. Specifications. 22 G. A., ch. 32, § 3. The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of construction thereof shall be such as may be required by the board of public works and approved by the mayor and council, but if there be no board of public works, then they shall be such as may be required by the council.

1940. Apportionment of cost; repairs. 22 G. A., ch. 32, § 4. When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or of the cost to be borne by each shall be determined by the council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct, or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city, and the remaining half shall be borne by the railroad company or companies and if the track of more than one company is so crossed the said one-half of such repairs shall be borne by such companies in the same proportion as the original construction of such viaduct.

1941. Indemnity bond. 22 G. A., ch. 32, § 5. Every city to which this act applies is authorized and empowered to receive a bond of indemnity from persons interested in the construction of any such viaduct conditioned for the payment of all the damages which may be assessed in favor of abutting property owners together with costs.

1942. Refusal to comply. 22 G. A., ch. 32, § 6. If any railroad company neglects or refuses for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions hereof, the city may construct or repair the viaduct or approach or portion of viaduct or approach which such ordinance may require such railroad company to construct or maintain, and recover the cost of such construction or maintenance from such railroad company in any court of competent jurisdiction.

RIGHT OF WAY FOR OTHER PURPOSES.

1943. Canal, turnpike or bridge. 1269. When any corporation or person desires to construct a canal, turnpike, graded, macadamized, or plank road, or a bridge, as a work of public utility, although for private profit, such corporation or person may take such private property as may be deemed necessary for right of way, not exceeding one hundred feet in width, by pursuing the course prescribed in this chapter, all the provisions of which are made applicable in similar cases. [R., §§ 1278-88.]

This section does not authorize the taking of private property for landings for a public ferry: *Sandford v. Martin*, 31-67.

1944. Cities and towns. 1270. Cities and incorporated towns may exercise the powers herein conferred for the purpose of taking private property for streets, alleys, and market-house sites.

STATE MAY CONDEMN.

1945. How and when. 1271; 16 G. A., ch. 75. Whenever in the opinion of the governor, the public interest requires the taking of any real estate for the making or construction of any drains, sewers, yards, walls, buildings, or other improvements or conveniences for the use or benefit of the penitentiaries, hospitals for the insane, or any other institution of the state, upon or across lands being private property, the same proceedings may be had in the name of the state as provided in this chapter, and for that purpose the state shall be considered a person, and the proceedings shall be conducted by the district [county] attorney of the district [county] in which the land is situated, whenever directed by the governor, or the governor may appoint some other person for that purpose. [12 G. A., ch. 189, §§ 1, 2.]

1946. Damages. 1272. Whenever the amount of the damages contemplated in the preceding section is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor, who shall, by an order indorsed thereon, direct the payment of the same, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid with any money not otherwise appropriated. When the money is paid to the sheriff or person entitled thereto, the state, through its proper agent or officer, may enter on the premises and construct the desired work. [Same, § 4.]

STREET RAILWAYS OVER HIGHWAYS.

1947. Right of way. 18 G. A., ch. 32, § 1. Any street railway company now or hereafter organized under the laws of this state to operate a street railway in any city or incorporated town in this state, for the purpose of extending its railway beyond the limits of such city or town, may locate, build and operate, either by animal or motor power, its road over and along any portion of a highway which is of a width of one hundred feet or more. In such cases said company as soon as practicable shall put said highway in as good repair and condition as the same was before its use for the purpose herein contemplated, and boards of supervisors are hereby authorized to accept for highway purposes under this act conveyances of land adjoining any highway or part thereof sufficient to increase said highway to the width of one hundred feet.

1948. Condemnation; damages. 18 G. A., ch. 32, § 2. Unless the owners of the land abutting each *site* [side] of said highway shall consent to its use as contemplated in section one [§ 1947], said railway company shall pay all damages sustained by such land owners by reason of building said road, which damages shall be ascertained and paid in the same manner as provided for taking private property for works of internal improvement. Said company

shall also be liable for all damages sustained by any one, resulting from the carelessness of its officers, agents, or servants, in the construction or operation of its railway.

PUBLIC WAYS TO MINES AND STONE QUARRIES.

1949. By quarry or mine owners. 15 G. A., ch. 34, § 1. Any person, copartnership, joint-stock association, or corporation, owning, leasing, or possessing any lands having thereon or thereunder any coal, stone, lead, or other mineral, may have established over the land of another a public way from any stone-quarry, coal, lead or other mine, to any railway or highway, not exceeding (except by the consent of the owner of the land to be taken) fifty feet in width. When said road shall be constructed, it shall, when passing through inclosed lands, be fenced on both sides by the person or corporations causing said road to be established.

No authority is given by this act to construct a private way. The way, when condemned, is to be a public one, and the act is therefore not invalid: *Jones v. Mahaska, etc., Coal Co.*, 47–35.

A road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the manner in which roads and highways are ordinarily used by it, and the mine owner who procured it to be established must use the special privilege which the act confers on him in such a way as not to destroy this right of the public or prevent its enjoyment, and the statute is therefore constitutional. Nor can the construction of the railway in accordance with these provisions be enjoined on the ground that it prevents the owner of the land from constructing a railway thereon for his own use: *Phillips v. Watson*, 63–28.

11 G. A., ch. 127, which provided for the establishment of private ways was held unconstitutional; but *held, arguendo*, that to afford an outlet to a citizen or access to mineral wealth, a public way might properly be established: *Bankhead v. Brown*, 25–540.

1950. Proceedings. 15 G. A., ch. 34, § 2. If the owner of any real estate, necessary to be taken for the purposes mentioned in this act, refuse to grant the right of way, or if such owner and the person, partnership, joint-stock association, or corporation seeking to have such way established, cannot agree upon the compensation to be paid for the same, the sheriff of the county in which said real estate may be situated shall, upon the application of either party, appoint six disinterested freeholders of the county, not interested in a like question, who shall inspect said real estate, and assess the damage which said owner will sustain by the appropriation of said land for such public way, and make *and* report in writing to the sheriff of said county, and if the applicant for such public way shall at any time before entering upon said real estate, for the purpose of constructing such way, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him as aforesaid, said highway may be at once constru[ct]ed and maintained over and across said premises.

1951. Provisions applicable. 15 G. A., ch. 34, § 3. In proceeding under this act, the application to the sheriff, the duty of commissioners, the time and manner of assessing the damages, the giving of notice thereof to residents and non-residents, the power of guardians to settle and convey, the making and returning of appraisement, the selection of talesmen, the payment of the costs of assessment, the report of the commissioners, the recording thereof, the right of appeal, the proceedings relating thereto, the result of non-user, the rights and duties as to other highways, are and shall be the same as provided in the sections of the code numbered twelve hundred and forty-five to and including twelve hundred and sixty-eight [§§ 1909–1936], and the provisions of all of said sections, so far as applicable, are declared to be a part of this act, except that the report of the commissioners, and record thereof, shall confer no title to the applicant for the land taken for the highway, but shall be presumptive evidence of the establishment of such way.

1952. Railway established. 15 G. A., ch. 34, § 4. Any owner, lessee, or possessor of lands having coal, stone, lead, or other mineral thereon, who

has paid the damages assessed for highways established under this act, may construct, use, and maintain a railway on such way, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In the giving of the notices required by this act, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established; and if it be so stated the jury shall consider that fact in the assessment of damages.

RIGHTS OF RIPARIAN OWNERS.

1953. Erection of piers, cribs, etc. 15 G. A., ch. 35, § 1. All owners and lessees of lands, or lots, situate upon the Iowa banks of the Mississippi and Missouri rivers, upon which property there is now, or may hereafter be, carried on any business which is in any way connected with the navigation of said rivers, or to which the said navigation is a proper or convenient adjunct, are hereby authorized to construct and maintain, in front of their said property, piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits and the protection and harbor of rafts, logs, floats, and other water-crafts; *provided*, that the same present no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property.

1954. Construction of railroad. 15 G. A., ch. 35, § 2. It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by chapter four, title ten of the code.

Whether § 1953 is in conflict with act of congress (U. S. Rev. Stat., § 5254), relating to the construction of cribs, piers, etc., on the Mississippi river, *quære*. But even if it is, this section is not thereby rendered void. If a riparian owner is engaged in business connected with the navigation of the river it is not essential to his right to recover under this section that he should have erected a crib or pier in front of his property. The rule recognized in *Tomlin v. Dubuque, B. & M. R. Co.*, 32-106, is no longer applicable, Revision, § 1328, being now repealed: *Renwick v. Davenport & N. W. R. Co.*, 49-664; *S. C.*, 102 U. S., 108.

CHAPTER 5.

OF RAILWAYS.

ORGANIZATION.

1955. Change of name. 1273. Any corporation organized under the laws of this state for the purpose of constructing and operating a railway, may, with the assent of two-thirds of all the stockholders in interest, change the corporate name thereof. But no change in the name of any such corporation shall be deemed complete until the president and secretary thereof shall file in the office of the secretary of state, a statement, under oath, showing the assent of the stockholders to such change, and the new name adopted, and a certified copy of the proceedings had by the corporation and stockholders in relation thereto as the same appears in the records thereof; from the time of such filing, the corporation by its new name shall be entitled to all the rights, powers, and franchises that it possessed under the old name, and by the new name shall be liable upon all contracts and obligations of every kind and description entered into by or binding upon such corporation by or under its old name to the same extent and manner as if no change in the name of such corporation had been made. [10 G. A., ch. 44, §§ 3, 4.]

1956. Record. 1274. The secretary of state shall immediately record in the proper book in his office the matters filed under the preceding section, and make intelligible references to the record of the articles of incorporation as originally recorded.

1957. May join or consolidate. 1275. Any such corporation may join, intersect, and unite its railway with the railway of any other corporation at such point on the boundary line of this state as may be agreed upon by such corporations. And with the assent of three-fourths in interest of all the stockholders, may, by purchase or sale, or otherwise, merge and consolidate the stock, property, franchises, and liabilities of such corporations, making the same one joint-stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state. [R., § 1332.]

A railroad corporation organized under the general law may, after constructing a line, sell the property and continue the object of its incorporation by the construction of a new line: *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28–437.

Where the articles of incorporation of the company provided for the sale of the property with the limitation that "no sale shall be valid until all debts of the company shall be paid or arranged for," *held*, that the indebtedness being a very inconsiderable sum, if anything, and the purchaser having inquired if there were any debts, and being always ready to pay any that might be established, a sale under such circumstances was valid: *Ibid.*

Where a railway company through its directors sold its property to another company, and the directors and stockholders of the former stood by with knowledge of all the facts and saw the latter company make large expenditures on the property, *held*, that they were estopped from seeking a recovery of the property because of an irregularity in the sale: *Ibid.*

A company buying in the franchise of property of a railroad at a foreclosure sale does not become privy to any agreement on the part of the original company except so far as it may be incorporated into the deeds of conveyance under which the title is held: *Close v. Burlington, C. R. & N. R. Co.*, 64–149.

Where two railroad companies were consolidated under the arrangement that stock in the new company should be issued to stockholders in the old companies, and the new company should acquire the property of the old, *held*, that a stockholder in one of the old companies did not, by such transfer of property, acquire a vendor's lien thereon: *Cross v. Burlington & S. W. R. Co.*, 58–62.

1958. Connections. 1276. Any such corporation which has or may construct its railway so as to meet or connect with any other railway in an adjoining state at the boundary line of this state, shall have power to make such contracts and agreements with the corporations controlling such railways in an adjoining state, for the transportation of freight and passengers, or for the use of its railway by such foreign corporation, as the board of directors may see proper. [R., § 1334.]

1959. Extension. 1277. Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state under such regulations as may be prescribed by the laws of such state; and the rights and privileges of such corporation over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if its railway was constructed wholly within this state. [R., § 1333.]

1960. Duties and liabilities of lessees. 1278. All the duties and liabilities imposed upon corporations owning or operating railways by this chapter, shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which might be brought, or penalty enforced, against any such corporation by virtue of any provision of this chapter, may be brought or enforced against such lessees or other persons. [12 G. A., ch. 79; ch. 172, § 1.]

The obligation to fence (under § 1972) rests upon the lessee as much as upon the lessor, and the lessee is liable to damages done by its train, although as between it and the lessor the duty of fencing rests upon the latter: *Clary v. Iowa Midland R. Co.*, 37–344.

Where the owner and a lessee each runs trains over the road, each is liable only for stock injured by its own trains by reason of the failure to fence: *Stephens v. Davenport & St. P. R. Co.*, 36–327.

The remedy given against the lessees by statute is merely cumulative, and the right of action for negligence causing the injury of a

passenger exists as against the company in whose name the road is being operated, although it may, in fact, have been leased to and be under the control of a lessee: *Bower v. Burlington & S. W. R. Co.*, 42-546.

Prior to express statutory provision, *held*, that the statute imposing a liability for injuries to stock where the right of way is not fenced was applicable to a lessee: *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23-378.

But further, *held*, under the same statutory provision, that where the lessee had the exclusive right to run, operate and control the road, and had built and maintained fences along the road, and had the same power to protect itself that the lessor would have, it was liable for injury to stock to the same extent as though it were owner of the road: *Stewart v. Chicago & N. W. R. Co.*, 27-282.

The company whose engines set out fire are liable for damages from the fire thus set out, although the line is owned and operated by another company and fire starts on the right of way by reason of combustible material allowed to accumulate thereon by such other company: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Where a railway company incorporated under the laws of Iowa leases its road to a foreign corporation, the lessor is a necessary party to an action for breach by the lessee of a contract entered into originally with the lessor. The statutory provision as to the liability of a lessee does not discharge lessor from liability, but in effect makes both the lessor and the lessee jointly liable: *Chicago & N. W. R. Co. v. Crane*, 113 U. S., 424.

A lessee of a railroad can exercise no right that its lessor could not, and if the lessor was subject to injunction against operating its road at the suit of the land owner whose property had been taken without compensation, the lessee is subject to the same restriction: *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The company owning a railroad, and in whose name it is being operated, is liable in an action for personal injuries received thereon, although the road is leased to and operated by a lessee: *Bower v. Burlington & S. W. R. Co.*, 42-546.

Where a railroad was leased to defendant under a contract by which he was to manage the same and apply the profits, after paying operating expenses, to the payment of certain advances made by him, etc., *held*, that he was a trustee and was not individually liable as lessee for operating expenses: *United States Rolling Stock Co. v. Potter*, 48-56.

A receiver operating a railway under direction of the court is liable to judgment for personal injuries received by an employee from the negligence of other employees engaged in the operation of the road, under the statutory provision on such subject: *Sloan v. Central Iowa R. Co.*, 62-728.

For similar provisions, see § 1995.

1961. Offices. 1279. The offices of secretary and treasurer, or assistant treasurer and general superintendent of every railway corporation organized under the laws of this state, shall be kept where the principal place of business of such corporation is to be, in which offices the original record, stock, and transfer books, and all the original papers and vouchers of such corporation shall be kept; and such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which may be inspected at all reasonable hours by any stockholder, or any committee appointed by the general assembly. Such corporation may keep in any other state a transfer office, in which may be kept a duplicate transfer book; but no transfer of shares of stock shall be legal or binding until the same is entered in the transfer book kept in this state. The secretary and treasurer, or assistant treasurer and general superintendent aforesaid shall reside in this state. [9 G. A., ch. 159, §§ 2, 6.]

1962. Report. 1280. Every such corporation shall, annually, under the oath of the president, in the month of January, make a full report of the condition of its affairs to the secretary of state, and shall have the same published in some newspaper printed in the place of its general business office, showing the amount of the capital stock of such corporation, and the amount paid thereon, the amount of bonds issued, and how secured, and all other indebtedness; the length of such railway when completed, and how much is built and in use; the number of acres of land donated or granted to them, by whom and what disposition has been made of said grants or donations, the gross amount of receipts and how disbursed, the net amount of profit and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such corporation, and the secretary of state shall present the said report to the general assembly. [Same, § 3.]

1963. Proceedings to compel. 1281. In case any such corporation shall neglect to make such report as required in the preceding section, any stockholder may file his petition in the district [or circuit] court in the county

where the principal business office is kept, stating that said report has not been made, and praying that an order may issue against the corporation commanding it to make said report; said petition, shall be under oath and filed at least ten days before the next term of the district [or circuit] court in said county, and notice thereof shall be given such corporation for the same length of time, and in the same manner as is now required to be given in other suits in the district [or circuit] court, and upon the filing of such petition, the clerk shall issue such order and make the same returnable at the next term of the district [or circuit] court in said county, and costs shall be recoverable by either party as in ordinary actions. [Same, § 4.]

1964. Examination. 1282. If it appears such report has not been filed, the court shall, during the term, appoint three disinterested and competent persons near the place of the general business office of the corporation as an investigating committee, who shall examine into its affairs and report at as early a day as practicable its condition, in manner and form as prescribed in section twelve hundred and eighty of this chapter [§ 1962]; one copy of said report to be filed in the office of the clerk of the district court of the county where the proceedings are had, and one copy to be filed in the office of the secretary of state. The compensation for the services of such committee shall be paid by the corporation thus investigated, but it shall not exceed three dollars per day and mileage at the rate of ten cents per mile, counting one way. [Same, § 5.]

OF STOCK AND DEBTS.

1965. Bonds; mortgages. 1283. Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent. per annum, and make the same convertible into stock, and may sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof, they shall, nevertheless, be valid and binding, and no plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises. [R., § 1339; 10 G. A., ch. 20.]

1966. After-acquired property. 1284. Said mortgages or deeds of trust, may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof. [R., § 1340.]

1967. Execution of mortgages. 1285. Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all parties under the same, and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded, shall have the same effect both as to notice and otherwise, as to the personal, as to real estate covered by them. [R., § 1341.]

1968. Preferred stock. 1286. Any such corporation, with the assent of two-thirds of all the stockholders in interest, may issue in payment of debts,

preferred stock, not exceeding ten thousand dollars for each mile of railway constructed, which stock shall be entitled to such dividends as the directors of the corporation may determine, not exceeding eight per cent. per annum, if the same is earned in any one year after payment of all interest on the bonds of the corporation before any dividend is made to the common stock. [10 G. A., ch. 44, § 1; 11 G. A., ch. 102.]

1969. Exchange for bonds. 15 G. A., ch. 20. Any railway corporation which has no surplus, after paying its running expenses, with which to pay the interest on its bonded indebtedness, with the assent of its bondholders, in addition to the right conferred by section one thousand two hundred and eighty-six of the code [§ 1968], may, with the assent of two-thirds of its stockholders, issue its preferred stock, at par, to an amount equal to and not exceeding its bonded indebtedness, in exchange for its said bonded indebtedness. The said stock shall be entitled to such dividends from its net profits as the directors of the corporation may determine, not exceeding eight per cent. per annum, if the same is earned in any one year, after payment of all interest on the indebtedness of the corporation, before any dividend is made to the common stock.

1970. Conversion into common stock. 1287. Such preferred stock, and any income or mortgage bond of the corporation, shall, at the option of the holder, be convertible into common stock in such manner and on such terms as the board of directors thereof may prescribe; but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be by law, or the articles of incorporation thereof, authorized to issue. [10 G. A., ch. 44, § 2.]

OF THE TRACK.

1971. Cattle-guards; crossings; signs. 1288. Every corporation constructing or operating a railway, shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle-guards, and erect at such points at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railway and warn persons of the necessity of looking out for the cars; and any railway company neglecting or refusing to comply with the provisions of this section, shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover, it shall only be necessary for him to prove such neglect or refusal. [R., § 1331; 9 G. A., ch. 169, §§ 3, 4, 5.]

Cattle-guards: This section makes it necessary that cattle-guards be constructed not only where the track goes through outside fences, but also at division fences: *Smith v. Chicago, C. & D. R. Co.*, 38–518.

Where the track passes through the lands of two owners fenced in common, and subsequently a division fence is constructed, it is the duty of the company upon notice to put in a cattle-guard, and it will be liable for the value of crops destroyed by reason of the failure to do so: *Donald v. St. Louis, K. C. & N. R. Co.*, 44–157.

Where a railroad is constructed across unimproved or unmclosed land, and the land is afterwards improved or inclosed, the railway company is under obligation to construct cattle-guards just as it would have been under obligation to do if the land had been inclosed at the time the road was constructed: *Heskett v. Wabash, St. L. & P. R. Co.*, 61–467.

Whether notice to the company to construct cattle-guards is necessary after the land has been thus inclosed, *quære;* but, if necessary, the service of notice upon the station agent is sufficient: *Ibid.*

This provision as to cattle-guards applies to cases where the corporation fences its right of way. When it does so there is fenced land, and, upon entering or leaving, the law requires a cattle-guard: *Robinson v. Chicago, R. I. & P. R. Co.*, 67–292.

The statute is imperative, and the court will not engraft an exception upon it relieving a company from obligation to put in a cattle-guard on the ground that it is not fit, proper and suitable to do so in a particular case: *Mundhenk v. Central Iowa R. Co.*, 57–718.

Where it appeared that plaintiff's horses were put temporarily in a field, from which they escaped through a defective fence, and were injured by reason, as alleged, of an insufficient cattle-guard, in a county where cattle were not allowed to run at large, *held*, that the facts did not necessarily show contributory negligence defeating plaintiff's right to recover: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

There is nothing in this section requiring a company to make cattle-guards at a *private* crossing: *Bartlet v. Dubuque & S. C. R. Co.*, 20-188. (But see § 1936.)

Method of construction: The term cattle-guard as used in the statute imports a guard or protection extending the whole width of the right of way. The owner is under no obligation to construct a fence up to the track upon the right of way: *Mundhenk v. Central Iowa R. Co.*, 57-718; *Hewett v. Wabash, St. L. & P. R. Co.*, 61-467.

The duty of connecting a cattle-guard with the right of way fence devolves upon the company, and is implied in the duty to construct the guard itself: *Miller v. Chicago, R. I. & P. R. Co.*, 66 546.

Where the right of way and public highway intersect obliquely, the company should fence to the point where the highway crosses the track, and construct the cattle-guard there, and not at the point where the highway intersects the right of way: *Andre v. Chicago & N. W. R. Co.*, 50-107.

Crossings: Where a railway impinged upon a highway some twenty rods from the place where it finally crossed it, *held*, that all the intervening highway was not to be deemed a part of the crossing, within the meaning of this section: *Beatty v. Central Iowa R. Co.*, 58-242.

It is the duty of the company to repair the crossings and keep them in a safe condition: *Farley v. Chicago, R. I. & P. R. Co.*, 42-234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing, and the company is required to keep it in repair: *Ibid.*

Purchasers of a road at judicial sale take subject to any oral obligations to maintain crossings, etc., made by the former company in connection with the acquisition of the right of way: *Swan v. Burlington, C. R. & N. R. Co.*, 72-650.

Negligence: Where plaintiff's cow was injured by a wild-train at a highway crossing, *held*, that it was a question for the jury whether it was negligence in the plaintiff to allow his cow to be at such crossing at the time when no regular train was due: *Coulson v. Chicago, M. & St. P. R. Co.*, 71-28.

Evidence in a particular case *held* sufficient to sustain a verdict against a railroad company for injury to a horse at a cattle-guard: *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45-699.

Where the sufficiency of a cattle-guard was in question, *held*, that the fact that a similar guard situated on other premises was sufficient to, and did, keep out stock, was not material or relevant: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96

Under the evidence in a particular case, *held*, that it was for the jury to say whether or not the cattle-guard was reasonably sufficient for the purpose for which it was constructed: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

Measure of damages: As the owner of the land has no legal right to construct cattle-guards across the track, he is not bound to do so in order to protect himself from damages for want thereof, but may recover whatever damages he may sustain by reason of his land being left open and unfenced: *Raridon v. Central Iowa R. Co.*, 65-640; *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Measure of damages for failure to erect a cattle-guard at a partition fence between two fields, one of which might have been used for pasture, *held* to be the difference between the value of the pasture in the condition in which the inclosure was left by the company and what the value would have been if the cattle-guards had been maintained: *Raridan v. Central Iowa R. Co.*, 69-527.

Where the land owner seeks to recover the entire value of a crop which he alleges to have been totally lost by reason of the failure of the company to construct cattle-guards, the question of how much less value the crop is by reason of such failure is a question of proof. The fact that a claim is made for the entire loss will not prevent the owner from recovering whatever loss is suffered: *Raridon v. Central Iowa R. Co.*, 65-640.

The measure of damage for crops destroyed by reason of failure to put in a cattle-guard where a partition fence is erected subsequently to the completion of the road is the value of the crop destroyed by reason of such failure: *Donald v. St. Louis, K. C. & N. R. Co.*, 44-157.

Double damages: A cattle-guard is not to be deemed a part of the fence required by other statutory provisions, and the company is not liable in double damages for failure to construct such cattle-guard as it is in case of failure to construct a fence: *Moriarity v. Central Iowa R. Co.*, 64-696.

Contract: A company required to maintain and construct proper cattle-guards cannot, by contract with another company whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Signs: This section only renders the company liable for damages sustained by reason of the failure to erect such signs: *Lang v. Holiday Creek R., etc., Co.*, 49-469.

The failure to erect a sign renders the company absolutely liable in a case wherein it is shown that a person was injured at a crossing. Evidence of the injury and of the company's neglect to erect the sign establishes its liability, and it is not necessary for plaintiff to show his own care. (As the case arose, however, under a previous statute, this point was not involved): *Payne v. Chicago, R. I. & P. R. Co.*, 44-236.

Under a previous statute which did not contain the provision that proof of the neglect to erect a sign should be sufficient to entitle the injured party to recover for injuries received at such crossing, *held*, that proof of failure to erect a sign established negligence on the part

of the company, but did not relieve plaintiff of the necessity of showing that his own negligence did not contribute to the injury: *Dodge v. Burlington, C. R. & M. R. Co.*, 34-276; *Correll v. Burlington, C. R. & M. R. Co.*, 38-120; *Payne v. Chicago, R. I. & P. R. Co.*, 39-523; *S. C.*, 44-236.

1972. Liability for stock killed; speed at depots; damages by fire. 1289. Any corporation operating a railway, that fails to fence the same against live-stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto; *provided*, that no law of this state, nor any local or police regulations of any county, township, city or town, regulating the restraint of domestic animals, or, in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless so specifically stated in the law or regulation. The operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section. *And provided, further* that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except to double damages. [Same, § 6; 14 G. A., ch. 128.]

Failure to fence: This section makes the fact of the injury or destruction of stock on the railway track *prima facie* evidence of negligence on the part of the corporation, and the burden of proof is upon the defendant to establish the building of a good and sufficient fence: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

In order to render the company liable for injury to stock, negligence must be shown, but it is sufficient to make out a *prima facie* case to show the injury and that it occurred by reason of the omission to fence. Thereupon the burden is upon the company to show freedom from negligence in the matter of a fence: *Small v. Chicago, R. I. & P. R. Co.*, 50-338.

If a railroad company fails to fence its road it is absolutely liable for stock injured, in the absence of wilful act of the owner: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459.

Liability for injury under this section attaches where the want of a fence in connection with some act of the company is the proximate cause of the injury. If it is claimed that defendant is liable for negligence in so constructing a bridge as to render it dangerous for stock running at large, such negligence must be directly alleged: *Asbach v. Chicago, B. & Q. R. Co.*, 74-248.

Before the enactment of this statute it was held that to permit cattle to run at large did not impute negligence on the part of the owner, and that cattle would not be trespassers if found upon the unfenced track of a railway; that if the track was unfenced the company would be held to the use of ordinary care and diligence in running its trains to avoid injuring such stock, but if its track was fenced it would only be liable for injury resulting from gross or wilful negligence: *Russell v. Hanley*, 20-219; *Alger v. Mississippi & M. R. Co.*, 10-268.

The railroad company is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." The fact that the animal is injured by reason of failure to leave the track through want of natural intelligence will not show that the injury did not result from want of a fence: *Liston v. Central Iowa R. Co.*, 70-714.

This statutory provision does not require railway companies to fence their roads, but subjects them to certain liabilities if they fail to do so. Failure to fence cannot, therefore, be imputed to the company as negligence in a case where a child, playing on an unfenced track of a road, is run over by one of the company's trains: *Walkenhauer v. Chicago, B. & Q. R. Co.*, 3 McCrary, 555.

A railway company does not owe to its employees the duty to fence its right of way, and employees are supposed to contract to operate the road in its unfenced condition so far as it is unfenced. Any additional exposure on that account must be presumed to have been taken into consideration upon entering into the em-

ployment: *Patton v. Central Iowa R. Co.*, 73-306. (By §§ 1973-1975 fencing is now obligatory.)

Animals not struck by train: It may be said that an animal is injured by reason of the failure of the company to fence when the want of a fence in connection with the acts of the defendant is the proximate cause of the injury. Therefore, where a horse going upon a track where there was a failure of the company to fence, being frightened by a coming train, ran upon a bridge and was injured, there being no other practicable means of escape for the animal, *held*, that the company was liable: *Young v. St. Louis, K. C. & N. R. Co.*, 44-172.

It is therefore for the jury to say whether or not in a particular case an animal injured upon the track without being struck by the train was injured by defendant's negligence: *Kraus v. Burlington, C. R. & N. R. Co.*, 55-338.

The fact that the train does not strike the animal does not relieve the company of liability for the injury: *Liston v. Central Iowa R. Co.*, 70-714.

Negligence: Plaintiff may ask recovery for stock killed, on the ground that the road was not fenced, pleading the facts entitling him to such recovery, and also on the ground of the negligent manner in which the train was operated, and he may then introduce evidence to sustain both or either of these causes of action: *Scott v. Chicago, M. & St. P. R. Co.*, 68-360.

Where it is claimed that stock was injured by reason of defective fence plaintiff may without proof of that fact recover the value of the stock killed if it is shown that the injury of the stock was due to negligence of the employees of the company operating the train: *Baker v. Chicago, B. & Q. R. Co.*, 73-389.

The burden of proof is upon plaintiff to show that the injury occurred at a place where defendant had a right to fence and did not, and that it was caused by defendant's negligence: *Comstock v. Des Moines Valley R. Co.*, 32-376.

An agreement with the land owner by which he undertakes to erect and maintain a fence will not prevent liability on the part of the company to other persons for double damages for stock injured where such land owner has failed to fence or repair, even though the owner of the stock has placed them for pasture upon the land of the person agreeing to maintain the fence: *Warren v. Keokuk & D. M. R. Co.*, 41-481.

Negligence of land owner: Where a company is compelled to pay for injuries to animals of a third person which have got upon the track through a gate at a private crossing, wrongfully removed by the land owner for whom the gate was constructed, it may recover from such land owner the amount so paid: *Chicago & N. W. R. Co. v. Dunn*, 59-619.

The fact that there were two gaps in a railroad fence within four hundred feet of each other, made by the plaintiff in the prosecution of work connected with such railroad, *held* not to preclude the owner from recovering damages for injuries to his stock by their escape upon the railroad track through a gap in the fence intermediate the two made by him and for which he was not responsible: *Accola v. Chicago, B. & Q. R. Co.*, 70-185.

Sufficiency of fence: The fence contemplated is such as is reasonably sufficient to prevent live-stock from going on the railroad track. It is error to charge the jury that when fences are constructed along the right of way by the company they must, in order to relieve it from liability for injuries to stock, be such as to absolutely prevent stock from getting under, through or over the same: *Shellabarger v. Chicago, R. I. & P. R. Co.*, 66-18.

The fence must not only be sufficient to turn horses and cattle, but must be sufficient to turn swine, or the company will be liable for swine killed: *Fritz v. Milwaukee & St. P. R. Co.*, 34-337.

The fence must be sufficient to turn live-stock of any kind in order to exonerate the company from liability for injuries to such live-stock. It is not sufficient that the fence be such as is described by statute as a lawful fence: *Lee v. Minneapolis & St. L. R. Co.*, 66-151.

A bluff, a hedge, a trench, a wall, a trestle, or the like, may constitute a sufficient fence. The question whether the fence is sufficient is for the jury: *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

The fact that the fences and track are so constructed that stock having once entered upon the right of way cannot, when frightened and driven before the engine, find a safe place to leave the track will not render the company liable: *Gilman v. Sioux City & P. R. Co.*, 62-299.

The fact that the fastening of a gate in the fence is placed on the inside may be a proper matter to be considered by the jury in determining whether the fence is sufficient: *Butler v. Chicago & N. W. R. Co.*, 71-206.

Replacing fences destroyed: The allegation that the road is unfenced at the time of the accident is supported by proof of the removal or destruction of the fence before the accident: *Fritz v. Kansas City, C. B. & St. J. R. Co.*, 61-323.

Where the fences were swept away by a flood, failure to rebuild them within two months after the road was repaired and operated, *held* sufficient to render the company liable: *Ibid.*

If a fence constructed by the company falls by reason of its insufficiency, it is immaterial that it was not down such length of time before the animal passed through that the company might, in the exercise of due diligence, have had knowledge thereof: *Libby v. Chicago, M. & St. P. R. Co.*, 60-323.

Where a railway was fenced only upon one side, and the animal injured was confined in a field inclosed in part by such fence, and escaped therefrom by reason of the fence being blown down by a storm, *held*, that the railroad not being fenced as required, the company was liable without regard to whether it was negligent in repairing the fence which was blown down, for the reason that the road was not properly fenced, and the animal after escaping from the inclosure was running at large: *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

Operation of the road; construction train: The railway company is liable for stock killed by a construction train by reason of the failure to fence, although the road is not completed: *Glandon v. Chicago, M. & St. P. R. Co.*, 68-457.

Failure to repair fences: While the company is liable for stock injured or killed on its track by reason of its failure to keep in repair the fences which it has erected on the line of its road, yet before such liability will attach the company must have knowledge, either express or implied, that the fence is out of repair, and a reasonable time after such notice to put it in repair: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

Knowledge that the fence is out of repair may be shown by the lapse of such time as to afford reasonable presumption thereof: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459; *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

The company having constructed a sufficient fence is only liable for failure to exercise reasonable care and diligence in maintaining it: *Lemmon v. Chicago & N. W. R. Co.*, 32-151.

It is error to instruct the jury that the company would be liable if it failed to erect and maintain a fence sufficient to keep cattle from its right of way, and the cattle were injured by reason of such failure. The jury must be allowed to consider whether the defect in the fence was occasioned by want of repair, and if so, whether the company had discovered that it was out of repair, or should have discovered it in the exercise of reasonable care, and had had a reasonable time afterward to make the repair: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Where the track has been properly fenced and the fence has been destroyed, the company is liable, in case of a failure to use reasonable and ordinary diligence and care in rebuilding it. Reasonable time must be allowed: *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

Burden of proof: Liability of the company for injuries caused by bars being left down at private crossings exists, if at all, either in failing to put them up after acquiring knowledge that they are down, or neglect to use reasonable diligence in ascertaining such condition, and the burden of proving these facts is upon the plaintiff seeking to recover damages for such negligence: *Perry v. Dubuque Southwestern R. Co.*, 36-102.

In case of an injury to stock by reason of a gate being open the burden is on plaintiff to show that the gate became open by defendant's fault. The fact that the gate was defectively constructed, unless it became open by reason of such construction, is not sufficient to entitle plaintiff to recover: *Butler v. Chicago & N. W. R. Co.*, 71-206.

A railway is required to exercise due care to keep gates closed and obtain knowledge of their condition. If it fails to exercise such care and through its negligence remains ignorant of the fact that a gate is open, it will be chargeable with having knowledge of that fact which due care would have given it. It is the duty of the company in such cases to close a gate after gaining knowledge that it is open, whether left open by its own employees or others. The question whether it should have had knowledge is for the determination of the jury: *Wait v. Burlington, C. R. & N. R. Co.*, 74-207.

Further as to gates and bars at private crossings, see § 1936 and notes.

An instruction to the effect that defendant was not liable unless there was neglect in failing to repair the fence within a reasonable time after notice of the defective condition, *held* proper, as the jury must have understood therefrom that the burden of showing neglect rested upon the party seeking to recover: *Dunn v. Chicago & N. W. R. Co.*, 58-674.

Evidence of the condition of the fence subsequent to the time of the injury is admissible only where it is shown that there had been no change in the condition: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

Evidence of the condition of the fence at the time of the accident is admissible for the purpose of showing that the company was negligent in allowing it to get out of repair, and such evidence need not be confined to the particular portion of the fence through which the stock escaped: *Lemmon v. Chicago & N. W. R. Co.*, 32-151.

Where damages are claimed by reason of the injured stock having escaped upon the right of way by reason of the fastening of a gate in the fence of the company being defective, evidence is admissible to show that other like fastenings have proved insufficient, and it is not competent for defendant to show that the fastening used was of the kind generally in use: *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

Ownership of stock: In an action against a railway company for damages for stock killed by its train, the ownership of the stock is an issuable fact, and while possession might make out a *prima facie* case of ownership, yet there must be such proof of possession or other proof of ownership to entitle plaintiff to recover: *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Stock running at large: The company is only liable for injuries to stock "running at large," and not when it is in charge of the owner and being driven by him at the time of the injury: *Smith v. Chicago, R. I. & P. R. Co.*, 34-96.

Stock which escapes from the inclosure of the owner upon the track of the company is "running at large:" *Hinman v. Chicago, R. I. & P. R. Co.*, 28-491.

And so, too, is stock which is in a field through which the railway passes and where the company has failed to fence: *Swift v. North Missouri R. Co.*, 29-243.

The words "running at large" mean "not under control of the owner." A mule which had escaped from its owner, and which he was unable to catch, *held* to be running at large: *Hammond v. Chicago & N. W. R. Co.*, 43-168.

Allegations in a petition that the animal injured escaped upon the railroad track, *held* to be in effect an allegation that he was running at large: *Liston v. Central Iowa R. Co.*, 70-714.

A horse may be regarded as running at large where he has escaped from the control

of his owner and cannot be caught by him. So *held* where the horse injured had on a bridle and an untied halter rope: *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Where a person in charge of a herd of cattle left them temporarily, and before the person who was to succeed him in their care took possession of them one of them escaped from the herd and was very soon afterwards killed on defendant's railway track, not having been missed from the herd, *held*, that such animal was running at large within the meaning of this section: *Valleau v. Chicago, M. & St. P. R. Co.*, 73-723.

A suckling colt may be considered as running at large within the provisions of the statute, although its mother is under the control of the owner: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

A team of horses hitched to a wagon and which have escaped from the control of their owner are, within the terms of this statute, "live-stock running at large:" *Inman v. Chicago, M. & St. P. R. Co.*, 60-459.

It is error to instruct the jury that it is the duty of the company to build and maintain fences sufficient to keep cattle off the track under all ordinary circumstances, and that it is liable for all injury to cattle occasioned by its failure to perform that duty. The instructions should be qualified by limiting the liability to injuries caused to animals running at large: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Proof of injury: When stock is killed at a place where the company has failed to fence, it will be presumed, *prima facie*, that the injury occurred "by reason of the want of such fence:" *Spence v. Chicago & N. W. R. Co.*, 25-139.

The evidence in a particular case as to stock killed by a train, having been struck by the train going in a particular direction and carried upon a bridge, *held* sufficient to support a verdict for damages: *Martin v. Central Iowa R. Co.*, 59-411.

In an action against the company for injury to stock, there being no direct evidence as to whether the injury was caused by defendant's train, the jury may consider the character of the injury for that purpose, but evidence that when animals are struck by moving trains there is always some indication left along the track of the collision is not proper: *Clark v. Kansas City, St. L. & N. R. Co.*, 55-455.

Double damages; constitutionality: The provision as to double damages is constitutional. It is uniform in its operation as to all persons or companies pursuing a particular business: *Jones v. Galena & C. U. R. Co.*, 16-6; *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Nor does such provision deny to railway companies, or persons operating railways, equal protection of the laws: *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

This provision does not conflict with the constitutional guaranties for the protection of property: *Mackie v. Central Railroad of Iowa*, 54-540.

Not a penalty: The statute giving the owner double damages is not unconstitutional, as in conflict with the provision that all fines and penalties shall be paid into the school fund. Such damages are not a fine or penalty, and the legislature may determine the measure of damages to be recovered as in other particular cases: *Ibid.*

No part of the double damages is a statute penalty in such sense as to bring the action therefor within the provisions of the statute of limitations as to actions to recover such penalties. The period of limitation for such action is five years: *Koons v. Chicago & N. W. R. Co.*, 23-493.

Not applicable in other cases: The provision for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the section with reference to cattle-guards: *Moriarty v. Central Iowa R. Co.*, 64-696.

Neither can the provision be construed so as to authorize the recovery of double damages for injuries to stock on depot grounds where the company has no right to fence, caused by negligence in operating trains thereon: *Miller v. Chicago & N. W. R. Co.*, 59-707.

Double damages can be recovered only when stock has been injured or killed by reason of the want of a fence, and not when the injury results by reason of the company having fenced where it should not: *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

For failure to repair: A railway company is liable in double damages for injuries caused by negligence in failing to keep a fence in repair as well as by reason of failure to fence: *Bennett v. Wabash, St. L. & P. R. Co.*, 61-355; *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72-214.

Interest: As this statutory provision establishes the measure of recovery in the cases contemplated, the court or jury cannot, in addition to the damages authorized, allow interest on the amount of recovery from the time of the accident, or from the time of the expiration of the thirty days allowed after notice in which to pay the damages: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Assignment: The right of the owner to recover double damages may be assigned, and the assignee may serve the notice and affidavit required to authorize such recovery: *Everett v. Central Iowa R. Co.*, 73-442.

Laws of another state: An action for double damages may be maintained in the courts of this state for injury occurring in another state which has a statute authorizing the recovery of such double damages: *Boyce v. Wabash R. Co.*, 63-70.

Tender: Where stock was killed and before suit tender was made and kept good of a sum less than the value of the stock as found by the jury on the trial, such tender being made as in full payment, *held*, that plaintiff was entitled to double damages in the full amount found by the jury, and that a tender to be sufficient must be of an amount large enough to discharge defendant's full liability: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Where a gross sum is tendered by the rail-

way company in payment of damages caused by injuries to two different animals of the same owner, but it does not make a separate tender as to each, and the jury find the aggregate damage to be greater than the amount tendered, such tender cannot be considered as sufficient for either: *Shuck v. Chicago, R. I. & P. R. Co.*, 73-333.

Notice and affidavit: The written notice required by statute to entitle the owner to recover double damages is only necessary when double damages are sought: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

The affidavit required to entitle a party to double damages may be made by any one acquainted with the facts: *Henderson v. St. Louis, K. C. & N. R. Co.*, 36-387.

It is not necessary that the affidavit designate the place of the injury: *Mundhenk v. Central Iowa R. Co.*, 57-718.

The notice and affidavit need not be separate. If the notice contains the statements necessary in the affidavit, and is sworn to, that is sufficient: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

It is only necessary that the notice be such as to inform the company of the injury. It need not be stated therein that the animals were running at large or were destroyed without the wilful act of the owner: *Mackie v. Central R. of Iowa*, 54-540.

The fact that the amount claimed in the notice is greater than the value of the animal as stated in the petition is not sufficient in itself to show bad faith. If defendant claims that plaintiff's demand was made in bad faith such fact should be pleaded and issue joined thereon, and the same submitted to the jury: *Valleau v. Chicago, M. & St. P. R. Co.*, 73-723.

A return stating service of the notice upon a person named, "being the station agent of said road," etc., sufficiently shows service upon the station agent "employed in the management of the business of the corporation," as provided for by statute: *Welsh v. Chicago, B. & Q. R. Co.*, 53-632; *Schlengener v. Chicago, M. & St. P. R. Co.*, 61-235.

An amendment to an affidavit for the purpose of perfecting the jurat may be allowed, but the company will not become entitled to the thirty days after the amendment in which to pay the claim and escape double damages, where it is clear that there was a *bona fide* attempt on the part of the owner to bring himself within the provisions of the statute, and it was so understood by defendant: *Mundhenk v. Central Iowa R. Co.*, 57-718.

The original of the affidavit and notice of loss should be delivered to the agent upon whom service is made. The delivery of a copy is not sufficient: *McNaught v. Chicago & N. W. R. Co.*, 30-336: *Campbell v. Chicago, R. I. & P. R. Co.*, 35-334.

The original of the affidavit must be served upon the company or its agent, and a copy thereof introduced in evidence. The introduction in evidence of a paper similar to that served upon the company is not sufficient: *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56-207

The officer making service may, by oral testimony, show that he served the original, although his return states the service of a copy: *Liston v. Central Iowa R. Co.*, 70-714.

Service of the affidavit and notice should be made by delivering them to the agent of the company. It is not necessary to read them and deliver a copy: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

As the statute does not prescribe the manner of service, a service by simply delivering the notice and affidavit to the person upon whom service is to be made is sufficient: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Service of the affidavit may be made by the claimant or any other person: *Mundhenk v. Central Iowa R. Co.*, 57-718.

Whether proof of service of notice and affidavit upon the company can be made by an *ex parte* affidavit, *quære: Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

The notice and affidavit will be admissible as proof of service if the return of the officer serving the same be regularly indorsed thereon: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Evidence that a paper was read and given to the agent similar to that introduced in evidence is a sufficient proof of service of the notice of which the paper introduced is a copy: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56-440.

The original of notice and affidavit of loss which have been served upon defendant's agent are not evidence of such service in such sense that notice upon the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability of the company: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

Pleading: In an action before a justice of the peace for killing stock for which the company is liable in double damages, the notice and affidavit may be introduced in evidence though not mentioned in the pleadings, as no petition need be filed: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

On the trial of an action against the company to recover double damages, the fact that the notice required by statute was not attached to the petition must be raised by demurrer, if at all, and cannot be raised as an objection when the notice is offered in evidence: *McKinley v. Chicago, R. I. & P. R. Co.*, 47-76.

Question for jury: Although the sufficiency of the service of the notice is a question of law for the court, yet where the fact of service is in issue its determination may properly be left to the jury: *Cole v. Chicago & N. W. R. Co.*, 38-311.

Fencing at depot grounds: The company is not required to fence where it would not, in view of public convenience, be fit, proper or suitable for it to do so. Depot and station grounds may be left uninclosed when the businesss of the road and the interests of the public so require: *Latty v. Burlington, C. R. & M. R. Co.*, 38-250; *Smith v. Chicago, R. I. & P. R. Co.*, 34-506; *Davis v. Burlington & M. R. R. Co.*, 26-549; *Rogers v. Chicago &*

N. W. R. Co., 26–558; *Durand v. Chicago & N. W. R. Co.*, 26–559.

In the absence of proof of want of ordinary care, a company is not liable for stock killed on depot grounds: *Packard v. Illinois Cent. R. Co.*, 30–474.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the place at which it was killed was not within depot grounds in the absence of any evidence upon the question: *Smith v. Chicago, M. & St. P. R. Co.*, 60–512.

The burden is upon the company to show that the place where stock is injured and where there is no fence is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character: *Comstock v. Des Moines Valley R. Co.*, 32–376

Where the company has its depot grounds surveyed and definitely allotted, the survey or allotment and use constitute a very strong presumptive proof of their necessary boundaries: *Cole v. Chicago & N. W. R. Co.*, 38–311.

The fixing of cattle-guards at long distances beyond the switches and failing to fence between such guards and the switches cannot be regarded as setting apart that part of the main line as station or depot grounds, unless it be necessary for the purpose of transaction of business with the public that such part of the line remain unfenced. It is no reason for not fencing beyond such switch that in the operation of trains it would be inconvenient and possibly more hazardous to couple and uncouple cars if the track beyond the switches was fenced and provided with a cattle-guard: *Peyton v. Chicago, R. I. & P. R. Co.*, 70–522.

Negligence at depot grounds: As between the owner of cattle and the company, the latter cannot be required to keep a watch or guard at depot grounds, any more than it can be required to fence the same: *Smith v. Chicago, R. I. & P. R. Co.*, 34–506.

Speed at depot grounds: By this section a railroad company is liable for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour; but if the stock is killed at a place where the company has a right to fence, although nearly adjacent to the depot grounds, the provisions as to the rate of speed have no application, and it is not negligence in the company that its trains are running at a higher rate of speed, even at such rate that they must necessarily enter on the depot grounds running faster than eight miles an hour: *Monahan v. Keokuk & D. M. R. Co.*, 45–523.

The provision making the company liable for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour applies only to cases where the stock is killed on such grounds: *Ibid.*

If the train comes upon the depot grounds at a greater rate of speed than eight miles per hour, a verdict for damages for stock killed may be sustained, although at the time of the injury to the stock the train had nearly stopped. The jury might be authorized in such case to find that the train would have been stopped entirely if it had entered the grounds at a speed not exceeding the lawful rate: *Miller v. Chicago & N. W. R. Co.*, 59–707.

An ordinance regulating the rate of speed of cars within city limits is applicable to the switch yards of the company, and is not to be limited to places where the public have a right to travel: *Crowley v. Burlington, C. R. & N. R. Co.*, 65–658.

Fencing at highway crossings: The company is not required to fence where its track crosses a public highway, whether such highway be one *de jure* or only *de facto: Soward v. Chicago & N. W. R. Co.*, 33–386.

The company has no right to fence its line so as to obstruct a public street, whether such street is actually opened for public travel or not: *Long v. Central Iowa R. Co.*, 64–657.

A railway company has not the right to fence across platted streets and alleys within city or town limits, even though such streets or alleys are not opened or used: *Lathrop v. Central Iowa R. Co.*, 69–105.

A railroad corporation does not have a right to fence its track in cities and towns where it is intersected and crossed by streets and alleys: *Blanford v. Minneapolis & St. L. R. Co.*, 71–310.

But the company has the right to fence within the corporate limits of a town so far as its line runs through lands situated beyond streets or other highways, and it will be liable in damages for injuries to stock at such places if it has failed to fence: *Coyle v. Chicago, M. & St. P. R. Co.*, 62–518.

In a particular case, *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the station grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58–622.

Negligence at highway crossings or depot grounds: The company is bound to use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence: *Whitbeck v. Dubuque & P. R. Co.*, 21–103; *Balcom v. Dubuque & S. C. R. Co.*, 21–102.

The company is not liable in double damages under the statute for cattle killed at a place where it has no right to fence its track: *Soward v. Chicago & N. W. R. Co.*, 30–551.

Where an animal is killed on the depot grounds, negligence must be shown on the part of the company in order to make it liable: *Cleveland v. Chicago & N. W. R. Co.*, 35–220; *Plaster v. Illinois Cent. R. Co.*, 35–449.

In an action to recover for stock killed upon a railway the burden rests upon plaintiff to show that the injury was caused at a point where the company is required to fence its track: *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56–207; *Comstock v. Des Moines Valley R. Co.*, 32–376.

Evidence considered and *held* sufficient to show that the animal killed was struck at a highway crossing, and not in the field where the marks of blood were found: *Sullivan v. Wabash, St. L. & P. R. Co.*, 58–602.

In case of the killing of stock at a point

where the railway has not the right to fence, the burden of proof is upon plaintiff to show negligence of the company: *Schneir v. Chicago, R. I. & P. R. Co.*, 40–337.

The failure to give signals at crossings does not in itself establish negligence on the part of the company nor render it liable for stock killed at such crossings. In such cases it is necessary, in order to hold the company liable, that the jury find that the failure to give signals, under the circumstances, constituted negligence, and also that such negligence, if any, was the cause of the injury: *Jackson v. Chicago & N. W. R. Co.*, 36–451.

Under particular facts, *held*, that the company was not guilty of any negligence in connection with the injury received from its train to stock, at its crossing, and was, therefore, not liable: *Plaster v. Illinois Cent. R. Co.*, 35–449; *Schneir v. Chicago, R. I. & P. R. Co.*, 40–337.

In a particular case, *held*, that there was not such absence of proof of negligence causing the injury to stock at a crossing, on the part of the company, as to require the setting aside of a verdict against it for damages: *Lawson v. Chicago, R. I. & P. R. Co.*, 57–672.

The fact that an engineer, in the exercise of his judgment, believes he can frighten stock from the track without reversing his engine or stopping the train, will not show that there is not negligence unless it appears that he possesses and exercises ordinary judgment: *Parker v. Dubuque Southwestern R. Co.*, 34–399.

In an action for negligence causing injuries to stock at a place where the company was not entitled to fence, *held*, that it was not improper to instruct the jury that, if defendant's employees saw the animal upon the track, and so near that it might reasonably be supposed, under all the circumstances, that the animal would be in danger, and could, by the use of ordinary care and prudence, have avoided the injury, and did not do so, the defendant was liable: *Edson v. Central R. Co.*, 40–47.

The question whether negligence is shown under such circumstances is one of fact for the jury: *Ibid.*

Negligence or wilful act of stock owner: Contributory negligence of stock owner, not amounting to a wilful act, will not defeat his right to recover for stock injured where the company has a right to fence: *Inman v. Chicago, M. & St. P. R. Co.*, 60–459.

The mere fact that the owner, by his voluntary act, exposes the animal to danger, will not necessarily make the act wilful. If the act of the owner was for a lawful purpose, and the danger was merely incidental, it should not be considered wilful so as to defeat recovery: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58–622.

Wilful act of owner: The statutory provision excludes all defenses in such cases except such as arise from the wilful act of the owner. This implies something more than mere negligence. It is an act in some way connected with the injury, such as driving live-stock upon the track, or permitting the animals to escape for the purpose of going upon the track: *Ibid.*

The fact that the owner of swine allows the animals to run at large on his premises, in close proximity to the railroad track, does not constitute a wilful act such as to defeat his recovery: *Lee v. Minneapolis & St. L. R. Co.*, 66–131.

The act of the owner in permitting stock to run at large is not evidence of contributory negligence: *Whitbeck v. Dubuque & P. R. Co.*, 21–103; *Evans v. Burlington & M. R. R. Co.*, 21–374; *Stewart v. Burlington & M. R. R. Co.*, 32–561; *Searles v. Milwaukee & St. P. R. Co.*, 35–490.

The liability of the company for stock killed where it has a right to fence exists regardless of the negligence of the owner. It is only upon a showing that the injury is the result of the wilful act of the owner or his agent that the company is excused from liability: *Spence v. Chicago & N. W. R. Co.*, 25–139.

It is contributory negligence on the part of the owner of cattle to allow them to frequent places of danger such as depot grounds: *Smith v. Chicago, R. I. & P. R. Co.*, 34–506.

But where plaintiff allowed a blind horse to run at large and it was killed by defendant's train on its depot grounds, *held*, that the question whether plaintiff was guilty of contributory negligence was for the jury, and that such act was not, as a matter of law, negligence sufficient to defeat recovery: *Hammond v. Sioux City & P. R. Co.*, 49–450.

The fact that a party knowingly allows his animals to be upon and frequent depot and station grounds does not necessarily constitute contributory negligence such as to defeat recovery for injury to such animals: *Miller v. Chicago & N. W. R. Co.*, 59–707.

That a stock owner allows his stock to run at large with the knowledge that a crossing is dangerous, and that his animals frequent such crossing, does not constitute negligence even though the statute makes the owner liable for all damage resulting from his animals being at large: *Kuhn v. Chicago, R. I. & P. R. Co.*, 42–420.

Where the owner of stock turned it loose upon the portion of his farm which was fenced, and it broke through the fence and strayed upon the railroad track, and it did not appear that the fence was not reasonably sufficient, *held*, that plaintiff, having no knowledge that his animals had escaped until they were killed, could not be considered guilty of contributory negligence: *Moriarty v. Central Iowa R. Co.*, 64–696.

Stock unlawfully at large: The fact that sheep and swine are not allowed to run at large will not defeat the owner's right to recover for injuries to such animals: *Spence v. Chicago & N. W. R. Co.*, 25–139; *Stewart v. Chicago & N. W. R. Co.*, 27–282; *Fernow v. Dubuque & S. W. R. Co.*, 22–528; *Lee v. Minneapolis & St. L. R. Co.*, 66–131.

Where animals, allowed to run at large in violation of a city ordinance, come upon the track, they are trespassers, and the company owes no duty with reference to them and is not liable for injuries received by them, even though occasioned by a train running at greater speed than eight miles per hour, it not appearing that such improper speed was wanton or reckless: *Vanhorn v. Burlington, C. R. & N. R. Co.*, 59–33; *S. C.*, 63–67.

To defeat recovery from a railroad company for killing on its depot grounds an animal which it is unlawful to allow to run at large, it is necessary to show that the animal is at large by the owner's sufferance: *Pearson v. Milwaukee & St. P. R. Co.*, 45-497.

The fact that plaintiff's horse was at large in the night-time on the premises of another in violation of the herd law in force in the county, and was killed by defendant's train without fault or negligence of defendant, at a point where defendant had a right to fence, but did not, *held* not sufficient to defeat plaintiff's right of recovery: *Krebs v. Minneapolis & St. L. R. Co.*, 64-670.

It is not contributory negligence sufficient to defeat the owner's right of recovery that the animal is at large within the city limits in violation of an ordinance of the city, if it is at large by accident and not intentionally: *Doran v. Chicago, M. & St. P. R. Co.*, 73-115.

Setting out fires: The effect of the present statutory provision above referred to is not to make the company absolutely liable for damages from fires set out, but to render the injury *prima facie* proof of negligence on part of the company, which may be rebutted by showing freedom from such negligence: *Small v. Chicago, R. I. & P. R. Co.*, 50-338; *Slosson v. Burlington, C. R. & N. R. Co.*, 51-294; *Libby v. Chicago, R. I. & P. R. Co.*, 52-92.

The negligence of the company is presumed if the fire proceeds from one of its engines, and it is not necessary for the plaintiff in the first instance to prove more than that it did so proceed: *Rose v. Chicago & N. W. R. Co.*, 72-625.

It is sufficient for plaintiff suing in such cases to set forth in his pleading simply the occurrence of the injury. The presumption of liability arising from the occurrence itself is not necessarily overcome by the proof merely that the company was not guilty of negligence in the matters which were the immediate cause of the injury, as permitting combustible material to accumulate and remain on the right of way. The burden of proving such fact is not upon plaintiff even though he may allege it in his petition: *Engle v. Chicago, M. & St. P. R. Co.*, 37 N. W. Rep., 6.

This *prima facie* evidence may be rebutted by defendant, the effect of the statute being simply to change the burden of proof. As to whether the rebutting evidence showing due care, etc., on the part of the company is sufficient is a question for the jury and not for the court: *Babcock v. Chicago & N. W. R. Co.*, 62-593.

The good condition of the engine, the diligence of defendant's employees and other facts are evidence of care. When such evidence is introduced on the part of the defendant after the fact of the injury is proven by plaintiff, a conflict in the evidence arises which may be determined by the jury: *Ibid.*

The fact that the right of way is procured from the owner of the land does not preclude recovery of damages for fires set out in the operation of the railway to fences not then built and timber situated a mile from the track. Such damages could not have been considered in estimating damages in proceedings for condemning the right of way: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

A railroad company is liable for damages from fire communicated by its negligence to a building of a third person and from such building to buildings of plaintiff, and negligence of the third person owning the intermediate building in not keeping it in the proper condition will not defeat plaintiff's right to recover: *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

Company operating road: The company whose engine sets out the fire is liable for the damages resulting, although it is operating a line owned and used by another company, and the fire originates on the right of way by reason of combustible matter allowed to accumulate thereon by such other company: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Contributory negligence: If, by plowing around stacks in a field or otherwise protecting them, the owner could have prevented destruction of them by reason of fire originally set out by sparks from the locomotive spreading to such stacks, and the omission to protect them was negligence, then plaintiff cannot recover for their destruction; the question whether failure to thus plow around the stacks for their protection being a question for the jury: *Kesee v. Chicago & N. W. R. Co.*, 30-78.

It is not, as a matter of law, contributory negligence on the part of the owner of grain stacked upon the open prairie to fail to take certain precautions to guard against the approach of fire, as by plowing around it, etc. The question whether such omission constitutes negligence in a particular case is one of fact for the jury: *Garrett v. Chicago & N. W. R. Co.*, 36-121.

The right of recovery for an injury caused by fire set out in the operation of a railroad is not defeated by the mere contributory negligence of the injured party: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661.

Whether, under the section as it now stands, differing from the provisions under which preceding cases were decided, it is necessary for plaintiff suing to recover damages to his property for fire set out by an engine to prove absence of contributory negligence on his part, *quære: Ormond v. Central Iowa R. Co.*, 58-742.

Evidence as to whether other farmers had plowed around their stacks at the time plaintiff's stacks were destroyed by fire, *held* not admissible: *Ibid.*; *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

Held, also, that it was error to instruct the jury in such cases that plaintiff's act in stacking his wheat in a field where it was grown and adjacent to a railroad, without plowing around his stacks, would not constitute negligence defeating his recovery unless the act was such as ordinarily prudent and cautious men would not have done in like manner under similar surrounding circumstances: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

The party from whose land the right of way is taken would not be negligent, as a matter of law, in sowing wheat upon the right of way and allowing the stubble to remain there after the wheat was removed: *Ibid.*

Constitutional: These peculiar provisions as to liability of railway companies for damages from fires are not in conflict with the constitution, being applicable alike to all persons

or companies engaged in such business: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

Evidence: The frequent occurrence of fires caused by the same engine on the same trip may be shown for the purpose of proving that it was defective in its construction, or that it was out of repair or negligently handled: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502; *West v. Chicago & N. W. R'y Co.*, 77-654.

But, in such a case, it is not competent to show that other fires occurred along the right of way in the same vicinity shortly after the engine passed over the road and before the fire that destroyed plaintiff's property: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

Plaintiff, in introducing evidence to rebut the evidence of the railway company tending to show want of negligence on its part causing fire set out by its locomotives, may do so by facts of a circumstantial character, as it is not usually possible to introduce witnesses who can testify from personal knowledge. Therefore evidence which might not be free from difficulties in other cases open to clearer proofs, might be considered sufficient: *Babcock v. Chicago & N. W. R. Co.*, 62-593.

In an action by the tenant to recover the value of a crop destroyed by fire set out by the company's engines, it appearing that plaintiff did not pay cash rent, *held* error to refuse to allow plaintiff to be cross-examined as to whether he was to give a share of the grain for rent: *Ormond v. Central Iowa R. Co.*, 58-742.

Where it appeared that plaintiff had as a trespasser cut and stacked hay upon the land of another which he had no title to, and of which he was not in possession, *held*, that he could not maintain an action against a railroad company for its negligence resulting in the destruction thereof by fire: *Murphy v. Sioux City & P. R. Co.*, 55 473; *Lewis v. Chicago, M. & St. P. R. Co.*, 57-127.

Negligence: Before the enactment of this statutory provision, it was held that the burden of proof in an action against the company for such damages was upon plaintiff to show negligence of the company, and that proof of the injury alone was not sufficient to make out a *prima facie* case: *Gandy v. Chicago & N. W. R. Co.*, 30-420: *McCummons v. Chicago & N. W. R. Co.*, 33-187; *Garrett v. Chicago & N. W. R. Co.*, 36-121.

But in such case, *held*, that as in the nature of the case plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it might be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, and which might not be satisfactory in other cases, free from difficulty and open to clear proof: *Gandy v. Chicago & N. W. R. Co.*, 30-420.

A party using a dangerous instrument, body or element will be held to use greater care and prudence than when using a less destructive agency. Fire being a destructive element, persons using it are required to exercise all reasonably careful precautions against its spread, and the care and prudence required by law to prevent the spread of fire from a locomotive are not deemed to be exercised unless some proper precautions are used for that purpose: *Jackson v. Chicago & N. W. R. Co.*, 31-176.

Ordinary care and prudence require the use of the best contrivances known, and unless such are used it will be considered negligence; but what amounts to negligence in such cases is a question of fact for the jury: *Ibid.*

Also *held*, that to allow dried grass, weeds, and other matter, the natural accumulations of the soil, to remain upon the right of way, was not negligence *per se*, but that there might be such peculiar or unusual circumstances in a given case as that such acts would amount to negligence in fact, and that when such circumstances existed they might properly be submitted to the jury to establish the fact of negligence: *Kesee v. Chicago & N. W. R. Co.*, 30-78.

Also *held*, that the question of negligence, such as to render the company liable for damages resulting from such fires, was to be determined by the jury, and that it was not proper to enumerate facts and circumstances which as matter of law would be sufficient to charge the company with negligence: *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

1973. Fences required. 22 G. A., ch. 30, § 1. All railroad corporations organized under the laws of this state, or any other state, owning or operating a line of railroad within this state, which have not already erected a lawful fence, shall construct, maintain and keep in good repair a suitable fence of posts and barb wire, or posts and boards on each side of the tracks of said railroad within the state of Iowa, and so connected with cattle-guards at all public highway crossings as to prevent cattle, horses and other live-stock from getting on the railroad tracks. Said railroad tracks to be fenced by said railroad companies on or before January first, 1890, where the railroads are now built, and within six months after the completion of any new rail roads, or any part thereof, the said fences to be constructed either of five barbed wires, securely fastened to posts; said posts to be not more than twenty feet apart, and not less than fifty-four inches in height, or of five boards securely nailed to posts, said posts to be not further than eight feet apart, and said fence to be not less than fifty-four inches in height. *Provided;* when said railroad corporations, who have now their fences built shall when they rebuild or repair their fences the same shall be built as provided

in this act: *Provided:* further that any other fence which in the judgment of the fence viewers is equivalent to the fence herein provided shall be a lawful fence. *Provided* however that this act shall not be so construed as to compel a railway company operating a third-class railway to fence its road through the land of any farmer or other person, who by written agreement with said company has waived or may waive the fencing of said road through such land. *Provided* further however, that at any points where third-class roads are not released by written agreement, from building fence as herein provided for, and fences are built on both sides of railway track at such points, cattle-guards shall be so constructed at such points as to prevent stock from going upon said track so fenced.

1974. Penalty. 22 G. A., ch. 30, § 2. If any corporation or officer thereof or lessee owning or engaged in the operation of any railroad, in this state, neglect or refuse to comply with any provision of section one of this act [§ 1973], such corporation, officer or lessee, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars for each and every offense. And every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense within and for the purposes of this act.

1975. Killing of stock. 22 G. A., ch. 30, § 3. Nothing herein contained shall relieve said railroad corporations from pecuniary liability arising from the killing or maiming of live-stock on said track or right of way by said corporation, that may occur through the negligence of said corporation or its employees, and *provided* further, that nothing in this act shall be construed so as to interfere with the right to open or private crossings, as now maintained, or with the right of persons to such crossings. *Provided* further, that nothing in this act contained shall in any way limit or qualify the liability of any corporation or person, owning or operating a railway, that fails to fence the same against live-stock running at large, for any stock injured or killed by reason of the want of such fence as now provided for in section twelve hundred and eighty-nine of the Code of 1873 [§ 1972].

1976. Railway crossings near Mississippi river. 1290. Whenever it becomes necessary in the construction of any railway to cross any other railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing, so that the respective road-beds thereof shall be above high water in such river. But where such crossings occur within the limits of cities containing six thousand inhabitants as shown by the last preceding census, the city council of such cities may establish the grade at such crossings. [14 G. A., ch. 33.]

1977. Conditions of aid tax. 1291. In all cases where taxes have been voted under chapter forty-eight, of twelfth general assembly, or chapter one hundred and two of thirteenth general assembly, to aid in the construction of any railway, or where said tax has been transferred under chapter eighty-one of the fourteenth general assembly, and said tax has been voted or transferred under any condition or contract with the railway company which the township may desire to have changed or modified, said township is hereby authorized upon agreement of its trustees with the railway company constructing said proposed railway, to submit to a vote of the electors of the township, the question whether the conditions or contract under which said tax was voted or transferred, shall be changed or modified, and said trustees, upon petition of one-third of the legal voters of the township, as shown by the vote cast at the last general election, asking such change or modification, shall order an election, submitting the agreement to the electors, at a special election called therefor, said election to be conducted in all respects as to notice and manner of holding, as the election at which the tax was originally voted.

FOREIGN RAILWAY CORPORATIONS.

1978. Privileges; filing articles. 18 G. A., ch. 128, § 1. Any railroad company organized, or created by, or under the laws of any other state, and owning and operating a line or lines of railroad in such state, is hereby authorized to extend and build its road or any branches thereof into the state of Iowa. And such railroad company shall have and possess all the powers, franchises, rights and privileges, and be subject to the same liabilities of railroad companies organized and incorporated under the laws of this state, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this state; *provided*, such railroad corporation shall file with the secretary of the state of Iowa, a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of the statute laws of such state incorporating such company, where the charter of such railroad corporation was granted by statute of such state.

RELOCATION OF RAILWAYS.

1979. Petition for change. 16 G. A., ch. 118, § 1. Any railroad company desiring to change or remove the line of its road, after the same has been permanently located and constructed, may for that purpose file a petition in the district [or circuit] court in any one of the counties wherein the change or removal is proposed to be made, describing with convenient accuracy that portion of its line of road which said company seeks to have changed or removed, and asking the court to grant the right or authority to make such change or removal. To this suit, all trustees, mortgagees, or other lien holders, and all townships, cities and counties which have aided by taxation to build the road, must be made defendants by service of original notice, in the time and manner as provided by law for service of original notices.

1980. Notice. 16 G. A., ch. 118, § 2. In addition to the foregoing notice, a public notice to all whom it may concern, of the time of filing such petition and of the object thereof and of the term of court at which the application for authority to make the change will be made, and requiring all persons desiring the repayment of money or the return of property, as in this act contemplated, to appear at such court and make good their claim therefor, must be published in a newspaper printed in each county wherein the change is to be made, for a period of ten successive weeks before the term of court at which the application is to be made. The court may order any additional notice or publication that it may deem proper.

1981. Conditions. 16 G. A., ch. 118, § 3. But no railroad company shall be allowed to change or remove the line of its road after its permanent location and construction, without repaying to the proper parties all moneys, and restoring all property, or its value, which were given or donated to the company building the same, exclusively in consideration of the said railroad's being located and constructed on such line, nor without first procuring the proper consent of all parties having liens upon said railroad; and also of any township, city or county that has by taxation or by the issuing of bonds contributed money to aid in the construction thereof; *provided*, that the consent of such township, city or county shall be necessary with reference only to the change to be made within its own territorial limits.

The obligation to operate a railway is incurred by accepting taxes: *State v. Central Iowa R. Co.*, 71-410.

1982. Order of court. 16 G. A., ch. 118, § 4. If the court is satisfied that due and proper notice has been given, and that the consent of the proper parties, as herein contemplated, has been duly obtained, it shall order and adjudge in favor of all persons who have appeared and established their claims thereto, the repayment of all moneys, and the return of all property, or its value, which were given or donated to the company exclusively in considera-

tion of the roads being located on the line from which it is proposed to make the removal, and shall declare and adjudge all persons not so appearing and establishing their claims as aforesaid, forever thereafter debarred and estopped from setting up or asserting the same. The court may, if the public interest demand it, make an order authorizing the railroad company to change or remove the location of its road, as asked for in the petition, but such order must be on the condition that all claims for the repayment of money, or the return of property, which may be allowed by the court, as herein provided, shall be first paid or satisfied.

1983. Effect. 16 G. A., ch. 118, § 5. All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change, shall be and remain valid liens and incumbrances on the line of road to which the change is made, and shall take priority of all other liens and incumbrances upon such new line of road.

1984. Notice. 16 G. A., ch. 118, § 6. For the purpose of this act, the trustees of each township shall be served with notice, and shall be authorized to represent and act for their respective townships; *provided*, that no vested right of any person or persons, living on and along the line of any railroad removed under the provisions of this act, shall be defeated or affected by this act; *and provided further*, that the provisions of this act shall apply only to such railroads as were constructed prior to the year 1866.

1985. Cuts and banks. 16 G. A., ch. 118, § 7. When any railroad company shall take up their track and relocate the same under the provisions of this act, shall fill up the cuts and level down the banks, or cause the same to be done, within two years from the time of taking up such track.

1986. Provisions not to apply. 17 G. A., ch. 152, § 1. The provisions of section seven, of chapter one hundred and eighteen, of the laws of the sixteenth general assembly [§ 1985], shall not apply to any railroad which has its initial point at any town upon the Mississippi river, and which had in the year 1859, sixty-three miles and no more of completed track from such initial point, and provided that the exemption from the provisions of said section shall only apply a distance of sixty-three miles from the initial point of any such railroad.

OF THE OPERATION.

1987. Connections. 1292; 15 G. A., ch. 18. Any railway corporation, operating a railway in this state, intersecting or crossing any other line of railway, of the same gauge, operated by any other company, shall, by means of a Y, or other suitable and proper means, be made to connect with such other railway so intersected or crossed; and railway companies where railroads shall be so connected shall draw over their respective roads the cars of such connecting railway; and also those of any other railway or railways connected with said roads made to connect as aforesaid, and also the cars of all transportation companies or persons, at reasonable terms, and for a compensation not exceeding their ordinary rates. [9 G. A., ch. 158, § 1.]

1988. Commission to adjust rates. 1293; 15 G. A., ch. 18. When such corporations are unable to agree upon the method and terms of connection and rates of transportation, either, or any person interested in having such connection made, may make application to the district [or circuit] court in any county in which said connection may be desired or located, or to the judge of said courts if in vacation, after ten days' notice in writing to the companies. After hearing the parties, or on default, the said judge shall appoint three disinterested persons, being presidents or superintendents of railways, or experts in railway business, without regard to their place of residence, as commissioners, to determine the method and terms of connection and rules and

regulations necessary thereto; *provided*, that the rates as fixed by the said commissioners, for freights offered or transported in the cars of the company offering the same, shall in no case exceed the local rates per mile fixed by law or set forth in the carrying companies' freight tariff prepared and made public in accordance with the laws of the state. [Same, § 2.]

1989. Report of. 1294. Said commissioners shall meet at such time and place as may be ordered by said court or judge, and shall hear the parties and any testimony brought before them, and make and sign their report, prescribing the things to be done. Such report made by them, or a majority of them, shall, within such time as ordered by said court or judge, be returned to and filed in said court, to be confirmed thereby; and, when so confirmed, it shall be binding upon the parties until another report shall be made upon a new application, which cannot be made within two years after such confirmation. [Same, § 3.]

1990. Duty, power, and compensation. 1295. Said commissioners shall have such compensation as shall be deemed reasonable by the court, and shall be governed by the same rules and have the same power in compelling the attendance of witnesses, and shall themselves be sworn, as is now provided in cases of referees in civil actions at law in the district court, and exceptions may be taken to their report in the same manner; and such exceptions shall have the same effect, and the proceedings upon their report shall be the same as on reports of referees in cases referred from said court, and the costs shall be paid by the parties in such proportion as to the court may seem equitable and just. [Same, § 4.]

1991. Penalty. 1296. If the officers of, or any person in the employ of said corporation, refuse to comply with the terms of such confirmed report, they may be punished as for a contempt of said court. [Same, § 5.]

1992. Pooling; penalty. 1297. It shall be unlawful for any railway company to make any contract, or enter into any stipulation with any other railway company running in the same general direction, by which either company shall, directly or indirectly, agree to divide in any manner or proportion the joint earnings upon the whole or any part of the freight transported over such roads, and any violation of this provision shall render the railway company violating the same, liable to a penalty of five thousand dollars for each month for which such earnings are divided, to be recovered for the use of the permanent school fund in the name of the state.

1993. Drawback. 1298. Contracts between any such corporations operating a railway, allowing a drawback of not exceeding fifteen per cent. on the gross earnings of the railway on business coming from or going to any other railway, shall be legal and binding. [10 G. A., ch. 86, § 1.]

1994. Same. 1299. Any such corporation owning and operating a railway partially constructed, may, for the purpose of inducing the investment of capital in the extension or completion of its railway, contract with the party furnishing such means, or the trustees who may represent them, allowing a drawback not exceeding twenty per cent. of the gross earnings of all business coming from and going to any part of the extension or portion to be aided or completed with the money or means thus obtained; or such railway company may lease of the trustees or said parties, the portion to be built with means thus furnished, subject to the same rights and liabilities as are provided in the next section. [Same, § 2; 14 G. A., ch. 39.]

1995. Sale; lease; joint arrangement. 1300. Any such corporation may sell or lease its railway property and franchises to, or may make joint running arrangements with, any corporation owning or operating any connecting railway, and the corporation operating the railway of another, shall,

in all respects, be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this state. [10 G. A., ch. 86, § 4.]

Where a line of road has been built by aid of taxes levied for that purpose, the line in aid of which the tax is voted must be operated as a whole, and a portion thereof cannot be leased and operated separately to the injury of any locality on the line. Any railroad company availing itself of such aid assumes relations to the public different from those resulting from a mere private contract: *State v. Central Iowa R. Co.*, 71-410.

Further as to this section, see *Treadway v. Chicago & N. W. R. Co.*, 21-351; and, in general, notes to § 1957.

1996. Mortgaged. 1301. Any contract, lease, or benefit derived therefrom, contemplated in either of the three preceding sections, may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation. [Same, § 3.]

Where a railroad has been constructed by the aid of taxes the obligation to operate it as an entire line attaches to it in the hands of a purchaser thereof at sale under foreclosure: *State v. Central Iowa R. Co.*, 71-410.

1997. Change of name. 1302. Where any railway company shall be organized under a corporate name, and shall have made contracts for payments to it upon delivery of stock in such company, and shall, subsequent to such contracts, have changed their corporate name, or when the real ownership in the property, rights, powers, and franchises have passed legally or equitably, into any other company, no such contracts shall be enforced in law or equity until tender or delivery of stock in such last named corporation or company.

1998. Report. 1303. When any railway has been completed and opened for use, the corporation constructing the same shall report to the next general assembly, under oath, the total cost thereof, specifying the amount expended for construction, engines, cars, depots, and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes, with their inclination to the mile, the greatest curvature, the average width of grade, and the number of ties per mile. [9 G. A., ch. 169, § 1.]

1999. Maximum rates. 1304. In the month of June in each year, every corporation operating a railway in this state shall fix its maximum rates of fare for passengers and freight, for transportation of timber, wood, and coal, per ton, cord, or thousand feet per mile; also its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth classes of freight; and, on the first day of July following, shall put up at all the stations and depots on its railway, a printed copy of such fare and freight, and cause a copy to remain posted during the year. For wilfully neglecting so to do, or for wilfully receiving higher rates of fare or freight than those posted, the company shall forfeit and pay to the state of Iowa, for the use of the school fund, not less than one hundred dollars nor more than two hundred dollars, to be recovered in any civil action in the name of the state; and it is hereby made the duty of the several district [county] attorneys within their respective districts [counties] to sue for and recover all sums forfeited as aforesaid; and such corporation shall also forfeit and pay to the person injured, double the amount of compensation or charge illegally taken, to be recovered by such person in a civil action. [9 G. A., ch. 169, § 2; 13 G. A., ch. 139.]

A former statute, similar to this section, considered and *held* not to be in conflict with the U. S. Const., as being an attempt to regulate commerce between the states: *Fuller v. Chicago & N. W. R. Co.*, 31-187.

Under such statute, *held*, also, that the receiving of higher rates than those posted subjected the company to the penalties imposed by the statute without it being shown that such overcharge was wilful: *Fuller v. Chicago & N. W. R. Co.*, 31-211.

2000. Maximum passenger fare. 1305. For the transportation of passengers, no railway company shall charge to exceed three and one-half cents per mile per passenger.

2001. Rights reserved. 1306. All contracts, stipulations, and conditions, regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land or other property or voting taxes to aid in the construction of, or franchises to, railway corporations, are expressly reserved, continued, and perpetuated in full force and effect, to be exercised by the general assembly, whenever the public good or the public necessity requires such exercise thereof.

[In next to the last line, the word "and" is erroneously inserted in the printed Code in place of "or."]

2002. Liability for negligence or wrongs of employees. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. [9 G. A., ch. 169, § 7; 13 G. A., ch. 121; 14 G. A., ch. 65.]

In general: Without this statutory provision the company would not be liable to an employee for injuries resulting from negligence of a co-employee, and the intention of the statute is merely to give to the employee a right of action in such cases, and not to change the degree of care necessary, which is, as between master and servant, that of ordinary care and diligence only: *Hunt v. Chicago & N. W. R. Co.*, 26-363.

The company is liable to an employee for damages resulting from the negligence of a co-employee whose duty it was to keep a bridge in order, in the performance of such duty: *Locke v. Sioux City & P. R. Co.*, 46-109.

Person or company operating railway: A receiver who is managing a railway under the direction of a court is within this section and may be charged, and a recovery obtained against him, as a person operating a railway. And though his liability could not be personal, a judgment against him might be satisfied out of the property in his hands if the court by whom he was appointed should so direct: *Sloan v. Central Iowa R. Co.*, 62-728.

The fact that a lessee may be held liable under this section does not prevent recovery against the owner of the road. The actions are cumulative: *Bower v. Burlington & S. W. R. Co.*, 42-546.

The running of special trains over the railway by a construction company in constructing it is operating a railroad within the meaning of the statutory provision: *McKnight v. Iowa & M. R. Constr. Co.*, 43-406.

Persons not employees: The language of the section is so broad that it includes any and all persons, employees and others, who may be injured by the negligence of the agents or servants of the railway company or persons operating the railway: *Rose v. Des Moines Valley R. Co.*, 39-246.

If the act of the employee is within the scope of his authority the company is liable for injuries therefrom to a third person, even though the act is wilfully wrongful: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

If the employees perform their duty in operating a train in a manner so unusual or reckless as to endanger lives of persons upon the train they are guilty of negligence, and if in direct consequence of such negligence a person is injured the company will be liable even though the person was on the train without right. This section renders the company liable for all damages sustained by any person in consequence of the neglect of agents, etc.: *Way v. Chicago, R. I. & P. R. Co.*, 73-463.

It is not material that plaintiff, claiming to recover by virtue of this section, was not employed in the operation of the road. It is sufficient if it appears that he was injured by the operation of the road and by negligence of the parties charged with responsibility with respect to the movement of trains: *Pierce v. Central Iowa R. Co.*, 73-140.

Employees engaged in operating road: This section affords a remedy only to such employees as are employed, at the time of receiving the injury, in the business of operating a railroad: *Malone v. Burlington, C. R. & N. R. Co.*, 65-417.

So that to entitle an employee to recover against the company for injuries which he has sustained, he must show, first, that he belonged to the class of employees to whom the statute affords a remedy, and, second, that the company which occasioned the injury was of a class of companies for which the remedy is given: *Ibid.*

Therefore, *held*, that an employee whose duty was to wipe off engines, open and close the doors of the engine house, and remove snow from the turn-table and tracks and operate the turn-table, and who was injured by reason of the negligence of a co-employee causing the door of the engine house to fall upon him, was not engaged in the operation of the road in such a sense as to be within the statutory provisions: *Ibid.*

The change from the common law made by this section extends no further than to employees engaged in the business of operating a railway, and not to persons employed by the corporation without regard to the nature of

their employment. Such corporation may be engaged in any other business, which may be within the scope of their organization, but not at all, or very remotely, connected with the use of their road, and in such cases employees by whom such affairs are conducted acquire no rights under the statutory provision, as their occupation does not expose them to the hazards incident to the use of railways, and the statute was not designed for their protection and benefit: *Schroeder v. Chicago, R. I. & P. R. Co.*, 41-344.

It is error for the court to instruct the jury that, as a matter of law, the nature of plaintiff's service and employment bring him within the terms of the statute. The character of his employment, whether in connection with the use of defendant's railroad, or whether thereby he is brought within the provisions of the statute, are questions of fact to be determined by the jury: *Ibid.*

This statutory provision applies no further than to employees engaged in the business of operating a railroad, and does not apply to employees in a machine-shop of the company. In such case the common-law rule exempting the employer from liability for injury to an employee resulting from the negligence of a co-employee is still in force: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399.

The words "where such wrongs are in any manner connected with the operation or use of any railway" apply not only to wilful wrongs, but also to negligence of agents, etc., and in order to entitle an employee to recover for injuries received from a co-employee, it must appear that he was engaged in a service connected with the use and operation of the railroad: *Foley v. Chicago, R. I. & P. R. Co.*, 64-644.

Therefore, *held*, that an employee whose duty it was to repair cars while standing upon the track and side track of the company, while not in motion, and who was sometimes required to ride on the trains of the company from place to place for the purpose of making such repairs at different places, was not employed in the operation of the road in such sense as to bring him within the protection of the provision: *Ibid.*

Injuries to one employee by reason of negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, *held* not within the provisions of the statute: *Matson v. Chicago, R. I. & P. R. Co.*, 68-22.

Employees engaged in hoisting coal in a coal-house for the purpose of filling a car are not so engaged in the hazardous business of operating a railroad as that one can recover for injuries caused by the negligence of the other: *Luce v. Chicago, St. P., M. & O. R. Co.*, 67-75.

In order to render a company liable for injuries to an employee by reason of negligence of a co-employee, the negligence complained of must be that of an employee and affect a co-employee, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, or superintending, directing or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from the train, is not connected with its movement: *Stroble v. Chicago, M. & St. P. R. Co.*, 70-555.

Therefore, *held*, that where employees were engaged about elevating coal to a platform to supply the engine, their duties were not so connected with the use and operation of the railroad as that one of them could recover for injuries received from negligence of the other: *Ibid.*

Where a section hand was injured by the negligence of a co-employee while engaged in loading a car, *held*, that it did not sufficiently appear that his employment was of such character as to entitle him to recover: *Smith v. Burlington, C. R. & N. R. Co.*, 59-73.

Where an employee was injured by appliances connected with the round-house, *held*, that it was not error to instruct the jury that if they found it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employee of the same kind to do so, and that they both, or either of them, neglected to do so, then the plaintiff could not recover, the employees not being engaged in the operation of the road: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240.

A person engaged in working on a bridge of the company and required, in the course of his employment, to ride on its trains, is within the statutory provision: *Schroeder v. Chicago, R. I. & P. R. Co.*, 47-375.

And so is a section hand: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36-372.

And so is a hand engaged in shoveling gravel from a gravel train: *McKnight v. Iowa & M. R. Constr. Co.*, 43-406.

Or a hand engaged in connection with the operation of a dirt train: *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52.

Where the plaintiff was employed on a train used for hauling sand, and was injured by the falling of a bank of sand where he had been shoveling, *held*, that the case was within the provisions of this section: *Handelun v. Burlington, C. R. & N. R. Co.*, 72-709.

An employee required to go upon a train for the purpose of unloading cars is within the scope of this section and may recover for injuries received by reason of negligence of a co-employee: *Raben v. Central Iowa R. Co.*, 73-579.

Where the employee was injured while engaged in operating a derrick situated on a flat car, the operation of which involved the movement of the car upon the track, *held*, that he was within the scope of this section: *Nelson v. Chicago, M. & St. P. R. Co.*, 73-576.

A private detective injured while walking along the track, in accordance with directions of the company, to a certain place where he was to try to detect persons accustomed to place obstructions on the track, and who, while so walking to the place designated, was prostrated by sunstroke on the track and negligently run over and injured by defendant's engine, *held* to be so engaged as to subject him to the hazard peculiar to the business of operating a railway, and to be within the protection of the statutory provision: *Pyne v. Chicago, B. & Q. R. Co.*, 54-223.

Injury to foreman from negligence of subordinate: The fact that an employee of a railroad company is the foreman of a crew of workmen with power to direct the men under him in their work and to hire and discharge them at will does not prevent his being a co-employee with such workmen, within the meaning of this section, and he may recover for injuries received from the negligence of the men in his employ: *Houser v. Chicago, R. I. & P. R. Co.*, 60-230.

Contributory negligence: This statutory provision does not exonerate the injured party from the necessity of exercising reasonable care. Its purpose is to extend the liability of railroads to injuries to employees for which, at the common law, they were not liable: *Murphy v. Chicago, R. I. & P. R. Co.*, 45-661.

In case of death: Where the injury results in death, the company is liable to the personal representatives of deceased: *Philo v. Illinois Cent. R. Co.*, 33-47.

Constitutionality: This provision is not unconstitutional, as subjecting railroad corporations to penalties and liabilities other than those imposed on other business corporations engaged in a like business; being applicable to all persons or corporations engaged in a peculiar business it is not open to such objection: *McAunich v. Mississippi & M. R. Co.*, 20-338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Pierce v. Central Iowa R. Co.*, 73-140; *Raben v. Central Iowa R. Co.*, 73-579.

Liability of company for negligence of superior or inferior employee: If the employee of a railroad company is injured while riding on a hand-car, through the negligence of the boss in charge thereof, the company is liable: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

Instructions based upon the hypothesis that a person for whose death damages were sought to be recovered from the company for injuries received while acting in obedience to the directions of an employee having authority to control him, *held* applicable where deceased was a fireman accompanying the engineer and discharging his duty while upon the engine under the control of such engineer: *Cooper v. Central R. of Iowa*, 44-134.

Where an accident by which an employee is injured is caused by the act of an inferior employee acting under the direction of such superior, the latter cannot recover for an injury received: *Dewey v. Chicago & N. W. R. Co.*, 31-373.

Where the foreman of a crew of men employed by the company in the repair of bridges brought action against the company for injury received from negligence of one of the men under his control, *held*, that the fact that he was in charge of the workman did not defeat his right to recover for such negligence under the statute (referred to below), giving a right of action for the negligence of a co-employee: *Houser v. Chicago, R. I. & P. R. Co.*, 60-230.

It may be that a mere foreman, as the word is generally understood, that is, a laborer with power to superintend the labor of those working with him, is a co-employee so far as his own mere labor is concerned, but it is error to exclude from the jury the consideration of the question whether there is negligence of such foreman, acting as a superior: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-37.

Release of claim: A written release of all claim for damages resulting from an injury, executed for a consideration, will be binding on the person injured in the absence of fraud, even though it is not read over by him before signing it: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59-416.

Contract: A written contract between a company and an employee by which he agrees to hold the company harmless for injuries received in doing certain acts which he is advised are dangerous is admissible for the purpose of showing the existence of the rule on the subject, and notice of it to the employee and also notice to the employee of such danger: *Sedgwick v. Illinois Cent. R. Co.*, 73-158.

2003. Signals at crossings. 20 G. A., ch. 104, § 1. A bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be twice sharply sounded at least sixty rods before a highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, *provided*, that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless required by the council of any such city or town; and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

Where there is failure to ring the bell upon approaching a crossing and an injury results, such failure will be negligence for which defendant will be liable unless exonerated by some negligence of plaintiff: *Reed v. Chicago, St. P., M. & O. R. Co.*, 74-188.

2004. Penalty. 20 G. A., ch. 104, § 2. Every officer or employee of any railway company who shall violate any of the provisions of this act shall be punished by fine, not exceeding one hundred dollars, for each offense.

2005. Stopping at railway crossings. 20 G. A., ch. 163, § 1. All trains run upon any railroad in this state which intersects or crosses, or is intersected or crossed by any other railroad upon the same level, shall be brought to a full stop, at a distance not less than two hundred feet, nor more than

eight hundred feet from the point of intersection or crossing of such road, before such intersection or crossing is passed by any such train.

2006. Penalty. 20 G. A., ch. 163, § 2. Every engineer violating the provisions of the preceding section shall for each offense forfeit one hundred dollars to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit for each offense so committed the sum of two hundred dollars, to be recovered in like manner.

2007. Liability; contract or rule limiting. 1308. No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into. [11 G. A., ch. 113.]

A contract such as is prohibited by this section is void whether it is with or without consideration: *Brush v. Sabula, A. & D. R. Co.*, 43-554.

Whether this section would be applicable to a contract made in Iowa but to be wholly performed in another state, *quære;* but it was held applicable to a contract to transport cattle from Clinton, Iowa, to Chicago, on the ground that it was to be partly performed in Iowa: *McDaniel v. Chicago & N. W. R. Co.*, 24-412.

A company is not prohibited from providing by contract that it shall not be liable beyond the terminus of its road: *Mulligan v. Illinois Cent. R. Co.*, 36-181, 187.

The common-law liability of a common carrier attaches to a carrier of live-stock, so far as the rule is not inapplicable by reason of the peculiar character of the property. Responsibility for the carriage of stock cannot, therefore, be restricted by contract: *McCoy v. Keokuk & D. M. R. Co.*, 44-424.

A rule or custom limiting liability for injury to all stock, including such as is of especial value as being blooded, to the value of common stock, is void: *McCune v. Burlington, C. R. & N. R. Co.*, 52-600.

This section does not render the carrier liable for loss occurring by the act of the owner: *Hart v. Chicago & N. W. R. Co.*, 69-485.

Whether a carrier, in the absence of any statute restricting his powers, can, by rule, regulation or contract, limit the amount for which he will be liable in case of loss of the property, *quære.* But the statutory provision prohibits the making of such contract: *Ibid.*

This statutory provision is applicable to contracts for transportation from a point within to a point without the state, and is not unconstitutional in that respect: *Ibid.*

2008. Judgment against; lien. 1309. A judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, A. D. 1862. [9 G. A., ch. 169, § 9.]

Where action is brought for recovering from the company damages for breach of a contract under which the right of way was conveyed to it, the judgment may be made a lien on the portion of the line conveyed: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

A judgment for damages for breach of contract by a railway company for failure to fence its right of way and construct cattle-guards becomes a lien on the property of the company, but the party is not entitled to such lien for damages caused by negligent construction of the road causing an overflow of his land, nor for trespass in going upon his land outside the right of way: *Hull v. Chicago, B. & P. R. Co.*, 65-713.

A right of action, or an action pending for such injury, is not a lien, and a purchaser of the road before the rendition of judgment takes it free from the lien of such judgment when rendered: *Burlington, C. R. & N. R. Co. v. Verry*, 48-458; *White v. Keokuk & D. M. R. Co.*, 52-97.

This section is not unconstitutional: *Central Trust Co. v. Sloan*, 65-655.

2009. Railways terminating at Council Bluffs. 1310. All railway corporations that have been, or may hereafter be organized, under the laws of this state, that operate or may hereafter operate, a line of railway in this state terminating at or near the city of Council Bluffs, and making a connection with any railway, which, either by its charter or otherwise, extends to a point on the boundary or within the limits of this state, be, and they are hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railway corporation at or near such terminus — either by delivering or receiving the same — at any other place than in this state, at

or near the said point at which the said railway extending to the boundary of this state terminates. [14 G. A., ch. 6, § 1.]

This and following sections relating to the same subject are void as being a regulation of commerce between the states and therefore in conflict with U. S. Const., art. 1, § 8, and acts of congress, U. S. Rev. Stat., §§ 5257, 5258: *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45–338.

2010. Transfers. 1311. Every railway corporation, which, by its charter or otherwise, has its terminus at any point on the boundary or within the limits of this state, or which has authority to bridge or ferry the Missouri river for the purpose of having a continuous line of its railway, and for connecting with other railways in this state, is hereby prohibited from making any transfer of freights, passengers, or express matters to or with any other railway corporation, either by delivering or receiving the same at any other place than in this state, at or near its legal terminus; and every such corporation extending to the boundary or within this state, or having authority to bridge or ferry said Missouri river, shall erect and maintain at or near its legal terminus within the limits of this state, all its depots, stations, and other buildings necessary for such transfer. [Same, § 2.]

2011. Contracts with municipal corporations. 1312. Every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby prohibited from, in any manner, violating any of the provisions of such contract; and every railway corporation which has heretofore made, or which shall hereafter make, any contract with any municipal corporation in this state, is hereby required to perform each and all of the provisions of any and every such contract, specifically as agreed therein. In every case in which any such municipal corporation has complied with its obligations relating to such contract at any stage of the progress of its fulfillment, so far as it has agreed to do, such municipal corporation shall not be required to furnish any further tender or guaranty of compliance on its part in order to secure its rights in the courts; but in case anything remains to be done by such municipal corporation under such contract, after the completion of the same on the part of the railway corporation contracting therewith, then it shall, after the enforced compliance on the part of such corporation as hereinafter provided, be required to fully comply on its part. [Same, § 3.]

2012. Penalty. 1313. In case of a refusal of any railway corporation to comply with the provisions of section thirteen hundred and ten of this chapter [§ 2009], or its failure to perform the duties required in the preceding section, or their doing or having done any act at variance with such performance or duties, then the municipal corporation affected thereby, or with which the contract in that particular case was made, may, in an action by mandamus, in any court of record in the county in which such municipal corporation is situate, proceed against such corporation so failing or refusing, and such corporation shall, on proper proof, be required by such court to perform all the duties required by this and the three preceding sections, and said law pertaining to mandamus shall apply in such a case with the same force that it does in all other cases, except as it is herein enlarged. [Same, § 4.]

[In the Code the word "provided" is erroneously inserted between "action" and "by" in the sixth line.]

2013. Proceedings to enforce. 1314. In case any municipal corporation affected as before stated, or with which any such contract has been made, should not desire to seek the remedy given in the last preceding section, it may proceed in equity by the action of specific performance, in any court in the county in which such municipal corporation is situate, and in case such court should find that a contract had been made, it shall, by decree, require such company so violating or offering to violate its contract, or failing or re-

fusing to perform the provisions thereof, to specifically perform the same. [Same, § 5.]

2014. Injunction. 1315. Any court or judge in this state to whom application shall be made, shall, at the suit of any municipal corporation as aforesaid, restrain by injunction the violation of any provisions of the five preceding sections of this chapter, or of the provisions of any contract as aforesaid; and in such proceeding, it shall not be necessary for such municipal corporation to give bond. [Same, § 6.]

2015. Remedies not exclusive. 1316. The remedies provided for in the two preceding sections shall not be construed to be exclusive, and any order, judgment, or decree made by any court in pursuance of any provisions of the six preceding sections, shall be enforced in the usual manner. [Same, § 7.]

OF ASSESSMENT AND TAXATION.

2016. Executive council to assess. 1317. On the first Monday of March in each year, the executive council shall assess all the property of each railway corporation in this state, excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway. [14 G. A., ch. 26, § 1.]

This and the following sections relating to the taxation of railway property are not unconstitutional as providing for the taxation of the property of a corporation otherwise than that of individuals: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

But a former statutory provision releasing railway companies from payment of municipal taxes previously levied, *held* unconstitutional: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

However questionable may be the constitutionality of provisions exempting railway companies from all other burdens by the payment of a definite sum annually, whether that sum be greater or less than its share of taxation, it is clear that such an exemption does not render void the general tax levied on other property; *Muscatine v. Mississippi & M. R. Co.*, 1 Dillon, 536.

The order of the board of supervisors declaring the length of the main track and the assessed value of the railroad lying within each city, town, township or lesser taxing district in the county, and transmitted to the city council or trustees of each city or incorporated town or township, becomes the basis for the levy of taxes upon the railroad property without such property being placed upon the assessment books of the township or city: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168.

Although these sections relate to the assessment of the right of way, which is real property, and which, according to the general law as to assessments, would be assessed only once in two years, yet they are not unconstitutional, being applicable to all railway companies: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

As to taxation of property not used in operating the road, and of railway bridges over the Mississippi or Missouri rivers, see § 1281.

As to taxation of railway property under former statutes, see notes to § 1274.

2017. Statement furnished. 1318. The president, vice-president, or general superintendent, and such other officers as such council may designate of any corporation operating any railway in this state, shall furnish said council on or before the fifteenth day of February in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on January the first preceding:

1. The whole number of miles owned, operated, or leased in the state by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value, located in each county in the state.

2. Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing such railway in this state; and on railways which are part of lines extending beyond the limits of this state, the return shall show the actual amount of rolling stock in use on the corporation's line in the state during the year for which return is made.

The return shall show the amount of rolling stock, the gross earnings of

the entire railway, and the gross earnings of the same in this state, and all property designated in the next section, and such other facts as such council may, in writing, require. If such officers fail to make such statement, said council shall proceed to assess the property of the corporation so failing, adding thirty per cent. to the assessable value thereof. [Same, §§ 2, 11; 12 G. A., ch. 196.]

[As to taxation of sleeping and dining cars, see §§ 2023–2025.]

2018. Assessment; valuation. 1319. The said property shall be valued at its true cash value, and such assessment shall be made upon the entire railway within the state, and shall include the right of way, road-bed, bridges, culverts, rolling-stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January the first, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without the state; such valuation shall be in the same ratio as that of the property of individuals. [14 G. A., ch. 26, § 3.]

The provisions of this section are applicable to railway bridges in general, but those of § 1281 apply to those therein mentioned: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

2019. Statement sent county auditor. 1320; 16 G. A., ch. 153. On or before the twenty-fifth day of March in each year, said council shall transmit to the county auditor of each county through which any railway may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole property named in the preceding section. Said statement shall be entered on the proper record of the county. [Same, § 4.]

2020. Levy and collection. 1321. At the first meeting of the board of supervisors held after said statement is received by the county auditor, they shall make and cause the same to be entered in the proper record, an order, stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, or lesser taxing district in their county through which said railway runs, as fixed by the executive council, which shall constitute the taxable value of said property for taxable purposes, and the taxes on said property when collected by the county treasurer shall be paid over to the persons or corporations entitled thereto as other taxes, and the county auditor shall transmit a copy of said order to the city council or trustees of such city, incorporated town, or township. [Same, § 5.]

The order of the board becomes the basis for the levy of taxes on railway property for all purposes, and the assessment need not be placed upon the assessor's books: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168, 177.

The valuation upon which a railway company is to be taxed within any corporation or taxing district is to be determined from the number of miles of main track within the corporation or district, as determined by the order of the board of supervisors, and the value per mile as fixed by the executive council. The order of the board determining the number of the miles of track is not, in any sense, an assessment of valuation, and the provision of statute exempting agricultural and horticultural lands lying within the limits of incorporated towns and cities from taxation for city purposes have no application to railway property. The taxes due from the railroad company for such purposes cannot be reduced by reason of the fact that the track runs for a portion of the way within the city limits through land that is not platted or laid out into lots: *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

2021. Rate of taxation. 1322. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, and lesser taxing districts. [Same, § 6.]

See § 1286.

2022. Provisions as to fare. 1323. The provisions of this chapter in relation to transporting of passengers, shall not apply to any railway in this state until the gross earnings of the preceding year, reckoning from the first day of January of each year, shall equal or exceed the sum of four thousand dollars per mile average for all the miles of road operated during the whole of that preceding year.

TAXATION OF SLEEPING AND DINING CARS.

2023. Number reported. 17 G. A., ch. 114, § 1. In addition to the matters required to be contained in the statement provided for in section thirteen hundred and eighteen of the code [§ 2017], such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, and also the number of miles each month that said cars have been run or operated on such railway within the state, and the total number of miles that said cars have been run or operated each month within and without the state.

2024. Assessment by executive council. 17 G. A., ch. 114, § 2. The executive council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof, that the monthly average number of miles that such cars have been run or operated within the state shall bear to the monthly average number of miles that such cars have been used or operated within and without the state, such valuation shall be in the same ratio as that of the property of individuals.

2025. Manner. 17 G. A., ch. 114, § 3. The executive council shall, as provided by sections thirteen hundred and eighteen and thirteen hundred and nineteen of the code [§§ 2017, 2018], first assess the value of the property of the corporation using sleeping and dining cars not owned by such corporation, and shall then add to such valuation, the amount of the assessed valuation of said sleeping and dining cars, made as hereinbefore provided, and such aggregate amount shall constitute and be considered the assessed value of the property of such corporation for the purposes of taxation.

These provisions *held* valid and constitutional, as subjecting such property only to the extent to which it receives protection, and not an interference with interstate commerce: *Pullman's Palace Car Co. v. Twombly*, 29 Fed. Rep., 658.

RATES OF FARE AND FREIGHT.

2026. Classification of railroads. 15 G. A., ch. 68, § 1. All railroad corporations organized or doing business in this state, their trustees, receivers, or lessees, under the laws or authority thereof, shall be limited in their maximum charges to the rates of compensation for the transportation of passengers and freight, which are herein prescribed. All railroads in this state shall be classified according to the gross amount of their respective annual earnings within the state, per mile, for the preceding year, as follows: Class "A" shall include all railroads whose gross annual earnings, per mile, shall be four thousand dollars or more. Class "B" shall include all railroads whose gross annual earnings, per mile, shall be three thousand dollars or any sum in excess thereof

less than four thousand dollars. Class "C" shall include all railroads whose gross annual earnings, per mile, shall be less than three thousand dollars.

The state cannot by statute regulate rates of transportation under one entire contract from a point within to a point without the state. Such regulation would be an interference with the power of the federal government to regulate interstate commerce: *Carton v. Illinois Cent. R. Co.*, 59–148; *Keiser v. Illinois Cent. R. Co.*, 5 McCrary, 496.

Where the railway obligates itself to carry to another point within the state and deliver to a connecting carrier, its contract is not one for transportation to a point beyond the state: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63–732.

The regulation by a board of railroad commissioners that rates of transportation from a point without to a point within the state shall conform to like distances within the state is unconstitutional and interferes with interstate commerce: *State v. Chicago & N. W. R. Co.*, 70–162.

Where a contract for transportation by a carrier provided for transportation of the goods from one point within the state to another point also within the state, and the rates of transportation were in excess of those fixed by statute, *held*, that the excess of charges paid might be recovered back, although it was shown that the intention was that the property should be delivered by the carrier receiving it to a connecting carrier and continuously transported to a point without the state, and although the charge for the entire transportation would have been a reasonable one: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63–732.

Where the statute defines the charges which can lawfully be made by a railway company, charges in excess of those prescribed are unlawful and may be recovered back in an action for the excess. The amount fixed by statute will be conclusively presumed to be the limit of reasonable compensation: *Ibid.*

The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, and providing a punishment against the agent of a carrier for exacting and collecting excessive charges, does not take away the right existing at common law to recover money paid in excess of a reasonable charge: *Ibid.*

In such case an action will not be barred in two years under the provision relating to suits to recover a statute penalty, but will stand on the same footing as any action on implied contract: *Ibid.*

In an action to recover excessive charges paid, the plaintiff need not show objection or protest prior to or at the time of making payment which is in excess of a reasonable compensation: *Ibid.*

Under a statute imposing upon any railway company charging excessive rates a forfeiture to be recovered by the person injured, and providing that any agent or officer of such corporation violating or being a party to the violation of any of the provisions of the act should be guilty of a misdemeanor and punished accordingly, *held*, that where an agent was himself a shipper and accounted and turned over to the company charges for shipments made by him at illegal rates, he and the company were *in pari delicto* as to such charges, and that he could not recover the same in an action against the company: *Steever v. Illinois Cent. R. Co.*, 62–371.

This statutory provision *held* not an impairment of the charter of a railroad granted before its enactment, for the reason that as the charter of the company did not establish the maximum charges, it was competent for the legislature to do so afterwards. Nor is such legislation unconstitutional by reason of not being of uniform operation: *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S., 155.

2027. Maximum rates of fare. 15 G. A., ch. 68, § 2. All railroad corporations, according to their classifications as herein prescribed, shall be limited to compensation per mile for the transportation of any person, with ordinary baggage not exceeding one hundred pounds in weight as follows: Class "A" three cents; class "B" three and one-half cents; class "C" four cents; *provided*, that no such corporation shall charge, demand, or receive any greater compensation per mile for the transportation of children twelve years of age or under, than half the rate above prescribed; *and provided, also*, a charge of ten cents may be added to the fare of any passenger, when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train.

The regulation that a passenger shall pay full rate upon failure to procure and present a ticket which he might have purchased from the agent at a reduced rate is not unreasonable: *State v. Chovin*, 7–204.

The carrier may make a regulation requiring passengers to procure a ticket before taking passage in a caboose car attached to a freight train, and may eject from the car, in a proper place and manner, any person failing to comply with such regulation: *Law v. Illinois Cent. R. Co.*, 32–534.

A railway company is allowed to collect an additional sum over the regular rate of fare from passengers who fail to purchase tickets, and the reasonableness of such regulation is not a question for the jury: *Hoffbauer v. Davenport & N. W. R. Co.*, 52–342.

In an action to recover for being ejected from a train for want of a ticket, where the plaintiff claimed that he was not able to procure such ticket on account of the failure of the company to have its ticket office open before the starting of the train, *held*, that it was

proper to allow defendant to introduce evidence of the character of the station and whether the facilities extended to the traveling public to purchase tickets were such as required for the convenience of the public. While it is required that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other, yet it is not required that the office shall remain open up to the instant the train moves off. Unfitness of the station cannot be relied on as an excuse for not procuring a ticket, that reason not having been alleged to the conductor: *Everett v. Chicago, R. I. & P. R. Co.*, 69–15.

The failure of the company to sell a ticket to a passenger before entering the cars cannot be made a ground for recovery of damages where the passenger afterward tenders with his fare to the conductor the extra amount required on account of not having a ticket: *Curl v. Chicago, R. I. & P. R. Co.*, 63–417.

2028. Annual statement. 15 G. A., ch. 68, § 7. It shall be the duty of each railroad corporation operating a railroad in this state during the month of January, 1875, and each and every year thereafter, to make and return to the governor a statement of its gross receipts on its entire road within this state for the year preceding and ending with the thirty-first day of December. Said statement shall be sworn to by the president and superintendent of the road in this state, and shall contain a detailed statement of the entire receipts for transporting freight and passengers, and all other sources of income of the road. A failure to comply with the provisions of this section shall subject the corporation so failing, to a penalty of one hundred dollars per day, for each and every day after such report is due until it is made; to be recovered in an action in the name of the state of Iowa, for the benefit of the school fund. If the executive council shall, on examination, be satisfied of the correctness of said return, it shall be their duty to classify the different railroads in this state as hereinbefore provided, and the governor, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying to them the class to which they are respectively assigned. And any change of rates made by any railroad corporation pursuant to any change of classification, shall take effect and be in force from and after the fourth day of July following such changes. The reports from the railroad corporations of this state for the year 1873, made pursuant to the provisions of section twelve hundred and eighty of the code [§ 1912], shall determine the classification of each road for the year ending July third, 1875.

BOARD OF RAILROAD COMMISSIONERS.

2028a. 22 G. A., ch. 29, § 1. Sections two and eight, of chapter seventy-seven, acts of the seventeenth general assembly, and all acts and parts of acts inconsistent with this act, are hereby repealed.

2029. Election; organization. 17 G. A., ch. 77, § 2; 22 G. A., ch. 29, § 2. At the regular election in the year 1888, there shall be three persons having the qualification of electors, in the places where they shall respectively reside in the state of Iowa, chosen by the electors of the state, from the body of the electors of said state, who, when they shall have taken the oath of office and given such bond as may be required of them by the governor of the state, shall be known and styled the board of railroad commissioners of the state of Iowa. They shall hold office, beginning on the second Monday in January, 1889. for the period of one, two, and three years respectively, as shall be decided between them by lot at their first meeting as a board in such manner as may be designated by the secretary of state. At the regular election in the year 1889, and every year thereafter at each such election there shall be chosen one person as commissioner, having the qualification hereinbefore and hereinafter described, who shall hold his office for three years from the second Monday in January after his election. and until his successor is elected and qualified. Said person shall fill the vacancy caused by the expiration of the term of the commissioner whose term expires on the second Monday in Janu-

ary following his said election. It shall organize on each second Monday in every year immediately after the new member has been qualified and if for any cause this is not done, it may be done at a subsequent meeting. The organization shall be by the selection of one member as chairman and a person having the qualifications hereinbefore and hereinafter described for a commissioner as secretary. The board shall have power to employ such additional clerical help as it may deem necessary and for the good of the service. No person in the employ of any common carrier or owning any bonds, stock, or property, in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporation shall be eligible to the office of railroad commissioner and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this act after his election or appointment shall disqualify him to hold the office, and to perform the duties thereof.

2030. Vacancies filled. 22 G. A., ch. 29, § 3. All vacancies in the office of railroad commissioners shall be filled by appointment of the governor. The person appointed to serve until his successor is elected and qualified. The board of commissioners as constituted by chapter seventy-seven, acts seventeenth general assembly [§§ 2033–2046], shall hold office and have all powers conferred upon them by chapter seventy-seven, acts of the seventeenth general assembly and acts amendatory thereto and such other powers and authority as are now or may hereafter be conferred upon them by law until commissioners shall be chosen and enter upon their duties as contemplated by this act.

2031. Canvass of votes for. 22 G. A., ch. 29, § 4. The canvass of votes cast for election of commissioners provided for in this act shall be made and returns and abstracts thereof and relating thereto be made, certified and forwarded and results of said election declared (by the executive council) in all respects in the same manner and by the same officers and boards as now provided by law for canvassing, making, certifying, forwarding and declaring the same as to other state officers.

2032. Powers. 22 G. A., ch. 29, § 5. The commissioners chosen under this act shall have all the powers that are conferred upon the railway commission by chapter seventy-seven, acts of the seventeenth general assembly [§§ 2033–2046], and such other powers and authority as may be now or shall hereafter be imposed by law.

2033. Duties. 17 G. A., ch. 77, § 3. Said commissioners shall have the general supervision of all railroads in the state operated by steam, and shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents or employees, thereof, and shall also from time to time carefully examine and inspect the condition of each railroad in the state, and of its equipment, and the manner of its conduct and management, with reference to the public safety and convenience, and for the purpose of keeping the several railroad companies advised as to the safety of their bridges, shall make a semi-annual examination of the same, and report their condition to the said companies. And if any bridge shall be deemed unsafe by the commissioners, they shall notify the railroad company immediately, and it shall be the duty of said railroad company to repair and put in good order within ten days after receiving said notice, said bridge, and in default thereof, said commissioners are hereby authorized and empowered to stop and prevent said railroad company from running or passing its trains over said bridge, while in its unsafe condition. Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation fails, in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment

any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates of fare for transporting freight or passengers, or any change in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said railroad commissioners shall inform such railroad corporation of the improvements and changes which they adjudge to be proper, by a notice thereof in writing to be served by leaving a copy thereof certified by the commissioners' clerk, with any station agent, clerk, treasurer or any director of said corporation and a report of the proceedings shall be included in the annual report of the commissioners to the legislature. Nothing in this section shall be construed as relieving any railroad company from their present responsibility or liability for damage to person or property.

2034. Report. 17 G. A., ch. 77, § 4. The said railroad commissioners shall, on or before the first Monday in December in each year, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the working of the system of railroad transportation in this state, and its relation to the general business and prosperity of the citizens of the state, and such suggestions and recommendations in respect thereto as may to them seem appropriate. Said report shall also contain as to every railroad corporation doing business in this state:

First.— The amount of its capital stock.

Second.— The amount of its preferred stock, if any, and the condition of its preferment.

Third.— The amount of its funded debt and the rate of interest.

Fourth.— The amount of its floating debt.

Fifth.— The cost and actual present cash value of its road and equipment, including permanent way buildings and rolling stock, all real estate used exclusively in operating the road, and all fixtures and conveniences for transacting its business.

Sixth.— The estimated value of all other property owned by such corporation, with a schedule of the same, not including lands granted in aid of its construction.

Seventh.— The number of acres originally granted in aid of construction of its road by the United States or by this state.

Eighth.— Number of acres of such land remaining unsold.

Ninth.— A list of its officers and directors, with their respective places of residence.

Tenth.— Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly, or as may be required by the governor. Such report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June thirtieth.

Eleventh.— The average amount of tonnage that can be carried over each road in the state with an engine of given power.

2035. Report of railroad companies. 17 G. A., ch. 77, § 5. To enable said commissioners to make such a report, the president or managing officer of each railroad corporation doing business in this state, shall annually make to the said commissioners, on the fifteenth day of the month of September, such returns, in the form which they may prescribe, as will afford the information required for their said official report; such returns shall be verified by the oath of the officer making them; and any railroad corporation whose return shall not be made as herein prescribed by the fifteenth day of September, shall be liable to a penalty of one hundred dollars for each and every day

after the sixteenth day of September that such return shall be wilfully delayed or refused.

2036. Salaries. 17 G. A., ch. 77, § 6. The said commissioners shall hold their office in the capitol, or at some other suitable place in the city of Des Moines. They shall each receive a salary of three thousand dollars per annum, to be paid as the salaries of other state officers are paid, and shall be provided at the expense of the state with necessary office furniture and stationery, and they shall have authority to appoint a secretary, who shall receive a salary of fifteen hundred dollars per annum.

2037. Oath; bond. 17 G. A., ch. 77, § 7. Said commissioners and secretary shall be sworn to the due and faithful performance of the duties of their respective offices before entering upon the discharge of the same, as prescribed in section six hundred and seventy-six of the code [§ 1141], and no person in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as secretary. Each of said commissioners shall enter into bonds with security to be approved by the executive council, in the sum of ten thousand dollars, conditioned for the faithful performance of his duties.

2038. Examinations. 17 G. A., ch. 77, § 9. The said commissioners shall have power, in the discharge of the duties of their office, to examine any of the books, papers or documents of any such corporation, or to examine under oath or otherwise any officer, director, agent, or employee of any such corporation; they are empowered to issue subpœnas and administer oaths in the same manner and with the same power to enforce obedience thereto in the performance of their said duties as belong and pertain to courts of law in this state; and any person who may wilfully obstruct said commissioners in the performance of their duties, or who may refuse to give any information within his possession that may be required by said commissioners within the line of their duty, shall be deemed guilty of a misdemeanor, and shall be liable, on conviction thereof, to a fine not exceeding one thousand dollars, in the discretion of the court, the costs of such subpœnas and investigation to be first paid by the state on the certificate of said commissioners.

2039. Duty of railroad to transport. 17 G. A., ch. 77, § 10. It shall be the duty of any railroad corporation, when within their power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling the same at any depot on the line of its road; and also to receive and transport in like manner, the empty or loaded cars, furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged, or reloaded and returned to the road so connecting; and for compensation, it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad, for a similar service.

The duty of one railway to transport the cars of another road may be enforced by mandatory injunction, and the fact that the receiving of such cars by the former road will cause a strike of its employees will constitute no defense: *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed. Rep., 481.

2040. Reasonable rates. 17 G. A., ch. 77, § 12. No railroad company shall charge, demand, or receive from any person, company, or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation.

2041. Penalty. 17 G. A., ch. 77, § 13. Any railroad corporation which shall violate any of the provisions of this act, as to extortion or unjust dis-

crimination, shall forfeit for every such offense to the person, company, or corporation aggrieved thereby, three times the actual damages sustained or overcharges paid by the said party aggrieved, together with the cost of suit, and a reasonable attorney's fee to be fixed by the court, and if an appeal be taken from the judgment or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in the appellate court or courts, to be recovered in a civil action therefor. And in all cases where complaint shall be made, in accordance with the provisions of section fifteen [§ 2043], hereinafter provided, that an unreasonable charge is made, the commissioners shall require a modified charge for the service rendered, such as they shall deem to be reasonable, and all cases of a failure to comply with the recommendation of the commissioners shall be embodied in the report of the commissioners to the legislature; and the same shall apply to any unjust discrimination, extortion, or overcharge by said company, or other violation of law.

The extortion or unjust discrimination contemplated in this section is such as arises from extortionate or discriminating charges and not such as arises from failure or refusal to furnish transportation, or to furnish cars, nor does § 2039 make any provisions against discriminating in furnishing cars or transportation of property. It simply imposes duties which the common law lays upon all carriers with others relating to the furnishing of cars and the transportation of cars delivered to the railroad by a connecting road. The penalty in treble damages provided in this section is therefore not applicable to such discrimination: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

This statute, so far as it imposes a forfeiture for doing acts therein prohibited, is to be regarded as penal and cannot be extended by implication: *Ibid.*

2042. Investigation of accident. 17 G. A., ch. 77, § 14. Upon the occurrence of any serious accident upon a railroad which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of the mismanagement or neglect of the corporation on whose line the injury or loss of life occurred. *Provided*, that such report shall not be evidence or referred to in any case in any court.

2043. Examination of rates. 17 G. A., ch. 77, § 15. It shall be the duty of said commissioners upon the complaint and application of the mayor and aldermen of any city or the mayor and council of any incorporated town, or the trustees of any township, to make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town or township, and if twenty-five or more legal voters in any city or township shall, by petition in writing, request the mayor and aldermen of such city or the trustees of such township, to make the said complaint and application, and the mayor and aldermen, or the trustees, refuse or decline to comply with the prayer of the petition, they shall state the reason for such non-compliance in writing upon the petition, and return the same to the petitioners; and the petitioners may thereupon, within ten days from the date of such refusal and return, present such petition to said commissioners and said commissioners, shall, if upon due inquiry and hearing of the petitioners, they think the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and aldermen of any city, or the trustees of any township. Before proceeding to make such examination, in accordance with such application or petition, said commissioners shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to said commissioners that the complaint alleged

by the applicants or petitioners is well founded, they shall so adjudge, and shall inform the corporation operating such railroad of their adjudication within ten days, and shall also report their doings to the governor, as provided in the fourth section of this act [§ 2034].

2044. To whom applicable. 17 G. A., ch. 77, § 16. In the construction of this act, the phrase railroad shall be construed to include all railroads and railways operated by steam, and whether operated by the corporation owning them or by other corporations or otherwise. The phrase railroad corporation shall be construed to mean the corporation which constructs, maintains or operates a railroad operated by steam power.

2045. Cumulative. 17 G. A., ch. 77, § 17. Nothing in this act shall be construed to estop or hinder any persons or corporations from bringing suit against any railroad company for any violation of any of the laws of this state for the government of railroads.

2046. 17 G. A., ch. 77, § 18. All acts or parts of acts inconsistent with this act are hereby repealed.

2047. Decrees of commissioners enforced. 20 G. A., ch. 133, § 1. The [circuit and] district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public right, made or to be made by the board of railroad commissioners, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa and shall be instituted by the attorney-general, whenever advised by the board of railroad commissioners that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by such board of railroad commissioners, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending to require the issues to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation, or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction compelling obedience to and compliance with such rule, order, or regulation by said railroad company, or other person, its officers, agents, servants and employees and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employees who are in any manner instrumental in such violations, guilty of contempt of court, and the court may punish such contempt by fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board of railroad commissioners.

See *State v. Central Iowa R. Co.*, 71-410.

2048. Costs. 20 G. A., ch. 133, § 2. Whenever a decree shall be entered against a railroad company or person under section one [§ 2047], the court shall render judgment for costs, including a reasonable attorney's fee for counsel representing the state in said case, and said judgment shall be enforced by execution.

REGULATION OF RAILROADS AND OTHER CARRIERS.

2049. To what applicable. 22 G. A., ch. 28, § 1. The provisions of this act shall apply to the transportation of passengers and property, and to receiving, delivering, storage and handling of property wholly within this state

and shall apply to all railroad corporations and railway companies, express companies, car companies, sleeping-car companies, freight or freight-line companies and to any common carrier or carriers engaged in this state in the transportation of passengers or property by railroad therein, and shall also be held to apply to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this and an adjoining state or states. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation, receiver, trustee or other person operating a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term "transportation" shall include all instrumentalities of shipment or carriage, and the term "railroad corporation" contained in this act shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad in whole or in part in this state; and the provisions of this act shall apply to all persons, firms and companies and to all associations of persons whether incorporated or otherwise that shall do business as common carriers upon any of the lines of railway in this state (street railways excepted) the same as to railroad corporations herein mentioned.

2050. Charges to be reasonable. 22 G. A., ch. 28, § 2. All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, as aforesaid or in connection therewith or for the receiving, delivering, storage or handling of such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

2051. Unjust discrimination. 22 G. A., ch. 28, § 3. If any common carrier subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; this section, however, is not to be construed as prohibiting a less rate per one hundred pounds in a carload lot than is charged, collected or received for the same kind of freight in less then a carload lot.

As to construction of provisions against unjust discriminations in a former statute, see *Paxton v. Illinois Cent. R. Co.*, 56-427.

2052. No preference or advantage; interchange. 22 G. A., ch. 28, § 4. It shall be unlawful for any common carrier, subject to the provisions of this act to make or give any preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, in any respect whatsoever or to subject any particular person company firm corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; *provided*, however, that nothing herein shall be construed to prevent any common carrier from giving preference as to time of shipment of live-stock, uncured meats or other perishable property. All common carriers subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and the receiving, forwarding and delivering of passengers and property to and from their several lines, and

to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. And any common carrier may be required to switch and transfer cars for another for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners.

2053. Long and short haul. 22 G. A., ch. 28, § 5. It shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer. And said common carrier shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of freight transportation to or from any other point.

2054. Freight pooling. 22 G. A., ch. 28, § 6. It shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freight of different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

2055. Schedules of rates and fare. 22 G. A., ch. 28, § 7. Every common carrier subject to the provisions of this act, shall print and keep for public inspection, schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroads between which property and passengers will be carried and shall contain the classification of freight in force upon such railroad, and shall also state separately any terminal charges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office and passenger station, on such railroad, where it can be conveniently inspected, and such common carrier shall keep a printed notice posted in every such freight office and passenger station indicating where therein such schedules can be found. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection. And when any such common carrier shall have established and published its rates, fares and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith than is specified

in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this act shall file with the board of railroad commissioners of this state, copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commissioners of all changes made in the same. Every such common carrier shall also file with said commissioners, copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes in this state operated by more than one common carrier and the several common carriers operating such lines or routes have established joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commissioners. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers, when directed by said commissioners in so far as may in the judgment of the commissioners be deemed practicable; and said commissioners shall from time to time prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such part of them as they may deem it practicable for such common carriers to publish and the places in which they shall be published; but no common carrier, party to any such joint tariff shall be liable for the failure of any other common carrier party thereto, to observe and adhere to the rates, fares or charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section or any part of the same, such common carriers shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus to be issued by any district court of this state in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed. And if such common carrier be a foreign corporation, then such writ may be issued by any district court, in the judicial district where such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section, and such writ shall issue in the name of the state of Iowa at the relation or upon the petition of the said board of railroad commissioners of this state; and failure to comply with its requirements shall be punishable as and for a contempt; and shall make said corporation liable to a penalty of five hundred dollars for each day's failure to comply and when any such writ of mandamus, shall be so applied for by said commissioners, no bond shall be required of them by any court or judge, in which or before whom any such application may be made.

2056. Continuous shipments. 22 G. A., ch. 28, § 8. It shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent by change of time schedules, carriage in different cars or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination in this state; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

2057. Penalty. 22 G. A., ch. 28, § 9. In case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited, or declared to be unlaw-

ful, or shall omit to do any act, matter or thing, in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any such violation of the provisions of this act, together with costs of suit and a reasonable counsel or attorney's fee to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; *provided* that in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section and that no suit shall be brought until the expiration of fifteen days after such demand.

2058. Remedy; evidence. 22 G. A., ch. 28, § 10. Any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the board of railroad commissioners of this state or may bring suit in his or their own behalf for the recovery of damages for which any such common carrier may be liable under the provisions of this act in any court of this state of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time. In any such action brought for the recovery of damages, the court before whom the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company, defendant in such suit to attend, appear and testify in such case and may compel the production of the books and papers of such corporation or company party to any such suit; the claims that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing said books and papers; but such evidence or testimony shall not be used against such person in any way, on the trial of any criminal proceedings.

2059. Penalty against individuals. 22 G. A., ch. 28, § 11. Except as otherwise specially provided for in sections twenty-three to twenty-eight inclusive, of this act [§§ 2071–2076], and unless relieved from the consequences of a violation of the law as provided in section fifteen of this act [§ 2063], any common carrier, subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by such corporation, who, alone or with any other corporation, company, person or party shall wilfully do, or cause to be done, or shall willingly suffer or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer, or permit any act, matter or thing so directed or required by this act to be done, not to be so done, or shall aid or abet any such omission, or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof in any district court of this state of competent jurisdiction be subject to a fine of not to exceed five thousand dollars and not less than five hundred dollars for each offense.

2060. Inquiry by commissioners. 22 G. A., ch. 28, § 12. It shall be the duty of and the board of railroad commissioners of this state shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted and shall have the right to obtain from such common carriers full and complete information necessary to enable the said commissioners to perform the duties and carry out the object for which said board was created and which are contemplated by this act; and for the purposes of this act the said commissioners shall have power to require the attendance and testimony of witnesses and the produc-

tion of all books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section. And any court of this state within the jurisdiction of which such inquiry is carried on, shall in case of contumacy, or refusal to obey a subpœna, or other proper process issued to any common carrier or person subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commissioners (and produce books and papers if so ordered) and give evidence touching or in relation to the matter in question; and any failure to obey such order of the court shall be punished by such court as a contempt thereof; the claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such person or witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

2061. Complaint. 22 G. A., ch. 28, § 13. Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done, by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commissioners by petition which shall briefly state the facts whereupon a statement of the complaint thus made with the damages if any are alleged shall be forwarded by the said commissioners to such common carrier who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time to be specified by the commissioners. If such common carrier within the time specified shall make reparation for the injury alleged to have been done or shall correct the wrong complained of, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such common carrier shall not satisfy the complaint, within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the said commissioners to investigate the matters complained of in such manner and by such means as said commissioners shall deem proper and said commissioners whenever they may have sufficient reason to believe that any common carrier is violating any of the provisions of this act shall at once institute an inquiry in the same manner, and to the same effect, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant or complainants or petitioners.

2062. Investigations; report. 22 G. A., ch. 28, § 14. Whenever an investigation shall be made by said commissioners after notice as provided by section thirteen, of this act [§ 2061], it shall be their duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commissioners are based, together with its or their recommendation or orders as to what reparation, if any, should be made by the common carrier to any party, or parties, who may be found to have been injured; and such finding, so made shall thereafter in all judicial proceedings be deemed and taken as *prima facie* evidence as to each and every fact found. All reports of investigation made by said commissioners shall be entered of record, and a copy thereof shall be furnished to the party who may have complained and any other person or persons directly interested, and to any common carrier that may have been complained of.

2063. Findings of the commissioners. 22 G. A., ch. 28, § 15. If in any case in which an investigation shall be made by said commissioners it shall be made to appear to the satisfaction of the commissioners, either by the testimony of witnesses or other evidence that anything has been done or omit-

ted to be done in violation of the provisions of this act or of any law cognizable by said commissioners by any common carrier, or that any injury or damages has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation it shall be the duty of said commissioners forthwith to cause a copy of their report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both within a reasonable time to be specified by the commissioners; and if within the time specified it shall be made to appear to the commissioners that such common carrier has ceased from such violation of law and has made reparation for the injury found to have been done in compliance with the report and notice of the commissioners, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commissioners and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

2064. Enforcement of orders. 22 G. A., ch. 28, § 16. Whenever any common carrier as defined in and subject to the provisions of this act shall violate or refuse or neglect to obey any lawful order or requirement of the said board of railroad commissioners, it shall be the duty of said commissioners, and lawful for any company or person interested in such order or requirement to apply in a summary way, by petition to the district or superior court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line or road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit to direct and prosecute, in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commissioners shall be *prima facie* evidence of the matter therein, or in any order made by them stated; and if it be made to appear to such court on such hearing or on the report of any such person or persons, that the order or requirement of said commissioners drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process mandatory or otherwise to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commissioners and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such courts to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of one thousand dollars for every day

after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process mandatory or otherwise; and such monies (moneys) shall, upon the order of the court, be paid into the treasury of the county in which the action was commenced and one-half thereof shall be transferred by the county treasurer to the state treasury; and the payment thereof may without prejudice to any other mode of recovering the same be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the commissioners and any other party or person interested the right of appeal to the supreme court of the state under the same regulations now provided by law in relation to appeals to said court as to security for such appeal except that in no case shall security for such appeal be required when the same is taken by said commissioners; but no appeal to said supreme court shall operate, to stay or supersede the order of the court, or the execution of any writ or process thereon; and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented, or be prosecuted by the said commissioners, or by their direction it shall be the duty of the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any county attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such county attorney to render such assistance; and the costs and expenses on the part of said commissioners of any such prosecution shall be paid out of the appropriations for the expenses of said board of commissioners.

2065. Commissioners to make schedules. 22 G. A., ch. 28, § 17. The board of railroad commissioners of this state are hereby empowered and directed to make for each of the railroad corporations, doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights, and it shall be the duty of said commissioners to make such classification; *provided*, that the said rates of charges to be so fixed by said commissioners shall not in any case exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners, shall in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars or unjust discrimination in relation thereto be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules, subject to the same provision that the rates fixed are not to be higher than now or hereafter established by law. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some public newspaper published in the city of Des Moines in this state, which notice shall state the date of the taking effect of said schedule and said schedule shall take effect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such common carrier in each freight office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as *prima facie* the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of said railroad commissioners, that the same is a true copy of the schedule pre-

pared by them for the railroad company or corporation therein named, and that notice of making the same has been published as required by law; *provided* that before finally fixing and deciding what the original maximum rates and classification shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers published in Des Moines setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation or common carrier who may desire it an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates and classification; and in any event the original schedule of rates and classification of freights on all lines of railroads in Iowa shall be fixed and shall go into effect within sixty days from the taking effect of this act.

2066. Complaint of violation of schedule. 22 G. A., ch. 28, § 18. Whenever any person upon his own behalf, or class of persons similarly situated, or any firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to said board of railroad commissioners, that the rate charged or published by any railroad company, or the maximum rates fixed by said commissioners in the schedules of rates made by them under the provisions of section seventeen of this act [§ 2065], or the maximum rate that now or hereafter may be fixed by law is unreasonably high or discriminating, it shall be the duty of said commissioners to immediately investigate the matter of such complaint. If such complaint appears to be well founded and not trivial in character the board shall fix a day for hearing the same and shall notify the railroad company of the time and place of such hearing by mailing a notice properly directed to any division superintendent general or assistant superintendent, general manager, president or secretary of such company, which notice shall contain the substance of the complaint so made, and the board shall also notify the person or persons complaining of such time and place.

2067. Hearing; evidence. 22 G. A., ch. 28, § 19. Upon such hearing so provided for, the said commissioners shall receive whatever evidence, statements or arguments either party may offer or make pertinent to the matter under investigation; and the burden of proof shall not be held to be upon the person or persons making the complaint, but the commissioners shall add to the showing made at such hearing whatever information they may then have, or can secure from any source whatsoever, and the person or persons complaining shall be entitled to introduce any published schedules of rates of any railroad company, or evidence of rates actually charged by any railroad company for substantially the same kind of service, whether in this or any other state; and the lowest rates published or charged by any railroad company for substantially the same kind of service, whether in this or any other state, shall, at the instance of the person or persons complaining be accepted as *prima facie* evidence of a reasonable rate for the services under investigation, and if the railroad company complained of is operating a line of railroad beyond the state of Iowa, or if it appears that it has a traffic arrangement with any such railroad company, then the commissioners in determining what is a reasonable rate, shall take into consideration the charge made, or rate established by such railroad company or the company with which it has traffic arrangements for carrying freight from beyond the state to points within the state, and from within the state to points beyond [the] state; and if such company be operating a line of railway beyond the state they shall also take into consideration the rate charged or established for a substantially similar

or greater service by such company in any other state in which said railroad company operates a line of railway.

2068. Decision. 22 G. A., ch. 28, § 20. After such hearing and investigation the said commissioners shall fix and determine the maximum charge to be thereafter made by the railroad company or common carriers complained of, which charge shall in no event exceed the one now, or hereafter fixed by law, and the said commissioners shall render their decision in writing; and shall spread the same at length in the record to be kept for that purpose; such decision shall, specifically, set out the sums or rate which the railroad company or common carrier, so complained of, may thereafter charge or receive for the service therein named and including a classification of such freight, and the said commissioners shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of but it shall be extended to all such rates between points in this state and whatever part of the line of railway of such company or common carrier within this state as may have been fairly within the scope of such investigation, and any such decisions so made and entered on record of said commissioners, including any such schedules and classifications, shall, when duly authenticated be received and held in all suits brought against any such railroad corporation or common carrier wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates, the same as the schedules made by said commissioners as provided in section seventeen hereof [§ 2065]; and the rates and classifications so established after such hearing and investigation shall from time to time thereafter upon complaint duly made be subject to revision by said commissioners the same as any other rates and classifications.

2069. Proceedings of commissioners. 22 G. A., ch. 28, § 21. That the said board of railroad commissioners may in all cases conduct its proceedings when not otherwise particularly prescribed by law, in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commissioners may from time to time make or amend such general rules, or orders, as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform as nearly as may be to those in use in courts of this state. Any party may appear before said board of commissioners and be heard in person or by attorney. Every vote and official action of said board of commissioners shall be entered of record and its proceedings shall be public upon the request of either party or any person interested. Said board of railroad commissioners shall have an official seal, which shall be judicially noticed, and every commissioner shall have the right to administer oaths and affirmations in any proceeding pending before said board.

2070. Annual reports. 22 G. A., ch. 28, § 22. The said board of railroad commissioners is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the said commissioners may need information. Such annual reports shall show in detail the amount of the capital stock issued, the amounts paid therefor, and the manner of the payment of the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the costs and value of the carrier's property, franchises and

equipment; the number of employees, and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business, and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations, concerning fares or freights, or agreements, arrangements, or contracts with other common carriers as the commissioners may require; and the said board of commissioners may within its discretion for the purpose of enabling it the better to carry out the purpose of this act (if in the opinion of the commissioners it is practicable to prescribe such uniformity and methods of keeping accounts), prescribe a period of time within which all common carriers subject to the provisions of this act, shall have as near as may be a uniform system of accounts and the manner in which such accounts shall be kept.

2071. Extortion; penalty. 22 G. A., ch. 28, § 23. If any railroad corporation or common carrier subject to the provisions of this act, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this state which it has the right, license or permission to use, operate or control or shall make any unjust and unreasonable charge prohibited in section two of this act [§ 2050], the same shall be deemed guilty of extortion, and shall be dealt with as hereinafter provided, and if any such railroad corporation (or common carrier) shall be found guilty of any unjust discrimination as defined in section three of this act [§ 2051], upon conviction thereof, shall be dealt with as hereinafter provided.

2072. Discrimination; punishment. 22 G. A., ch. 28, § 24. If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad; or if it shall charge, collect or receive at any point upon its railroad a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity, than it shall at the same time charge, collect or receive at any other point upon the same railroad; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railroad a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railroad of equal distance; or if it shall charge, collect or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity, at the same point upon its railroad; or if it shall charge, collect or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons, for the transportation of the like quantity of freight of the same class, being transported from the same point in the same direction, over equal distances of the same railroad, or if it shall charge, collect or receive, from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, a greater amount

of toll or compensation than is at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, a higher or greater compensation in the aggregate, than it shall, at the same time, charge, collect or receive from any other person or persons, for the use and transportation of any railroad car or cars of the same class for a like purpose, being transported from the same original point, in the same direction, over an equal distance of the same railroad; all such discriminating rates, charges, collection or receipts whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act; and it shall not be deemed a sufficient excuse or justification of such discrimination on the part of said railroad corporation, that the railway station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railroad car the greater distance than for the shorter distance, is a railway station or point at which then exists competition with any other railroad or means of transportation. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates. The provisions of this section shall extend and apply to any railroad, the branches thereof, and any road or roads which any railroad corporation has the right, license or permission to use, operate or control wholly or in part, within this state; *provided*, however, that nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand-mile tickets; *provided* the same are issued alike to all applying therefor.

2073. Discrimination as to quantity. 22 G. A., ch. 28, § 25. It shall be unlawful for any such common carrier to charge, collect demand or receive more for transporting a car of freight than it at the same time charges, collects demands or receives per car for several cars of a like class of freight over the same railroad, for the same distance, in the same direction, or to charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a car load of a like class of freight over the same railroad for the same distance, in the same direction or to charge collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class of freight over the same railroad, for the same distance, in the same direction, all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad company as *prima facie* evidence of the unjust discrimination prohibited by this act; *provided*, however, that for the protection and development of any new industry within this state, such railroad company may grant concession or special rates for any agreed number of car loads, but such special rates aforesaid shall first be approved by the board of railroad commissioners, and a copy thereof filed in the office thereof.

2074. Penalty for discrimination. 22 G. A., ch. 28, § 26. Any such railroad corporation guilty of extortion or of making any unjust discrimination as to passenger or freight rates or the rates for the use and transportation of railroad cars or in receiving handling or delivering freights shall upon conviction thereof be fined in any sum not less than one thousand dollars nor more than five thousand dollars for the first offense; and for every subsequent

offense not less than five thousand dollars nor more than ten thousand dollars such fine to be imposed in a criminal prosecution by indictment, or shall be subject to the liability prescribed in the next succeeding section to be recovered as therein provided.

2075. Forfeiture. 22 G. A., ch. 28, § 27. Any such railroad corporation guilty of extortion or of making any unjust discrimination as to passenger or freight rates or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights shall forfeit and pay to the state of Iowa not less than one thousand dollars nor more than five thousand dollars for the first offense and not less than five thousand dollars nor more than ten thousand dollars for every subsequent offense to be recovered in a civil action by ordinary proceedings instituted in the name of the state of Iowa. And the release from liability or penalty provided for in section fifteen of this act [§ 2063] shall not apply to either a criminal prosecution under the last preceding section or a civil action brought under this section.

2076. Suits by commissioners. 22 G. A., ch. 28, § 28. Whenever said railroad commissioners have good reason to believe, that any railroad corporation or common carrier subject to the provisions of this act has been guilty of extortion or unjust discrimination and thereby become liable to the penalties prescribed in sections twenty-six and twenty-seven hereof [§§ 2074, 2075], it shall be their duty to immediately cause suits to be commenced and prosecuted against any such railroad corporation or common carrier. Such suits and prosecutions may be instituted in any county of this state through or into which the line of the railroad corporation sued for violation of this act may extend. And such railroad commissioners are hereby authorized, when in their judgment, it is necessary so to do, to employ counsel to assist the attorney-general in conducting such suit on behalf of the state. No such suits commenced by said commissioners shall be dismissed unless the said commissioners and the attorney-general shall consent thereto. And the court may in its discretion give preference to such suits over all other business except criminal cases.

2077. Free transportation or reduced rates. 22 G. A., ch. 28, § 29. Nothing in this act shall apply to the carriage, storage or handling of property free or at reduced rates for the United States or this state or municipal governments or for charitable purposes, or to and from fairs and expositions for exhibition thereat or for the employees of such common carriers or their families or private property or goods for the family use of the employees of such common carriers, or the issuance of mileage, excursion or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to prevent railroads from giving free carriage to their own officers and employees and their families dependent upon said officer or employee for support and to persons in charge of live-stock being shipped from the point of shipment to destination and return, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies; *provided*, that no pending litigation shall in any way be affected by this act.

2078. Commissioners transported free. 22 G. A., ch. 28, § 30. The said railroad commissioners and their secretary shall have the right of free transportation in the performance of their duties concerning railroads, on all railroads and railroad trains in this state; and they may take with them experts or other agents whose services they may require and who shall in like manner be transported free of charge.

2079. Appropriation. 22 G. A., ch. 28, § 31. To defray the necessary expenses of the said railroad commissioners in making investigations and prosecuting suits and to pay all necessary costs attending the same under the provision of this act there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars or so much thereof as may be necessary, to be drawn upon warrants of the state auditor issued upon the requisition of said commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid.

2080. 22 G. A., ch. 28, § 32. Section eleven of chapter seventy-seven of the acts of the seventeenth general assembly in relation to the board of railroad commissioners, and all laws now in force in direct conflict with any of the provisions of this act, are hereby repealed.

TAXES IN AID OF RAILROADS.

2081. 20 G. A., ch. 159, § 1. Chapter one hundred and twenty-three of laws of the sixteenth general assembly and chapter eighty-seven and one hundred and seventy-three of the laws of the seventeenth general assembly and chapter one hundred and ninety-two of the laws of the eighteenth general assembly and chapter one hundred and two of the laws of the nineteenth general assembly are hereby repealed and the following is enacted instead thereof:

2082. By township, cities, or towns; limit. 20 G. A., ch, 159, § 2. Taxes not to exceed five per centum on the assessed value of any township, incorporated town or city may be voted to aid any railroad company which is or may become incorporated under the laws of the state of Iowa, to aid in the construction of a projected railroad within this state as hereinafter provided.

[As to the limitation of amount, see also § 2084.]

Constitutionality: Under the constitution of 1846, *held*, that counties might, by a public vote, be authorized to issue bonds in aid of a railway to be constructed through the county: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Also, *held*, under the provisions of Code of '51, that counties had authority by popular vote to issue bonds in subscription for the stock of a railway: *Clapp v. Cedar County*, 5-15; *Ring v. Johnson County*, 6-265.

Where such bonds were issued, *held*, that they were valid in the hands of a purchaser, and he need not go behind the records of the county to ascertain whether authority had been properly conferred upon the county officers to issue such bonds: *Clapp v. Cedar County*, 5-15.

Under the cases holding that the county had authority to subscribe for stock in aid of railway corporations, *held*, that irregularities in submitting the proposition to subscribe to such stock to the electors of the county might be cured by a legalizing act of the legislature: *McMillen v. Boyles*, 6-304; *S. C.*, 6-391.

Held, also, that the county might vote taxes in aid of railroads: *Games v. Robb*, 8-193.

Where a county voted the issuance of bonds in aid of a railroad under the agreement that the county should receive certificates of stock of like amount, *held*, that delivery of such certificates was not a condition precedent to the delivery of the bonds: *State ex rel. v. County Judge*, 9-288.

It was held also that the power to subscribe for stock of a railroad and issue bonds in payment therefor might be conferred upon the county by the legislature, and, if conferred, the bonds issued in pursuance of such authority, or duly legalized if issued originally without authority, would be valid: *Stokes v. Scott County*, 10-166.

But, *held*, that a county had no authority without legislative grant to issue bonds in subscription for stock of a railway company: *Ibid.*

And, *held*, that the case above cited, upholding the authority of the county to issue bonds or vote a tax in aid of railroads, were erroneously decided, and that such power was not conferred by the provisions of the Code of '51: *Ibid.*

Therefore, *held*, that where, in the pursuance of the submission of such a proposition to vote, and the adoption thereof by the voters of the county, bonds were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance: *Ibid.*; *State ex rel. v. Wapello County*, 13-388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities or townships in aid of railroads: *State ex rel. v. Wapello County*, 13-388; *McMillan v. Boyles*, 14-107; *Smith v. Henry County*, 15-385; *Ten Eyck v. Mayor of Keokuk*, 15-486; *Hanson v. Vernon*, 27-28; *King v. Wilson*, 1 Dillon, 555.

But under a subsequent similar statute, *held*,

that such provisions were not unconstitutional, overruling the previous cases: *Stewart v. Board of Supervisors*, 30-9; *McGregor & S. C. R. Co. v. Birdsall*, 30-255; *Bonnifield v. Bidwell*, 32-149; *Renwick v. Davenport & N. W. R. Co.*, 47-511.

The present statute to the same effect is also upheld: *Snell v. Leonard*, 55-553; *Chicago, M. & St. P. R. Co. v. Shea*, 67-728.

The fact that the company in favor of which the tax is voted is organized as a railroad and telegraph company will not affect its validity: *Snell v. Leonard*, 55-553.

Repeal of statute: Where, prior to the repeal of the act authorizing the levy of taxes in aid of a railroad in pursuance of a popular vote, the company in favor of which the tax is voted has expended money in constructing its road, relying upon such tax, it has a right, notwithstanding the repeal of the statute, to have the tax levied and collected in its favor: *Burges v. Mabin*, 70-633.

The right to the tax and penalties and interest thereon is not taken away by the repeal of the statute under which the tax is voted, but repeal of the statute terminates the right to additional penalties: *Tobin v. Hartshorn*, 69-648.

The statute of limitations, as against an action to enforce a tax voted under a statute afterwards repealed, *held* to commence to run only in accordance with provisions of new statute: *Harwood v. Brownell*, 48-657.

Where a railroad was constructed by another corporation than that in whose behalf the tax was voted, and it did not appear that such construction was made in reliance upon the tax voted, or that the right to the tax was transferred to the other contracting road, *held*, that such tax could not be levied or collected after repeal of statute under which it was voted: *Barthel v. Meader*, 72-125.

Cities under special charter may vote a tax as here provided: *Bartemeyer v. Rohlfs*, 71-582.

2083. Petition; notice; submission; certificate; levy; collection. 20 G. A., ch. 159, § 3. Whenever a petition shall be presented to the council or trustees of any incorporated town or city, or the trustees of any township signed by a majority of the resident freehold taxpayers of such township, incorporated city or town asking that the question of aiding any railroad company incorporated under the laws of the state of Iowa in the construction of a projected railroad within this state be submitted to the voters thereof, it shall be the duty of the trustees or council of such incorporated town or city or trustees of such township to immediately give notice of a special election by publication in some newspaper published in said incorporated town, city or township if any be published therein, and if not, then in some newspaper published in the county if any such there be and also by posting copies of said notice in five public places in such township, incorporated city or town at least ten days before said election which notice shall specify the time and place of holding said election, the name of the company and the line of the road proposed to be aided, the rate per centum of the tax to be levied, whether one-half of said tax shall be collected the first year and one-half the following year, or the whole thereof to be collected in one year, the amount of work required to be done, and when and where the same shall be done, to what point said railroad shall be fully completed and any other conditions which shall be performed before such tax or any part thereof shall become due, collectible and payable, and in no case shall such tax become due, collectible or payable until such railroad is fully completed according to the conditions in said notice. At such election the question of taxation shall be submitted. The form of the ballots shall be "for taxation" and "against taxation" and if a majority of the votes polled be "for taxation" then the recorder of the incorporated town, city or township clerk or clerk of election shall forthwith certify to the county auditor the result of said election, the rate per centum of tax thus voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms, and conditions upon which the same, when collected, is to be paid to the railroad company under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds of the county; and the expense thereof and of publishing said notices and all the expenses of said election shall be paid by the railroad company to which it is proposed to vote said tax. When such certificates shall have been made and recorded the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes

as are voted under the provisions of this act as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, incorporated city or town, indicating in their order thereupon when and in what proportion the same are to be collected and upon what conditions the same are to be paid to the railroad company, a certified copy of which order shall accompany the tax lists. Said taxes shall be collected at the time or times specified in said order in the same manner and subject to the same laws after they are collectible as other taxes, or as may be stated in the petition and notices for the election.

Petition for tax: A resident tax payer of the township may sign the petition for an election by the township to vote a tax in aid of a railroad, although he is also a resident and a voter of an incorporated town or city within the limits of such township: *Ryan v. Varga*, 37–78.

Under a previous statute, *held*, that one-third of the tax payers and not one-third of the resident tax payers must sign the petition: *Zorger v. Township of Rapids*, 36–175.

Action of trustees: The action of the township trustees in calling an election in pursuance of the petition, *held* to be of a judicial or *quasi*-judicial character, so that the question whether such action was illegal or without jurisdiction might be determined on *certiorari*: *Jordan v. Hayne*, 36–9.

The trustees may decide this question upon their own knowledge: *Ibid.*

Although the petition is not signed by the requisite number of tax payers, if the trustees have decided it to be sufficient and ordered an election, and the tax has been voted and levied, the validity of the tax cannot be assailed for such defect in the petition. The defect can only be taken advantage of in some method provided for direct review: *Ryan v. Varga*, 37–78; *West v. Whitaker*, 37–598.

But where the finding of the trustees was that the petition was signed by one-half of the resident freehold tax payers, when the statute required that it be signed by a majority, *held*, that although they ordered an election, subsequent proceedings were void: *Slack v. Blackburn*, 64–373.

Township embracing incorporated town: If the township embraces an incorporated town, and it is proposed that a township shall aid in the construction of the road, the voters in the corporation are entitled to vote at such election: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Notice: The statute provides that the notice shall specify to what point the road shall be fully completed before the tax can be collected, and if the notice does not so specify the election will be void: *Allard v. Guston*, 70–731.

Ballots: Where the ballots upon the question of voting a tax in aid of a railroad were "taxation" and "no taxation," *held*, that the form of ballots was sufficient: *West v. Whitaker*, 37–598.

In a particular case, *held*, that the ballots were sufficient although they contained matter not necessary: *Cattell v. Lowry*, 45–478.

Undue influence at election: Where it appeared that an agent authorized by the company for whom the tax was being voted to represent it in procuring the voting of the tax for a compensation agreed upon made promises to voters that all resident tax payers who voted for the tax would receive fifty cents on the dollar on their certificates when issued, and thereby induced some of the voters to change their minds as to the vote which they would cast with reference to such tax, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 66–728.

Where the submission of the proposition and its adoption are procured by false statements and fraudulent representations of the company and its agents the tax cannot be enforced: *Sinnett v. Moles*, 38–25.

Expenses of election in townships for the purpose of voting aid to railroads are not chargeable to the county: *McBride v. Hardin County*, 58–219.

Certificate as to result of election: The certificates of the clerk of election required by the statute in order to authorize the board of supervisors to levy a tax should set out the conditions under which the tax was voted, and it is not sufficient to attach and refer to the notice of the election in which such conditions are stated: *Minnesota & I. S. R. Co. v. Hiams*, 53–501.

Where the township clerk filed with the county auditor such records of proceedings as showed what was required to be certified by such clerk, *held*, that the certificate was sufficient to support the tax, although not contained in one paper; a substantial compliance with the law being deemed sufficient: *Shontz v. Evans*, 40–139.

Where there is a certificate which is defective, and the board of supervisors has determined that the certificate sufficiently complies with the law, the correctness of such decision cannot be collaterally attacked by an action to enjoin the collection of the tax: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where by mistake of the clerk the certificate has been improperly issued the collection of the tax may be restrained by injunction: *Cattell v. Lowry*, 45–478.

Levy: Where certain taxes were properly voted and certified, and the board of supervisors levied "all . . . railroad taxes that have been certified according to law," and the railroad tax in question was accordingly placed upon the tax list, *held*, that the levy was sufficient: *Casady v. Lowry*, 49–523.

The levy of a railroad aid tax *held* sufficient in a particular case, it being mentioned in the resolution enumerating the different taxes as "railroad tax," and being made certain as to amount by reference to the proper records of proceedings of the township for voting such tax: *Shontz v. Evans*, 40–139.

Where a committee of the board of supervisors recommended in a report that certain taxes be levied, which included the tax in question, and it appeared from the record that the report was adopted, the names of those voting in favor thereof being given, *held*, that the levy was sufficient: *West v. Whitaker*, 37–598.

A levy of taxes in different townships is to be considered as distinct, even though such separate levies are made by one resolution: *Woodworth v. Gibbs*, 61–398.

The action of the board in making the levy is not judicial but purely ministerial; their action in so doing may be questioned in a collateral proceeding, and held void for want of power to do it at the time it was done: *Scott v. Union County*, 63–583.

Authority to vote and levy the tax rests upon a substantial compliance with the requirements of the statute in the performance of the conditions upon which the authority is granted: *Allard v. Guston*, 70–731.

Under 12 G. A., ch. 48, *held*, that no levy by the board of a tax properly voted by a township was necessary, and that therefore such levy could not be compelled by *mandamus: Chicago, D. & M. R. Co. v. Olmstead*, 46–316.

Where a tax in aid of a railway was voted in March, *held*, that the levy was properly made upon the assessment of the same year, although the books were not returned until after that date: *Parsons v. Childs*, 36–108.

As to levy, see *Bartemeyer v. Rohlfs*, 71–582.

Entry of tax on tax list *held* not necessary under 12 G. A., ch. 48: *Harwood v. Brownell*, 48–657.

Validity: Where the validity of such a tax has been adjudicated in an action against the treasurer and the board of supervisors by parties claiming the tax, it cannot, in the absence of collusion or fraud, be again called in question in an action by a tax payer against the treasurer to enjoin its collection: *Lyman v. Faris*, 53–498.

Collection of tax: Although it may be the duty of the treasurer to proceed to collect the tax when due, he could not, under previous statutes, be compelled by the company to do so until it had showed itself entitled thereto: *Harwood v. Case*, 37–692.

Under a subsequent statute the tax did not become delinquent until the company was entitled to the tax and the whole amount thereof, and as to taxes levied before the passage of such act, *held*, though retrospective, it was not invalid: *Ibid.*

Where it appeared that the company was entitled to only a part of the tax, and such part was not claimed merely as an instalment, *held*, that the part claimed would not be regarded as an instalment, but in satisfaction of the whole tax, and as such might be collected: *Casady v. Lowry*, 49–523.

The county has no interest in the tax collected, and if it is to be refunded it should be refunded by the treasurer without any warrant or order of the board of supervisors. In the case of misappropriation by the treasurer the loss would not fall upon the county: *Barnes v. Marshall County*, 56–20.

A claim for the refunding of a portion of the tax is against the fund and not against the county: *Ibid.*

The county cannot be made liable for any part of a railroad tax paid into the county treasury. Where a railroad tax illegally collected remains in the treasury the proper officer may be compelled to refund the same by an action against him, but an action for the amount cannot be maintained against the county: *Eyerly v. Jasper County*, 72–149.

Where such taxes do not remain in the hands of the treasurer as a distinct fund, but have been placed in the general fund and expended in paying ordinary indebtedness of the county, judgment may be rendered against the county therefor: *Merrill v. Marshall County*, 74–24.

Conditions and stipulations: No contract, stipulation or reservation could, under the previous act, be set up to defeat the tax unless it was in writing: *Muscatine Western R. Co. v. Horton*, 38–33; *Harwood v. Quinby*, 44–385.

The omission to state in the levy the condition upon which it is to be paid to the company will not render the levy invalid when the condition was complied with before the levy: *Burges v. Mabin*, 70–633.

Where a condition on which the taxes in aid of a railroad was that "the road should be built and in operation" by the time fixed, *held*, that such condition was sufficiently complied with if the trains were running by the time specified, although it was necessary in order to the completion of the road that it be ballasted and additional ties put in: *Muscatine Western R. Co. v. Horton*, 38–33.

Where the road is completed in accordance with the conditions of a written contract between the company and the township voting the tax, a failure of the company to comply with the just expectations of the voters which have not been embodied in such contract will not forfeit the tax: *Ibid.*

Where one of the conditions on which a tax was voted was that the road should be constructed and operated, and a depot located within a town named, on or before a certain day, and by that date the depot was partially erected and a track was laid for the distance of a mile from such depot, and the road was operated, although not in a first-class manner, the track not being ballasted, *held*, that there was a sufficient compliance with the conditions of the tax to entitle the railway to the same: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

In a particular case, *held*, that the construction of the road was not such as to constitute a compliance with the conditions on which the aid tax had been voted: *Cox v. Forest City & S. R. Co.*, 66–289.

Where a tax was voted to be expended in three townships mentioned, *held*, that it appearing that more than the amount of tax voted had been expended in the township in question, the company was entitled to the tax in that township although nothing had been expended in the other two townships: *Merrill v. Welsher*, 50–61.

Also, *held*, that the fact that the line of the road was changed so that it did not pass through one of the townships specified, would

not prevent the collection of the tax in the township through which it did pass: *Ibid.*

Also, *held*, under a special statute, that a mere suspension of work and failure to build the road for the period of four years mentioned in such statute was not the non-fulfillment of a special contract or agreement as therein specified, and did not amount to a forfeiture of the tax: *Ibid.*

Where the articles of incorporation of the company declared its purpose to be to construct a railroad by the way of Newton, in Newton township, and the petition and notice for the voting of a tax in that township specified that it was for the purpose of aiding in the construction of the road to be expended in Newton and another township named, *held*, that without the construction of the line to Newton the tax in Newton township could not be enforced, although double the amount of such tax had been expended in the other township: *Lamb v. Anderson*, 54–190.

It is a sufficient designation of the terminal point of a proposed line to state that it is to run in a certain direction to the connection with another line. It is sufficient completion of the line that the track is laid and cars run thereon: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

Where a paper was signed by the president of a company, bearing the seal of the corporation, and was circulated among the electors on the day of election, containing certain stipulations in regard to the construction of the road for which the tax was being voted, *held*, that the provisions of such paper became binding upon the company: *Meeker v. Ashley*, 56–188.

Where the president of the company made statements at a public meeting called to discuss the voting of a tax in aid of a railway, which tended to induce tax payers to believe that the road, if built, would be located upon a line already surveyed and known to them, and afterwards the road was built upon a different line, less advantageous to the tax payers, *held*, that the collection of the tax could be enjoined: *Curry v. Supervisors*, 61–71.

As to notice, see *Bartemeyer v. Rohlfs*, 71–582.

Narrow Gauge: Where a tax was voted in aid of a railroad between certain termini and a narrow gauge road was constructed, *held*, that that fact would not defeat the company's right to the tax, it not having been specified in the notice of election what the gauge of the road should be, and it appearing that the road as constructed answered the purpose of the tax payers: *Meader v. Lowry*, 45–684.

And in such case, *held*, that the township trustees were not guilty of any fraud in certifying the construction of the road as contemplated in the notice submitting the question of levying the tax: *Ibid.*

The construction of a narrow gauge road having sufficient capacity for all the business to be done, and capable of doing it as economically as a road of any other gauge, is a sufficient compliance with the provisions for the voting of the tax, where no stipulation as to the gauge is made, to entitle the company to the tax voted: *Casady v. Lowry*, 49–523.

Estoppel. Where conditions and representations have not been complied with, the tax payer will not be estopped from enjoining the collection of the tax by the fact that the road has been built, where it appears that notice was given to the company before the construction of the road upon the new line that the tax would be contested on the ground of fraud and false representations: *Curry v. Supervisors*, 61–71.

Where it is not shown that the party objecting to the validity of a railroad aid tax had any knowledge thereof at the time it was expended, he will not be estopped from questioning its validity afterward: *Truesdell v. Green*, 57–215.

Purchase or leasing of another road: The leasing or purchase and operation of a line of road as a part or whole of the line for the construction of which the tax is voted will not constitute a compliance with the agreement to construct such road: *Lamb v. Anderson*, 54–190; *Meeker v. Ashley*, 56–188; *Iowa, M. & N. P. R. Co. v. Schenck*, 56–628; *Lawrence v. Smith*, 57–701.

Alienation: Where the company to which a tax has been voted has, upon the faith of the tax, constructed the road and put it in operation, such company becomes entitled to the tax, and this right is not forfeited by a subsequent alienation of the road to another company: *Parsons v. Childs*, 36–108.

The fact that a road in aid of which taxes are voted is sold at or before the time of its completion to another company will not defeat the right of the company in whose favor the tax is voted to receive the same: *Muscatine Western R. Co. v. Horton*, 38–33.

The alienation of the road before the payment of the tax, so that shares of stock in the road for which the tax was voted can no longer be issued to those holding certificates for the payment of such taxes as provided by statute, is a ground for setting such tax aside and releasing the tax payer from his burden: *Manning v. Mathews*, 66–675; *Blunt v. Carpenter*, 68–265.

The right of the tax payer to receive such certificates of stock in exchange for his receipts for taxes paid cannot be set aside by agreement or waiver: *Blunt v. Carpenter*, 68–265.

But a consolidation under terms securing to the tax payer equivalent stock in the consolidated company will not avoid the tax (see § 1997): *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

But the lease of the road in favor of which the tax is voted in perpetuity to another road, by which the latter agrees to operate the line and pay the lessor company a per cent. of the gross earnings, it not appearing that the contract of lease is inequitable or not beneficial to the company constructing the road, will not deprive the company of the right to the tax: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The county having collected a railroad aid tax cannot resist payment of it to the company on the ground that the company has sold and conveyed its property and franchises. Such a defense can only be interposed by the tax payer: *Merrill v. Marshall County*, 74–24.

Change of line: The fact that, after a tax in aid of a railroad is voted, the location of the line in a part of its course is changed,

which change, however, is not in conflict with any of the conditions upon which the tax is voted, will not affect its validity: *Shontz v. Evans*, 40–139.

A private individual cannot, on account of private injuries to him alone, maintain an action of *mandamus* to compel a railway company which has received the benefit of taxes voted by the public to operate its line as it was originally located: *Crane v. Chicago & N. W. R. Co.*, 74–330.

2084. Notice; conditions; limit of tax. 20 G. A., ch. 159, § 4. The stipulations and conditions contained in the said notices must conform to those set forth in the petition asking the election, and the aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively.

Under the statutory provision that a township, town or city, having voted a tax to the amount of five per centum upon its taxable property in aid of railroads, cannot impose another tax upon property for that purpose, *held*, that the power conferred to levy such taxes ceases upon a levy of taxes to that amount, but that taxes duly levied which have been abandoned or become uncollectible cannot be taken into account: *Dumphy v. Supervisors of Humboldt County*, 58–273.

An increase in value of taxable property after levy of the five per centum of taxes does not confer the power to make an additional levy: *Ibid.*

Taxes levied under a prior act providing for such taxation, although such act contained the same limitation as the present act, cannot be taken into account in determining whether the limit fixed in the present act has been exceeded: *Scott v. Union County*, 63–583.

Where, at the time of voting the tax under the present act, a prior tax of five per cent. stood uncanceled, but before the levy of the tax thus voted the prior tax was canceled, *held*, that the second tax was valid. The statute should be construed as if it provided that the aggregate amount of tax to be voted and levied shall not exceed five per cent.: *Williams v. Poor*, 65–410.

Penalties accruing on a railroad aid tax are not to be taken into account in determining whether the amount of the tax exceeds the limit fixed by statute: *Tobin v. Hartshorn*, 69–648; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed. Rep., 541.

2085. Money paid out; certificate. 20 G. A., ch. 159, § 5. The moneys collected under the provisions of this act shall be paid out by the county treasurer to the treasurer of the railroad company for whom the same was voted upon the orders of the president or managing director thereof at any time after the trustees of such township, or trustees or council of such incorporated town or city voting said tax, or a majority of them, shall have certified to the county treasurer that the conditions required of the railroad company and set forth in the notice for the special election at which the tax was voted have been complied with, and said township trustees, or trustees or council of such incorporated town or city shall make said certificate when the said conditions have been complied with sufficiently to entitle the said railroad company to the amount of such orders, or when the said conditions are fully complied with and performed on the part of the railroad company; but if the costs and expenses of holding said election and of recording said certificates shall not have been paid by the railroad company, then the county treasurer shall first deduct from the moneys so collected the amount of said costs and expenses and pay the same over to the parties entitled thereto.

[By § 527 the township trustees are authorized to employ counsel in litigation to which they are made parties, concerning their right or duty to levy taxes which have been authorized upon express conditions.]

Fee for collection: The treasurer is not authorized to deduct from the tax collected three per cent. for its collection. Sec. 5067 does not authorize such deduction: *Merrill v. Marshall County*, 74–

Certificate: The certificate of the township trustees of the compliance of the company with the terms on which the tax is voted need only be properly signed. It need not appear that there is a previous resolution or order authorizing its issuance: *Merrill v. Welsher*, 50–61.

Under a certificate in such case that the company had "so complied with the act as to entitle it to draw the sum of," etc., *held*, that as the company could not have been entitled to draw any sum until it had complied with the act, the certificate was sufficient: *Casady v. Lowry*, 49–523.

The certificate of the trustees is not a judicial act and is not conclusive, its only purpose being to authorize the treasurer to pay over the funds collected. It has nothing to do with the treasurer's right to collect the tax: *Lamb v. Anderson*, 54–190.

The duty of the trustees as to giving a cer-

tificate of completion of a road is only to determine whether it is completed, and they should not refuse to give it on the ground of fraud in the election, or in the certificate of the engineers: *Harwood v. Quinby*, 44-385.

An action to enforce the duty imposed on the trustees to make such certificate does not become barred as to a tax already voted until three years after the passage of the act limiting the time for making such certificate: *Ibid.*

The fact that the certificate of the trustees is given at a place outside of their township will not render it absolutely void: *Meader v. Lowry*, 45-684.

Also, *held*, that the proper trustees to make the certificate were those of the township which had voted the tax, although afterward portions of the township were organized into or transferred to another township: *Ibid.*

Assignment: The claim for a railroad aid tax is assignable: *Merrill v. Welsher*, 50-61.

The assignment of such a tax does not discharge the assignee of the equities between the company in favor of which the tax was voted and the tax payers, and in a suit by a tax payer to invalidate such a tax because of the non-fulfillment of conditions precedent on the part of the railroad company, the company in whose favor the tax was voted and the assignee of such tax are necessary parties. So, also, the township trustees and the county treasurer are to be made parties defendant: *Sully v. Drennan*, 113 U. S., 287.

2086. Certificate of taxes exchangeable for stock or bonds. 20 G. A., ch. 159, § 6. It shall be the duty of the county treasurer, when required, in addition to a tax receipt to issue to each tax payer on the payment of any taxes voted under the provisions of this act a certificate showing the amount of tax so paid, the name of the railroad company entitled thereto, and when the same was paid, and the treasurer shall be entitled to charge and receive the sum of twenty-five cents for each certificate so issued. Said certificates are hereby made assignable and when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid as shown by such certificate, in amount showing the sum of one hundred dollars or more of taxes to have been paid for said railroad company, said railroad company shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of said stock, then the holder of said certificates shall be entitled to receive the full number of shares of stock covered by said certificates and may make up and tender in money the balance of any share of said stock when the certificates held by him are not equal in amount to one full share of such stock, the stock for such purpose to be estimated at its par value. Whenever it shall be proposed in the petition and notice calling said election to issue first mortgages, bonds, not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge and not exceeding the sum of sixteen thousand dollars per mile for the ordinary four feet eight and one-half inch gauge, in lieu of stock as herein provided, it shall be lawful to issue said bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal of said bonds.

If the company to which a tax has been voted transfers its property and franchises so that the tax payer cannot secure the stock to which he is entitled, the collection of the tax cannot be enforced. The tax payer cannot be compelled to take stock in another corporation, even though more valuable: *Manning v. Matthews*, 66-675; *Blunt v. Carpenter*, 68-265. But a consolidation under terms which secure to the tax payer equivalent stock in the consolidated company will not avoid the tax (see § 1997): *Cantillon v. Dubuque & N. W. R. Co.*, 78-48.

2087. Liability of directors. 20 G. A., ch. 159, § 7. The board of directors of any railroad company receiving taxes voted in aid thereof under the provisions of this act, or those members thereof or either of them who shall vote to bond, mortgage, or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of sixteen thousand dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in

either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount estimated of its par value of the stock by him or her held, if the same should be rendered of less value or lost thereby.

2088. Forfeiture of tax. 20 G. A., ch. 159, § 8. Should the taxes voted in aid of any railroad under the provisions of this act remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be considered forfeited, and the persons who paid the said taxes shall be entitled to receive back from the county treasurer their pro-rata shares thereof remaining, and in all such cases where any taxes have been voted or levied upon the real or personal property in any township, city or town in any county in this state to aid in the construction of any railroad as hereinbefore provided, and the railroad in aid of which said taxes were voted or levied has not been built or completed or operated into or through such township, city or town, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books, to give the railroad company to which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to abate and cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy of said taxes; but the foregoing provisions shall in no manner affect any actions which may now be pending for the recovery of any taxes heretofore voted in aid of any railroads; and in all cases where the railroad company to whom any taxes may have been or may hereafter be voted, neglects or refuses to receive such taxes or to require or permit the same to be collected and certificates therefor to be issued for the period of one year after such taxes become due and collectible, and in all cases where any taxes have been heretofore voted in aid of any railroad and the conditions upon which the same were voted have not in fact been complied with and the time in which said conditions were to be fulfilled has expired, all such taxes are hereby declared forfeited and canceled and the county officers of the county in which any such taxes shall have been levied and entered upon the tax books shall enter cancellation thereof upon the proper county records; and in all cases where any taxes to aid in the construction of any railroad may hereafter be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebate or exemption from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax or any portion or percentage thereof, with any of the voters or tax payers as an inducement to procure said tax to be voted, all such taxes so procured to be voted are and shall be absolutely void.

The fact that a portion of the tax voted in aid of the railroad has been paid, and, after having lain in the treasury two years uncalled for, has been refunded to the tax payer as provided by statute, does not operate as a forfeiture of taxes not so paid: *Merrill v. Welsher*, 50–61.

Where the road has been completed and there has been a continuing demand of taxes received by the treasurer, the right to recover taxes received will not be defeated by the fact that they have remained in the treasury more than two years. The provision was intended to secure the speedy and prompt building of the road: *Merrill v. Marshall County*, 74–24.

Under a former statute, *held*, that the county had no interest in the tax collected; that it was to be paid to the county treasurer, and in proper case should be refunded by him without any warrant or order of the board of supervisors; that in case of misappropriation by the county treasurer the loss would not fall upon the county, and that the claim of plaintiff for the refunding of his proportion of the tax forfeited was strictly against the fund, and not against the county: *Barnes v. Marshall County*, 56–20.

2089. Taxes paid in labor or supplies. 20 G. A., ch. 159, § 9. Nothing contained in this act shall preclude any tax payer who may contract with a railroad company for which taxes shall have been or may hereafter be

voted under the provisions of this act, to pay his tax thus voted or any part thereof in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction of the road in pursuance of the terms and conditions stipulated in the notices of election in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from said railroad company or its duly authorized agent specifying the amount of such payment, the same shall be credited by the county treasurer on his tax in aid of said railroad, with the effect in all respects as though the same was paid in money to the said county treasurer; and when such receipts have been presented and thus credited by the county treasurer they shall have the same force and validity in his settlement with the board of supervisors as the orders from the railroad company provided for in section four [five] of this act [§ 2085]; and *provided*, laborers shall have lien upon said tax so voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad.

Where the company issued to a tax payer a receipt for taxes paid directly to the company, to be presented to the county treasurer in payment of the taxes, *held*, that such receipts were in the nature of advance receipts for the taxes, and that no action thereon against the company or the assignor of such instrument could be maintained thereon, at least until demand has been made on the treasurer that they be received for taxes: *Lisle v. Iowa, M. & N. P. R. Co.*, 54–499.

UNION RAILWAY DEPOTS.

2090. Corporations formed. 20 G. A., ch. 139, § 1. In order to facilitate the public convenience and safety in the transmission of freight and passengers from one railway to another and to prevent unnecessary expense and inconvenience attending the accumulation of a number of stations in one place, authority is hereby given to any number of persons or any number of railway corporations or both persons and railway corporations to form themselves into a body corporate under the general incorporation laws of this state relating to corporations for pecuniary profit for the purpose of acquiring, establishing, constructing and maintaining at any place in this state union station-houses or depots for freight or passengers, or for both, with necessary offices for express, baggage and postal rooms in the same or separate buildings, railroad *tracts* [tracks] and other appurtenances of such depots. And for that purpose may make and file for record articles of association in the manner provided for such corporations in this state, and any railroad company operating a road in this state or interested in the operation of a road in this state, whether organized under the laws of this state or elsewhere, may become stockholder in such corporation in the same manner an individual might. Such articles may provide for the business of the corporation being conducted under by-laws to be adopted by the stockholders, in which case a copy of such by-laws shall be posted in the passenger or waiting rooms of the depot and in the office of the company.

2091. Powers. 20 G. A., ch. 139, § 2. Every corporation formed under the provisions of this act shall have power to take and hold for the purposes mentioned in section one [§ 2090], such real estate as may be deemed necessary by the railroad commissioners for the location, erection and construction of their depot and its approaches, which they may acquire by purchase or by condemnation as provided by chapter four, title ten, code of Iowa, 1873, and when condemned and paid for as thereby provided, such real estate shall belong to the corporation.

2092. Connecting tracks. 20 G. A., ch. 139, § 3. Such corporation, with consent of the city council of any city or town in this state in which said depot is located, shall have the right to lay its tracks to make necessary connection with all railways desiring to use such depot upon the streets or alleys

of said city, and by and with the consent of such city council may erect such depot upon or across any such street or alley, but no railroad track can thus be located, nor can such depot be so erected until after due injury to property abutting upon the streets or alleys upon which such railway track is proposed to be located or such depot is proposed to be erected, has been ascertained and compensation made in the manner provided for taking private property for works of internal improvement in chapter four of title ten of the code, subject to the provisions of section four hundred and sixty-four of the code [§ 623].

2093. Liability for damages. 20 G. A., ch. 139, § 4. Nothing in this act contained, or in the articles of incorporation or by-laws, of the corporation herein provided for, shall in any manner release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages by injuries to persons, stock, baggage or freight, or for the loss of baggage or freight, in or about said union depot grounds as if said depot, tracks and appurtenances wholly belonged to and were operated by said railroad companies using the same.

STATION-HOUSES AT INTERSECTIONS.

2094. Railroads to maintain. 20 G. A., ch. 24, § 1. All railroad corporations shall at all points of connection, crossing, or intersection with the roads of other corporations, unite with such corporations in establishing and maintaining suitable platforms and station-houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and such corporation shall, when so ordered by the railroad commission, keep such depot or passenger-house warmed, lighted and opened to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and said railroad companies so connecting, crossing or intersecting, shall stop all trains at said depots at said connections, crossings or intersections, for the transfer of passengers, baggage and freight, when so ordered by the railroad commission, and the expense of constructing and maintaining such station-house and platform shall be paid by such corporations in such proportions as may be fixed by the order of the railroad commission. Such corporations, connecting or intersecting as aforesaid, shall also, whenever ordered by the railroad commission, so unite and connect the tracks of said several corporations as to permit the transfer from the track of one corporation to the other of loaded or unloaded cars designed for transportation upon both roads.

2095. Penalty. 20 G. A., ch. 24, § 2. Any railroad corporation or company which, after having received ninety days' notice by the railroad commissioners, shall neglect or refuse to comply with the provisions of section one of this act [§ 2094], shall, for every day such corporations or company fails, neglects or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Iowa, for the use of the school fund of the county wherein such crossing or intersection is situated, and it shall be the duty of the prosecuting [county] attorney of the proper judicial district [county] to prosecute for and recover the same.

CHANGING NAMES OF STATIONS.

2096. By railroad commissioners. 22 G. A., ch. 31, § 1. In all cases where any railway company shall fail or refuse to make the name of a railway station conform to the name of the incorporated town within the limits

of which it is situated, the railway commissioners of the state, upon hearing and after notice thereof may order a change in the name of the said station to effect such uniformity in name, said notice may be served upon the same persons and in the same manner as provided for service upon said railway company of original notice, at least ten days before the date named for hearing.

2097. Notice. 22 G. A., ch. 31, § 2. When the railway commissioners shall order a change in the name of a railway station in pursuance of the provisions of section one of this act [§ 2096], said commission shall give the company upon whose line the said station is located, notice of such order, and if the said order be not complied with, within thirty days from the date of service of such notice, it shall be the duty of the said commissioners to notify the attorney-general of the facts in the case, who upon such notice shall proceed in the courts of the state, to compel the enforcement of said order.

2098. Penalty. 22 G. A., ch. 31, § 3. A failure to comply with the order of the railway commissioners within thirty days from service of such notice, shall constitute a misdemeanor for which said railway company shall be subject to a fine of one thousand dollars and non-compliance for each thirty days thereafter shall constitute a separate and distinct offense, subject to a fine of one thousand dollars.

REGULATIONS AS TO OFFICES.

2099. Where maintained. 16 G. A., ch. 68, § 1. All railroads terminating in Iowa, shall establish and maintain at such terminus, general freight and passenger offices (and express and telegraph offices, when operating an independent express or telegraph company), at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and in advertising, correctly set forth their true connections, starting or terminal points, time-tables and freight tariffs, affording correct information to the business and traveling public.

2100. Penalty. 16 G. A., ch. 68, § 2. If any officer, agent, employee or lessee engaged in operating any railroad, express company or telegraph line, terminating in or operated within the state of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of section one of this act [§ 2099], he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars, and may be imprisoned not more than six months.

SLEEPING-CARS.

2101. Office kept open. 18 G. A., ch. 169, § 1. All railroad and sleeping-car companies running or operating sleepers or sleeping-cars within this state, upon railroads terminating therein, shall establish, maintain and keep open to the public at such termini, ticket offices at accessible and convenient places in which they shall keep a diagram of the berths, and state-rooms in such sleepers or sleeping-cars, and shall at all times during the day-time keep such offices open for the sale of tickets for such berths and state-rooms.

2102. Penalty. 18 G. A., ch. 169, § 2. If any officer, agent, employee, or lessee, engaged in operating any sleeper or sleeping-car line, terminating or operated within the state of Iowa, shall refuse or neglect to comply with any of the provisions or requirements of section one of this act [§ 2101] he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding five hundred dollars and may be imprisoned not more than six months.

CHAPTER 6.

OF TELEGRAPH AND TELEPHONE LINES.

2103. Right of way. 1324; 19 G. A., ch. 104. Any person or company may construct a telegraph or telephone line along the public highways of this state or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor; *provided*, that when any highway along which said line has been constructed shall be changed, said person or company shall, upon ninety days' notice in writing, remove said line to said highway as established. Said notice contemplated herein may be served on any agent or operator in the employ of said person or company. [R., § 1348; C., '51, § 780.]

Both telegraph and telephone are used for distant communication by means of wire stretched over different jurisdictions. The fundamental principle in each, by which communication is procured, is the same, and the statutes with reference to telegraph companies are in general applicable to telephone companies: *Iowa Union Telephone Co. v. Board of Equalization*, 67–250: *Franklin v. Northwestern Telephone Co.*, 69–97.

2104. How constructed. 1325. Such fixtures must not be so constructed as to incommode the public in the use of any highway or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damages he thereby sustains. [R., § 1349; C., '51, § 781.]

[The word "so" in the first line is erroneously omitted in the Code.]

2105. Damages assessed. 1326. If the person over whose lands such telegraph line passes claims more damage therefor than the proprietor of the telegraph is willing to pay, the amount of damages may be determined in the same manner as is provided in chapter four of this title. [R., § 1350; C., '51, § 782.]

2106. Liability for refusing to transmit. 1327. If the proprietor of any telegraph within this state, or the person having the control and management thereof, refuses to receive dispatches from any other telegraph line, or to transmit the same with fidelity and without unreasonable delay, all the laws of the state in relation to limited partnerships, to corporations, and to obtaining private property for the use of such telegraph shall cease to operate in favor of the proprietor thereof; and, if private property has been taken for the use of such telegraph without the consent of the owner, he may reclaim and recover the same. [R., § 1351; C., '51, § 783.]

2107. Penalty. 1328. Any person employed in transmitting messages by telegraph, must do so without unreasonable delay, and any one who wilfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. [R., § 1352; C., '51, § 784.]

This does not excuse an operator from producing the telegrams which have passed between parties when subpœnaed as a witness in an action between them as to the transaction to which they relate: *Woods v. Miller*, 55–168.

2108. Liable for mistakes. 1329. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law. [R., § 1353; C., '51, § 785.]

A company may insert, in a contract under which a message is sent, a condition exempting it from liability for mistake made from unavoidable causes, provided proper instruments have been used and proper care and skill exercised by the company's employees to

avoid or prevent mistake; but it cannot make general printed regulations which shall have the effect to relieve it from liability for improper conduct or negligence of its servants: *Sweatland v. Ill. & Miss. Tel. Co.*, 27-433; *Manville v. Western Union Tel. Co.*, 37-214.

Where the company has been released from liability except for its own negligence the party seeking to recover from it must make out such negligence: *Ibid.*

A telegraph company may contract to restrict its liability, but it cannot contract against its own negligence in failing to transmit and deliver a message: *Harkness v. Western Union Tel. Co.*, 73-190.

To entitle a party to recover for a mistake in the transmission of a message he must prove something more than mistake and damage. He must show that the mistake was caused by the fault of the company, and that it might have been avoided if defendant's instruments had been good ones and his agents had been skillful operators and exercised the proper diligence in respect to the transmission and receipt of the message in question: *Aikin v. Western Union Tel. Co.*, 69-31.

An instruction imposing liability upon a company upon proof of a mistake without evidence of negligence, and also the burden of proving that there was no negligence by reason of the mistake occurring through uncontrollable causes, *held* erroneous: *Ibid.*

In an action to recover damages for mistake in the transmission of a message, *held*, that the plaintiff to whom the message was delivered might testify as to what the message directed, as tending to show his good faith in acting thereunder, such evidence bearing upon the question whether the plaintiff, in the exercise of ordinary diligence and intelligence, was authorized to interpret the language of the dispatch as he did: *Ibid.*

An action for mistake in the transmission of a message from a broker to his principal may be brought by the principal in his own name: *Ibid.*

Where an agent sends or receives a telegram for the benefit and use of an undisclosed principal such principal may recover damages sustained by reason of the negligence or delay of the company in delivering it, and the recovery cannot be limited to the amount which the agent could have recovered for damages sustained by him individually: *Harkness v. Western Union Tel. Co.*, 73-190.

TAXATION OF TELEGRAPH LINES.

2109. 17 G. A., ch. 59, § 1. All telegraph lines built and operated within the state of Iowa shall be subject to taxation, as hereinafter required.

These provisions as to taxation of telegraph companies are applicable to telephone companies: *Iowa Union Telephone Co. v. Board of Equalization*, 67-250.

2110. Annual report. 17 G. A., ch. 59, § 2. It shall be the duty of the president, vice-president, general manager or superintendent of every telegraph company operating a line in this state, to furnish the auditor of state, on or before the first Monday of May in each year, a statement under oath, and in such form as the auditor may prescribe, showing the following facts: *First* — The total number of miles owned, operated or leased, within the state, with a separate showing of the number leased. *Second* — The total number of miles in each separate line or division thereof, together with the number of separate wires thereon, and stating the counties through which the same is carried. *Third* — The total number of telegraph stations on each separate line, and the total number of telegraphic instruments in use therein, together with the total number of stations, other than railroad stations, maintained. *Fourth* — The average number of telegraph poles, per mile, used in the construction and maintenance of said lines.

2111. Assessment. 17 G. A., ch. 59, § 3. Upon the receipt of the said statement from the several companies, the auditor of state shall lay the same before the state board of equalization at its meeting on the second Monday in July in each year, which shall proceed to assess said telegraph lines at the true cash value thereof.

2112. Rate of tax. 17 G. A., ch. 59, § 4. The said state board shall also, at said meeting, determine the rate of tax to be levied and collected upon said assessment, which shall not exceed the average rate of taxes, general, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, which tax shall be in lieu of all other taxes, state and local, and shall be payable into the state treasury.

2113. When due; collection. 17 G. A., ch. 59, § 5. The taxes levied as provided by this chapter, shall become due and payable at the state treasury on the first day of February, following the levy thereof, and if said taxes are not paid as herein provided, it shall be the duty of the treasurer of state to collect the same by distress and sale of any property belonging to such company in the state, in the same manner as required of county treasurers, in like cases, by section eight hundred and fifty-eight of the code [§ 1340]; and the record of the state board in such case shall be sufficient warrant therefor.

2114. Line operated by railroad. 17 G. A., ch. 59, § 6. *Provided*, however, that any telegraph line which may be owned and operated by any railroad company exclusively for the transaction of the business of such company, and which has been duly reported as such in the annual report of such company, and been duly taxed as part of the property thereof under the laws providing for the taxation of railway property, shall be exempt from the provisions of this act.

2115. Penalty. 17 G. A., ch. 59, § 7. If the officers of any company fail to make and file the report required by section two of this act [§ 2110] such neglect shall not release its lines from taxation, but the state board shall proceed to assess the line notwithstanding, adding thereto thirty per centum on the assessable value thereof.

2116. 17 G. A., ch. 59, § 8. All acts in conflict herewith are hereby repealed.

TITLE XI.

OF THE POLICE OF THE STATE.

CHAPTER 1.

OF THE SETTLEMENT AND SUPPORT OF THE POOR.

2117. Who liable to maintain. 1330. The father, mother, and children of any poor person who is unable to maintain himself by work, shall, jointly or severally, relieve or maintain such poor person in such manner as may be approved by the trustees of the township where such poor person may be; but these officers shall have no control unless the poor person has applied for aid. [R., § 1355; C., '51, § 787.]

A child is not liable for the support of a parent except as provided by statute, and such liability can be enforced only in the manner specified; but the obligation of a parent to support a child until maturity is a perfect common-law duty: *Dawson v. Dawson*, 12–512.

Where one was afflicted with disease and cruelly treated by the members of his family, so that he was driven from home, *held*, that he was a poor person within the meaning of this section, although he had property which was appropriated and withheld from him by such family; and therefore that the son was liable to an action by the county for support furnished to him, and that the county, although having the right of action against the wife, might waive it and enforce recovery against the son: *Jasper County v. Osborn*, 59–208.

2118. Same. 1331. In the absence or inability of nearer relatives, the same liability shall extend to the grandparents, if of ability without personal labor, and to the male grandchildren who are of ability by personal labor or otherwise.

2119. Putative father. 1332. The word "father" in this chapter includes the putative father of an illegitimate child, and the question of his being the father may be tried in any action or proceeding to recover for, or to compel the support of an illegitimate child. But there shall be no obligation to proceed against the putative father before proceeding against the mother. [R., § 1356; C., '51, § 788.]

The county is not required to thus proceed against the father of an illegitimate child before proceeding against the mother: *McAndrew v. Madison County*, 67–54.

After recognition of an illegitimate child the father is chargeable with its support, the same as with that of a legitimate child: *State v. Hastings*, 74–574

2120. Proceeding to compel. 1333. Upon the failure of such relatives so to relieve or maintain a poor person who has made application for relief, the township trustees may apply to the circuit [district] court of the county where such poor person resides, for an order to compel the same, and all provisions of this chapter relating to trustees shall apply to any other officers of a county, township, or incorporated town, or city, charged with the oversight of the poor. [R., § 1357; C., '51, § 789.]

2121. Notice. 1334. At least ten days' notice of the application shall be given in writing, which shall be served as original notice in an action. In such proceedings the county is plaintiff, and the person to be charged is defendant. [R., § 1358; C., '51, § 790.]

2122. Same. 1335. The court shall make no order affecting a person not served, but may notify him at any stage of the proceedings. [R., § 1359; C., '51, § 791.]

2123. Hearing. 1336. The court may proceed in a summary manner to hear the allegations and proofs of the parties, and order any one or more of the relatives of such poor person who appear to be able, to relieve and maintain him, charging them, as far as practicable, in the order above named, and for that purpose making new parties to the proceedings when necessary. [R., § 1360; C., '51, § 792.]

2124. Order. 1337. Such order may be for the entire or partial support of the poor person, and it may be for the support, either by money or by taking the poor person to a relative's house, or the order may assign the poor person for a certain time to one, and for another period to another relative, as may be adjudged just and convenient, taking into view the means of the several relatives; but no person shall be sent to the house of any relative who shall be willing to pay the amount necessary for his support. [R., § 1361; C., '51, § 793.]

2125. Money value. 1338. If the court order the relief in any other manner than in money, it shall fix a just weekly value upon it. [R., § 1362.]

2126. Change. 1339. The order may be specific in point of time, or it may be indefinite until the further order of the court, and may be varied from time to time when the circumstances require it, on the application of the trustees, of the poor person, or of any relative affected by it, upon ten days' notice being given. [R., § 1363; C., '51, § 795.]

2127. Payment. 1340. When money is ordered to be paid, it shall be paid to such officer as the court may direct. [R., § 1364; C., '51, § 796.]

2128. Execution. 1341. If any person fails to render the support ordered, on the affidavit of one of the proper trustees showing the fact, the court may order execution for the amount due, rating any support ordered in kind as before assessed. [R., 1365; C., '51, § 797.]

2129. Appeal. 1342. An appeal may be taken from such judgment as from other judgments of the circuit [district] court. [R., § 1366; C., '51, § 798.]

[The word "any" is erroneously substituted for "an" in the first line in the printed Code.]

2130. Abandonment; seizure of property. 1343. Whenever a father, or mother, abandons children, or husband abandons his wife, or wife her husband, leaving them chargeable, or likely to become chargeable, upon the public for their support, the trustees of the township where such abandoned person may be, upon application being made to them, may apply to the clerk of the circuit [district] court or judge thereof of any county in which the parties reside, or in which any estate of such absconding father, mother, husband or wife, may be, for an order to seize the same, and, upon due proof of the above facts, the clerk of the court or judge may issue an order authorizing the trustees or the sheriff of the county to take into their possession the goods, chattels, things in action, and lands of the person absconding. [R., § 1367; C., '51, § 799.]

[The word "thereof" is erroneously omitted in the printed Code after "judge" in the sixth line.]

2131. Property appropriated. 1344. By virtue of such order, the trustees or sheriff may take the property wherever the same may be found, and shall be vested with all the right and title to the personal property, and to the rents of the real property, which the person absconding had at the time of his departure. [R., § 1368; C., '51, § 800.]

2132. Real estate. 1345. Such order, when affecting any real estate, may be entered in the incumbrance book, and all sales, leases, and transfers of any such property, real and personal, made by the person after the issuing and entry of the order shall be void. [R., § 1369; C., '51, § 801.]

2133. Inventory. 1346. The trustees or sheriff shall immediately make an inventory of the property so seized by them, and return the same, together with the proceedings, to the court, there to be filed. [R., § 1370; C., '51, § 802.]

2134. Discharge; sale. 1347. The court, upon inquiring into the facts and circumstances of the case, may discharge the order of seizure; but if it be not discharged, the court shall have power to direct from time to time what part of the personal property shall be sold and how, and how much of the proceeds of such sale, and of the rents and profits of the real estate shall be applied to the maintenance of the children, wife, or husband, of the person so absconding. [R., § 1371; C., '51, § 803.]

2135. Restoration; security. 1348. If the party against whom such order issued, return and support the person so abandoned, or give security to the county, satisfactory to the clerk of the circuit [district] court, that such person shall not become chargeable to the county, the order shall be discharged by another order from such clerk, and the property taken and remaining restored. [R., § 1372; C., '51, § 804.]

2136. Trial by jury. 1349. The defendant may demand a jury in the trial contemplated, on the question of his ability and of his obligation to support a poor relative; and also on the questions of abandonment and liability to become a public charge as provided above, which demand may be made upon the inquiry contemplated above, and such inquiry shall take place on the request of the defendant unless it be ordered on the motion of the court itself with notice to the defendant. [R., § 1373; C., '51, § 805.]

2137. Recovery by county. 1350. Any county having expended any money for the relief of a poor person under the provisions of this chapter, may recover the same from any of his kindred mentioned in sections one thousand three hundred and thirty, and one thousand three hundred and thirty-one of this chapter [§§ 2117, 2118], by an action brought in any court having jurisdiction within two years from the payment of such expenses. [R., § 1374; C., '51, § 806.]

The kindred may be made liable as here provided without any proceedings having been instituted under § 2120 *et seq.*: *Boone County v. Ruhl*, 9–276.

There is no statute making a pauper liable to the county for aid furnished him as such, and he cannot be held liable on an implied promise: *Bremer County v. Curtis*, 54–72.

Nor can the county recover from his estate for such aid; and this is true notwithstanding the provision as to the liability of relatives: *Ibid.*

2138. By relative. 1351. A more distant relative who may have been compelled to aid a poor person, may recover from any one or more of the nearer relatives, and any one so compelled to aid may recover contribution from others of the same degree. [R., § 1375; C., '51, § 807.]

[The word "any" in the third line is erroneously omitted in the printed Code.]

2139. Settlement; how acquired. 1352. Legal settlements may be acquired in the counties as follows:

1. Any person having attained majority, and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence;

2. A married woman follows and has the settlement of her husband, if he have any within the state, and if she had a settlement at the time of marriage it is not lost by the marriage;

3. A married woman abandoned by her husband, may acquire a settlement as if she were unmarried;

4. Legitimate minor children follow and have the settlement of their father if he have one, but if he has none, then that of their mother;

5. Illegitimate minor children follow and have the settlement of their mother, or if she have none then that of the putative father;

6. A minor whose parent has no settlement in this state, and a married woman living apart from her husband and having no settlement, and whose husband has no settlement in this state, residing one year in any county gains a settlement in such county;

7. A minor bound as an apprentice or servant, immediately upon such binding, if done in good faith, gains a settlement where his master has one. [R., § 1376; C., '51, § 808; 10 G. A., ch. 40.]

The residence contemplated in this section is his "personal presence in a fixed, permanent abode:" *Cerro Gordo County v. Wright County*, 50-439.

Facts considered as showing what was the county of residence of the person receiving relief: *Cerro Gordo County v. Hancock County*, 58-114.

A *prima facie* case of settlement is made by proving residence, unless it be proven or conceded that the party is a married woman; in such case it might be necessary to prove either that her husband resides in the same county or that she has been deserted by him: *Scott County v. Polk County*, 61-616.

The provision of the section above referred to is applicable to the case of an insane person who becomes a county charge: *Ibid.*

A person choosing a residence while sane, and removing there, acquires a settlement as provided in this section, although he becomes insane and is removed to the hospital before the expiration of the year. Such removal to the hospital is not an interruption of his residence: *Washington County v. Mahaska County*, 47-57.

A person who is insane and helpless and does not voluntarily change his place of residence, but is a simple, passive subject without exercise of volition, does not acquire a settlement upon being removed from one county to another at the expense of the former: *Fayette County v. Bremer County*, 56-516.

If taken from one county to the other at the suggestion of the former county, merely that the charge of the person may remain with the same party who has had such charge, the settlement will remain as though no such change had been made: *Ibid.*

2140. How lost. 1353. A settlement once acquired continues until it is lost by acquiring a new one. [R., § 1377; C., '51, § 809.]

2141. Foreign paupers. 1354. A person coming from another state, and not having become a citizen of nor having a settlement in this state, falling into want and applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the circuit [district] court, or judge, otherwise he is to be relieved in the county where he applies. [R., § 1379; C., '51, § 811.]

2142. Warning to depart. 1355. Persons coming from other states or counties who are, or of whom it is apprehended that they will become county charges, may be prevented from obtaining a settlement in a county by warning them to depart from the same or any township thereof, and thereafter they shall not acquire a settlement except by the requisite residence for one year uninterrupted by another warning. [R., § 1380; C., '51, § 812.]

2143. How served. 1356. Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors; and, if not made by a sworn officer, it must be verified by affidavit. [R., § 1381; C., '51, § 813.]

A warning for the purpose of preventing a pauper coming into the county from obtaining a settlement may be served upon the order of the trustees of the township, but the service of such warning signed by the trustees themselves does not constitute a sufficient order by them: *Bremer County v. Buchanan County*, 61-624.

2144. Removal. 1357. When a poor person applying for relief in one county has a settlement in another, he may be removed to the county of his settlement, if he be able to be removed, upon the order of the trustees of the township or board of supervisors of the county where he applied for relief, and delivered to any officer charged with the oversight of the poor, in the county where his settlement is, giving written notice of the fact to the county auditor; or the trustees of the township, or board of supervisors of the county where he applied for relief, may, in their discretion, cause the auditor of the county where he has a settlement to be notified of his being a county charge, and,

thereupon, it will become the duty of the latter board to order the removal of the poor person, if he is able to be removed, and, if not able, then to provide for his relief and for refunding all expenses incurred in his behalf. [R., § 1382; C., '51, § 814.]

[The word "refunding" in the last line is erroneously omitted in the printed Code.]

Notice by one county to another that a poor person having a settlement in the latter has become a county charge in the former, and is receiving relief, and that the county of settlement will be held responsible, imposes on the latter county the duty of making an order for removal. It is, in such case, not obliged to serve upon the other county notice of intention to contest the order for removal. If, instead of making the order for removal, the county furnishing the relief gives notice that the pauper has become a county charge and is receiving relief, and that the county of settlement will be held responsible, it may recover of the county of settlement, but the burden is upon it to show that the person relieved had a settlement in the defendant county: *Winneshiek County v. Allamakee County*, 62–558.

In the petition in an action by one county to recover from another the expenses of the support of a pauper it must be averred that the defendant county is the county of the pauper's settlement. An averment that plaintiff is informed that the pauper has a settlement in defendant county is not sufficient: *Ibid.*

Notice from the auditor of one county to the auditor of the other that relief was being furnished to a poor person having a residence in the latter county, *held* sufficient: *Cerro Gordo County v. Wright County*, 50–439.

It does not follow that, because a person is obliged to apply to the county for relief where he has no settlement, he should be removed at once to the county of his settlement, regardless of distance, expense or other circumstances. The county furnishing the relief should have a right of action upon the county of the settlement for relief so furnished, without obligating the supervisors of the latter county to make an order of removal; and it should be allowable in such cases to give notice of such claim for relief furnished, without requiring removal. The county auditor may give such notice, but the notice for the order of removal can only be given by the township trustees or county supervisors: *Scott County v. Polk County*, 61–616.

Where a party removes from one county to another, and, before obtaining a settlement in the new county, receives assistance, the county from which the person removes is liable therefor, although the person to whom the relief is furnished did not have a "pauper record" prior to such removal: *Hardin County v. Wright County*, 67–127.

2145. County of settlement liable. 1358. The county where the settlement is, shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person, if notice of relief being rendered is given to the county of the settlement within a reasonable time after the county of the settlement is ascertained, and for the charges of removal and expenses of support incurred after notice given, in all cases. [R., § 1383; C., '51, § 815.]

Action cannot be brought by one county against another for charges, etc., as here contemplated, until the claim is presented to the board of supervisors of the county liable, and payment demanded as provided in § 3815: *Cerro Gordo County v. Wright County*, 50–439.

Ignorance of the fact of the pauper's settlement will not prevent the statute of limitations from running against such claim: *Washington County v. Mahaska County*, 47–57.

In the petition in an action by one county to recover from another the expenses of the support of a pauper it must be averred that the defendant county is the county of the pauper's settlement. An averment that plaintiff is informed that the pauper has a settlement in defendant county is not sufficient: *Winneshiek County v. Allamakee County*, 62–558.

2146. Notice of contest. 1359. Such order of removal shall be binding on the county to which the removal is to be made, unless, within thirty days after receipt of the notice provided by section thirteen hundred and fifty-seven [§ 2144], it gives notice to the auditor of the county making such order of its intention to contest the same. In such case, the proper settlement of the pauper in such county may be tested and determined in an action brought to recover the amount already expended in his behalf. A notice of such action, signed by the county auditor, shall be served on the auditor of the other county, specifying the amount claimed and the facts out of which the claim arises, and no other proceeding shall be necessary to commence the action. The notice hereinbefore provided for, and a transcript of whatever other proceedings or papers there may be relative to the matter, shall be filed in the office of the clerk of the circuit [district] court, and the cause may be

entitled as of the county issuing the order as plaintiff against the county contesting the same as defendant. [R., § 1384; C., '51, § 816.]

The county applied to for relief may make an order of removal to the county of the pauper's settlement, and give notice thereof, or it may give to the county of the settlement notice that such pauper has become a county charge. In the latter case the county notified is not under obligation to give notice of its intention to contest the removal: *Winneshiek County v. Allamakee County*, 62–558.

Under the section as it stood before the abolition of the circuit court that court had exclusive jurisdiction, and the case could not be taken to the district court even by consent of parties: *Ibid.; Cerro Gordo County v. Wright County*, 59–485.

2147. Trial. 1360. The cause may be tried as other actions at law, but no pleadings are necessary, the only issues being whether the pauper had a settlement in the county to which he was ordered to be removed at the time of such order, and whether the amount claimed, or any part thereof, was actually and properly expended by the plaintiff county in his behalf; and the burden of proof shall be on the county making the order of removal. [R., § 1385; C., '51, § 817.]

2148. Relief by trustees; overseer of the poor. 1361; 18 G. A., ch. 133. The trustees of each township shall provide for the relief of such poor persons in their respective townships as should not in their judgment be sent to the county poor-house. But where a city of the first or second class or acting under special charter is embraced within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city all the powers and duties conferred by this chapter on the township trustees. The relief thus furnished may be in the form of food, clothing, fuel, lights, rent, medical attendance or money; but exclusive of medical attendance the relief thus furnished shall not exceed the sum of two dollars per week for each person. And when in the opinion of the trustees or overseer the person asking aid, or any member of his family, is able to work, and such a condition would not be oppressive, they may require the person or any member of his family who is able, as a condition on which relief shall be granted to earn the relief by labor on the public highway at the rate of not to exceed sixty-five cents per day. The trustees of townships or overseers of the poor are also authorized to grant relief by furnishing food to transient persons who appear needy, and who are able to work; but such relief shall not exceed the sum of forty cents per day; and they may require such able-bodied persons to labor faithfully on the streets or highway at the rate of five cents an hour in payment for and as a condition of granting the relief. Said labor shall be performed under the direction of the officer having charge of working streets or highways. [12 G. A., ch. 95, § 1.]

Where a board of supervisors appoints an overseer of the poor for a city of the first or second class the power conferred upon such overseer is exclusive of that of the trustees of the township in which such city is located: *Hoyt v. Black Hawk County*, 59–184.

The township trustees having provided relief, the board of supervisors cannot limit the amount of such relief unless they establish a limit before the relief is rendered as may be done by § 2150. If no limit is established the board must pay the reasonable value of the services rendered: *Hunter v. Jasper County*, 40–568.

"Medical attendance" is not restricted to the services of a physician, but may include nursing, etc., and the expense thereof is not limited to $2 per week: *Scott v. Winneshiek County*, 52–579.

The board of supervisors have power to determine under § 2152 whether they will continue or deny the relief thus granted: *Ellison v. Harrison County*, 74–494.

2149. Soldiers or families. 1362; 16 G. A., ch. 26; 17 G. A., ch. 37. In no case shall a soldier, or the widows or families of soldiers, requiring public relief, be sent to the county poor-house when they can and prefer to be relieved out of the poor-house. All other persons in families requiring such aid, may, at the discretion of the board of supervisors, or the overseer of the poor under the supervision of the board of supervisors of such county, be sent to the county poor-house, or receive such aid out of poor-house, as the board

may deem necessary, not to exceed the extent as above provided. [Same, § 2.]

2150. County expense. 1363. All moneys expended as contemplated in the two preceding sections, shall be paid out of the county treasury, after the proper account rendered thereof shall have been approved by the board of supervisors of the respective counties, and in all cases the necessary appropriations therefor shall be made by the respective counties. But the board of supervisors may limit the amount of relief thus to be furnished. [Same, § 3.]

Any limit to the amount of relief to be furnished must be fixed in advance, otherwise the board must pay the reasonable value of the services rendered: *Hunter v. Jasper County*, 40-568.

WHERE THERE IS NO POOR-HOUSE.

2151. Township trustees. 1364. The trustees in each township, in counties where there is no poor-house, have the oversight and care of all poor persons in their township, and shall see that they receive proper care, until provided for by the board of supervisors. [R., § 1387; C., '51, § 819.]

2152. Application for relief; action of supervisors. 1365; 22 G. A., ch. 101. The poor must make application for relief to the trustees of the township where they may be, and, if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief subject to the approval of the board of supervisors as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief as they find cause. The board of supervisors may examine into all claims including claims for medical attendance allowed by the township trustees for the support of the poor and if they find the amount allowed by said trustees to be unreasonable, exorbitant or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just, and this act shall apply to all counties in the state whether there are poor-houses established in the same or not: *Provided* that this act shall apply to acts of overseers of poor in cities as well as to township trustees. [R., § 1388; C., '51, § 820.]

The township trustees may bind the county for medical services rendered at their instance to poor sick persons in their township while the board of supervisors is not in session. Whether the physician employed by the trustees has a right to compensation for services rendered after the trustees ought to have reported to the board, though he was not notified of their failure to do so, *quære: Cooledge v. Mahaska County*, 24-211.

With the trustees rests, in the first instance, the determination of the question whether a poor person needs aid, and the nature of the relief to be given, and if made in good faith it binds the board of supervisors: *Armstrong v. Tama County*, 34-309.

Where the board of supervisors, as a matter of precaution and in the interest of economy, employ a convenient and competent physician, in advance, to furnish to all poor persons of the county all medicines and medical aid that they may require, the trustees cannot disregard such employment and render the county liable for services rendered by a physician employed by them: *Mansfield v. Sac County*, 59-694; *Gawley v. Jones County*, 60-159.

When the trustees authorize aid to be furnished to a poor person, it may be continued, if done in good faith, until the board of supervisors otherwise order, even though the trustees fail to report the case to the board: and the trustees, in such case of failure to report, will be held liable to the county for damages arising from continuance of aid to persons not properly entitled to it: *Mansfield v. Sac County*, 60-11.

Recovery cannot be had for aid furnished before application is made to the trustees, and the furnishing of such aid is authorized by them: *Ibid.*

The board have the authority to continue or deny the relief to persons to whom relief has been granted by the township trustees under the provisions of § 2148: *Ellison v. Harrison County*, 74-494.

Written orders of the township trustees for relief upon which the board of supervisors act are valid although not made of record as required in general with reference to the action of the trustees by §§ 531 and 534: *Bremer County v. Buchanan County*, 61-624.

The duty of the township trustees when applied to for relief for the poor is not to be determined by very rigid rules; they must, in the exercise of a wise discretion, grant relief where they judge that humanity requires it. Where they act in good faith, or without abuse of discretion, their action is not subject to re-

view: *Hardin County v. Wright County*, 67–127.

The fact that the party to whom relief is furnished has, in fact, property, will not render the furnishing of relief necessarily improper: *Ibid.*

A pauper resident of one township who receives an injury while temporarily in another township may lawfully receive aid by order of the trustees of the latter: *Mussel v. Tama County*, 73–101.

2153. Expense paid by county. 1366. All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they are to be paid out of the county treasury. In no case shall a trustee, or either of the trustees, nor overseer of the poor, draw an order upon himself, or upon either of the board, for supplies for the poor, except such trustees or overseer has a contract to furnish such supplies. [R., § 1389; C., '51, § 821.]

The obligation of the county to support the poor is purely statutory: *Cooledge v. Mahaska County*, 24–211.

Under prior statutes *held* that neither the county judge nor county court had jurisdiction over the settlement or support of the poor, such jurisdiction being vested in the board of supervisors: *Lucas County v. Ringgold County*, 21–83.

The action of the board in allowing claims for care and support is of a *quasi*-judicial character, but the claimant having presented his bill is not limited to an appeal from the action of the board, but may bring suit against the county by ordinary proceedings: *Armstrong v. Tama County*, 34–309.

The certificate of the trustees required by that section to be presented with the claim to the board need not be made at a regular meeting: *Hunter v. Jasper County*, 40–568.

The board of supervisors may waive such certificate: *Collins v. Lucas County*, 50–448; *Bradley v. Delaware County*, 57–552.

A recommendation by the trustees that a bill be paid is not equivalent to the certificate required, and is not sufficient to entitle claimant to payment of his claim from the county: *Mansfield v. Sac County*, 60–11.

A certificate signed by the trustees, to the effect that they had ordered the services specified in claimant's bill for medical service to poor persons, but not stating that the charges were correct, *held* not a sufficient certificate as required by statute: *Sloan v. Webster County*, 61–738.

The duty of determining who are to be relieved at the public expense pertains to the trustees and cannot be delegated to a physician or any other person; and where blank certificates were filled out by two trustees and left with a third person in order to be filled up by the physician rendering services to poor persons as he should designate, *held*, that such certificates were not sufficient to entitle the physician to recover from the county: *Ibid.*

Where the liability of the county is directly put in issue, a member of the board of supervisors cannot be regarded as having waived the certificate: *Ibid.*

A certificate of the trustees showing that the aid was furnished at their request and by their order is conclusive in that respect, and cannot be contradicted by parol evidence: *Mussel v. Tama County*, 73–101.

2154. Allowance. 1367. The board may, in its discretion, allow and pay to poor persons who may become chargeable as paupers and who are of mature years and sound mind, and who will probably be benefited thereby, such sums or such annual allowance as will not exceed the charge of their maintenance in the ordinary mode. [R., § 1390; C., '51, § 822.]

2155. Appeal to supervisors. 1368. If any poor person, on application to the trustees, is refused the required relief, he may apply to the board of supervisors, who, on examination into the matter, may direct the trustees to afford relief, or they may direct specific relief. [R., § 1391; C., '51, § 823.]

SUPERVISORS MAY CONTRACT.

2156. Support of county poor. 1369. The board of supervisors may enter into contract with the lowest bidder through proposals opened and examined at a regular session of the board, for the support of all the poor of the county for one year at a time, and may make all requisite orders to that effect; and shall require such contractor to give bonds in such sum as they deem sufficient to secure the faithful performance of the same. [R., § 1393; C., '51, § 825.]

2157. Supervision. 1370. When such a contract is made, the board shall, from time to time, appoint some person to examine and report upon the man-

ner the poor are kept and treated, which shall be done without notice to the person contracting for their support; and, if upon due notice and inquiry, the board find that the poor are not reasonably and properly supported or cared for, they may, at a regular session, set aside the contract, making proper allowances for the time it has been in force. [R., § 1394; C., '51, § 826.]

2158. Employment of paupers. 1371. Any such contractor may employ a poor person in any work for which his age, health and strength is competent, subject to the control of the trustees, and in the last resort of the board of supervisors. [R., § 1395; C., '51, § 827.]

SUPERVISORS MAY ESTABLISH POOR-HOUSE.

2159. Submission to vote. 1372. The board of supervisors of each county may order the establishment of a poor-house in such county whenever it is deemed advisable, and also the purchase of such land as may be deemed necessary for the use of the same, and may make the requisite contracts and carry such order into effect, provided the cost of said poor-house and land shall be first estimated by said board and approved by a vote of the people. [R., § 1396; C., '51, § 828.]

2160. Contracts; government. 1373. The board of supervisors, or any committee appointed by them for that purpose, may make all contracts and purchases requisite for the poor-house, and may prescribe rules or regulations for the management and government of the same, and for the sobriety, morality, and industry of its occupants. [R., § 1401; C., '51, § 833.]

2161. Steward appointed. 1374. The board may appoint a steward of the poor-house, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may appoint. [R., § 1402; C., '51, § 834.]

The steward of the poor-house is also steward of the poor-farm: *State v. Platner*, 43-140. The board cannot make such contract with the steward as to deprive themselves of the power of removal at pleasure: *Ibid.*

2162. Duty of. 1375. The steward shall receive into the poor-house any person producing an order as hereinafter provided, and enter in a book to be kept for that purpose the name and age, and the date of the reception of such person. [R., § 1403; C., '51, § 835.]

2163. Employment of paupers. 1376. He may require of persons so admitted, such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor-farm, if there be one, shall be appropriated to the use of the poor-house in such manner as the board may determine. [R., § 1404; C., '51, § 836.]

The steward of the poor-house is steward of the poor-farm: See note to § 2161.

2164. Admission to poor-house. 1377. No person shall be admitted to the poor-house, unless upon the written order of a township trustee or member of the board of supervisors, and relief is to be furnished in the poor-house only, when the person is able to be taken there, unless in the cases hereinbefore provided. [R., § 1405; C., '51, § 837.]

2165. Binding out. 1378. The board may bind out such poor children of the poor-house as they believe are likely to remain a permanent charge on the public, males until eighteen and females until the age of sixteen, unless sooner married, on such terms and conditions as prescribed in the chapter concerning master and apprentices. And they may bind for shorter periods on such conditions as they may adopt. [R., § 1407; C., '51, § 839.]

2166. Discharge. 1379. When any inmate of the poor-house becomes able to support himself, the board may order his discharge. [R., § 1408; C., '51, § 840.]

2167. Visitation of poor-house. 1380. The board shall cause the poor-house to be visited at least once a month by one of their body, who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the poor-house and its inmates and report to the board. [R., § 1410; C., '51, § 842.]

2168. Expenses; tax. 1381; 17 G. A., ch. 166. The expense of supporting the poor-house shall be paid out of the county treasury in the same manner with other disbursements for county purposes; and in case the ordinary revenue of the county prove insufficient for the support of the poor, the board may levy a poor tax not exceeding one mill on the dollar, to be entered on the county list and collected as the ordinary county tax. The expense of the poor-house shall include such an amount of tuition for the instruction of the pauper children as the whole number of days' attendance of such pauper children is to the total number of days' attendance in the school at which such pauper children attend, and such amount shall be paid into the treasury of the district where said children attend. [R., § 1412; C., '51, § 844.]

[By 16 G. A., ch. 149, and 21 G. A., ch. 10, the section is amended so as to make the limit of the amount of tax one and one-half mills; "*provided* that the provisions of this act shall not apply to counties in which the population is less than fourteen thousand inhabitants."]

The increase of the amount of the tax to one and one-half mills is not applicable to counties in which the population is less than the number fixed in the amendment: *Lucas County v. Chicago, B. & Q. R. Co.*, 67-541.

2169. Letting out. 1382. The board is invested with authority to let out the support of the poor, with the use and occupancy of the poor-house and farm for a period not exceeding three years. [R., § 1415; C., '51, § 847.]

CHAPTER 2.

OF THE CARE OF THE INSANE.

2170. Hospitals established; trustees. 1383. The hospital for the insane, located at Mount Pleasant, in Henry county, shall be known by the name of the Iowa hospital for the insane at Mount Pleasant; and the hospital for the insane, located at Independence, in Buchanan county, shall be known by the name of the Iowa hospital for the insane at Independence. Each of said hospitals shall be under the charge of five trustees, two of whom may be women, three of whom shall constitute a quorum for the transaction of business; and in future no member of the general assembly shall be eligible to that office. When the term of a trustee expires, his successor shall be appointed by the general assembly for four years; but no vacancy shall be filled until the number of trustees is reduced to the number provided in this section. No trustees shall receive pay for more than thirty days in any year. [13 G. A., ch. 109, § 1.]

[As to the additional hospital for the insane at Clarinda, see §§ 2182-2188.]

2171. Compensation; meetings. 1384; 17 G. A., ch. 100, § 1; 20 G. A., ch. 66. The trustees shall be paid five cents per mile for each mile traveled, and five dollars per day during the time they are actually engaged in

the discharge of their official duties, from the state treasury, out of any moneys not otherwise appropriated, by an order drawn by the secretary of the board and approved by the board. Each board of trustees shall hold an annual meeting upon the second Wednesday of July at the hospital, when they shall choose one of their number president and another secretary, and shall also choose a treasurer for the year then ensuing and until their successors are elected and qualified. They shall also hold quarterly meetings on the second Wednesday in October, January, and April. [Same, § 3; 14 G. A., ch. 135, § 1.]

[This section is modified as to compensation of trustees by § 5104.]

2172. Visitation; record; report. 1385. The board of trustees, or a majority thereof, shall inspect the hospital under their charge at each quarterly meeting and a committee may visit the hospital monthly. The trustees shall make a record of their proceedings in books kept for the purpose; and at the annual meetings preceding the regular sessions of the general assembly, they shall make a report to the governor of the condition and wants of the hospital, which shall be accompanied by full and accurate reports of its superintendent and treasurer, and an account of all moneys received and disbursed. [13 G. A., ch. 109, § 5.]

[As to time when reports of boards of trustees of state institutions are to be filed, and the publication thereof, see §§ 122–126.]

2173. Management. 1386; 15 G. A., ch. 53, § 1. The trustees shall have the general control and management of the hospital under their charge; shall make all by-laws necessary for the government of the same, not inconsistent with the laws and constitution of the state, and conduct the affairs of the institution in accordance with the laws and by-laws regulating the same. They shall appoint a medical superintendent, and upon the nomination of the superintendent, shall appoint an assistant physician or physicians, a steward, and a matron, who shall reside in the hospital and be styled resident officers of the same, and be governed and subject to all the laws and by-laws for the government of the said institution. But the same person shall not hold the office of superintendent and steward. They may, also, in their discretion, and upon the nomination of the superintendent appoint a chaplain and prescribe his duties. The board of trustees shall, from time to time, fix the salaries and wages of the officers and other employees of the hospital, and certify the same to the auditor of state; and they may remove any officer or other employee of such institution. [Same, § 6; Ex. S., 9 G. A., ch. 19, § 1; 11 G. A., ch. 100; 13 G. A., ch. 131; 14 G. A., ch. 135, § 1.]

2174. Property in trust. 1387. The board of trustees may take, in the name of the state, and hold in trust for the hospital, any land conveyed or devised, and any money or other personal property given or bequeathed, to be applied for any purpose connected with the institution. [13 G. A., ch. 109, § 7.]

2175. Officers not to be interested in contracts. 1388. No trustee, or officer of the hospital, shall be, either directly or indirectly, interested in the purchase of building material, or any article for the use of the institution. [Same, § 8.]

2176. Trustees ineligible. 1389. No trustee shall be eligible to the office of steward or superintendent of the hospital during the term for which he was appointed, nor within one year after his term shall have expired. [Same, § 9.]

2177. Treasurer. 1390; 17 G. A., ch. 100, § 2. The treasurer shall execute a bond to the state of Iowa for the use of the hospital (naming which), in double the highest amount of money likely to come into his hands, and with such securities as the executive council shall require, conditioned that he

will faithfully perform the duties of his office, and pay over and account for all money that shall come into his hands, and shall be filed with the secretary of state. He shall receive such compensation as the board shall fix, not exceeding one-half of one per cent. on all moneys paid out by him. Upon authority granted by the board, he may draw from the state treasury, out of money not otherwise appropriated, upon his order, approved by the superintendent and not less than two of the trustees, and under seal of the hospital, a sufficient amount quarterly for the purpose of defraying any deficiencies that may arise in the current expenses of the hospital, but the amount of each requisition shall in no case exceed sixteen dollars per month for each public patient in the hospital, taking the number of such patients on the fifteenth day of each month as the average number on which the estimate shall be made, the number then in the hospital to be certified to the auditor of state by the superintendent and steward, which certificate shall accompany the requisition. But no part of the money so drawn for current expenses shall be used in making improvements. Upon the presentation of such order to the auditor of state, he shall draw a warrant upon the treasurer of state for the amount therein specified, not exceeding the amount for each patient hereinbefore specified. [Same, § 10; 14 G. A., ch. 135, § 1.]

2178. Superintendent. 1391. The superintendent of the hospital shall be a physician of acknowledged skill and ability in his profession. He shall be the chief executive officer of the hospital, and shall hold his office for six years unless sooner removed as above provided. He shall have the entire control of the medical, moral, and dietetic treatment of the patients, and he shall see that the several officers of the institution faithfully and diligently discharge their respective duties. He shall employ attendants, nurses, servants, and such other persons as he may deem necessary for the efficient and economical administration of the affairs of the hospital, assign them their respective places and duties, and may, at any time, discharge any of them from service. [13 G. A., ch. 109, § 11.]

2179. Steward. 1392; 15 G. A., ch. 53, § 1. The steward, under the direction of the trustees and superintendent, shall make all purchases for the hospital where and in such manner as they can be made on the best terms, keep the accounts, pay all employees, and have a personal superintendence of the farm. He shall take duplicate vouchers for all purchases made, and for all wages paid by him, which he shall submit to the trustees at each of their quarterly meetings, for their examination and approval. Such settlement of accounts shall be made by the board of trustees in open session, and shall not be intrusted to a committee. The trustees shall, after examining and approving such vouchers, file one set of them with the auditor of state. The books and papers of the steward and treasurer shall be open at all times to the inspection of any one of the trustees, state officers, or members of the general assembly. [13 G. A., ch. 109, § 12; 14 G. A., ch. 135, § 1.]

2180. Seal. 1393. The superintendent shall provide an official seal, upon which shall be inscribed the statute name of the hospital under his charge, and the name of the state. [13 G. A., ch. 109, § 13.]

2181. Assistant physicians. 1394. The assistant physicians shall be medical men of such character and qualifications as to be able to perform the ordinary duties of the superintendent during his necessary absence, or inability to act. [Same, § 14.]

HOSPITAL FOR THE INSANE AT CLARINDA.

2182. Name. 22 G. A., ch. 75, § 1. The hospital for the insane, located at Clarinda, in Page county, shall be known by the name of the Iowa hospital for the insane at Clarinda.

2183. Trustees. 22 G. A., ch. 75, § 2. Said hospital shall be under the charge and control of five trustees, one of whom may be a woman, one of whom shall be a resident of Page county, three of whom shall constitute a quorum for the transaction of business; but three affirmative votes shall be necessary to carry any measure, and no member of the general assembly shall be eligible to that office.

2184. Election; office. 22 G. A., ch. 75, § 3. Said trustees shall be elected by the twenty-second general assembly, two of whom shall be elected for two years, two of whom shall be elected for four years, and one of whom shall be elected for six years, their term of office to commence on the second Wednesday of March, 1888.

2185. Duties and powers. 22 G. A., ch. 75, § 4. The duties and powers of said trustees shall be as the duties and powers of the trustees of the hospitals for the insane located at Mount Pleasant and Independence, provided in chapter two, of title eleven, of the code, and all amendments made thereto.

2186. Qualification; organization. 22 G. A., ch. 75, § 5. Said trustees shall qualify in manner as the trustees for the hospitals at Mount Pleasant and Independence, and shall convene at Clarinda, Iowa, on the second Wednesday of March, 1888, and perfect their organization, take possession of the property of the state and enter upon the discharge of their duties.

2187. Commissioners. 22 G. A., ch. 75, § 6. When said trustees have qualified and entered upon the discharge of their duties, the board of commissioners, who now have charge of said hospital, shall cease to act and their offices shall therefrom be vacated and thereafter the powers and duties of said board of commissioners, as provided in chapter two hundred and one, of the acts of the twentieth general assembly, shall devolve upon, and be exercised by the trustees aforesaid.

2188. Final report. 22 G. A., ch. 75, § 7. Said board of commissioners shall on or before the first Wednesday of May, 1888, make their final report to the governor in manner as by law required.

COMMISSIONERS OF INSANITY.

2189. Appointment. 1395. In each county there shall be a board of three commissioners of insanity. The clerk of the circuit [district] court shall be a member of such board and clerk of the same. The other members shall be appointed by the judge of said court. One of them shall be a respectable practicing physician and the other a respectable practicing lawyer; and the appointment shall be made of persons residing as convenient as may be to the county seat. Such appointment may be made during the session of the court or in vacation; and, if made in vacation, it shall be by written order, signed by the judge and recorded by the clerk of the court. The appointment shall be for two years, and so that the term of one commissioner shall expire every year. The appointment of successors may be made at any time within three months prior to the expiration of the term of the incumbent, who shall hold his office until his successor is appointed and qualified. In the temporary absence or inability to act of two commissioners, the judge of the circuit [district] court, if present, may act in the room of one, or the commissioner present may call to his aid a respectable practicing physician or lawyer, who, after qualifying as in other cases, may act in the same capacity. The record in such cases must show the facts. [Same, § 15; 12 G. A., ch. 179, §§ 1–6.]

2190. Organization. 1396. They shall organize by choosing one of their number president. They shall hold their meetings for business at the office of the clerk of said court, unless, for good reasons, they shall fix on some other place, and shall also meet on notice from the clerk. [Same, § 16.]

2191. Clerk. 1397. The clerk of said board of commissioners shall sign and issue all notices, appointments, warrants, subpœnas, or other process required to be given or issued by the commissioners, affixing thereto his seal as clerk of the circuit [district] court. He shall file and preserve in his office all papers connected with any inquest by the commissioners, and properly belonging to his office, with all notices, reports, and other communications. He shall keep separate books in which to minute the proceedings of the board, and his entries therein shall be sufficiently full to show, with the papers filed, a complete record of their findings, orders and transactions. The notices, reports, and communications herein required to be given or made, may be sent by mail, unless otherwise expressed or implied; and the facts and date of such sending and their reception, must be noted on the proper record. [Same, § 17; 12 G. A., ch. 179, §§ 1-6.]

2192. Jurisdiction and power. 1398. The said commissioners shall have cognizance of all applications for admission to the hospital, or for the safe-keeping otherwise of insane persons within their respective counties, excepting in cases otherwise especially provided for. For the purpose of discharging the duties required of them, they shall have power to issue subpœnas and compel obedience thereto, to administer oaths, and do any act of a court necessary and proper in the premises. [Same, § 18; 12 G. A., ch. 179, §§ 1-6.]

2193. Admission to hospital. 1399. Applications for admission to the hospital must be made in the form of an information, verified by affidavit, alleging that the person in whose behalf the application is made, is believed by the informant to be insane, and a fit subject for custody and treatment in the hospital; that such person is found in the county, and has a legal settlement therein, if such is known to be the fact; and, if such settlement is not in the county, where it is, if known; or where it is believed to be, if the informant is advised on the subject. [Same, § 19; 12 G. A., ch. 179, §§ 1-6.]

2194. Investigation; warrant; certificate of physician. 1400. On the filing of such information, the commissioners may examine the informant, under oath, and if satisfied there is reasonable cause therefor, shall at once investigate the grounds thereof. For this purpose they may require that the person for whom such admission is sought be brought before them, and that the examination be had in his presence; and they may issue their warrant therefor, and provide for the suitable custody of such person until their investigation shall be concluded. Such warrant may be executed by the sheriff, or any constable of the county; or, if they shall be of opinion, from such preliminary inquiries as they may make — and in making which they shall take the testimony of the informant, if they deem it necessary or desirable, and of other witnesses if offered,— that such course would probably be injurious to such person, or attended with no advantage, they may dispense with such presence. In their examination they shall hear testimony for and against such application, if any is offered. Any citizen of the county or any relative of the person alleged to be insane, may appear and resist the application, and the parties may appear by counsel, if they elect. The commissioners, whether they dispense with the presence before them of such person or not, shall appoint some regular practicing physician of the county to visit such person and make a personal examination touching the truth of the information, and the actual condition of such person, and forthwith report to them thereon. Such physician may, or may not, be of their own number; and the physician so appointed and acting shall certify, under his hand, that he has, in pursuance of his appointment, made a careful personal examination as required; and that, on such examination, he finds the person in question insane, if such is the fact, and if otherwise, not insane; and in connection with his examination the said physician shall endeavor to obtain from the relatives of the person in

question, or from others who know the facts, correct answers, so far as may be, to the interrogatories hereinafter required to be propounded in such cases, which interrogatories and answers shall be attached to his certificate.

The interrogatories and answers appended to the certificate of the physician are not competent evidence as to whether the party was insane previous to the examination: *Butler v. St. Louis L. Ins. Co.*, 45–93, 36.

2195. Finding of commissioners' warrant; confinement. 1401; 18 G. A., ch. 152, § 6; 22 G. A., ch. 68, § 1 On the return of the physician's certificate, the commissioners shall, as soon as practicable, conclude their investigation, and shall find whether the person alleged to be insane, is insane; whether, if insane, a fit subject for treatment and custody in the hospital; whether the legal settlement of such person is in their county, and, if not in their county, where it is, if ascertained. If they find such person is not insane, they shall order his immediate discharge, if in custody. If they find such person insane, and a fit subject for custody and treatment in the hospital, they shall order said person to be committed to the hospital, and unless said person so found to be insane (or some one in his or her behalf) shall appeal from the finding of said commissioners, they shall forthwith issue their warrant, and a duplicate thereof, stating such finding, with the settlement of the person, if found; and, if not found, their information, if any, in regard thereto, authorizing the superintendent of the hospital to receive and keep such person as a patient therein. Said warrant and duplicate, with the certificate and finding of the physician, shall be delivered to the sheriff of the county, who shall execute the same by conveying such person to the hospital, and delivering him, with such duplicate and physician's certificate, and finding, to the superintendent thereof. The superintendent, over his official signature, shall acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commissioners, with his costs and expenses indorsed thereon. If neither the sheriff nor his deputy is at hand, or if both are otherwise engaged, the commissioners may appoint some other suitable person to execute the warrant in his stead, who shall take and subscribe an oath faithfully to discharge his duty, and shall be entitled to the same fees as the sheriff. The sheriff, or any other person so appointed, may take to his aid such assistance as he may need to execute such warrant; but no female shall thus be taken to the hospital without the attendance of some other female, or some relative. The superintendent, in his acknowledgment of delivery, must state whether there was any such person in attendance, and give the name or names, if any. But if any relative or immediate friend of the patient who is a suitable person, shall so request, he shall have the privilege of executing such warrant in preference to the sheriff, or any other person, and without taking such oath; and for so doing he shall be entitled to his necessary expenses but to no fees. And no person during such investigation, or who shall be found to be insane, as above provided, shall during investigation, or after such finding and pending commitment to the hospital for the insane or when *en route* to said hospital be confined in any jail or prison, or other place of solitary confinement; except in cases of extreme violence, when it may be deemed absolutely necessary for the safety of such insane person, or of the public; and if such violently insane person be so confined there shall at all times during such confinement be some suitable person or persons in attendance in charge of such insane person; but at no time shall any female be placed in such confinement, without at least one female attendant remaining in charge of such insane person. The requirements of this and preceding sections are modified by the provisions of the next section [§ 2201]. [Same, § 21; 12 G. A., ch. 179, §§ 1–6.]

The provisions here made for appeal, and the further provisions contained in §§ 2215 and 2217, allowing subsequent investigation of the question of sanity, prevent this section from

being in conflict with the constitutional guaranties against deprivation of personal liberty without due jury trial: *Blackhawk County v. Springer*, 58–417.

2196. Appeal from finding. 18 G. A., ch. 152, § 1. Any person found to be insane by the commissioners of insanity, may appeal to the circuit [district] court by giving the clerk of said court notice in writing that he or she appeals from said finding, which notice may be signed by the party, his or her attorney, agent or guardian.

2197. How taken. 18 G. A., ch. 152, § 2. Such appeal may be taken at any time within ten days after the filing of the finding of said commissioners.

See *Wilson v. State*, 66–487.

2198. Trial of appeal. 18 G. A., ch. 152, § 3. The cause, when thus appealed, shall be placed upon the docket by the clerk of said court, and stand for trial anew in the circuit [district] court.

2199. Custody pending appeal. 18 G. A., ch. 152, § 4. If any person found to be insane by the commissioners of insanity takes an appeal from such finding, such person shall be discharged from custody pending such appeal, unless the commissioners, for any reason, find that such person cannot, with safety, be allowed to go at large, in which case they shall require that such patient shall be suitably provided for, as provided in section fourteen hundred and three of the code [§ 2202], until such appeal can be tried and determined.

2200. Final order. 18 G. A., ch. 152, § 5. If, upon the trial, such person is found not insane, the court shall order his or her immediate discharge, if in custody. If such person is found to be insane, and a fit subject for custody and treatment in the hospital, the court shall order that such person be committed to the hospital, and the clerk of the court shall issue a warrant to carry said finding and order into effect, which warrant and the proceedings on and under it, shall be substantially the same as are provided for in section fourteen hundred and one, of chapter two, title eleven, of the code [§ 2195].

2201. Settlement in another county. 1402. If the commissioners find that the person so committed to the hospital has, or probably has, a legal settlement in some other county, they shall immediately notify the auditor of such county of such finding and commitment; and the auditor so notified shall thereupon inquire and ascertain, if possible, whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county from which such person was committed, of the result of such inquiry. If the legal settlement of a person so committed cannot for a time be ascertained, and is afterwards found, the notices so required shall then be given. [13 G. A., ch. 109, § 22.]

Notice to the county of settlement is a condition precedent to the right of recovery: *Poweshiek County v. Cass County*, 63–244.

2202. Custody outside hospital. 1403; 22 G. A., ch. 68, § 2. If any person found to be insane and a fit subject for custody and treatment in the hospital, cannot at once be admitted therein for want of room, or for any other cause, and cannot with safety be allowed to go at liberty, the commissioners shall require that such patient shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists. Such patients may be cared for either as private or as public patients. Those shall be treated as private patients, whose relations or friends will obligate themselves to take care of and provide for them without public charge. In such case, the commissioners shall appoint some suitable person a special custodian, who shall have authority, and who shall, in all suitable ways, restrain, protect, and care for such patient, in such manner as to best secure his safety and comfort, and to best protect the person and property of others. In the case of public patients, the commissioners shall require that they

be in like manner restrained, protected and cared for by the board of supervisors at the expense of the county, and they may, accordingly, issue their warrant to such board, who shall forthwith comply with the same. If there is no poor-house for the reception of such patients, or if no more suitable place can be found, they may be confined in the jail of the county in charge of the sheriff. *Provided* however that any female that may be so confined in such poor-house or jail shall be at all times under the personal care of a suitable female attendant, who shall hold a key of the apartment in which said insane person is confined. [Same, § 28.]

Where an adult is adjudged insane and a fit subject to be treated in the hospital, but cannot be admitted there, and is otherwise maintained and treated, his father is not liable for the expense of his maintenance although he is appointed custodian: *Speedling v. Worth County*, 68–152.

2203. Same. 1404. On application to the commissioners in behalf of persons alleged to be insane, and whose admission to the hospital is not sought, made substantially in the manner above prescribed, and asking that provision be made for their care as insane — either public or private — within the county, and on proof of their insanity and need of care as above pointed out, the commissioners may provide for their restraint, protection and care, as in the case of other applications. [Same, § 29.]

2204. In case of need. 1405. On information laid before the commissioners of any county that a certain insane person in the county is suffering for want of proper care, they shall forthwith inquire into the matter, and, if they find the information well founded, they shall make all needful provisions for the care of such person, as provided in other cases. [Same, § 30; 12 G. A., ch. 179.]

2205. Transfer to hospital. 1406. Insane persons who have been under care, either as public or private patients, outside of the hospital, by authority of the commissioners of any county, may, on application to that effect, be transferred to the hospital whenever they can be admitted thereto, on the warrant of such commissioners. Such admission may be had without another inquest, at any time within six months after the inquest already had, unless the commissioner shall deem further inquest advisable. [13 G. A., ch. 109, § 33.]

2206. Interrogatories. 1407. In each case of application for admission to the hospital, correct answers to the following interrogatories, so far as they can be obtained, shall accompany the physician's certificate; and if, on further examination after the answers are stated, any of them are found to be erroneous, the commissioners shall cause them to be corrected:

1. What is the patient's name and age? Married or single? If any children, how many? Age of youngest child?
2. Where was the patient born?
3. Where is his (or her) place of residence?
4. What has been the patient's occupation?
5. Is this the first attack? If not, when did the others occur, and what was their duration?
6. When were the first symptoms of this attack manifested, and in what way?
7. Does the disease appear to be increasing, decreasing or stationary?
8. Is the disease variable, and are there rational intervals? If so, do they occur at regular periods?
9. On what subjects, or in what way is derangement now manifested? State fully.
10. Has the patient shown any disposition to injure others?
11. Has suicide ever been attempted? If so, in what way? Is the propensity now active?

12. Is there a disposition to filthy habits, destruction of clothing, breaking of glass, etc.?

13. What relatives, including grandparents and cousins, have been insane?

14 Did the patient manifest any peculiarities of temper, habits, disposition, or pursuits, before the accession of the disease?—any predominant passion, religious impressions, etc.?

15. Was the patient ever addicted to intemperance in any form?

16. Has the patient been subject to any bodily disease; epilepsy, suppressed eruptions, discharges of sores, or ever had any injury of the head?

17. Has restraint or confinement been employed? If so, what kind, and how long?

18. What is supposed to be the cause of the disease?

19. What treatment has been pursued for the relief of the patient? Mention particulars and effects.

20. State any other matter supposed to have a bearing on the case. [Same, § 34.]

2207. Discharge from hospital. 1408. On the application of the relations or immediate friends of any patient in the hospital who is not cured, and who cannot be safely allowed to go at liberty, the commissioners of the county where such patient belongs, on making provisions for the care of such patient within the county as is in other cases, may authorize his discharge therefrom; *provided*, no patient who may be under criminal charge or conviction shall be discharged without the order of the district court or judge, and notice to the district [county] attorney of the proper district [county] as hereinbefore provided. [Same, § 41.]

2208. Discharge from custody. 1409. Whenever it shall be shown to the satisfaction of the commissioners of insanity of any county, that cause no longer exists for the care within the county of any particular person as an insane patient, they shall order the immediate discharge of such person. [Same, § 47.]

2209. Expenses. 1410. Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expense thereof are needed in advance, they shall estimate the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff; and on such estimate, certified by the clerk, the auditor of the county shall issue his order on the treasury of the county in favor of the sheriff or other person intrusted with the execution of such warrant; the sheriff, or other person executing such warrant shall accompany his return with a statement of the expenses incurred; and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commissioners order the return of a patient, compensation and expenses shall be in like manner allowed. [Same, § 48.]

2210. Warrant and certificate. 1411. The warrant of the commissioners of insanity, authorizing the admission of any person to the hospital as a patient, accompanied by a physician's certificate as herein provided, shall operate to shield the superintendent and other officers of the hospital against all liability to prosecution of any kind on account of the reception and detention of such person in the hospital; *provided*, such detention shall be otherwise in accordance with the laws and by-laws regulating its management. [Same, § 51.]

INSANE PRISONERS.

2211. Inquiry; confinement. 1412. If any person in prison charged with a crime, shall, at any time before indictment is found against him, at the

request of any citizen be brought before the commissioners in the manner provided by law, and if it shall be found by them that such person was insane when he committed the offense; or if any person in prison shall, after the commission of an offense, and before conviction, become insane, and if at the request of any citizen an inquest be instituted as provided for in this chapter, and if the commissioners shall find that such person became insane after the commission of the crime of which he stands charged or indicted, and is still insane, they shall issue their warrant authorizing and requiring the superintendent of either hospital to receive and keep the person as a patient therein. In such case the warrant can only be executed by the sheriff or his deputy; and no delivery of the insane prisoner to any other person than the superintendent of the hospital shall exonerate the sheriff from his liability for the custody of such prisoner, and any such lunatic may, when restored to reason, be prosecuted for any offense committed by him previous to such insanity. [R., §§ 1458, 1459.]

2212. Notice of recovery. 1413. When any lunatic shall be confined in either hospital under the preceding section, the superintendent in whose charge he may be, shall, as soon as such lunatic is restored to his reason, give notice thereof to the district [county] attorney of the proper county, and retain such lunatic in custody for such reasonable time thereafter as may be necessary for said attorney to cause a warrant to issue and to be served, by virtue whereof the said person so restored to reason shall again be returned to the jail of the proper county to answer to the offense alleged against him. [R., § 1460.]

2213. Prisoner insane after conviction. 1414. If any person, after being convicted of any crime or misdemeanor, and before the execution in whole or part of the sentence of the court, becomes insane, the governor shall inquire into the facts, and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such a period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of either penitentiary, order such lunatic to be conveyed to the hospital and there kept until restored to reason. If the sentence of any such lunatic be suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor. [R., § 1464.]

CUSTODIAN OF INSANE PERSONS.

2214. Misdemeanor. 1415. Any person having care of an insane person, and restraining such person whether in the hospital or elsewhere either with or without authority, who shall treat such person with wanton severity, harshness, or cruelty, or shall in any way abuse such person, shall be guilty of a misdemeanor, besides being liable in an action for damages. [13 G. A., ch. 190, § 32.]

[The words "whether in the hospital or elsewhere," in the second line, are erroneously omitted in the printed Code.]

2215. Restraint without authority. 1416. No person supposed to be insane shall be restrained of his liberty by any other person, otherwise than in pursuance of authority obtained as herein required, excepting to such extent and for such brief period as may be necessary for the safety of person and property until such authority can be obtained. [Same, § 31.]

EXPENSES — REGULATIONS.

2216. County of settlement liable. 1417. When the superintendent of the hospital has been duly notified as herein required, that a patient sent to

the hospital from one county has a legal settlement in another county, he shall thereafter hold and treat such patient as from the latter county; and such holding shall apply to expenses already incurred in behalf of such patient and remaining unadjusted. [Same, § 23.]

2217. Recovery. 1418. Expenses incurred as hereinafter provided by one county on account of an insane person whose legal settlement is in another county, shall be refunded, with lawful interest thereon, by the county of such settlement, and shall be presented to the board of supervisors of the county sought to be charged, allowed, and paid the same as other claims. If the settlement is denied by the latter board, they may serve a notice similar to that provided for in section thirteen hundred and fifty-nine, of chapter one of this title [§ 2146] for cases of removal; and all the provisions of that chapter in regard to the determination of a disputed claim upon an order of removal shall apply to the change of settlement of an insane person. [Same, § 24.]

Before the abolition of the circuit court it did not have exclusive jurisdiction of this action, although it did of the action provided for by § 2146: *Winneshiek County v. Allamakee County*, 62–558.

As to liability of county of settlement, see notes to § 2144.

2218. At expense of state. 1419; 21 G. A., ch. 47. Patients in the hospital having no legal settlement in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state, and the trustees may authorize the superintendent to remove any patient at the expense of the state if they see proper. The cost of such removal to be paid directly from the state treasury upon the sworn statement of the superintendent and approval of the trustees appended to each voucher, and counties from which such patients are hereafter received, shall be reimbursed for expenses incurred in sending such patients to the hospital. claim for such reimbursement to be certified to by the county auditor and be paid directly from the state treasury. [Same, § 25.]

2219. Special care. 1420. All patients in the hospital shall be regarded as standing upon an equal footing, and the several patients, according to their different conditions of mind and body, and their respective needs, shall be provided for and treated with equal care; but if the relative or friends of any patient shall desire it, and shall pay the expense thereof, such patient may have special care, and may be provided with a special attendant, as may be agreed upon with the superintendent. In such cases, the charges for such special care and attendance shall be paid quarterly in advance. [Same, § 26.]

2220. Expenses paid by relatives. 1421. The relatives or friends of any patient in the hospital shall have the privilege of paying any portion or all of the expenses of such patients therein; and the superintendent shall cause the account of such patient to be credited with any sums so paid. [Same, § 27.]

2221. Discrimination in reception. 1422. If at any time it may become necessary, for want of room or other cause, to discriminate in the general reception of patients into the hospital, a selection shall be made as follows:

1. Recent cases, *i. e.*, cases of less than one year's duration, shall have the preference over all others;

2. Chronic cases, *i. e.*, where the disease is of more than one year's duration, presenting the most favorable prospects of recovery shall be next preferred;

3. Those for whom application has been longer on file, other things being equal, shall be next preferred;

4. Where cases are equally meritorious in all other respects, the indigent shall have the preference. [Same, § 35.]

2222. Escape. 1423. If any patient shall escape from the hospital, the superintendent shall cause immediate search to be made for him; and, if he can-

not soon be found, shall cause notice of such escape to be forthwith given to the commissioners of the county where the patient belongs; and if such patient is found in their county, the commissioners shall cause him to be returned, and shall issue their warrant therefor as in other cases, unless the patient shall be discharged, or unless, for good reasons, they shall provide for his care otherwise, of which they shall notify the superintendent. [Same, § 39.]

2223. Discharge when cured. 1424. Any patient who is cured shall be immediately discharged by the superintendent. Upon such discharge, the superintendent shall furnish the patient, unless otherwise supplied, with suitable clothing and a sum of money, not exceeding twenty dollars, which shall be charged with the other expenses in the hospital of such patient. The relatives of any patient not susceptible of cure by remedial treatment in the hospital, and not dangerous to be at large, shall have the right to take charge of and remove such patient on consent of the board of trustees. In the interim of the meetings of the board, the consent of two of the trustees shall be sufficient. [Same, § 40; 12 G. A., ch. 179, § 7.]

2224. Discharge of incurables. 1425. The board of trustees shall order the discharge or removal from the hospital of incurable and harmless patients, whenever it is necessary to make room for recent cases; in the interim between the meetings of the board, the superintendent, in connection with two trustees, shall possess and exercise the same power. [13 G. A., ch. 109, § 42.]

2225. Notice to commissioners. 1426. When patients are discharged from the hospital by the authorities thereof without application therefor, notice of the order of discharge shall at once be sent to the commissioners of the county where they belong; and the commissioners shall forthwith cause them to be removed, and shall at once provide for their care in the county as in other cases, unless such patients are discharged as cured. [Same, § 43.]

2226. Compensation for keeping. 1427; 17 G. A., ch. 84. The trustees shall, from time to time, fix the sum to be paid per month for the board and care of the patients, which shall not exceed the sum of sixteen dollars per month, and the monthly sum so fixed shall be the sum the said hospital shall be entitled to demand for keeping any patient; and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence in all places of the amount due as fixed. [Same, § 44; 14 G. A., ch. 135, § 1.]

2227. Enforcing payment by counties. 1428; 16 G. A., ch. 28; 17 G. A., ch. 183, § 1. The superintendent shall certify to the auditor of state on the first day of January, April, July and October, the amount, not previously certified by him, due to said hospital, from the several counties having patients chargeable thereto; and said auditor shall pass the same to the credit of the hospital. The auditor shall, thereupon, notify the county auditor of each county so owing of the amount thereof, and charge the same to said county; and the board of supervisors shall levy a tax in said county for said amount, and pay the amount due the state into the state treasury; and should they within one year from the taking effect of this act fail to levy such tax sufficient to pay the amount now due the state, as shown by the books of the auditor of state, and shall fail at the time of levying other taxes thereafter to levy the tax aforesaid to an amount sufficient to pay the sum then due the state, it shall be the duty of the auditor of state to charge such delinquent county with a penalty of three per centum per month upon the amount of indebtedness then six months due, for each month until payment thereof and penalty thereon be made. And should any county, within one year from the taking effect of this act, fail to levy such tax sufficient to pay the amount then due the state, and shall fail, at the time of levying other county taxes thereafter to levy the tax aforesaid to an amount sufficient to pay the indebtedness subsequently incurred, it shall be the duty of the attorney-general,

upon request of the executive council, to bring, in the name of the state, an action against any county so failing as aforesaid, to enforce the levying of said tax. [13 G. A., ch. 109, § 45.]

No authority is given to the board of supervisors to levy an independent or special tax for the purposes here specified: *Iowa Land Co. v. Carroll County*, 39–151.

2228. Tax collected and paid. 17 G. A., ch. 183, § 2. It shall be the duty of the county treasurer on collection of the taxes herein required to be levied to pay into the state treasury the amount due and owing from his county at the times and in the manner required for the payment of state taxes collected.

2229. Not to be diverted. 17 G. A., ch. 183, § 3. Taxes levied and collected in any county for the purpose named in this act, shall be used only to defray the expenses of the insane chargeable to such county, and the costs incident thereto, and shall not be diverted to any other purpose, nor be transferred to any other fund.

2230. Penalty. 17 G. A., ch. 183, § 4. Any member of the board of supervisors, or any county treasurer who shall violate any of the provisions of this act, shall be liable to a fine of not less than one hundred nor more than five hundred dollars, to be recovered in an action brought against him in the district court of his county, in the name of the state, by the attorney-general.

2231. Notice to officers. 17 G. A., ch. 183, § 5. The auditor of state shall notify the several county auditors, and county treasurers of the provisions of this act, and it shall be the duty of said officers to present said notice to the board of supervisors at their first meeting thereafter.

2232. Fees of superintendent as witness. 1429. When the superintendent of the hospital, in obedience to a subpœna, attends any court of the county in which the hospital is situated as witness for either party in the case of a person on trial for a criminal offense, and the question of the sanity of such person is raised, he shall be allowed, on such account, his necessary and actual expenses, and such daily pay as is allowed to other witnesses, and such expenses and pay shall be paid by the state. When compelled so to attend in civil cases, he shall be entitled to the same compensation, to be paid by the party requiring his attendance. [13 G. A., ch. 109, § 52.]

2233. Seal. 1430. The superintendent shall affix the seal of the hospital to any notice, order of discharge, or other paper required to be given by him or issued. [Same, § 53.]

2234. Blanks. 1431. The trustees of the hospital shall provide for furnishing the commissioners of the counties entitled to send patients to the hospital with such blanks for warrants, certificates, etc., as will enable them with regularity and facility to comply with the provisions of this chapter; and, also, with copies of the by-laws of the hospital when printed. [Same, § 55.]

2235. Rules. 1432; 22 G. A., ch. 76. The superintendents of the hospitals and the governor of the state, shall adopt such regulations as they may deem expedient in regard to what patients, or class of patients, shall be admitted to and provided for in the respective hospitals; or from what portion of the state patients, or certain classes of patients, may be sent to any hospital; and they may change such regulations from time to time as they may deem best; and they shall make such publication of these regulations as they may deem necessary for the information of those interested. The regulations so adopted shall be conformed to by the parties interested. [Same, § 56.]

2236. Estates of patients liable. 1433; 15 G. A., ch. 26. The provisions herein made, for the support of the insane at public charge, shall not be construed to release the estates of such persons from liability for their support, and the auditors of the several counties, subject to direction of the board

of supervisors, are authorized and empowered to collect from the property of such patients any sums paid by the county in their behalf as herein provided; and the certificate from the superintendent and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sums so stated. If the board of supervisors in the case of any insane patient, who has been supported at the expense of the county, shall deem it a hardship to charge the estate of any such patient with such cost of supporting the patient, they may relieve such estate or estates from any part or all of such burden as may seem to them reasonable and just. [Same, § 46; 12 G. A., ch. 179, § 13.]

The "relatives" contemplated in this section, as it stood before amendment, were only such as were legally bound for the support of the insane person. A father is not legally bound to support his adult children. The provisions of § 2117 *et seq.*, as to the support of paupers, have no application under this section: *Monroe County v. Teller*, 51-670.

Under this section as amended a husband is not liable for the expense of treating an insane wife sent to the hospital by the commissioners of insanity. Such expense is not family expense within the meaning of § 3405: *Delaware County v. McDonald*, 46-170.

The claim of the county becomes a lien from the commencement of the suit by the county for the expense of support, and collection is to be made like any other claim by action, judgment and execution. There is no lien until it is allowed by the court: *Thode v. Spofford*, 65-294.

2237. Meaning of term "insane." 1434. The term "insane," as used in this chapter, includes every species of insanity or mental derangement. The term "idiot," is restricted to persons foolish from birth, supposed to be naturally without mind. No idiot shall be admitted to the hospital. [13 G. A., ch. 109, § 54.]

A person who, of sound mind until nine years of age, then became affected with epilepsy and gradually lost her mind until she was unable to take the slightest care of herself, *held* insane within the meaning of this section: *Speedling v. Worth County*, 68-152.

VISITING COMMITTEE.

2238. Appointed by governor; power and duties. 1435. There shall be a visiting committee of three, one of whom at least shall be a woman, appointed by the governor, to visit the insane asylums of the state at their discretion, and without giving notice of their intended visit; who may, upon such visit, go through the wards unaccompanied by any officer of the institution, with power to send for persons and papers, and to examine witnesses on oath, to ascertain whether any of the inmates are improperly detained in the hospital, or unjustly placed there, and whether the inmates are humanely and kindly treated, with full power to correct any abuses found to exist; and any injury inflicted upon the insane shall be treated as an offense, misdemeanor, or crime, as the like offense would be regarded when inflicted upon any other citizen outside of the insane asylums. They shall have power to discharge any attendant or employee who is found to have been guilty of misdemeanor meriting such discharge; and in all these trials for misdemeanor, offense, or crime, the testimony of patients shall be taken and considered for what it is worth, and no employee at the asylum shall be allowed to sit upon any jury before whom these cases are tried. Said committee shall make an annual report to the governor. [14 G. A., ch. 91, § 1.]

[By § 132 this report, on odd-numbered years, is required to be made on or before September fifteenth. As to compensation of visiting committee, see § 5104.]

A visiting committee has no authority to punish witnesses for contempt in refusing to testify before it: *Brown v. Davidson*, 59-461.

2239. Inmates allowed to write. 1436; 15 G. A., ch. 53, § 2. The names of this visiting committee and their postoffice address, shall be kept posted in every ward in the asylum, and every inmate in the asylum shall be allowed to write once a week what he or she pleases to this committee. And

any member of this committee who shall neglect to heed the calls of the patient to him for protection, when proved to have been needed, shall be deemed unfit for his office, and shall be discharged by the governor. [Same, § 2.]

2240. Writing material furnished. 1437. Every person confined in any insane asylum, shall be furnished by the superintendent or party having charge of such person, at least once in each week, with suitable materials for writing, inclosing, sealing, and mailing letters, if they request the same, unless otherwise ordered by the visiting committee, which order shall continue in force until countermanded by said committee. [Same, § 3.]

2241. Letters. 1438; 15 G. A., ch. 53, § 2. The superintendent or party having charge of any person under confinement, shall receive, if requested to do so by the person so confined, at least one letter in each week addressed to one of the visiting committee, without opening or reading the same, and without delay to deposit it in a postoffice for transmittal by mail, with a proper postage stamp affixed thereto; and to deliver to said person any letter (without opening or reading the same) written to him or her by one of the visiting committee. But all other letters written by, or to, the person so confined may be examined by the superintendent, and, if in his opinion the delivery of such letters would be injurious to the person so confined, he may retain the same. [Same, §§ 4, 5.]

2242. Inquest. 1439. In the event of the sudden and mysterious death of any person so confined, a coroner's inquest shall be held as provided for by law in other cases. [Same, § 6.]

2243. Punishment for violation of law. 1440. Any person neglecting to comply with, or wilfully and knowingly violating any of the provisions of the five preceding sections, shall, upon conviction thereof, be punished by imprisonment for a term not exceeding three years, or by fine not exceeding one thousand dollars, or by both fine and imprisonment in the discretion of the court, and by ineligibility for this office in the future, and, upon trial had for such offense, the testimony of any person, whether insane or otherwise, shall be taken and considered for what it is worth. [Same, § 7.]

2244. Visits of committee. 1441. At least one member of said committee shall visit the asylums for the insane every month. [Same, § 8.]

WHEN ILLEGALLY CONFINED.

2245. Commission of inquiry. 1442. On a statement in writing, verified by affidavit, addressed to a judge of the district [or circuit] court of the county in which the hospital is situated, or of the county in which any certain person confined in the hospital has his legal settlement, alleging that such person is not insane, and is unjustly deprived of his liberty, such judge shall appoint a commission of not more than three persons, in his discretion, to inquire into the merits of the case, one of whom shall be a physician, and if two or more are appointed, another shall be a lawyer. Without first summoning the party to meet them, they shall proceed to the hospital and have a personal interview with such person, so managed as to prevent him, if possible, from suspecting its object; and they shall make any inquiries and examinations they may deem necessary and proper of the officers and records of the hospital touching the merits of the case. If they shall judge it prudent and advisable, they may disclose to the party the object of their visit, and either in his presence or otherwise, make further investigation of the matter. They shall forthwith report to the judge making the appointment, the result of their examination and inquiries. Such report shall be accompanied by a statement of the case, made and signed by the superintendent. If, on such report and statement, and the hearing of the testimony, if any is offered, the judge shall

find the person not insane, he shall order his discharge. If the contrary, he shall so state, and authorize his continued detention. The finding and order of the judge, with the report and other papers, shall be filed in the office of the clerk of the court over which such judge presides, who shall enter a memorandum thereof on his record, and forthwith notify the superintendent of the hospital of the finding and order of the judge, and the superintendent shall carry out the order. The commissioners appointed as provided in this section, shall be entitled to their necessary expenses and a reasonable compensation, to be allowed by the judge, and paid by the state out of any funds not otherwise appropriated; *provided*, that the applicant shall pay the same if the judge shall find that the application was made without probable grounds, and shall so order. [12 G. A., ch. 179, § 9; 13 G. A., ch. 109, § 36.]

2246. How often. 1443. The commission so provided for, shall not be repeated oftener than once in six months in regard to the same party; nor shall such commission be appointed in the case of any patient within six months of the time of his admission. [13 G. A., ch. 109, § 37.]

2247. Habeas corpus. 1444. All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason. [Same, § 38.]

2248. Failure of duty. 1445. Any officer required herein to perform any act and any person accepting an appointment under the provisions of this chapter, and wilfully refusing or neglecting to perform his duty as herein prescribed, shall be guilty of misdemeanor, besides being liable to an action for damages. [Same, § 49.]

CHAPTER 3.

OF DOMESTIC AND OTHER ANIMALS.

2249. Restrained. 1446; 15 G. A., ch. 70, § 2. Every owner of swine, sheep, or goats shall restrain the same from running at large. [R., § 288; 14 G. A., ch. 59, § 2.]

2250. Male animals. 1447. Any person may take possession of any stallion, jack, bull, boar, or buck, found at large in the county in which such person resides, and give notice thereof to any constable in the county, who shall sell the animals so taken at public auction to the best bidder for cash, having given ten days' notice of the time and place of sale, by posting the same in writing in three public places in the township wherein such animals were found at large. Out of the proceeds of sale he may pay all costs and charges of keeping and any damage done by said animals, and shall pay the remainder of said proceeds into the county treasury, to be applied to the use of the county, unless legal proof be made to the county auditor by the owner of said animals of his right thereto; such proof may be made at any time within twelve months from the sale, and thereupon said auditor shall order the proper amount to be paid to the owner out of any money in the treasury not otherwise appropriated. But if the owner or any person for him, shall, on or before the day of sale, pay the costs and charges thus far made, and all damages, and make satisfactory proof of his ownership, the constable shall release the animals to him without proceeding further. [R., §§ 289, 1522; 10 G. A., ch. 65; 14 G. A., ch. 59, § 3.]

Under a somewhat similar provision it was said that the law did contemplate that the officer should have a process in order to make the sale provided for: *Dalby v. Wolf*, 14–228.

The provisions as to stallions is not applicable to colts until they are of such age as to be troublesome to mares or dangerous to be at large: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30–459.

2251. Distraint damage feasant; recovery. 1443; 15 G. A., ch. 70, § 3. When any person is injured in his lands inclosed by a lawful fence by any kind of domestic animal, he may recover his damages by an action against the owner, or by distraining the animals doing the damage; but if they were lawfully on the adjoining land, and escaped therefrom by reason of the neglect of the person suffering the damage to maintain his part of the division fence, the owner of the animals shall not be liable for such damage, and if the party injured elects to recover by action against the owner of the stock, no appraisement need be made by the trustees as in cases of distraint; and in counties where by police regulation stock is restrained from running at large, any person injured in his improved or cultivated lands by any domestic animal may recover his damages as provided in section six of this act and sections one thousand four hundred and fifty-four, one thousand four hundred and fifty-five, and one thousand four hundred and fifty-six of the code [§§ 2255 and 2258–2260], whether the lands whereon the injury was done was inclosed by a lawful fence or not. [R., § 1548; C., '51, § 913.]

In this state cattle are free commoners, and may lawfully be permitted to run at large, and the rule of the common law that every man is bound to keep his cattle within his own inclosure or be responsible in damage for injuries arising from their being abroad is not applicable to the condition and circumstances of the people, and is not in force: *Wagner v. Bissell*, 3–396; *Heath v. Coltenback*, 5–490; *Alger v. M. & M. R. Co.*, 10–268; *Russell v. Hanley*, 20–219; *Smith v. C., R. I. & P. R. Co.*, 34–506. Therefore, the owner of land can only maintain an action for trespass by cattle by showing that his fence was such as is required by statute: *Frazier v. Nortinus*, 34–82. But if cattle, after breaking over a sufficient fence into one field, go thence into another of the same owner, through a fence which is not sufficient, the action for their trespass upon the second field will lie: *Herold v. Meyers*, 20–378.

Cattle being free commoners, the mere fact of permitting them to run at large is not a ground of imputing negligence to the owner: *Haughey v. Hart*, 62–96.

The right of the owner of cattle or other stock to pasture them upon the commons is a permissive and not an abstract right. And while the owner of an inclosure cannot maintain an action for trespass against the owner of cattle entering thereon from the commons unless his fence is such as is required by statute, yet there is no obligation on his part to fence, and there can be no recovery for injuries to the cattle from feeding upon growing crops: *Herold v. Meyers*, 20–378.

If animals, though lawfully on adjoining land, escape therefrom and do damage, and their escape is not in consequence of the neglect of the person suffering the damage, their owner is liable therefor. It is not necessary that the fence surrounding the land of the person injured is throughout a lawful fence, if it is shown to have been such at the place where the cattle broke through. And this will be true where the owner of the adjoining land and the owner of the cattle are the same person and the fence broken through belongs to him: *Noble v. Chase*, 60–261.

It is only persons whose lands are inclosed by a lawful fence who are authorized to distrain domestic animals injuring their premises. If lands are not so inclosed there is no right to distrain, and possession acquired by such distraint is unlawful. The rightfulness of the distraint may therefore be inquired into in an action of replevin; it is not a matter for the exclusive determination of the fence viewers. But if the distraint is found to be legal the property may be remanded to the distrainor, and the damages may be assessed by the township trustees subject to the right of appeal as provided for in §§ 2258 and 2259: *Syford v. Schiver*, 61–155.

Cattle, when they of their own accord go upon the unfenced land of another, do not render their owner liable to an action by the owner of the land, and the owner of the cattle may rightfully enter to remove them; and if they have crossed the unfenced land of one and gone on to that of another they may be driven back across the land they crossed in entering: *Camp v. Flaherty*, 28–520.

Where plaintiff, claiming to own certain real estate, sought to recover damages from defendant for maliciously, wrongfully and unlawfully breaking down and destroying the fence and turning his cattle upon such land without plaintiff's consent, *held*, that an instruction, in substance, that if the land was the property of plaintiff, as to which the jury were directed to inquire, and if they found the land was fenced and the defendant broke down the fence and thereby allowed the cattle to go upon the land, or if the land was fenced and the fence was broken down without defendant's fault, and he drove his cattle upon the land, the plaintiff would be entitled to recover, was not erroneous: *Erbes v. Wehmeyer*, 69–85.

The owner of the land may have his remedy by action against the owner of the stock as here provided, or by distraining the animals

as provided in §§ 2255 *et seq.* If he pursue the former course the ordinary rules as to proof, etc., apply, and he need not have the damages ascertained by the township trustees, as provided in § 2258: *Quinton v. Van Tuyl*, 30-554.

A land owner in a county where stock is prohibited from running at large is not relieved of his obligation to maintain partition fences, and if stock rightfully in an adjoining inclosure escape upon his land by reason of his failure to maintain such fence he cannot recover damages from the owner of the stock: *Duffees v. Judd*, 48-256.

The servant of a land owner, who distrains stock as agent of such owner, may justify as such agent in an action of replevin brought against him to recover the stock: *Bearinger v. O'Hare*, 26-250.

As to damage from bull unlawfully at large, see note to § 2255.

2252. Adjoining owner; neglect. 1449. And if the animals are not lawfully upon the adjoining close and came thereupon, or if they escaped therefrom into the injured inclosure in consequence of the neglect of the adjoining owner to maintain any partition fence, or any part thereof, which it was his duty to maintain, then the owner of the adjoining land shall be liable as well as the owner of the animals. [R., § 1549; C., '51, § 914.]

2253. Meaning of "stock;" question of running at large. 1450; 15 G. A., ch. 70, § 4. Section three hundred and nine of the code [§ 430] is hereby amended by striking out the word "now" in the fifth line thereof; and the word "stock," as used therein and in this chapter, is hereby declared to mean cattle, horses, mules, and asses; and under said section, the board of supervisors of each county may — and on petition of one-fourth of the legal voters thereof, as shown by the returns of the last general election, must — submit, in the manner provided by section three hundred and ten of the code [§ 431], except as herein modified, to the electors of the county at the next general election, or, if they deem it advisable, at a special election called for that purpose, the following questions of police regulation, or either of them, and no others, to wit:

First. Shall stock be restrained from running at large?

Second. Shall stock be restrained from running at large between sunset and sunrise?

Third. Shall stock be restrained from running at large from the first day of (naming the month) in each year, until the first day of (naming the month) following?

Fourth. Shall stock be restrained from running at large between sunset and sunrise from the first day of (naming the month) in each year, until the first day of (naming the month) following? [12 G. A., ch. 144; 13 G. A., ch. 26, § 1.]

The provisions of former statutes authorizing a submission of the question whether swine and sheep should be allowed to run at large, to vote in each county, were held to be merely an exercise of the police power, and therefore not unconstitutional as not having a uniform operation, nor as depending for their validity upon a vote of the people. (Const., art. 1, § 6, and art. 3, § 1): *Dalby v. Wolf*, 14-228.

A section similar to this, making the question whether that act should be in force in any county dependent upon a vote of the people of the county, was held unconstitutional, and the act was held to be in force in all the counties of the state without such adoption: *Weir v. Cram*, 37-649; *Little v. McGuire*, 38-560; *Hallock v. Hughes*, 42-516.

The provision that the word stock shall include cattle, horses, mules and asses is only applicable in the connection in which it is used, and is not to be deemed a limitation upon the meaning of the word as found in other statutes. As generally used it includes swine as well as the animals referred to: *State v. Clark*, 65-336.

2254. Adoption. 1451; 15 G. A., ch. 70, § 5. If at such election a majority of the electors voting thereon, shall vote in favor of either of such regulations, then the same shall take effect and be in force at the end of thirty days after said election, and shall continue in force until the end of ninety days after an election at which, on a resubmission of the same question, a majority of the electors of the county voting thereon shall vote against the same: *provided*, that where any county prior to the taking effect of this act, shall have voted, on the submission of such question, "for restraining stock from

running at large," or "for restraining stock from running at large between the hours of sunset and sunrise," as provided in chapter three, title eleven, of the code, or in the law or laws to which the same is amendatory, such vote is hereby declared to be legal and valid, and to amount to an adoption by the county of the police regulation so voted for, as the same is herein set out as fully and effectually as if the same was submitted and voted for under this act, except that the same shall be and remain in force in such county until the end of thirty days after the next general election and no longer unless re-adopted thereat. [12 G. A., ch. 144; 13 G. A., ch. 26, § 2.]

2255. Owner liable; distraint. 1452; 15 G. A., ch. 70, § 6; 18 G. A., ch. 188, § 1. The owner of any stock or domestic animal, prohibited by law or police regulation of any country from running at large at any of the times hereinbefore mentioned, shall be liable for all damages done thereby while wrongfully remaining at large upon the public highway, or upon the improved or cultivated lands of another, which may be recovered by action at law, or the party injured may, at his option, distrain the trespassing animals, and retain the same in some safe place, at the expense of the owner, until the damages are paid as provided in section[s] fourteen hundred and fifty-four, fourteen hundred and fifty-five, and fourteen hundred and fifty-six of the code [§§ 2258–2260]; said damages to be assessed pro rata per head, and each owner, if more than one owner, be liable for the pro rata amount, and each owner shall have the right to discharge his stock from distraint by paying the said pro rata amount to the person damaged, together with his pro rata share of the cost of distraint; *provided*, that no stock or domestic animal, except the male animals mentioned in section fourteen hundred and forty-seven of the code [§ 2250], shall be considered as running at large, so long as the same is upon unimproved or uncultivated lands, and under the immediate care and control of the owner, or upon the public highway under like care and control, for the purpose of travel or driving thereon. [12 G. A., ch. 144; 13 G. A., ch. 26, § 3.]

Held, that the original section as contained in 13 G. A., ch. 26, was applicable without a submission to vote of the question of restraining stock from running at large, and that it was immaterial whether the premises were inclosed with a lawful fence or not: *Little v. McGuire*, 38–560; *Hallock v. Hughes*, 42–516; and see notes to § 2253.

The owner of a thoroughbred cow, which is got with calf by an ill-bred and unpedigreed bull, unlawfully running at large, may recover damages from the owner of such bull, which are to be measured by the difference in the value of the cow, for the purpose of breeding of fine stock, before meeting such bull and afterwards: *Crawford v. Williams*, 48–247.

The fact that an eighty-acre tract of land is surrounded by a single ploughed furrow, and includes a few acres under cultivation, will not render it all improved or cultivated land within the meaning of this section; but in such cases the owner of the land may recover damages from the owner of cattle who herds and confines them upon such land: *Otis v. Morgan*, 61–712.

2256. Relieving from distraint. 18 G. A., ch. 188, § 2. If any person by force or otherwise without leave of the person having stock under distraint, relieve the stock from distraint he shall be guilty of a misdemeanor and shall pay a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than thirty days.

The word "stock" here used includes swine: *State v. Clark*, 65–336.

2257. Who to be considered owner. 1453; 15 G. A., ch. 70, § 7. The word owner, as used in the preceding and in the three succeeding sections of this chapter of the code [§§ 2255 and 2258–2260], shall include the person entitled to the present possession of the animal, and also the person having the care or charge of the same, as well as the person having the legal title thereto. [12 G. A., ch. 144; 13 G. A., ch. 26, § 4.]

2258. Assessment of damages; enforcement. 1454. Within twenty four hours after the stock has been distrained, Sunday not being included, the party so injured, or his agent, shall notify the owner of said stock, when

known, and if said owner shall fail to satisfy the owner of, or occupant cultivating said land, he shall, within twenty-four hours thereafter, notify the township trustees to be and appear upon the premises to view and assess the damages; such notices to be either verbal or in writing. When two or more trustees have assembled, they shall proceed to view and assess the damages and the amount to be paid for keeping said stock; and if the person or persons owning such distrained stock refuse to pay such damages so assessed, then the trustees shall post up notices in three conspicuous places in the township where such damages were done, that the said stock, or so much thereof as is necessary to pay said damages with costs of sale, will be sold to the highest bidder; any money or stock left after satisfying such claims shall be returned to the owner of the stock so disposed of; said sale shall take place at the inclosure where such stock was distrained between the hours of one and three P. M. on the tenth day after the posting of said notice; *provided*, that if any one or more of said trustees are interested in said damages, the trustee or trustees not so interested shall appoint some one or more, as the case may require, to act in the place of the person or persons so interested; the owner of the stock, or the person entitled to the possession thereof, when known, shall also be notified of the time and place of the meeting of said trustees to assess said damages. When either trustee is absent so that notice cannot be served upon him, then any justice of the peace shall appoint a suitable person, having the qualifications of a juror, to supply the place of the absent trustee, and the person so appointed shall serve as such trustee for all the purposes of this and the following sections. [13 G. A., ch. 26, § 5; 12 G. A., ch. 144.]

Upon the hearing before fence viewers to assess the damages caused by stock running at large, the question as to whether the stock was improperly at large, as well as the amount of damage done, is before the fence viewers, and such question may also be considered on appeal from their action: *Duffees v. Judd*, 48-256.

This section does not confer special authority upon the township trustees to inquire into and determine the lawfulness of the fence inclosing the injured premises, and that matter may be determined in an action of replevin to recover the property from the person making distraint, when it is claimed that his premises are not surrounded by a lawful fence: *Syford v. Schiver*, 61-155.

The fence viewers are not given special authority to inquire into and determine the lawfulness of fences inclosing the premises trespassed upon by cattle, and that matter may be determined in an action of replevin to recover the animals from the person making distraint, when it is claimed that his premises are not surrounded by a lawful fence: *Ibid.*

Failure to serve notice upon one of the trustees, who might have been served, will render the action of the other two entirely void, as being without jurisdiction: *Barrett v. Dolan*, 71-94.

Notice to the owner of the stock of the amount of damages assessed by the trustees, and the demand from him that he pay such damages, are not necessary to warrant a sale: *Miller v. Dale*, 72-470.

2259. Assessment made; appeal. 1455. The trustees shall make their assessment in writing and file the same with the township clerk, to be of record in his office. Any person aggrieved by the action of the trustees under this chapter, may appeal to the circuit [district] court of the proper county. The bond shall be filed with the clerk of the township in a penalty double the value of the property distrained, or if the value of the property exceed the amount of the damage claimed, then double the amount of the damage. Notice of such appeal shall be given in the same time and manner as in appeals from a judgment of a justice of the peace, with good and sufficient securities, to be approved by the clerk; and from and after the filing of the appeal bond, the same shall operate as a supersedeas. In case the owner of such stock be appellant the same shall be delivered to him. The clerk, after the appeal is taken, shall certify all the original papers to the clerk of the circuit [district] court within the time prescribed for the appeal. [13 G. A., ch. 26, § 6; 12 G. A., ch. 144.]

[The word "stock" between "such" and "be" in the eleventh line is omitted in the printed Code.]

Upon appeal to the circuit court, not only the amount of damages, but also the question whether the stock were in fact trespassers, and the sufficiency of the fences, may be reviewed: *Duffees v. Judd*, 48-256.

2260. Estrays. 1456. If the owners of such distrained stock are not known, it shall be treated as estrays. [13 G. A., ch. 26, § 7; 12 G. A., ch. 144.]

[Secs. 1457 to 1463 repealed by 15 G. A., ch. 70, § 1.]

An animal stolen from its owner and afterwards abandoned by the thief may lawfully be treated as an estray: *Kinney v. Roe*, 70-509.

2261. Unbroken animals. 1464. No person shall take up any unbroken animal as a stray, between the first day of May and the first day of November, unless the same be found within his lawful inclosure, nor shall any person take up any stray unless he be a householder. [9 G. A., ch. 102, § 1.]

[The word "any" in the first line is "an" in the printed Code.]

A distinction is here contemplated between a broken and an unbroken animal. The former may be taken up if found running in the highway: *Knudson v. Gieson*, 38-234.

2262. Who may take up. 1465. If any horse, mule, neat cattle, or other animal, liable to be taken up as a stray, come upon any person's premises, any other person may notify him of the fact, and if he fail to take up such stray for more than five days after such notice, any other person being a householder in the same township, may take up such stray and proceed with it as if taken upon his own premises; *provided*, that he shall produce to the justice of the peace proof of the service of such notice, and all persons taking up stray animals shall state to the justice, under oath, where such stray was taken up. [Same, § 2.]

An estray is an animal whose owner is unknown, and therefore a person cannot take up an animal as an estray when the owner of such animal is known to him. In such case the owner may replevin without tendering costs: *Walters v. Glats*, 29-437.

2263. Notices posted. 1466. Any person taking up a stray, shall, within five days thereafter, post up written notices in three of the most public places in the township, containing a full description of said animal, and, unless such stray shall have been previously reclaimed by the owner, he shall, within ten days, go before a justice of the peace in the township in which such stray was taken up, or, in case there is no justice in the township, he shall go before the nearest justice in the county, and make oath as to where said stray was taken up, and that the marks or brands have not been altered to his knowledge, either before or after the same was taken up. [Same, § 3.]

2264. Appraisement. 1467. If necessary, the justice shall issue a notice to three disinterested householders in the township, to appear at the time and place mentioned in said notice to appraise the stray. The persons so notified, or any two of them attending, shall take an oath that they will fairly and impartially appraise said stray, and their appraisement, embracing a description of the size, age, color, sex, marks, and brands of the stray, shall be entered by the justice in a book to be kept by him for that purpose. [Same, § 4.]

2265. Entry in estray book. 1468. The justice shall, within ten days thereafter, send a certified copy of said entry to the county auditor, who shall immediately enter the same in an estray book, to be kept by him for that purpose. If the appraised value of the stray is ten dollars, or more, the auditor shall cause a copy of said entry to be posted on the court-house door, and a copy of said notice to be inserted three times in some newspaper in the county, if there be one, if not, he shall cause to be posted up written notices in three public places in the county, and he shall, within ten days after receiving the notice of appraisement, unless the animal shall have been previously reclaimed by the owner, forward a certified copy of the same to the public printer hereafter provided; together with the amount required to pay for two insertions of said notice in the paper published by such printer. [Same, §§ 5, 6.]

2266. Advertising strays. 1469. The secretary of state shall select and contract with a printer to print all such advertisements of strays, and shall immediately notify the auditor of each county of the name and residence of such printer, and the price of such advertisements. In making the contract the secretary shall select an agricultural paper, published at the capital, if there be one. Such contract shall be renewed on the first day of January, annually; and if a vacancy should from any cause occur, the secretary shall immediately fill it with a new contract. [Same, §§ 7, 10, 11.]

2267. Estray notices. 1470. The printer thus selected, shall, once in each week, issue a newspaper or printed sheet, in which he shall give two successive insertions of all estray notices sent to him, and shall send one copy of each paper issued to the auditor of each county, who shall receive, file, and preserve the same, to be examined by any person who may desire to see them. The auditor is hereby required to subscribe for one copy of the paper selected by the secretary of state for the publication of estray notices, and the amount of the subscription price shall be allowed and paid out of the treasury of the county. [Same, §§ 8, 9.]

2268. Property vests when. 1471. Where the appraised value of any stray does not exceed five dollars, no further proceedings need be had than for the justice to enter a description of said stray on his estray book, and if no owner appear within six months, the right of the property shall vest in the finder, if he has complied with the law and paid all costs. [Same, § 12.]

[The word "where" in the first line is "when" in the printed Code.]

2269. Same. 1472. Where the appraised value of the stray exceeds five dollars and is less than ten, and the finder shall have complied with the provisions of this chapter, and paid all costs, the property shall vest in him after the expiration of nine months, if no owner appear. [Same, § 13.]

2270. Use or appropriation. 1473. Any person legally taking up a stray may use or work, if he does so with care and moderation, and does not abuse or injure it. But if any person unlawfully take up any stray, or take up any stray and fail to comply with the provisions of this chapter, or use or work it in a manner contrary to this chapter, or work it before having it appraised, or keep such stray out of the county for more than five days at any one time, before he acquires a title to said stray, such offender shall forfeit to the county twenty dollars, to be sued for by any person in the county; and the owner of the stray may also recover of such offender double the amount of all injury sustained, with costs. [Same, § 16.]

2271. Recovery by owner. 1474. The owner of any stray may, within one year from the time of taking up, prove his ownership of the same before a justice of the peace (and if the title shall not have already vested in the finder by sections fourteen hundred and seventy-one or fourteen hundred and seventy-two of this chapter [§§ 2268, 2269]), and upon payment of all costs, the reward, and a reasonable allowance, he shall be entitled to recover the stray. If the owner and finder cannot agree upon the amount of such allowance, it shall be settled by some justice of the peace, who shall take into consideration the trouble and expense incurred by the finder, and whatever use he may have had of the stray. [Same, § 17.]

2272. Title vests in finder. 1475. If the owner fail to claim and prove his title to any stray for one year after the time of taking up, and the finder shall have complied with this law, a complete title to the stray shall vest in the finder; but if the owner shall appear within eighteen months from the time of taking up, and prove his ownership of such stray, and pay all costs and expenses as above provided, the finder shall pay him the appraised value of such stray, or may, at his option, deliver up the stray. [Same, § 18.]

2273. Finder not liable. 1476. If any stray legally taken up, escape from the finder, or die, without any fault on his part, he shall not be liable for the loss. [Same, § 19.]

2274. Penalty. 1477. If any person shall sell, or trade, or take out of the state, any stray before the legal title shall have vested in him, he shall forfeit to the owner double the value of said stray, and shall be punished by fine not exceeding ninety dollars, or imprisonment in the county jail not exceeding thirty days. [Same, § 20.]

2275. Same. 1478. If any printer, auditor, or justice of the peace, fail to perform the duties enjoined upon him by this chapter in relation to strays, he shall forfeit to the county not less than five or more than fifty dollars, to be sued for by any person in the county. [Same, § 21.]

2276. Marks and brands. 1479. The board of supervisors of each county shall procure at the expense of the county, a book for each civil township, in which to record the marks and brands of horses, sheep, hogs, and other animals. [R., § 1555; C., '51, § 920.]

2277. Record. 1480. Any person wishing to mark or brand his domestic animals with any distinguishing mark, may adopt his own mark and have a description thereof recorded by the clerk of the township in which the owner lives. [R., § 1556; C., '51, § 921.]

2278. Mark previously recorded. 1481. No person shall adopt a mark or brand previously recorded to another person residing in the same township, nor shall the clerk record the same one to two persons, unless on their joint application. [R., § 1557; C., '51, § 922.]

REGISTRATION OF PEDIGREES.

2279. Certificate posted. 22 G. A., ch. 102, § 1. Any owner or keeper of a stallion or bull for public service, who represents him to be a pure bred, or thorough bred bull, or standard bred, or thorough bred stallion or bull, of any breed of horses or cattle, that have a stud or herd book for the registration of their pedigrees, shall place a copy of certificate of registration on the door of the stall or stable, where said stallion is usually kept, giving the number of registration, name of breeder and name of animal and the volume and page of the stud or herd book in which said stallion or bull is recorded and when requested to do so shall give to any patron a copy of said certificate.

2280. Penalty. 22 G. A., ch. 102, § 2. Any owner or keeper of such stallion or bull who shall violate provisions of this act shall be deemed guilty of a misdemeanor, and shall be punished accordingly.

CARE; PREVENTION OF CRUELTY.

2281. Abandoned animals. 1482. Any person may take charge of any animal whose owner has abandoned it or fails to properly take care and provide for it, and may furnish the same with proper shelter, nourishment, and care, at the owner's expense, and shall have a lien on such animal for the same; which lien, at the expiration of three months, shall become a perfect title to the property as provided in the case of a stray. [13 G. A., ch. 176, § 4.]

2282. Food and water supplied. 1483. In case any creature impounded or otherwise confined, shall be without necessary food or water for more than twelve successive hours, it shall be lawful for any person, as often as necessary, to enter the pound, inclosure, or building, and supply it with necessary food and water so long as it shall remain so confined; and the reasonable cost of such food and water may be collected by him of the owner of such creature. [Same, § 9.]

2283. Diseased animals killed. 1484. The sheriff, constable, police officer, officer of any society for the prevention of cruelty to animals, or any magistrate, shall destroy any horse or other animal having the disease called and known as the glanders, or any disabled creature unfit for further use. [Same, § 10.]

[See further § 5414.]

2284. Dogs killed. 1485. It shall be lawful for any person to kill any dog caught in the act of worrying, maiming, or killing any sheep or lambs, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured, for all damages done by his dog, except when the party is doing an unlawful act. [Ex. S., 9 G. A., ch. 20, § 3; 9 G. A., ch. 76, § 9.]

To justify the killing of a dog under this section he must be not only trespassing but actually engaged in one of the acts mentioned: *Marshall v. Blackshire*, 44–475.

A person who has a dog in his possession or harbors him on his premises, as owners usually do with their dogs, is to be considered the owner within the meaning of this section. In determining the question of ownership the jury must consider the party's former treatment of the animal, his declarations concerning him, and the habits of the dog as to staying at such person's place: *O'Harra v. Miller*, 64–462.

Aside from this provision a person who has in his charge a vicious dog, knowing his character, and fails to restrain him, is absolutely liable for an injury inflicted. It makes no difference whether the person has charge of the animal as owner or only as bailee: *Marsel v. Bowman*, 62–57.

Dogs may be personal property and have value, and such value may be shown in an action for injury thereto: *Anson v. Dwight*, 18–241.

OTHER PROVISIONS.

2285. Bond to release. 1486. Any animal, or other property, taken up, held, distrained, or seized under this chapter, may be released at once by the owner, upon execution and filing of a bond in double the value of the property held, conditioned for the payment of all costs and damages for which the same is held, and to which the one taking up, holding, or distraining, may be legally entitled, within twenty days from the filing and approval of such bond; said bond shall be filed with and approved by any constable, sheriff, or other officer having custody of the property, or by the nearest acting justice of the peace, or by the justice before whom any legal proceedings relating to such property is pending. Said bond shall be for the use of any person having any right or interest in or to said property so released.

[The word "with" after "filed" in the seventh line is erroneously omitted in the printed Code.]

2286. Bounty. 1487. A bounty of one dollar shall be allowed on each scalp of a wolf, lynx, swift, or wild-cat, to be paid out of the treasury of the county in which the animal was taken, upon a verified statement of the facts showing the claimant to be entitled thereto. [R., §§ 2193, 2195.]

2287. Proceedings. 1488. The person claiming the bounty shall produce such statement, together with the scalp or scalps, with the ears thereon, to the county auditor, or a justice of the peace of the county wherein such wolf, lynx, swift, or wild-cat, may have been taken and killed; and the officer before whom such scalps are produced shall deface or destroy the scalps when so produced, so as to prevent the use of the same to obtain for the second time the bounty herein provided for. [R., § 2194.]

In an action to recover from the county additional bounty offered for wolf scalps, *held*, that the certificate of a justice of the peace showing the delivery to him of the scalps and that he had destroyed the same was sufficient evidence of the fact that such wolves were caught and killed in the county, and that the scalps had ears: *Murray v. Jones County*, 72–286.

COMPENSATION FOR DOMESTIC ANIMALS KILLED BY DOGS.

2288. Assessors to list dogs. 20 G. A., ch. 70, § 1. It shall be the duty of every assessor of this state, at the time of listing the property of his district, to list each dog over three months of age in the name of the owner thereof, without affixing any value thereto. Any person keeping or harboring a dog or dogs shall be deemed the owner thereof within the meaning of this act.

2289. Tax. 20 G. A., ch. 70, § 2. The board of supervisors of each county shall, at their September session each year, when levying other taxes, levy a tax of fifty cents on each male, and one dollar on each female dog listed by the assessor, which tax shall constitute a special fund, to be disposed of as provided for in this act.

2290. Assessment. 20 G. A., ch. 70, § 3. It shall be the duty of each county auditor to provide suitable columns, properly headed, in the assessor's book, to carry out the provisions of this act.

2291. Collection. 20 G. A., ch. 70, § 4. The treasurer of each county, on receiving the tax books for the collection of other taxes, shall collect the tax herein provided for as other taxes are collected, and keep the same as a separate fund, to be known as the domestic animal fund.

2292. Damages, how claimed; proof; allowance. 20 G. A., ch. 70, § 5; 22 G. A., ch. 42. Any person damaged by the killing or injury of sheep, or any other domestic animal, by a dog or dogs, may present to the board of supervisors of the county in which such killing or injury occurred, a detailed account of such killing or injury, stating the amount of damage claimed therefor, and verified by affidavit, such claim to be filed with the county auditor at least ten days before some regular session of the board, and within sixty days from the time such killing or injury occurred. At the first regular session of the board of supervisors after such claim shall have been filed for ten days as herein provided, the same may be established by proof before the board; and upon the hearing thereof, the claimant shall establish his claim for damages by testimony satisfactory to said board. It shall also be made to appear to the satisfaction of said board that such damage was not caused, in whole or in part, by a dog or dogs owned or controlled by the claimant, and that claimant does not know whose dog or dogs caused the damage, and that said damage was caused by dogs; or, in case the owner of such dog or dogs is known to the claimant, and that such owner has no property subject to execution, out of which the claim can be made. The board shall hear and determine said claims in the order in which they are filed unless good cause is shown for continuance, and shall allow the same or such portions thereof as they may deem just, and shall authorize the auditor to issue warrants for the same not to exceed seventy-five per cent. of the amount allowed to be paid out of the domestic animal fund.

2293. Payment. 20 G. A., ch. 70, § 6. The treasurer shall, between the first and tenth days of January and the first and tenth days of July of each year, pay the said warrants issued by the auditor as provided for by section five of this act [§ 2292], out of the domestic animal fund. If said fund is insufficient to pay said warrants in full, he shall pay on each *pro rata*. If after paying all warrants at either period above named, there shall remain more than two hundred and fifty dollars of said fund in the treasury, the board of supervisors shall order the excess to be transferred to the county fund.

CHAPTER 3a.

STATE VETERINARY SURGEON.

2294. Appointment; qualification; compensation. 20 G. A., ch. 189, § 1. The governor shall appoint a state veterinary surgeon who shall hold his office for a term of three years unless sooner removed by the governor; he shall be a graduate of some regular and established veterinary college and shall be skilled in veterinary science; he shall be a member of the state board of health, which membership shall be in addition to that now provided by law. When actually engaged in the discharge of his official duties he shall receive from the state treasury as his compensation the sum of five dollars per day and his actual expenses, which shall be presented under oath and covered by written vouchers before receiving the same.

2295. Powers. 20 G. A., ch. 189, § 2. He shall have general supervision of all contagious and infectious diseases among domestic animals within or that may be in transit through the state and he is empowered to establish quarantine against animals thus diseased or that have been exposed to others thus diseased, whether within or without the state, and may, with the concurrence of the state board of health, make rules and regulations such as he may deem necessary for the prevention, against the spread, and for the suppression of said disease or diseases, which rules and regulations, after the concurrence of the governor and executive council, shall be published and enforced, and in doing said things or any of them, he shall have power to call on any one or more peace officers whose duty it shall be to give him all assistance in their power.

2296. Penalty for interfering with. 20 G. A., ch. 189, § 3. Any person who wilfully hinders, obstructs or resists said veterinary surgeon or his assistants, or any peace officer acting under him or them when engaged in the duties or exercising the powers herein conferred, shall be guilty of a misdemeanor and punished accordingly.

2297. Annual report. 20 G. A., ch. 189, § 4; 22 G. A., ch. 82, § 39. Said veterinary surgeon shall, biennially, make a full and detailed report of all and singular his doings since his last report to the governor, including his compensation and expenses, and the report shall not exceed one hundred and fifty pages of printed matter.

2298. Duties; deputies. 20 G. A., ch. 189, § 5. Whenever the majority of any board of supervisors, city council, trustees of an incorporated town or township trustees, whether in session or not, shall in writing notify the governor of the prevalence of, or probable danger from, any of said diseases, he shall notify the state veterinary surgeon who shall at once repair to the place designated in said notice and take such action as the exigencies may demand, and the governor may in case of emergency appoint a substitute or assistants with equal powers and compensation.

2299. Destruction of stock; compensation; appeal. 20 G. A., ch. 189, § 6. Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock under the provisions of this act he shall, unless the owner or owners consent to such destruction, notify the governor, who may appoint two competent veterinary surgeons as advisors, and no stock shall be destroyed except upon the written order of the state veterinary surgeon countersigned by them and approved by the governor and the owners of all stock destroyed under the provisions of this act except as hereinafter provided shall be entitled to receive a reasonable compensation therefor, but not more than its actual value in its condition when condemned,

which shall be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree, shall jointly select another justice of the peace as umpire and their judgment shall be final when the value of the stock does not exceed one hundred dollars, but in all other cases either party shall have the right of appeal to the circuit [district] court, but such appeal shall not delay the destruction of the diseased animals. The state veterinary surgeon shall, as soon thereafter as may be, file his written report thereof with the governor, who shall, if found correct, indorse his finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state who shall pay the same out of any moneys at his disposal under the provisions of this act; *provided*, that no compensation shall be allowed for any stock destroyed while in transit through or across this state, and that the word stock, as herein used, shall be held to include only neat cattle and horses.

A certificate given by a deputy veterinary surgeon to the owner of a horse showing him to be affected with glanders, *held* not admissible as evidence that he was so affected at the time of his purchase, more than a year previous to the giving of such certificate: *Welch v. Norton*, 73-721.

2300. Co-operate with United States. 20 G. A., ch. 189, § 7. The governor of the state, with the state veterinary surgeon, may co-operate with the government of the United States for the objects of this act, and the governor is hereby authorized to receive and receipt for any moneys receivable by this state under the provisions of any act of congress which may at any time be in force upon this subject, and to pay the same into the state treasury to be used according to the act of congress and the provisions of this act as nearly as may be.

2301. Appropriation. 20 G. A., ch. 189, § 8. There is hereby appropriated out of any moneys not otherwise appropriated the sum of ten thousand dollars for use in 1884 and 1885, and three thousand dollars annually thereafter, or so much thereof as may be necessary for the uses and purposes herein set forth.

2302. Compensation to assistants. 20 G. A., ch. 189, § 9. Any person, except the veterinary surgeons, called upon under the provisions of this act shall be allowed and receive two dollars per day while actually employed.

CHAPTER 35.

CARE AND PROPAGATION OF FISH.

2303. Private ownership. 16 G. A., ch. 70, § 4. Persons raising or propagating fish on their own premises, or owning premises on which there are waters having no natural outlet, supplied with fish, shall absolutely own said fish, and any person taking fish therefrom, or attempting to take fish therefrom, without the consent of the owner, or his agent, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than twenty-five dollars, nor less than five dollars or imprisoned in the county jail not more than thirty days, and shall be liable to the owners of the fish in damages in double the amount of damages sustained, the same to be recovered in a civil action before any court having jurisdiction over the same.

2304. Time for catching. 16 G. A., ch. 70, § 6. It shall be unlawful to catch and kill any bass or wall-eyed pike between the first day of April and the first day of June, or any salmon or trout between the first day of November and the first day of February, of any year, in any manner whatever.

2305. Fine for violation. 16 G. A., ch. 70, § 7. Any person found guilty of a violation of section six of this act [§ 2304], shall, on conviction before a justice of the peace, be fined not less than five dollars nor more than twenty-five dollars for each offense, and shall stand committed until such fine be paid.

2306. 16 G. A., ch. 70, § 10; 18 G. A., ch. 92. *Provided*, that nothing herein contained shall be held to apply to fishing in the Mississippi and Missouri rivers, nor in so much of the Des Moines river as forms the boundary between the states of Iowa and Missouri.

2307. Fish commissioner; duties. 17 G. A., ch. 80, § 1. The governor of the state is hereby authorized and required to appoint, after the expiration of the term of the present incumbent, and biennially thereafter, one competent person, who shall be known as the state fish commissioner, who shall hold his position for the term of two years; and any vacancy that may occur, for the unexpired term, or by reason of the expiration of the term of said office, shall be filled by the appointment and commission of the governor. The general duties of said commissioner, including the present incumbent, shall be to have general charge and superintendence of the state hatching house, now located at Anamosa, to forward the restoration of fish to the rivers and waters of the state, and to stock the same with fish from said hatching house, and elsewhere, to the extent that means therefor may be furnished by the state, and to the extent that means for that purpose may be furnished by the United States fish commissioner, and by societies and individuals interested in the propagation of fish in the waters of this state.

2308. Salary. 17 G. A., ch. 80, § 2. The fish commissioner, including the present incumbent, shall receive, in full compensation for his services, twelve hundred dollars per year, to be paid out of any money in the state treasury not otherwise appropriated.

2309. Report. 17 G. A., ch. 80, § 4. It shall be the duty of said fish commissioner to make a detailed, itemized and sworn statement, on or before two years after the fifteenth day of November, 1877, and every two years thereafter, showing the amount of money expended, for what purpose or purposes expended, the number and kinds of fish distributed, together with such general information on the subject of fish culture as such commissioner may think proper; and upon the submission of such report, and each subsequent, the same shall be caused to be printed and distributed, to the same extent and in the same manner as now provided by law for the printing and distribution of the reports of public officers of the state.

[The time for making the report is changed by § 117.]

2310. Obstructions prohibited. 17 G. A., ch. 80, § 5. No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds or lakes of this state, any trot line, dam, seine, weir, fish dam, or other obstruction, in such manner as to prevent the free passage of fish up, down or through such water-courses, unless the same be done by the instruction or under the direction of the fish commissioner, and when the same is so done by or through the instruction, or under the direction of the fish commissioner, it shall be unlawful for any person or persons to remove, or in any way interfere with the same. This section shall not be construed to prohibit the erection of dams for manufacturing purposes as provided by law.

2311. Penalty. 17 G. A., ch. 80, § 6. Any person found guilty of a violation of the provisions of section five of this act [§ 2310], shall, upon conviction before a justice of the peace, be fined not less than twenty-five, nor more than one hundred dollars, or imprisoned in the county jail not less than ten days, nor more than thirty days, in the discretion of the court.

[For similar provisions, see §§ 5403, 5404.]

2312. 17 G. A., ch. 80, § 7. All acts or parts of acts in conflict herewith are hereby repealed.

2313. Hatchery transferred to Spirit Lake. 21 G. A., ch. 155, § 1. The state fish hatchery now located in Jones county, Iowa, is hereby transferred and located at Spirit Lake in Dickinson county, Iowa, and the state shall hereafter keep and maintain but the one hatchery located in Dickinson county.

2314. Purchase of land. 21 G. A., ch. 155, § 2. The fish commissioner is hereby authorized to purchase on behalf of the state the necessary land at an expense to the state not to exceed one dollar, upon which the state fish hatching house shall be located and to take a deed of said land in the name of the state of Iowa and have the same recorded in the proper office for the record of such deed.

2315. Provisions applicable. 21 G. A., ch. 155, § 5. Wherever the law in regard to the propagation of fish now in force refers to the hatching house at Anamosa the same shall be deemed hereafter to refer so far as applicable to the hatching house at Spirit Lake.

CONSTRUCTION OF FISH-WAYS.

2316. Where required. 17 G. A., ch. 188, § 1. The owner or owners of any dam or obstruction across any river or stream, creek, pond, lake, or watercourse, in this state, shall, within a reasonable time, erect, construct and maintain, over or across said dam or obstruction, a suitable fish-way of suitable capacity and facility to afford a free passage for fish up and down through such water-course when the water of said stream is running over the said dam.

2317. Dam or obstruction a nuisance. 17 G. A., ch. 188, § 2. Any dam or obstruction mentioned in section one of this act [§ 2316], not provided with such fish-way within a reasonable time after the taking effect of this act, is hereby declared a nuisance, and may be abated accordingly.

2318. Penalty. 17 G. A., ch. 188, § 3. Any person guilty of the violation of the provisions of this act, shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and not less than twenty dollars for each subsequent offense, and shall stand committed until such fine is paid.

FISH DAMS ACROSS OUTLETS OF LAKES.

2319. Cities and towns may maintain. 21 G. A., ch. 63, § 1; 22 G. A., ch. 108. Any city or incorporated town which is bounded in whole or in part by any meandered lake or chain of lakes of this state is hereby authorized and empowered to construct and maintain across any outlet of such lake a dam to obstruct the passage of fish. Such dam may be constructed of earth, masonry or other substance to the *heighth* [height] of the natural and ordinary level of the lake, but above such level and across the entire width of the natural outlet it shall be an open net-work of bars, rods, or wire, including however the necessary and proper framework and supports therefor. Said net-work may be constructed to prevent so far as possible the escape of fish from the lake. But nothing herein contained shall be construed to authorize the raising of the ordinary and natural level of the lake or the interfering with any water-power, dwelling-house, out-building, orchard or grove.

2320. May condemn property for. 21 G. A., ch. 63, § 2. Such city or town is authorized to purchase or to condemn in the manner provided by law for condemning private property for streets and other municipal purposes so much land situate within or without the corporate limits of said city or town

as the council shall deem necessary for the construction and maintai[e]nance of such dam and to pay for the same out of the general fund; *provided*, however that before any city or incorporated town shall be authorized to acquire property or construct or maintain a dam by virtue of the provisions of this act a majority of the resident tax payers of such city or town shall petition the council therefor.

2321. Penalty for injuring. 21 G. A., ch. 63, § 3. If any person shall wilfully injure or destroy or be a party to the injury or destruction of any dam constructed or maintained by virtue of the provisions of this act he shall be punished by a fine not exceeding five hundred dollars and by imprisonment in the county jail not exceeding one year.

CHAPTER 4.

OF FENCES.

2322. Partition. 1489. The respective owners of lands inclosed with fences, shall keep up and maintain partition fences, between their own and the next adjoining inclosure so long as they improve them in equal shares, unless otherwise agreed between them. [R., § 1526; C., '51, § 895.]

Applied: *Schnare v. Gehman*, 9-283.

2323. Neglect to build or repair; fence viewers. 1490. If any party neglect to repair or rebuild a partition fence, or a portion thereof, which he ought to maintain, the aggrieved party may complain to the fence viewers, who, after due notice to each party, shall examine the same, and if they determine the fence is insufficient, shall signify it in writing to the delinquent occupant of the land, and direct him to repair or rebuild the same within such time as they judge reasonable. [R., § 1527; C., '51, § 896.]

The duty of maintaining partition fences as provided in this chapter, being one created solely by statute, the method prescribed by the statute for enforcing such duty must be followed. A party cannot proceed by action in court instead of by application to the fence viewers: *Lease v. Vance*, 28-509.

It is not necessary that the complaint to the fence viewers be in writing and made matter of record: *Tubbs v. Ogden*, 46-134.

Unless due notice is given to the adverse party of the meeting of the fence viewers to examine the fence the subsequent proceedings cannot constitute the basis of a recovery against him: *Lookhart v. Wessels*, 46-81. As to what is due and sufficient notice, see *Tubbs v. Ogden*, 46-134.

Fence viewers have jurisdiction only when a controversy arises between the respective owners of land about the partition fences: *Anderson v. Cox*, 54-578.

Where the parties have agreed to maintain a certain kind of fence the trustees may determine whether such agreement has been performed and decide as to time and manner of performance: *Huber v. Wilkinson*, 46-458.

The evidence of fence viewers is competent in regard to a matter upon which they are authorized to form an opinion: *Phillips v. Oystee*, 32-257.

An apportionment of the obligation to maintain a partition fence, made after the adoption of the herd law, which is acquiesced in and complied with by both parties, remains binding on them until in some manner the parties are relieved therefrom: *Barrett v. Dolan*, 71-94.

2324. Penalty for non-compliance with order. 1491. If such fence be not repaired or rebuilt accordingly, the complainant may repair or rebuild it, and the same being adjudged sufficient by the fence viewers, and the value thereof, with their fees, being ascertained by them and certified under their hands, the complainant may demand of the owner of the land where the fence was deficient the sum so ascertained, and, in case of neglect to pay the same for one month after demand, may recover it with one per cent. a month interest by action. [R., § 1528; C., '51, § 897.]

The action of the fence viewers is conclusive where they have jurisdiction; but they cannot conclude a party by determining that to be a partition fence which, in fact, is not: *Bills v. Belknap*, 38-225.

The adjudication by the trustees as to the

sufficiency of the fence should be by them sitting as a board, and as a result of personal inspection, but the inspection need not be made by them in a body. A record of the adjudication should be made by the clerk, but it is not necessary that such adjudication be reduced to writing and certified by them. The certificate of the viewers as to the value of the fence should be filed with the clerk and will then be sufficient evidence of complainant's rights and notice to the adverse party: *Tubbs v. Ogden*, 46-134.

There is no appeal from the action of fence viewers: *McNeever v. Jenks*, 59-350.

The decision of fence viewers upon questions within their jurisdiction is conclusive, and the fact that the statute as to these matters denies to the parties a trial in court, either by an appeal or otherwise, does not render it unconstitutional: *Ibid.*

The statute does not make the fence viewers sole judges of the sufficiency of the fence in an action brought for damages caused by trespassing cattle. The sufficiency may be proved like any other fact: *Noble v. Chase*, 60-261.

Where a party, without availing himself of the provisions of the statute as to fence viewers, gave notice to an adjoining land owner to build one-half the fence between their lands, and such adjoining owner, in compliance with his demands, built his one-half the fence and afterwards built the remainder of the fence, which should have been built by the party giving the notice, *held*, that the party thus building the fence might recover, from the party serving the notice, the value of one-half the fence built: *Schnare v. Gehman*, 9-283.

2325. Disputes; fence viewers to settle. 1492. When a controversy arises between the respective owners about the obligation to erect or maintain partition fences, either party may apply to the fence viewers, who, after due notice to each party, may inquire into the matter and assign to each his share thereof, and direct the time within which each shall erect or repair his share in the manner provided above. [R., § 1529; C., '51, § 893.]

Neither the notice here provided, nor the finding assigning to each his share, etc., need be in writing, though it would be the better practice to put them in that form: *Talbot v. Blackledge*, 22-572; *Gantz v. Clark*, 31-254.

Therefore, *held*, that a party at whose house the viewers met, and who was verbally notified by them of making a division, and, on being asked whether he had received notice, admitted that he had, could not object to want of a written notice. Also *held*, that where parties were verbally notified, and knew of the action and decision of the fence viewers, and such decision was reduced to writing and duly recorded, objection as to want of notice thereof could not be considered: *Talbot v. Blackledge*, 22-572.

Under a former statutory provision, *held*, that notice of a meeting of the fence viewers to determine the value of a fence erected in pursuance of their direction, not being expressly required, was not necessary: *Ibid.*

When exercising power granted to them, the proceedings of fence viewers are to be considered by the court as to all matters of form with at least the same tender and indulgent consideration which is extended to proceedings before a justice of the peace: *Ibid.*

As to necessity of notice, see note to § 2323.

The decision of the fence viewers is not conclusive as to the true division line, and in an action by one land owner against an adjoining owner to recover the proportion of the cost of building a partition fence, in accordance with the direction of the fence viewers, the defendant may show, as a defense, that the fence was not erected upon the true line: *Peschong's v. Mueller*, 50-237; and see note to preceding section.

2326. Failure to comply. 1493. If a party neglect to erect or maintain the part of fence assigned him by the fence viewers, it may be erected and maintained by the aggrieved party in the manner before provided, and he shall be entitled to double the value thereof, to be recovered as directed above. [R., § 1530; C., '51, § 899.]

2327. Repair. 1494. All partition fences shall be kept in good repair throughout the year, unless the owners on both sides otherwise agree. [R., § 1531; C., '51, § 900.]

2328. Who required to maintain. 1495; 22 G. A., ch. 95, § 1. No person not wishing his land inclosed and not occupying nor using it otherwise than in common, shall be compelled to contribute to erect or maintain any fence between him and an adjacent owner; but when he incloses, cultivates or uses his land otherwise than in common, he shall contribute to the partition fences as in this chapter provided. [R., § 1532; C., '51, § 901.]

In counties where a herd law is in force a party desiring to use his ground for purposes not requiring a fence in such county, for instance, for raising crops alone, cannot be compelled to contribute to the erection of a partition fence between his land and that of an owner who desires to use his premises for purposes requiring fence, as, for instance, raising

stock; and this is true notwithstanding the provision of § 2341: *Syas v. Peck*, 58-256.

Land is to be deemed as not used in common where the use is such that means must be taken to preserve the crops. Where there is no regulation prohibiting stock from running at large, the party desiring to use his land for the raising of crops which must be protected from such stock must contribute to a partition fence. Where it did not appear that stock was not prohibited from running at large, *held*, that such fact would not be presumed for the purpose of establishing error in the judgment below: *Hewit v. Jewell*, 59-37.

2329. Division of land inclosed in common. 1496. When lands owned in severalty have been inclosed in common without a partition fence, and one of the owners is desirous to occupy his in severalty, and the other refuses or neglects to divide the line where the fence should be built or build a sufficient fence on his part of the line when divided, the party desiring it may have the same divided and assigned by the fence viewers, who may, in writing, assign a reasonable time, having regard for the season of the year for making the fence, and if either party neglect to comply with the decisions of the viewers, the other, after making his own part, may make the other part and recover as directed above. [R., § 1533; C., '51, § 902.]

Adjoining owners cannot be considered as occupying their premises in severalty, within the meaning of the statute, unless there be a partition fence of such character that the proprietor is able to keep his stock upon his own premises. Therefore, *held*, that a hedge which had not attained sufficient perfection to prevent stock from passing through it did not constitute a partition fence, and the owners were therefore holding in common within the meaning of the statute: *Miner v. Bennett*, 45-635.

Where one of the owners of adjacent property inclosed in common intentionally puts his animals into the common inclosure, by which the property of the other owner is injured, he is liable therefor, and it is immaterial whether the fence inclosing the common inclosure was a lawful fence or not: *Broadwell v. Wilcox*, 22-568.

One who purposely turns his cattle upon his land, from which they go upon the land of another, inclosed in common, and do damage, is liable, though there was no intention that they should go upon his neighbor's land. And where the land trespassed upon is inclosed in common with that of the owner of the cattle, without partition fence, by agreement, the liability is the same as though their lands were separated by a lawful partition fence. The agreement stands as and for the fence: *Winters v. Jacobs*, 29-115.

2330. Throwing open. 1497. In the case mentioned in the preceding section, when one of the owners desires to throw open any portion of his field not less than twenty feet in width, and leave it uninclosed to be used in common by the public, he shall first give the other party six months' notice thereof. [R., § 1534; C., '51, § 903.]

When a person incloses land adjoining the inclosure of another, and, before any division of the fence separating them has been made, desires to throw open his field as provided in this section, it would seem that he might do so at pleasure and without notice: *Miner v. Bennett*, 45-635.

2331. Payment for fence when used. 1498. When land which has lain uninclosed is inclosed, the owner thereof shall pay for one-half of each partition fence between his lands and the adjoining lands, the value to be ascertained by the fence viewers, and if he neglect for thirty days after notice and demand to pay the same, the other party may recover as before provided; or he may, at his election, rebuild and make half of the fence, and if he neglect so to do for two months after making such election, he shall be liable as above provided. [R., § 1535; C., '51, § 904.]

2332. Division recorded. 1499. When a division of fence between the owners of improved lands may have been made, either by fence viewers, or by agreement in writing, recorded in the office of the clerk of the township where the lands are, the owners and their heirs and assigns shall be bound thereby, and shall support them accordingly, but if any desire to lay his lands in common, and not improve them adjoining the fence divided as above, the proceedings shall be as directed in the case where lands owned in severalty have been inclosed in common without a partition fence. [R., § 1536; C., '51, § 905.]

If parties use a fence as a partition fence between their farms, it is wholly immaterial whether it is on the exact boundary line, so far as the obligation to maintain the fence or

contribute to its construction is concerned: *Card v. Dale*, 67–552.

One of the adjacent proprietors cannot evade the law or defeat it by purposely making his fence a few feet from instead of upon the dividing line: *Talbot v. Blacklege*, 22–572.

Where defendant in inclosing his premises left a private way entirely on his own land, next to his neighbor's, *held*, that he could not be required, in addition to fencing such right of way over the remainder of his own land, to construct his share of the partition fence between such right of way and his neighbor's land: *Bland v. Hixenbaugh*, 39–532.

A party who fences across a public alley in a village, separating his lot from his neighbor's, so as to make use of his neighbor's fence, does not thereby make such fence a partition fence nor render himself liable to pay for a share thereof: *Anderson v. Cox*, 54–578.

An assignment made by the fence viewers under § 2325 is binding upon the parties thereto without being recorded: *Gantz v. Clark*, 31–254.

The agreement here referred to is one between the owners as to the amount of fence each shall maintain; and *held*, that an agreement that there should be a lane and no partition fences need not be in writing: *Bills v. Belknap*, 38–225.

See note to § 2330.

2333. Definition of "owner" and "fence viewers." 1500. In the provisions of this chapter, the term "owner" shall apply to the occupant or tenant when the owner does not reside in the county, but these proceedings will not bind the owner unless notified. The term "fence viewers" means the fence viewers of the township, in which the division line in controversy is, and if that line is between two townships, and both parties live in the same, then it means the viewers of that township, but if the parties live in different townships, one viewer at least shall be taken from that of the party complained against. [R., § 1537; C., '51, § 906.]

2334. Fence on another's land. 1501. When a person has made a fence or other improvement on an inclosure, which, on afterward making division lines is found to be on land of another, and the same has occurred through mistake, such first person may enter upon the land of the other and remove his fence or other improvement and material within six months after such line has been run, upon his first paying, or offering to pay, the other party for any damage to the soil which may be occasioned thereby, and when the parties cannot agree as to the damages the fence viewers may determine them as in other cases. [R., § 1538; C., '51, § 907.]

2335. Payment. 1502. But such fence or other improvement, except substantial buildings, shall not be removed if they were made or taken from the land on which they lie, until the party pays the owner the value of the timber, to be ascertained by the fence viewers, nor shall a fence be removed at a time when the removal will throw open or expose the crop of the other party, but it shall be removed in a reasonable time after the crop is secured, although the above six months have passed. [R., § 1539; C., '51, § 908.]

2336. Disputes; fence viewers to determine. 1503. When any question arises between parties, other than those above stated, concerning their rights in fences, or their duties in relation to building or supporting or removing them, such question may be determined by the fence viewers upon the principles of this chapter. [R., § 1540; C., '51, § 909.]

Where the parties have agreed to maintain a certain kind of fence the trustees may determine whether such agreement has been performed, and decide as to time and manner of performance: *Huber v. Wilkinson*, 46–458.

2337. Lines; fence on. 1504. A person building a fence, may lay the same upon the line between him and the adjacent owners, so that the fence may be partly on one side and partly on the other, and the owner shall have the same right to remove it as if it were wholly on his own land. [R., § 1541; C., '51, § 910.]

2338. Same. 1505. The foregoing provisions concerning partition fences shall apply to a fence standing wholly upon one side of the division line. [R., § 1542; C., '51, § 911.]

2339. Other proceedings. 1506. The foregoing provisions of this chapter do not bar any other legal proceedings for the determination of the title to

land, or the dividing line between contending owners, nor do they preclude agreements by the parties. [R., § 1543; C., '51, § 912.]

The agreements here referred to need not necessarily be in writing. It was not so intended by § 2332: *Bills v. Belknap*, 38–225.

The proceedings of the fence viewers do not bar other proceedings which involve division lines: *Peschongs v. Mueller*, 50–237.

2340. Lawful fence defined. 1507; 16 G. A., ch. 101; 17 G. A., ch. 124; 18 G. A., ch. 47. A fence made of three rails of good substantial material, or three boards not less than six inches wide, and three-quarters of an inch thick, such rails or boards to be fastened in or to good substantial posts, not more than ten feet apart, where rails are used, and not more than eight feet apart where boards are used, wire either wholly or in part, substantially built and kept in good repair, or any other kind of fence, which, in the opinion of the fence viewers shall be equivalent thereto, shall be declared a lawful fence; *provided*, that the lowest or bottom rail, wire, or board shall not be more than twenty nor less than sixteen inches from the ground, and that such fence shall be fifty-four inches in height, except that a barbed wire fence may consist of three barbed wires, or of four wires, two of which shall be barbed; such fence in either case to have not less than thirty-six iron barbs of two points each, [or] twenty-six iron barbs of four points each on each wire to the rod, the wires to be firmly fastened to posts not more than two rods apart, with two stays between the posts, or with posts not more than one rod apart without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height, and the bottom wire not more than twenty nor less than sixteen inches from the ground; *provided further*, that all partition fences may be made tight at the expense of the party desiring it, and such party may take from such fence the same material by him added thereto whenever he may elect; and *provided further*, that when the owner or occupants of adjoining land use the same for the purpose of pasturing swine or sheep, each of said owners or occupants shall keep their respective share of the partition fence sufficiently tight to restrain such swine or sheep. [R., § 1545.]

A ditch, a hedge, a trench, a wall, a trestle or the like may be held to be in fact a lawful fence: *Howard v. Chicago & N. W. R. Co.*, 37–414.

The evidence of fence viewers is competent in regard to a matter upon which they are authorized to form an opinion: *Phillips v. Oystee*, 39–257.

Rev., § 1544, construed in regard to height there required: *Ibid.*

There is no obligation as to the public resting upon the owners of growing crops to fence them; and in an action by the owner of an ox which had broken through an insufficient fence into a cornfield, and died from the effects of eating the corn, brought against the owner of the field for damages, *held*, that defendant was not liable: *Herold v. Meyers*, 20–378.

As to obligation to fence generally, see notes to § 2251.

2341. Where stock is restrained. 1508. All the provisions of this chapter in relation to partition fences, shall be alike applicable to counties or townships having restrained, or which may restrain, stock from running at large. [14 G. A., ch. 128.]

Applied: *Duffees v. Judd*, 48–253.

This section does not prevent the rule as to partition fences being different in counties where stock is prohibited from running at large from what it is in other counties: See note to § 2328.

2342. 22 G. A., ch. 95, § 2. Section fifteen hundred and eight of the code of 1873 [§ 2341], is hereby amended by adding the following, to wit: and section fourteen hundred and ninety-five of the code of 1873 [§ 2328], and all parts thereof shall be so construed in counties where stock is restrained from running at large as in counties where stock is not so restrained: *provided* that the provisions of this act shall not apply to counties having a population of less than twelve thousand inhabitants according to the census of 1885.

DIVISION HEDGES.

2343. Fence beyond division line. 16 G. A., ch. 106, § 1. If any person shall desire to plant or make a hedge fence on any line separating his

lands, or inclosures from the lands, or inclosures of any other person, or persons, he shall be allowed to make or build a fence sufficient to protect the hedge and set the same five feet beyond the line on the adjoining lands and keep the same there, not more than five years, and free from weeds, and then he shall be allowed to remove the same, and during which time he shall be permitted to cultivate the land thus inclosed for the benefit of the hedge; *provided*, he shall enter upon the cultivation of said hedge within twelve months from the time said fence is removed on the adjoining land.

2344. Payment for hedge. 16 G. A., ch. 106, § 2. When any person builds a hedge on the entire line between his own and uninclosed lands, when said lands are inclosed the owner thereof shall pay for one-half of said hedge the value to be ascertained by the fence viewers, and the manner of proceeding in this respect shall conform to the provisions of the law now in force in relation to the ascertainment of the value of partition fences with like remedies; the maker of said hedge to select his own half thereof; *provided*, this act shall not apply to town lots.

The language of this statute is not to be so construed as to defeat recovery by a party on the ground that on some point on his line a hedge could not be grown for a short distance: *McKeever v. Jenks*, 59–300.

CHAPTER 5.

OF LOST GOODS.

2345. Taking up rafts, logs, and lumber. 1509. If any person shall hereafter stop or take up any raft of logs, or part thereof, or any logs suitable for making lumber, or hewn timber or sawed lumber, found adrift on any water-course within the limits or upon the boundaries of this state, such person, within five days thereafter, provided the same shall not have been previously restored to the owner, shall go before some justice of the peace or notary public of the county in which the same was taken up, and make affidavit in writing, setting forth an exact description of the articles found, and stating when and where the same were found, the number of logs or other pieces, and the marks and brands thereon, and that the same have not been altered or defaced since the taking up by him or by any other person to his knowledge. And such justice of the peace or notary public, within five days thereafter, shall transmit such affidavit to the county auditor of said county, and the said auditor shall thereupon file the same in his office, and enter in his estray book the description of the said property, the time and place, when and where, and the name and residence of the person by whom the same was taken up, and the said auditor shall also publish a notice thereof for three weeks successively in some newspaper printed in the county. [14 G. A., ch. 20, §§ 1, 5.]

2346. Disposition of property unclaimed. 1510. In all cases where the value of the articles so taken up shall not exceed five dollars, and no person shall appear to claim and prove the same within three months after the publication of such notice, then the property in the same shall vest in the person taking them up; but if the value thereof shall exceed five dollars, and the same be not claimed or proven within six months after such publication, then the finder shall deliver them to the sheriff of said county, and thereupon the same proceedings shall be had, and the same disposition be made of the proceeds arising from the sale thereof, as is provided for in section fifteen hundred and thirteen of this chapter [§ 2349] in relation to boats, vessels, etc., the value of which exceeds twenty dollars. [Same, §§ 2, 5.]

2347. Compensation for. 1511. As a reward for the taking up of any such boards, timber, logs, rafts of logs, or any part thereof, there shall be paid by the owner to the person taking up the same, for each log, not exceeding ten, twenty-five cents; for each log exceeding ten and not exceeding fifty, twenty cents; and for sawed lumber, fifty cents per thousand feet. [Same, §§ 3, 5.]

2348. Vessels and water-crafts. 1512. If any person shall stop or take up any vessel or water-craft found adrift within the limits or upon the boundaries of this state, of the value of five dollars or upwards, including her cargo, tackle, rigging, and other appendages, such person, within five days thereafter, provided the same shall not have been previously proven and restored to the owner, shall go before some justice of the peace in the township where the craft or vessel is found of the proper county, and make affidavit in writing, setting forth the exact description of such vessel or water-craft; where and when the same was found; whether any, and if so, what cargo, tackle, rigging, or other appendages, were found on board or attached thereto; and that the same has not been altered or defaced, either in the whole or in part, since the taking up, either by him, or by any other person, to his knowledge; and the said justice shall thereupon issue his warrant, directed to some constable of his township or district, commanding him to summon three respectable householders of the neighborhood, who shall proceed without delay, to examine and appraise such boat or vessel, her cargo, or tackle, rigging, and all other appendages as aforesaid, and to make report thereof, under their hands, to the justice issuing such warrant, who shall enter the same, together with the affidavit of the taker-up at large in his estray book; and, within five days, shall transmit a certified copy thereof to the county auditor of the proper county, to be by him recorded in his estray book and filed in his office. [R., § 1506.]

2349. Advertisement; title vests. 1513. In all cases where the appraisement of any such boat or vessel, including her cargo, tackle, rigging, or other appendages, shall not exceed the sum of twenty dollars, the taker-up shall advertise the same on the door of the court-house and in three other of the most public places in the county within five days after the appraisement, and if no person shall appear to claim and prove such boat or vessel within six months from the time of taking up, the property in the same shall vest in the taker-up; but if the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of reception of the justice's certificate at his office, shall cause an advertisement to be set up on the door of the court-house, and at three other of the most public places of the county; and, also, a notice thereof to be published for three weeks successively in some public newspaper printed in this state, and if the said boat or vessel be not claimed or proven within ninety days after the advertisement of the same as aforesaid, the taker-up shall deliver the same to the sheriff of the county wherein such boat or vessel may have been taken up, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the cost and other necessary expenses, shall be paid into the county treasury. [R., § 1507.]

2350. Money; bank-notes. 1514. If any person shall find any lost goods, money, bank-notes, or other things of any description whatever, of the value of five dollars and upwards, such person shall inform the owner thereof, if known, and make restitution of the same without any compensation whatever, except the same be voluntarily given; but if the owner be unknown, such person shall, within five days after such finding, take such goods, money, bank-notes, or other things, before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place, when and where the same was found, and that no alteration had been made

in the appearance thereof since the finding of the same; whereupon the justice shall enter a description of the property, and the value thereof, as near as he can ascertain, in his estray book, together with the affidavit of the finder; and shall, also, within five days transmit to the county auditor a certified copy thereof, to be by him recorded in his estray book and filed in his office. [R., § 1508.]

2351. Advertisement; title vests. 1515. In all cases where such lost goods, money, bank-notes, or other things, shall not exceed the sum of ten dollars in value, the finder shall advertise the same on the door of the court-house, and three other of the most public places in the county; and if no person shall appear to claim and prove such money, goods, bank-notes, or other things, within twelve months from the time of such advertisement, the right to such property when the same shall consist in goods, money, or bank-notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten dollars, the county auditor, within five days from the receipt of the justice's certificate, shall cause an advertisement to be set upon the court-house door, and in three of the most public places in the county; and also a notice thereof to be published for three weeks successively in some public newspaper printed in this state; and if the said goods, money, bank-notes, or other things, be not reclaimed within six months after the finding, the finder, if the same shall consist in money or bank-notes, shall deliver the same to the county treasurer, after deducting the necessary expenses hereinafter provided for; if in bills, notes of hand, patents, deeds, mortgages, or other instruments of value, the same shall be delivered to the county auditor, to be preserved in his office for the benefit of the owner, whenever legal application shall be made therefor; if in goods, or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of such sale; and the proceeds of all such sales, after deducting the costs and other expenses, shall be paid into the county treasury. [R., § 1509.]

2352. Same. 1516. In all cases where any vessel or water-craft shall be taken up, or any goods, money, or bank-notes shall be found as aforesaid, which shall be of a value less than five dollars, the finder shall advertise the same by setting up three advertisements in the most public places in the neighborhood; but in such cases he shall keep and preserve the same in his possession, and shall make restitution thereof to the owner, without fee or reward, except the same be given voluntarily, whenever legal application be made for the same, provided it shall be done in three months from such taking up or finding; but if no owner shall appear to claim such property within the time aforesaid, the exclusive right to the same shall be vested in the finder or taker-up. [R., § 1510.]

2353. Ownership settled. 1517. In any case where a claim is made to property found or taken up, and the ownership of the property cannot be agreed upon by the finder and claimant, they may make a case before any justice of the peace, who may hear and adjudicate it, and if either of them refuses to make such case, the other may make an affidavit of the facts which have previously occurred, and the claimant shall also verify his claim in his affidavit, and the justice may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law. [R., § 1504.]

2354. Compensation. 1518. As a reward for the taking up of all boats and other vessels, and for finding of lost goods, money, bank-notes, and other things, before restitution of the property or proceeds thereof shall be made, the finder shall be entitled to ten per cent. upon the value thereof, in addition

to which said allowance the owner shall also be required to pay to the taker-up, or finder, all such costs and charges as may have been paid by him for services rendered as aforesaid, including the cost of publication, together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the taker-up, or finder, and the owner cannot agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some justice of the peace of the proper county, whose decision, when made, shall be binding and conclusive on all parties. [R., § 1514.]

2355. Proceeds. 1519. The net proceeds of all sales made by the sheriff, and all money or bank-notes paid over to the county treasurer, as directed in this chapter, shall remain in the hands of the county treasurer in trust for the owner, if any such shall apply in one year from the time the same shall have been paid over; but if no owner shall appear within the time aforesaid, the said money shall be considered as forfeited, and the claim of the owner thereto forever barred, in which event the money shall remain in the county treasury for the use of common schools in said county. [R., § 1516.]

2356. Taker-up not accountable. 1520. If the taker-up of any watercraft, raft, logs, timber or boards, or finder of lost goods, bank-notes, or other things, shall be faithful in taking care of the same, and if any unavoidable accident shall happen thereto, without the fault or neglect of the finder or taker-up before the owner shall have an opportunity of reclaiming the same, such taker-up or finder shall not be accountable therefor; *provided*, that in cases of accident as aforesaid, the taker-up or finder, within ten days thereafter, shall certify the same under his hand to the county auditor, who shall make an entry thereof in his estray book. [R., § 1517; 14 G. A., ch. 20, § 4.]

The sole object of this notice to the auditor is to advise the owner of the property, when examining the estray book, of the loss or accident, and when he has actual knowledge of the loss without such notice there is no necessity for it: *Howes v. Carver*, 3-257.

2357. Penalty for selling. 1521. If any person shall trade, sell, or loan, out of the limits of this state, any such property as may at any time be taken up or found as aforesaid before he shall be vested with the right to the same, agreeably to the foregoing provisions, he shall forfeit and pay double the value thereof, to be recovered by any person who shall sue for the same, in any court, or before any justice of the peace having jurisdiction thereof; one-half thereof shall go to the person suing, and the other half to the county aforesaid. [R., § 1518; 14 G. A., ch. 20, § 4.]

2358. Penalty for failure to comply. 1522. If any person shall take up any boat or vessel, or any raft, logs, timber or boards, or shall find any goods, money, bank-notes, or other things, and shall fail to comply with the requisitions of this chapter, every such person so offending shall forfeit and pay the sum of twenty dollars, to be recovered before any justice of the peace by any person who will sue for the same, one-half for the use of the person suing, and the other half to be deposited in the county treasury for the use of common schools; but nothing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he may sustain. [R., § 1519; 14 G. A., ch. 20, § 4.]

A failure to take the steps here contemplated will not render the finder guilty of larceny under § 5213, where the owner was not known at the time of the taking: *State v. Dean*, 49-73.

CHAPTER 6.

OF INTOXICATING LIQUORS.

2359. Selling or keeping for sale prohibited. 1523. No person shall manufacture or sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this state contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided. [R., § 1559.]

Statute constitutional: The provisions of the Code of '51 prohibiting the sale of intoxicating liquors by the glass, *held* constitutional: *Zumhoff v. State*, 4 G. Gr., 526.

The provisions of the prohibitory liquor law are not in conflict with the constitution nor laws of the state nor the United States: *Santo v. State*, 2-165; *State v. Carney*, 20-82; *State v. Baughman*, 20-497.

As to the effect of United States internal revenue license, see notes to § 2400.

The statute prohibiting the sale of intoxicating liquors cannot be said to deprive the owner of his property therein without compensation in violation of constitutional guaranties, unless such property was owned by him prior to the prohibitory act of 1855: *McLane v. Leicht*, 69-401.

The power of the legislature to enact laws for the suppression of the general traffic in intoxicating liquors within the state has been recognized and affirmed by this court for more than twenty-five years. It has uniformly been held that the state, in the exercise of its police power, might regulate the traffic, or prohibit it entirely; and when the power to prohibit the traffic is recognized, the power to enact whatever laws may be necessary to make the prohibition effectual follows necessarily: *McLane v. Bonn*, 70-752.

Laws regulating the sale of intoxicating liquors are regarded as police regulations, and the state may in its discretion prohibit the sale of one kind of liquor and allow the sale of another kind, and the fact that it prohibits the sale of wine from foreign grapes, while permitting the sale of native wine, will not render the legislation unconstitutional as an improper regulation of interstate commerce: *State v. Stucker*, 58-496.

The restrictions as to the sale of intoxicating liquors were adopted not for the purpose of securing an undue advantage to the citizens of the state, but for the purpose of preventing violations of the prohibitory laws of the state, and although, in effect, the citizens of other states are debarred from selling in Iowa liquors to be resold for legal purposes, this is but an incidental result of a valid exercise of police power by the state, and no provision of the federal constitution is thereby violated: *Kohn v. Melcher*, 29 Fed. Rep., 433.

Where the evidence does not show that the prosecution of the defendant is for illegal sales of wine or beer, the objection that the statute is unconstitutional on the ground that it provides for the taking of private property without due compensation does not arise: *State v. Jordan*, 72-377.

The prohibitory law as amended so as to cover manufacture and sale of beer which was previously legal is constitutional. (Following *Mugler v. Kansas*, 123 U. S., 623): *Kaufman v. Dostal*, 73-691.

What selling or keeping prohibited: A sale of liquor to be used as a beverage is a violation of law, regardless of the quantity to be used and the extent to which it is to be diluted. Therefore, *held*, that the sale of beer by one having a permit for use in manufacturing a beverage not intoxicating was illegal: *State v. Yager*, 72-421.

When liquors are so compounded with other substances as to lose their characteristics as intoxicating liquors, and are no longer desirable for use as a stimulating beverage their sale is not prohibited; but if, notwithstanding other ingredients have been mixed therewith, they retain their character and are capable of use as a beverage, they fall under the ban of the law. The question is one for the jury: *State v. Leffer*, 38-422.

As to what are deemed intoxicating liquors, see notes to § 2416.

To authorize the forfeiture of liquors it must be shown that they are kept with intent to sell in violation of law: *State v. Harris*, 36-136.

The keeping of intoxicating liquors with no intent to sell within the state in violation of law is not forbidden. In the absence of such intention the possession is lawful, and will be protected: *Niles v. Fries*, 35-41.

This section prohibits the manufacture and sale of intoxicating liquors except as permitted or authorized by statute, and manufacture for exportation from the state not being permitted or authorized, such manufacturing is illegal even though the manufacturer holds a permit to manufacture for lawful purposes: *Pearson v. International Distillery*, 72-318.

Buyer not punished: The statutes punishing the illegal sale of intoxicating liquor are applicable to the seller and not to the buyer of such liquors, and the buyer is not guilty of a crime as accessory to the sale in such sense that he may be excused from testifying as to his purchase of such liquor on the ground that such testimony would tend to criminate him: *Wakeman v. Chambers*, 69-169.

One who buys intoxicating liquor from a person illegally selling the same does not become an accomplice in the crime of the illegal sale, and therefore the speaking of words charging a person with such purchase does not constitute slander actionable *per se: Sterling v. Jugenheimer*, 66–210.

Property in intoxicating liquors: While the commerce in intoxicating liquor as an article of beverage is unlawful, its character as property is not thereby destroyed; and where such liquor was seized on execution for the debt of one not its owner, *held*, that the owner might recover it by replevin, although it was kept for sale in violation of the statute: *Monty v. Arneson*, 25–383.

That intoxicating liquors are held for an unlawful purpose is no answer to an indictment for stealing the same: *State v. May*, 20–305.

That liquors are unlawfully kept is not a defense to an action of trespass for destroying them: *Turner v. Hitchcock*, 20–310.

Where liquor had been seized by an officer under an information which had subsequently been held defective and a return of the liquor ordered, *held*, that in an action by the owner against such officer to recover damages for a failure to return the property as so ordered, the plaintiff could not recover without proving that he owned and kept the liquor with a lawful intent: *Walker v. Shook*, 49–264.

In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed by it, it is necessary for plaintiff to prove that he owned or possessed such liquors with lawful intent. (Overruling *Bowen v. Hale*, 4–430): *Sommer v. Cate*, 22–585.

Intoxicating liquors cannot be recovered by the owner unless he shows that they were in his possession with lawful intent, and that he was illegally deprived of them: *Funk v. Israel*, 5–438, 452.

The keeping of intoxicating liquors with no intent to sell within the state in violation of law is not forbidden. In the absence of such intention the possession is lawful, and will be protected. And it is immaterial that they were bought of one not authorized to sell: *Niles v. Fries*, 35–41.

Any person has the right to own and keep liquors unless he owns and keeps them with intent to sell them without lawful authority: *Wakeman v. Chambers*, 69–169.

[Sec. 1524 is repealed by 20 G. A., ch. 71, § 20.]

2360. Manufacture; sales under permits; renewal. 22 G. A., ch. 71, § 1. After this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act. Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue unless revoked according to law or until application for renewal is disposed of, if such application is made before the year expires. *Provided*, that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have during the preceding year complied with the provisions of this act and to execute a new bond as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits.

Under Code, § 1524, now repealed, it was held not necessary in a prosecution for using a building for the purpose of illegally selling, etc., for the state to negative the exceptions, and they must be proved by way of defense if relied on: *State v. Becker*, 30–438.

A manufacturer as therein specified had no right to sell without a permit: *Becker v. Betten*, 39–668.

That section did not authorize a person holding a manufacturer's permit to manufacture for exportation outside of the state, and such manufacture was unlawful: *Pearson v. International Distillery*, 72–348.

2361. Penalty for manufacturing. 1525; 20 G. A., ch. 143, § 1. Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense, shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months, and on his second and every subsequent conviction for said offense, he shall pay a fine of not less than five hundred dollars nor more than one thousand dollars and costs of prosecution, and be imprisoned in the county jail one year. [R., § 1561.]

[Sections 1526 to 1538, inclusive, are repealed by 22 G. A., ch. 71, § 20.]

2362. Application for permit. 22 G. A., ch. 71, § 2. Notice of an application for a permit or renewal thereof must be published for three consecutive weeks in a newspaper regularly published and printed in the English language and of general circulation in the city or town where the applicant proposes to keep and sell intoxicating liquors or if there be no newspaper regularly published in such city or town, such publication shall be made in one of the official papers of the county, the last of which publications shall be not less than ten days nor more than twenty days before the first day of the term; and state the name of applicant; the purpose of the application; the particular location or the place where the applicant proposes to keep and sell liquors and that the petition provided for in the next section will be on file in the clerk's office at least ten days before the first day of the term naming it, when the application will be made, and a copy thereof shall be served personally on the county attorney in the same manner and time as required for service of original notices in the district court.

2363. What to contain. 22 G. A., ch. 71, § 3. Applications for permits shall be made by petition signed and sworn to by the applicant and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term, which petition shall state the applicant's name; place of residence; in what business he is then engaged, and in what business he has been engaged for two years previous to filing petition; the place particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the state of Iowa; that he is a registered pharmacist and now is, and for the last six months has been lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage and has not within the last two years next preceding his application, been directly or indirectly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only.

The provision of a former statute that a permit should be granted only to a person of good moral character was held not unconstitutional: *In re Ruth*, 32–250.

2364. Bond. 22 G. A., ch. 71, § 4. This permit or renewal thereof shall issue only on condition that the applicant shall execute to the state of Iowa, a bond in the penal sum of one thousand dollars with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of Iowa now or hereafter in force in relation to the sale of intoxicating liquors; that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the term for which said permit or renewal thereof is granted. Said bond shall be for the use and benefit of any person or persons who may be injured or damaged by reason of any violation of the law relating to intoxicating liquors purchased, sold or given away during the term for which said permit or renewal thereof is granted. The said bond shall be deposited with the county auditor, and suit shall be brought thereon at any time by the county attorney, or any person for whose benefit the same is given, and in case the conditions thereof or any of them shall be violated, the principal and sureties therein, shall also be jointly and severally liable for all civil damages, costs and judgments that may be obtained against the principal in any civil action brought by a wife, child, parent, guardian, em-

ployer or other person, under the provisions of sections fifteen hundred and fifty-six, fifteen hundred and fifty-seven and fifteen hundred and fifty-eight of the code of Iowa [§§ 2417–2419], as the same is amended and now in force, and section twelve, chapter sixty-six, acts of the twenty-first general assembly of the state of Iowa [§ 2419]. All other money collected for breaches of such bond shall go to the school fund of the county. Said bond shall be approved by the clerk of the district court under the rules and laws applicable to the approval of official bonds.

In an action on such bond under former provisions, *held*, that the assignment of a breach thereof by selling intoxicating liquors to divers persons whose names were unknown, to be by them used as a beverage, etc., was sufficient: *Jones County v. Sales*, 25–25.

In case of a sale for purposes not specified in the permit, the defendant is not only liable on his bond, but also to a criminal prosecution for selling in violation of law: *State v. Adams*, 20–486; *State v. Stutz*, 20–488.

Under the provisions of this Code it was held that action on the bond might be brought by any citizen of the county: *State ex rel. v. Martland*, 71–543.

2365. Petition by freeholders; remonstrance. 22 G. A., ch. 71, § 5. At least ten days before the first day of the term the applicant shall file with the clerk in support of the application, a petition signed by one-third of the freehold voters of the township, incorporated town, city or ward in which the permit is to be used, and each person aforesaid shall sign said petition by his own true name and signature, and state that each, before signing the same, has read said petition and understands the contents and meaning thereof, and is well and personally acquainted with the applicant, that the applicant is a resident of the county, is over twenty-one years of age, is of good moral character, reputed to be law-abiding, and has not been found guilty of violating the laws relating to intoxicating liquors in any proceeding at law or in equity within the last two years next preceding the date of his application as far as the petitioner has knowledge or information and is not in the habit of using intoxicating liquors as a beverage; and that the permit prayed for is necessary for the convenience and accommodation of the people of said locality and that they believe that the applicant is worthy of confidence and will observe the laws governing permitted persons in conducting the dispensation of liquors. On or before nine o'clock, A. M., of the first day of the term any resident of the county may file a remonstrance against granting the permit applied for, which must show the residence, sex and age of the person signing it and the grounds of objection to granting the permit.

2366. Hearing; resistance. 22 G. A., ch. 71, § 6. No application for a permit or renewal thereof shall be considered or acted upon by the court until the requisite notice has been given and petitions filed as provided by this act, and each is in form and substance such as required. On the first day of the term, having ascertained that the application is properly presented the court shall proceed to hear the application, unless objection thereto be made, in which case the court shall appoint a day during the term, but not later, when the same shall be heard; and in doing so shall consider the convenience of the court, and the interested parties and their counsel so far as the state of the business and the necessities of the case will permit. If unavoidable causes prevent a hearing during the regular time allotted to the term, the same shall be heard and disposed of in vacation by the judge as soon as practicable thereafter. The county attorney, or other counsel, or any citizen may in person or by counsel appear and resist the application, and whether resisted or objection be made or not the court shall not grant the permit until it shall first be made to appear by competent evidence that the applicant is possessed of the character and qualifications requisite, is worthy of confidence and to receive the trust and will be likely to execute the same with fidelity; and that the statements made in his application and the petition of residents are all and singular true, and, considering the population of the locality and the reasonable necessities

and convenience of the people such permit is proper. If the application is resisted the court or judge shall hear controversy upon the petitions, remonstrances and objections, and the evidence offered and grant or refuse such permit, as the public good may require. If there be more than one permit applied for in the same locality, they shall all be heard at the same time, unless for good cause otherwise directed, and the court may grant or refuse any or all of the applications as will best subserve the public interest.

Under the former statute, *held*, that any citizen of the county who appeared to resist the granting of a permit might make a showing with reference to either of the questions which the board of supervisors was required to determine in granting such permit, and might introduce evidence to negative either of the facts which the statute provided must be proven before the permit should be granted. He, in effect, became a party to the proceeding and had sufficient interest in the matter to authorize him to institute a proceeding by *certiorari* to have any errors and irregularities by the board in granting the permit reviewed: *Darling v. Boesch*, 67–702.

2367. Oath of applicant; permit issued. 22 G. A., ch. 71, § 7. If the application for the permit or renewal thereof is granted it shall not issue until the applicant shall make and subscribe an oath before the clerk, which shall be indorsed upon the bond to the effect and tenor following:

"I, —— —— do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep and sell intoxicating liquors. I will not sell, give or furnish to any person any intoxicating liquors otherwise than as provided by law, and, especially, I will not sell or furnish any intoxicating liquors to any person who is not known to me personally, or duly identified: nor to any minor, intoxicated person or persons who are in the habit of becoming intoxicated: and I will make true, full and accurate returns of all certificates and requests made to or received by me as required by law; and said returns shall show every sale and delivery of such liquors, made by or for me during the month embraced therein, and the true signature to every request received and granted: and such returns shall show all the intoxicating liquors sold or delivered to any and every person as returned."

Upon taking said oath and filing bond as herein before provided, the clerk shall issue to him a permit authorizing him to keep and sell intoxicating liquors as in this act provided: and every permit so granted, shall specify the building giving street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force which in no case shall exceed twelve months.

Liquors held for the purpose of lawful sale under a permit are not subject to seizure, and the possession thereof may be lawful although they be bought of one not authorized to sell: *Niles v. Fries*, 35–41.

An indictment for unlawful sale need not negative the authority of defendant to sell under a permit. Such authority must be pleaded in defense: *State v. Beneke*, 9–203; *State v. Collins*, 11–141.

Under former provisions a person having a permit to sell was only bound to exercise due diligence and act in good faith in determining whether the person buying intended to use the liquors for a lawful purpose: *Taylor v. Pickett*, 52–467; *State v. Blair*, 72–591.

Selling without a permit may be punished both under § 2381 and § 2384: *State v. Waynick*, 45–516.

The legislature may change a law under which a permit has been granted so as to impose other regulations upon the holder of such permit. A permit is not a vested right: *State v. Mullenhoff*, 74–271.

2368. Revocation. 22 G. A., ch. 71, § 8. Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right but of confidence, and may be revoked upon sufficient showing, by order of the court or judge thereof. Complaint may be presented at any time to the district court, or one of the judges thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted, and a copy of such complaint shall, with a notice in writing of the time and place of hearing be served on the accused, five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the

same, the court or judge shall proceed without delay, unless continued for cause to hear and determine the controversy, but if continued or appealed at the instance of the permit holder, his permit to buy and sell liquors may in the discretion of the court be suspended pending the controversy. The complainant and accused may be heard in person or by counsel or both, and submit such proofs as may be offered by the parties; and if it shall appear upon such hearing, that the accused has in any way abused the trust or so conducted the business under the permit as to acquire notoriety and public repute that liquors are sold by the accused or his employees in violation of law, or if it shall appear that any liquor has been sold or dispensed unlawfully or has been unlawfully obtained at said place from the holder of the permit or any employee assisting therein, or that he has in any proceeding, civil or criminal, since receiving his permit, been adjudged guilty of violating any of the provisions of this act or the acts for the suppression of intemperance, the court or judge shall by order revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, if heard by the judge and the order entered of record as if made in court and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating this act or the act for the suppression of intemperance and amendments thereto, by unlawfully manufacturing, selling, giving away or unlawfully keeping with intent to sell intoxicating liquors, such adjudication may in the discretion of the commissioners of pharmacy work a forfeiture of his certificate of registration, and the commissioners of pharmacy shall, upon receipt of a transcript of a judgment or order authenticated by the clerk of the court showing a second and subsequent violation, cancel his registration. It shall be the duty of the clerk to forward to the commissioners of pharmacy such transcripts without charge therefor as soon as practicable after final judgment or order.

In a proceeding to revoke a permit, defendant is not entitled to trial by jury. The permit is not property in such sense that by its revocation the party is deprived of his property without due process of law: *State v. Schmidtz*, 65-556.

The proceeding to revoke a permit is not a criminal proceeding, but a special proceeding of a civil nature. The revocation, therefore, cannot be suspended by giving bail, nor by a *supersedeas* bond on appeal, for the reason that the judgment is self-executing and no process is necessary in order to carry it out. A *supersedeas* bond would, however, suspend the execution of the judgment for costs: *Ibid.*

A judgment revoking a permit, being a final order in a special proceeding affecting a substantial right, may be appealed from: *Ibid.*

2369. To whom permit granted. 22 G. A., ch. 71, § 9. Registered pharmacists who show themselves to be fit persons and who comply with all the requirements of this act may be granted permits, and in any township where there is a registered pharmacist conducting a pharmacy and no pharmacist obtains a permit, if found necessary the court may grant a permit to one discreet person in such township not a pharmacist, but having all other qualifications requisite under this act, upon like notice and proceedings as pertain to permitted pharmacists and subject to the same liabilities, duties, obligations and penalties.

2370. Records. 22 G. A., ch. 71, § 10. The clerk of the court granting the permit shall preserve as part of the records and files of his office all petitions, bonds and other papers pertaining to the granting or revocation of permits and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused the applicant shall pay the costs incurred in the case, and when granted he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons, resisting said application, and the fees for serving such subpœnas to such persons when it is shown that such witnesses were summoned maliciously or

without probable cause to believe their evidence material. A fee of one dollar and fifty cents shall be taxed for the filing of the petition and one dollar for entering the order of the court approving bond and granting said application, and witnesses shall be entitled to mileage and per diem as in other cases And fees for serving notices and subpœnas shall be the same as in other cases in the district court.

2371. Authority to purchase; certificate. 22 G. A., ch. 71, § 11. When any person holding a permit in full force desires to purchase or procure any intoxicating liquors to be kept and sold under his permit, the county auditor shall upon the written or printed application of the permit holder, signed by him, specifying the kind and quantity of liquors desired by him, issue to such holder under seal of his office a certificate authorizing him to purchase and cause to be transported from the place of purchase to his place of business described in his permit, the kind and quantity of liquors mentioned in such certificate. Said certificate shall be dated as of its true date when issued and attached to the way bill accompanying the shipment and when so attached, shall be authority for the common carrier in whose hands it may be, to transport and deliver the package or packages containing the liquors therein described and in packages therein designated according to the direction of the certificate. Upon receipt of the liquors, the certificate shall be returned to the auditor who issued the same and be canceled, filed and preserved by him in his office. No certificate so issued authorizing the purchase and transportation of any intoxicating liquors shall be used more than once or later than thirty days following its date; and such certificate shall be in the following form, to wit:

"STATE OF IOWA, }
—— County. }

"I hereby certify that —— ——, who is permitted under the laws of Iowa to buy and sell intoxicating liquors at ——, in said county of ——, is hereby authorized to purchase and ship to —— —— the following described intoxicating liquors, to wit: ——, provided such liquors are shipped in the following described packages, to wit: ——. Witness my hand and the seal of the county this —— day of ——, 18—.

—— ——, Auditor."

2372. Sales under permits. 22 G. A., ch. 71, § 12. Before selling or delivering any intoxicating liquors to any person a request must be printed or written, dated of the true date, stating the age, and residence of the signer, for whom and whose use the liquor is required, the amount and kind required, the actual purpose for which the request is made and for what use desired and his or her true name and residence, and where numbered by street and number if in a city, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage and the request shall be signed by the applicant by his own true name and signature and attested by the permit holder who receives and fills the request by his own true name and signature in his own handwriting. But the request shall be refused notwithstanding the statement made unless the permit holder has reason to believe said statement to be true, and in no case unless the permit holder filling it personally knows the person applying to be of good moral character, reliable and trustworthy, that he is not a minor, that he is not intoxicated, and that he is not in the habit of using intoxicating liquors as a beverage; or if the applicant is not so personally known to the permit holder before filling the said order or delivering the liquor he shall require identification and the statement of a reliable and trustworthy person of good character and habits known personally to him that the applicant is not a minor and is not in the habit of using intoxicating liquor as a beverage and is worthy of credit as to the truthfulness of the statements in the application and this statement shall be signed

by the witness in his own true name and handwriting stating his residence correctly. The requests shall be made upon blanks furnished by the county auditor in packages of one hundred each to the holders of the permits from time to time as the same shall be needed and shall be consecutively numbered by the auditor. The blanks shall be in two series, one for requests by persons known to the seller and one for requests by unknown applicants, identified and vouched for by a known witness both on one sheet and each request and identification shall when used be attested by the seller and such attestation shall be conclusive evidence against the permit holder that the seller did fill the order and deliver the liquor as stated therein and that the sale was made with knowledge of the habits and character of the purchaser or witness. The blanks aforesaid shall be procured by the county auditor in uniform cheap books like blank checks at the expense of the county and furnished to the holders of permits by the county auditor at actual cost and the proceeds be by said auditor paid into the county treasury, and the date of delivery shall be indorsed by the county auditor on each book and receipt taken therefor; and preserved in his office. The permit holder shall preserve the applications in the original form and book except the filling of the blanks therein until returned to the county auditor. When return thereof is made if the book be full the county auditor shall indorse thereon the date of return and file and preserve the same. If the book is not filled the auditor shall remove those filled, inclose the same in an envelope and indorse thereon the name of the permit holder, the date of return and number thereof and file and preserve the same and redeliver the book with indorsement of date thereon and statement of the number remaining therein and so on until the book is filled and return thereof made. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such permit holders.

2373. Monthly returns of sales. 22 G. A., ch. 71, § 13. On or before the tenth day of each month each permit holder shall make full returns to the county auditor of all requests filled by him and his clerks during the preceding month and accompany the same with a written or printed oath duly taken and subscribed before the county auditor or notary public, which shall be in the following form, to wit: "I, —— ——, being duly sworn on oath state that the requests for liquors herewith returned are all that were received and filled at my pharmacy (or place of business) under my permit during the month of ——, 18—; that I have carefully preserved the same and that they were filled up, signed and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required and that no liquors have been sold or dispensed under color of my permit during said month except as shown by the requests herewith returned and that I have faithfully observed and complied with the conditions of my bond and oath taken by me thereon indorsed and with all the laws relating to my duties in the premises." Every permit holder shall keep strict account of all liquors purchased or procured by him in a book kept for that purpose which shall be subject at all times to the inspection of the commissioners of pharmacy and the county attorney, any grand juror or peace officer of the county and such book shall show of whom such liquors were purchased or procured, the amount and kind of liquors purchased or procured, the date of receipt and amount sold and amount used in compounding medicines tinctures and extracts, amount on hand of each kind for each month. Such book shall be produced by the party keeping the same, to be used as evidence on the trial of any prosecution against him or against liquors alleged to have been seized from him or his house, on notice duly served that the same will be required as evidence; and at the same time he returns requests to the county auditor he shall file a statement of such account with such auditor except that the items of sales need not be embraced therein, but the aggregate amount

of each kind shall be, and such statement shall be verified before the county auditor or a notary public. All forms necessary to carry out the provisions of this act not otherwise provided for shall be as may be provided by the commissioners of pharmacy.

The provisions of Code, § 1537 (now repealed), as it originally stood, with reference to the time when the report of sales by a person having a permit should be made, were directory, and a failure to file such report at the time specified would not subject such person to the penalty provided, if it was in fact filed before action for the penalty was commenced: *Abbott v. Sartori*, 57–656.

But after the amendment of this section so as to require the return to be made on the day specified or within five days thereafter, *held*, that the provisions as to the penalty must be regarded as mandatory, and a failure to make return within the time would render a party liable for the statutory penalty: *State ex rel. v. McEntee*, 68–381; *State ex rel. v. Chamberlin*, 74–266.

Under the provisions of the Code, now repealed, *held*, that it was the duty of a pharmacist holding a permit to make returns of prescription sales as well as of others: *State ex rel. v. Chamberlin*, 74–266.

Under the provisions of the Code, failure to make reports and selling at illegal profit would not render the seller liable to punishment for illegal sales which were otherwise lawful: *State v. Von Hattschuherr*, 72–541.

2374. Punishment for illegal sales under permit. 22 G. A., ch. 71, § 14. Every permit holder or his clerk under this act, shall be subject to all the penalties, forfeitures and judgments and may be prosecuted by all the proceedings and actions, criminal and civil, and whether at law or in equity provided for or authorized by the laws now or hereafter in force for any violation of this act, and the act for the suppression of intemperance and any law regulating the sale of intoxicating liquors and by any or all of such proceedings applicable to complaints against such permit holder; and the permit shall not shield any person who abuses the trust imposed by it or violates the laws aforesaid and in case of conviction in any proceeding civil or criminal all the liquors in possession of the permit holder shall by order of the court be destroyed. On the trial of any action or proceeding against any person for manufacturing selling, giving away or keeping with intent to sell intoxicating liquors in violation of law, or for any failure to comply with the conditions or duties imposed by this act, the requests for liquors and returns made to the auditor as herein required, the general repute of the accused and his place of business and manner of conducting the same, the quantity and kinds of liquors sold or kept, purchased or disposed of, the purpose for which liquors were obtained by or from him and for which they were used, the character and habits of applicants for liquor and their general repute as to habits of sobriety or otherwise, shall be competent evidence and may be considered so far as applicable to the particular case with any other recognized, competent and material facts and circumstances bearing on the issues involved in determining the ultimate facts. In any suit, prosecution or proceeding for violations of this act or the acts for the suppression of intemperance, and acts amendatory thereof, the court may compel the production in evidence of any books or papers required by this act to be kept, and may compel any permit holder, his clerk or any person who has purchased liquors of either of them to appear and give evidence, and the claim that any such testimony or evidence will tend to criminate the person giving such evidence shall not excuse such person or witness from testifying or producing such books or papers in evidence: but such oral evidence shall not be used against such person or witness, on the trial of any criminal proceeding against him. Any number of distinct violations of this act may be charged in one indictment in different counts and all tried in the same action, the jury specifying the counts, if any, on which the defendant is found guilty.

2375. Sales to pharmacists. 22 G. A., ch. 71, § 15. Registered pharmacists, conducting pharmacies and not holding permits and manufacturers of proprietary medicines are hereby authorized to purchase of permit holders in the counties of their residence, intoxicating liquors (not including malt) for

the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. Said permit holders shall not charge such registered pharmacists over ten per cent. net profit for liquors so sold. Such purchasers shall keep a record of uses to which the same are devoted, giving the kind and quantity so used, and on or before the tenth day of each calendar month they shall make and file with the county auditor sworn reports for the preceding calendar month giving full and true statements of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the names of the permit holders of whom the same were purchased and the dates and quantities so purchased, together with an invoice of the amount of each kind still in stock and kept for such compounding. The commissioners of pharmacy are hereby empowered and directed to make further rules and regulations regarding the quantity of intoxicating liquors to be kept in stock by such pharmacists at any one time, and such further rules and regulations with respect to the purchase, use and keeping of such liquors as they may deem proper for the prevention of abuses of the trust reposed in such purchasers, and if the said registered pharmacist sell, barter, give away, exchange or in any manner dispose of said liquors, or use the same for any purpose other than authorized in this section, he shall upon conviction before any district court thereof forfeit his certificate of registration; and be liable to all the penalties, prosecutions and proceedings at law or in equity provided against persons selling without a permit, and upon any such conviction the clerk of the district court shall within ten days after said judgment or order transmit to the commissioners of pharmacy the certified record thereof, upon receipt of which the commission shall strike his name from the list of pharmacists and cancel his certificate. *Provided*, that nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under any name, form or device which may be used as a beverage and which is intoxicating in its character.

2376. Permit holders liable for sales by clerks. 22 G. A., ch. 71, § 16. A permit holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and provisions of this act, but in such case the acts of his clerks in conducting the business shall be deemed the acts of the permit holder who shall be liable therefor as if he had personally done the acts and in making returns the verification of such requests as may have been received attested and filled by a clerk must be made by such clerk and the clerk who transacted any of the business under the permit must join in the general oath required of the employer so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof his permit shall thereby be forfeited and be null and void.

2377. Permits in force. 22 G. A., ch. 71, § 17. Any person holding a permit in force when this act takes effect may continue to purchase, keep and sell intoxicating liquors according to the laws under which his permit was given until such time as a permit can be obtained under the provisions of this act but all such permits shall expire on the first day of October, 1888.

2378. Fines for violations. 22 G. A., ch. 71, § 18. If any person shall be convicted of violating any of the provisions of this act or of the acts regulating the practice of pharmacy or any acts for the suppression of intemperance or amendments thereto by reason of a prosecution by the commissioners of pharmacy all fines so imposed and collected shall be paid into the county treasury of the proper county for the use of the school fund, and the commissioners of pharmacy shall be entitled to draw from the state treasury an amount not exceeding fifty per cent. of the amount of the fines so collected

to be used solely in prosecution instituted by them for failure to comply with the provisions of this act or of the acts regulating the practice of pharmacy. And the court before whom any prosecution instituted and prosecuted by the commissioners of pharmacy shall certify to the auditor of state all cases in which they have appeared as prosecutors, either in person or by their attorney, and the amount of fines imposed and collected in such cases. And the commissioners of pharmacy shall have power to revoke the certificate of registration of pharmacists for repeated violation of this act. Said amount to be drawn from time to time upon the warrants of the state auditor which shall issue for the payment of expenses actually incurred in said prosecutions after said expenses shall have been audited by the executive council.

2379. Penalties. 22 G. A., ch. 71, § 19. If any person shall make any false or fictitious signature or sign any name other than his or her own to any paper required to be signed by this act or make any false statement in any paper or application signed to procure liquors under this act, the person so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars and cost of prosecution and shall be committed until said fine and cost are paid or be imprisoned not less than ten nor more than thirty days. If any permit holder or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall upon conviction therefor be punished as provided by law for perjury. If any person holding a permit under this law shall purchase or procure any intoxicating liquors otherwise than authorized by this act, or in any larger quantities than shall be stated in the county auditor's certificate obtained by him for that purpose, or make any false return to the county auditor, or use any request for liquors for more than one sale or the county auditor's certificate for purchasing liquors for more than one purchase, in any of such cases he shall be deemed guilty of a misdemeanor and upon conviction, punished accordingly.

2380. Selling or giving to minors or intoxicated persons. 1539; 20 G. A., ch. 143, § 9. It shall be unlawful for any person to sell or give away by agent or otherwise, any spirituous or other intoxicating liquors, including wine or beer, to any minor for any purpose whatever, unless upon the written order of his parent, guardian, or family physician, or to sell the same to any intoxicated person, or to any person who is in the habit of becoming intoxicated, and any person violating the provisions of this section shall forfeit and pay to the school fund the sum of one hundred dollars for each offense, to be collected by action against him, or by action against him and the sureties on his bond, if one has been given, by any citizen in the county. One-half of the amount so recovered shall go to informer, and the other half shall go to the school fund of the county. [14 G. A., ch. 24, § 5.]

This section applies not only to persons having a permit to sell liquors, but to all persons: *Cobleigh v. McBride*, 45–116, 120.

To constitute the offense it is not necessary that defendant should have known that the person to whom sale was made was a minor. Knowledge of such fact need neither be charged nor proved: *Jamison v. Burton*, 43–282. So, in case of sale to a person in the habit of becoming intoxicated, it is immaterial whether the seller knew the habits of such person. He sells at his peril: *Dudley v. Sautbine*, 49–650.

A defendant charged with such sales cannot excuse himself on the ground of his ignorance of the fact that the person to whom such sales were made was a minor or an inebriate: *State v. Ward*, 75–637; *State v. Thompson*, 74–119.

In case of sale to a minor the consent of the parent will be no defense unless it is in writing: *State v. Coeman*, 48–567.

The principal is liable for a sale made by an agent in violation of this section, although the agent was positively forbidden to sell to such persons generally, or to the particular person to whom sale was made: *Dudley v. Sautbine*, 49–650.

The sale of wine or beer to one of the classes of persons here mentioned, resulting in injury such as is contemplated in § 2418, will give a right of action under that section: *Jewett v. Wanshura*, 43–574.

Under § 2415, this section is to be construed

as prohibiting the giving as well as the sale to an intoxicated person: *Church v. Higham*, 44–482.

The action for the benefit of the school fund may be brought by a citizen as well as by the treasurer: *Ibid.*

Under this section the seller of liquor to an intoxicated person will be liable, although the liquor is bought and paid for by a third person by way of treating such intoxicated person: *State v. Hubbard*, 60–466.

Evidence of intoxication at a period subsequent to the sale of the liquor should not be received to prove that the person to whom it was furnished was intoxicated at the time of such sale: *Ibid.*

No section of the statute except this forbids the giving away of intoxicating liquors, except it is done as an evasion of the penalties for selling or as a subterfuge to conceal unlawful sales: *State v. Hutchins*, 74–20.

A corporation is a person within the meaning of this section. Therefore, *held*, that where the defendant corporation ordered and conducted a ball at which the principal officer and member of the managing committee and other officers thereof sold beer, the proceeds of which were received by the corporation, the action provided by this section might be maintained against it: *Stewart v. Waterloo Turn Verein*, 71–226.

Sales of liquors to the class of persons enumerated in this section are not by its terms declared to be misdemeanors, and the penalty imposed by it can be enforced only by civil action by a citizen of the county: *State v. Douglass*, 73–279.

Whether allegation of plaintiff's citizenship is sufficiently put in issue by a mere general denial of the allegation of the petition, *quære: Kirk v. Litterst*, 71–71. But in actions under § 2384, it is held that a general denial does not put in issue plaintiff's citizenship as alleged in the petition: See notes to that section.

2381. Penalty for selling without a permit. 1540; 20 G. A., ch. 143, § 10. If any person not holding such a permit, by himself, his clerk, servant or agent, shall for himself or any person else directly or indirectly, or on any pretense, or by any device, sell, or in consideration of the purchase of any other property, give to any person any intoxicating liquors, he shall, for the first offense be deemed guilty of a misdemeanor, and on conviction for said first offense shall pay a fine of not less than fifty or more than one hundred dollars and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and every subsequent offense he shall pay on conviction thereof, a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution and be imprisoned in the county jail, not to exceed six months. All clerks, servants, and agents of whatever kind, engaged or employed in the manufacture, sale, or keeping for sale in violation of this chapter, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and information for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations, but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and subsequent convictions mentioned in this section shall be construed to mean convictions on separate indictments or information. And in default of the payment of the fines and cost provided for the first conviction under this section, the person so convicted shall not be entitled to the benefit of chapter forty-seven, title twenty-five, of this code, until he shall have been imprisoned sixty days. [R., § 1562; C., '51, §§ 930–1.]

Without permit: This section contains the only provision under which a party can be punished criminally for an act of sale of intoxicating liquors, and by its express language it is applicable only to persons not holding permits. Persons holding permits are subject to the penalties prescribed by §§ 2383 and 2384 for owning or keeping liquors with unlawful intent, or for keeping or maintaining a place in which such liquors are sold or kept for sale unlawfully: *State v. Douglass*, 73–279.

Sales by clerks: Under provisions for the punishment of the illegal sale of intoxicating liquors, *held*, that the fact that defendant acted as the clerk of another or as volunteer and without pecuniary reward would be no defense, clerks being liable equally with their principals. Nor would it be any defense that the principal has been convicted for the same act: *State v. Finan*, 10–19.

One who acts as agent or clerk of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished under this section: *State v. Mercer*, 32–405; *Cantril v. Sainer*, 59–26.

Where the only evidence of illegal sale was the testimony of a clerk in defendant's drug

store that he sold at that store a half-pint of liquor to a certain person, it not appearing that defendant knew of such sale or kept intoxicating liquors for sale, or that there were any such in his possession or kept by him for any purpose, *held*, that the conviction could not be sustained: *State v. Findley*, 45–435.

Giving: Under a similar statutory provision, *held*, that the giving of intoxicating liquor to another was not an offense unless it was "in consideration of the purchase" of other property as specified in the statute, and that the fact that the liquors were so given, if such was the case, should be averred: *State v. Finan*, 10–19.

There is no provision making a gift of intoxicating liquors not in consideration of the purchase of any other property illegal, except the provisions of the preceding section which have reference to minors: *State v. Hutchins*, 74–20.

Indictment or information: Under the provisions of § 2406, as to the sufficiency of an indictment or information for illegal sales, an information charging defendant with selling intoxicating liquors is sufficient: *Foreman v. Hunter*, 59–550.

It is not necessary in an indictment for the illegal sale to specify the kind of liquor sold: *State v. Whalen*, 54–753.

However, if the kind of liquor is specified it must be proven as charged: *State v. Hesner*, 55–494.

An information charging defendant with selling, etc., is sufficient without stating the method in which the sale was accomplished. A selling committed in any of the different methods referred to by statute constitutes one and the same offense: *Devine v. State*, 4–443.

Any number of violations may be charged in separate counts and a separate conviction had on each: *Walters v. State*, 5–507.

Under an ordinance providing a punishment for the sale of spirituous, vinous or malt liquors not prohibited by statute, *held*, that more than one offense might be included in the same complaint: *Jackson v. Boyd*, 53–536.

But the first and second, or second and third, offenses cannot be charged in the same indictment or information: *State v. Leis*, 11–416.

The separate counts should show that the offense charged in each is different from those charged in the others, and where a number of counts were identical in language so that the charge in each would be proven by the same evidence, which would establish that alleged in any of the others, *held*, that a demurrer to the information should have been sustained, or the state should have been restricted in the introduction of evidence to such as was intended to sustain a single sale: *State v. Van Haltschuherr*, 72–541.

An attorney entitled to recover the fee provided by § 5109 can recover but one such fee for each prosecution, although several counts for different offenses are embraced in the same information or indictment: *Schulte v. Keokuk County*, 74–292.

An information for the offense of illegal sales should charge that defendant sold, etc., to some person, giving the name, if known: *State v. Allen*, 32–491.

An indictment charging defendant with keeping for sale and selling intoxicating liquors is good without the allegation that they were so kept and sold in violation of law: *State v. Jordan*, 39–387.

Where the information charges the sales of liquor to different persons named, on certain dates, the jury may convict on proof of sales to any of the persons named at any time within the statute of limitation and prior to the filing of the information: *State v. Johnson*, 69–623.

Evidence: On proof of the sale of intoxicating liquors in defendant's place of business, the burden is upon him to prove that the sales were lawful: *State v. Cloughly*, 73–626.

In a prosecution for the illegal sale it is proper to ask a witness whether he purchased such liquor of defendant and whether he knows of defendant selling such liquor to any one. It is also proper to ask a witness what defendant's business was: *State v. Roben*, 39–424.

The testimony of a witness in a prosecution for illegal sale that he bought and drank in defendant's saloon what, in his opinion, was whisky, *held* not incompetent as being merely an opinion. A man who resorts to a saloon for intoxicating liquors may be presumed to be qualified to express an opinion as to the liquor supplied him: *State v. Miller*, 53–84.

Punishment: Under a previous act, *held*, that while a person holding a permit was liable on his bond for selling for improper purposes, he was also liable to a criminal prosecution: *State v. Adams*, 20–486.

A person selling without a license may also be punished for the crime of keeping a nuisance under § 2384, either independently of or in addition to the punishment for the illegal sale: *State v. Waynick*, 45–516.

Where a previous conviction was not shown, *held*, that it was erroneous to impose a greater fine than authorized for the first offense: *Walters v. State*, 5–507.

But where, on appeal, the prosecution offered to remit the excess, the supreme court modified the judgment in accordance with such offer and affirmed it: *State v. Shaw*, 23–316.

Under the section as it now stands the length of imprisonment for non-payment of a fine is as provided generally in § 5894: *Ex parte Tuicher*, 69–393.

A person sentenced under this section cannot avail himself of the provisions for the discharging of poor convicts: *Hanks v. Workman*, 69–600.

Subsequent convictions: Before defendant can be found guilty of the offense of a second sale he must be charged, convicted and fined for the first offense of selling: *State v. Leis*, 11–416.

Under an information charging a second or third offense and a former conviction, defendant may be found guilty of a first offense: *State v. Ensley*, 10–149; *State v. Gaffeny*, 65–262.

In such case the offense of a first sale may be regarded as included in the offense of a second sale charged in the indictment: *Ibid.*

Revenue license no defense for illegal selling: See notes to § 2400.

2382. Sale of mixed liquors. 1541. Any person who shall mix any intoxicating liquor with any beer, wine, or cider by him sold, and shall sell, or keep for sale, as a beverage, such mixture, shall be deemed guilty under the preceding section, and shall be punished accordingly. [R., § 1587.]

2383. Keeping with intent to sell; evidence. 1542; 20 G. A., ch. 143, § 11. No person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping any intoxicating liquors with intent to sell the same within this state, or to permit the same to be sold therein in violation of the provisions hereof, and any person who shall so own or keep, or be concerned, engaged or employed in owning or keeping such liquors with any such intent, shall be deemed, for the first offense, guilty of a misdemeanor; and on conviction for said first offense shall pay a fine of not less than fifty nor more than one hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, and in default of such fine and costs, he shall not be entitled to the benefits of chapter forty-seven, title twenty-five, of the code, until he shall have been imprisoned sixty days; for the second and every subsequent offense he shall pay a fine of not less than three hundred dollars nor more than five hundred, or be imprisoned in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court, and upon trial of every indictment or information of violations of the provisions of this section, proof of the finding of the liquor named in the indictment or in the information, in the possession of the accused in any place except his private dwelling-house or its dependencies, or in such dwelling-house or dependencies, if the same is a tavern, public eating-house, grocery or other place of public resort, or in unusual quantities in the private dwelling-house or its dependencies of any person keeping a tavern, public eating-house, grocery, or other place of public resort in some other place, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions hereof. [R., § 1583.]

As the keeping of intoxicating liquors for sale within the state is unlawful in itself, unless the party thus keeping and offering for sale is authorized to sell, an indictment charging the keeping of intoxicating liquors in the state with intent to sell the same will be sufficient, and the indictment need not negative the authority to sell: *State v. Collins*, 11–141.

Held, that the expression in an indictment, "kept intoxicating liquors to sell," was sufficient to charge the offense: *Vaughn v. State*, 5–369.

An indictment charging that "defendant did keep and was concerned, etc., in owning and keeping intoxicating liquors to sell," *held* to charge but one offense: *Ibid.*

An information charging defendant with keeping intoxicating liquors "for the purpose of sale," instead of "with intent to sell the same," as provided in the statute, *held* sufficient to support a conviction: *State v. Mohr*, 53–261.

One who acts as agent or clerk of a social club, to keep and deal out its liquors to members purchasing and presenting tickets, may be indicted and punished under this section: *State v. Mercer*, 32–405.

Where a druggist has a permit to sell intoxicating liquors, but makes unlawful sales, the fact that the owning and keeping is with intent to make unlawful sales, and therefore unlawful in itself, may be presumed: *State v. Sartori*, 55–340.

The provision that the finding, etc., shall be presumptive evidence, etc., is not unconstitutional: *Santo v. The State*, 2–165, 214. But it would seem that such presumption would not attach to liquor *in transitu*, and it is doubtful whether it may be made except upon the trial of an indictment or information. In an action against a carrier for damages for the loss of liquor delivered to it for transportation, *held*, that the carrier could not set up as a defense that the keeping of such liquor was unlawful: *Bowen v. Hale*, 4–430; but see *Sommer v. Cate*, in notes to § 2407.

Any person has the right to own and keep liquors unless he owns and keeps them with intent to sell without lawful authority: *Wakeman v. Chambers*, 69–169.

The offense under this section and that under the next are not the same, and a conviction for one will not bar a prosecution for the other: *State v. Graham*, 73–553.

The provision that defendant shall stand committed until the fine and costs are paid does not take the offense out of the jurisdiction of a justice of the peace. Although such imprisonment may extend beyond thirty days, it is not as a punishment for the offense but only as a method of enforcing the payment of the fine: *Albertson v. Kriechbaum*, 65–11.

The provisions of § 5894, as to the extent of imprisonment for non-payment of fine, are still applicable under the section as it now stands: *Ex parte Tuicher*, 69–393.

2384. Nuisance; penalty; injunction. 1543; 20 G. A., ch. 143, § 12. In cases of violation of the provisions of either of the three preceding sections or of sections fifteen hundred and twenty-five of this chapter [§ 2361], the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents is hereby declared a nuisance and shall be abated as hereinafter provided. And whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid. And the provisions of chapter forty-seven, title twenty-five, of this code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court.

[The provisions of this section as to penalty are superseded by those of § 2383.]

What constitutes nuisance: The act of selling, or keeping with intent to sell, in a building or place, as here defined, is a nuisance, while the keeping with intent to sell and selling, as defined by the preceding section, is not a nuisance: *State v. Harris*, 64–287.

In order to convict for a nuisance it must be shown that the liquors were sold or kept with intent to sell in a building or place frequented by persons desiring to procure intoxicating liquors: *Ibid.*

This section provides a punishment for keeping nuisances for the sale of intoxicating liquors, which is a different crime from that of the unlawful sale, and the first as well as subsequent offenses are punishable by indictment: *State v. Howarth*, 70–151.

It is illegal for any person to sell for any purpose intoxicating liquors without a permit from the board of supervisors, and the use of a building for such illegal sales is a nuisance. So *held* as to a druggist selling intoxicating liquors for medicinal purposes: *State v. Waynick*, 45–516.

To constitute the offense of nuisance it is not sufficient that defendant used and kept a place with the intent and for the purpose of selling intoxicating liquors therein contrary to law. It must be charged and shown that he manufactured, or sold, or owned and kept with intent to sell, contrary to law. The presence of the liquor in the building is essential: *State v. Hass*, 22–193; *State v. Harris*, 27–429; *State v. Tierney*, 74–237.

A previous conviction or acquittal of the crime of owning or keeping with intent to sell will not bar a prosecution for a nuisance: *State v. Harris*, 64–287.

An instruction that any building where any kind of intoxicating liquors is kept for the purpose of sale or is sold is a nuisance is erroneous as not referring to lawful sales under permit. But such error will be without prejudice where it does not appear that defendant had any permit to sell: *State v. Wambold*, 74–605

Indictment: The offense of nuisance may be committed by the manufacture, or the sale, or the keeping with intent to sell, contrary to law. While an indictment charging the offense as committed in any of these three ways would be sufficient, yet one charging its commission by any two, or all three, of the specified unlawful acts, charges but one offense, and is not bad for duplicity: *State v. Becker*, 20–438; *State v. Baughman*, 20–497.

Two indictments charging the offense as committed in two different ways charge the same and not two separate offenses; and the fact that the acts set out in the indictments are charged as committed at different times is not conclusive that the offenses are separate and not the same, since the time need not be proved as alleged: *State v. Layton*, 25–193.

An allegation that a certain building was used by defendants as a place for the sale of intoxicating liquors, and that they did then and there keep said intoxicating liquors for sale in said building with intent to sell, *held* sufficient without further averment that said building was under their control: *State v. Schilling*, 14–455.

An indictment charging the offense as committed by using and keeping a room and place for the purpose of selling and by selling therein intoxicating liquors in violation of § 2381, *held* sufficient: *State v. Freeman*, 27–333.

And so held, also, where the indictment, similar to the foregoing, charged the acts as "contrary to law," without specifying the section: *State v. Allen*, 32–248.

It is not necessary that the nuisance should continue up to and exist at the time of the indictment to make it punishable: *State v. Schilling*, 14–455.

An indictment charging the keeping and using of a "certain building or place," or "a certain frame building," for the purposes pro-

hibited, is sufficiently definite: *Ibid.; State v. Kreig*, 13-462.

A matter of local description, though it need not have been stated, must be proved as laid: *State v. Crogan*, 8-523.

But on the trial of an indictment under this section, which charged the use of a building, etc., "next door west of Chamber's store," etc., while the proof was that the building was next door west from "Chamberlain's store," the court were equally divided as to whether the variance was fatal: *State v. Verden*, 24-126.

In an indictment for the crime of nuisance under this section it is not necessary that the premises be particularly described, although such description may be necessary where an order of abatement is desired: *State v. Waltz*, 74-610.

The indictment need not state the names of the persons to whom liquor was sold: *State v. Becker*, 20-438; *State v. Jordan*, 39-387.

Evidence: Proof of the manufacture, sale, or keeping with intent to sell, in violation of law, is presumptive proof of the offense of nuisance: *State v. Guisenhause*, 20-227; *State v. Baughman*, 20-497.

And this is true even though the sale be secret and by clerk: *State v. Freeman*, 27-333. Proof of actual sale is presumptive evidence of illegal sale, and the burden of proving that the sales made were legal is upon defendant: *Shear v. Green*, 73-688.

The proof of a single sale will warrant a conviction for nuisance. Such sale will show unlawful intent as well as keeping: *State v. Reyelts*, 74-499.

Evidence as to the control of the place in question by defendant, and that bottles, glasses, etc., were there found, *held* sufficient to warrant conviction of defendant for the crime of keeping a nuisance: *State v. Wambold*, 74-605.

Unlawful intent may be presumed from unlawful sales, and it is not sufficient for a registered pharmacist to show that sales were made on written applications stating that the purchaser was not a minor or in the habit of becoming intoxicated and that the liquor was desired for use as a medicine: *State v. Thompson*, 74-119.

The fact that defendant believed in good faith that he had the right to sell for the purposes for which sales were made will not constitute a defense in a prosecution for keeping a place where illegal sales were made: *State v. Mullenhoff*, 74-271.

As proof of the finding of liquor in the possession of accused, in any place except the private dwelling, is by § 2383 presumptive evidence that such liquor is illegally held for sale, the proof of such finding will be sufficient evidence of a nuisance committed by "keeping with intent to sell:" *State v. Norton*, 41-430.

The state is not bound to show affirmatively that the liquors were not kept in the original vessels or packages, or that they were not sold for proper purposes, these being proper matters of defense: *State v. Becker*, 20-438.

Sales by clerk: A barkeeper or clerk, having no interest in the business, may be convicted of the crime of nuisance for the mere sale by him of intoxicating liquors in a building used for that purpose: *State v. Stucker*, 33-395.

Where liquors are lawfully kept for sale and with intent to sell them for lawful purposes, an illegal sale by an agent without the knowledge or consent of the principal will not render such principal criminally liable for keeping a nuisance: *State v. Hayes*, 67-27.

Punishment: The punishment for the crime of nuisance, as defined in this connection, is that provided in § 5473 for the crime of nuisance generally: *State v. McGrew*, 11-112; *State v. Collins*, 11-141; *State v. Schilling*, 14-155; *State v. Little*, 42-51, 54; *State v. Dean*, 44-648.

A party may be punished for the offense of keeping a nuisance either independently of or in addition to the punishment for illegal selling: *State v. Waynick*, 45-561.

A pharmacist may be indicted and punished for illegal sales as constituting a nuisance: *State v. Mullenhoff*, 74-271.

This section authorizes commitment until both fine and costs are paid in case of a conviction for nuisance, but not in case of punishment for contempt: *Goetz v. Stutsman*, 73-693.

Under an indictment not specifying whether the offense was committed before or after the date of the change of this section, *held*, that evidence was admissible to prove the commission of the offense prior to such change, and that defendant was properly sentenced under the law as then in force: *State v. Reyelts*, 74-499.

Injunction; constitutionality: The provision for an injunction in such cases in an action in equity is not unconstitutional as depriving defendant of the right of trial by jury: *Littleton v. Fritz*, 65-488; *State v. Jordan*, 72-377.

An action to enjoin a nuisance caused by the selling and keeping for sale of intoxicating liquors contrary to law, *held* not to involve a federal question in such sense as to authorize a removal of the cause to the federal court: *Lemen v. Wagner*, 68-660; *Schmidt v. Cobb*, 119 U. S., 286 (the supreme court of the United States being equally divided).

While the penalty of five hundred dollars for the violation of an injunction in such cases is extraordinary, the statute imposing such a penalty is not unconstitutional: *Jordan v. Circuit Court*, 69-177.

Citizenship of plaintiff: The action by a citizen of the county to obtain an injunction, although prosecuted in the name of such citizen as a private party, is for the public benefit, and it cannot be maintained except by a citizen of the county. A wife who has been injured in her means of support by illegal sales cannot maintain the action for an injunction if she is a resident of another county: *Applegate v. Winebrenner*, 66-67.

An allegation that plaintiff is a citizen of the county is not put in issue by a general denial, but only by specially alleging facts showing the allegation of the petition in this respect not to be true: *Littleton v. Harris*, 73-167, *Shear v. Green*, 73-688.

Averment by defendant of want of knowledge or information sufficient to form a belief

as to plaintiff's citizenship is not sufficient to put that matter in issue: *Craig v. Hasselman*, 74-538.

While the right to institute proceedings is dependent upon residence or citizenship of the plaintiff in the county, yet when that right has attached and the suit has been instituted, the right to prosecute it to judgment does not terminate by plaintiff's removal to another county: *Judge v. Kahl*, 74-486.

An allegation in a petition for injunction that defendant had established and was maintaining a place for the sale of intoxicating liquors contrary to the statutes of the state, and that he kept such liquors for sale contrary to law and there sold the same unlawfully, not being controverted must be deemed true: *Bloomer v. Glendy*, 70-757.

Temporary injunction: It was held before the statutory provision expressly authorized it, that a preliminary injunction might be granted as in other proceedings for an injunction: *Littleton v. Fritz*, 65-488.

A temporary injunction should not be awarded against the premises. The injunction against the occupant and owner is all that is contemplated at that stage of the proceedings: *Gray v. Stienes*, 69-124.

Where it appears that defendant has been maintaining a nuisance which would warrant the granting of an injunction, the fact that on the application for a temporary injunction he testifies that he has a few days previously quit the business will not be sufficient ground for refusing to grant a temporary injunction: *Judge v. Kribs*, 71-183.

Owner of the property: Where leased property is being used as a place for the unlawful sale of liquors, the landlord may be made a party defendant to the action to abate such place as a nuisance without regard to his previous knowledge of such use. The building becomes a nuisance and its continuance as such may be enjoined and prevented: *Martin v. Blattner*, 68-286.

The owner of the building in which unlawful sales of liquor are conducted permitting such sales by a tenant may properly be enjoined from further permitting such use: *Gray v. Stienes*, 69-124.

A decree abating premises as a nuisance and providing for the destruction of property should not be entered when some of the owners of the property are not parties to the suit: *Shear v. Green*, 73-688.

If persons not parties to the suit have an interest in the real property involved therein a decree should not be made for removal and sale of fixtures constituting a part of the realty: *Danner v. Hotz*, 74-389.

Facts in a particular case *held* sufficient to warrant a decree against the owner of the property: *Littleton v. Harris*, 73-167.

Where premises are leased for a lawful purpose, to render the owner liable to the penalties herein provided, it is not sufficient to show that he knew of their unlawful use, without taking steps to prevent it, but it must appear that, after he became aware of such illegal use, he did some act or made some declaration affirmatively assenting thereto: *State v. Ballingall*, 42-87.

Permanent injunction: An injunction should not be issued against a building in which a nuisance has been maintained by a tenant when the owner of the building upon being informed of the nuisance has taken steps to have it abated, and there is nothing tending to show that this was not done in good faith: *Shear v. Brinkman*, 72-698.

The fact that the owner of property ceases to use it for improper purposes only about the time the case is reached for trial does not render it erroneous to enter a decree for abating the property as a nuisance: *Danner v. Hotz*, 74-389.

Where the evidence shows that a nuisance is being maintained in the building the personal property used about the premises is subject to sale upon the judgment. A violation of the law works a forfeiture of the permit, and the premises used for the purpose of illegal manufacture may be closed even for the purposes of legal manufacture: *Pearson v. International Distillery*, 72-348.

Contempt: An order imposing a fine and imprisonment for contempt in violating an injunction may be made by the judge in vacation: *McLane v. Granger*, 74-152.

Abatement: The provisions as to abatement of the nuisance are applicable to acts committed before the enactment of those provisions: *McLane v. Bonn*, 70-752; *Drake v. Jordan*, 73-707.

2385. Action by county attorney; when triable; evidence. 21 G. A., ch. 66, § 1. Actions to enjoin nuisances as authorized by section twelve, of chapter one hundred and forty-three, of the acts of the twentieth general assembly [§ 2384], may be brought in the name of the state of Iowa, by the [district or] county attorney of the proper county; and it shall be the duty of such [district or] county attorney where any such nuisance exists, to institute and prosecute such action for the abatement thereof; *provided*, however, if after notice or information given him of such nuisance, said [district or] county attorney refuse or neglect to bring suit, and prosecute the same with reasonable diligence, then any citizen residing in the county may institute and prosecute such action in the name of the state for the abatement of such nuisance. But nothing in this section shall prevent any citizen of a county from instituting and maintaining in his own name an action under said section twelve, of said chapter one hundred and forty-three, and to all of such actions, whether brought under the provisions of said section twelve of said chapter one hundred and forty-three or of this act, the provisions contained in this act

shall apply. All such actions shall be triable at the first term of court, after due and timely notice of the commencement thereof has been given. Evidence of the general reputation of the place designated in the petition shall be admissible for the purpose of proving the existence of such nuisance, and if successful in the action the plaintiff shall be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant.

Whether this statute changes the general rule as to the method of trial of equity causes in this class of cases or not, it is error to continue a case for the purpose of taking depositions without making an order for the trial of the cause upon depositions: *Ellwood v. Price*, 73–84.

The provisions of this act as to attorneys' fees and also as to closing the building are applicable on the trial of cases commenced before the statute went into effect: *Drake v. Jordan*, 73–707.

2386. Temporary injunction. 21 G. A., ch. 66, § 2. In any such action the court, if in session, or the judge thereof in vacation shall upon the demand of the attorney or party charged with the management of the cause for the plaintiff, grant a temporary injunction without bond, if it be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits or otherwise as the court or judge may order, that such nuisance actually exists, or is being maintained, and when the cause is continued at the instance of the defendant, a temporary injunction shall be issued as a matter of course without bond.

2387. Violation of injunction. 21 G. A., ch. 66, § 3. In case of the violation of any injunction granted in such action, the court, or in vacation the judge thereof shall have power to try summarily and punish the party or parties guilty thereof, as required by section twelve of chapter one hundred and forty-three of the acts of the twentieth general assembly [§ 2384], *provided*, that if the penalty inflicted for such contempt, be imprisonment alone, it shall not be for less than three nor more than six months. The evidence in such proceeding or trial for contempt, may be in the form of affidavits, or on the demand of either party the witnesses shall be brought before the court for examination and the provisions of section three thousand four hundred and four of the code [§ 4640] shall not be held to apply to persons charged with violating injunctions issued under this act and the act to which this is amendatory.

This section expressly authorizes the examination in court of witnesses in contempt proceedings. In such case it is sufficient if the evidence is taken down by the shorthand reporter and filed with the certificate of the judge thereto, followed at a later time by the filing of the reporter's transcript of his shorthand notes certified to by him: *Goetz v. Stutsman*, 73–693.

2388. Punishment. 21 G. A., ch. 66, § 4. Whoever is convicted of keeping a nuisance as provided in section twelve, of chapter one hundred and forty-three, acts of the twentieth general assembly [§ 2384], shall pay a fine not exceeding one thousand dollars, nor less than three hundred dollars, and costs of prosecution, and the cost shall include a reasonable attorney fee to be assessed by the court, and stand committed until the fine and costs are paid, and the provisions of chapter forty-seven, title twenty-five, of the code shall not be applicable to persons committed under this section.

2389. Nuisance abated. 21 G. A., ch. 66, § 5. If the existence of the nuisance be established either in criminal or equitable action, it shall be abated under the judgment and order of the court, by seizing and destroying the liquor therein, and removing from the building, erection or place, all fixtures, furniture, vessels, and all movable property, used in or about the premises, in carrying on the unlawful business, and selling the same in a manner provided for sale of chattels under execution, and by securely closing the said building, erection, or place, as against the use or occupation of the same for saloon pur-

poses, and keeping the same securely closed for the period of one year (unless sooner released as hereinafter provided) and any person breaking open said building, erection, or place, or using the premises so ordered to be closed, shall be punished as for contempt as above provided in case of the violation of injunctions, *provided*, however, that when leasehold premises are adjudged to be a nuisance, the owner thereof shall have the right to terminate the lease by giving three days' notice thereof, in writing, to the tenant, and when this is done the premises shall be turned over to the owner upon the order of the court or judge. But the release of the property shall be upon condition that the nuisances shall not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant.

2390. Proceeds, how applied. 21 G. A., ch. 66, § 6. The proceeds of the sale of the personal property as provided in the preceding section, shall be applied, first: in payment of the costs of the action and abatement, secondly: to the satisfaction of any fine and costs adjudged against the proprietor of the premises and keepers of said nuisance, and the balance if any shall be paid to the defendant.

2391. Abatement by owner. 21 G. A., ch. 66, § 7. If the owner appear and pay all costs of the proceeding and file a bond with sureties to be approved by the clerk, in the full value of the property to be ascertained by the court or in vacation by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; *provided*, however, that the release of the property under the provisions of this section shall not release it from any judgment lien or penalty, or liability to which it may be subject under any other statute or law.

2392. Presumption from possession. 21 G. A., ch. 66, § 8. In all actions, prosecutions and proceedings under the laws of this state prohibiting the illegal manufacture and sale of intoxicating liquors, the finding of such liquors, except in the possession of one legally authorized to sell the same or except in a private dwelling-house, which does not include, or is not used in connection with a tavern, public eating-house, restaurant, grocery or other place of public resort shall be presumptive evidence that such liquors were kept for illegal sale; and proof of actual sale shall be presumptive evidence of illegal sale.

2393. Second offense. 21 G. A., ch. 66, § 9. Any person who shall have been convicted of keeping a nuisance under the laws prohibiting the illegal sale of intoxicating liquors, or who shall have been enjoined under the provisions of this act or the act to which this is amendatory, and shall again directly or indirectly engage in such unlawful business, of keeping a nuisance or selling such liquors in violation of law, in the same or any other county in this state, shall upon conviction thereof be punished by imprisonment in the county jail not less than three months or more than one year. But no equitable proceeding, order or judgment shall be construed as a conviction under the provisions of this section.

2394. Repeal; saving clause. 21 G. A., ch. 66, § 13. All acts and parts of acts, inconsistent with this act, are hereby repealed; *provided*, however, that this repeal shall not effect [affect] any act done, or right accruing or

accrued, or which had been established, nor any action or proceeding commenced before the time this repeal takes effect, nor any offense committed or penalty or forfeiture incurred; and any suit or proceeding pending when the repeal takes effect, or thereafter brought, for any offense committed, or for recovery of a forfeiture or penalty incurred, prior thereto shall be maintained and prosecuted under the law, as in force prior to the taking effect of this act.

2395. Fees for abating nuisances. 22 G. A., ch. 73, § 1. In the abatement of a nuisance as provided in section five, of chapter sixty-six, of the acts [of] the twenty-first general assembly [§ 2389] the officer shall be entitled to the same fees for removing and selling the movable property that he would be for levying on and selling like property on execution. And for closing and keeping closed, the building erection or place, as in said section required he shall receive such reasonable fees, as the court may allow. All such fees and costs to be paid out of the proceeds of the property, sold so far as the same may be available.

2396. Advance of fees not required. 22 G. A., ch. 73, § 2. In any action brought by a citizen of the county as provided by section one, chapter sixty-six, of the acts of the twenty-first general assembly [§ 2385], no officer, or witness shall be entitled to demand his fees, for services or attendance in advance. And the costs, in case of failure of the prosecution, or inability to collect the same from the defendant, shall be paid in the same manner as provided by law for the payment of fees in the case of criminal prosecutions. But nothing herein shall prevent the court trying such action from taxing the costs to the party bringing the same, in case it appears that the action was brought maliciously and without probable cause.

2397. Showing for temporary injunction. 22 G. A., ch. 73, § 3. In any action to restrain a nuisance brought under chapter one hundred and forty-three, of the acts of the twentieth general assembly [§§ 2383, 2384], or chapter sixty-six of the acts of the twenty-first general assembly [§§ 2385–2394], the party entitled under section two, of said chapter sixty-six, of the acts of the twenty-first general assembly [§ 2386], to demand a temporary injunction, shall be entitled, on such application for a temporary injunction, to prove the existence of such nuisance, by affidavits, depositions, or testimony of witnesses examined orally in court, at his election, unless the court has by previous order otherwise fixed the form and manner of evidence to be adduced, *provided* however that the plaintiff shall serve the defendant or his counsel with notice of such application, at least three days before such hearing.

2398. Contempt. 22 G. A., ch. 73, § 4. In any action to enjoin a nuisance as authorized by section twelve, of chapter one hundred and forty-three, of the acts of the twentieth general assembly [§ 2384], and chapter sixty-six, of the acts of the twenty-first general assembly [§§ 2385–2394], the injunction granted shall be binding on the party or parties enjoined throughout the judicial district in which the action is brought. And any person enjoined in such action, who shall while such injunction remains in force, again engage in, or be in any manner concerned in the selling, or keeping for sale, contrary to law, of any intoxicating liquor, anywhere within the jurisdiction of the court, he shall be deemed guilty of contempt of court and punished accordingly.

2399. Attorney's fee. 22 G. A., ch. 73, § 5. In all cases of proceedings against persons charged with contempt for violating any injunctions, either temporary or permanent, issued or decreed, under said chapter one hundred and forty-three, acts of the twentieth general assembly [§§ 2383, 2384], or chapter sixty-six, acts of the twenty-first general assembly [§§ 2385–2394], or under this act, the court shall order that the attorney prosecuting or constructing such proceedings against the person so charged, shall be allowed ten per cent. of the amount of the fine assessed against such person, if a fine be as-

sessed against him. And the clerk of the court, when such fine is paid, shall pay over to such attorney the amount thus allowed him.

2400. Revenue license; evidence. 21 G. A., ch. 113, § 1. The fact that any person engaged in any kind of business, has or keeps posted, in or about his place of business, a receipt, or stamp, showing payment of the special tax, levied under the laws of the United States, upon the business of selling distilled, malt or fermented liquors, or shall have paid such special tax for the sale of distilled malt or fermented liquors in the state of Iowa, shall be evidence that said person, or persons so owning, or controlling such receipts or stamps, or having paid such special tax, are engaged in keeping, and selling intoxicating liquors contrary to the provisions of chapter one hundred and forty-three of the laws of the twentieth general assembly of the state of Iowa [§§ 2383, 2384], and also *prima facie* evidence that any, and all intoxicating liquors found in the possession or under the control of any person so holding such receipts or stamp or having paid such special tax, are kept for sale in violation of law; and on conviction shall be subject to the penalties provided for in said chapter one hundred and forty-three: *Provided* however, that this act shall not apply to persons lawfully authorized to keep for sale and to sell intoxicating liquors for such purposes as are authorized by law.

Before this act, *held*, no defense in a prosecution for selling in violation of the state law that defendant held a United States internal revenue license to retail liquors. Such license does not authorize the holder to violate the law of the state: *State v. McCleary*, 17–44: *State v. Carney*, 20–82; *State v. Stutz*, 20–488; *State v. Baughman*, 20–497.

Nor was the holding of such license a circumstance tending to show a violation of the state law: *State v. Stutz*, 20–488.

2401. Search-warrant; seizure. 1544. If any credible resident of any county, shall, before a justice of the peace for the same county, make written information, supported by his oath or affirmation, that he has reason to believe, and does believe, that any intoxicating liquor described, as particularly as may be, in said information, is in said county, in any place described, as particularly as may be, in said information, owned or kept by any person named or described in said information, as particularly as may be, and is intended by him to be sold in violation of the provisions of this chapter, said justice shall, upon finding probable cause for such information, issue his warrant of search, directed to any peace officer in said county, describing as particularly as may be, the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding the said officer to search thoroughly said place, and to seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon; whereupon, the said peace officer to whom such warrant shall be delivered, shall forthwith obey and execute, so far as he shall be able, the commands of said warrant, and make return of his doings to said justice, and shall securely keep all liquors so seized by him, and the vessels containing it, until final action be had thereon; *provided, however*, that if the place to be searched be a dwelling-house in which any family resides, and in which no tavern, eating-house, grocery, or other place of public resort is kept, such warrant shall not be issued unless said complainant shall, on oath or affirmation, declare before said justice that he has reason to believe, and does believe, that within one month next before the making of said information, intoxicating liquor has been, in violation of this chapter, sold in said house, or in some dependency thereof, by the person accused in said information, or by his consent or permission; nor unless from the facts and circumstances disclosed by such complaint to said justice, the said justice shall be of opinion that said complainant has adequate reason for such belief. [R., § 1565; 9 G. A., ch. 94, § 9.]

Information: The expression "as particularly as may be" conveys the idea of the greatest degree of certainty, and this section is therefore not in conflict with Const., art. 1,

§ 8, as authorizing a search-warrant to issue without the particularity of description there required; nor as authorizing unreasonable search and seizure: *Santo v. State*, 2–165, 212.

Although the section requires that the information be filed by "a credible resident of" the county, it is not necessary that either the information or the warrant should state that it is made by such a person. That fact may be found by the justice before whom information is filed, upon proof independent of the information, or from personal knowledge: *State v. Thompson*, 44–399; *Weir v. Allen*, 47–482; *State v. Blair*, 72–591.

Warrant: Proceedings under a warrant will not be rendered invalid by the fact that the officer searched for and seized the liquor before having such warrant. Nor is it material whether the liquor was in possession of the person claiming to be owner thereof, it appearing that the owner had no right to keep or sell such liquor: *State v. Ward*, 75–637.

What subject to seizure: It is only liquors which are kept with the intention of selling the same in violation of law that may be seized: *State v. Harris*, 36–136.

The fact that the owner has been selling liquors in violation of law is not a ground for their condemnation, and is simply evidence of the unlawful intent with which they were kept: *State v. Blair*, 72–591.

The information must charge some specific person as owner or keeper of the intoxicating liquor with an illegal intent, and the liquor cannot be destroyed unless the evidence shows that the person who is charged as owner or keeper had such intent: *State v. Intoxicating Liquors*, 64–300.

If a pharmacist sells liquors for purposes other than as medicine, search and seizure of liquors owned by him may be made as provided in this section: *State v. Ward*, 36 N. W. Rep., 765.

It will not be presumed that the place to be searched is a dwelling-house, etc., from the mere fact that the information avers that the liquors are kept in "a certain house or place, known," etc.: *Sanders v. State*, 2–230, 277.

A previous conviction of the owner of the liquors for selling the same will not bar a proceeding, under this section, against the liquors themselves: *Ibid.*

The jurisdiction here conferred upon justices of the peace is not exclusive, but may also be exercised by police justices in cities acting under special charter: *Weir v. Allen*, 47–482.

Seizure: Liquors seized as here contemplated cannot be taken from the officer by replevin: *Funk v. Israel*, 5–438; *State v. Harris*, 38–242; *Weir v. Allen*, 47–482; *Fries v Porch*, 49–351.

Nor can the owner recover their value from such officer by way of damages in an action of trespass, unless he show that he possessed them with lawful intent, and was unlawfully deprived of them: *Plummer v. Harbut*, 5–308.

Liquors in the hands of an officer by virtue of a seizure cannot be taken from him by writ of replevin from a federal court: *Senior v. Pierce*, 31 Fed. Rep., 625.

A judgment rendered against the officer holding the liquor by stipulation on his part should be set aside on motion of the attorney representing the prosecution in the case against the liquors: *Fries v. Porch*, 49–351.

Where intoxicating liquors held for sale are seized in the custody of an express company, in a proceeding to condemn them it is immaterial whether the officers of the company knew the character of the property and the use to which it was to be put. It is the duty of such company, under the statute, to know whether goods it receives for shipment are such as the law authorizes to be bartered and sold: *State v. United States Ex. Co.*, 70–271.

Such a proceeding is not a criminal one against the express company and it becomes a party voluntarily, if at all, to the case: *Ibid.*

Proceeding criminal: These proceedings for the condemnation of intoxicating liquors illegally kept with intent to sell are criminal in their nature, and the defendant has the rights of the defendant in a criminal prosecution. For instance, a verdict of the jury for defendant should not be set aside upon motion in arrest of judgment in behalf of the prosecution: *State v. Harris*, 40–95.

A proceeding for the seizure, condemnation and destruction of intoxicating liquors kept for sale in violation of law is a criminal action, and the jurisdiction of the justice does not, therefore, depend on the amount in controversy: *State v. Arlen*, 71–216.

2402. Information. 1545. The information and search-warrant in such case, shall describe the place to be searched, as well as the liquors to be seized, with reasonable particularity. When any liquors shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of description in the warrant of the liquor or place, but the claimant shall only have a right to be heard on the merits of the case. [9 G. A., ch. 94, § 9.]

2403. Notice; trial; judgment; appeal. 1546. Whenever upon such warrant such liquors shall have been seized, the justice who issued such warrant shall, within forty-eight hours after such seizure, cause to be left at the place where said liquor was seized, if said place be a dwelling-house, store, or shop, posted in some conspicuous place on or about said buildings, and also to be left with or at the last known and usual place of residence of the person named or described in said information as the owner or keeper of said liquor, if he be a resident of this state, a notice, summoning such person and all others whom it may concern, to appear before said justice at a place and time named

in said notice, which time shall not be less than five nor more than fifteen days after the posting and leaving of said notices, and show cause, if any they have, why said liquor, together with the vessels in which the same is contained, should not be forfeited; and said notice shall, with reasonable certainty, describe said liquor and vessels, and shall state where, when, and why, the same were seized. At the time and place prescribed in said notice, the person named in said information, or any other person claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear, he shall become a party defendant in said case, and said justice shall make a record thereof. Whether any person shall so appear or not, said justice shall, at the prescribed time, proceed to the trial of said case, and said complainants, or either of them, may, and upon their default, the officer having such liquor in custody shall appear before said justice and prosecute said information, and show cause why such liquor should be adjudged forfeited. The proceeding in the trial of such case may be the same, substantially, as in cases of misdemeanor triable before justices of the peace, and if any person shall appear and be made a party defendant as herein provided, and shall make written plea that said liquor, or the part thereof claimed by him, was not owned or kept with intent to be sold in violation of this chapter, such party defendant may, at his option, demand a jury to try the issue, and, if upon the evidence then and there presented, the said justice or jury as the case may be, shall find for verdict that said liquor was, when seized, owned or kept by any person, whether said party defendant or not, for the purpose of being sold in violation of this chapter, the said justice shall render judgment that said liquor, or said part thereof, with the vessels in which it is contained, is forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecutions where the prosecution fails. If the judgment shall be against only one party defendant appearing as aforesaid, he shall be adjudged to pay all the costs of proceedings in the seizure and detention of the liquor claimed by him up to that time, and of said trial. But, if such judgment shall be against more than one party defendant claiming distinct interests in said liquor, then the cost of said proceedings and trial shall be according to the discretion of said justice equitably apportioned among said defendants, and execution shall be issued on said judgments against said defendants for the amount of the costs so adjudged against them. Any person appearing and becoming party defendant as aforesaid, may appeal from said judgment of forfeiture as to the whole, or any part, of said liquor and vessels claimed by him and so adjudged forfeited, to the district court as in ordinary cases of misdemeanor. [R., § 1566.]

See notes to § 2401.

2404. Destruction of liquor and vessels. 1547. Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the court rendering final judgment of forfeiture, shall issue to the officer having said liquors in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquor and vessels containing the same, and immediately thereafter to make return of said order to the court whence issued, with his doings indorsed thereon, and sworn to. Whenever it shall be finally decided that any liquor so seized is not liable to forfeiture, the court by whom such final decision shall be rendered, shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquor, with the vessels containing the same, to the place where it was seized, as nearly as may be, or to the person entitled to receive it, which order, the officer, after obeying the commands thereof, shall return to the said court with

his doings thereon indorsed; and the costs of the proceedings in such case attending the restoration, as also the costs attending the destruction of such liquor in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecution, where the prosecution fails. [R., § 1567.]

2405. Intoxication punished. 1548; 15 G. A., ch. 37. If any person shall be found in a state of intoxication, he shall be deemed guilty of a misdemeanor, and any peace officer may, without warrrant, and it is hereby made his duty to, take such person into custody, and to detain him in some suitable place, till an information can be made before a magistrate and a warrant issued in due form, upon which he may be arrested and tried, and, if found guilty, he shall pay a fine of ten dollars and the costs of prosecution, or shall be imprisoned in the county jail thirty days. But the magistrate before whom such person is tried and convicted may remit any portion of such penalty, and order the prisoner to be discharged upon his giving information, under oath, stating when, where, and of whom he purchased or received the liquor which produced the intoxication, and the name and character of the liquor obtained; *provided* such intoxicated person gives bail for his appearance before the proper magistrate, court, or jury, to give testimony in any action or complaint against the party for furnishing such liquor. In cases arising under this section, appeals may be allowed as in cases of ordinary misdemeanor within the jurisdiction of the justices of the peace. [R., §§ 1568, 1586.]

The word drunkenness, in a warrant of commitment, *held* to have the same legal signification as the word intoxication: *Smith v. Bigelow*, 19-459.

An instruction defining "intoxication" discussed: *State v. Huxford*, 47-16.

A person is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited and his judgment impaired: *State v. Pierce*, 65-85.

2406. Requisites of indictment or information. 1549. In any indictment or information arising under this chapter, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured or sold, or kept for purposes of sale, nor the exact time of the manufacture, or sale, or keeping with intent to sell, but proof of the violation by the accused of any provision of this chapter, the substance of which violation is briefly set forth, within the time mentioned in said indictment or information, shall be sufficient to convict such person; nor shall it be necessary in any indictment or information to negative any exceptions contained in the enacting clause, or elsewhere, which may be proper ground of defense; and, in any prosecution for a second or subsequent offense as provided herein, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction, nor shall it be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this chapter, and the person purchasing any intoxicating liquor sold in violation of this chapter, shall, in all cases, be a competent witness to prove such sale. [R., § 1569.]

As to sufficiency of indictments or informations, see notes to § 2381.

2407. Payments; contracts; negotiable paper. 1550. All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor, or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods, land, labor, or other thing. All sales, transfers, conveyances, mortgages, liens, attachments, pledges, and securities of every kind, which either in whole or in part shall have been

made for or on account of intoxicating liquors sold in violation of this chapter, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this state for intoxicating liquors, or the value thereof, sold in any other state or country contrary to the law of said state or country, or with intent to enable any person to violate any provision of this chapter, nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent, may have been illegally deprived of the same. Nothing, however, in this section shall affect in any way negotiable paper in the hands of holders thereof in good faith for valuable consideration, without notice of any illegality in its inception or transfer, or the holder of land or other property who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this chapter, and all evidence given in actions brought by or against such holders, shall be in no way affected by the provisions of this section. [R., § 1571.]

Recovery of payments: The statutory provision as to recovery of money paid for intoxicating liquors is not unconstitutional on account of being in any way a regulation or restriction of commerce among the states: *Connolly v. Scarr*, 72–223.

A claim for money paid for intoxicating liquors may be set up by way of counter-claim in an action on account: *Tolman v. Johnson*, 43–127.

A manufacturer not being allowed to sell without the permit required by § 2360, even to one having such permit, money paid on such sale may be recovered back: *Becker v. Betten*, 39–668.

The giving of a note for liquors does not constitute payment, even when it has been sold and transferred by the payee, and until it is actually paid the maker cannot maintain an action for the amount thereof: *Carlin v. Heller*, 34–256.

The action to recover money paid will not be barred until five years from time of payment: *Woodward v. Squires*, 41–677.

One who has exchanged property for liquors sold in violation of law may, instead of suing upon a promise to pay therefor, treat the transaction as void and sue for the value of the property; and if accord and satisfaction is then set up as a defense, he may, in reply, set up the illegal nature of the transaction: *Smith v. Grable*, 14–429.

The action to recover money paid is civil, and not *quasi*-criminal in character: *Woodward v. Squires*. 39–435.

A party who has made payments for illegal sales of liquors and is entitled to recover back the purchase money paid, being garnished for the indebtedness thereupon arising to him from the person to whom the payments were made, it must be shown, in order to warrant judgment against him as garnishee, that the liquors were intoxicating and sold in violation of law: *Church v. Simpson*, 25–408.

The provisions for recovery of money paid do not apply to a non-resident selling liquor without permit to a registered pharmacist for lawful purposes and receiving payment therefor in another state: *Kohn v. Melcher*, 29 Fed. Rep., 433.

Sales, securities, etc., void: Under the provision with reference to sales, securities, etc., being void, *held*, that the word securities includes promissory notes: *Taylor v. Pickett*, 52–467.

A promissory note given in part for intoxicating liquors is wholly void: *Ibid.; Braitch v. Guelick*, 37–212.

But where a note was given for the amount due on an account, some of the items of which were legal and others illegal as being for intoxicating liquors, and the account was continued and payments afterwards made on accounts generally, *held*, that the note being void, the legal items of account included therein should be regarded as still due on account and the subsequent payments applied thereto: *Quigley v. Duffey*, 52–610.

An assignment of a contract against a third person, made for intoxicating liquors sold in violation of law, is void, and the assignee cannot recover against such third person thereon: *Davis v. Slater*, 17–250.

A judgment recovered on a claim founded upon the illegal sale of intoxicating liquors is not void. The defense must be interposed before judgment or it is lost: *Smith v. Leddy*, 50–112.

A person who has sold another intoxicating liquor in violation of law cannot, on the ground that the sale is void, recover them back in an action of replevin from attaching creditors of his vendee. Being *particeps criminis*, the law will leave the seller where it finds him: *Marienthal v. Shafer*, 6–223.

In an action on a note in which defendant pleaded that it was given to him for liquors sold in violation of law, *held*, that an indictment against him for nuisance committed in the sale of intoxicating liquors was not competent evidence in his behalf: *Taylor v. Pickett*, 52–467.

Bona fide purchasers: A party claiming the benefit of the provision in such section protecting *bona fide* holders for value has the burden of showing that he is such holder without notice: *Rock Island Nat. Bank v. Nelson*, 41–563.

An assignee after maturity is not protected: *Barlow v. Scott's Adm'rs*, 12–63.

Sale made in another state: A contract for the sale of liquors, made in another state, with the intention of violating the laws of this state, will not be enforced in our courts, although good where made: *Davis v. Bronson*, 6–410.

Where the contract of sale is made outside of the state, it must, to render the contract void, be made to appear affirmatively that the vendor intended thereby to enable the vendee to violate the laws of this state: *Whitlock v. Workman*, 15–351.

It must be shown not only that the vendor knew of the laws of this state, but that he made the sale with the intention of enabling the purchaser to violate them: *Second Nat. Bank v. Curren*, 36–555.

But while mere knowledge on the part of the vendor that the purchaser intends to violate the liquor law of this state may not vitiate the sale, yet it is a fact from which the jury might infer the intent to enable the buyer to violate such law: *Tegler v. Shipman*, 33–194, 200.

Evidence that one of the partners in the firm making the sale had been in this state before the sale was made and had knowledge of the existence of the law in this state with reference to the suppression of intemperance, *held* admissible in order to show that he must have known that under the circumstances stated to him the sale of the liquor by the purchaser in Iowa would be illegal: *Rindskoff v. Curran*, 34–325.

A sale of intoxicating liquors in violation of law, made in this state by an agent of a firm in another state, is void: *Second Nat. Bank v. Curren*, 36–555; *Taylor v. Pickett*, 52–467; *Schuenfeldt v. Junkermann*, 20 Fed. Rep., 357.

If the order for liquor is taken in this state by such agent, but subject to the approval or disapproval of his principal, the sale will be held as made in the state where the principal resides, and will be enforceable in Iowa unless made with intent to violate its laws: *Tegler v. Shipman*, 33–194; *Schuenfeldt v. Junkermann*, 20 Fed. Rep., 357.

Where a sale was made in another state, but notes in payment of the purchase money were executed in Iowa and forwarded to the seller, *held*, that the place where the contract and delivery was made, and not the place where the notes were executed, was the place of contract: *Whitlock v. Workman*, 15–351.

Where liquors are ordered by mail by a resident of one state, the contract is deemed made in the place where the order is received and the goods delivered to the carrier for shipment; and the same rule applies to a contract taken by an agent at the place of residence of the buyer, but subject to the approval of the principal in another state from which the goods are to be shipped in case of the approval of the contract: *Engs v. Priest*, 65–232.

Where it appears that the contract for sale of liquor was made in Iowa it will be presumed that payment therefor was intended to be made and was afterwards made at the place where the contract was entered into: *Connolly v. Scarr*, 72–223.

Sales under permits: Where orders were taken in different parts of the state by a firm having authority to sell within a particular county, *held*, that it would be presumed that the sale was made in that county, and was completed when the orders were taken, unless the contrary was made to appear: *Gross v. Scarr*, 71–656.

Where orders for liquors sent to a druggist were filled by a third person having a permit to sell intoxicating liquors, and that fact was known to the purchaser, *held*, that he could not recover from the druggist money paid for liquors the sale of which to him was illegal: *Hurlburt v. Fyock*, 73–477.

Property in intoxicating liquors and the recovery thereof: While the commerce in intoxicating liquor as an article of beverage is unlawful, its character as property is not thereby destroyed; and where such liquor was seized on execution for the debt of one not its owner, *held*, that the owner might recover it by replevin, although it was kept for sale in violation of the statute: *Monty v. Arneson*, 25–383.

That intoxicating liquors are held for an unlawful purpose is no answer to an indictment for stealing the same: *State v. May*, 20–305; nor to an action of trespass for destroying them: *Turner v. Hitchcock*, 20–310.

Where liquor had been seized by an officer under an information which had subsequently been held defective and a return of the liquor ordered, *held* that, in an action by the owner against such officer to recover damages for a failure to return the property as so ordered, the plaintiff could not recover without proving that he owned and kept the liquor with a lawful intent: *Walker v. Shook*, 49–264.

In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed by it, it is necessary for plaintiff to prove that he owned or possessed such liquors with lawful intent (overruling *Bowen v. Hall*, 4–430): *Sommer v. Cate*, 22–585.

Intoxicating liquors cannot be recovered by the owner unless he shows that they were in his possession with lawful intent, and that he was illegally deprived of them: *Funk v. Israel*, 5–438, 452; and as to action of replevin or trespass against officer seizing liquors, see notes to § 2401.

2408. Information by peace officer. 1551; 20 G. A., ch. 143, § 13. All peace officers shall see that the provisions of this chapter are faithfully executed, and when informed that the law has been violated, or when they have reason to believe that the law has been violated, and that proof of the fact can be had, such officers shall go before a magistrate and make information of the same and of the person so violating the law. Upon the filing of such information before a magistrate he shall institute a suit and proceed to the arrest, and trial thereof, according to law. Upon trials before a magistrate, it shall be the duty of the district [county] attorney to appear for the state, unless

the person filing such information shall select some other attorney. Any peace officer failing to comply with the provisions of this section, shall be guilty of a misdemeanor, and pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office. Every peace officer shall give evidence when called upon, of any facts within his knowledge, tending to prove a violation of the provisions of this chapter, but his evidence shall in no case be used against him in any prosecutions against him for a violation of the provisions of this chapter. [R., § 1578.]

It is only a peace officer who files an information for the violation of the liquor law that is authorized to select an attorney other than the district attorney to prosecute the same and receive fees therefor from the county: *Foster v. Clinton County*, 51–541.

A special constable is not such peace officer as that he is authorized to employ an attorney at the expense of the county under such circumstances: *Ibid.*

The county is not liable for the fees of an attorney in prosecutions upon information by a private person for illegal sales, but only for those commenced by peace officers: *Blair v. Dubuque County*, 27–181.

A peace officer may select another attorney than the county attorney, and the attorney thus selected will be entitled to the fees authorized by § 5109: *Work v. Wapello County*, 73–357.

As to compensation of attorney selected by a peace officer filing an information as here provided, see § 5109 and note.

2409. Principal and securities liable. 1552. The principal and securities in the bond mentioned in sections fifteen hundred and twenty-eight and fifteen hundred and twenty-nine [§§ 2364, 2366], shall be jointly and severally liable for all fines and costs that they be adjudged against the principal for any violation of any of the provisions of this chapter, and shall also jointly and severally be liable for all civil damages and costs that may be adjudged against such principal in any civil action authorized to be brought against him by the provisions of this chapter. [R., § 1579.]

2410. Transportation. 1553; 20 G. A., ch. 143, § 14; 21 G. A., ch. 66, § 10; 22 G. A., ch. 73, § 6. If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution and the cost shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state, to issue the certificate herein contemplated, to any person having such permit and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. *Provided* however that the defendant may show as a defense hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him. [R., § 1580.]

This section, as now amended, is unconstitutional as being in conflict with the provisions of the United States constitution granting to congress the power to regulate commerce

among the several states: *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.

The statute does not forbid the transportation of liquors out of the state, but it does forbid the manufacture of liquors for purposes other than for sale according to the provisions of the statute. This construction does not render the statute unconstitutional as an interference with interstate commerce: *Pearson v. International Distillery*, 72-348.

2411. False statements. 21 G. A., ch. 66, § 11. If any person for the purpose of procuring the shipment, transportation, or conveyance of any intoxicating liquors from point to point or from one place to another within this state, shall make to any company, corporation or common carrier, or to any agent of such company, corporation or common carrier, or other person, any false statements as to the character or contents of any box, barrel or other vessel or package containing such liquors or shall refuse to give correct and truthful information as to the contents of any such box, barrel, or other vessel or package so sought to be transported or conveyed; or shall falsely mark, brand or label such box, barrel, or other vessel or package, in order to conceal the fact that the same contains intoxicating liquors for the purpose aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such liquors as herein prohibited, he shall upon conviction, be fined for each offense one hundred dollars, and costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and be committed to the county jail until such fine and costs are paid. Any peace officer of the county under process or warrant to him directed shall have the right to open any box, barrel, or other vessel or package, for examination if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed.

2412. Packages labeled. 22 G. A., ch. 73, § 7. It shall be unlawful for any common carrier or other person, to transport or convey by any means, from point to point or from one place to another within this state, any intoxicating liquor, unless the vessel, or other package containing such liquors, shall be plainly and correctly labeled or marked, showing the quantity and kind of liquor contained therein, as well as the name of the party to whom it is to be delivered. And no person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required. The violation of any provision in this section, by any common carrier or any agent, or employee of such carrier or by any other person, shall be punished the same as provided in section fifteen hundred and fifty-three, as substituted and enacted in section ten, chapter sixty-six, acts of twenty-first general assembly [§ 2410], for the violation of the provisions of that section. And liquors conveyed or transported, or delivered without being marked or labeled as herein required, whether in the hands of the carrier or some one to whom it shall have been delivered shall be subject to seizure and condemnation as liquor kept for illegal sale.

2413. Club room. 20 G. A., ch. 143, § 15. Every person who shall, directly or indirectly, keep or maintain, by himself, or by associating or combining with others, or who shall in any manner aid, assist, or abet, in keeping or maintaining any club room, or other place in which intoxicating liquors is received or kept for the purpose of use, gift, barter, or sale, or for distribution or division among the members of any club or association by any means whatever, and every person who shall use, barter, sell, or give away, or assist or abet another, in bartering, selling, or giving away any intoxicating liquors as received or kept, shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

2414. Repeal. 20 G. A., ch. 143, § 16. All statutes and acts and parts of acts inconsistent with the provisions of this chapter as hereby amended are

hereby repealed; *provided*, however, that this repeal shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time such repeal takes effect, and no offense committed, nor penalty or forfeiture incurred, and no suit or prosecution pending when the repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by this repeal, and the provisions of section fifteen hundred and fifty-five, as amended and substituted by the act of this general assembly approved March fourth, 1884 [§ 2416], shall apply and have relation to the provisions of the code as herein amended, and all penalties as herein provided shall be held to apply to intoxicating liquors as defined in said act of March fourth, 1884.

2415. Evasions. 1554. Courts and jurors shall construe this chapter so as to prevent evasion, and so as to cover the act of giving as well as selling by persons not authorized. [R., § 1581; C., '51, § 929.]

Applied: *Woolheather v. Risley*, 38–486, 491; *Church v. Higham*, 44–482, 484.

It is proper to instruct a jury that a licensed pharmacist selling intoxicating liquors must use the utmost good faith and ordinary caution, and show that liquor is only sold by him as medicine, and that his license will not protect him for artful sales of liquor for other purposes than medicine: *State v. Harris*, 64–287.

This section does not declare the act of giving unlawful. Its purpose is to provide a rule for the interpretation of other provisions which will defeat the evasions of their penalties: *State v. Hutchins*, 74–20.

2416. "Intoxicating liquors" construed. 1555; 20 G. A., ch. 8, § 1. Wherever the words intoxicating liquors occur in this chapter, the same shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever: and no person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquors whatever including ale, wine and beer. And the same provisions and penalties of law in force relating to intoxicating liquors, shall in like manner be held and construed to apply to violations of this act, and to the manufacture, sale, or keeping for sale, or keeping with intent to sell, or keeping or establishing a place for the sale of ale, wine and beer, and all other intoxicating liquors whatever.

Under this section as amended the sale of cider when intoxicating is forbidden. It includes intoxicating liquors of every kind: *State v. Hutchinson*, 72–561.

The inference from the statute is that there is but one kind of beer and that it is intoxicating, and a liquor denominated beer, without anything in its name tending to show it not to be intoxicating, may be refused by the common carrier for transportation: *Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.*, 73–98.

The statute classes beer as an intoxicating liquor; and if there are kinds of beer not in fact intoxicating, the burden is upon the person charged with the sale of such liquor to show that it is not in fact that kind, if he so claims: *State v. Cloughly*, 73–626.

So long as liquors retain their character of intoxicating liquors capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall within the provisions of the statute prohibiting the sale of such liquors. But when they are so compounded with other substances as to lose the character of intoxicating liquors and are no longer desirable for use as a stimulating beverage, and are, in fact, medicine, then their sale is not prohibited: *State v. Laffer*, 38–422.

Under this section, before its amendment, by which the manufacture and sale of beer, cider from apples, or wine from grapes, currants or other fruits grown in this state, was not prohibited, *held*, that wine was presumed to be an intoxicating liquor, unless it was shown that it was manufactured from grapes or fruit grown in this state: *Worley v. Spurgeon*, 38–465.

Held, also, that, in an indictment for the sale of wine made from fruit grown out of the state, an allegation that it was intoxicating was mere surplusage: *State v. Curley*, 33–359.

The distinction made in this section, as it stood before repeal, between wine made from native and that from foreign grapes, did not render the regulations as to sale of the latter void, as an improper regulation of interstate commerce in violation of the federal constitution: *State v. Stucker*, 58–496.

The meaning put by that section upon the term intoxicating liquors, so as to include those that were spirituous and vinous, excluding malt liquors, *held* to be purely arbitrary, as the latter are known to be in fact intoxicating: *Jewett v. Wanshura*, 43–574.

Also *held*, that the limitation of the latter part of the provision in regard to the place where the materials were grown did not apply to beer: *State v. Brindle*, 28–512.

A defendant relying upon such proviso as to beer and native wine must allege and prove the facts bringing him within its provisions, and it was not necessary that the prosecution charge and prove, in the first instance, that the case did not fall within the proviso: *State v. Stapp*, 29-551: *State v. Curley*, 33-359; *State v. Miller*, 53-84. (This is expressly provided in § 2406.)

2417. Liability for care of intoxicated person. 1556. Any person who shall by the manufacture or sale of intoxicating liquors, contrary to the provisions of this chapter, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof. [9 G. A., ch. 47, § 1.]

A physician, called to attend a person for an injury received, or for sickness resulting from intoxication, has no claim against the person selling the liquor, as contemplated by this section: *Sansom v. Greenough*, 55-127.

2418. Civil action for damages by wife, parent, etc. 1557. Every wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, against any person who shall, by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sustained as well as exemplary damages; and a married woman shall have the same right to bring suits, prosecute, and control the same and the amount recovered as if a single woman; and all damages recovered by a minor under this section, shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof. [Same, § 2.]

Right of action: The cause of action is the selling of the liquors, yet the foundation of the action is the wrongful act of defendant in causing the intoxication of the husband, father or other person, which is a personal injury to him, and the action is one for injury to the person in such sense that it must be brought within two years as provided by the statute of limitations in reference to that class of actions: *Emmert v. Grill*, 39-690.

In an action by a plaintiff suing as wife, the fact of marriage is not essential, and she may recover without proof thereof: *Kearney v. Fitzgerald*, 43-580.

By the provisions of this section a right of action was given for the sale of wine and beer to minors or intoxicated persons when sales of those liquors were in general not prohibited: *Jewett v. Wanshura*, 43-574.

Before the passage of the present law prohibiting entirely sales of wine and beer there was no cause of action for injuries due to the sale of beer, unless it was sold in violation of § 2380, prohibiting the sale to minors, intoxicated persons, etc.: *Myers v. Conway*, 55-166.

And before the enactment of that statutory provision there was no liability whatever to civil damages for injury resulting from the sale of beer: *Woody v. Coenan*, 44-19.

Giving: Damages arising from the giving as well as from the sale of intoxicating liquors may be recovered: *Welch v. Jugenheimer*, 56-11.

Under circumstances indicating that liquor furnished to plaintiff's husband was for a pecuniary compensation, although not directly paid for nor charged to him, *held*, that it was not error to allow the wife to recover damages for such act: *Rafferty v. Buckman*, 46-195.

For what injuries: The wife may recover damages resulting from the death of her husband caused by intoxication: *Ibid.*

In order that a right of action may exist, the liquor sold must cause or contribute to intoxication, and the wife must sustain some injury by the intoxication: *Welch v. Jugenheimer*, 56-11.

The damages sustained "in person" as contemplated by the statute mean in body, and threatening language, vulgar conduct, etc., directed towards plaintiff by her husband, but not resulting in physical injury or impairment of health, will not entitle her to either actual or exemplary damages as against the person causing the intoxication of her husband: *Calloway v. Laydon*, 47-456; *Welch v. Jugenheimer*, 56-11.

For wounded feelings, disgrace, etc., not resulting from injury to the person, no recovery can be had, but for mental anguish, shame or suffering resulting from violence to the person, plaintiff is entitled to recover: *Ward v. Thompson*, 48-588.

Plaintiff may recover for injuries to person, property and means of support, but not for wounded feelings or disgrace or loss of standing in society: *Jackson v. Noble*, 54-641.

The occupation and business capacity of the husband may be shown, and the manner in which he supported plaintiff previous to the intoxication, as showing of what plaintiff was deprived by reason of such intoxication: *Ibid.*

If it is shown that defendant has deprived plaintiff of the assistance of her husband in the support of herself and family by causing his frequent intoxication, her means of support would thus be shown to have been injured to that extent without reference to her condition before such injury: *Woolheather v. Risley*, 38–486.

The fact that plaintiff's husband has been for a long time habitually drunk cannot be shown in evidence for the purpose of affecting the wife's damages, but evidence as to the previous habits of the husband was material in such cases under the statute by which sale of beer was legal, except to persons in the habit of becoming intoxicated: *Huff v. Aultman*, 69–71.

Exemplary damages: This statutory provision gives a new and peculiar remedy not only for actual but also for exemplary damages. The injury is of a peculiar character not recognized or redressed by the common law: *Dunlavey v. Watson*, 38–398.

Exemplary damages may be allowed although no tort or breach of the peace has resulted: *Goodenough v. McGrew*, 44–670.

While threatening language and vulgar conduct by the husband towards the wife may result in the impairment of health, and thus amount to an injury for which damages might be recovered, yet such words and conduct unaccompanied with physical injury will not entitle her to actual damages, and therefore they cannot be a ground for exemplary damages, even where damages on other grounds are recovered. The exemplary damages in such case must be such as are called for under the circumstances under which the actual damages are sustained: *Calloway v. Laydon*, 47–456.

Where it appeared that defendant sold plaintiff's husband intoxicating liquor when he was in a state of intoxication, and continued to sell him liquors, knowing that he was in the habit of becoming intoxicated, *held*, that a verdict for exemplary damages was not erroneous: *Weitz v. Ewen*, 50–34.

Exemplary damages may be awarded in every case brought under this section where there has been a wilful violation of the statute which has occasioned injury, for which a right of action is given. The party injured is entitled to exemplary damages in a proper case, and the awarding of them is not left to the discretion of the jury: *Fox v. Wunderlich*, 64–187.

No special prayer for exemplary damages is required: *Gustafson v. Wind*, 62–281.

Who liable: The right of action is given any person who actually makes the sale of the intoxicating liquor, whether he be the owner, or the son, clerk or servant of such owner: *Worley v. Spurgeon*, 38–465.

It is sufficient to hold a defendant liable if it be shown that liquor sold by him contributed to the intoxication complained of: *Woolheather v. Risley*, 38–486.

A party is liable if he contributes to actual specific fits of intoxication as a direct result of liquor sold by him in part, even if the intoxication had become habitual, but not for contributing to the habit of drinking without intoxication, but leading to other drinking resulting in intoxication: *Cox v. Newkirk*, 73–42; *Arnold v. Barkalow*, 73–183.

Joint liability: A joint action will not lie against several defendants having independent places of business, where the injuries are successive and not the result of one particular intoxication. Section 3755 is not applicable to such cases: *La France v. Krayer*, 42–143.

Where a joint action will not lie, each party is liable for the damages which he occasions, and a settlement with one does not bar an action against another: *Jewett v. Wanshura*, 43–574.

But defendant may show that plaintiff has brought actions and obtained judgments against others for causing the same habitual intoxication, not by way of defense or mitigation of damages, but to show the actual extent of the damage caused by defendant's own act, and that he was not responsible for the entire damage resulting from such intoxication: *Ibid.*; *Ennis v. Shiley*, 47–552; *Engleken v. Webber*, 47–558.

The fact that plaintiff has brought another action against another person covering injuries caused in the same manner, and during the same time, is not a matter which may be shown by way of defense: *Ward v. Thompson*, 48–588.

While defendant in such action may show that he was only liable for part of the injuries resulting from the intoxication on the ground that plaintiff received compensation in other suits for injuries from the same intoxication, he should prove that such sales for which the other suits were brought were made during the same time as those sued for during the pending action, and if defendant desires to rely upon such partial defense, it is questionable whether he should not set it up in his answer: *Jackson v. Noble*, 54–641.

Where the intoxication causing the damages sued for was produced on some occasions by defendant and at other times by others, the defendant should only be held liable for the damages to which he contributed, and the difficulty of thus apportioning the damages will not render him liable for the whole: *Huggins v. Kavanagh*, 52–368.

If the damage is the proximate result of a particular intoxication, all parties contributing thereto are jointly liable, but not if it is the result of a besotted condition: *Hitchner v. Ehlers*, 44–40.

Where a wife sued for damages from the suicide of her husband caused by intoxication, *held*, that if the act resulted from the particular intoxication during which it was committed, all persons who contributed to such intoxication by selling him liquor were jointly liable for the injuries she sustained in her means of support, but if it resulted not alone from that particular intoxication but from a besotted condition, those contributing to such besotted condition but not to the immediate intoxication would not be jointly liable with those who did contribute to such particular intoxication: *Ibid.*

Where plaintiff did not rely on or prove any specific act or acts of intoxication, but it appeared that her husband had been in the habit of becoming intoxicated for many years, procuring liquor from any person who would let

him have it, *held*, that the several persons who had sold him liquor could not be considered as joint wrong-doers, but that each was severally liable for the damage caused by his own acts: *Richmond v. Shickler*, 57–486.

Persons who have contributed to habitual intoxication are not to be held responsible as joint wrong-doers, but each is liable for the part of the damages caused by his acts: *Ennis v. Shileu*, 47–552; *Flint v. Gauer*, 66–696.

Plaintiff contributing to injury: The wife cannot recover damages where she has herself contributed to her husband's intoxication: *Engleken v. Hilger*, 43–563; *Kearney v. Fitzgerald*, 43–580.

The fact that during the period covered by the wife's action for damages for sale of intoxicating liquors to her husband she herself bought liquors for him will not be such contribution on her part to the injury as to defeat her recovery if she had reason to believe that she would thereby keep him away from saloons and prevent the injuries for which she sues: *Ward v. Thompson*, 48–588.

In such case the fact that the wife has contributed to the condition of the husband by at times giving him permits to buy liquor will not absolutely defeat her recovery. Such connivance or assent will only defeat recovery for damages resulting from or caused by intoxication contributed to or connived at by her: *Rafferty v. Buckman*, 46–195.

The fact that the wife gives to the husband at his request sums of money belonging to him and placed by him in her custody, with knowledge on her part that portions thereof will be used for the purpose of procuring intoxicating liquors, will not necessarily constitute a voluntary contribution on her part to the intoxication of her husband, so as to defeat her right of recovering damages against the persons causing such intoxication: *Huff v. Aullman*, 69–71.

Evidence: In an action by the wife for damages for a sale of intoxicating liquors to her husband, the burden of proof is upon plaintiff to establish the fact that defendant sold liquor to the husband, and also that such liquor produced or contributed to produce the intoxication complained of: *Macleod v. Geyer*, 53–615.

In an action by the wife, *held* not error to allow the husband as a witness to state about how much money he had paid defendant for liquor, such fact being material as tending to show the injury to plaintiff's means of support, but not otherwise: *Ward v. Thompson*, 48–588.

Held, that in such cases indictments against defendant and convictions thereon for illegal sales of intoxicating liquors were not admissible in evidence against defendant, at least where it was not shown that the indictments were founded upon unlawful sales made to plaintiff's husband: *Applegate v. Weinbrenner*, 67–235.

Evidence of an assault committed upon the wife by the husband, *held* not admissible in an action by the wife against defendant for the recovery of damages for illegal sale of liquors to the husband, it not appearing that at the time of the assault the husband was intoxicated, nor that his intoxication, if any, was contributed to by defendant: *Ibid.*

The evidence necessary or competent to establish the injury and its extent is not confined within the bounds admissible to establish a common-law tort: *Dunlavey v. Watson*, 38–398.

Evidence as to the age, condition, circumstances, etc., of the husband, his habits of industry and his ability to support his wife before and after the acts complained of, may be received: *Ibid.*

It is error, in an action by the wife, to allow evidence as to number, age, etc., of children: *Huggins v. Kavanagh*, 52–368; *Welch v. Jugenheimer*, 56–11.

The wife may show the number and ages of her children belonging to her family if she also shows that defendant had knowledge of the facts, and that they were in danger of being injured or compelled to leave home, and after such knowledge wantonly continued to sell liquor to the husband, by reason of which the right of action arose, such evidence being pertinent to the question of exemplary, not of actual, damages: *Ward v. Thompson*, 48–588.

Life tables: It is doubtful whether the Carlisle life tables are admissible as evidence in determining the amount of damages in such an action, the measure of actual damage being the amount which would, from a pecuniary point of view, compensate the wife for the injury: *Rafferty v. Buckman*, 46–195.

2419. Property liable; lien of judgment; bond. 1558; 21 G. A., ch. 66, § 12. For all fines and costs assessed, or judgments rendered, of any kind, against any person for any violation of the provisions of this chapter, or costs paid by the county on account of such violations, the personal and real property, except the homestead and the personal property of such person which is exempt from execution, as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner thereof or his agent, by the person manufacturing or selling or keeping, with intent to sell intoxicating liquors contrary to law, shall be liable; and all such fines, costs and judgments shall be a lien on such real estate until paid. And where any person is required by section fifteen hundred and twenty-eight and fifteen hundred and twenty-nine of this chapter [§§ 2364–2366] to give bond with sureties, the principal and sureties on such bond, shall be jointly and severally liable for all civil damages, costs and judgments that may be adjudged against the principal in any civil action authorized to be brought against him for any

violation of the provisions of this chapter; costs paid by any county for the prosecution or on account of any violation of the law prohibiting the illegal sale of intoxicating liquors, that would be a lien on the property under the foregoing provisions, and including costs paid in seizure and condemnation proceedings, may be [re]covered by such county, by the enforcement of such lien by execution, or by action against the owner to subject the property to sale for the payment thereof. And evidence of the general reputation of the place shall be admissible on the question of knowledge, and written notice given him or his agent by any citizen of the county shall be sufficient to charge the owner with knowledge under the provisions of this section. [Same, § 3.]

When accrue: The right to make the judgment a lien upon the property where the business is carried on rests in the exercise of the police power and not in the right of eminent domain: *Polk County v. Hierb*, 37–361.

Property can only be made liable after it has been established in a competent court by a legal jury that it was used for the illegal purpose with the knowledge or consent of the owner, and the statute does not, therefore, authorize the taking of private property without a trial: *Ibid.*

That under this section a party is liable to a pecuniary forfeiture does not constitute the act or omission so punished a crime. The section is not an *ex post facto* law, nor does it impair vested rights: *Ibid.*

Method of proceeding: The party injured by the illegal sale may bring action against the seller alone, and by subsequent action against the owner enforce the judgment previously obtained; or may join the seller and the owner of the building in the same action: *La France v. Krayer*, 42–143.

The action for damages against the person selling may be joined with that against the person owning the premises in which sales are made and against which it is sought to have the judgment established as a lien: *Loan v. Hiney*, 53–89.

If a joint action is brought, either party is entitled to a jury trial on the question of the illegal sale and damages, and the owner is entitled to a jury trial also on the question as to whether such use of the premises was with his consent and knowledge: *Ibid.*

Where plaintiff brought action for damages for sale of intoxicating liquors against three defendants jointly as sellers, and joined with them as defendant the owner of the property in which the business was carried on, and two separate judgments were rendered at separate trials against two sellers respectively, and at a third trial the judgments were made a lien against the property of the owner, *held*, that on appeal of the owner from final judgment against him, he could not set up the fact of recovery of the former judgment against another one of the sellers by default: *Putney v. O'Brien*, 53–117.

In such case, *held*, that plaintiff might elect which judgment she would enforce and the other would be treated as satisfied: *Ibid.*

Where it is sought to subject property alleged to have been fraudulently conveyed for the purpose of evading the lien of a judgment to the payment of the same, the action against the grantee is equitable in its nature, and the defendant cannot demand a jury trial: *Buckham v. Grape*, 65–535.

In such an action against the holder of the legal title, who was not a party to the original action in which judgment was recovered, the record of the judgment in the former action may be introduced in evidence for the purpose of showing that the plaintiff has recovered judgment against the defendant in such former action, but not as evidence of the amount for which the lien should be established, except that in no event can the lien be established for any greater amount: *Ibid.*

The court establishing the lien of a judgment for illegal sale of liquors against the premises in which the same were sold should ascertain specifically the property upon which the lien shall attach. Such a judgment should not be entered where there is no evidence on the trial showing the title to be in defendant, and that fact is only shown by an affidavit filed after the verdict: *Flint v. Gauer*, 66–696.

The court should specifically ascertain and fix the property upon which the lien shall attach: *Engleken v. Webber*, 47–558, 561.

The statute does not contemplate that judgment against the wrong-doer may be split up and a part only charged as a lien upon the premises. It is sufficient that the landlord furnished the liquor seller, in part, the means of committing the injury: *Arnold v. Barkalow*, 73–183.

Knowledge of owner: A judgment in a proceeding to recover penalties for illegal sales to minors or intoxicated persons is not a lien upon the premises where such sales were made, unless the owner had knowledge of and consented to illegal sales of that character. His knowledge of and consent to sales without permit would not be sufficient. The owner should be shown to have had knowledge of and to have consented to the unlawful act on account of which the judgment was recovered: *Cobleigh v. McBride*, 45–116; *Myers v. Kirt*, 64–27.

Both knowledge and assent, on the part of the owner of the premises unlawfully used, must be shown to render them subject to the lien of the judgment: *Meyers v. Kirt*, 57–421.

Facts in a particular case *held* to show knowledge and assent on the part of the owner of the building: *Putney v. O'Brien*, 53–117.

The consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as

properly to call forth a protest, and a failure to make any objection: *Loan v. Etzel*, 62-429.

Knowledge and consent of the owner of the property cannot be inferred from circumstances tending to show knowledge alone: *Cox v. Newkirk*, 73-42.

Where the owner by reason of absence from the state was not aware of the improper use being made of his building, and so soon as he became aware of such use removed the tenant, *held*, that he was not liable for costs: *Drake v. Kingsbaker*, 72-441.

Under the provisions of this section as amended the knowledge to which the owner is entitled may be shown by proving the general reputation of the place or by proving that a written notice by any citizen of the county was given to him or his agent. The property is only liable for fines, costs and judgments assessed or rendered for violations of the law occurring after the owner is chargeable with knowledge that the property is being used for prohibited purposes: *Judge v. O'Connor*, 74-166.

Under this section prior to its amendment it was held that to fix the liability of the property it must be shown to have been used for unlawful purposes with the consent and knowledge of the owner; but under the present statute it is sufficient, in order to make out a *prima facie* case, to show that the unlawful use was with the knowledge of the owner. If, notwithstanding that fact, the property is not liable, the burden of showing it is on the owner: *Ibid.; Judge v. Flournoy*, 74-164.

When the property of one not a party to the suit is seized on process issued on a judgment on the ground that the property was used with the knowledge of the owner for purposes in violation of statute, the officer makes such seizure at his peril, but is protected if he can show that the property has been so used that under the law it is liable: *Snedaker v. Jones*, 74-235.

Lien attaches when; conveyance subject to: A purchaser of the property occupied and used for purposes of illegal sale, who purchases pending an action against the seller and the owner, in which it is sought to make any judgment recovered a lien upon the property, takes subject to the lien of any such judgment. The doctrine of *lis pendens* applies: *O'Brien v. Putney*, 55-292.

The lien of the judgment upon the premises attaches only on the rendition thereof, and is subordinate to that of a mortgage previously executed: *Goodenough v. McCoid*, 44 659.

Where a conveyance of property on which it is sought to establish a lien is made pending the action, that fact is no defense for the original owner, against whom a lien is sought to be established: *Myers v. Kirt*, 68-124.

The homestead when not used for the purpose of the violation of the liquor law is exempt from judgment therefor; but when used or kept for such purpose, with the consent of the owner, it is subject to such judgment: *Arnold v. Gotshall*, 71-572.

2420. False statements. 1559. If any one purchasing intoxicating liquors of a person authorized to sell, shall make to such person any false statement regarding the use to which such liquor is intended by the purchaser to be applied, such person so obtaining such liquor shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, forfeit and pay a fine of ten dollars, together with costs of prosecution, or shall stand committed until the same is paid. For the second offense he shall pay a fine of twenty dollars and costs of prosecution, and be imprisoned in the county jail not less than ten nor more than thirty days. [R., § 1577.]

2421. Two-mile limit; city or town. 17 G. A., ch. 119, § 1. It is hereby made unlawful for any person by himself, his agent or employee, directly or indirectly to sell to any person ale, wine, beer or other malt or vinous liquor within two miles of the corporate limits of any municipal corporation; except at wholesale for the purpose of shipment to places outside of such corporation and such two-miles limits, except as hereinafter provided; and excepting further, that when said two miles embrace any part of another municipal corporation, that part so embraced within said other corporation shall not be held to be affected by this act, but shall remain as heretofore exclusively under the control of the corporation within which it is situated.

This statute *held* constitutional: *State v. Shroeder*, 51-197; *Centerville v. Miller*, 51-712; *Toledo v. Edens*, 59-352.

By virtue of this statute a city ordinance regulating within the city limits the sale of liquors not prohibited would become operative within the limits specified without further action: *Toledo v. Edens*, 59-352.

Whatever territory the city maintains jurisdiction over for the purpose of taxes or otherwise, under a claim to exercise such jurisdiction, must be regarded as a *de facto* portion of its territory. The right of jurisdiction cannot be questioned in a prosecution for violation of this statutory provision: *Albia v. O'Harra*, 64-297.

2422. Place of election. 17 G. A., ch. 119, § 2. It is hereby made unlawful for any person by himself, his agent or employee, directly or indirectly to sell to any person, and upon any pretext whatever ale, wine, beer or other malt

or vinous liquors upon the day on which any election is held under the laws of this state, within two miles of the place where said election is held.

2423. Under permit upon prescription. 17 G. A., ch. 119, § 3. The foregoing sections shall not be held to include the sale, by any person holding a permit therefor under the laws of this state, of said malt or vinous liquors, when said sale is made upon the prescription therefor of a practicing physician. The provisions of this section shall be a matter of defense in any prosecution under this act.

2424. Exchanging deemed selling. 17 G. A., ch. 119, § 4. The giving to any person of ale, wine, beer, or other malt or vinous liquor, in consideration of the purchase of any other property shall be construed and held to be a sale thereof within the meaning of this act, and courts and jurors shall construe this act so as to prevent evasion.

2425. Penalty. 17 G. A., ch. 119, § 5. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of twenty dollars, and costs of prosecution, and shall stand committed five days, unless the same be sooner paid; on the second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed fifteen days, unless the same be sooner paid; and on the third and every subsequent conviction for said offense, he shall be punished by a fine of one hundred dollars, and shall pay the costs of prosecution, and shall stand committed for thirty days, if the same be not sooner paid, or by imprisonment in the county jail for thirty days.

2426. Liability of agent. 17 G. A., ch. 119, § 6. Any employee or agent of whatsoever kind, engaged or employed in selling, in violation of this act, shall be charged and convicted in the same manner as a principal may be, and shall be subject to the penalties and punishment in this act provided for such principal.

2427. Information. 17 G. A., ch. 119, § 7. Informations for violations under this act may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate informations; but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions mentioned in this act shall be construed to mean convictions on separate informations. If the information does not otherwise indicate, it shall be held to be for a first offense.

2428. Conviction forfeits lease. 17 G. A., ch. 119, § 8. A conviction for a violation of the provisions of this act, shall, at the option of the landlord or his agent, be held to be a forfeiture of any lease of the real estate in or upon which such sale in violation thereof is made, and such landlord or his agent shall have the right at any time within thirty days from such conviction to institute a suit of forcible entry and detainer for the possession of said real estate, and shall recover possession of such leased premises upon proof of the conviction of the tenant, his agent, servant, clerk, or any one claiming under him, of a violation of the provisions of this act, committed in or upon said leased premises.

2429. Jurisdiction of city or town. 17 G. A., ch. 119, § 9. The power and jurisdiction of every municipal corporation, whether acting under general or special charter, to regulate, prohibit or license the sale of ale, wine and beer, and of the courts and officers thereof to enforce said regulations, is hereby extended two miles beyond the corporate limits of said corporation; *provided*, that this section shall not be held to authorize said corporation to license any malt or vinous liquors, other than those malt or vinous liquors which said corporation, at this date, is authorized to license.

2430. Giving liquor to voters. 18 G. A., ch. 82, § 1. It shall be unlawful for any person to furnish, or give, or offer to give, any intoxicating liquors including ale, wine and beer, to voters at or within one mile of the polls during the day upon which any election is held in this state, prior to the closing of the polls.

2431. Penalty. 18 G. A., ch. 82, § 2. Any person violating the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars nor less than five dollars, or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment, in the discretion of the court, and in case of fine he shall stand committed until the same be paid.

CHAPTER 7.

OF FIRE COMPANIES.

2432. Exemptions to. 1560. Any person who is an active member of any fire-engine, hook and ladder, hose, or any other company, for the extinguishment of fire, or the protection of property at fires under the control of the corporate authorities of any city or incorporated town, shall, during the time he shall continue an active member of such company, be exempted from the performance of any military duty, and from the performance of labor on the highways on account of poll-tax, and from serving as a juror; and any person who shall have been an active member of such company in any city or town as aforesaid, and shall have faithfully discharged his duties as such for the term of ten years, shall be forever thereafter exempted from the performance of military duty in the time of peace, from serving as a juror, and from the performance of labor on the highways. [R., § 1763; 13 G. A., ch. 18, § 1.]

2433. Certificate. 1561. Any person who has served in any company for the term of ten years, as provided in the preceding section, shall be entitled to receive from the foreman of the company of which he shall have been a member, a certificate to that effect, and on the presentation of such certificate to the clerk or recorder of the proper city or town, such clerk or recorder shall file the same in his office, and give his certificate, under the corporate seal, to the person entitled thereto, setting forth the name of the company of which such person shall have been a member, and the duration of such membership; and such certificate shall be received in all courts and places as evidence that the person legally holding the same is entitled to the exemption hereinbefore mentioned. [R., § 1764.]

2434. Certificate of foreman. 1562. To entitle any person to exemption from labor on the highway before the expiration of the aforesaid term of ten years, he shall, on or before the first day of April of each year, file with the clerk or recorder of the proper city or town, a certificate signed by the foreman of the company of which said person is a member, that the person holding said certificate is an active member of said fire company, and thereupon the clerk or recorder shall enter said exemption upon the street tax list for that year. [13 G. A., ch. 18, § 2.]

2435. Misrepresentation. 1563. Any person who shall either by misrepresentation or by the use of a false certificate, or the certificate of any other person, endeavor to avail himself of the benefits of this chapter, upon conviction thereof before any mayor, recorder, or magistrate of any incorporated city or town, or before any district court, shall be sentenced to imprisonment in the county jail for a period of not more than six months, or less than

one month, and to pay a fine of not less than ten dollars, or more than one hundred dollars. [R., § 1765.]

2436. Destruction of fire apparatus. 1564. Any person or persons who shall wilfully destroy or injure any engines, hose carriage, hose, hook and ladder carriage, or anything whatever, used for the extinguishment of fires, belonging to any fire company, on conviction thereof shall be sentenced to imprisonment in the penitentiary for a period of not less than one year, nor more than three years. [R., § 1766.]

2437. Removal of fire apparatus. 1565. It shall not be lawful for any person to remove any engine or other apparatus for the extinguishment of fire, from the house or other place where the same shall be kept or deposited, except in time of fire or alarm of fire, unless properly authorized so to do by the president and director, or foreman, of the company to whom the same shall belong, or their duly authorized agent; and any person offending against the provisions of this section shall forfeit and pay a sum not less than five dollars, nor more than twenty dollars, to be sued for and recovered in the name of the state, for the use of the school fund, before any mayor, recorder, or magistrate of the city or town wherein the offense has been committed. [R., § 1767.]

2438. False alarms. 1566. It shall not be lawful for any person or persons to cause false alarm of fire, either by setting fire to any combustible material, or by giving an alarm of fire without cause, and any person offending against the provisions of this section shall be fined a sum of not less than five dollars or more than twenty dollars, to be sued for and recovered as specified in the foregoing sections. [R., § 1768.]

CHAPTER 7*a*.

BUREAU OF LABOR STATISTICS.

2439. Commissioner. 20 G. A., ch. 132, § 1. There is hereby created a bureau of labor statistics, to be under the control and management of a commissioner thereof, to be appointed as hereinafter provided by this act.

2440. Appointment; term; bond. 20 G. A., ch. 132, § 2. The governor shall, within thirty days after the taking effect of this act and biennially thereafter, with the advice and consent of the executive council, appoint a commissioner of labor statistics; the term of office of said commissioner to commence on the first day of April in each even-numbered year and continue for two years and until his successor is appointed and qualified. And said commissioner before entering upon the discharge of his duties shall take an oath or affirmation to discharge the same faithfully, and to the best of his ability; and shall give bond in the sum of two thousand dollars with sureties to the approval of the governor, conditioned for the faithful discharge of his official duties.

2441. Salary; office. 20 G. A., ch. 132, § 3. Said commissioner shall receive a salary of fifteen hundred dollars per annum, payable monthly, and necessary postage, stationery and office expenses, the said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. He shall have and keep an office in the capitol at Des Moines, in which shall be kept all records, documents, papers, correspondence and property pertaining to his office, and shall deliver them to his successor in office.

2442. Removal. 20 G. A., ch. 132, § 4. Said commissioner may be removed from his office by the governor for neglect of duty or malfeasance in

office; and any vacancy occurring at any time may be filled by the governor by and with the consent of the executive council.

2443. Duties; report. 20 G. A., ch. 132, § 5. The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor on or before the fifteenth day of August preceding each regular meeting of the general assembly, statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state, and shall as fully as practicable collect such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry. He shall by correspondence with interested parties in other parts of the United States impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts and what systems have been found most practical with details thereof. Such report when printed shall not consist of more than six hundred printed pages octavo. Five thousand copies thereof shall be printed and bound uniformly similar to the reports of other state officers as now authorized by law; said reports when published to be disposed of as follows, viz.: To the public libraries in the state, to the various trade organizations, agricultural and mechanical societies, and other places where the commissioner may deem proper and best calculated to accomplish the furtherance of the industrial interests of the state.

2444. Obtaining evidence. 20 G. A., ch. 132, § 6. The commissioner shall have power to issue subpœnas for witnesses and examine them under oath and enforce their attendance to the same extent and in the same manner as a justice of the peace; said witnesses to be paid the same fees as are now allowed witnesses before a justice of the peace, the same to be paid by the state.

CHAPTER 75.

IOWA WEATHER SERVICE.

2445. Central station; director. 17 G. A., ch. 45, § 1. There is established, at Iowa City, a central station for the Iowa weather service, with Gustavus Hinrichs as director thereof; and in case of his death or disability, his successor shall be appointed by the governor.

2446. Duties. 17 G. A., ch. 45, § 2. The duties of said director shall be to establish volunteer weather stations throughout the state, and supervise the same, to receive reports therefrom, and reduce the same to tabular form, and to report the same quarterly to the state printer, for publication, in the form of the "Iowa Weather Report."

2447. Report. 17 G. A., ch. 45, § 3. The state printer *be* [is] authorized to print two thousand copies of the said Iowa weather report quarterly, one thousand copies of which shall be for distribution by the said director, and one thousand copies delivered to the secretary of state, to be by him distributed in the same manner as other state documents.

2448. Annual appropriation. 17 G. A., ch. 45, § 4. There is hereby appropriated the sum of one thousand dollars annually, or so much thereof as may be necessary, for the purpose of meeting the actual expenses in carrying out the provisions of this measure, but no part of said sum shall be used in payment of salaries to any officer or officers, except for clerk hire, and only upon the order of the said director.

CHAPTER 8.

MINES AND MINING.

[Sections 1567 to 1569, inclusive, of the Code, 15 G. A., ch. 31, and 18 G. A., ch. 202, have been repealed by successive enactments.]

2449. Mine inspectors; appointment and qualification. 20 G. A., ch. 21, § 1; 21 G. A., ch. 140, § 1. There shall be appointed by the governor with the advice and consent of the senate, three inspectors of mines who shall hold their offices for two years. The said inspectors subject however to be removed by the governor for neglect of duty or malfeasance in office. Said term of office shall commence on the first day of April of each even-numbered year. Said inspectors shall have a theoretical and practical knowledge of the different systems of working and ventilating coal mines, and of the nature and properties of the noxious and poisonous gases of mines and of mining engineering; and said inspectors before entering upon the discharge of their duties shall take an oath or affirmation to discharge the same faithfully and impartially, which oaths or affirmations shall be indorsed upon their commissions, and their commissions so indorsed shall be forthwith recorded in the office of the secretary of state, and such inspectors shall each give bonds in the sum of two thousand dollars, with sureties to the approval of the governor, conditioned for the faithful discharge of their duties. The governor shall divide the state into inspection districts and shall assign the inspectors to duty in such place or districts as he shall deem proper.

2450. Duties; powers; records. 20 G. A., ch. 21, § 2; 21 G. A., ch. 140, § 2. Said inspectors shall give their whole time and attention to the duties of their offices respectively and shall examine all the mines in this state as often as their duties will permit, to see that the provisions of this act are obeyed, and it shall be lawful for such inspectors to enter, inspect and examine any mine in this state, and the works and machinery belonging thereto, at all reasonable times by night or by day, but so as not to unnecessarily obstruct or impede the working of the mines, and to make inquiry and examination into the state and condition of the mine as to ventilation and general security as required by the provisions of this act. The inspectors shall make a record of all examinations of mines inspected by them, showing the date when made, the condition in which the mines are found, the extent to which

the laws relating to mines and mining are observed or violated, the progress made in the improvement and security of life and health sought to be secured by the provisions of this chapter, number of accidents, injuries or deaths in or about the mines; the number of mines visited, the number of persons employed in or about the mines, together with all such facts and information of public interest concerning the condition of mines as they may think useful and proper, or so much thereof as may be of public interest to be included in their biennial report. The owner and agents of all coal mines are hereby required to furnish the means necessary for such inspection, and it shall be the duty of the person having charge of any mine, whenever any loss of life shall occur by accident connected with the workings of such mine to give notice forthwith by mail or otherwise to the inspector of mines of his district and to the coroner of the county in which such mine is situated, and the coroner shall hold an inquest on the body of the person or persons whose death has been caused, and inquire carefully into the cause thereof and shall return a copy of the verdict and all testimony to the said inspector. No person having a personal interest in or employed in the mine where a fatal accident occurs shall be qualified to serve on the jury impaneled on the inquest, and the owner or agent of all coal mines shall report to the inspector all accidents to miners in and around the mines, giving cause of same, such report to be made in writing and within ten days from the time any accident occur.

2451. Not to be interested; report. 20 G. A., ch. 21, § 3; 21 G. A., ch. 140, § 3. Said inspectors while in office shall not act as agents or managers or mining engineers, or be interested in operating any mine, and the inspector shall biennially, on or before the fifteenth day of August preceding the regular session of the general assembly make a report to the governor, of their proceedings and the condition and operation of the mines in this state, enumerating all accidents in or about the same, and giving all such information as they may think useful and proper, and making such suggestions as they may deem important as to future legislation on the subject of mining.

2452. Compensation; office. 20 G. A., ch. 21, § 4; 21 G. A., ch. 140, § 4; 22 G. A., ch. 52, § 1. The inspectors provided for in this act shall each receive a salary of twelve hundred dollars per annum, payable monthly, and shall be furnished with necessary stationery, and actual traveling expenses not to exceed five hundred dollars per annum; *provided*, that each inspector shall file at the end of each quarter of his official year with the auditor of state a sworn statement of his actual traveling expenses incurred in the performance of his official duty for such quarter. The said salary and expenses to be paid by the state as the salaries and expenses of other state officers are provided for. They shall have and keep an office in the capitol at Des Moines, in which shall be kept all records, correspondence, papers, apparatus and property pertaining to their duties belonging to the state and which shall be handed over to their successors in office. And each of said mine inspectors shall during his term of office have and keep a residence in the district to which he is assigned without expense to the state. Also have and keep an office at a place designated by the governor accessible to railroad and telegraph in their respective districts where at all reasonable times and when not actually engaged elsewhere such inspectors shall be found.

2453. Vacancies. 20 G. A., ch. 21, § 5; 21 G. A., ch. 140, § 5. Any vacancy occurring in the office of inspector when the senate is not in session, either by death or resignation, removal by the governor or otherwise, shall be filled by appointment by the governor, which appointment shall hold good until his successor is appointed and qualified.

2454. Instruments. 20 G. A., ch. 21, § 6; 21 G. A., ch. 140, § 6. There shall be provided for such inspectors all instruments necessary for the dis-

charge of their duties under this act, which shall be paid for by the state on the certificate of the inspectors, and shall be the property of the state.

2455. Maps of mines. 20 G. A., ch. 21, § 7. The agent or owner of every coal mine shall make or cause to be made, an accurate map or plan of the working of such mine on a scale of not less than one hundred feet to the inch, showing the area mined or excavated. Said map or plan shall be kept at the office of such mine. The owner or agent shall, on or before the first day of September of each year, cause to be made a statement and plan of the progress of the workings of such mine up to said date, which statement and plan shall be marked on the map or plan herein required to be made. In case of refusal on the part of said owner or agent for two months after the time designated to make the map or plan, or addition thereto, the inspector is authorized to cause an accurate map or plan of the whole of said mine to be made at the expense of the owner thereof, the cost of which shall be recoverable against the owner in the name of the person or persons making said map or plan. And the owner or agent of all coal mines hereafter wrought out and abandoned, shall deliver a correct map of said mine to the inspector, to be filed in his office.

2456. Outlets or escapes. 20 G. A., ch. 21, § 8; 22 G. A., ch. 56, § 1. It shall be unlawful for the owner or agent of any coal mine worked by shaft, to employ or permit any person to work therein unless there are to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but in no case shall a furnace shaft be used as an escape shaft; and if the mine is a slope or drift opening, the escape shall be separated from the other openings by not less than fifty feet of natural strata, and shall be provided with safe and available traveling ways, and the traveling ways to the escapes in all coal mines shall be kept free from water and falls of roof; and all escape shafts shall be fitted with safe and convenient stairs at an angle of not more than sixty degrees descent, and with landings at easy and convenient distances, so as to furnish easy escape from such mine, and all air shafts used as escapes where fans are employed for ventilation, shall be provided with suitable appliances for hoisting the underground workmen; said appliances to be always kept at the mine ready for immediate use; and in no case shall any combustible material be allowed between any escape shaft and hoisting shaft, except such as is absolutely necessary for operation of the mine; *provided*, that where a furnace shaft is large enough to admit of being divided into an escape shaft and a furnace shaft, there may be a partition placed in said shaft, properly constructed so as to exclude the heated air and smoke from the side of the shaft used as an escape shaft, such partition to be built of incombustible material for a distance of not less than fifteen feet up from the bottom thereof; and *provided*, that where two or more mines are connected underground, each owner may make joint provisions with the other owner for the use of the other's hoisting shaft or slope as an escape, and in that event the owners thereof shall be deemed to have complied with the requirements of this section. And *provided further*, that in any case where the escape shaft is now situated less than one hundred feet from the hoisting shaft there may be provided a properly constructed underground traveling way from the top of the escape shaft, so as to furnish the proper protection from fire, for a distance of one hundred feet from the hoisting shaft; and in that event the owner or agent of any such mine shall be deemed to have complied with the requirements of this section; and *provided further*, that this act shall not apply to mines operated by slopes or drift opening where not more than five persons are employed therein. And *provided further*, that any escapement shaft that is hereafter sunk and equipped before said escapement

shaft shall be located or the excavation for it be begun the district inspector of mines shall be duly notified to appear and determine what shall be a suitable distance for the same. The distance from the main shaft shall not be less than three hundred feet without the consent of the inspector and no buildings shall be put nearer the escape shaft than one hundred feet, except the house necessary to cover the fan.

2457. Time allowed for making outlets. 20 G. A., ch. 21, § 9; 22 G. A., ch. 56, § 2. In all mines there shall be allowed one year to make outlets as provided in section eight [§ 2456], when such mine is under two hundred feet in depth, and two years when such mine is over two hundred feet in depth; but not more than twenty men shall be employed in such mine at any one time until the provisions of section eight are complied with; and after the expiration of the period above mentioned should said mines not have the outlets aforesaid, they shall not be operated until made to conform to the provisions of section eight. And *provided further* that this act shall not apply to mines where the escape-way is lost or destroyed by reason of the drawing of pillars preparatory to the abandonment of the mine; *provided* that not more than twenty persons shall be employed in said mine at any one time.

2458. Ventilation. 20 G. A., ch. 21, § 10; 22 G. A., ch. 56, § 3. The owner or agent of every coal mine, whether it be operated by shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in such mine, and not less than five hundred cubic feet of air per minute for each mule or horse employed in the same, which shall be distributed and circulated throughout the mine in such manner as to dilute, render harmless, and expel the poisonous and noxious gases from each and every working place in the mine. And whenever the inspector shall find men working without sufficient air or under any unsafe conditions he shall first give the operator or his agent a reasonable notice to rectify the same and upon a refusal or neglect so to do the inspector may himself order them out until said portion of said mine shall be put in proper condition. And all mines governed by the provisions of this act shall be provided with artificial means for producing ventilation, such as exhaust or forcing fans, furnaces, or exhaust steam, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air for all the requirements of the persons employed in the mine; but in case a furnace is used for ventilating purposes it shall be built in such manner as to prevent the communication of fire to any part of the works by lining the upcast with incombustible material for a sufficient distance up from said furnace to insure safety.

2459. Safety appliances. 20 G. A., ch. 21, § 11. The owner or agent of every coal mine operated by a shaft or slope, in all cases where the human voice cannot be distinctly heard, shall forthwith provide and maintain a metal tube, or other suitable means for communication from the top to the bottom of said shaft or slope, suitably calculated for the free passage of sound therein, so that communication can be held between persons at the bottom and top of the shaft or slope. And there shall be provided a safety catch of approved pattern and a sufficient cover overhead on all carriages used for lowering and hoisting persons, and on the top of every shaft an approved safety gate, and also approved safety spring on the top of every slope, and an adequate brake shall be attached to every drum or machine used for raising or lowering persons in all shafts or slopes, and a trail shall be attached to every train used on a slope, all of said appliances to be subject to the approval of the inspector.

2460. Hoisting engines; operation. 20 G. A., ch. 21, § 12. No owner or agent of any coal mine operated by shaft or slope shall knowingly place in charge of any engine used for lowering into or hoisting out of such mine persons employed therein, any but experienced, competent and sober engineers,

and no engineer in charge of such engine shall allow any person except such as may be deputed for that purpose by the owner or agent, to interfere with it, or any part of the machinery; and no person shall interfere or in any way intimidate the engineer in the discharge of his duties; and the maximum number of persons to ascend out of or descend into any coal mine on one cage shall be determined by the inspector, but in no case shall such number exceed ten, and no person shall ride upon or against any loaded cage or car in any shaft or slope except the conductor in charge of the train.

2461. Boys. 20 G. A., ch. 21, § 13. No boy under twelve years of age shall be permitted to work in any mine; and parents or guardians of boys shall be required to furnish an affidavit as to the ages of their boys when there is any doubt in regard to their age, and in all cases of minors applying for work the agent or owner of the mines shall see that the provisions of this section *is* [are] not violated.

2462. Penalties; injunction; damages. 20 G. A, ch. 21, § 14; 22 G. A., ch. 56, § 4. In case any coal mine does not, in its appliances for the safety of the persons working therein, conform to the provisions of this act, or the owner or agent disregards the requirements of this act for twenty days after being notified by the inspector, any court of competent jurisdiction, while in session, or the judges in vacation, may, on application of the inspector, by civil action in the name of the state, enjoin or restrain by writ of injunction, the said agent or owner from working or operating such mines with more persons at once than are necessary to make the improvements needed, except as provided in sections eight and nine [§§ 2456, 2457], until it is made to conform with the provisions of this act, and such remedies shall be cumulative, and shall not take the place of, or affect any other proceedings against such owner or agent authorized by law, for the matter complained of in such action; and for any wilful failure or neglect to comply with the provisions of this law by any owner, lessee, or operator of any coal mine or opening whereby any one is injured, a right of action shall accrue to the party so injured for any damage he may have sustained thereby; and in case of loss of life by reason of such wilful neglect or failure aforesaid, a right of action shall accrue to the widow, if living, and if not living, to the children of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

2463. Penalty for mischief or disobedience. 20 G. A., ch. 21, § 15. Any miner, workman or other person who shall knowingly injure or interfere with any air-course or brattice, or obstruct, or throw open doors, or disturb any part of the machinery, or disobey any order given in carrying out the provisions of this act, or ride upon a loaded car or wagon in a shaft or slope except as provided in section twelve [§ 2460], or do any act whereby the lives and health of the persons, or the security of the mines and machinery is endangered; or if any miner or person employed in any mine governed by the provisions of this act, shall neglect or refuse to securely prop or support the roof and entries under his control, or neglect or refuse to obey any order given by the superintendent in relation to the security of the mine in the part of the mine under his charge or control, every such person shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

See *Crabell v. Wapello Coal Co.*, 68-751.

2464. Trial of inspector. 20 G. A., ch. 21, § 16; 21 G. A., ch. 43. Whenever written charges of gross neglect of duty or malfeasance in office against any inspector shall be made and filed with the governor, signed and sworn to by five miners, or one or more operators of mines, together with a bond in the sum of five hundred dollars, payable to the state, and signed by two or more responsible freeholders to be approved by the clerk of the courts

of the county where the bond is made, and conditioned for the payment of all costs and expenses arising from the investigation of such charges, it shall be the duty of the governor to convene a board of examiners, to consist of two practical miners, one mining engineer and two operators, at such time and place as he may deem best, giving ten days' notice to the inspector against whom charges may be made, and also the person whose name appears first in the charges, and said board when so convened, and having first been duly sworn or affirmed truly to try and decide the charges made, shall summon any witness desired by either party and examine them on oath or affirmation, which may be administered by any member of the board, and depositions may be read on such examination as in other cases, and report the result of their investigations to the governor, and if their report shows that said inspector has grossly neglected his duties, or is incompetent, or has been guilty of malfeasance in office, it shall be the duty of the governor forthwith to remove said inspector and appoint a successor, and said board shall award the costs and expenses of such investigation against the inspector or person signing said bond.

2465. Supply of props. 20 G. A., ch. 21, § 18. The owner, agent or operator of any coal mine shall keep a sufficient supply of timber to be used as props, so that the workmen may at all times properly secure the workings from caving in, and it shall be the duty of the owner, agent or operator to send down all such props when required.

2466. Penalties. 20 G. A., ch. 21, § 19. Any person wilfully neglecting or refusing to comply with the provisions of this act when notified by the mine inspector to comply with such provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, except when different penalties are herein provided.

2467. 20 G. A., ch. 21, § 20. Chapter two hundred and two of the acts of the eighteenth general assembly is hereby repealed.

2468. Board of examiners of candidates for mine inspector. 22 G. A., ch. 52, § 22. The executive council shall appoint a board of examiners composed of two practical miners, two mine operators and one mining engineer who shall have at least five years' experience in his profession. The members of said board shall be of good moral character, and citizens of the United States and state of Iowa, and they shall before entering upon their duties take the following oath (or affirmation): "I —— do solemnly swear (or affirm) that I will perform the duties of examiner of candidates for the office of mine inspector to the best of my ability and that in recommending any candidate I will be governed by the evidence of qualification to fill the position under the law creating the same, and not by any consideration of political or personal favors; that I will grant certificates to candidates according to their qualifications and the requirements of the law." They shall hold their office for two years.

2469. Meetings; compensation. 22 G. A., ch. 52, § 23. Said board shall meet biennially on the first Monday in April of each even-numbered year except that for the year 1888 said board shall meet on the second Monday of May in the office of the state mine inspector in the capitol, and they shall publish in at least one newspaper published in each mining district of the state the date fixed by them for the examination of candidates. They shall be furnished with the necessary stationery and other necessary material for said examination in the same manner as other state officers are now provided. They shall receive as compensation the sum of five dollars per day for time actually employed in the duties of their office and actual traveling expenses. The said compensation and expenses shall be paid in the same manner as the

salaries and expenses of other state officers are now paid: *provided* that in no case shall the per diem received by any member exceed fifty dollars for each biennial session.

2470. Certificate of competency. 22 G. A., ch. 52, § 24. Certificates of competency shall be granted only to citizens of the United States and state of Iowa of good moral character not less than twenty-five years of age, who shall have at least five years' experience in the mines and who shall not have been acting as agent or superintendent of any mine for at least six months prior to their appearance for examination.

2471. Examination. 22 G. A., ch. 52, § 25. The examination of candidates for the office of mine inspector shall consist of oral and written questions in theoretical and practical mining and mine engineering, on the nature and properties of noxious and poisonous gases found in mines and on the different systems of working and ventilating of coal mines. The candidates shall not be allowed to have in their possession at the time of their examination, any books, memoranda or notes to be used as aids in said examination. The board of examiners shall give to all persons examined who in their judgment possess the requisite qualifications, certificates of such qualification and from the persons holding such certificates the governor shall appoint the state mine inspectors.

2472. Scales provided. 22 G. A., ch. 53, § 1. The owner or agent of each coal mine within this state, at which the miners are paid by weight shall provide at such mine suitable scales of standard make for the weighing of all coal mined.

2473. Weigh master to be sworn. 22 G. A., ch. 53, § 2. The owner or agent of such mine shall require the person authorized to weigh the coal delivered from said mine to be sworn before some person having authority to administer an oath, to keep the scales correctly balanced, to accurately weigh, and to record a correct account of the amount weighed of each miner's car of coal delivered from such mine, and such oath shall be kept conspicuously posted at the place of weighing. The record of the coal mined by each miner shall be kept separate and shall be open to his inspection at all reasonable hours and also for the inspection of all others pecuniarily interested in such mine.

2474. Miners furnish check-weighman. 22 G. A., ch. 53, § 3. In all coal mines in this state the miners employed and working therein may furnish a competent check-weighman, who shall at all proper times have full right of access and examination of such scales, machinery or apparatus, and seeing all measures and weights of coal mined and accounts kept of the same, *provided* that not more than one person on behalf of the miners collectively shall have such right of access, examination and inspection of scales, measures and accounts at the same time and that such person shall make no unnecessary interference with the use of such scales, machinery or apparatus. The agent of the miners, as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some officer duly authorized to administer oaths, that he is duly qualified and will faithfully discharge the duties of check-weighman. Such oath shall be kept conspicuously posted at the place of weighing.

2475. Fraud in weighing. 22 G. A., ch. 53, § 4. Any person, company or firm having or using any scale or scales for the purpose of weighing the output of coal at mines so arranged or constructed that fraudulent weighing may be done thereby, or who shall knowingly resort to or employ any means whatsoever by reason of which such coal is not correctly weighed or reported in accordance with the provisions of this act; or any weighman or check-weighman who shall fraudulently weigh or record the weights of such coal, or connive at or consent to such fraudulent weighing, shall be deemed guilty

of a misdemeanor and shall, upon conviction for each such offense be punished by a fine of not less than two hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed sixty days or by both such fine and imprisonment; proceedings to be instituted in any court of competent jurisdiction.

2476. Punishment. 22 G. A., ch. 53, § 5. Any person, owner or agent, operating a coal mine in this state who shall fail to comply with the provisions of this act, or who shall obstruct or hinder the carrying out of its requirements, shall be fined for the first offense not less than fifty dollars nor more than two hundred dollars; for the second offense not less than two hundred dollars nor more than five hundred dollars; and for a third offense not less than five hundred dollars; *provided*, that the provisions of this act shall apply only to coal mines whose product is shipped by rail or water.

2477. Coal to be weighed before screening. 22 G. A., ch. 54, § 1. All coal mined in this state under contract for payment by the ton or other quantity shall be weighed before being screened unless otherwise agreed upon in writing, and the full weight thereof shall be credited to the miner of such coal; and eighty pounds of coal as mined shall constitute a bushel, and two thousand pounds of coal as mined shall constitute a ton. *Provided* that nothing in this act shall be so construed as to compel payment for sulphur rock slate black jack or other impurities including slack and dirt which may be loaded with or amongst such coal.

2478. Mine inspectors' apparatus. 22 G. A., ch. 54, § 2. Each state mine inspector shall procure from the state superintendent of weights and measures at the expense of the state, a full and complete set of standards, balances and other means of adjustment such as are necessary in the comparison and adjustment of the scales, beams and other apparatus used in weighing coal at the mines to the state standards of weight; and it shall be the duty of said inspectors to examine, test and adjust as often as occasion demands all scales, beams and other apparatus used in weighing coal at the mines.

2479. Damages recovered. 22 G. A., ch. 54, § 3. Any person damaged by reason of coal mined not having been weighed and credited to him in accordance with the provisions of this act may recover his damages in a civil action against the employer, but such action must be begun within two years after the right thereto accrued; but his right to recover in such action shall not be barred by reason of his having knowledge of the violation of this act at the time.

2480. Miners' wages, how paid. 22 G. A., ch. 55, § 1. It shall be unlawful for any person, firm, company or corporation, owning or operating coal mines in the state of Iowa, to sell, give, deliver or in any manner issue, directly or indirectly, to any person employed by him or it, in payment for wages due for labor, or as advances on the wages of labor not due, any script, check, draft, order or evidence of indebtedness, payable or redeemable otherwise than in their face value in money; and any such person, firm, company or corporation who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding three hundred dollars nor less than twenty-five dollars, and the amount of any scrip, token, check, draft, order or other evidence of indebtedness, sold, given, delivered or in any manner issued in violation of the provisions of this act, shall recover in money at the suit of any holder thereof, against the person, firm, company or corporation, selling, giving, delivering, or in any manner issuing the same: *provided* that this act shall not apply to any person, firm, company or corporation employing less than ten persons.

2481. Coercion in purchases forbidden. 22 G. A., ch. 55, § 2. Whoever compels, or in any manner seeks to compel or coerce an employee of any

person, firm, company or corporation, to purchase goods or supplies from any particular person, firm, company or corporation, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars or imprisonment in the county jail, not exceeding sixty days or both at the discretion of the court.

2482. Penalty. 22 G. A., ch. 55, § 3. The county attorney of any organized county, upon complaint being made to him of the violation of any of the provisions of this act within his county, shall cause such complaint to be investigated before the grand jury of the county where such wrong has been complained of, at its next session following the time such complaint is made.

CHAPTER 8*a*.

INSPECTION OF COAL OIL.

2483. Inspector of oils; appointment; duties. 20 G. A., ch. 185, § 1. The governor, by and with the advice and consent of the senate, shall appoint a suitable person, resident of the state, who is not interested in manufacturing, dealing in, or vending any illuminating oils manufactured from petroleum, as state inspector of oils, whose term of office shall commence on the first day of April of each even-numbered year, and continue for the term of two years and until his successor is appointed and qualified. It shall be the duty of such state inspector, by himself or his deputies, hereinafter provided for, to examine and test the quality of all such oils offered for sale by any manufacturer, vender, or dealer; and if upon such testing or examination the oils shall meet the requirements hereinafter specified, he shall fix his brand or device, "*Approved, flash test —— degrees*" (inserting the number of degrees), with the date, over his official signature, upon the package, barrel or cask containing the same. And it shall be lawful for the state inspector, or his deputies, to enter into or upon the premises of any manufacturer, vender or dealer of said oils, and if they shall find or discover any kerosene oil, or any other product of petroleum kept for illuminating purposes, that has not been inspected and branded according to the provisions of this act, they shall proceed to inspect and brand the same. It shall be lawful for any manufacturer, vender or dealer to sell the oil so tested and approved as an illuminator; but if the oil or other product of petroleum so tested shall not meet said requirements, he shall mark in plain letters on said package, barrel, or cask, over his official signature, the words: "*Rejected for illuminating purposes; flash test —— degrees*" (inserting the number of degrees). And it shall be unlawful for the owner thereof to sell such oil or other product of petroleum for illuminating purposes. And if any person shall sell or offer for sale any of such rejected oil or other product of petroleum for such purpose, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a penalty not exceeding three hundred dollars.

2484. May appoint deputies; apparatus. 20 G. A., ch. 185, § 2; 21 G. A., ch. 149, § 1. The state inspector provided for in this act, is authorized to appoint a suitable number of deputies, which deputies are empowered to perform the duties of inspection, and shall be liable to the same penalties as the state inspector; *provided*, that the state inspector may remove any of said deputies for reasonable cause. It shall be the duty of the inspector and his deputies to provide themselves at their own expense with the necessary instruments and apparatus for testing the quality of said illuminating oils, and when called upon for that purpose to promptly inspect all oils hereinbefore men-

tioned, and to reject for illuminating purposes, all oils which will emit a combustible vapor at a temperature of one hundred and five degrees standard Fahrenheit thermometer, closed test, *provided* the quantity of oil used in the flash test shall not be less than one-half pint. The oil tester adopted and recommended by the Iowa state board of health, shall be used by the inspector and his deputies in all tests made by them. And said board shall prepare rules and regulations as to the manner of inspection which rules and regulations shall be in effect and binding upon the inspector and deputies appointed under this act.

2485. Oath and bond. 20 G. A., ch. 185, § 3. The state inspector before he enters upon the discharge of the duties of his office shall take the oath or affirmation provided by law, and file the same in the office of the secretary of state, and execute a bond to the state of Iowa in a penal sum not less than twenty thousand dollars with sureties thereto, to be approved by the secretary of state, who shall justify as provided by law, and in addition thereto state under oath that they are not interested, directly or indirectly, in manufacturing, dealing in or vending any illuminating oils manufactured from petroleum; such bond to be conditioned for the faithful performance of the duties imposed upon him by this act, and which shall be for the use of all persons aggrieved by the acts of said inspector, or his deputies, and the same shall be filed with the secretary of state. Every deputy inspector before entering upon the discharge of his duties, shall take a like oath or affirmation prescribed herein for the state inspector, and execute to the state a bond in the penal sum of five thousand dollars with like conditions and for like purposes, and with sureties thereto who shall justify and have like qualifications as herein provided for the sureties for state inspector, and such sureties shall be approved by the clerk of the district court of the county in which such deputy inspector resides, and said bond and oath shall be filed in the office of such clerk and such deputy inspector shall before entering upon the discharge of his duties forward said clerk's certificate of such filing to the state inspector and to the secretary of state to be placed on file.

2486. Inspection. 20 G. A., ch. 185, § 4; 21 G. A., ch. 149, § 2. All inspections herein provided for shall be made within the state of Iowa, and the inspector and deputy inspectors shall be entitled to demand and receive from the owner or party calling on him or for whom he shall perform the inspection the sum of ten cents per barrel, and for the purposes of this act a barrel shall be deemed to be fifty-five gallons. All fees accruing for inspection shall be a lien upon the oil so inspected.

2487. Record and report. 20 G. A., ch. 185, § 5; 22 G. A., ch. 82, § 38. It shall be the duty of the state inspector and every deputy inspector to keep a true and accurate record of all oils so inspected and branded by him which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the number and kind of barrels, casks or packages, the name of the person for whom inspected and the amount of money received for such inspection; and such record shall be open to the inspection of all persons interested; and every deputy inspector shall return a true copy of such record at the beginning of each month to the state inspector. It shall be the duty of the state inspector to make and deliver to the governor for the fiscal period ending the thirteenth day of June, 1885, and every two years thereafter, a report of the inspections made by himself and deputies for such period, containing the information and items required in this act to be made of record, and the same shall be laid before the general assembly.

2488. Penalty. 20 G. A., ch. 185, § 6; 21 G. A., ch. 149, § 3. If any person or persons, whether manufacturer, vendee or dealer shall purchase, sell or attempt to sell to any person in this state any illuminating oil, the

product of petroleum, whether manufactured in this state or not, which has not been inspected as provided in this act, he shall be deemed guilty of a misdemeanor and subject to a penalty in any sum not exceeding three hundred dollars, and if any manufacturer, vendee or dealer in either or any of said illuminating oils shall falsely brand the package, cask or barrel containing the same, as provided in this act, or shall refill packages, casks or barrels having the inspector's brand thereon without erasing such brand, and having the oil inspected and such packages, casks or barrels rebranded, he shall be guilty of a misdemeanor and shall be subject to a penalty not exceeding three hundred dollars or be imprisoned in the county jail not exceeding six months or both in the discretion of the court.

2489. Empty barrels; use of oil not inspected. 20 G. A., ch. 185, § 7. Any person selling or dealing in illuminating oils produced from petroleum who shall sell or dispose of any empty kerosene barrel, cask or package before thoroughly canceling, removing or effacing the inspection brand on the same, shall be guilty of a misdemeanor, and on conviction thereof, shall pay a fine of one dollar for each barrel, cask or package thus sold or disposed of; and any person who shall knowingly use any lubricating oil, the product of petroleum, for illuminating purposes before the same has been approved by the state inspector of oils, or his deputy, shall be guilty of a misdemeanor, and, on conviction thereof, shall pay a fine in any sum not exceeding ten dollars for each offense.

2490. Adulteration. 20 G. A., ch. 185, § 8. No person shall adulterate with parafine or other substance, for the purpose of sale or for use, any coal or kerosene oils, to be used for lights, in such a manner as to render them dangerous to use; nor shall any person knowingly sell or offer for sale, or knowingly use any coal or kerosene oil, or any products of petroleum for illuminating purposes which by reason of being adulterated, or for any other reason, will emit a combustible vapor at a temperature less than one hundred degrees of standard Fahrenheit's thermometer, tested as provided in this act; *provided*, that the gas or vapor from said oils may be used for illuminating purposes when the oils from which said gas or vapor is generated are contained in close reservoirs outside the building illuminated or lighted by said gas. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment in the discretion of the court; *provided further*, that nothing in this act shall be so construed as to prevent the sale for and use in street lamps of lighter products of petroleum, such as gasoline, benzine, benzole, naphtha, or to prevent the use of machines or generators constructed on the principle of the "Davy safety lamp."

2491. Prosecuting violators. 20 G. A., ch. 185, § 9. It shall be the duty of the state inspector, and of any deputy inspector, who shall know of the violation of any of the provisions of this act, to prosecute before a court of competent jurisdiction any person so offending. And in case the state inspector, or any deputy inspector, having knowledge of the violation of any of the provisions of this act, shall neglect to prosecute as required herein, he shall be deemed guilty of a misdemeanor and punished accordingly, and upon conviction, shall be removed from office.

2492. Carriers not to carry nor use inflammable oil. 20 G. A., ch. 185, § 10. No oil, nor fluid, whether composed wholly or in part of petroleum, or its products, or of other substances or material, which will ignite and burn at a temperature of three hundred degrees of the standard Fahrenheit thermometer, open test, shall be carried as freight, nor shall the same be burned in any lamp, or vessel, or stationary fixture of any kind, in any pas-

senger, baggage, mail or express car on any railroad, nor on any passenger boat moved by steam-power, nor in any street railway car, stage-coach, omnibus or other public conveyance in which passengers are carried, within this state. A violation of any of the provisions of this section shall be deemed a misdemeanor, and the offender shall on conviction thereof be fined not less than one hundred dollars, nor more than one thousand dollars, and shall be liable for all damages resulting therefrom.

2493. Penalty for false branding. 20 G. A., ch. 185, § 11. If any inspector or deputy shall falsely brand or mark any barrel, cask or package, or be guilty of any fraud, deceit, misconduct or culpable negligence in the discharge of his official duties, or shall deal in, or have any pecuniary interest, directly or indirectly, in any oils or fluids used or sold for illuminating purposes, while holding such office he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days, and be liable to the party injured for all damages resulting therefrom.

2494. Removal from office. 20 G. A., ch. 185, § 12. It shall be the duty of the governor to remove from office, and to appoint a competent person in the place of any inspector who is unfaithful in the duties of his office.

2495. Penalty for selling oil below test. 20 G. A., ch. 185, § 13. Any person who shall knowingly or negligently sell, or cause to be sold, any of the oils mentioned in this act, for illuminating purposes, except for the purposes herein authorized, which are below the standard and test required in this act, shall be liable to any one purchasing said oil, or to any person injured thereby, for all damages resulting from any explosion of said oil.

2496. Rules. 20 G. A., ch. 185, § 14; 21 G. A., ch. 149, § 4. Within sixty days after the passage of this act, the state board of health shall make and provide the necessary rules and regulations for the inspection of illuminating oil and for the government of the inspector and deputy inspectors provided for in this act, and as contemplated by the provisions of this act, which shall be approved by the governor of the state and when so approved shall be furnished by said board to the inspector and his deputies. When written complaint shall be presented to the governor charging the inspector or any deputy with a failure or refusal to comply with or carry out said rules, and regulations, or any provisions of this act he shall investigate such charge, and if well founded and sustained, the person against whom said charges were made shall be removed from office by the governor without delay. Said rules and regulations may be changed or modified by said board subject to the approval of the governor not oftener than once a year.

2496a. 20 G. A., ch. 185, § 15. Chapter 172 of the acts of the seventeenth general assembly and section 3901 of the code are hereby repealed.

CHAPTER 8*b*.

INSPECTION OF PASSENGER BOATS.

2497. License. 22 G. A., ch. 107, § 1. From and after the taking effect of this act it shall be unlawful for any person as owner, agent or master of any sail or steamboat plying on the inland waters of this state, having a capacity to carry five persons or more, to hire such boat for the carrying of persons, or to receive passengers for carriage thereon for hire, without each year before the boating season and before its use first obtaining a license for the said boat as hereinafter provided; and every person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished accordingly. *Provided* that the provisions of

this act shall not apply to any sail or steamboat duly licensed under laws of the United States during the term covered by such license.

2498. Inspectors. 22 G. A., ch. 107, § 2. The governor shall on or before the second Monday in May in each year appoint such number of competent and suitable persons inspectors of boats as he may deem necessary, to serve until the second Monday in May of the next ensuing even-numbered year, unless sooner removed by the governor. The person so appointed shall qualify by taking an oath to be indorsed on his certificate of appointment, to faithfully and honestly discharge the duties of his office.

2499. Duties; certificate. 22 G. A., ch. 107, § 3. It shall be the duty of any inspector upon demand of any owner, agent, or master of any sail or steamboat, having a capacity for the carrying of five passengers or more, plying upon the inland waters of the state, and upon payment to him of the fee hereinafter provided for, to thoroughly and carefully inspect such boat and all its machinery and appliances, and if such boat is found safe and suitable to be hired for the carrying of persons or for the carrying of passengers, to give to such owner, agent or master, a certificate to that effect, and certifying therein the number of persons that may be carried thereon; which certificate shall entitle such boat to be used for the carrying of passengers for the season from the date thereof; and said certificate or a copy thereof shall be posted in a conspicuous place on or in said boat. And any owner, agent, or master of such boat, knowingly permitting or receiving for carriage on such boat a greater number of persons than authorized in such certificate shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than twenty dollars nor more than one thousand dollars.

2500. License of pilots and engineers. 22 G. A., ch. 107, § 4. It shall be unlawful for any person to act as pilot or engineer on any steamboat carrying passengers on the inland waters of this state, without first obtaining a license so to do as hereinafter provided. And any person violating this provision shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not less than twenty dollars nor more than five hundred dollars. That any person desiring license as such pilot or engineer shall apply therefor to some inspector appointed under this act whose duty it shall be, upon payment to him of the fee hereinafter provided for, to forthwith inquire into the competence of such applicant. If such applicant is found to be of sober habits, competent and capable of performing the duties of a pilot or engineer as the case may be, the inspector shall issue to such pilot or engineer, a certificate entitling him to act as such pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for good cause by some inspector of the state, with the approval of the governor.

2501. Inspectors' fees. 22 G. A., ch. 107, § 5. Said inspector shall be entitled to charge the following fees and require payment thereof in advance: For each sail boat inspected one dollar; for each steamboat inspected ten dollars. *provided* that steamers with capacity of twenty or less passengers shall be inspected for five dollars, whether the same be licensed or not, and for each application for license as pilot or engineer three dollars, whether a license be granted or not.

2502. Report. 22 G. A., ch. 107, § 6. Said inspectors shall report on or before January first of each year, to the governor of the state, the whole number of licenses, granted by them to pilots and engineers and to whom granted, the total number of sail boats and steamboats inspected by them, also the total amount of fees received by them for such licenses and inspection.

CHAPTER 8c.

IMITATION DAIRY PRODUCTS — STATE DAIRY COMMISSIONER.

2503. Imitation butter and cheese. 21 G. A., ch. 52, § 1. For the purposes of this act every article, substance or compound other than that produced from pure milk or cream from the same made in the semblance of butter and designed to be used as a substitute for butter made from pure milk or cream from the same is hereby declared to be imitation butter; and that for the purposes of this act every article, substance or compound other than that produced from pure milk or cream from the same made in the semblance of cheese and designed to be used as a substitute for cheese made from pure milk or cream from the same is hereby declared to be imitation cheese; *provided* that the use of salt, rennet, and harmless matter for coloring the product of pure milk or cream, shall not be construed to render such product an imitation.

2504. How marked. 21 G. A., ch. 52, § 2. Each person who manufactures imitation butter or imitation cheese shall mark by branding, stamping or stenciling upon the top and sides of each tub, firkin, box or other package in which such articles shall be kept and in which it shall be removed from the place where it is produced, in a clear and durable manner, in the English language, the name of the contents thereof as as herein designated, in printed letters of plain Roman type each of which shall be not less than one inch in length by one-half of one inch in width. Every person who by himself or another violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed two hundred and fifty dollars or by imprisonment in the county jail not to exceed sixty days.

2505. Shipment. 21 G. A., ch. 52, § 3. No person by himself or another shall knowingly ship, consign or forward by any carrier whether public or private any imitation butter or imitation cheese, unless the same be marked as provided by section two [§ 2504] of this act; and no carrier shall knowingly receive for the purpose of forwarding or transporting any imitation butter or imitation cheese, unless it shall be marked as hereinbefore provided, consigned, and by the carrier receipted for by its name as designated by this act; *provided* that this act shall not apply to any goods in transit between foreign states and across the state of Iowa.

2506. Having in possession. 21 G. A., ch. 52, § 4. No person shall knowingly have in his possession or under his control any imitation butter or imitation cheese unless the tub, firkin, box or other package containing the same be clearly and durably marked as provided by section two of this act [§ 2504]; *provided*, that this section shall not be deemed to apply to persons who have the same in their possession for the actual consumption of themselves or family.

2507. Selling. 21 G. A., ch. 52, § 5. No person by himself or another shall knowingly sell or offer for sale imitation butter or imitation cheese under the name of, or under the pretense that the same is pure butter or pure cheese; and no person by himself or another shall knowingly sell any imitation butter or imitation cheese unless he shall have informed the purchaser distinctly at the time of the sale, that the same is imitation butter or imitation cheese as the case may be and shall have delivered to the purchaser at the time of the sale a statement clearly printed in the English language which shall refer to the article sold and which shall contain in prominent and plain Roman type the name of the article sold as fixed by this act and shall give the name and place of business of the maker.

2508. Hotels; eating-houses. 21 G. A., ch. 52, § 6. No keeper of a hotel, boarding-house, restaurant, or other public place of entertainment shall knowingly place before any patron for use as food any imitation butter or imitation cheese unless the same be accompanied by a placard containing the name in English of such article as fixed by this act printed in plain Roman type. Each violation of this section shall be deemed a misdemeanor.

2509. Action on contract. 21 G. A., ch. 52, § 7. No action can be maintained on account of any sale or other contract made in violation of or with intent to violate this act by or through any person who was knowingly a party to such wrongful sale or other contract.

2510. Presumption from possession. 21 G. A., ch. 52, § 8. Every person having possession or control of any imitation butter or imitation cheese which is not marked as required by the provisions of this act shall be presumed to have known during the time of such possession or control the true character and name as fixed by this act of such imitation product.

2511. Defacing or removing marks. 21 G. A., ch. 52, § 9. Whoever shall deface, erase, cancel or remove any mark provided for by this act with intent to mislead, deceive or to violate any of the provisions of this act, shall be deemed guilty of a misdemeanor.

2512. Penalty for violation. 21 G. A., ch. 52, § 10. Whoever shall violate any of the provisions of the third, fourth and fifth sections of this act [§§ 2505–2507] shall, for the first offense, be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment not exceeding thirty days, and for each subsequent offense shall be punished by a fine of not less than two hundred and fifty dollars nor more than five hundred dollars or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment in the discretion of the court.

2513. Appointment of dairy commissioner. 21 G. A., ch. 52, § 11; 22 G. A., ch. 98, § 1. The governor shall on or before the first day of April of each even-numbered year appoint an officer, who shall be known as the Iowa state dairy commissioner, who shall have practical experience in the manufacture of dairy products, and who shall hold his office for the term of two years from the first day of May following his appointment: or until his successor is appointed and qualified. Said commissioner shall give an official bond conditioned for the faithful performance of the duties of his office in the sum of ten thousand dollars with sureties to be approved by the governor. He may be removed from office by the governor with the approval of the executive council for neglect or violation of duty. Any vacancy shall be filled by the appointment of the governor by and with the advice and consent of the executive council.

2514. Salary; office; clerk. 21 G. A., ch. 52, § 12. The state dairy commissioner shall receive a salary of fifteen hundred dollars per annum, payable monthly and the expenses necessarily incurred in the proper discharge of the duties of his office, *provided* that a complete itemized statement of all expenses shall be kept by the commissioner and by him filed with the auditor of state after having been duly verified by (him) before receiving the same. He shall be furnished a room in the agricultural department of the capitol at Des Moines, in which he shall keep his office and all correspondence, documents, records and property of the state pertaining thereto, all of which shall be turned over to his successor in office. He may, if it is found to be necessary, employ a clerk whose salary shall not exceed the sum of fifty dollars per month. Said salaries and expenses to be paid from the appropriation provided for in section seventeen of this act [§ 2519]. The commissioner pro-

vided for by this act shall hold no other official position under the laws of Iowa or a professorship in any of the state institutions.

2515. Duties; reports. 21 G. A., ch. 52, § 13. It shall be the duty of the state dairy commissioner to secure, so far as possible the enforcement of this act. He shall collect, arrange and present in annual reports to the governor on or before the first day of November of each year, a detailed statement of all matters relating to the purposes of this act, which he shall deem of public importance including the receipts and disbursements of his office. Such reports shall be published with the reports of the state agricultural society.

2516. Securing evidence. 21 G. A., ch. 52, § 14. The state dairy commissioner shall have power in all cases where he shall deem it important for the discharge of the duties of his office, to administer oaths, to issue subpœnas for witnesses and to examine them under oath and to enforce their attendance to the same extent and in the same manner as a justice of the peace may now do, and such witnesses shall be paid by the commissioner the same fees now allowed witnesses in justices' courts.

2517. Possession construed; seizures. 21 G. A., ch. 52, § 15. Whoever shall have possession or control of any imitation butter or imitation cheese contrary to the provisions of this act shall be construed to have possession of property with intent to use it as a means of committing a public offense within the meaning of chapter fifty of title twenty-five, of the code; *provided* that it shall be the duty of the officer who serves a search-warrant issued for imitation butter or imitation cheese, to deliver to the state dairy commissioner or to any person by such commissioner authorized in writing to receive the same, a perfect sample of each article seized by virtue of such warrant, for the purpose of having the same analyzed and forthwith to return to the person from whom it was taken, the remainder of each article seized as aforesaid. If any sample be found to be imitation butter or imitation cheese it shall be returned to and retained by the magistrate as, and for, the purpose contemplated by section forty-six hundred and forty-eight of the code [§ 6046], but if any sample be found not to be imitation butter or imitation cheese, it shall be returned forthwith to the person from whom it was taken.

2518. Prosecutions; costs. 21 G. A., ch. 52, § 16. It shall be the duty of the court in each action for the violation of this act to tax as costs in the cause, the actual and necessary expense of analyzing the alleged imitation butter or imitation cheese which shall be in controversy in such proceeding *provided* that the amounts so taxed shall not exceed the sum of twenty-five dollars. It shall be the duty of the [district or] county attorney, upon the application of the dairy commissioner, to attend to the prosecution in the name of the state of any suit brought for violation of any of the provisions of this act within his district, and in case of conviction he shall receive twenty-five per cent of the fines collected, which shall be in addition to any salary he may receive to be taxed as costs in the case.

2519. Appropriation. 21 G. A., ch. 52, § 17. There is hereby appropriated for the purposes of this act the sum of twenty thousand dollars or so much thereof as shall be necessary not more than one-half of which shall be drawn from the state treasury prior to the first day of July A. D. 1887. The amount hereby appropriated shall be expended only under the direction and with the approval of the executive council. And all salaries, fees, costs and expenses of every kind incurred in the carrying out of this law shall be drawn from the sum so appropriated.

2520. 21 G. A., ch. 52, § 18. Chapter thirty-nine of the acts of the eighteenth general assembly of Iowa and all acts and parts of acts in conflict with this act are hereby repealed.

2521. 22 G. A., ch. 98, § 2. Section seventeen [§ 2519] is hereby repealed and the following enacted in lieu thereof — "The unexpended portion of the appropriation provided for by section seventeen of the fifty-second chapter of the acts of the twenty-first general assembly, is hereby appropriated for the next biennial period, or so much thereof as may be necessary for the proper carrying out of the purposes of the act; but not more than one-half of said unexpended balance shall be drawn from the state treasury prior to the first day of May 1889. The amount hereby appropriated shall be expended only under the direction and with the approval of the executive council. And all salaries, fees, costs and expenses of every kind incurred in the carrying out of this law shall be drawn from the sum so appropriated."

2522. 22 G. A., ch. 98, § 3. Said chapter fifty-two of the acts of the twenty-first general assembly as hereby amended is continued as a general and permanent statute.

CHAPTER 8*d*.

THE PRACTICE OF PHARMACY, AND SALE OF MEDICINES AND POISONS.

2523. Registry required; suits for prosecutions. 18 G. A., ch. 75, § 1; 22 G. A., ch. 71, § 21. From and after the passage of this act it shall be unlawful for any person, not a registered pharmacist within the meaning of this act, to conduct any pharmacy, drug store, apothecary shop or store for the purpose of retailing, compounding or dispensing medicines or poisons, and any person violating the provisions of this section shall be liable to pay a penalty of five dollars for each day of such violation and cost of prosecution. Suits brought to recover any of the penalties provided for in this act or the acts to which it is amendatory shall be instituted in the name of the state of Iowa by the county attorney or under the direction and by the authority of the commissioners of pharmacy for the state of Iowa. In all cases brought under this act or the acts to which it is amendatory, the prosecution need not prove that the defendant has not the required pharmacy certificate of registration; if the defendant has such certificate he must produce it.

A non-registered clerk may aid a pharmacist under his supervision, but the pharmacist must have immediate personal direction and supervision of the work: *State v. Mullenhoff*, 74-271.

2524. Penalty. 18 G. A., ch. 75, § 2. It shall be unlawful for the proprietor of any store or pharmacy to allow any person except a registered pharmacist to compound or dispense the prescriptions of physicians, or to retail or dispense poisons for medical use, except as an aid to and under the supervision of a registered pharmacist. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be liable to a fine of not less than twenty-five dollars, nor more than one hundred dollars, for each and every such offense.

2525. Commissioners of pharmacy. 18 G. A., ch. 75, § 3; 21 G. A., ch. 83, § 1. The governor, with the advice of the executive council, shall appoint three persons from among the most competent pharmacists of the state, all of whom shall have been residents of the state for five years, and of at least five years' practical experience in their profession, who shall be known and styled as commmissioners of pharmacy for the state of Iowa; one of whom shall hold his office for one year, one for two years, and the other for three years, and each until his successor shall be appointed and qualified; and each year thereafter another commissioner shall be so appointed for three years, and until a successor be appointed and qualified. If a vacancy occur

in said commission, another shall be appointed, as aforesaid, to fill the unexpired term thereof. Said commissioners shall have power to make by-laws and all necessary regulations for the proper fulfillment of their duties under this act, without expense to the state; except that the secretary of state is authorized to furnish said commissioners with stationery and blanks necessary for their office, and said commissioners are authorized to administer oaths, and take and certify the acknowledgments of instruments in writing.

[By § 122 the commission is required to make its report to the governor on odd-numbered years on or before September fifteenth.]

This is a proper delegation of power: *Hildreth v. Crawford*, 65-339.

2526. Registry of certificates; forfeiture; renewal. 18 G. A., ch. 75, § 4; 19 G. A., ch. 137, § 1; 22 G. A., ch. 71, § 22; 22 G. A., ch. 106. The commissioners of pharmacy shall register in a suitable book, the names and places of residence of all persons to whom they issue certificates, and dates thereof. Druggists and pharmacists, who were registered without examination, forfeit their registration when they have voluntarily sold, parted with, or severed their connection with the drug business for a period of two years at the place designated in certificate of registration. Should such party who has thus forfeited his registration wish to re-engage in the practice of pharmacy, he is required to be registered by examination as per section five [§ 2527], *provided* that registered pharmacists who remove to another locality, and re-engage in the practice of pharmacy within a period of two years, and have paid to the commission of pharmacy the sum of one dollar on or before the twenty-second day of March of each year, as provided in this chapter, such registered pharmacist shall not be required to register by examination, but his former registration shall be in full force and effect. Every registered pharmacist, who desires to continue his profession, shall, on or before the twenty-second day of March of each year, pay to the commission of pharmacy the sum of one dollar, for which he shall receive a renewal of his certificate unless his name has been stricken from the register for violation of law. It shall be the duty of each registered pharmacist, before changing his locality as designated in his certificate of registration, to notify the secretary of the commission of pharmacy of his new place of business, and for recording the same and certification thereto, the secretary shall be entitled to receive fifty cents for each certificate. It shall be the duty of every registered pharmacist to conspicuously post his certificate of registration in his place of business. Any person continuing in business, who shall fail or neglect to procure his annual renewal of registration, or who shall change his place of business without complying with this section, or who shall fail to conspicuously post his certificate of registration in his place of business, shall for each such offense be liable to a fine of ten dollars for each calendar month during which he is so delinquent.

A pharmacist who was in business before the law took effect and was registered without examination, and then removed to another place, and has for two years failed to submit to an examination, cannot compel the commissioners to issue him a new certificate without such examination: *Braniff v. Weaver*, 72-641.

2527. Examination; diploma. 18 G. A., ch. 75, § 5. The said commissioners of pharmacy shall, upon application, and at such time and place, and in such manner as they may determine, examine, either by a schedule of questions, to be answered and subscribed to under oath, or orally, each and every person who shall desire to conduct the business of selling at retail, compounding, or dispensing drugs, medicines or chemicals for medicinal use, or compounding or dispensing physicians' prescriptions as pharmacists, and if a majority of said commissioners shall be satisfied that said person is competent and fully qualified to conduct said business of compounding or dispensing drugs, medicines or chemicals for medicinal use, or to compound and dispense physicians' prescriptions, they shall enter the name of such person as a regis-

tered pharmacist in the book provided for in section four of this act [§ 2526]; and all graduates in pharmacy having a diploma from an incorporated college or school of pharmacy that requires a practical experience in pharmacy of not less than four years before granting a diploma, shall be entitled to have their names registered as pharmacists by said commissioners of pharmacy without examination.

2528. Fee. 18 G. A., ch. 75, § 6. The commissioners of pharmacy shall be entitled to demand and receive from each person whom they register and furnish a certificate as a registered pharmacist, without examination, the sum of two dollars; and from each and every person whom they examine orally, or whose answers to a schedule of questions are returned subscribed to under oath, the sum of five dollars, which shall be in full for all services. And in case the examination of said person should prove defective and unsatisfactory and his name not be registered, he shall be permitted to present himself for re-examination within any period not exceeding twelve months next thereafter, and no charge shall be made for such re-examination.

2529. Adulteration. 18 G. A., ch. 75, § 7. Every registered pharmacist shall be held responsible for the quality of all drugs, chemicals and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturer, and also those known as "patent medicines;" and should he knowingly, intentionally and fraudulently adulterate, or cause to be adulterated, such drugs, chemicals or medical preparations, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be liable to a penalty not exceeding one hundred dollars, and in addition thereto, his name be stricken from the register.

2530. Sole right to sell, except liquors. 18 G. A., ch. 75, § 8; 21 G. A., ch. 83, § 2; 22 G. A., ch. 71, § 20. Pharmacists whose certificates of registration are in full force and effect, shall have the sole right to keep and to sell under such regulations as have been or may be established from time to time by the commissioners of pharmacy, all medicines and poisons, excepting intoxicating liquors.

Before the passage of 21 G. A., ch. 83, pharmacists could not sell intoxicating liquors without permits obtained in accordance with the statutes regulating the sale of such liquors: *State v. Mercer*, 58–182; *State v. Bissell*, 67–616; *State v. Knowles*, 57–669.

But that act made special provision for permits to pharmacists, and superseded other statutes on that subject, and under it no bond was required, and the permit was not limited to one year: *State v. Courtney*, 73–619; *State v. Mullenhoff*, 74–271. [The provisions of this act with reference to permits are now repealed by 22 G. A., ch. 71, § 20.]

A pharmacist having been permitted under former statutes to keep intoxicating liquors without a permit for dispensing as medicine, it is error in a prosecution for keeping a nuisance to allow evidence of the keeping of the intoxicating liquor at such time when it was lawful: *State v. Shank*, 74–649.

Under former statutes it was held that an unregistered pharmacist could not defend, in a prosecution for unlawfully keeping liquors for sale, on the ground that sales were made by a clerk who was registered, and for medicinal purposes only: *State v. Norton*, 67–641.

Also *held* that a licensed pharmacist selling intoxicating liquors must use the utmost good faith and ordinary caution, and show that the liquor was only sold by him as medicine; and his license would not protect him for artful sales of liquor for other purposes than as medicine: *State v. Harris*, 64–287; *State v. Knowles*, 57–669.

If sales are for unlawful purposes a pharmacist has no protection in the pharmacy statute, and the question of his guilt is to be determined according to the rules applicable to other offenders; and a written statement by the purchaser that he is one to whom a sale may properly be made, and that the liquor is desired for proper purposes, will not protect the pharmacist in case of an unlawful sale: *State v. Thompson*, 74–119.

A pharmacist is liable for illegal sales as well as any other person: *State v. Mullenhoff*, 74–271.

If it is proven that persons drank intoxicating liquors in defendant's pharmacy, that fact would be presumptive evidence that the liquors so drank had been unlawfully sold or given to the party by defendant: *State v. Cloughly*, 73–626.

Under the provisions of 21 G. A., ch. 83, now repealed, with reference to sales to minors or persons in the habit of becoming intoxicated, it was held that a pharmacist was not excusable for ignorance of the fact that the person to whom sale was made was a minor, or in the habit of becoming intoxicated: *State v. Ward*, 75–637.

A registered pharmacist being now required to hold a permit and make monthly reports,

such permit does not prevent his being prosecuted and convicted for illegal sales, and his reports are admissible in evidence for the purpose of showing the fact of illegal sales: *State v. Smith*, 74-580.

Failure to make reports or selling at an illegal profit will not subject defendant to punishment for unlawful sales where the sales are otherwise legal: *State v. Von Haltschuherr*, 72-541.

2531. Poisons, how retailed; liquors. 18 G. A., ch. 75, § 9. It shall be unlawful for any person, from and after the passage of this act, to retail any poisons enumerated in schedules "A" and "B," except as follows: *Schedule A;* arsenic, and its preparations, corrosive sublimate, white precipitate, red precipitate, biniodide of mercury, cyanide of potassium, hydrocyanic acid, strychnia, and other poisonous vegetable alkaloids, and their salts, essential oil of bitter almonds, opium and its preparations, except paregoric and other preparations of opium containing less than two grains to the ounce; *Schedule B*, aconite, belladonna, colchicum, conium, nux vomica, henbane, savin, ergot, cotton root, cantharides, creosote, digitalis, and their pharmaceutical preparations, croton oil, chloroform, chloral hydrate, sulphate of zinc, mineral acids, carbolic acid and oxalic acid; without distinctly labeling the box, vessel or paper in which the said poison is contained, and also the outside wrapper or cover, with the name of the article, the word "poison," and the name and place of business of the seller. Nor shall it be lawful for any person to sell or deliver any poison enumerated in schedules "A" and "B" unless, upon due inquiry, it be found that the purchaser is aware of its poisonous character, and represents that it is to be used for a legitimate purpose. Nor shall it be lawful for any registered pharmacist to sell any poisons included in schedule "A" without, before delivering the same to the purchaser, causing an entry to be made, in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name of the poison sold, the purpose for which it is represented by the purchaser to be required, and the name of the dispenser; such book to be always open for inspection by the proper authorities, and to be preserved for at least five years. The provisions of this section shall not apply to the dispensing of poisons, in not unusual quantities or doses, upon the prescriptions of practitioners of medicine. Nor shall it be lawful for any licensed or registered druggist or pharmacist to retail, or sell, or give away any alcoholic liquors or compounds as a beverage, and any violation of the provisions of this section shall make the owner or principal of said store or pharmacy liable to a fine of not less than twenty-five dollars, and not more than one hundred dollars, to be collected in the usual manner; and, in addition thereto, for repeated violations of this section his name shall be stricken from the register.

The provision that it shall be unlawful for a licensed druggist to retail alcoholic liquors as a beverage applies to the sale in any form of intoxicating liquor as a beverage which is not authorized by statute, either at retail or wholesale: *Torbert v. Clough*, 72-220.

2532. Itinerant vender of drugs; license; appropriation. 18 G. A., ch. 75, § 10; 19 G. A., ch. 137, § 2; 21 G. A., ch. 83, § 3. Any itinerant vender of any drug, nostrum, ointment or appliance of any kind, intended for the treatment of diseases or injury, who shall, by writing or printing, or any other method, publicly profess to cure or treat diseases, or injury, or deformity, by any drug, nostrum, manipulation, or other expedient, shall pay a license of one hundred dollars per annum, to be paid to the treasurer of the commission of pharmacy, whereupon the secretary of said commission shall issue such license for one year. Any person violating this section shall be deemed guilty of a misdemeanor, and shall, upon conviction, pay a fine of not less than one hundred nor more than two hundred dollars; all moneys received for licenses to be reported to the auditor of state. The sum of two thousand dollars per year, or as much thereof as may be necessary, is hereby appropriated out of the moneys so received for licenses, for the expenses of said commission, all exceeding said amount to be paid into the state treasury.

2533. Penalty for false representations. 18 G. A., ch. 75, § 11; 19 G. A., ch. 137, § 3. Any person who shall procure, or attempt to procure, registration for himself or for another under this act, by making, or causing to be made, any false representations, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be liable to a penalty of not less than twenty-five nor more than one hundred dollars, and the name of the person so fraudulently registered shall be stricken from the register. Any person, not a registered pharmacist as provided for in this act, who shall conduct a store, pharmacy, or place for retailing, compounding or dispensing drugs, medicines or chemicals, for medicinal use, or for compounding or dispensing physicians' prescriptions, or who shall take, use or exhibit the title of registered pharmacist, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be liable to a penalty of not less than fifty dollars nor more than two hundred dollars.

2534. Physicians' prescriptions; proprietary medicines; concentrated lye. 18 G. A., ch. 75, § 12; 19 G. A., ch. 137, § 4; 21 G. A., ch. 83, § 4; 22 G. A., ch. 81. Physicians dispensing their own prescriptions only, are not required to be registered pharmacists. *Provided*, that nothing in this act shall prevent any person not a registered pharmacist or not holding a permit, from keeping and selling proprietary medicines, and such other domestic remedies as do not include any intoxicating liquors or poisons, nor from selling concentrated lye and potash, *provided* however, that if any person sell or deliver said concentrated lye or potash without having the word "poison" and the true name thereof written or printed upon a label attached to the vial, box, or parcel containing the same shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars, but they shall not be compelled to register the sales of said lye and potash as required by section four thousand and thirty-eight, code of 1873, [§ 5359].

Where liquors are dispensed by a physician, not upon his judgment as to the needs of the patients, but upon the demands of his customers, such transaction is not protected under this section: *State v. Cloughly*, 73-626.

CHAPTER 8e.

PRACTICE OF DENTISTRY.

2535. Dentist must have license or diploma. 19 G. A., ch. 36, § 1. It shall be unlawful for any person who is not at the time of the passage of this act engaged in the practice of dentistry in this state to commence such practice unless such person shall have received a license from the board of examiners, or some member thereof as hereinafter provided, or a diploma from the faculty of some reputable dental college duly authorized by the laws of this state, or by some other of the United States, or by the laws of some foreign country in which college or colleges there was, at the time of the issue of such diploma, annually delivered a full course of lectures and instructions in dental surgery.

2536. Board of examiners. 19 G. A., ch. 36, § 2. A board of examiners is hereby created whose duty it shall be to carry out the purposes and enforce the provisions of this act. The members of said board shall be appointed by the governor, and shall consist of five practicing dentists, who shall have been engaged in the continuous practice of dentistry in the state for five years or over, at the time of, or prior to, the passage of this act. The

term for which the members of said board shall hold their office shall be five years, except that the members of the board first to be appointed under this act shall hold their offices for the term of one, two, three, four and five years respectively, and until their successors shall be duly appointed. In case of vacancy occurring in said board, such vacancy shall be filled by the governor.

2537. Organization and meetings of board. 19 G. A., ch. 36, § 3. Said board shall choose one of its members president, and one the secretary thereof; and it shall meet at least once in each year, and as much oftener, and at such times and places, as it may deem necessary. A majority of said board shall at all times constitute a quorum, and the proceedings thereof shall at all reasonable times be open to public inspection.

2538. Registry of practitioners. 19 G. A., ch. 36, § 4. It shall be the duty of every person who is engaged in the practice of dentistry in this state, within six months from the date of the taking effect of this act, to cause his or her name and residence, or place of business, to be registered with the said board of examiners, who shall keep a book for that purpose; and every person, who shall so register with said board as a practitioner of dentistry, may continue to practice the same as such without incurring any of the liabilities or penalties of this act.

2539. Persons not registered must be examined. 19 G. A., ch. 36, § 5. No person whose name is not registered on the books of said board as a regular practitioner of dentistry, within the limits prescribed in the preceding section, shall be permitted to practice dentistry in this state until such person shall have been duly examined by said board, and regularly licensed in accordance with the provisions of this act.

2540. Examination and license. 19 G. A., ch. 36, § 6. Any and all persons, who shall so desire, may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and if such person shall be found, after having been so examined, to possess the requisite qualifications, said board shall issue a license to such person to practice dentistry in accordance with the provisions of this act. But said board shall at all times issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof and be attested by its president and secretary; and such license shall be *prima facie* evidence of the right of the holder to practice dentistry in the state of Iowa.

2541. Temporary license. 19 G. A., ch. 36, § 7. Any member of said board shall issue a temporary license to any applicant upon the presentation by such applicant of the evidence of the necessary qualifications to practice dentistry; and such temporary license shall remain in force until the next regular meeting of said board occurring after the date of such temporary license and no longer.

2542. Penalty. 19 G. A., ch. 36, § 8. Any person who shall violate any of the provisions of this act shall be liable to prosecution, before any court of competent jurisdiction, upon information, and upon conviction shall be fined not less than twenty-five dollars, nor more than fifty dollars, for each and every offense.

2543. Fees; compensation; report. 19 G. A., ch. 36, § 9. In order to provide the means for carrying out and maintaining the provisions of this act, the said board of examiners may charge each person applying to or appearing before them for examination for license to practice dentistry a fee of two dollars; and out of the funds coming into the possession of the board from the fees so charged, the members of said board may receive as compensation the sum of five dollars for each day actually engaged in the duties of

their office. And no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of said per diem allowance shall be held by the secretary of said board as a special fund for meeting the expenses of said board, he giving such bond as the board shall from time to time direct. The said board shall make an annual report of its proceedings to the governor, by the fifteenth of November of each year, together with an account of all moneys received and disbursed by them pursuant to this act.

2544. Registry of licenses; penalty. 19 G. A., ch. 36, § 10. Any person who shall be licensed by said board to practice dentistry, shall cause his or her license to be registered with the county clerk of any county, or counties, in which such person may desire to engage in the practice of dentistry; and the county clerks of the several counties in this state shall charge for registering such license a fee of twenty-five cents for each registration. Any failure, neglect, or refusal on the part of any person holding such license to register the same with the county clerk, as above directed, for a period of six months, shall work a forfeiture of the license; and no license, when once forfeited, shall be restored, except upon the payment to the said board of examiners of the sum of twenty-five dollars, as a penalty for such neglect, failure, or refusal.

2545. Extracting teeth. 19 G. A., ch. 36, § 11. Nothing in this act shall be construed to prevent persons from extracting teeth.

CHAPTER 8*f*.

THE PRACTICE OF MEDICINE.

2546. Qualifications required; graduates; examination. 21 G. A., ch. 104, § 1. Every person practicing medicine, surgery or obstetrics, in any of their departments, within this state, shall possess the qualifications required by this act. If a graduate in medicine such person shall present his or her diploma to the state board of examiners, for verification as to its genuineness. If the diploma is found genuine, and is issued by a medical school legally organized and in good standing, of which the state board of examiners shall determine, and if the person presenting and claiming such diploma be the person to whom the same was originally granted, then the state board of examiners shall issue its certificates to that effect signed by not less than five physicians thereof, representing one or more physicians of the schools on the board, and such certificate shall be conclusive as to right of the lawful holder to practice medicine, surgery, and obstetrics within this state. If not a graduate the person practicing medicine or surgery within this state, unless he or she shall have been in continuous practice in this state, for a period of not less than five years, of which he or she shall present to the state board of examiners satisfactory evidence in the form of affidavits, shall appear before said state board of examiners, and submit to such examination as said board may require. All examinations shall be conducted in writing, and all examination papers, together with the reports, and action of the examiners thereon, shall be preserved as the records of the said board for a period of five years, during which time they shall remain open for inspection at the office of the said state board of examiners. Such examinations shall be in anatomy, physiology, general chemistry, pathology, therapeutics, and the principles and practice of medicine, surgery and obstetrics. *Provided*, that each applicant upon receiving from the secretary of the board an order for an examination shall receive

also a confidential number, which he or she shall place upon his or her examination papers so that when said papers are passed upon by the examiners, the latter shall not know by what applicant said papers have been prepared. That upon each day of examination all candidates be given the same set or sets of questions. It is further provided that the examination papers shall be marked upon the scale of one hundred, and that in order to secure a license, it shall be necessary for the applicant to attain such average as shall hereafter be determined by the state board of examiners, and if such examination be satisfactory to at least five physicians of said board, representing the different schools of medicine on the board, the board shall issue a certificate which shall entitle the lawful holder thereof to all the rights and privileges herein provided, and the physicians and the secretary of the state board of health shall constitute, and be deemed a board of examiners for the purpose of this act.

2547. Seal; certificates; meetings. 21 G. A., ch. 104, § 2. The state board of examiners shall procure a seal within sixty days after the passage of this act, and through the secretary of said board shall receive applications for certificates and examinations. The president, or any member of the board, shall have the authority to administer oaths and take testimony in all matters relating to their duties as examiners aforesaid. The board shall provide three forms of certificates: One for persons in possession of genuine diplomas, one for candidates examined by the board, and one for persons who have practiced medicine or surgery in any of its departments for five years as provided in this act. Said certificate shall be signed by not less than five physicians of the board, and this number may act as an examining board in the absence of the full board: *Provided* that one or more members of the different schools of medicine represented in the state board of health shall also be represented in the board of examiners. The board of examiners shall hold meetings at such places as will best accommodate applicants residing in different portions of the state, and at any such time as they shall deem best, and due notice of the time and place of such meetings shall be published.

2548. Certificate on diploma. 21 G. A., ch. 104, § 3. The board shall examine all diplomas submitted to them for such purpose to determine their genuineness and the rightful ownership of the person presenting the same. The affidavit of the applicant and holder of any diploma that he or she is the person therein named, and is the lawful possessor thereof, shall be necessary to verify the same, with such other testimony as the board may require. Diplomas and accompanying affidavits may be presented in person or by proxy. If the diploma shall be found genuine, and in possession of the person to whom it was issued, the state board of examiners shall, upon the payment of a fee of two dollars, to the secretary of the board, issue a certificate to the holder of such diploma, and no further fee or sum shall be demanded or collected from said applicant by said board for such certificate. If the diploma shall be found to be fraudulent, or not lawfully in possession of the holder or owner thereof, the person presenting such diploma or holding or claiming possession thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof, before any court of competent jurisdiction, be fined not less than twenty dollars, nor more than one hundred dollars.

2549. Recording certificate. 21 G. A., ch. 104, § 4. Every person holding a certificate issued by the state board of examiners, shall, within sixty days after the date of such certificate, have the same recorded in the office of the county recorder in the county wherein he resides, and should he remove from one county to another to practice medicine, surgery, or obstetrics, his certificate must be recorded in the county to which he removes. The county recorder shall indorse upon the certificate the date of record, and he shall be entitled to charge and receive a fee of fifty cents for his services, the fee to be paid by the applicant.

2550. How recorded. 21 G. A., ch. 104, § 5. The county recorder shall record in a book provided for that purpose, a complete list of the certificates presented for record, and the date of their issue by the state board of examiners. If the certificate is issued by reason of a diploma, the name of the medical college conferring the same, and the date when conferred shall be recorded; and when such certificate shall have been granted upon the examination of the board, or because of five years' practice in the state, such fact shall be recorded. Said records shall be open for inspection during business hours.

2551. Fees; compensation. 21 G. A., ch. 104, § 6; 22 G. A., ch. 66. Candidates for examination shall pay in advance to the secretary of the state board of examiners, a fee of ten dollars, which fee, together with the fees received for certificates, shall defray the entire expense of the aforesaid board of examiners, and the balance shall be turned over to the state treasurer for the benefit of the school fund, except such an amount as will pay each member of the board ten dollars per day during the time he is in actual attendance upon the session of the said board for the purpose of performing the duties required of him under this act, and, as will pay the secretary of the board such a salary as they may allow, not to exceed five dollars per day during the time he is actually engaged in performing the work of the board under this act, and each member of the board of examiners shall also receive a sufficient amount to defray his actual and necessary expenses while in the discharge of the duties herein provided. Any one failing to pass the required examination shall be entitled to a second examination within twelve months without fee; *provided* that any applicant for examination by notice in writing to the secretary shall be entitled to an examination within three months from the time of said notice and a failure to give such opportunity, shall entitle such applicant to practice without the certificate required by this act until the next regular meeting of said board. *Provided further*, the board may also issue certificates to persons, who, upon application present a certificate of having passed a satisfactory examination before any other state board of medical examiners, upon the payment of the fee provided in section three [§ 2548.]

2552. Refusal of certificate; revocation. 21 G. A., ch. 104, § 7. The state board of examiners may refuse to grant a certificate to any person, who has been convicted of a felony committed in the practice of his profession or in connection therewith or may revoke certificates for like cause, or for palpable evidence of incompetency, and such refusal or revocation shall prohibit such person from practicing medicine, surgery or obstetrics, *provided*, such refusal or revocation of a certificate can only be made with the affirmative vote of at least five physicians of the state board of examiners, in which number shall be included one or more members of the different schools of medicine represented in said board; and *provided further*, that the standing of a legally chartered medical college, from which a diploma may be presented, shall not be questioned except by a like vote.

2553. Who deemed practitioner. 21 G. A., ch. 104, § 8. Any person shall be deemed as practicing medicine, surgery or obstetrics or to be a physician within the meaning of this act, who shall publicly profess to be a physician, surgeon, or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal, by any means whatsoever, but nothing in this act shall be construed to prohibit students of medicine, surgery or obstetrics, from prescribing under the supervision of preceptors, or gratuitous service in case of emergency, nor shall this act extend to prohibit women who are at this time engaged in the practice of midwifery nor to prevent the advertising, selling or prescribing natural mineral waters flowing from wells or springs nor shall this act apply to surgeons of the United States army or navy, marine hospital service, nor to physicians as defined herein who have been in

practice in this state for five consecutive years, three years of which time shall have been in one locality; *provided*, such physican shall furnish the state board of examiners satisfactory evidence of such practice, and shall procure the proper certificate, as provided in this act, and for which certificate such physician shall pay the secretary of the state board of examiners a fee of two dollars, and said board shall issue to the applicant such certificate; nor shall this apply to registered pharmacists when filling prescriptions, nor shall it be construed to interfere with the sale of patent or proprietary medicines in the regular course of trade.

2554. Penalty for practicing without compliance. 21 G. A., ch. 104, § 9. Any person who shall practice medicine or surgery within this state, without having complied with the provisions of this act, and who is not embraced in any of the exceptions or after being prohibited from so doing as provided in section seven of this act [§ 2552], shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of not less than fifty nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days, nor more than thirty days.

2555. Penalty for fraud. 21 G. A., ch. 104, § 10. Any person who shall file, or attempt to file, with the state board of examiners, as his or her own, the diploma of another person, or who shall file, or attempt to file, with the county recorder the certificate of another person, as his or her own, or who shall file or attempt to file a diploma or certificate with the true name erased therefrom and the claimant's name inserted, or who shall file or attempt to file any forged affidavit of identification, shall be deemed guilty of the crime of forgery.

2556. Time of taking effect. 21 G. A., ch. 104, § 11. The penalties, as provided in this act, or violations thereof, shall not be enforced prior to the first day of January, A. D. 1887.

2557. 21 G. A., ch. 104, § 12. All acts and parts of acts in conflict with this act are hereby repealed.

CHAPTER 8*g*.

THE STATE BOARD OF HEALTH.

2558. Appointment. 18 G. A., ch. 151, § 1. The governor, with the approval of the executive council, shall appoint nine persons, one of whom shall be the attorney-general of the state (by virtue of his office), one a civil engineer, and seven physicians, who shall constitute a state board of health. The persons so appointed shall hold their offices for seven years: *provided*, that the terms of office of the seven physicians first appointed shall be so arranged by lot that the term of one shall expire on the thirty-first day of January of each year; and the vacancies thus occasioned, as well as all other vacancies otherwise occurring, shall be filled by the governor, with the approval of the executive council.

2559. Powers and duties. 18 G. A., ch. 151, § 2. The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state. They shall have charge of all matters pertaining to quarantine; they shall supervise a state registration of marriages, births and deaths, as hereinafter provided; they shall have authority to make such rules and regulations and such sanitary investigations as they may, from time to time, deem necessary for the preservation or improvement of public health; and it shall be the duty of all police officers, sheriffs, constables, and all other

officers of the state to enforce such rules and regulations, so far as the efficiency and success of the board may depend upon their official co-operation.

[The board is required to cause the prosecution of persons violating the law as to the sale of canned goods. See § 5377.]

2560. Clerk of court to keep registry; report; fees. 18 G. A., ch. 151, § 3; 19 G. A., ch. 140. The clerk of the district [and circuit] court[s] of each of the several counties in the state shall be required to keep separate books for the registration of the names and postoffice address of physicians and midwives, for births, for marriages, and for deaths, which record shall show the names, date of birth, death or marriage; the names of parents and sex of the child, when a birth; and when a death, shall give the age, sex and cause of death, with the date of the record and the name of the person furnishing the information. Said books shall always be open for inspection without fee, and the clerks of said courts shall be required to render a full and complete report of all births, marriages and deaths to the secretary of the board of health, annually, on the first day of October of each year, and at such other times as the board may direct; for which service the clerk shall receive, in addition to the compensation already allowed him by law, the sum of ten cents for each birth, marriage, or death so recorded by him, and the further sum of ten cents for each one hundred words of written matter contained in said report, the same to be paid out of the county fund.

2561. Forms furnished. 18 G. A., ch. 151, § 4. It shall be the duty of the board of health to prepare such forms for the record of births, marriages and deaths as they may deem proper; the said forms to be furnished by the secretary of said board to the clerk[s] of the district [and circuit] court[s] of the several counties, whose duty it shall be to furnish them to such persons as are herein required to make reports.

2562. Physicians and midwives to register and report. 18 G. A., ch. 151, § 5. It shall be the duty of all physicians and midwives in this state to register their names and postoffice address with the clerk of the district [and circuit] court[s] of the county where they reside, and said physicians and midwives shall be required, under penalty of ten dollars, to be recovered in any court of competent jurisdiction in the state at suit of the clerk of the courts, to report to the clerk of the courts, within thirty days from the date of their occurrence, all births and deaths which may come under their supervision, with a certificate of the cause of death, and such other facts as the board may require, and the blank forms furnished as hereinafter provided.

This statute, so far as it authorizes the board of health to require a physician to report information as to birth and deaths, is not unconstitutional. Its objects are within the authority of the state, and may be attained in the exercise of its police power: *Robinson v. Hamilton*, 60–134.

2563. Report by parent; by clerk. 18 G. A., ch. 151, § 6. When any birth or death shall take place, no physician or midwife being in attendance, the same shall be reported by the parent to the clerk of the district [and circuit] court[s] within thirty days from the date of its occurrence, and if a death, the supposed cause of death, or if there be no parent by the nearest of kin not a minor, or if none, by the resident householder, where the birth or death shall have occurred, under penalty provided in the preceding section of this act. Clerks of the district [and circuit] court[s] shall annually, on the first day of October of each year, send to the secretary of the state board of health a statement of all births and deaths recorded in their offices for the year preceding said date under a penalty of twenty-five dollars in case of failure.

2564. Coroners to report. 18 G. A., ch. 151, § 7. The coroners of the several counties shall report to the clerk of the courts, all cases of death which

may come under their supervision, with the cause or mode of death, etc., as per form furnished, under penalty as provided in section five of this act [§ 2562].

2565. Penalties; special fund. 18 G. A., ch. 151, § 8. All amounts recovered under the penalties of this act shall be appropriated to a special fund for carrying out the object of this law.

2566. Meetings of board. 18 G. A., ch. 151, § 9. The first meeting of the board shall be within twenty days after its appointment, and thereafter in May and November of each year, and at such other times as the board shall deem expedient. The November meeting shall be in the city of Des Moines; a majority of the members of the board shall constitute a quorum. They shall choose one of their number to be president and shall adopt rules and by-laws for their government, subject to the provisions of this act.

2567. Secretary; compensation. 18 G. A., ch. 151, § 10; 20 G. A., ch. 173. They shall elect a secretary who shall perform the duties prescribed by the board and by this act. He shall receive a salary which shall be fixed by the board, not exceeding twelve hundred dollars per annum. He shall, with the other members of the board receive actual traveling and other necessary expenses incurred in the performance of official duties; but no other member of the board shall receive a salary. The president of the board shall monthly certify the amount due the secretary, and on presentation of said certificate, the auditor of state shall draw his warrant on the state treasurer for the amount.

2568. Biennial report. 18 G. A., ch. 151, § 11; 22 G. A., ch. 82, § 37. It shall be the duty of the board of health to make a biennial report, through their secretary or otherwise, in writing to the governor of the state, and such report shall include so much of the proceedings of the board, such information concerning vital statistics, such knowledge respecting diseases and such instruction on the subject of hygiene as may be thought useful by the board for dissemination among the people, with such suggestions as to the legislative action as they may deem necessary.

[As to report and its publication, see §§ 117-121.]

2569. Annual appropriation; office. 18 G. A., ch. 151, § 12; 20 G. A., ch. 173. The sum of five thousand dollars per annum, or so much thereof as may be necessary, is hereby appropriated to pay the salary of the secretary, meet the contingent expenses of the office of the secretary and the expenses of the board and all costs of printing, which, together, shall not exceed the sum hereby appropriated. Said expenses shall be certified and paid monthly in the same manner as the salary of the secretary. The secretary of state shall provide rooms suitable for the meeting of the board and office room for the secretary of the board.

2570. Local boards of health. 18 G. A., ch. 151, § 13. The mayor and alderman of each incorporated city, the mayor and council of any incorporated town or village, in the state, or the trustees of any township, shall have and exercise all the powers and perform all the duties of a board of health within the limits of the cities, towns and townships of which they are officers.

[Other provisions as to local boards of health are found in §§ 532, 556-561, 723, 961-979.]

2571. Officers; fees. 18 G. A., ch. 151, § 14. Every local board of health shall appoint a competent physician to the board, who shall be the health officer within its jurisdiction, and shall hold his office during the pleasure of the board. The clerks of the townships and the clerks and recorders of cities and towns shall be clerks of the local boards. The local boards shall also regulate all fees and charges of persons employed by them in the execution of the health laws and of their own regulations.

2572. Report to state board. 18 G. A., ch. 151, § 15. It shall be the duty of the health physician of every incorporated town, and also the clerk of the local board of health in each city or incorporated town or village in the state, at least once a year to report to the state board of health their proceedings, and such other facts required, on blanks, and in accordance with instructions received from said state board. They shall also make special reports whenever required to do so by the state board of health.

2573. Regulations; penalty. 18 G. A., ch. 151, § 16. Local boards of health shall make such regulations respecting nuisances, sources of filth, and cause of sickness within their jurisdiction, and on board any boats in their ports or harbors, as they shall judge necessary for the public health and safety; and if any person shall violate any such regulations, he shall forfeit a sum of not less than twenty-five dollars for every day during which he knowingly violates or disregards said rules and regulations, to be recovered before any justice of the peace or other court of competent jurisdiction.

Where the mayor and aldermen of a city constituting a board of health made a regulation that no hog-pen nor inclosure wherein swine are kept and fed otherwise than for purpose of commerce should be allowed within the city limits, *held*, that such regulations might be enforced by the city: *State v. Holcomb*, 68-107.

2574. Notice to abate nuisance. 18 G. A., ch. 151, § 17. The board of health of any city or incorporated town or village shall order the owner of any property, place or building (at his own expense), to remove any nuisance, source of filth or cause of sickness, found on private property, within twenty-four hours, or such other time as is deemed reasonable after notice served as hereinafter provided; and if the owner or occupant neglects to do so, he shall forfeit a sum not exceeding twenty dollars for every day during which he knowingly and wilfully permits such nuisance or cause of sickness to remain after the time prescribed for the removal thereof.

Exclusive jurisdiction to determine what constitutes a nuisance and to abate nuisances is not conferred upon the local board of health. A private action for damages may be maintained against a person maintaining a nuisance by one specially injured thereby without regard to the action of the board: *Baker v. Bohannan*, 69-60.

2575. Abatement by board. 18 G. A., ch. 151, § 18. If the owner or occupant fails to comply with such order, the board may cause the nuisance, source of filth or cause of sickness to be removed, and all expenses incurred thereby shall be paid by the owner, occupant or other person who caused or permitted the same, if he has had actual notice from the board of health of the existence thereof, to be recovered by civil action in the name of the state before any court having jurisdiction.

2576. Tenements. 18 G. A., ch. 151, § 19. The board when satisfied, upon due examination, that any cellar, room, tenement, or building in its town, occupied as a dwelling-place, has become, by reason of the number of occupants, or want of cleanliness, or other cause, unfit for such purpose, and a cause of nuisance or sickness to the occupants or the public, may issue a notice, in writing, to such occupants, or any of them, requiring the premises to be put in a proper condition as to cleanliness, or, if they see fit, requiring the occupants to remove or quit the premises within such time as the board may deem reasonable. If the persons so notified, or any of them, neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners, or may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling-place without permission, in writing, of the board.

2577. Forcible entry. 18 G. A., ch. 151, § 20. Whenever the board of health shall think it necessary for the preservation of the lives or health of the inhabitants to enter a place, building or vessel in their township, for the purpose of examining into and destroying, removing or preventing any nui-

sance, source of filth, or cause of sickness, and shall be refused such entry, any member of the board may make complaint, under oath, to any justice of the peace of his county, whether such justice be a member of the board or not, stating the facts of the case so far as he has knowledge thereof. Such justice shall thereupon issue a warrant directed to the sheriff or any constable of the county, commanding him to take sufficient aid, and being accompanied by two or more members of said board of health between the hours of sunrise and sunset, repair to the place where such nuisance, source of filth, or cause of sickness complained of may be, and the same destroy, remove or prevent, under the direction of such members of the board of health.

2578. Removal of infected person. 18 G. A., ch. 151, § 21. When any person coming from abroad, or residing within any city, town, or township, within this state, shall be infected, or shall lately have been infected with small-pox or other sickness dangerous to the public health, the board of health of the city, town or township, where said person may be, shall make effectual provision in the manner in which they shall judge best for the safety of the inhabitants by removing such sick or infected person to a separate house, if it can be done without damage to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents or other person who may be liable for his support, if able, otherwise, at the expense of the county to which he belongs.

The board of health may, under this section, erect a temporary building to which infected persons may be removed for isolation, and the county will be liable for the expenses thereof in case of the inability of the infected person or persons to pay such charge. Whether the infected person would be liable for such expenses in any event, doubted: *Staples v. Plymouth County*, 62-364.

The sick person is properly chargeable with all expenses which may be incurred, as, including expenses of removal, if that plan is adopted, or isolation, if that is adopted; and in the latter case the expense of food furnished to the entire family during the period of isolation may be included; also, the supplying of clothing in place of clothing worn by the family which is burned. For all such expenses which the sick person or those liable for his support are unable to pay the county is ultimately liable: *Clinton v. Clinton County*, 61-205.

It is the imperative duty of the local board of health to provide for a sick person, regardless of his settlement — as where the person is a foreigner, not yet having acquired a settlement. The sick or afflicted person must in such case be deemed to belong to the county where the relief becomes necessary: *Ibid.*

The county is liable for the care of sick persons under said statute only in case they or the persons liable for their support are not able to make compensation therefor. The liability of the county can be established only by showing that the facts exist which are contemplated by the statute as rendering the county liable, and the burden of proving these facts is therefore upon the party seeking to establish such liability: *Gill v. Appanoose County*, 68-20.

The board will not be bound by the actions of individual members in authorizing a physician to render services. Such action must be by the board as a body: *Young v. Blackhawk County*, 66-460.

2579. Care without removal. 18 G. A., ch. 151, § 22. If any infected person cannot be removed without damage to his health, the board of health shall make provision for him as directed in the preceding section in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed and may take such other measures as may be deemed necessary for the safety of the inhabitants.

2580. Warrant for removal. 18 G. A., ch. 151, § 23. Any justice of the peace on application under oath showing cause therefor by a local board or any member thereof, shall issue his warrant under his hand, directed to the sheriff or any constable of the county, requiring him under the direction of the board of health to remove any person infected with contagious diseases, or to take possession of condemned houses and lodgings, and to provide nurses and attendants and other necessaries for the care, safety, and relief of the sick.

2581. Meeting of local boards; report of clerk. 18 G. A., ch. 151, § 24; 22 G. A., ch. 65. Local boards of health shall meet for the transaction

of business on the first Monday of April and the first Monday in October of each year, and at any other time that the necessities of the health of their respective jurisdictions may demand, and the clerk of each board shall transmit his annual report to the secretary of the state board of health within two weeks after the October meeting. Said report shall embrace a history of any epidemic disease which may have prevailed within his district. The failure of the clerk of the board to prepare, or cause to be prepared, and forward such report as above specified, shall be considered a misdemeanor for which he shall be subject to a fine of not more than twenty-five dollars.

2582. 18 G. A., ch. 151, § 25. All laws in conflict with this act are hereby repealed.

CHAPTER 9.

OF QUARTERLY BANK STATEMENTS.

[For other provisions as to banks, see §§ 1788-1825.]

2583. What required. 1570. All associations organized under the general incorporation laws of this state, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits, discounting notes, etc., shall make a full, clear, and accurate statement of the condition of the association as hereinafter provided, which shall be verified by the oath of the president or vice-president, cashier or secretary, and two of the directors, which statement shall contain:

1. The amount of capital stock actually paid in, and then remaining as the capital of such association;
2. The amount of debts of every kind due to banks, bankers, or other persons, other than regular depositors;
3. The total amount due depositors, including sight and time deposits;
4. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such association;
5. The amount of gold and silver coin and bullion belonging to such association at the time of making the statement;
6. The amount then on hand of bills of solvent specie-paying banks;
7. The amount of bills, bonds, notes, and other evidences of debt, discounted or purchased by such association, and then belonging to the same, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful, and the amount in suit or judgment;
8. The value of real or personal property held for the convenience of such association, specifying the amount of each;
9. The amount of the undivided profits, if any, then on hand;
10. The total amount of all liabilities to such associations on the part of the directors thereof; which statement shall be forthwith transmitted to the auditor of state, and be by him filed in his office. [R., § 1636.]

2584. Additional reports. 1571. The auditor of state shall, at any time he may see proper, make or cause to be made, an examination of any association, as hereinafter provided, contemplated in this chapter, or he shall call upon any such association for a report of its state and condition as hereinbefore provided, upon any given day which has passed, as often as four times a year, and which reports the auditor shall cause to be published for one day in some daily newspaper published in the county where such association shall be located, or if there be no such newspaper published in said county, then such report shall be published in some weekly newspaper printed in said

county for one week; the expenses of such publication shall be paid by each institution.

2585. Insolvent; receiver appointed. 1572. If such auditor is satisfied from said examination or reports that any such institution is insolvent, he shall direct the attorney-general to commence the proper proceedings, to have a receiver appointed and said institution wound up, and the assets thereof ratably distributed among the creditors thereof, giving preference in payment to depositors.

2586. Forfeiture. 1573. Any wilful failure or neglect of the proper officers of such association to comply with the provisions of this chapter, shall be regarded as a forfeiture of all the rights and privileges of such association. [R., § 1638.]

2587. Failure to report. 1574. Any officer whose duty it is made to make statement and publication as aforesaid, who shall wilfully neglect, or refuse to do so shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary. [R., § 1639.]

2588. Existing associations; how affected; four statements required each year. 1575. The provisions of sections fifteen hundred and seventy-three and fifteen hundred and seventy-four, of this chapter [§§ 2586, 2587], shall not apply to or be enforced against any such banking institution, or the officers thereof, who heretofore have been incorporated and come under the provisions of this chapter; *provided*, that on or before the first day of September, 1873, any such institution shall have shown by a statement of its condition to the satisfaction of the auditor of the state, that it is now in a sound condition. In no case shall more than four statements in one year be required.

2589. Amount of capital required. 1576. No association shall be organized under the provisions of this chapter with a less amount of paid-up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid-up capital of not less than twenty-five thousand dollars. But no such association shall have the right to commence business until its officers-elect, or its stockholders, shall have furnished to the auditor of state a sworn statement of the paid-up capital, and when the auditor of state is satisfied as to the fact, he shall issue to such association a certificate authorizing such association to commence business, a copy of which shall be published as provided in section fifteen hundred and seventy-one of this chapter [§ 2584].

TITLE XII.

OF EDUCATION.

CHAPTER 1.

OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

2590. Duties. 1577. The superintendent of public instruction shall be charged with the general supervision of all the county superintendents and all the common schools of the state. He may meet county superintendents in convention at such points in the state as he may deem most suitable for the purpose, and by explanation and discussion endeavor to secure a more uniform and efficient administration of school laws. He shall attend teachers' institutes in the several counties of the state, as far as may be consistent with the discharge of other duties imposed by law, and assist by lecture or otherwise in their instruction and management. He shall render a written opinion to any school officer asking it, touching the exposition or administration of any school law, and shall determine all cases appealed from the decision of county superintendents. [C., '51, § 1080; 10 G. A., ch. 52, § 5; 12 G. A., ch. 162, § 2.]

If the superintendent should announce a decision differing from the decision actually rendered, he possesses the power to recall such announcement and publish the decision correctly, or if mistakenly he should render the decision, he could, before rights had been acquired under it and within proper time, upon discovering his mistake, recall it and decide rightly. If the decision is recalled and a different one rendered it will be presumed, in the absence of any showing on the subject, that it was done for a proper cause and within a proper time and that no rights had been acquired under his decision. The second decision is to be regarded as the final judgment rendered: *Desmond v. Independent Dist.*, 71-23.

As to provision for traveling expenses, see § 5014.

2591. Office. 1578. An office shall be provided for him at the seat of government, in which he shall file all papers, reports, and public documents, transmitted to him by the county superintendents each year, separately, and hold the same in readiness to be exhibited to the governor, or to a committee of either house of the general assembly, at any time when required; and he shall keep a fair record of all matters pertaining to his office. [C., '51, § 1078; 10 G. A., ch. 52, § 4.]

2592. Publication of school laws. 1579; 18 G. A., ch. 150, § 1; 22 G. A., ch. 59. After the adjournment of the eighteenth general assembly and every four years thereafter, if deemed necessary, he may cause to be printed and bound in cloth the school laws, and all amendments thereto, with such notes, rulings, forms and decisions as may seem of value to aid school officers in the proper discharge of their duties. Appropriate reference shall be made to the previous law that has been amended or changed so as clearly to indicate the effect of such amendments or changes. He shall send to each county superintendent a number of copies sufficient to supply each school district in his county with one copy of such school laws, with decisions. He shall also cause to be printed and bound in paper covers the school laws with notes and with forms necessary to be used in carrying out the school laws. *Provided* that he shall furnish each of the members of the board of directors with one copy of the laws bound in paper covers, which shall be turned over to their successors in office. [C., '51, §§ 1083, 1085; 10 G. A., ch. 52, § 8; 12 G. A., ch. 162, § 2.]

2593. Amendments; how published. 18 G. A., ch. 150, § 2. After such sessions of the general assembly as the state superintendent shall not deem it necessary to publish the laws, as provided for in section one of this act [§ 2592], he shall cause to be published in pamphlet form all the amendments to the school laws passed by such general assembly, in sufficient number to supply each of the county superintendents and school officers of the state with one copy free of charge, which said amendments shall be sent to the several county superintendents for distribution.

[Sec. 1580 is repealed by 17 G. A., ch. 102.]

2594. Iowa School Journal. 1581. He may, if he deem it expedient, subscribe for a sufficient number of copies of the Iowa School Journal, or of such other educational journal published in the state as he may select to furnish each county superintendent with one copy, and his certificate of having thus subscribed, shall be authority for the auditor of state to issue his warrant for the amount of said subscriptions; *provided*, he shall cause to be inserted in the journal he may so select a correct copy of any decision he may deem it necessary to make for the efficient carrying out of the school law. [10 G. A., ch. 52, § 7.]

[The words "of copies" in the second line are erroneously omitted in the printed Code.]

2595. Report to auditor. 1582. He shall, annually, on the first day of January, report to the auditor of state the number of persons in each county between the ages of five and twenty-one years. [Same, § 9.]

2596. Report to governor. 1583; 22 G. A., ch. 82, § 29. He shall make to the governor, biennially a report which shall embrace, first, a statement of the condition of the common schools of the state; the number of district townships and subdistricts therein; the number of teachers; the number of schools; the number of school-houses and the value thereof; the number of persons between five and twenty-one years of age; the number of scholars in each county that have attended school the previous year, as returned by the several county superintendents; the number of books in the district libraries; and the value of all apparatus in the schools and such other statistical information as he may deem important. Second, such plans as he may have matured for the more perfect organization and efficiency of common schools. He shall cause one thousand copies of his report to be printed, and shall present it to the general assembly on the second day of its session. [C., '51, § 1086; Same, § 10.]

2597. Appoint teachers' institutes. 1584. Whenever reasonable assurance shall be given by the county superintendent of any county to the superintendent of public instruction, that not less than twenty teachers desire to assemble for the purpose of holding a teachers' institute in said county, to remain in session not less than six working days, he shall appoint the time and place of said meeting, and give due notice thereof to the county superintendent; and for the purpose of defraying the expenses of said institute there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, a sum not exceeding fifty dollars annually for one such institute in each county held as aforesaid, which the said superintendent shall immediately transmit to the county superintendent in whose county the institute shall be held, who shall therewith defray the necessary expenses of the institute, and, if any balance remains, he shall pay the same into the county treasury and the same shall be credited to the teachers' fund. [10 G. A., ch 52, § 11.]

CHAPTER 1*a*.

STATE EDUCATIONAL BOARD OF EXAMINERS.

2598. Who constitute board. 19 G. A., ch. 167, § 1. The superintendent of public instruction, the president of the state university, the principal of the state normal school, and two persons, to be appointed by the executive council, one of whom shall be a woman, for terms of four years: *Provided*, that of the two first appointed, one shall be for two years: *and provided further*, that no one shall be his own successor in said appointments; are hereby constituted a state board of examiners, with the superintendent of public instruction as, ex-officio, its president.

2599. Public examination. 19 G. A., ch. 167, § 2. The board shall meet at such times and places as its president shall direct for transaction of business, and shall hold annually at least two public examinations of teachers, at each of which examinations one member of the board shall preside, assisted by such well qualified teachers, not to exceed two in number, as the board of examiners may elect. Said board may adopt such rules, not inconsistent herewith and with the statutes of Iowa, as they may deem proper; and said board shall keep a full record of their proceedings, and a complete register of all persons to whom certificates and diplomas are issued.

2600. State certificates and diplomas. 19 G. A., ch. 167, § 3. Said board shall have power to issue state certificates and state diplomas to such teachers as are found, upon examination, to possess good moral character, thorough scholarship, clear and comprehensive knowledge of didactics, and successful experience in teaching.

2601. Branches for examination. 19 G. A., ch. 167, § 4. Candidates for state certificates shall be examined upon the following branches: orthography, reading, writing, arithmetic, geography, English grammar, book-keeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of Iowa, and didactics; and candidates for state diplomas shall pass examination upon all branches required by candidates for state certificates and in addition thereto in geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature and general history, and such other branches as the board of examiners may require.

2602. How long valid; revocation. 19 G. A., ch. 167, § 5. A state certificate shall authorize the person to whom it is issued to teach in any public school of the state for the term of five years from the date of its issue, and a state diploma shall be valid for the life of the person to whom it is issued: *Provided*, that any state certificate, and any state diploma, may be revoked by the board of examiners for any cause of disqualification, on well-founded complaint entered by any county superintendent of schools.

2603. Fee. 19 G. A., ch. 167, § 6. The fee for each state certificate shall be three dollars, and for each state diploma five dollars, which fee shall be paid before examination to such person as the board of examiners may designate from their own number, and the same shall be paid into the state treasury, when so collected: *Provided*, that if said applicant shall fail in said examination, one-half of the fee shall be returned.

2604. Registration. 19 G. A., ch. 167, § 7. Every holder of a state certificate, or of a state diploma shall have the same registered by the county superintendent of schools of the county in which he wishes to teach, before entering upon his work, and each county superintendent of schools is required

to include in his annual report to the superintendent of public instruction a full account of the registration of state certificates and diplomas.

2605. Compensation of board. 19 G. A., ch. 167, § 8. Each member of the state education board of examiners, and each person appointed by said board to assist in conducting examinations as provided for in section two of this act [§ 2599], shall be entitled to receive for the time actually employed in such service his necessary expenses: *And provided further*, that each member of said board, not a salaried officer, shall, in addition to his necessary expenses, receive the sum of three dollars per day he or she is actually employed in said examination, which amounts shall be certified by the superintendent of public instruction; and the auditor of state is hereby authorized to audit and draw his warrant for the same upon the treasurer of state: *Provided*, the aggregate amount for any one year shall not exceed three hundred dollars.

2606. Accounts of moneys. 19 G. A., ch. 167, § 9. The board of examiners shall keep a detailed and accurate account of all moneys received and expended by them, which, with a list of the names of persons receiving certificates and diplomas, shall be published by the superintendent of public instruction in his annual report.

CHAPTER 2.

OF THE STATE UNIVERSITY.

2607. Objects; course of study. 1585. The objects of the state university, established by the constitution at Iowa City, shall be to provide the best and most efficient means of imparting to young men and women on equal terms, a liberal education and thorough knowledge of the different branches of literature, the arts and sciences, with their varied applications. The university, so far as practicable, shall begin the courses of study in its collegiate and scientific departments, at the points where the same are completed in high schools; and no student shall be admitted who has not previously completed the elementary studies, in such branches as are taught in the common schools throughout the state. [R., § 1926; 10 G. A., ch. 59; 13 G. A., ch. 87, § 1.]

The state university is not a corporation and cannot be sued: *Weary v. State University*, 42–335.

A statute making appropriation for the support of the state university construed in view of the character of the institution and the intention of the legislature with reference thereto: *State v. Sherman*, 46–415.

2608. Control of. 1586. The university shall never be under the exclusive control of any religious denomination whatever. [R., § 1930; C., '51, § 1020; 10 G. A., ch. 59, § 6; 13 G. A., ch. 87, § 1.]

2609. Board of regents. 1587; 16 G. A., ch. 147; 21 G. A., ch. 181. The university shall be governed by a board of regents, consisting of the governor of the state, who shall be president of the board by virtue of his office, the superintendent of public instruction, who shall be a member by virtue of his office, together with one person from each congressional district of the state, who shall be elected by the general assembly. [10 G. A., ch. 59, § 3; 13 G. A., ch. 87, § 3.]

2610. Members classed. 1588. The members of said board shall be divided into three classes, consisting of two each. The number in each class, as the congressional districts of the state increase, shall be kept as nearly equal as practicable, and the members in each class shall hold office for the term of

six years from their election and until their successors are elected and qualified. The general assembly shall elect members every two years, as the terms of office of the respective classes expire. The board of regents shall fill all vacancies occurring therein, except when the legislature is in session, and the persons so appointed shall hold their offices until the next session of the general assembly. [10 G. A., ch. 59, §§ 3, 4, 15; 13 G. A., ch. 87, § 4.]

2611. Departments; degrees. 1589. The university shall include a collegiate, scientific, normal, law, and such other departments, with such courses of instruction and elective studies as the board of regents may determine; and the board shall have authority to confer such degrees, and grant such diplomas and other marks of distinction as are usually conferred and granted by other universities. [10 G. A., ch. 59, §§ 2, 10; 13 G. A., ch. 87, § 5.]

2612. Meeting of; special. 1590. The meetings of the board of regents shall be held at such times as the board may appoint. The president of the board may call special meetings when he deems it expedient, or special meetings may be called by any three members of the board. [10 G. A., ch. 59, § 15; 13 G. A., ch. 87, § 6.]

2613. Executive committee; power; duties. 1591. An executive committee, consisting of three competent and responsible persons, shall be appointed by the board of regents, who shall audit all claims, and whose chairman shall draw all orders for such audited claims on the treasurer, but before payment such orders shall be countersigned by the secretary. Said committee shall keep a specific and complete record of all matters involving the expenditure of money, which record shall be submitted to the board of regents at each regular meeting of the same. [13 G. A., ch. 87, § 7.]

2614. Secretary; records; books. 1592. The board of regents shall elect a secretary, who shall hold his office at the pleasure of the board. He shall record all the proceedings of the board of regents, and carefully preserve all its books and papers. His books shall exhibit what parts of the university lands have been sold, when the same were sold and at what price, and to whom, on what terms, what portion of the purchase money has been paid, and when paid, on each sale, how much is due on each sale, by whom and how secured, and when payable, what lands remain unsold, where situated, and their appraised value, if appraised, or their estimated value, if not appraised. His books shall also show how the permanent fund of the university has been invested, the amount of each kind of stocks, if any, with the date thereof and when due, and the interest thereon and when and where payable, the amount of each loan, if any, and when made, and payable to whom, and how secured, and at what rate of interest, and when and where payable. When any further sales of lands, or further instruments shall be made, the secretary shall enter the same upon his books as above set forth. The secretary shall countersign and register all orders for money on the treasurer, and the treasurer shall not pay an order on him for money unless the same be countersigned by the secretary. [10 G. A., ch. 59, § 12; 13 G. A., ch. 87, § 8.]

2615. Treasurer; bond; duties. 1593. The board of regents shall elect a treasurer, who shall hold his office at the pleasure of the board. He shall keep a true and faithful account of all moneys received and paid out by him, and before entering upon the duties of his office he shall take and subscribe an oath that he will faithfully perform the duties of treasurer; and he shall also give a bond in the penalty of not less than fifty thousand dollars, conditioned for the faithful discharge of his duties as treasurer, and that he will at all times keep and render a true account of moneys received by him as such treasurer, and of the disposition he has made of the same, and that he will at all times be ready to discharge himself of the trust, and to pay over

when required; which bond shall have two or more good sureties, and shall be approved as to its form and the sufficiency of its sureties by the board of regents, and also the auditor and secretary of state, and shall be filed in the office of the latter. [Same chs., § 9.]

[The word "sureties," in the eleventh line, is erroneously printed "securities" in the Code.]

2616. Treasurer's accounts. 1594. The treasurer of the university shall have a set of books, in which he shall keep an accurate account of all transactions relative to the sale and disposition of university lands, and the management of the fund arising therefrom; which books shall exhibit what parts and portions of land have been sold, at what prices and to whom, and how the proceeds have been invested, and on what securities, and what lands still remain unsold, where situated, and of what value respectively. [R., § 1937; 10 G. A., ch. 59, §§ 9, 16; 13 G. A., ch. 87, § 10.]

[As to issuing patents to lands sold where the certificates have been lost, see §§ 103, 104.]

2617. Notice of default in payments. 1595. The treasurer shall, on the first day of June and December of each year, notify in writing each person in default of payment of either principal or interest of funds loaned by or due to the university, and shall cause suit to be commenced against such delinquents, when, in his judgment, the best interest of the institution requires it. [10 G. A., ch. 59, § 9; 13 G. A., ch. 87, § 11.]

2618. President and professors; salaries. 1596. The board of regents shall enact laws for the government of the university, and shall appoint a president and the requisite number of professors and tutors, together with such other officers as they may deem expedient, and shall determine the salaries of such officers, the compensation of the secretary and treasurer, and the amount of fees to be paid for tuition. They shall remove any officer connected with the university, when, in their judgment, the good of the institution requires it. [R., § 1934; 10 G. A., ch. 59, § 11; 13 G. A., ch. 87, § 12.]

2619. Apparatus; library. 1597. The board of regents is authorized to expend such portion of the income of the university fund as it may deem expedient, in the purchase of apparatus, library, and a cabinet of natural history, in providing suitable means to keep and preserve the same, and in procuring all other necessary facilities for giving instruction. [R., § 1935; same chs., § 13.]

2620. Cabinet of natural history. 1598. All specimens of natural history and geological and mineralogical specimens, which are or hereafter may be collected by the state geologist of Iowa, or by any others appointed by the state to investigate its natural history and physical resources, shall belong to and be the property of the state university, and shall form a part of its cabinet of natural history, which shall be under the charge of the professor of that department. [R., § 1931; 10 G. A., ch. 59, § 7; 13 G. A., ch. 87, § 14.]

2621. Sale of lands; investment of funds. 1599. No sales of lands belonging to the university shall hereafter take place unless the same shall have been decided upon at a regular meeting of the board of regents, or at one called for that particular purpose, and then only in the manner, upon the notice, and on the terms which the board shall prescribe; and no member of the board shall be either directly or indirectly interested in any purchase of such lands upon sale, nor shall the secretary or treasurer be so interested. It shall be lawful for the board to invest any portion of the permanent endowment fund, not otherwise invested, as well as any surplus income which is not immediately required for other purposes, in United States stock, or stocks of the state of Iowa, or by note and mortgage on unincumbered real estate, the value of which, after deducting the value of all perishable improvements

thereon, shall be double the amount of the sum loaned, and hold the same for the university, either as a permanent fund, or as an income to defray current expenses, as said board of regents may deem expedient. It shall not be lawful for the board to use any portion of the permanent fund for the ordinary expenses of the institution. [R., § 1398; 13 G. A., ch. 87, § 15.]

Where the purchaser of state university land failed for three years to pay instalments of interest under the contract of sale, and the trustees of the university thereupon, and in accordance with its terms, forfeited the contract, and afterward resold the land to a third party for less than was owing thereunder, *held*, that the first purchaser was estopped by his own laches from demanding a specific performance of such contract or from recovering payments made thereunder: *Lenn v. State University*, 22-185.

And *held*, that the repeal of § 1052 of the Code of '51, which authorized such forfeiture, did not deprive the university of its equitable rights: *Ibid.*

2622. President's report. 1600. The president of the university shall make a report on the fifteenth day of September preceding the meeting of the general assembly, to the board of regents, which shall exhibit the condition and progress of the institution in its several departments, the different courses of study pursued therein, the branches taught, the means and methods of instruction adopted, the number of students, with their names, classes, and residences, and such other matters as he may deem proper to communicate. [Same, § 16.]

2623. Regents' report. 1601; 22 G. A., ch. 82, § 29. The board of regents shall, on the first day of October preceding each regular meeting of the general assembly, make a report to the superintendent of public instruction, which report, with that of the president of the university, shall be embodied in the said superintendent's report to the governor. The report of the board of regents shall contain the number of professors, tutors, and other officers, with the compensation of each, the condition of the university fund, and the income received therefrom, the amount of expenditures, and the items thereof, with such other information and recommendations as they may deem expedient to lay before the general assembly. [Same chs., § 17.]

[Further as to the time of report and its publication, see §§ 117–131.]

2624. Compensation. 1602. The regents shall receive no compensation except for mileage in traveling to and from the meetings of the board, which shall be at the same rate, and computed in the same manner, as the mileage allowed to members of the general assembly. The auditor of state is hereby authorized to audit and allow the claims for such attendance, for not more than three meetings annually. [10 G. A., ch. 59, § 5; 13 G. A., ch. 87, § 18.]

[This section is modified as to compensation of regents by § 5104.]

2625. Member of general assembly not eligible. 1603. No member of the general assembly shall be eligible to the office of regent during the term for which he was so elected.

2626. Endowment. 17 G. A., ch. 76, § 1. There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of twenty thousand dollars annually to the state university as an endowment fund for said institution, to be paid in instalments of five thousand dollars each; the first instalment of five thousand dollars to be paid on the first day of July, 1878, and the same sum quarterly thereafter.

2627. How drawn. 17 G. A., ch. 76, § 3. The money hereby appropriated shall be drawn from the state treasury by the treasurer of said state university, on the order of the executive committee appointed by the board of regents of said university, countersigned by the secretary thereof under the university seal.

2628. Additional annual appropriation. 20 G. A., ch. 115, § 1. There is hereby appropriated out of any money in the state treasury not other-

wise appropriated, for the support of the state university in the several departments and chairs, and in aid of the income fund and for the development of the institution, the sum of eight thousand dollars annually.

2629. Preparatory department. 17 G. A., ch. 115, § 1. After the first day of July, 1879, no part of the funds belonging to or appropriated for the state university shall be used for the support of the preparatory or non-collegiate course of studies heretofore taught in said university.

CHAPTER 3.

OF THE STATE AGRICULTURAL COLLEGE AND FARM.

2630. Board of trustees. 1604; 20 G. A., ch. 76, § 1. The lands, rights, powers, and privileges, granted to and conferred upon the state of Iowa by the act of congress entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, 1862, are hereby accepted by the state of Iowa, upon the terms, conditions, and restrictions contained in said act, and there is hereby established an agricultural college and model farm, to be connected with the entire agricultural and mechanical interests of the state; the said college and farm to be under the control and management of a board of trustees consisting of one person from each congressional district of the state. But the present board of trustees shall continue as members of the board of trustees from their several congressional districts until their terms of office expire. [R., § 1714; Ex. S., 9 G. A., ch. 26, § 1; 11 G. A., ch. 47, § 1.]

2631. Election and term of trustees; vacancies. 1605; 20 G. A., ch. 76, § 2. Of the members of said board representing the different congressional districts there shall be elected by this general assembly one to serve two years, four to serve four years, and three to serve six years from the first day of May, A. D. 1884, and as the term of office of the members of the board expire, the general assembly shall elect their successors whose term of office shall be six years. The board of trustees shall fill all vacancies occurring therein, except when the legislature is in session, and the persons so appointed shall hold their office until the next session of the general assembly after such appointment: but neither the president nor any other officer or employee of the college and farm, nor any member of the general assembly, shall be eligible as trustees. [11 G. A., ch. 47, § 2.]

2632. Powers. 1606; 16 G. A., ch. 119. The board of trustees shall have power:

1. To elect a chairman from their own number, a president of the college and farm, a secretary, a treasurer, professors and other teachers, superintendents of departments, a steward, a librarian and such other officers as may be required for the transaction of the business of the board; also to fix the salaries of officers and prescribe their duties; and to appoint substitutes who shall discharge the duties of such officers during their temporary absence;
2. To manage and control all the property of the college and farm, whether real or personal;
3. To make all rules and regulations for the government of the college and farm;
4. To establish rules regulating the number of hours which shall be devoted to manual labor, and to fix the compensation therefor; *provided*, no student

shall be exempt from labor except in cases of sickness or other infirmity, or where students from the advanced classes may be employed as teachers;

5. To arrange courses of study and practice, and to establish such professorships as they may deem best to carry into effect the provisions of this chapter; also to prescribe conditions of admission to the college;

6. To grant diplomas, on the recommendation of the faculty, to any student who has completed either of the industrial courses prescribed by said board, or an equivalent thereof;

7. To remove any officer by a majority vote of all the members of the board of trustees;

8. To direct the expenditure of all appropriations which the general assembly shall from time to time make to said college and farm, and the income arising from the congressional grant, and from all other sources;

9. To keep a full and complete record of their proceedings, and to do such other acts as are found necessary to carry out the intent and meaning of this chapter. [14 G. A., ch. 62.]

2633. Quorum. 1607. A majority of the trustees shall be a quorum for the transaction of business.

2634. Compensation. 1608. The trustees shall receive as their compensation five dollars a day for each and every day actually employed in the discharge of their duties, and five cents per mile for each and every mile actually traveled on such business; *provided*, that no member shall receive compensation for more than thirty days in each year.

[This section is modified as to compensation of trustees by § 5104.]

2635. Auditing. 15 G. A., ch. 7, § 1. The auditor of state is hereby authorized to audit and allow the claims of the board of trustees from and after the first day of September, 1873, in accordance with section sixteen hundred and eight of the code of 1873 [§ 2634].

2636. Annual meetings. 1609. The annual meetings of the board of trustees shall be held at the agricultural college on the second Wednesday of November.

2637. College year; report of trustees. 1610; 16 G. A., ch. 159, § 9. The college year shall begin on Thursday after the second Wednesday in November of each year, and end on the second Wednesday of November of the following year. The biennial report of the board of trustees shall be filed in the office of the governor, not later than the first day of December preceding the regular meeting of the general assembly.

[For provisions as to the time of making the report and its publication, see §§ 117-121.]

2638. Power and duty of president. 1611. The president of the college and farm shall control, manage, and direct the affairs of the college and farm herein established, subject to such rules as may be prescribed by the board of trustees, and shall report to said board at their annual meeting in November, and at such other times as they shall direct, all his acts as such president, and the condition of the several departments of the college and farm, together with his recommendations for the future management thereof.

2639. Of secretary. 1612. The secretary shall keep the documents and a record of the proceedings of the board of trustees, and conduct their official correspondence. All acts of the board of trustees as to the management, disposition, or use of the lands, funds, or other property of the institution shall be entered in the record of its proceedings, and said record shall show how each member voted on each proposition. He shall also make the biennial report of the board to the general assembly. Upon the election of any person to an office under said board, he shall give notice thereof to the secretary of state. He shall also keep an account with the treasurer, charging him with

all money paid to him from any source, and crediting him with the amounts paid out by him upon the order of the board of audit, which account shall be balanced monthly.

2640. Board of audit. 1613. The president and secretary shall constitute a board of audit, who shall, under the rules of the board of trustees, examine all bills presented for payment, and no bills shall be paid without their joint indorsement thereon: *provided*, that no bill shall be so audited for whose payment the board of trustees has not made appropriation; also, the said board of audit shall examine the treasurer's books and vouchers monthly, and at such other times and so often as they shall deem necessary. All the proceedings as contemplated in this section shall be reported by the secretary to the board of trustees at each meeting thereof.

2641. Treasurer; election; duties. 1614. The treasurer shall receive and keep all notes and other evidence of indebtedness, contracts, and all moneys arising from the income of the congressional grant, from the appropriations of the general assembly, from the sales of the products of the farm, from the payments of students, and from all other sources, and shall pay out the same upon bills duly audited as above prescribed, and he shall retain such bills with the receipt for their payment as his vouchers; but no bill shall be paid for which appropriation had not been made by the board of trustees. He shall keep an accurate account of the revenue and expenditures of said college and farm from all sources, and in such manner that the receipts and disbursements of each and every one of the several departments thereof shall be apparent at all times, and the gains or losses in such departments shall be carefully set forth; and he shall report to the board of trustees at their annual meeting in November, and at such other times as they shall direct. He shall also execute duplicate receipts of all money received by him, specifying the source from which received, and the fund to which it belongs, one of which must be filed with the secretary, and no receipt for money paid him shall be valid unless the duplicate is so filed. The treasurer shall be elected annually, and give a bond every year in double the highest amount of money likely to be in his hands at any one time, with such sureties as the executive council shall prescribe, and said bond shall be filed in the office of secretary of state, and the treasurer may appoint a deputy who shall reside at the college, and the board of trustees shall fix the compensation to be paid to such deputy, and the treasurer shall be responsible on his official bond for all acts done by such deputy.

2642. Offices; oath. 1615. The president and secretary shall have their respective offices at the college, and they, with the treasurer, shall take and prescribe the oath provided in section one hundred and twenty-six, chapter nine, title two of this code [§ 163].

[Sec. 1616 is repealed by 15 G. A., ch. 71, § 3.]

2643. Sale of lands. 20 G. A., ch. 72, § 1. The trustees of the Iowa state agricultural college and farm are hereby authorized to sell the lands granted to the state of Iowa by an act of congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July second, 1862. Such sale shall be for cash, or upon a partial credit not exceeding ten years, at such appraised value as shall be fixed by said trustees. All deferred payments shall draw interest at the rate of eight per cent. per annum, payable annually in advance. Upon a failure to pay the annual interest or principal within sixty days after it becomes due and within sixty days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holder of the lease shall have been given, the purchaser shall forfeit all claim

to said land and the improvements made thereon and all sums paid on said contract, unless in the opinion of the trustees an extension should be allowed.

Proceedings had for the condemnation of a right of way over agricultural college land, to which the trustees of the college are properly made parties, will be binding upon a subsequent purchaser of such property: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

2644. Lease. 20 G. A., ch. 72, § 2. Said trustees are also authorized to lease the said lands for a term not exceeding ten years at an annual rent equal to eight per cent. per annum upon the appraised value of the tract, payable annually in advance, and the said lessee, his heirs or assigns, shall have the privilege of purchasing said tract of land at the expiration of the lease at the appraised value stated in the lease. The lessee failing to pay the annual interest upon said lease within sixty days after the same becomes due and within sixty days after notice thereof in writing by mail or otherwise from the trustees or land agent of said college to the holders of the lease shall have been given, shall forfeit his lease together with the interest paid thereon and improvements made on said lands.

The legislature can fix and enforce the terms and conditions of a lease or sale of lands of the agricultural college belonging to the state: *Smith v. Trustees*, 28–500.

2645. Renewal. 20 G. A., ch. 72, § 3. The said trustees are authorized at their option to cause to be *revived* [reviewed] the purchase price of the land so sold or leased, or which has been heretofore sold or leased before the same becomes due, upon such terms and conditions of payment as said trustees may deem for the best interest of the institution. Said trustees may also renew leases as they expire, and when so renewed the leasehold estate shall be subject to taxation as provided in chapter one hundred and sixty-nine of the acts of the nineteenth general assembly entitled, "An act to provide for taxation of leasehold estates in agricultural college lands," approved March twenty-fifth, 1882 [§§ 2651–2657].

2646. Assignment. 20 G. A., ch. 72, § 4. Leases heretofore issued by said trustees under the authority of former acts of the general assembly of this state and all renewals of such leases shall be deemed assignable and all transfers of such leases or renewals heretofore made shall be valid, and the owner, whether holding one or more than one such lease or renewal, who has made the annual payments therein required, shall be entitled to all the benefits of such contract or contracts, and shall have the privilege of purchasing the tract or tracts of land so held by him as provided in the lease, and upon payment of the purchase money shall be entitled to a patent for the land described in said lease or leases.

2647. Lands acquired by purchase. 20 G. A., ch. 72, § 5. The said trustees are hereby authorized in like manner to sell or lease the lands belonging to the said Iowa agricultural college acquired by purchase with accumulated interest fund.

2648. Certificate; patent. 20 G. A., ch. 72, § 6. Whenever a sale shall be made of any of said lands as hereinbefore provided, the president of the said agricultural college shall issue to the purchaser a certificate, countersigned by the secretary of said board, stating the fact of purchase, the name of the purchaser, description of land and the appraised value thereof. Upon payment of such purchase price to the treasurer of state the purchaser or his assigns shall be entitled to a patent or patents for such tract or tracts of land. And upon presentation of such certificate to the secretary of state with the receipt of the treasurer of state showing full payment of the purchase money and stating the amount thereof, said secretary of state shall issue to the purchaser or to his assignee a patent or patents for the tract or tracts of land therein described, which patents shall be signed by the governor and secretary of state, as other patents or deeds for lands conveyed by the state, and shall

vest in the purchaser all the right, title and interest of the state and of said college in and to the lands therein described.

2649. Investment of proceeds. 20 G. A., ch. 72, § 7. The principal of all moneys collected under the provisions of this act, shall be paid to and held by the treasurer of state, and shall be drawn out for the purpose of investment on the order of the board of trustees, only when required to complete a loan. The interest collected shall be paid to the treasurer of the college upon the order of the board of trustees.

2650. 20 G. A., ch. 72, § 8. Chapter seventy-one of the acts of the fifteenth general assembly entitled, "An act to regulate the leasing of the lands belonging to the Iowa state agricultural college," approved March nineteenth, 1874, and all acts and parts of acts conflicting with the provisions of this act are hereby repealed.

2651. Taxation of leasehold interest. 19 G. A., ch. 169, § 1. In all cases where leases of lands executed by the trustees of the agricultural college have been, or shall hereafter be, renewed ten years after the date of the original lease has expired, the interest in such lands of the lessee, his heirs, or assigns shall be subject to assessment and taxation as real property. The value of such interest shall be ascertained by deducting from the value of such lands and the improvements thereon the amount required to be paid by the terms of the lease to acquire the title thereto. Such leasehold interest shall be assessed, taxed, and sold for delinquent taxes, and redemption from such sale be made or tax deed be issued, in all respects like other real estate, save as herein otherwise provided, with the same rights, liabilities, and effect, and the treasurer's tax deed shall operate as a full and complete assignment of said leasehold interest to the grantee named in such deed.

2652. Payments after sale; redemption. 19 G. A., ch. 169, § 2. At any time after such leasehold interest shall have been sold for delinquent taxes the holder of the certificate of purchase may pay any interest or principal due by the terms of the lease, or do any other act necessary to prevent a forfeiture of such lease by the terms thereof, and the proper voucher for such payment shall be filed with the auditor of the county where the land is situated. No redemption from a sale of such land shall be allowed until the amounts paid by the holder of the certificate of sale by virtue of this act, together with interest thereon at eight per cent. per annum from the dates of payment shall be paid to the auditor, with all other amounts required by law to complete such redemption, to be by him paid to the holder of such certificate, and the certificate of redemption shall show the amounts paid by the party redeeming on account of such lease.

2653. Purchase. 19 G. A., ch. 169, § 3. Where any leasehold interest has been sold for delinquent taxes and a treasurer's deed issued thereon, the grantee in such deed named, his heirs or assigns, shall be entitled to purchase the land conveyed by such deed at the price and on the terms specified in the lease therefor then in force, and to receive a patent therefor. In case such lease shall expire before the holder of the certificate of sale shall be entitled to a treasurer's deed, such holder may pay the amount required by the terms of such lease to acquire the title in fee to said land, and receive a conveyance of the same, and after such conveyance is made, no redemption from the tax sale of the land thereby conveyed shall be allowed.

2654. Certificate of sale, or tax deed. 19 G. A., ch 169, § 4. The right of the tax-sale purchaser or his assigns to pay any amount due by virtue of any lease shall be evidenced by a copy of the certificate of sale or treasurer's deed, as the case may be, duly certified by the officer, or officers, executing the same, and in case no tax deed has been issued the auditor of the proper county shall further certify that redemption from the tax sale has not

been made. Such copy and certificate shall be filed with the secretary of the board of trustees and become a part of the records of his office.

2655. Board to certify. 19 G. A., ch. 169, § 5. The board of trustees shall cause to be certified to the auditor of each county in which leased college lands are situated, on or before the first day of April, A. D. 1882, and on or before the fifth day of January of each year thereafter, a list of such lands held under renewed leases, together with the name of each lessee thereof, the date and terms of each lease, the amounts to be paid thereunder, and the dates when such amounts will become due. Each auditor of a county in which such lands are situated shall deliver to the assessor of each township, which contains any of said lands, on or before the first day of April, A. D. 1882, and on or before the fifteenth day of January for each year thereafter, a list of such land situated in such township, together with a statement showing the lessee of each tract and the amounts to be paid by virtue of the lease thereon, and the dates of payment.

2656. 19 G. A., ch. 169, § 6. Nothing in this act shall be so construed as to authorize the taxation of any leasehold interest under and by virtue of this act, for any year prior to 1882.

2657. 19 G. A., ch. 169, § 7. All acts and parts of acts, so far as they conflict with this act, are hereby repealed.

2658. Money arising from sale of lands to be paid to state treasurer. 1617; 16 G. A., ch. 91. The moneys arising from the sale of said lands shall be paid into the state treasury, and shall be invested by the state treasurer subject to the approval of the executive council, in stocks of the United States, or of the states, or some other safe stocks, yielding not less than five per centum on the par value of said stocks as directed by the act of congress granting said lands, and the money arising from the interest on said stocks, on the deferred payments, and on the leases of said lands, as rental thereof, shall be paid over to the board of trustees, and may be loaned by said board of trustees on good and sufficient security when not needed to defray such expenses of the college, as said moneys are legally applicable to.

[This section is evidently superseded by sections following.]

2659. Management and investment of fund. 20 G. A., ch. 193, § 1. The board of trustees of the Iowa state agricultural college and farm, are hereby charged and intrusted with the management and investment of the endowment fund of said college, derived from the sale of the lands granted to the state of Iowa by an act of congress entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and mechanic arts," approved July second, 1862. Such investment may be in the stocks of the United States, or of the states, or some other safe stocks yielding not less than five per centum of the par value of said stocks, as provided by act of congress granting said lands. Before the purchase of any such stocks shall be made the proposed investment shall be submitted to and approved by the state executive council.

2660. Loan of funds. 20 G. A., ch. 193, § 2. Said board of trustees are also authorized to loan said fund upon approved real estate security in accordance with the following rules and regulations:

First. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board not exceeding ten per centum, and not less than six per cent. per annum, payable annually.

Second. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state of Iowa, and shall not exceed forty per cent. of the cash value of the mortgaged premises, exclusive of buildings.

Third. Principal and interest shall be payable to the order of said board

at the office of the state treasurer at Des Moines, Iowa, and the notes and mortgages shall provide for the payment, by the borrower, of all expenses, attorneys' fees and costs, which shall be incurred in collecting the principal and interest of such loans, or any part thereof, by reason of the default of such borrower.

Fourth. A register containing a complete abstract of such loan, and showing its actual condition shall be kept by the secretary of said board, and shall be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare all blanks, forms and instructions necessary to carry into effect the provisions of this section, and to keep the funds loaned as herein provided secure and unimpaired.

2661. Financial agent. 20 G. A., ch. 193, § 3; 22 G. A., ch. 58, § 1. For the purpose of carrying into effect the provisions of this act, the said trustees are authorized to appoint a financial agent to receive applications and negotiate loans in accordance with the conditions herein contained and to take charge of the foreclosure of the mortgages and collection of bonds from delinquent debtors to said fund when so directed by the said trustees. The trustees shall require any agent appointed under this act, before entering upon the discharge of his duties, to give bond with approved sureties in a penal sum to be determined by said board of trustees, which shall be at least double the amount of funds liable to come into his hands at any time, and shall be for the use and benefit of said Iowa state agricultural college and farm, and actions for breach of the conditions hereof may be brought in the name of said board of trustees. The appointment of such agent, and the bond given by him, shall be subject to approval by the state executive council. Such agent shall hold his office during the pleasure of the board of trustees.

2662. Bond of financial agent. 22 G. A., ch. 58, § 2. It shall be the duty of said trustees upon the passage of this act to require the said financial agent to execute an additional bond in such sums as shall be fixed by the trustees conditioned for the faithful performance of the additional duties herein required, and for the payment into the state treasury of all sums of money which shall come into his hands belonging to such endowment fund. And when any such agent shall hereafter be appointed by said trustees his bond as required by said section three [§ 2661] shall cover all the duties provided in said original section and in this act.

2663. Secretary to report loans. 20 G. A., ch. 193, § 4. The secretary of the board of trustees shall semi-annually report to the executive council, and to the board of trustees at every meeting, all loans made under this act, giving a description of the security taken and the value thereof, the name of the borrower, length of time, and amount of loan and rate of interest.

2664. Foreclosure of mortgages. 20 G. A., ch. 193, § 5. Foreclosure of mortgages taken under this act may be made in the name of the board of trustees of the Iowa state agricultural college and farm, and in case of sale on execution under such foreclosure the mortgaged premises may be bid off in the name of the state of Iowa, and if deed therefore be made, said premises shall be held by the state in trust for the benefit of said agricultural college. Such land shall be subject to lease or sale the same as other land belonging to the college.

2665. Compensation of agent. 20 G. A., ch. 193, § 6. The agent provided for by section three of this act [§ 2661] shall receive compensation to be fixed by said board of trustees at a rate not exceeding the sum of two thousand dollars per annum, and all necessary expenses while necessarily away from his office, in the discharge of his official duties, to be paid as other officers, out of the treasury of the state.

2666. Money collected. 20 G. A., ch. 193, § 7. Moneys collected from delinquents shall be paid at once into the state treasury. The principal of the

fund shall be kept by the treasurer of state and shall be drawn out for the purpose of investment as hereinbefore provided upon the order of the board of trustees subject to such restrictions as may be imposed by the attorney-general and the state executive council. The treasurer of state shall make monthly reports to the secretary of the board of trustees showing all payments of principal and interest and shall remit to the treasurer of the college all interest then in his hands, as shown by such reports.

2667. 20 G. A., ch. 193, § 8. All acts and parts of acts conflicting with the provisions of this act are hereby repealed.

2668. Agents appointed; bond. 1618. The trustees are hereby endowed with all the necessary authority to appoint agents, or do any other acts necessary to carry out the provisions of the three preceding sections [§§ 2642–2658]. But no such agent shall be appointed with authority to receive any money until he has executed a good and sufficient bond to be approved by the trustees in a sum double the amount he will be likely to receive. And every such agent shall make a monthly statement under oath to the college treasurer of the amount received by him, and transmit therewith all funds shown to be in his hands.

2669. Tuition free. 1619. Tuition in the college herein established shall be forever free to pupils from the state over sixteen years of age, who have been residents of this state six months previous to their admission. Each county in this state shall have a prior right to tuition for three scholars from such county; the remainder equal to the capacity of the college shall be by the trustees distributed among the counties in proportion to the population, subject to the above rule. Transient scholars otherwise qualified may at all times receive tuition.

2670. Sale of liquors. 1620. No person shall open, maintain, or conduct any shop or other place for the sale of wine, beer, or spirituous liquors, or sell the same at any place within a distance of three miles from the agricultural college and farm; *provided*, that the same may be sold for sacramental, mechanical, medical, or culinary purposes; and any person violating the provisions of this section shall be punished, on conviction by any court of competent jurisdiction, by a fine not exceeding fifty dollars for each offense, or by imprisonment in the county jail for a term not exceeding thirty days, or by both such fine and imprisonment.

2671. Course of study. 1621; 20 G. A., ch. 27. There shall be adopted and taught at the state agricultural college a broad, liberal and practical course of study in which the leading branches of learning shall relate to agriculture and the mechanic arts, and which shall also embrace such other branches of learning as will most practically and liberally educate the agricultural and industrial classes in the several pursuits and professions of life including military tactics.

2672. Diversion of money. 1622. No money shall be diverted from the fund to which it belongs, or used for any purpose other than is provided by law, and any trustee, officer, or employee of said institution who may, by vote, direction, or act, violate the provisions of this section, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary or county jail not less than six months.

CHAPTER 3*a*.

STATE NORMAL SCHOOL.

2673. Established. 16 G. A., ch. 129, § 1. A school for the special instruction and training of teachers for the common schools of this state is hereby established at Cedar Falls, in Black Hawk county.

2674. Board of directors. 16 G. A., ch. 129, § 2; 22 G. A., ch. 64, § 1. The school shall be under the management and control of a board of directors consisting of six members, no two of whom shall be from the same county, and the superintendent of public instruction shall be ex-officio a member of said board and president thereof. The board of directors shall be elected by the general assembly, two for two years, two for four years and two for six years, and the general assembly shall elect two members of said board every two years, for the full term of six years as the terms of office of the respective classes expire. Their term of office shall commence on the first day of June following their election. No member of the board shall be a teacher in the school or receive other compensation for his services than a reimbursement of his actual expenses to be certified to by him and paid out of the state treasury. Any vacancy occurring in the board shall be filled by the appointment of the governor.

2675. Board shall convene and organize. 16 G. A., ch. 129, § 3; 22 G. A., ch. 64, § 2. The board shall convene at the call of the superintendent of public instruction on or before June fifteenth, 1876, and having each qualified according to law, shall organize by the election of a vice president from their *member* [number], and a secretary and a treasurer who shall be persons not *numbers* [members] of the board. The secretary shall receive such compensation as may be fixed by the board not to exceed the sum of one hundred dollars and actual traveling expenses. The treasurer shall receive no compensation but shall receive reimbursement of actual expenditures.

2676. Treasurer. 16 G. A., ch. 129, § 4. The board shall require a bond in the sum of twenty thousand dollars of the treasurer with proper and sufficient sureties, conditional for the safe-keeping of funds coming into his hands. He shall receive and disburse all moneys hereby appropriated, and any other funds as the board may provide. The board may require of any other officer or employee who may be authorized to receive or pay out money a like bond.

2677. Duties of board; admission; school year; tuition. 16 G. A., ch. 129, § 5; 17 G. A., ch. 142, § 2. It shall be the duty of the board, in every necessary manner with the means at their disposal, to provide for and carry out the object for which the school is established. For that purpose they shall employ competent and suitable teachers, and other employees. They shall direct, use and control all the property of the state coming into their hands for that purpose. They shall control and direct the expenditure of all moneys. They shall make all necessary rules for the management of the school and the government thereof, and shall provide for the admission of pupils from the several counties of the state in proportion to their respective pupulation and upon the appointment of respective boards of supervisors, or as the board may direct. They shall establish and publish uniform rules for the admission of pupils thereto.and such rules shall provide for equal rights in said school to all the teachers in the state, but they shall require in all cases satisfactory evidence of the good character of the pupil. They shall also further require all pupils upon their admission to the school to sign a statement of their intention in good faith to follow the business of teaching in the schools of the state. It shall also be the duty of the board to make all possible and necessary arrangements with the means at their disposal for the boarding and

lodging of pupils, but the pupils shall pay the cost of the same. They shall require each pupil to pay a fee for contingent expenses amounting to not more than one dollar per month. The school shall be open during such part of the year as the board shall determine, but the sessions shall continue at least twenty-six weeks. But the board of directors may, in their discretion, charge the pupils with a tuition fee not exceeding six dollars per term, if such charge shall be necessary in order to the proper support of the school as provided by law.

2678. Location. 16 G. A., ch. 129, § 6. At the close of the year, and on or before the first day of July, 1876, it shall be the duty of the board of trustees of the Iowa soldiers' orphans' home, to deliver over to the board of directors provided for herein, the buildings and grounds at Cedar Falls, Iowa, now occupied by said home, transferring for the purpose the inmates of said home to the home at Davenport. They shall also at the same time turn over in like manner all the personal property at said home at Cedar Falls, except such as is necessary for and adapted to the personal use of such inmates at Davenport, and a careful inventory and appraisement thereof shall be made, and a proper voucher given therefor by said board of directors.

2679. When to open. 16 G. A., ch. 129, § 7. The board of directors shall at once proceed to make such improvements and changes in said buildings and grounds as may be necessary to *adopt* [adapt] the same to the use of said school but without greater expense to the state than is provided for in this act, and shall, on or before September tenth, 1876, open the same to the use and instruction of pupils.

2680. Report. 16 G. A., ch. 129, § 9; 22 G. A., ch. 64, § 2. The said board shall make, at the end of each school year, to the governor, a detailed report of their proceedings during the year. Their report shall also contain the number of teachers employed in the school, with the compensation of each, the number of pupils, classified; the amount of receipts and expenditures and the items thereof, with such other information and recommendations as they may deem expedient, which report shall be embodied in the superintendent's report to the general assembly.

CHAPTER 4.

OF THE SOLDIERS' ORPHANS' HOMES.

2681. Board of trustees. 1623; 16 G. A., ch. 94, § 10; 22 G. A., ch. 74. The board of trustees of the Iowa soldiers' orphans' home and home for destitute children shall consist of three persons, one of whom shall be a woman, one of whom shall be a resident of Scott county and no two of whom shall be residents of the same congressional district. The twenty-third general assembly shall appoint one of said trustees to serve for two years, one for four years and one for six years, and each general assembly thereafter shall appoint one trustee for said home to serve for a period of six years. [11 G. A., ch. 92, § 2; 14 G. A., ch. 75.]

2682. Powers of; recorder to act with. 1624. Said board shall govern and manage said homes, and shall have power to enact laws and rules for the regulation of all their concerns, and power also to alter the same from time to time as shall seem to them proper; and shall also have full power to carry on and manage all the affairs in said homes; *provided*, that the county recorder of the county in which each home is located, shall act in connection with the resident trustee in making quarterly settlements with the orphans'

home superintendents, for which service he shall be allowed three dollars per day, to be audited and drawn in the same manner with the mileage of trustees. [11 G. A., ch. 92, § 3; 14 G. A., ch. 75.]

[As to teaching physiology and hygiene with especial reference to the effects of stimulants and narcotics, see §§ 2884-2886.]

2683. Who eligible. 1625. No member of the general assembly shall be eligible to the office of trustee during the term for which he was elected.

2684. Compensation. 1626. The members of said board shall each receive the same mileage, going to and returning therefrom, as members of the general assembly. [11 G. A., ch. 92, § 4.]

[This section is modified as to compensation by § 5104.]

2685. Oath. 1627. Said trustees shall, before entering upon the discharge of their duties, take and subscribe an oath or affirmation to support the constitution of the United States and of this state, and also faithfully to discharge the duties required of them by law, and the by-laws that may be established. [Same, § 5.]

2686. Superintendent. 1628. The board of trustees of the soldiers' orphans' homes shall require the respective superintendents of the soldiers' orphans' homes, to give a good and sufficient bond with sureties thereto for the faithful performance of their respective duties.

2687. President, secretary, treasurer. 1629. Said board shall have all the power of reception, transmission, and succession which belongs to an incorporation, and shall choose a president, treasurer, and secretary from their own body, and determine the bonds to be given. [11 G. A., ch. 92, § 7.]

2688. Appropriation for. 1630. For the support of the several orphans' homes, there is appropriated out of any money in the state treasury not otherwise appropriated, the sum of ten dollars per month for each orphan actually supported, counting the average number sustained in the several homes for the month, and upon the presentation to the auditor of state each month of a sworn statement of the average number of orphan children supported by the institution for the preceding month, the auditor shall draw his warrant upon the treasurer of state in favor of the treasurer of the board of trustees of the Iowa soldiers' orphans' homes, for the sum hereinbefore provided. [Same, §§ 8, 10, 11; 12 G. A., ch. 66, § 1.]

2689. Expenses. 1631. The expenses of the transmission of orphans to the homes, and of the board and management, shall be paid out of the funds so provided. [11 G. A., ch. 92, § 9.]

2690. Report. 1632; 22 G. A., ch. 82, § 30. The board of trustees shall make a full and minute report of all the disbursements of the homes, and of their condition, financial and otherwise, biennially to the governor. [Same, § 12.]

[As to time of making the report and its publication, see §§ 117-121.]

2691. Enumeration of orphans. 1633. In the enumeration of persons between the ages of five and twenty-one years, as provided by section seventeen hundred and forty-four of chapter nine of this title [§ 2860], the orphans at the several homes shall in no case be enumerated in the school district in which such homes are located, except in cases where the mother, guardian, or other person having the legal charge or control of such child, other than the officers of the home, shall reside in such district. [12 G. A., ch. 66, § 6.]

2692. Adoption of children. 1634. Any child in either of the orphans' homes may, with the consent of the parents or guardian of such child, be adopted by any citizen of this state, but no article of adoption shall be of any force or validity until approved by the board of trustees, nor shall any child

so adopted be removed from the home until articles of adoption are so approved. The board of trustees shall have power to discharge from the homes all children who are of proper age, or have sufficient means to provide for themselves, or whose mothers have sufficient means and are competent to take care of them. Any child adopted from either of the homes shall be returned to the home from which it was taken upon the order of the board of trustees, and the board shall make such order whenever they are satisfied that such child is not properly trained, educated, and provided for by the person by whom it was adopted. Such order shall be entered on the minutes of the proceedings of the board of trustees, and shall discharge and cancel the articles of adoption. [Same, § 7.]

2693. Enumeration of children of deceased soldiers. 1635. The assessor of each ward and township, when he is making assessment for each term of two years, shall take an enumeration of all the children of deceased soldiers who were in the military service of the government of the United States from his ward or township, naming the company, regiment, battery, batallion, or organization to which the deceased soldiers belonged, and make accurate returns to the board of supervisors of his county, designating the name, age, and sex of the children belonging to the family of the deceased for which the assessor shall receive the same compensation as for other services. [11 G. A., ch. 92, § 13.]

2694. Supervisors to revise. 1636. The board of supervisors shall revise said enumeration list of orphans from time to time, by adding thereto or striking therefrom as they may deem proper. [Same, § 14.]

2695. Auditor to furnish blanks. 1637. The county auditor shall furnish to the assessors of the several townships in his county, such blanks as may be necessary for taking the aforesaid enumeration. [Same, § 15.]

2696. Orphan fund. 1638. The board of supervisors of the several counties shall have control of the county orphan funds, and shall use the same for the maintenance and education of the orphans aforesaid, in such a manner and in such sums as the exigencies of the case may demand, and for no other purpose. [Same, § 16.]

2697. Tax for. 1639. The board of supervisors may levy a tax not to exceed one-half mill on the dollar in any one year, on all the taxable property in their county, provided that there are any such orphans in their county needing such aid, and shall apply said fund in such manner as hereinbefore directed. [Same, § 17.]

2698. Care of children. 1640. If the children of the deceased soldiers aforesaid have no natural or other guardian, or are neglected, the board of supervisors may appoint some suitable person in the township, who shall see that said children are cared for according to the spirit and intent of this chapter. [Same, § 18.]

2699. County soldiers' orphan fund. 1641. The funds raised under the provisions of section sixteen hundred and thirty-nine [§ 2697], shall be called the soldiers' county orphan fund, and shall be levied, collected, and paid out in the same manner as other county funds. [Same, § 19.]

2700. Orphans may attend homes. 1642. The provisions regarding this county tax shall not be so construed as to prevent the orphans, or any number thereof, from their respective counties, to attend any orphans' home in this state. [Same, § 20.]

2701. Who admitted. 16 G. A., ch. 94, § 1. The board of trustees of the soldiers' orphans' home may receive into the care and privileges of the said home at Davenport, such destitute children as should, in their judgment, properly be admitted into said institution; *provided*, that the destitute children referred to in this act, shall in all cases, have a legal settlement in this state;

and *provided further*, that the soldiers' orphans now at the other Iowa soldiers' orphans' homes shall be received at this institution and properly provided for before other children shall be received into this institution.

2702. Applications for admission. 16 G. A., ch. 94, § 2; 21 G. A., ch. 111. Applications for admission of such children may be made to any court of record or to any judge thereof or to the board of supervisors of the county wherein the children to be admitted reside.

2703. Government. 16 G. A., ch. 94, § 3. All children admitted to the said home under the provisions of this act, shall from and after the date of their reception be subject to all the rules and regulations therein in force; and the trustees of said home shall have all the control over and all the powers and rights of disposal of said children as are now or may be by law given them, in respect to the orphans of soldiers.

2704. Trustees admit. 16 G. A., ch. 94, § 4. The propriety of admitting any child, under the provisions of this act, into the said home, shall be determined by the trustees of said institution. They may refuse to admit any child, who from any cause is deemed to be inadmissible.

2705. Payment for support. 16 G. A., ch. 94, § 5. Payment to the said home, for the support and maintenance of children admitted as herein provided, and expenses of transmission of children to said home, shall be made by the state auditor, at the same time and in the same manner as is now or may be provided by law for the maintenance of soldiers' orphans.

2706. Support. 16 G. A., ch. 94, § 6. The board of supervisors of the county from which such children are received into said home, shall make provisions for the payment, from any funds of the county not otherwise appropriated, for the amounts due monthly for the support of said children, and expenses of their transmission to said home, which amounts shall be paid to the state auditor at the same time that the state taxes are paid.

2707. Employment; education. 16 G. A., ch. 94, § 7. The trustees shall provide for the regular employment of all children received into the home, in some useful industrial pursuit, in order to enable them to support themselves after their discharge from the home, and shall also provide for each child the means of obtaining a common school education while such children remain inmates of the home. And any profits arising from any such labor shall go into the general support of the home, and shall be accounted for by the managers.

2708. Refusal to levy. 16 G. A., ch. 94, § 8. In cases of neglect or refusal of the board of supervisors of any county in the state to make the necessary levy for the support of children sent from said county, then, and in that case, the state board of equalization is hereby authorized and empowered to make the levy for such delinquent county or counties.

CHAPTER 4*a*.

INSTITUTION FOR FEEBLE-MINDED CHILDREN.

2709. Repeal. 19 G. A., ch. 40, § 1. Chapter one hundred and fifty-two of the sixteenth general assembly, and chapter one hundred and sixty-four of the eighteenth general assembly, are hereby repealed, and the following enacted in lieu thereof:

2710. Name; board of trustees. 19 G. A., ch. 40, § 2. The institution located at Glenwood, in Mills county, and heretofore known as the Asylum

for Feeble-Minded Children, shall by this act be termed the Institution for Feeble-Minded Children. Said institution shall be under the management of a board of trustees, consisting of three persons, two of whom shall constitute a quorum for the transaction of business. Said trustees shall be elected by the general assembly, one of whom shall be elected for two years, one for four years, and one for six years; and at least one of them shall be a resident of Mills county, and each general assembly shall hereafter elect one trustee for six years.

2711. Objects. 19 G. A., ch. 40, § 3. The purposes of this institution are to train, instruct, support and care for feeble-minded children.

2712. Superintendent. 19 G. A., ch. 40, § 4. The board of trustees shall appoint a superintendent, whose duty it shall be, under the direction of the board, to superintend the care, management, training and instruction of the wards of the institution, and the management of its finances. He shall give a bond to the state of Iowa, in such a sum as the board shall require, to be approved by the board, conditioned for the faithful performance of his duties. He shall make quarterly settlements with the treasurer of the board.

2713. Powers and duties of trustees; meetings; officers; compensation. 19 G. A., ch. 40, § 5. The board of trustees shall have the general supervision of the institution and all its affairs, and shall adopt such rules and regulations for the management of the same as will carry into effect the provisions and purposes of this act. The trustees shall elect one of their number president; and they shall elect a secretary and treasurer, who may or may not be members of the board. The treasurer shall give bonds, as the board may require, conditioned for the faithful accounting of all moneys that come into his hands. The secretary and treasurer, if not a member of the board, shall receive three dollars per day for the time he is actually employed during the sessions of the board, or under their direction. Said board shall meet at the institution on the first Wednesday in October of each year, and every three months thereafter, and at such other times as two of their number may decide. The full compensation of the members of the board shall be four dollars per day for time actually employed, and mileage, such as is allowed by law to members of the general assembly.

2714. Admission. 19 G. A., ch. 40, § 6. Every child and youth residing in this state, between the ages of five and eighteen years, who, by reason of deficient intellect, is rendered unable to acquire an education in the common schools, shall be entitled to receive the physical and mental training and care of this institution at the expense of the state; and it shall be the duty of the county superintendent of common schools in each county to report to the superintendent of the institution, on the first day of October of each year, the name, age, and postoffice address of every person in his county between the ages of five and twenty-one, who by reason of feeble mental and physical condition is deprived of a reasonable degree of benefit from the common schools. He shall also state in said report whether or not such person has ever attended school, and how long, if at all; and he shall also give the postoffice address of the parent, guardian, or nearest friend of such person.

2715. Method of admission. 19 G. A., ch. 40, § 7. There shall be received into the institution feeble-minded children between the ages of five and eighteen years, whose admission shall be applied for as follows:

First. By the father and mother, or either of them, if the other be adjudged insane.

Second. By the guardian duly appointed.

Third. In all other cases, by the board of supervisors of the county in which the child resides. It shall be the duty of such board of supervisors to make such application for any such child that has no living sane parent or guardian in the state, unless such child is comfortably provided for already.

2716. Application. 19 G. A., ch. 40, § 8. The forms for applications for admission into the institution shall be such as the trustees shall prescribe, and each application shall be accompanied by answers to such interrogatories as the trustees shall require propounded.

2717. Support; appropriation. 19 G. A., ch. 40, § 9. For the support of said institution there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of ten dollars per month for each inmate therein supported by the state, counting the actual time such person is an inmate and supported by the institution; and upon presentation to the auditor of state of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, the auditor of state shall draw his warrant upon the treasurer of the state for such sum. For the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers, there is hereby appropriated the sum of eleven thousand dollars annually, or so much thereof as may be necessary, which may be drawn quarterly upon the order of the trustees.

2718. Cost of transmission and clothing. 19 G. A., ch. 40, § 10. When the pupils of the institution are not otherwise provided with clothing, the same shall be furnished by the superintendent, who shall make out an account of the cost thereof, in each separate case, together with the cost of transmission of the pupil, when the latter is not otherwise provided for; and said account shall be made against the parent or guardian, if there be such, or otherwise against the inmate; and when said account shall have been certified to by the superintendent, it shall be presumed to be correct in all courts, and shall be transmitted by mail to the county auditor of the county from which said pupil was sent to the institution. The said auditor shall then proceed at once to collect the same, by suit, if necessary, in the name of the county, and pay the same into state treasury. The superintendent shall, at the same time, transmit a duplicate of the same account to the auditor of state, who shall credit the same to the account of the institution, and charge it to the proper county: *Provided*, [if] it shall appear by the affidavit of three disinterested citizens of the county, not kin to the inmate, that the parent or guardian would be unreasonably oppressed by such suit, then such auditor shall not institute such suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall draw from the county fund the amount claimed, and cause the same to be paid into the state treasury. All accounts for clothing and transportation of pupils on the books of the superintendent of this institution, and not paid at the time of the enactment of this section, hereby are made subject to the same, and shall be collected accordingly.

2719. Return of inmates. 19 G. A., ch. 40, § 11. Any inmate of the institution may be returned to the parents or guardian, whenever the trustees may so direct.

2720. Idiots. 19 G. A., ch. 40, § 12. The term "feeble-minded," as used in connection with this institution, shall be so construed as to include idiotic children, and the institution shall provide a custodial department for the care of such children as cannot be benefited by educational training.

2721. Report of board. 19 G. A., ch. 40, § 13; 22 G. A., ch. 82, § 36. The board of trustees shall make a full report of the disbursements of the institution, and its condition, financial and otherwise, to the governor biennially.

[Further as to time of making report and its publication, see §§ 117-121.]

2722. Appointment of officers and teachers. 19 G. A., ch. 40, § 14. The superintendent may, under the direction of the board of trustees, appoint such subordinate officers, teachers, attendants and other help as may be needed for the efficient working of the institution.

CHAPTER 5.

OF THE STATE INDUSTRIAL SCHOOLS.

2723. Located. 1643; 16 G. A., ch. 38, § 1. A reform school shall be permanently located at Eldora, in Hardin county, and maintained for the reformation of such boys and girls under the age of sixteen years, who may be committed to it as hereinafter provided. [12 G. A., ch. 59, § 1.]

2724. Name changed. 20 G. A., ch. 153, § 1. The reform schools of this state shall be hereafter known as industrial schools instead of reform schools and the trustees of said schools shall be known as the board of trustees of the industrial schools.

2725. Trustees. 1644. There shall be a board of trustees, whose name and style shall be "The board of trustees of the Iowa reform school," and it shall consist of five persons, who shall be appointed by the general assembly, no two of whom shall be taken from the same congressional district, and who shall hold office for the term of six years each, and until their successors are appointed and qualified. All vacancies in said board shall be filled by appointment by the governor of the state. No member of the general assembly shall be hereafter chosen a trustee of the reform school, and no appointment shall be made till the number of trustees is reduced to five. [Same, § 2; 14 G. A., ch. 131.]

2726. Oath. 1645. Said trustees shall, before entering upon the discharge of their duties, take and subscribe an oath or affirmation to support the constitution of the United States and of this state, and faithfully discharge the duties required of them by law. [12 G. A., ch. 59, § 3.]

2727. Compensation. 1646. The members of said board shall receive no compensation except the same mileage going to and returning from the place of meeting, as members of the general assembly, computed for the actual distance from their residence to the place of meeting; *provided*, that while employed in superintending the erection of buildings for said school, they shall receive the sum of three dollars per day and their actual traveling expenses, the amount due each trustee to be certified by the president and secretary of the board. [Same, § 4; 14 G. A., ch. 116, § 1.]

[For general provision as to compensation of trustees, etc., of state institutions, see § 5104.]

2728. Officer chosen; rules; bond of treasurer. 1647. Said board of trustees shall, from their board, appoint a president, secretary, and treasurer, and shall take charge of the general interests of the institution; shall have power to enact by-laws and rules for the regulation of all its concerns not inconsistent with the constitution and laws of this state; to see that its affairs are conducted in accordance with the requirements of law, and that strict discipline is maintained therein; to provide employment and instruction for the inmates; to appoint a superintendent, a steward, a teacher or teachers, and such other officers as in their judgment the wants of the institution may require, and prescribe their duties; to exercise a vigilant supervision over the institution, its officers, and inmates; to remove such officers at their pleasure and appoint others in their stead, and determine the salaries to be paid to the officers; and shall also require the treasurer to execute a bond to the state of Iowa in a sufficient amount to be approved by the executive council and filed in the office of the secretary of state. [12 G. A., ch. 59, § 5; 14 G. A., ch. 116, § 2.]

2729. Pupils taught. 1648. They shall cause the boys and girls under their charge to be instructed in piety and morality, and in such branches of useful knowledge as are adapted to their age and capacity, and in some regu-

lar course of labor, either mechanical, manufacturing, or agricultural, as is best suited to their age, strength, disposition, and capacity, and as may seem best adapted to secure the reformation and future benefit of the boys and girls. [12 G. A., ch. 59, § 6.]

[For provisions as to teaching physiology and hygiene with special reference to the effects of stimulants and narcotics, see § 2884-2886.]

2730. Pupils bound out. 1649. The trustees, with the consent in writing of their parents or guardians, as the case may be, or in case they have no parents or guardians, may bind out boys and girls committed to the school until they attain their majority, or for any less time, stipulating in the indentures for the needful amount of education, and from time to time, as the rightful guardians of the boys and girls, ascertain whether the duties and obligations of the person to whom the boy or girl is bound are faithfully performed, and if not, cancel the indenture and receive the boy or girl into the school again. [Same, § 7.]

2731. School visited; reports. 1650; 22 G. A., ch. 82, § 31. When there shall be twenty or more boys and girls in the school, one or more of the trustees shall visit the school once in every month and examine the boys and girls in their school-room and labor, and inspect the register and accounts of the superintendent. A record shall be kept of these visits in the books of the superintendent. Once in every year, or oftener if the trustees think it necessary, they shall examine the school in all its departments, including the accounts, vouchers, and documents of the superintendent, and prepare a report on the condition of the institution on the first Monday in July next preceding the meeting of the general assembly, which, together with a full report of the superintendent, and a list of the officers and their salaries, with an estimate of the value of the personal property of the state in connection with the school, shall be laid before the general assembly. [Same, § 8.]

[For further provisions as to the time of the report and its publication, see §§ 117-121.]

2732. Officers. 1651. The superintendent, with such subordinate officers as the trustees may appoint, shall have the charge and custody of the boys and girls; he shall discipline, govern, instruct, employ, and use his best endeavors to reform the inmates in such manner as, while preserving their health, will secure the promotion, as far as possible, of moral, religious, and industrious habits, and regular, thorough progress and improvement in their studies, trades, and employment. [Same, § 9.]

2733. Superintendent. 1652. He shall, before entering upon his duties, give a bond to the state, with sureties, the amount and sureties to be satisfactory to the board of trustees, conditioned that he shall faithfully perform all his duties, and account for all money received by him as superintendent, which bond shall be filed in the office of the secretary of state; he shall have charge of all the property of the institution within the precincts thereof; he shall keep in suitable books complete accounts of all his receipts and expenditures, and of all property intrusted to him, showing the income and expenses of the institution, and in such manner as the trustees may require, for all money received by him. His books and documents relating to the school shall, at all times, be open to the inspection of the trustees. He shall keep a register containing the name, age, and circumstances connected with the early history of each boy and girl, and shall add such facts as shall come to his knowledge relating to his or her history while at the institution, and after leaving it. [Same, § 10.]

2734. Sentence of commitment. 1653; 16 G. A., ch. 38, § 2. When a boy or girl under the age of sixteen years, shall, in any court of record, be found guilty of any crime, excepting murder, the said court may, if in its opinion

the accused is a proper subject therefor, instead of entering judgment, cause an order to be entered that said boy or girl be sent to the state reform school pursuant to the provisions of this chapter, and a copy of said order, duly certified by the clerk, under the seal of said court, shall be a sufficient warrant for carrying said boy or girl to the school, and for his or her commitment to the custody of the superintendent thereof. [Same, § 11.]

2735. Who committed. 16 G. A., ch. 38, § 4. No boy or girl shall ever be committed to the Iowa reform school in any case, who is under the age of seven years, or who is not of sound mind.

2736. Conviction before a justice. 1654; 16 G. A., ch. 38, § 3. When a boy or girl under the age of sixteen shall be convicted before a justice of the peace or other inferior court of any crime, or of being a disorderly person, it shall be lawful for the magistrate before whom he or she may be convicted, to forthwith send such boy or girl, together with all the papers filed in his office on the subject, under the control of some officer to a judge of a court of record, who shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom he or she has last resided, or one known to be nearly related to him or her, or if he or she be alone and friendless, then to such person as said judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated in said order, to show cause why said boy or girl should not be committed to the reform school for reformation and instruction. [Same, § 12.]

2737. Service of order. 1655. Said order shall be served by the sheriff or other officer, by delivering a copy thereof, personally, to the party to whom it is addressed, or leaving it with some person of full age at the place of residence or business of said party, and immediate return shall be made to the said judge of the time and manner of such service. The fees of the sheriff or other officer under this chapter, shall be the same as now allowed by law for like services. [Same, § 13.]

The same fees should be allowed for conveying a prisoner to the reform school as for conveying a convict to the penitentiary under § 5060: *Bringolf v. Polk County*, 41–554, 559.

2738. Hearing. 1656. At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she shall fail to appear, then in the presence of some suitable person whom the said judge shall appoint as guardian for the purposes of the case, it shall and may be lawful for the said judge to proceed to take the voluntary examination of said boy or girl, and to hear the statements of the party appearing for him or her and such testimony in relation to the case as may be produced, and if upon such examination and hearing the said judge shall be satisfied that the boy or girl is a fit subject for the state reform school, he may commit him or her to said school by warrant. [Same, § 14.]

2739. Warrant. 1657. The judge shall certify in the warrant the place in which the boy or girl resided at the time of his or her arrest, also his or her age, as near as can be ascertained, and command the said officer to take the said boy or girl and deliver him or her, without delay, to the superintendent of said school, or other person in charge thereof, at the place where the same is established; and such certificate, for the purpose of this chapter, shall be conclusive evidence of his or her residence or age. Accompanying this warrant, the judge shall transmit to the superintendent by the officer executing it, a statement of the nature of the complaint, together with such other particulars concerning the boy or girl as the judge is able to ascertain. [Same, § 15.]

2740. Appeal. 1658. If the judge is of the opinion that the boy or girl is not a fit subject for the school, or, if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law. [Same, § 16.]

2741. Complaint by parent or guardian. 1659; 19 G. A., ch. 150. If any parent or guardian shall make complaint to a judge of a court of record, that any boy or girl, the child or ward of such parent or guardian, is habitually vagrant or disorderly, or incorrigible, it shall and may be lawful for said judge to issue a warrant to have the sheriff or constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where said judge shall examine the parties, and if in his judgment the boy or girl is a fit subject for the reform school he may issue an order, with the consent of said parent or guardian indorsed thereon, to be executed by a sheriff or constable, committing said boy or girl to the custody of the superintendent of said school for reformation and instruction till he shall attain the age of twenty-one years; *provided*, that security for the payment of the expenses of said complaint, commitment, and of carrying said boy or girl to the reform school, and the expenses of board at such school, may, in the discretion of said judge, be required of said parent or guardian. [Same, § 17.]

2742. Discharge. 1660; 19 G. A., ch. 150. No boy or girl shall be committed to said reform school for a longer term than until he or she attain the age of twenty-one years, but the said trustees by their order may, at any time after one year's service, discharge a boy or girl from said school as a reward of good conduct in the school and upon satisfactory evidence of reformation. [Same, § 18.]

2743. Binding out or release. 1661; 19 G. A., ch. 150. Any boy or girl committed to the state reform school shall be there kept, disciplined, instructed, employed, and governed, under the direction of the trustees, until he or she arrives at the age of twenty-one years or is bound out, reformed, or legally discharged. The binding out or discharge of a boy or girl as reformed or having arrived at the age of twenty-one years, shall be a complete release from all penalties incurred by conviction of the offense for which he or she was committed. [Same, § 19.]

2744. Unruly pupil. 1662. If any boy or girl, convicted of a felony, committed to the reform school, shall prove unruly or incorrigible, or if his or her presence shall be manifestly and persistently dangerous to the welfare of the school, the trustees shall have power to order his or her removal to the county from which he or she came and delivery to the jailer of the said county, and proceedings against him or her shall be resumed as if no warrant or order committing him or her to the reform school had been made. [Same, § 20.]

2745. Punishment for aiding to escape. 1663. Every person who unlawfully aids or assists any boy or girl lawfully committed to the reform school in escaping, or attempting to escape therefrom, or knowingly conceals such boy or girl after his or her escape, shall be punished by fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding five years. [Same, § 21.]

2746. Appropriation for support. 15 G. A., ch. 21, § 1; 17 G. A., ch. 97, § 1. There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of eight dollars per month, or so much thereof as may be necessary, for each boy or girl actually supported in the state reform school, counting the average number sustained in the school for

the month; and upon the presentation to the auditor of state, each month, of a sworn statement by the superintendent of the average number of boys and girls supported by the school for the preceding month, the auditor of state shall draw his warrant on the treasurer of state in favor of the treasurer of the board of trustees of the state reform school for the sum hereinbefore provided.

GIRLS' DEPARTMENT.

2747. Location. 18 G. A., ch. 171, § 1. The executive council is hereby authorized and instructed to purchase for the use and occupancy of the girls' department of the reform school the building, furniture, and grounds of the Mitchell Seminary, located at Mitchellville, Iowa, and twenty acres of land adjoining said grounds on the south, comprising forty acres in all, and in payment therefor the auditor of state is hereby required to draw warrants on the state treasurer for the amount of the purchase money, and the warrants so drawn shall be payable, one half in the year 1882, and the other half in the year 1884: *Provided*, that the cost of the said property shall not exceed the sum of twenty thousand dollars, and *further provided*, that no money shall be paid for said property until a title thereof is furnished to the state free of all liens and incumbrances.

2748. Removal of department to. 18 G. A., ch. 171, § 2. It shall be the duty of the trustees of the reform school to take possession of said property after the completion of the purchase, and cause the building to be painted and repaired, and erect suitable stables, and out-buildings on the said grounds, at an expense not exceeding the sum of one thousand dollars; and they shall hereafter as soon as practicable remove to said premises the girls' department of the reform school which is now temporarily located at Mt. Pleasant, Iowa.

2749. Appropriation. 19 G. A., ch. 92, § 1. There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of ten dollars per month, or so much thereof as may be necessary, for each girl actually supported in the state reform school, counting the average number sustained in the school for the month, and upon the presentation to the auditor of state, each month, of a sworn statement of the superintendent of the average number of girls supported by the school for the preceding month, the auditor of state shall draw his warrant on the treasurer of state in favor of the treasurer of the board of trustees of the state reform school for the sum hereinbefore provided.

2750. 19 G. A., ch. 92, § 2. The provisions of section one of this act [§ 2749] shall apply from and after October first, 1881.

CHAPTER 6.

COLLEGE FOR THE BLIND.

2751. Trustees; how chosen. 1664. There shall be maintained at Vinton, in the county of Benton, a college for the blind, under the supervision of a board of trustees consisting of six persons who shall be chosen by the general assembly as their present or future terms of office expire, and hold their offices for four years from the date of each appointment.

2752. Who eligible. 1665. No member of the general assembly shall hereafter be chosen a trustee of the college for the blind.

2753. Powers. 1666. The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, serv-

ants, and necessaries for the institution, and perform all other acts necessary to render the institution efficient and to carry out the purpose of its establishment. [R., § 2145.]

2754. Quorum. 1667. Three of said trustees shall constitute a quorum for the transaction of business. [R., § 2146.]

2755. Compensation. 1668. Trustees residing more than ten miles from the institution, shall be allowed five dollars per day for actual services and ten cents per mile to and from their place of meeting, which shall be paid out of the funds of the institution, for attendance at the quarterly and annual meetings of the board. [10 G. A., ch. 36, § 3.]

[This section is modified as to compensation by § 5104.]

2756. Compensation of officers. 1669. The board of trustees shall fix the compensation of all the officers and employees of said institution, at such rate as shall by them be deemed just and equitable; *provided*, that in no event shall the total amount of expenses of the institution exceed the total amount of appropriation for the same. [10 G. A., ch. 54, §§ 2, 3; 11 G. A., ch. 43, §§ 2, 3; 12 G. A., ch. 94, § 2.]

2757. Officers. 1670. The assistant officers shall receive their appointment from the board, upon the nomination of the principal, and shall be responsible to the principal for the faithful performance of their duties, and the principal shall be held responsible to the board for the performance of his duties. [R., § 2154.]

2758. Steward. 1671. The trustees shall appoint some one of the employees, steward, at such compensation as they may deem just, who, under their direction, shall purchase all supplies for the institution. [10 G. A., ch. 54, § 4; 11 G. A., ch. 43, § 4.]

2759. Non-residents. 1672; 17 G. A., ch. 72, § 1. Persons not residents of the state shall be entitled to the benefits of this institution, on paying to the treasurer thereof the sum of fifty-four dollars a quarter in advance, *provided*, that no such person shall be so received to the exclusion of any resident of this state. [R., § 2148.]

2760. President; treasurer. 1673. The board of trustees shall elect one of their number president and another treasurer of the institution, and the treasurer shall enter into bonds, with security, in the sum of not less than thirty thousand dollars, to be approved by the executive council, conditioned for the faithful performance of his duties, and the honest disbursement of and accountal for all moneys belonging to the institution, which bond shall be filed with the secretary of state. [R., § 2150.]

2761. Indebtedness. 1674. The board of trustees shall not create any indebtedness against the institution, exceeding the amount appropriated by the general assembly for the support thereof. [R., § 2151.]

2762. Appropriation for. 1675; 19 G. A., ch. 166, § 1. To meet the ordinary expenses of the institution, including furniture, books, and maps, the compensation of principal, matron, teachers, and employees, and to provide for contingencies, there is hereby appropriated the sum of ten thousand dollars annually, or so much thereof as may be necessary, to be drawn quarterly, and then only as necessary to meet the wants of the institution. [10 G. A., ch. 54, § 1; 13 G. A., ch. 129, § 1.]

2763. Support. 1676; 17 G. A., ch. 72, § 2; 18 G. A., ch. 165; 19 G. A., ch. 166, § 2. For the purpose of meeting current expenses, there is appropriated out of the state treasury so much as is necessary, not to exceed forty dollars per quarter for each pupil in said institution, except non-residents at the time of their reception. [10 G. A., ch. 54, § 5; 11 G. A., ch. 43, § 5.]

2764. Report to governor. 1677; 22 G. A., ch. 82, § 32. The principal of said institution shall report to the governor, on or before the fifteenth day of August preceding each regular session of the general assembly, the number of pupils in attendance, with the name, age, sex, residence, place of nativity, and also the cause of blindness of each pupil. He shall also make a report of the studies pursued and trades taught in said institution, together with a complete statement of the expenditures, and also the number, kind, and value of articles manufactured and sold. [Same chs., § 6.]

[For provisions as to publication of the report, see §§ 122-126.]

2765. Clothing for pupils; how procured. 1678. When the pupils of said institution are not otherwise supplied with clothing, they shall be furnished by the principal, who shall make out an account therefor in each case against the parent or guardian, if the pupil be a minor, and against the pupil if he or she have no parent or guardian or has attained the age of majority, which account shall be certified to be correct and signed by the principal, and shall be presumptive evidence of its correctness in the courts, and such principal shall forthwith remit such account to the treasurer of the proper county, who shall proceed to collect the same by suit, if necessary, in the name of such institution, and pay the same into the state treasury, and said principal shall, at the same time, remit a duplicate of such account to the auditor of state, who shall credit the same to account of the college for the blind, and charge it to the proper county. [Same chs., § 7.]

2766. Appropriation. 1679. The above appropriations, including account of clothing furnished pupils, shall be drawn quarterly on the order of the trustees of the institution made on the auditor of the state, who shall draw his warrant in the name of such institution on the treasurer, as ordered by the trustees. [Same chs., § 8; 13 G. A., ch. 129, § 4.]

2767. Education free. 1680. All blind persons, residents of this state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state. Each county superintendent of common schools shall report on the first day of November of each year to the superintendent of the college for the blind, the name, age, residence, and postoffice address of every blind person, and every person blind to such an extent as to be unable to acquire an education in the common schools, and who resides in the county in which he is superintendent. [R., § 2147.]

[Secs. 1681, 1682 and 1683 are repealed by 16 G. A., ch. 71.]

2768. Vacancies in board. 1684. Upon the death, resignation, or removal from the state of any member of the board of trustees, the general assembly, if in session at the time, shall fill the vancancy, but if the general assembly is not in session, then shall the governor fill such vacancy by appointment, to continue until the next regular session of the general assembly and until a successor shall be by that body elected. The refusal or neglect of any duly elected or appointed member of said board to act, shall be deemed a resignation.

CHAPTER 7.

OF THE INSTITUTION FOR THE DEAF AND DUMB.

2769. Trustees. 1685; 17 G. A., ch. 136, § 5. There shall be permanently maintained at Council Bluffs, in the county of Pottawattamie, an institution for the support and education of the deaf and dumb, under the supervision of a board of trustees. [R., §§ 2157, 2158; 11 G. A., ch. 136, § 1.]

2770. Powers and duties. 1686. The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants, and necessaries for the institution, and perform all other acts necessary to render it efficient, and to carry out the purposes of its estab lishment. [R., § 2158; 10 G. A., ch. 54, §§ 2, 3.]

The trustees are not liable in damages at the suit of a teacher or superintendent whom they have employed, for wrongfully, unjustly and illegally refusing to allow him to enter upon his employment: *Chamberlain v. Clayton*, 56–331.

2771. Quorum; record. 1687. Three of said trustees shall constitute a quorum for the transaction of business, and their proceedings at each meeting shall be recorded in a minute book, which shall be signed by those present and form a record of their proceedings. [R., § 2159.]

[As to compensation of trustees of state institutions in general, see § 5104.]

2772. Non-residents. 1688. Persons not residents of the state, of suitable age and capacity, shall be entitled to an education in said institution, on paying to the trustees thereof the sum of forty dollars a quarter in advance. [R., § 2160.]

2773. Education free. 1689. Every deaf and dumb citizen of the state, of suitable age and capacity, shall be entitled to receive an education in said institution at the expense of the state, and each county superintendent of common schools shall report on the first day of November in each year to the superintendent of the institution the name, age, and postoffice address of every deaf and dumb person between the ages of five and twenty-one years residing in his county, including all such persons as may be too deaf to acquire an education in the common schools. [R., § 2156; 14 G. A., ch. 114.]

2774. Officers. 1690. The board of trustees shall select one of their number as president and another as treasurer of the institution, and the treasurer shall enter into bonds, with security, in such sum as the board shall direct, conditioned for the faithful paying over of all money belonging to the institution upon the order of the board, which bond shall be approved by the executive council and filed with the secretary of state. [R., § 2162.]

2775. Indebtedness. 1691. The board shall not create any indebtedness against the institution exceeding the amount appropriated by the general assembly for the use thereof. [R., § 2163.]

2776. Appropriation; current expenses. 1692; 17 G. A., ch. 98, § 1; 18 G. A., ch. 203; 19 G. A., ch. 105. For the purpose of meeting current expenses, there is hereby appropriated the sum of thirty-five dollars per quarter for each pupil in said institution. [10 G. A., ch. 54, § 5; 12 G. A., ch. 106, § 4; Priv. Laws, 14 G. A., ch. 75, § 2.]

2777. Ordinary expenses. 1693; 17 G. A., ch. 98, § 2; 18 G. A., ch. 203; 19 G. A., ch. 105; 20 G. A., ch. 73. To meet the ordinary expenses of the institution, including furniture, books, school apparatus, and compensation of officers and teachers, there is hereby appropriated the sum of twenty-one thousand dollars per annum, or so much thereof as may be necessary, which may be drawn quarterly in such sums as the necessities of the institution may require. [10 G. A., ch. 54, § 1.]

2778. Report. 1694; 22 G. A., ch. 82, § 32. The superintendent of said institution shall report to the governor, on or before the fifteenth day of August preceding each regular session of the general assembly, the number of pupils in attendance, with the name, age, sex, residence, place of nativity, and also the cause of the deafness of each pupil. He shall make a report of the studies pursued and trades taught in said institution, together with a complete detailed statement of the expenditures for said institution and the receipts on account of the same, the salaries paid to each officer and teacher, and also the

kind, number, and value of all articles manufactured and sold. [Same, § 6; 12 G. A., ch. 106, § 5.]

[For provisions as to publication of the report, see §§ 122–126.]

2779. Clothing for pupils. 1695. When the pupils of said institution are not otherwise supplied with clothing, they shall be furnished by the superintendent, who shall make out an account of the cost thereof in each case, against the parent or guardian if the pupil be a minor, and against the pupil if he or she have no parent or guardian or have attained the age of majority; which account shall be certified to be correct by said superintendent; and when so certified, such an account shall be presumed correct in all courts. The superintendent shall thereupon remit said accounts by mail to the treasurer of the county from which the pupil so applied shall have come to said institution; such treasurer shall proceed at once to collect the same by suit in the name of his county if necessary, and pay the same into the state treasury; the superintendent shall, at the same time, remit a duplicate of such account to the auditor of state, who shall credit the same to the account of the institution, and charge it to the proper county; *provided*, if it shall appear by the affidavit of three disinterested citizens of the county, not of kin to the pupil, that the said pupil or his or her parents would be unreasonably oppressed by such suit, then such treasurer shall not commence the said suit, but shall credit the same to the state on his books, and report the amount of such account to the board of supervisors of his county, and the said board shall levy sufficient tax to pay same to the state, and to cause the same to be paid into the state treasury. [10 G. A., ch. 54, § 7; 12 G. A., ch. 106, § 6.]

2780. Money drawn. 1696. The above-mentioned appropriations, including the accounts for clothing aforesaid, shall be drawn quarterly on the requisition of the board of trustees of the institution, in the usual manner, and then only in such amounts as the wants of the institution may require. [10 G. A., ch. 54, § 8; 12 G. A., ch. 106, § 7.]

2781. Board of trustees. 17 G. A., ch. 136, § 1. The board of trustees of the institution for the deaf and dumb shall consist of three persons, to be elected by the present general assembly, one for two years, one for four years, and one for six years; and each subsequent general assembly shall elect one trustee to serve for six years. Two of said trustees shall constitute a quorum for the transaction of business. Said trustees shall enter upon the duties of their office on the first day of May in the year in which they are elected.

2782. Teachers residing in institution. 17 G. A., ch. 136, § 2. And no teacher, superintendent, steward, or other employee, shall reside in the institution, or receive board, or any allowance of provision, clothing, fuel, or other supplies from the funds or supplies furnished for the support of the institution, except by arrangement made in advance with the trustees, and at and for prices that shall be just to the state.

2783. Labor of inmates. 17 G. A., ch. 136, § 4. The trustees shall have authority to utilize the inmates of the institution, so far as practicable without interfering with the proper education of the inmates, in any suitable labor on the farm, in the workshops, in the erection of buildings belonging to the institution, or in the domestic service of the same.

CHAPTER 7*a*.

SOLDIERS' HOME.

2784. Established; appropriation. 21 G. A., ch. 58, § 1. That there be and is hereby created and established in this state an institution to be known as the "Iowa Soldiers' Home," and that the sum of seventy-five thousand dollars, or so much thereof as is necessary, be and is hereby appropriated out of any money in the treasury not otherwise appropriated, for the purchase and preparation of grounds and for the erection and completion or purchase of suitable buildings and fixtures thereon, and furnishing and equipping the same; and the further sum of twenty-five thousand dollars, or so much thereof as may be necessary for the purpose of maintaining such soldiers' home for the year 1887; *provided*, however, that it shall not be lawful for the board of managers hereinafter created to draw upon the sum hereby appropriated, an amount exceeding seventy-five thousand dollars in the year 1886 and the sum of twenty-five thousand dollars in the year 1887.

2785. Objects; admission to. 21 G. A., ch. 58, § 2. The object of the "Iowa Soldiers' Home" shall be to provide a home and subsistence for all honorably discharged soldiers, sailors and marines who have served in the army or navy of the United States and who are disabled by disease, wounds or otherwise; *provided*, that no applicant shall be admitted to said home who has not been a resident of the state of Iowa for three years next preceding his application for admission therein unless he served in an Iowa regiment or was accredited to the state of Iowa. The board of commissioners shall determine the eligibility of applicants for admission to said home as herein provided.

[Provisions of 21 G. A., ch. 58, and 21 G. A., ch. 129, as to method of determining location, are omitted. The institution was, in pursuance of the provisions thus made, located at Marshalltown.]

2786. Board of commissioners; compensation. 21 G. A., ch. 58, § 4. The general supervision and government of said soldiers' home shall be vested in a board of commissioners, to consist of six members, who shall be appointed by the governor, by and with the consent of the senate, immediately after the taking effect of this act, not more than four of whom shall belong to the same political party, and no two of whom shall be from the same congressional district, and no member of the general assembly shall be eligible to the office, but all shall be ex-Union soldiers. The members of the board shall hold their office for the respective terms of two, four, and six years, from the first day of May, 1886, and until their successors shall be appointed and qualified, said respective terms of office to be determined by lot, and thereafter there shall be two members of said board appointed every two years during the session of the general assembly, whose term of office shall continue for six years from the first day of May next ensuing, or until their successors are appointed and qualified. The governor shall call a meeting of said board for the purpose of organization, within thirty days after the first appointments are made. No compensation shall be allowed any member of the board of commissioners other than president, treasurer, and secretary, save their actual expenses; *provided*, however, that a building committee may be appointed from the members of said board, consisting of not more than two persons, whose duty it shall be to visit and inspect the buildings at least once in two weeks during their period of construction, and who may receive in addition to their actual expenses the sum of five dollars for each day so actually employed. *Provided*, however, that no member of said building committee shall receive compensation for more than ten days' service in any one month. In case of a vacancy in the board of commissioners by death or

any other cause, the appointing power provided for shall have power to fill the vacancy for the unexpired portion of the term. Four members of the board shall constitute a quorum for the transaction of business; *provided*, that for the adoption of plans and the letting of contracts for buildings and the selection of a commandant for said home, the affirmative vote of a majority of the entire board shall be required.

2787. Board to qualify and give bond. 21 G. A., ch. 58, § 5. Before entering upon his duties each member of the board of commissioners shall take and sign an oath and execute a bond in the penal sum of ten thousand dollars for the use of the state of Iowa, to be approved by the executive council and filed in the office of the secretary of state, conditioned for the faithful performance of his duties and the honest and faithful disbursement of and accounting for all moneys which may come into his hands under the provisions of this act. The said board, having first taken the oath prescribed for the trustees of state institutions, is hereby empowered and required to cause to be prepared suitable plans and specifications by a competent architect, but no plans shall be adopted which shall not first have been approved by the governor. Such plans shall contemplate the erection of a home which shall accommodate not less than one hundred and fifty nor more than three hundred inmates, and shall be accompanied by specifications, and by a detailed estimate of the amount, quality and description of all material and labor required for the entire and full completion of the buildings, and no plan shall be adopted that contemplates the expenditure of more money for its completion than the amount appropriated by this general assembly added to any donations received by the state for the erection of the home.

2788. Architect or superintendent. 21 G. A., ch. 58, § 6. The said board of commissioners may at their discretion employ a competent architect or superintendent of construction, who may, in the discretion of said board, be the same person, and who shall receive such compensation as the board shall, by agreement, determine.

2789. Bids. 21 G. A., ch. 58, § 7. Whenever the said plans and specifications shall have been approved and adopted, the commissioners shall cause to be inserted in the Iowa State Register and Des Moines Leader, newspapers published in the city of Des Moines, Iowa, an advertisement for sealed bids for the construction of the buildings herein authorized, and they shall furnish a printed copy of this act and of the specifications to all parties applying therefor, and all parties interested who may desire it shall have free and full access to the plans and specifications with the privilege of taking notes and making memoranda.

2790. Letting contract. 21 G. A., ch. 58, § 8. Not less than thirty days after the publication of said proposals for bids, on a day and hour to be named in said advertisement at the place where said institution shall be located in the presence of the bidders, or so many of them as may be present, the bids received shall be opened for the first time, and the contract for building shall be let to the lowest and best bidder; *provided*, that should the commissioners deem it for the interest of the state they may reject any and all bids and advertise again and *also provided*, that no contract shall be made, and no expense incurred for any building or buildings, requiring for the completion of the same and fixtures thereon and furnishing and equipping the same a greater expense than is provided for in the appropriation made in this act added to any donations received by the state for the erection of the home. And *provided further*, that no bid shall be accepted which is not accompanied by a good and sufficient bond in the sum of ten thousand dollars, signed by at least three good and sufficient sureties who shall be resident freeholders of the state of Iowa conditioned as a guaranty for the responsibility and good faith

of the bidder, and that he will enter into a contract and give bond as provided in this act in case his bid is accepted.

2791. Bond. 21 G. A., ch. 58, § 9. The contract to be made with the successful bidder shall be accompanied by a good and sufficient bond, to be approved by the governor before being accepted, conditioned for the faithful performance of his contract, shall provide for the appointment of an architect or a superintendent of construction, who shall receive not more than five dollars per day for his services, and who shall carefully and accurately measure the work done, and the materials upon the ground at least once a month; for the payment of the contractor upon the aforesaid measurement, and for the withholding of twenty per cent. of the value of the work done and materials on hand until the completion of the buildings. And for a forfeiture of a stipulated sum per diem for every day that the completion of the work shall be delayed after the time specified for the completion of the contract, and for the full protection of all persons who may furnish labor or materials by withholding payment from the contractor and by paying the parties to whom any moneys are due for service or materials, as aforesaid, directly for all work done or materials furnished by them, and for a settlement of all disputed questions as to the value of alterations and extras by arbitration at the time of final settlement, as follows: One arbitrator to be chosen by the commissioners, one by the contractor, and one by the governor of the state; and all three of said arbitrators to be practical mechanics and builders. And said contract shall provide for the power and privilege of the commissioners to order changes in the plans and specifications at their discretion, and to refuse to accept any work which may be done not fully in accordance with the letter and spirit of the plans and specification; and all work not accepted shall be replaced at the expense of the contractor, and be deducted from the contract price. They may also make such other provisions and conditions in the said contract not hereinabove specified as may seem to them necessary or expedient, *provided*, that no conditions shall be inserted contrary to the letter and spirit of this act, and that in no event shall the state be liable for a greater amount of money than is appropriated for said buildings and appurtenances.

2792. Contract signed. 21 G. A., ch. 58, § 10. The said contract shall be signed by the president of the board of commissioners in behalf of the board after a vote authorizing him so to sign shall have been entered upon the minutes of the board, and it shall be attested by the signature of the secretary of the board and by the seal of the institution hereinafter provided for. It shall be drawn in triplicate, and one copy of the same shall be deposited in the office of the secretary of state.

2793. Bids in detail. 21 G. A., ch. 58, § 11. All bids shall show the estimated cost of the work to be done of each description in detail. And the commissioners shall have the right and power at their discretion to accept bids for particular portions of the work if for the advantage of the state, and all measurements and accounts as the work progresses, shall show in detail the amount and character of the work for which payment is made.

2794. Location and grounds. 21 G. A., ch. 58, § 12. The cost of location, including the cost of suitable grounds, may be paid out of the appropriations herein made, but shall not exceed the sum of ten thousand dollars. *Provided* that should the land be purchased with suitable buildings erected thereon, the same shall not exceed the sum of fifty thousand dollars and in that case the parts of this act which refer to erections of buildings shall not apply.

2795. Moneys, how payable. 21 G. A., ch. 58, § 13. The moneys herein appropriated shall be paid to the parties to whom they may become due and payable, directly from the treasurer of state, on the warrant of the

auditor of state, and the auditor is hereby authorized and required to draw the said warrants for money due under this act, upon the order of the board of commissioners accompanied by vouchers approved by the governor in the usual manner, and the board is authorized to advance and pay on contracts, before the same are fully completed not exceeding eighty per cent. on the estimates of material delivered or labor performed. All other moneys appropriated by this act shall be drawn quarterly on the requisition of the board of commissioners, in the usual manner, and then only in such amounts as the wants of the institution may require.

2796. Commissioners not to be interested. 21 G. A., ch. 58, § 14. No commissioner or officer of the said institution shall be in any way interested in any contract for the erection or purchase of said buildings, or furnishing any materials for said buildings, and if any such commissioner or officer shall be so interested he shall be deemed guilty of a misdemeanor and on conviction be fined in any sum not exceeding five thousand dollars.

2797. Meetings of board; officers; powers; report. 21 G. A., ch. 58, § 15. It shall be the duty of the board of commissioners to meet annually on the second Wednesday in May of each year, and at said annual meeting they shall elect from their own body a president, treasurer and secretary, whose compensation shall be determined by the board, and who shall hold office for one year, or until their successor shall be elected and qualified. The treasurer shall give a bond, which shall be approved by the executive council for double the amount of money liable to come into his hands at any one time. The board of commissioners shall meet at least once in three months, on the second Wednesday in August, November and February, and oftener if they deem it advisable, and shall have the power to adopt a seal and make rules and regulations, not inconsistent with the laws and constitution of the state, for the management and government of said home, including such rules as they may deem necessary for the preserving of order, enforcing discipline and preserving the health of its inmates. If necessary, for the purpose of procuring a better insight into the practical working of similar homes, and for the better information of the board, they may authorize not more than three of their number to visit similar institutions now in operation that they may have the benefit of their personal observation and investigation, and the expense actually incurred in any such visit may be charged against the appropriation hereinbefore made. The board of commissioners shall make full and minute report of all the disbursements of the home, and of its condition, financial and otherwise, to each regular session of the general assembly.

2798. Commandant; salary. 21 G. A., ch. 58, § 16. The board of commissioners shall have the power and it shall be their duty to appoint a commandant for said home who shall serve as such during the pleasure of the board of commissioners and who shall be one who has been honorably discharged from the military or naval service of the United States, whose salary shall not exceed twelve hundred dollars per annum, and who shall nominate for the action of the board of commissioners, all necessary subordinate officers, who shall also be persons who have been honorably discharged from the military or naval service of the United States, who may be removed by said commandant for insufficiency or misconduct; but in case of every removal a detailed statement of the cause shall be reported to the board of commissioners by the commandant. The board of commissioners shall have the power to fix the salary of all subordinate officers; *provided*, the amount so paid shall not exceed such reasonable compensation as is paid for like service in similar institutions.

2799. Action of board. 21 G. A., ch. 58, § 17. Every contract and duty required by this act to be acted upon by the board of commissioners

must receive the approval of the majority of the board in regular session duly called in order to make the same binding and valid; that all the proceedings of said board shall be recorded in a book and open to the inspection of anybody on request.

2800. Appropriation. 22 G. A., ch. 121, § 1. There is hereby appropriated out of any money in the treasury the sum of six thousand dollars per annum for the salary and wages of the officers and employees of said home.

2801. Support. 22 G. A., ch. 121, § 2. For the general support of the inmates of said home there is hereby appropriated the sum of ten dollars per month, or so much thereof as may be necessary to each inmate in said home to be estimated by the average number for the preceding quarter.

2802. How drawn. 22 G. A., ch. 121, § 3. The above-mentioned appropriation to be drawn monthly on the requisition of the board of commissioners of the home in the usual manner and then only in such amounts as the wants of the home may require.

CHAPTER 8.

OF COUNTY HIGH SCHOOLS.

2803. Establishment. 1697. Each county having a population of two thousand inhabitants or over, as shown by the last state or federal census, may establish a high school on the conditions and in the manner hereinafter prescribed, for the purpose of affording better educational facilities for pupils more advanced than those attending district schools, and for persons desiring to fit themselves for the vocation of teaching. [13 G. A., ch. 116, § 1.]

High schools are deemed a part of the common school system of the state, though they are not to derive any support or assistance from the school fund: *High School v. Clayton County*, 9-175.

2804. Petition for election. 1698. When one-third of the electors of a county, as shown by the returns of the last preceding election, shall petition the board of supervisors requesting that a county high school be established in their county at the place in said petition named, then, or when said board in its discretion shall deem proper, said board shall give twenty days' notice previous to the next general election, or previous to a special election duly called for that purpose, that they will submit the question to the electors of said county whether such high school shall be established; at which election said electors shall vote by ballot, for or against establishing such county high school. The notice contemplated in this section shall be given through one or more newspapers published in said county, if any be published therein, and by at least one written or printed notice to be posted in each township. [Same, § 2.]

2805. Votes canvassed; trustees. 1699. After said election, the ballots on said question shall be canvassed in the same manner as in the election for county officers; and if a majority of all the votes cast on said question shall be in favor of establishing said school, the board of supervisors shall immediately proceed to appoint six persons, who shall be residents of the county, but not more than two of whom shall be residents of the same township, who shall, with the county superintendent of common schools, constitute a board of trustees for said high school. Each of said trustees appointed as aforesaid shall hold his office until his successor is elected and qualified, and shall be required, within ten days after appointment, to qualify by taking the oath of office, and giving such bond as may be required by the said board of supervisors, for the faithful discharge of his duties. [Same, § 3.]

2806. Election of trustees. 1700. At the next general election after said appointment, there shall be elected in said county six high school trustees, who shall be divided into three classes of two each; each class to hold their office one, two, and three years, respectively, and their respective terms to be decided by lot. And each year thereafter there shall be two such trustees elected to succeed those whose term is about to expire. And said trustees shall qualify and enter upon the duties of their office in the same manner, and at the same time as other county officers. [Same, § 4.]

2807. County superintendent. 1701. The county superintendent shall, by virtue of his office, be president of said board of trustees; and at their first meeting in each year, they shall appoint from their own number a secretary and treasurer, who shall perform the usual duties devolving upon such officers for the term of one year, or until their successors are appointed to take their places. [Same, § 5.]

2808. Estimate of funds; tax levied. 1702. At said meeting, or at some succeeding meeting called for such purpose, said trustees shall make an estimate of the amount of funds needed for building purposes, for payment of teachers' wages, and for contingent expenses, and they shall present to the board of supervisors a certified estimate of the rate of tax required to raise the amount desired for such purposes. But in no case shall the tax for such purposes exceed in one year the amount of five mills on the dollar on the taxable property of the county, and, when the tax is levied for the payment of teachers' wages and contingent expenses only, shall not exceed two mills on the dollar. [Same, § 6.]

2809. Collection. 1703. The said tax shall be levied and collected in the same manner as other county taxes, and when collected the county treasurer shall pay the same to the treasurer of the county high school, in the same manner that school funds are paid to the district treasurers as required by law. [Same, § 7.]

2810. Treasurer; accounts. 1704. The said treasurer of the high school shall give such additional bond as the board of trustees may deem sufficient, and receive all moneys from the county treasurer and from other parties that belong to the funds of said school, and pay the same out only by direction of the board of trustees upon orders duly executed by the president, countersigned by the secretary thereof, stating the purpose for which they were drawn. Both the secretary and treasurer shall keep an accurate account of all moneys received and expended for said school; and at the close of each year, and as much oftener as required by the board, they shall make a full statement of the financial affairs of the school. [Same, § 8.]

2811. Site; contracts. 1705. The said board of trustees shall proceed, as soon as practicable after their appointment as aforesaid, to select the best site, in accordance with the vote of the county, that can be obtained without expense to the same, and the title thereof shall be vested in said county. They shall then proceed to make such purchases of material, and to let such contracts for their necessary school buildings as they may deem proper, but shall not make any purchase or contract in any year to exceed the amount on hand and to be raised by the levy of tax that year. [Same, § 9.]

2812. Employment of teachers. 1706. When said board of trustees shall have furnished a suitable building for the school, they shall employ some competent teacher to take charge of the same, and furnish such assistant teachers as they deem necessary, and provide for the payment of their salaries. As far as practicable, model schools shall be encouraged, and advanced students and those preparing to become teachers may be employed a portion of their time in teaching the younger pupils, in order that they may become familiar with the practice as well as theory of successful school-teaching, and

also avoid, as far as practicable, the expense of employing other assistant teachers. [Same, § 10.]

2813. Tuition free; rules. 1707. Tuition shall be free to all pupils of such school residing in the county where the same is located. The board of trustees, however, shall make such general rules and regulations as they deem proper in regard to age and grade of attainments essential to entitle pupils to admission in the school. If there should be more applicants than can be accommodated at any time, each district shall be entitled to send its equal proportion of pupils according to the number of pupils it may have, as shown by the last report to the county superintendent of common schools. And the boards of the respective school districts shall designate such pupils as may attend. [Same, § 11.]

2814. Pupils from other counties. 1708. If, at any time, the school can accommodate more pupils than apply for admission from that county, the vacancies may be filled by applicants from other counties, upon the payment of such tuition as the board of trustees may prescribe; but at no time shall such pupils continue in said school to the exclusion of pupils belonging in the county in which such high school is situated. [Same, § 12.]

2815. Rules. 1709. The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as he deems proper in regard to the studies, conduct, and government of the pupils under his charge, and if any such pupils will not conform to and obey the rules of the school, they may be suspended or expelled therefrom by the board of trustees.

2816. Trustees to report. 1710. The said board of trustees shall, annually, make a report to the board of supervisors of their county, which shall specify the number of students, both male and female, who have been in attendance at the county high school during the year, the branches of learning taught, the text-books used, the number of teachers employed, the amount of salary paid to them, the amount expended for library and apparatus, and for buildings and all other expenses; also the amount of funds on hand, debts unpaid, and other information deemed important or expedient to report. Said report shall be printed in at least one newspaper in the county, if any is published therein, and a copy of the report shall be forwarded to the state superintendent of public instruction. [Same, § 15.]

2817. Vacancies. 1711. The board of supervisors shall have power to fill any vacancy that may occur in the board of trustees of that county by appointment, until the next general election, and a majority of any such board of trustees shall be a quorum for the transaction of business. [Same, § 16.]

2818. Compensation. 1712. The board of supervisors may allow each member of the board of trustees the sum of two dollars per day for the time actually employed in the discharge of his official duties, and when such accounts are presented for payment, they shall be audited and paid out of the county treasury in the same manner as other accounts against the county, and said trustees shall not be entitled to any further remuneration for services or expenses. [Same, § 17.]

CHAPTER 9.

OF THE SYSTEM OF COMMON SCHOOLS.

2819. School districts. 1713. Each civil township now or hereafter organized, and each independent school district organized as such prior to the

taking effect of this code, is hereby declared a school district for all the purposes of this chapter, subject to the provisions hereinafter made. [R., § 2022; 9 G. A., ch. 172, § 1.]

It is contemplated that school districts shall coincide in boundary with civil townships. The only exception is found in the provisions (§ 2916) for the case where, by reason of streams or other natural obstacles, a portion of the inhabitants of a township cannot with reasonable facility enjoy the advantages of any school in their township; but no such restriction exists upon the formation of independent districts: *District T'p v. Independent Dist.*, 41–30.

2820. Special elections. 1714. When an organized district has been left without officers, the township trustees shall give such notice for a special election of directors, as is required in cases of regular district elections; and the persons elected shall continue in office until their successors are duly elected and qualified. [Same, § 3.]

2821. Division; apportionment. 1715. When changes in civil township boundaries are made, or any district shall be divided into two or more entire townships for civil purposes, the existing board of directors shall continue to act for both or all the new districts, or parts of districts, until the next regular district election thereafter, at which time the new district townships shall organize by the election of directors. The respective boards of directors shall, immediately after such organization, make an equitable division of the then existing assets and liabilities between the old and new districts; and in case of a failure to agree, the matter may be decided by arbitrators, chosen by the parties in interest. A similar division shall be made in case of the formation or changes of boundaries of independent districts. [Same, § 4; 14 G. A., ch. 133, § 1.]

The directors constitute a special tribunal to make division of assets and liabilities. Their jurisdiction for that purpose is exclusive and their decision cannot be collaterally attacked: *Independent School Dist. v. Independent School Dist.*, 43–444; *District T'p v. District T'p*, 45–104.

If this tribunal fails to act it may be compelled to do so by *mandamus*, but appeal from its decision cannot be had to the courts: *Ibid.*

The adjudication of the directors in the division of assets is final and conclusive until reversed by proper proceedings. Appeal in such case lies from their action to the county superintendent: *Independent School Dist. v. Independent School Dist.*, 45–391.

The failure to agree referred to in this section is a disagreement of the directors acting as a tribunal and not a failure of the new districts to agree: *Ibid.*

In making the division, school-houses and real estate used for school purposes are to be taken into account, but such division need not result in the partition of the real estate: *District T'p v. District T'p*, 36–216.

Where the boards of the two districts appoint arbitrators to make division of assets and liabilities, a court of equity has jurisdiction to set aside their award for gross error in computation, etc. In such a case an appeal would not lie to the county superintendent: *District T'p v. District T'p*, 54–286.

The arbitration here contemplated is a statutory arbitration (see §§ 4652–4667), and a court cannot enter up judgment for a different amount than that taxed in the award: *District T'p v. Independent Dist.*, 60–141.

Where it appears that the respective boards of directors have met and failed to agree, *mandamus* may be maintained to compel a choice of arbitrators, but not to compel the making of equitable division: *Case v. Blood*, 68–486.

A person who has ceased to be a resident of the district and a patron of the school, but is still a tax payer, may bring action to compel the board of directors to make the apportionment here required: *Case v. Blood*, 71–632.

Where a portion of an independent district is severed and restored to a district township, to which it geographically belongs, it seems that bonds issued by the independent district must be taken into account in apportioning the liabilities between it and the district township, although the district township cannot issue such bonds: *Albin v. Board of Directors*, 58–77.

Where the proper board of directors has made a division of assets and liabilities upon the organization of subdistricts into independent districts and then has ceased to exist, an action in equity may be maintained to effect such division, where it appears that the one originally made was inequitable and unjust, and there was no negligence on the part of the plaintiff in not having a proper division made by the board while in existence: *Independent School Dist. v. Independent School Dist.*, 41–321.

After the division of a district township the old district township goes out of existence entirely, and action by the new township for division of assets may be brought against the independent districts formed out of the other portion of the old district township. In such case an action against the old district could

be of no avail and no jurisdiction would be acquired thereby: *District T'p v. Independent Dist.*, 63–188.

The provisions as to division of assets in case of division of boundary or division of the district township are not applicable in case of an action by one district township against another: *District T'p v. District T'p*, 52–73.

2822. Body corporate. 1716. Every school district which is now, or may hereafter be organized, is hereby made a body corporate by the name of the "district township," or "independent district" (as the case may be), of ——, in the county of ——, and in that name may hold property, become a party to suits and contracts, and do other corporate acts. [R., § 2026; C., '51, § 1108; 9 G. A., ch. 172, § 5; 11 G. A., ch. 33.]

A school district is a body corporate with the power to hold property and be a party to suits and contracts: *Baker v. Chambles*, 4 G. Gr., 428.

A district township is a political corporation within the meaning of Const., art. 11, § 3, fixing the limit of indebtedness of political and municipal corporations: *Winspear v. District T'p*, 37–542.

The school district, being a public corporation or *quasi*-corporation, is not liable for personal injuries sustained on account of the negligent construction of its school-houses, or negligence in keeping them in repair: *Lane v. District T'p*, 58–462.

Whether a district township can be made liable for unlawful acts of officers in converting the property of others, *quære;* but where such officer allowed lumber, levied on under attachment but subsequently released, to be used in a school building, *held*, that the district township was not liable for its conversion: *Charnock v. District T'p*, 51–70.

A school-house, being public property, is not subject to execution and is therefore not subject to a mechanic's lien: *Charnock v. District T'p*, 51–70.

The property of school districts in cities and towns is not exempt from special taxation for improvement of streets, laying of sidewalks, etc.: *Sioux City v. Independent School Dist.*, 55–150.

2823. Annual meeting; powers. 1717; 18 G. A., ch. 63; 19 G. A., ch. 51. Each district township shall hold an annual meeting on the second Monday in March, and the electors of the district, when legally assembled at such meeting, shall have the following powers:

1. To appoint a chairman and secretary in the absence of the regular officers;

2. To direct the sale or other disposition to be made of any school-house or the site thereof, and of such other property, personal and real, as may belong to the district; to direct the manner in which the proceeds arising therefrom shall be applied; to determine what additional branches shall be taught in the schools of the district; or to delegate any of these powers to the board of directors, and to authorize the board of directors to obtain, at the expense of the district township, such highways as such board may deem necessary for proper access to the school-houses in their districts;

3. To vote such tax, not exceeding ten mills on the dollar in any one year, on the taxable property of the district township, as the meeting shall deem sufficient for the purchase of grounds and the construction of the necessary school-houses for the use of the district, and for the payment of any debts contracted for the erection of school-houses, and for procuring district libraries, and for obtaining highways for access to school-houses;

4. To instruct the board of directors to transfer any surplus in the school-house fund, not appropriated, to either the contingent or teachers' fund. [R., §§ 2027–28, 2033; C., '51, §§ 1114, 1115; 9 G. A., ch. 172, §§ 6, 7, 16; 11 G. A., ch. 143, §§ 1, 2; 14 G. A., ch. 84.]

It is not necessarily improper for the electors to vote a tax for the erection of a school-house where one school-house already exists in the district. It may be that the school-house existing is unfit for further use or unfit for the purpose: *Casey v. Independent Dist.*, 64–659.

The electors of a district township have no power under this section, or otherwise, to authorize the discharge of a debtor of the district without consideration: *District T'p v. Thomas*, 59–50.

The electors may provide that music shall be taught in the schools of the district: *Bellmeyer v. Independent Dist.*, 44–564.

Under the power to direct the sale or other disposition of the school-house, etc., the electors may authorize the use of such house for purposes of religious worship, Sabbath-schools, etc.: *Davis v. Boget*, 50–11; *Townsend v. Hagan*, 35–194.

A contract to repair a school-house may be made by the board without a previous vote of

the electors (§ 2867): *Williams v. Peinny*, 25–436.

The taxes for contingent and teachers' funds are to be estimated and certified by the board of directors under § 2895, and a vote of such tax by the electors, under this section, is not valid: *Cedar Rapids & M. R. R. Co. v. Carroll Co.*, 41–153.

Where the electors made an appropriation and voted a tax for the erection of a school-house, and such tax had been collected, and action commenced to compel the erection of the house by the board of directors, *held*, that the electors could not, at a subsequent annual meeting, rescind their previous action, the right of the parties interested in the erection of the school-house having become vested: *Benjamin v. District T'p*, 50–648.

In such action, *held*, that the directors might be compelled, by *mandamus*, to carry out the vote of the electors by the erection of a school-house, and that appeal to the county superintendent was not such speedy and adequate remedy as to deprive the plaintiff of his right to an action by *mandamus*: *Ibid.*

The board of directors may incur indebtedness, etc., in carrying out the vote of the township: See note to § 2832.

As to how long the polls shall remain open at such a meeting, see § 2908.

2824. Special meeting. 18 G. A., ch. 84. When a school district, by fire or otherwise, has been deprived of a school building, and the board of directors of such district, by the use of the powers in them vested, are unable to provide for the continuance of the school therein; then such board of directors shall call a meeting of such district. The manner of calling such meeting, and the powers of such meeting shall be as follows:

1st. The board of directors shall cause to be posted in three public places in such district, at least ten days prior to the designated time of holding such meeting, written notices of such meeting, in which shall be stated the time and place of such meetings, and the object or purpose for which same is called.

2d. The powers of such meeting shall be the same as is prescribed in section seventeen hundred and seventeen hereof [§ 2823], except those powers which are set forth in paragraph two, after the word "applied" in the fourth line thereof, and in paragraph three, after the word "district" in the fifth [fourth] line thereof.

SUBDISTRICTS.

2825. Election of subdirector. 1718. The several subdistricts shall, annually, on the first Monday in March, hold a meeting for the election of a subdirector, five days' notice of which meeting shall be given by the then resident subdirector, or, if there is none, by the district secretary, posting a written notice in three public places therein, and such notice shall state the hour of meeting. [R., § 2030; 9 G. A., ch. 172, § 8.]

2826. Certificate of election. 1719; 18 G. A., ch. 7, § 1. At the meeting of the subdistrict, a chairman and secretary shall be appointed, who shall act as judges of the election, and give a certificate of election to the subdirector elect. When there is a tie vote between two persons for the office of subdirector, the secretary shall notify the secretary of the district township board of such tie vote, and shall notify said persons to appear at the regular meeting of the board on the third Monday in March to determine the tie vote by lot before one or more members of the board elected, and the certificate of election shall be given accordingly. Should either party fail to appear or take part in the lot, the secretary shall draw for him. [R., § 2031; C., '51, § 1111; Same, § 9.]

The proceedings here contemplated are a meeting, and also an election; and where the polls were kept open only forty minutes, and after the meeting had formally adjourned, and while the officers and electors were still present, electors who applied to vote were refused permission to do so, *held*, that the election was invalid: *State ex rel. v. Wollem*, 37–131.

So where, at such an election, the polls were only kept open for thirty minutes, and soon after they were closed voters appeared and offered their votes, the other electors being still present, *held*, that it was error to refuse such votes, although the meeting had, by formal motion, adjourned: *State ex rel. v. Woolem*, 39–380.

As to how long the polls shall remain open, see § 2908.

The provision in § 2896, with reference to taxes voted by electors of subdistricts for school-house purposes, gives implied authority to vote such taxes, although the power is not elsewhere expressly conferred: *Wood v. Farmer*, 69–533.

2827. Number of subdirectors; certificates. 1720. In all district townships comprising but one subdistrict, the board of directors shall consist of three subdirectors; and in all district townships comprising but two subdistricts it shall consist of one subdirector chosen from each subdistrict, and one from the district township at large, who shall in both cases be elected in the manner provided by law for the election of one subdirector from each subdistrict. The judges of the respective subdistrict elections shall canvass the votes for subdirector chosen from the district township at large, and shall issue a certificate of election to the person elected. [R., §§ 2031, 2075; C., '51, § 1112; Same, § 10.]

2828. Women eligible. 16 G. A., ch. 136, § 1. No person shall be deemed ineligible by reason of sex, to any school office in the state of Iowa.

2829. Directors or superintendents. 16 G. A., ch. 136, § 2. No person who may have been or shall be elected or appointed to the office of county superintendent of common schools or school director in the state of Iowa, shall be deprived of office by reason of sex.

There is nothing in the constitution prohibiting women from holding such offices. The legislature has power to make good, retrospectively, acts which it had power to authorize in advance: *Huff v. Cook*, 44–639.

2830. Board of directors; president; secretary; treasurer. 1721; 15 G. A., ch. 27. The subdirectors of the several subdistricts shall constitute a board of directors for the district township, and shall enter upon their duties upon the day fixed for the regular meeting of the board in March, at which time they shall organize by electing from their own number a president, who shall simply be entitled to a vote as a member of the board, and from the district township at large, at their regular meeting on the third Monday of September in each year, a secretary and treasurer, unless there are at least five subdirectors in the district township, in which case they may be selected from the board; and said secretary and treasurer thus elected shall qualify and enter upon the duties of their respective offices within ten days following the date of their election. If selected from the district township at large, they shall have no vote in the proceedings of the board. [R., §§ 2035, 2076; C., '51, § 1721; Same, § 18; 11 G. A., ch. 143, § 13.]

The subdirector may qualify on or before the day fixed by appearing before some officer authorized to administer oaths and taking the oath of office. Failure to appear at the meeting of the board next ensuing does not prevent such qualification being valid: *Bennett v. District T'p*, 53–687.

The written evidence of such qualification is not required to be filed with the secretary: *Ibid.*

2831. Regular and special meetings. 1722; 18 G. A., ch. 176. The board of directors shall hold their regular meetings on the third Monday in March and September of each year, and may hold such special meetings as occasion may require, at the call of the president or by request of a majority of the board; *provided*, that the board of directors of a district township may hold their meetings at any place within the civil or district township in which such district township is situated. [R., § 2036.]

2832. Make contracts; school-houses. 1723. They shall make all contracts, purchases, payments, and sales necessary to carry out any vote of the district; but before erecting any school-house they shall consult with the county superintendent as to the most approved plan of such buildings. And all school-houses erected or repaired at a cost exceeding three hundred dollars, shall be so erected or repaired by contract, and no such contract for labor or materials shall be let until proposals for the same shall have been invited by advertisement for four weeks in some newspaper published in the county where the work is to be done, if there be one published therein, if not, in the nearest newspaper in an adjoining county; and such contract shall be let to the lowest responsible bidder, and bonds with sufficient sureties for the faith-

ful performance of the contract shall be required. [R., § 2037; 9 G. A., ch. 172, § 20.]

[As to issuing bonds to pay off bonded or judgment indebtedness, see §§ 2965-2974.]

Powers of directors: Lightning-rods are not such an expense as may be paid for out of the contingent fund, and an order for that purpose drawn upon such fund is *prima facie* invalid: *Wolf v. Independent School Dist.*, 51-432; *Monticello Bank v. District T'p*, 51-350.

The board of directors has no authority to bind the district township for insurance of building, furniture, etc.: *American Ins. Co. v. District T'p*, 55-606.

The directors have authority to bind a district for expenses incurred in procuring a highway to run by a school-house in case such house is not located upon a highway: *Independent Dist. v. Kelly*, 55-568.

Repairs proper may be contracted and paid for out of the contingent fund without being previously authorized by a vote of the electors; but where they amount to remodeling or rebuilding they should not be undertaken unless authorized by such vote: *Williams v. Peinny*, 25-436.

Apparatus, etc.: The board of directors of a district township are without power to make contracts to purchase apparatus, maps, charts, etc., thereby creating an indebtedness, without being first authorized thereto by the vote of the electors: *Taylor v. District T'p*, 26-281; *Manning v. District T'p*, 28-332.

Although by statute the board cannot contract indebtedness for apparatus, etc., but are limited to the use of unappropriated contingent funds on hand for such purposes, yet a contract for the purchase of such apparatus, to be paid for in the future, does not necessarily imply that there is no such fund, and such credit is not necessarily void: *Bellmeyer v. Independent Dist.*, 44-564.

An independent district has power to determine that music shall be taught in the school as a branch of education, and if it does so determine, the board may properly contract for the purchase of a musical instrument out of any unappropriated funds in their hands: *Ibid.*

The board cannot employ one of its members to complete an abandoned contract and allow him compensation therefor: *Moore v. Independent Dist.*, 55-654.

The directors cannot, by any acts, render the district liable upon an implied contract, or make valid by ratification a contract which they have no authority to make directly; and the use in the schools of apparatus, etc., the purchase of which is without authority, will not render the district liable: *Taylor v. District T'p*, 25-447; *Manning v. District T'p*, 28-332.

A school district may, through officers having authority to contract for it, adopt any contract of officers acting *de facto;* and thus officers, after legal incorporation, may ratify an act done before such incorporation: *Dubuque Female College v. District T'p*, 13-555.

Where the evidence shows that the directors and other officers knew of the services rendered and the materials furnished in constructing buildings under a parol contract not binding on the district, *held*, that acquiescence therein by such officers, and appropriation thereof to the use of the township, constituted a ratification binding upon such township: *Bellows v. District T'p*, 70-320.

While use of the buildings by school children may not alone authorize the finding of a ratification, yet that fact is evidence to be considered with other matters from which ratification may be presumed: *Ibid.*

Buildings in question being outbuildings in connection with the school-house, built under a valid contract, *held*, that if the acceptance of the main building was not intended to include the acceptance of the outbuildings the officers should, by some proper act, have prohibited the use of them: *Ibid.*

The board of directors acting for a school district has power to change a contract already made, even though such change operates to release sureties on the contract: *Independent Dist. v. Reichard*, 50-98.

A contract which the board of directors is authorized to make will not be void because no record thereof is made. Within the scope of their powers they may be bound by verbal contracts: *Bellmeyer v. Independent Dist.*, 44-564; *Athearn v. Independent Dist.*, 33-105.

The board of directors has no authority to release a lawful claim of the district against an officer for money coming into his hands: *District T'p v. Morton*, 37-550.

The assent of a majority of the members of the board of directors of the district township individually to a proposition will not bind the district. An action to be binding must be that of the board as a body: *Herrington v. District T'p*, 47-11.

Where individual members of the board were procured to sign their names individually to a contract for school supplies, conditioned that it should be binding when signed by a majority of the members of the board, *held*, that such contract was in contravention of the policy of the law and void, where it was procured by misrepresentation as to the fact that the president of the board had agreed to sign such contract: *Mills v. Collins*, 67-164.

Contracts which the directors of an independent district are authorized to make will be binding upon the district, although executed by them individually and not while acting as a board. Their powers are the same as those of a subdirector: *Athearn v. Independent Dist.*, 33-105.

A contract signed by the directors in their official capacity and attested by their secretary, *held* binding upon the district and not upon the directors individually: *Independent Dist. v. Reichard*, 50-98.

Where the language of a note was, "We, the undersigned, directors of school district No. 4, . . . promise to pay," etc., and it was signed by the directors in their individual names, without official designation, *held*, that the note was binding on the district, and the directors were not individually liable: *Baker v. Chambles*, 4 G. Gr., 428.

So *held*, also, where the note read, "We,

the board of school district No. 1, . . . promise to pay," and was signed by the directors with their individual names: *Lyon v. Adamson*, 7-509.

The directors or trustees are not liable to a personal action for damages at the suit of a teacher whom they have employed, for wrongfully, unjustly and illegally refusing to allow him to enter on his duties: *Chamberlain v. Clayton*, 56-331.

School-houses: The directors of a school district may, in a proper case, as where the public school-house is out of repair or insufficient, and in other cases where the best interests of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public school building. Their action in doing so cannot be reviewed by *mandamus: Scripture v. Burns*, 59-70.

It being the duty of a school district to maintain schools, it may maintain injunction to prevent the wrongful removal of school-houses, and is not limited to an action at law for damages in such case: *District T'p v. District T'p*, 54-115.

A contract to repair a school-house may be made by the board of directors without a previous vote of the electors: *Williams v. Peinny*, 25-436.

The conditions of the bond here provided for are not prescribed by law, and the court may require such bond as shall protect third parties who furnish material or work in the performance of the contract, and action thereon may be brought by such parties: *Baker v. Bryan*, 64-561.

A board of directors has no authority to employ one of its number for a compensation to oversee the completion of a school-house abandoned by the contractor: *More v. Independent Dist.*, 55-654.

A failure of the board to select a site or to receive proposals for the erection of a building will not render void the tax voted therefor: *Casey v. Independent Dist.*, 64-659.

Where a proposal for bids stated that the right to reject any and all bids was reserved by the board, *held*, that a bidder could not by *mandamus* compel the contract to be awarded to him as being the lowest responsible bidder: *Hanlin v. Independent Dist.*, 66-69.

The board of directors of a school district having the power to make contracts for the erection of school-houses in subdistricts may, by its acts in respect thereto, ratify a contract made by a subdirector for a like purpose: *Stevenson v. District T'p*, 35-462.

The board may proceed to the erection of a school-house in advance of the collection of the tax voted therefor under § 2823, ¶ 3. For this purpose they may incur indebtedness not to exceed the limit fixed by the township meeting, and may, by negotiable note, borrow money to pay such indebtedness. But they cannot bind the township by borrowing money to pay a debt contracted after the limit fixed by the township has been reached. And for money borrowed to pay a legitimate debt the board can only bind the township to pay six per cent. interest: *Austin v. District, etc.*, 51-102.

There is nothing in the statute providing that one school district shall have but one school-house. If it be necessary, in order to maintain more than one school in a subdistrict, to build another house, the authority to erect it is implied from the authority to maintain more than one school: *Wood v. Farmer*, 69-533.

2833. School-house sites. 1724. They shall fix the site for each school-house, taking into consideration the geographical position and convenience of the people of each portion of the subdistrict, and shall determine what number of schools shall be taught in each subdistrict, and for what additional time beyond the period required by law they shall be continued during each year. [19 G. A., ch. 172, § 21; R., § 2037.]

The power given to fix the site of each school-house carries with it the power to change the school-house site, and where the board acts within its jurisdiction in the matter an appeal to the county superintendent and not an injunction is the proper remedy to correct errors in the exercise of the power: *Vance v. District T'p*, 23-408; *Atkinson v. Hutchinson*, 68-161.

In determining such an appeal all considerations proper to be taken into account in determining whether the change should be made or not, and existing at the time of the decision of the appeal, may be considered: *Atkinson v. Hutchinson*, 68-161.

Upon the reversal of the action of the board in changing the site, it becomes their duty to restore the school-house to the original site unless they are excused from doing so for some reason occurring after the appeal was taken: *Ibid.*

Where changes relied on to justify the action of the board occur before the decision of the appeal, and are such as to render the new site the proper one, they should be shown upon a hearing of the appeal, and the appeal may be determined according to the propriety of the action at that time: *Ibid.*

It is the duty of the board to comply with orders of the state superintendent, in his decision upon an appeal from an action of the board, and such orders may be enforced by *mandamus: Newby v. Free*, 72-379.

Action of the board in improperly locating or relocating school-houses cannot be made the basis of an action by a tax payer in the name of the district against members of the board individually for damages: *Independent Dist. v. Gookin*, 72-387.

2834. Divide districts. 1725; 16 G. A., ch. 109; 21 G. A., ch. 124. They shall determine where pupils may attend school, and for this purpose may divide their district into such subdistricts as may by them be deemed

necessary; *provided*, that no such subdistrict shall be created for the accommodation of less than fifteen pupils, but the board of directors shall have power to rent a room and employ a teacher for the accommodation of any ten scholars; *provided further*, that nothing in this chapter contained shall be construed to prohibit the construction of as many school-houses, out of moneys derived from taxes levied previous to January first, 1876, in any subdistrict, where the subdistrict comprises the entire district township, as shall have been authorized and provided for at the annual meeting of the district township electors.

The board cannot discriminate between white and colored children and require the latter to attend a separate school: *Clark v. Board of Directors*, 24–266; *Smith v. Directors*, 40–518; *Dove v. Independent School Dist.*, 41–689.

The power of a board to rent a room and employ a teacher is discretionary, and their action in refusing to exercise such power cannot be questioned, except by appeal to the county superintendent: *Aananson v. Anderson*, 70–102.

2835. Graded or union schools. 1726. They may establish graded or union schools wherever they may be necessary, and may select a person who shall have the general supervision of the schools in their district, subject to the rules and regulations of the board. [R., § 2037; 9 G. A., ch. 172, § 22.]

[As to what rules the board may make and enforce, see notes to § 2849.]

2836. Insurance. 19 G. A., ch. 149, § 1; 21 G. A., ch. 107. The board of directors of all school districts organized under any of the laws of this state may use unappropriated contingent funds for the purpose of effecting an insurance on the school property of their district, but they may contract no debts for this purpose.

2837. Setting out shade trees. 19 G. A., ch. 22, § 1. The board of directors of each district township and independent district shall cause to be set out, and properly protected, twelve or more shade trees on each school-house site, belonging to the district, where such number of trees are not now growing, and such expense shall be paid from the contingent fund.

2838. County superintendent to enforce. 19 G. A., ch. 23, § 2. It shall be the duty of the county superintendent, in visiting the several schools in his county, to call the attention of any board of directors neglecting to comply with the requirements of this statute, and the required number of shade trees shall be planted as soon thereafter as the season will admit.

2839. Barb wire fences; removal. 20 G. A., ch. 103, § 1. It is hereby made the duty of the board of directors of every independent district and of every district township to remove before the first day of September, A. D. 1884, any barb wire fence inclosing in whole or part any public school grounds in such district, and it is also made the duty of any person owning or controlling any barbed wire fence within ten feet of any public school grounds to remove the same within the time herein above named.

2840. Prohibited. 20 G. A., ch. 103, § 2. Hereafter barb wire shall not be used in inclosing in whole or in part any public school building or the grounds upon which the same may stand; and no barbed wire shall be used for a fence or other purpose within ten feet of any public school ground.

2841. Penalty. 20 G. A., ch. 103, § 3. For a failure or neglect on the part of any board of directors of any independent district or of any district township to carry out the provisions of this act any member of such board shall be fined on conviction not exceeding twenty-five dollars; any person violating the provision of this act shall on conviction thereof be fined not exceeding twenty-five dollars.

2842. Number and length of schools; who attend. 1727. In each subdistrict there shall be taught one or more schools for the instruction of youth between the ages of five and twenty-one years, for at least twenty-four

weeks, of five school days each, in each year, unless the county superintendent shall be satisfied that there is good and sufficient cause for failure so to do. Any person who was in the military service of the United States during his minority shall be admitted into the schools in the subdistrict in which he may reside, on the same terms on which youths between the ages of five and twenty-one are admitted. [R., § 2023; Same, § 12; 11 G. A., ch. 143, § 3.]

[As to teaching the effects of stimulants and narcotics, see §§ 2884–2886.]

The board has authority to direct that no school shall be taught in a certain subdistrict during a particular period, and a contract for the employment of a teacher made by the subdirector in violation of such provision will be void: *Potter v. District T'p*, 40–369.

The board may provide a school for less than twenty-four weeks in the year, with the assent of the county superintendent, and such assent may be obtained after the action of the board is had: *Herrington v. District T'p*, 47–11.

Where a district fails to provide school for the prescribed period, children residing therein may attend school in another district, by consent of the directors of the latter, and the district in which they reside will be responsible for their tuition, as provided in § 2912: *District T'p. v. District T'p*, 49–231.

Though a person over twenty-one years of age is not entitled to attend school, yet if such person does attend he assumes all the duties of a scholar, and is as fully subject to discipline as one under that age: *State v. Mizner*, 45–248.

2843. Change of books. 1728. The board of directors of any district township or independent district, shall not order, or direct, or make any change in the school books, or series of text-books, used in any school under their superintendence, direction, or control, more than once in every period of three years, except by a vote of the electors of the district township or independent district. [14 G. A., ch. 80.]

2844. Contingent fund. 1729. They may use any unappropriated contingent fund in the treasury to purchase records, dictionaries, maps, charts, and apparatus for the use of the schools of their districts, but shall contract no debts for this purpose. [9 G. A., ch. 172, § 7.]

An unauthorized purchase of maps, apparatus, etc., will not bind the districts, nor will the use thereof in the schools be a ratification of such action, so as to make the district liable. A ratification to be binding would have to be by formal action of the electors: *Taylor v. District T'p*, 25–447.

The board may contract, in proper cases, for the purchase of an organ out of any unappropriated funds on hand: *Bellmeyer v. Independent Dist.*, 44–564.

2845. Temporary officers; vacancies. 1730. They shall appoint a temporary president and secretary in case of the absence of the regular officers, and shall fill any vacancy that may occur in the office of president, secretary, or treasurer, or in the board of directors. [R., § 2037; 9 G. A., ch. 172, § 23.]

2846. Bonds of officers. 1731. They shall require the secretary and treasurer to give bonds to the district in such penalty and with such security as they may deem necessary to secure the district against loss, conditioned for the faithful performance of their official duties. The bond shall be filed with the president, and in case of a breach of the conditions thereof, he shall bring suit thereon in the name of the district township, or independent district. [R., § 2037; C., '51, § 1144; 9 G. A., ch. 172, § 24.]

The treasurer of a school district is absolutely liable for money coming into his hands by virtue of his office, regardless of the cause or circumstances of the loss. Proof of a special deposit of such money in a bank which afterwards becomes insolvent will not excuse him: *District T'p v. Hardinbrook*, 40–130.

The treasurer is absolutely liable on his bond for the performance of the duties of holding and paying out money, and will not be excused for loss by showing the exercise of due diligence and care: *District T'p v. Morton*, 37–550.

Nor will he be excused upon showing that the money was destroyed by inevitable accident: *District T'p v. Smith*, 39–9.

2847. Examine accounts of treasurer. 1732. They shall, from time to time, examine the accounts of the treasurer and make settlement with him;

and shall present at each regular meeting of the electors of the district township, a full statement of the receipts and expenditures of the district township, and such other information as may be deemed important. [R., § 2037; C., '51, § 1146; 9 G. A., ch. 172, § 25.]

2848. Audit claims; compensation. 1733. They shall audit and allow all just claims against the district, and fix the compensation of the secretary and treasurer, and no order shall be drawn on the treasury until the claim for which it is drawn has been audited and allowed. [R., § 2037; C., '51, § 1149; 9 G. A., ch. 172, § 26.]

It is not a breach of duty on the part of the board to draw orders for a claim which has been audited and allowed, although the services for the claim as presented may not have been rendered: *State v. Stiles*, 40–148.

As no order can properly be drawn until the claim has been audited and allowed by the board, and as the board cannot audit and allow a claim until it has been presented, the presentation of the claim to the board is a condition precedent to the right of action thereon: *District T'p v. District T'p*, 56–85.

An order issued on a claim which has not been audited and allowed is void: *National State Bank v. Independent Dist.*, 39–490.

Although the compensation of the treasurer is not fixed until after the expiration of his term, still he is bound by the amount allowed by the board, and cannot recover on the basis of a reasonable compensation: *Wilson v. Independent Dist.*, 39–471.

Where no compensation has been allowed to the treasurer of a school district the sureties on his bond cannot, in an action against them for default of their principal, offset any claim for compensation on his part: *Independent School District v. McDonald*, 39–564.

As to orders, see notes to § 2854.

2849. Visit schools; make rules; discharge teachers. 1734. They shall visit the schools in their district, and aid the teachers in establishing and enforcing the rules for the government of the schools; and see that they keep a correct list of the pupils, embracing the periods of time during which they have attended school, the branches taught, and such other matters as may be required by the county superintendent. In case a teacher employed in any of the schools of the district township is found to be incompetent, or is guilty of partiality or dereliction in the discharge of his duties, or for any other sufficient cause shown, the board of directors may, after a full and fair investigation of the facts of the case, at a meeting convened for the purpose, at which the teacher shall be permitted to be present and make his defense, discharge him. [R., § 2037; C., '51, § 1147; 9 G. A., ch. 172, § 27.]

Rules: A board of directors has no authority to punish a scholar by suspension for acts which are not contrary to any rules of the school, and are not in themselves immoral. Therefore, *held*, that the acts of the pupil in making a publication out of school tending to bring ridicule upon the board of directors was not such as to warrant the suspension of the pupil: *Murphy v. Board of Directors*, 30–429.

Rules of a board of directors providing for the suspension of a pupil for a certain number of absences or cases of tardiness, unexcused, are reasonable and may be enforced, even if the absence or tardiness is by the consent or direction of the parent: *Burdick v. Babcock*, 31–562.

Acts out of school hours which are detrimental to the best interests of the school may be forbidden: *Ibid.*

Such rules are constitutional as a delegation to school boards of the power given the legislature under Const., art. 9, § 8. (Per Cole, J.): *Ibid.*

Where the parent and the pupil united in the request that the pupil be excused from attendance during a certain part of the day, and from a certain study, *held*, that the teacher was not authorized to punish the pupil for failure to attend such part of the day, or to pursue such study, the only remedy being the expulsion of the pupil: *State v. Mizner*, 50–145.

A rule providing for expulsion of a pupil for failure to pay for damages done by him to school property, when his default is no breach of good order or good morals, is beyond the authority of school officers to promulgate or enforce: *Perkins v. Board of Directors*, 56–476.

Powers of teacher: The general doctrine is that the teacher may, for the maintenance of his authority and the enforcement of discipline, legally inflict chastisement upon a pupil: *State v. Mizner*, 45–248.

In a criminal prosecution against a teacher for assault and battery in punishing a scholar, the court should permit the defendant to prove that the whipping was a reasonable chastisement of the prosecuting witness as a pupil for misconduct, and leave it to the jury to determine whether or not the whipping was, under the circumstances, reasonable: *Ibid.*

Although it is only scholars between the ages of five and twenty-one years who have the right to attend public schools, yet, if a person over that age is allowed to become a scholar by sufferance or through misrepresentation, he thereby waives any privilege that his age con-

fers, and the teacher has the same right of chastisement as to him that he has as to any other scholar: *Ibid.*

In a particular case, *held*, that it was proper to instruct the jury that in the absence of all proof the law presumes that a teacher punishes a pupil for a reasonable cause in a moderate and reasonable manner, but this presumption may be rebutted by the proof. Also that the legal object and purposes of punishment in school are like the object and purposes of the state in punishing a citizen. They are threefold: first, the reformation and the highest good of the pupil; second, the enforcement and maintenance of correct discipline in school; third, as an example to like evil-doers. And in no case can the punishment be justifiable unless it is inflicted for some definite offense which the pupil has committed and the pupil is given to understand what he is being punished for: *State v. Mizner*, 50–145.

Dismissal of teacher: Under a contract by which a teacher agreed to faithfully and impartially govern and instruct, etc., and to strictly conform to the rules and regulations established by the board, etc., and that the subdirector should have power to dismiss the teacher for a violation of any of the stipulations of the contract, *held*, that the teacher might be dismissed by the subdirector for failure to properly manage and control the school although not unfaithful in efforts to do so: *Eastman v. District T'p*, 21–590.

The action of a board of directors in discharging a teacher is judicial, and not ministerial: *Smith v. District T'p*, 42–522.

Where a teacher is discharged by the board without a full and fair investigation of the case at a meeting convened for that purpose, at which the teacher is permitted to be present and make defense as here required, the remedy of the teacher is by appeal to the county superintendent, and if he does not pursue such appeal he cannot recover in an action for damages for such improper discharge: *Kirkpatrick v. Independent Dist.*, 53–585.

The power and duty imposed upon a board of directors with reference to the discharge of a teacher partakes of a judicial character, and the teacher who has been discharged by the board has no remedy in court until it has been determined by the county superintendent that the discharge was wrongful or unlawful. The parties are concluded as to the question involved in the controversy by the decision which shall be officially made in the proceedings: *Park v. Independent School Dist.*, 65–209.

Pending the appeal by the teacher from the decision of the board discharging him, and the further appeal by the board from the decision of the county superintendent declaring such discharge invalid, the teacher is under no obligation to perform or offer to perform services required by his contract, but upon final decision by the superintendent of public instruction declaring the discharge illegal, he should perform or tender the performance of the duties remaining due from him under the contract in order to enable him to recover for breach of contract for that time: *Ibid.*

2850. Dismissal or suspension of pupil. 1735. The majority of the board in independent districts shall have power, with the concurrence of the president of the board of directors, to dismiss or suspend any pupils from the school in their district for gross immorality or for a persistent violation of the regulations or rules of the school, and to re-admit them if they deem proper so to do.

In district townships this power is in the subdirector: See § 2871. In regard to making and enforcing rules, see notes to preceding section.

2851. Certificate of election of officers. 1736. They shall, at their regular meeting in March of each year, require the secretary to file with the county superintendent, county auditor, and county treasurer each, a certificate of the election, qualification, and postoffice address of the president, treasurer, and secretary of the district township, and to advise them from time to time of any changes made in said offices by appointment. [9 G. A., ch. 172, § 2.]

2852. Rules for subdirectors. 1737. They shall make such rules and regulations as may be necessary for the direction and restriction of subdirectors in the discharge of their official duties, and not inconsistent with law. [Same, § 32.]

Held, that the board had authority to direct that no school should be taught in a certain subdistrict during the winter, and that a contract for the employment of a teacher, made by the subdirector in violation of such provision, was void: *Potter v. District T'p*, 40–369.

2853. Quorum; tax; boundaries; pay of officers. 1738. A majority of the board of directors shall be a quorum to transact business, but a less number may adjourn from time to time, and no tax shall be levied by the board after the third Monday in May; nor shall the boundaries of subdistricts be changed except by a vote of a majority of the board, nor shall the

members of the board, except its secretary and treasurer, receive pay out of any school funds for services rendered under this chapter. [R., § 2038; 9 G. A., ch. 172, § 34; 10 G. A., ch. 102, § 2.]

The assent of a majority of the members of the board, individually, to a proposition will not be binding. The action must be that of the board as such: *Herrington v. District T'p*, 47–11.

Directors not being allowed compensation for their services, the board cannot employ one of its members to oversee and complete a contract for the erection of a school-house left unfinished by the contractor and bind the district to compensate him therefor: *Moore v. Independent Dist.*, 55–654.

The provision as to the time within which a board of directors shall act with reference to the levy of the tax is mandatory, and any action by them after the time specified is void: *Standard Coal Co. v. Independent Dist.*, 73–304.

As to dividing the district into subdistricts, or discontinuing such subdistricts, see § 2915 and notes.

PRESIDENT.

2854. President to preside, draw drafts, sign orders. 1739; 19 G. A., ch. 46. The president shall preside at all meetings of the board of directors of independent districts and of the district townships; shall draw all drafts on the county treasury for money apportioned to his district, sign all orders on the treasury, specifying in each order the fund on which it is drawn, and the use for which the money is appropriated, and shall sign all contracts made by the board; and shall be empowered to administer the oath of office to the secretary, treasurer, and members of the board. [R., § 2039; C., '51, §§ 1122–3; 9 G. A., ch. 172, § 35.]

It is not essential that a judgment against a school district should specify the fund from which it is to be paid. The board must satisfy the same by orders drawn on the proper funds. It is the duty of the board to specify the fund from which payment is to be made or the amount to be paid from each fund, and the fact that plaintiff does not specify the fund, or that it is difficult to apportion the claim among different funds, is no defense: *District T'p v. Board of Directors*, 52–287.

Where a warrant was given by one district township to another in settlement of a claim for taxes, *held*, that there was sufficient consideration therefor, and the receipt by plaintiff of a portion of the taxes, in lieu of which the warrant was given, would not estop plaintiff from suing on the warrant: *District T'p v. District T'p*, 52–153.

A school order is not a negotiable instrument: *Shepherd v. District T'p*, 22–595; *School Dist. v. Lombard*, 2 Dillon, 493.

The president and secretary are not personally liable at the suit of an assignee of an order drawn by them on the treasurer, without authority, when they are induced to issue the same through fraud of the payee: *Boardman v. Hayne*, 29–339.

An assignee of an order is bound, at his peril, to ascertain whether or not officers issuing the same had authority to do so: *Ibid.*

A defense that warrants sued upon were issued to an amount in excess of the indebtedness for which they were issued may be urged against a *bona fide* assignee for value: *Eastman v. District T'p*, 40–438.

A school district may be sued, and a judgment recovered on an order properly drawn and not paid. This is contemplated by § 2906. *Mandamus* is not the only, even if the proper, remedy: *Cross v. District T'p*, 14–28.

2855. Represent district. 1740. He shall appear in behalf of his district in all suits brought by or against the same, but when he is individually a party this duty shall be performed by the secretary; and in all cases where suits may be instituted by or against any of the school officers to enforce any of the provisions herein contained, counsel may be employed by the board of directors. [R., § 2040; C., '51, § 1125; 9 G. A., ch. 172, § 36.]

The president is not authorized by this section to employ counsel to represent the board in case of appeal from an order of the board: *Templin v. District T'p*, 36–411.

SECRETARY.

2856. Keep records; countersign orders. 1741. The secretary shall record all the proceedings of the board and district meetings in separate books kept for that purpose; shall preserve copies of all reports made to the county superintendent; shall file all papers transmitted to him pertaining to the busi-

ness of the district; shall countersign all drafts and orders drawn by the president, and shall keep a register of all orders drawn on the treasury, showing the number of the order, date, name of the person in whose favor drawn, the fund on which it is drawn, for what purpose, and the amount; and shall, from time to time, furnish the treasurer with a transcript of the same. [R., § 2041; 9 G. A., ch. 172, § 37.]

Held, that a similar provision in the Code of '51 was directory merely, and that the fact that the records were kept on loose sheets of paper would not render the proceedings void: *Higgins v. Reed*, 8–298.

2857. Notice of meetings. 1742. He shall give ten days' previous notice of the district township meeting, by posting a written notice in five conspicuous places therein, one of which shall be at or near the last place of meeting, and shall furnish a copy of the same to the teacher of each school in session, to be read in the presence of the pupils thereof, and such notice shall in all cases state the hour of meeting. [R., § 2043; C., '51, § 1129; 9 G. A., ch. 172, § 38.]

2858. Keep accounts. 1743. He shall keep an accurate account of all the expenses incurred by the district, and shall present the same to the board of directors, to be audited and paid as herein provided. [R., § 2042; C., '51, § 1128; 9 G. A., ch. 172, § 39.]

2859. Notify county superintendent. 1744. He shall notify the county superintendent when each school of the district begins and its length of term.

2860. Reports. 1745; 16 G. A., ch. 112, § 1; 19 G. A., ch. 23, § 3. Between the fifteenth and twentieth days of September in each year, the secretary of each school district shall file with the county superintendent a report of the affairs of the district, which shall contain the following items:

1. The number of persons, male and female each, in his district between the ages of five and twenty-one years;
2. The number of schools, and the branches taught;
3. The number of pupils, and the average attendance of the same in each school;
4. The number of teachers employed, and the average compensation paid per week, distinguishing males from females;
5. The length of school, in days, and the average cost of tuition per week for each pupil;

* * * * * * * * *

9. The text-books used, and the number of volumes in the district library, and the value of apparatus belonging to the district;
10. The number of school-houses and their estimated value;
11. The name, age, and postoffice address of each deaf and dumb, and each blind person within his district between the ages of five and twenty-one, including all who are blind or deaf to such an extent as to be unable to obtain an education in the common schools;
12. The number of trees set out and in thrifty condition on each schoolhouse grounds. [R., § 2046; C., '51, §§ 1127–8; 9 G. A., ch. 172, § 41; 14 G. A., ch. 114, § 2.]

2861. Penalty. 1746. Should the secretary fail to file his report as above directed, he shall forfeit the sum of twenty-five dollars, and shall make good all losses resulting from such failure, and suit shall be brought in both cases by the district on his official bond. [R., § 2047; C., '51, § 1137; 9 G. A., ch. 172, § 42.]

TREASURER.

2862. Pay orders. 1747. The treasurer shall hold all moneys belonging to the district, and pay out the same on the order of the president, counter-

signed by the secretary, and shall keep a correct account of all expenses and receipts in a book provided for that purpose. [R., § 2048; C., '51, § 1138; 9 G. A., ch. 172, § 43.]

The treasurer of a school district is an officer thereof in such sense that service of notice upon him is binding on the district: *Kennedy v. Independent School Dist.*, 48-189.

The treasurer of a district township has no authority to bind the township by his contract or admissions: *Carpenter v. District T'p*, 58-335.

As to orders, see notes to § 2854.

As to liability of treasurer for money lost, etc., see notes to § 2846.

2863. Different funds; partial payments. 1748. The money collected by district tax for the erection of school-houses, and for the payment of debts contracted for the same, shall be called the "school-house fund;" that designed for rent, fuel, repairs, and all other contingent expenses necessary for keeping the school in operation, the "contingent fund;" and that received for the payment of teachers, the "teachers' fund;" and the district treasurer shall keep with each fund a separate account, and shall pay no order which does not specify the fund on which it is drawn and the specific use to which it is applied. If he have not sufficient funds in his hands to pay in full the warrants drawn on the fund specified, he shall make a partial payment thereon, paying as near as may be an equal proportion of each warrant. [R., § 2049; C., '51, § 1139; 9 G. A., ch. 172, § 44.]

Lightning-rods are not such an expense as may be paid for out of the contingent fund, and an order for that purpose drawn upon such fund is *prima facie* invalid: *Wolf v. Independent School Dist.*, 51-432; *Monticello Bank v. District T'p*, 51-350.

The payment of money out of the contingent fund to secure a highway to a school-house is not unlawful: *Independent Dist. v. Kelley*, 55-568.

The provision as to partial payment applies to orders drawn to pay a judgment. The holder thereof cannot insist on its being satisfied in full to the exclusion of the other creditors: *Chase v. Morrison*, 40-620.

2864. Receive money. 1749. He shall receive all moneys apportioned to the district township by the county auditor, and also all money collected by the county treasurer on the district school tax levied for his district. [R., § 2050; C., '51, § 1140; 9 G. A., ch. 172, § 45.]

2865. Register orders. 1750. He shall register all orders on the district treasury reported to him by the secretary, showing the number of the order, date, name of the person in whose favor drawn, the fund on which it is drawn, for what purpose, and the amount. [9 G. A., ch. 172, § 46.]

2866. Report to directors. 1751; 16 G. A., ch. 112, § 2. He shall render a statement of the finances of the district from time to time, as may be required by the board of directors, and his books shall always be open for inspection. He shall make to the board, on the third Monday in September, a full and complete annual report, embracing:

1st. The amount of teachers' fund held over, received, paid out, and on hand;

2d. The amount of contingent fund held over, received, paid out, and on hand;

3d. The amount of school-house fund held over, received, paid out, and on hand.

He shall immediately file a copy of said report with the county superintendent, and for failure to file said report, he shall forfeit the sum of twenty-five dollars to be recovered by suit brought by the district on his official bond. [R., § 2051; C., '51, § 1141; 9 G. A., ch. 172, § 47.]

SUBDIRECTOR.

2867. Oath. 1752. Each subdirector shall, on or before the third Monday in March following his election, appear before some officer qualified to

administer oaths, and take an oath to support the constitution of the United States, and that of the state of Iowa, and that he will faithfully discharge the duties of his office; and in case of failure to qualify, his office shall be deemed vacant. [R., §§ 2032, 2079; C., '51, §§ 1113, 1120; 9 G. A., ch. 172, § 11.]

2868. Powers. 1753. The subdirector, under such rules and restrictions as the board of directors may prescribe, shall negotiate and make in his subdistrict all necessary contracts for providing fuel for schools, employing teachers, repairing and furnishing school-houses, and for making all other provisions necessary for the convenience and prosperity of the schools within his subdistrict, and he shall have the control and management of the school-house unless otherwise ordered by a vote of the district township meeting. All contracts made in conformity with the provisions of this section shall be approved by the president and reported to the board of directors, and said board, in their corporate capacity, shall be responsible for the performance of the same on the part of the district township. [R., § 2053; C., '51, §§ 1124, 1142; 9 G. A., ch. 172, § 48.]

The district is bound by the contracts of the subdirector: *Athearn v. Independent Dist.*, 33-105.

The board may restrict the subdirector to the employment of a certain class of teachers, or prohibit his employing a certain specified teacher, where such teacher has proved unsatisfactory, and a contract made in violation of such restriction would be invalid: *Thompson v. Linn*, 35-361. And see *Potter v. District T'p*, 40-369.

The electors may authorize the use of the school-house for purposes of religious worship, etc. (notes to § 2823), and the subdirector may be compelled by *mandamus* to allow its use for such purposes in accordance with such vote: *Davis v. Boget*, 50-11.

The authority to repair the school-house does not authorize a contract to remodel or rebuild: See note to § 2832.

The board may regulate and restrict the action of subdirectors: See § 2852 and note.

2869. School list. 1754. He shall, between the first and tenth days of September of each year, prepare a list of the names of the heads of families in his subdistrict, together with the number of children between the ages of five and twenty-one years, distinguishing males from females, and shall record the same in a book kept for that purpose. [R., § 2052; 9 G. A., ch. 172, § 49.]

2870. Report to secretary. 1755. He shall, between the tenth and fifteenth days of September of each year, report to the secretary of the district township the number of persons in his subdistrict between the ages of five and twenty-one years, distinguishing males from females. [9 G. A., ch 172, § 50; 11 G. A., ch. 143, § 6.]

2871. Dismiss pupils with concurrence of directors. 1756. He shall have power, with the concurrence of the president of the board of directors, to dismiss any pupil from the schools in his subdistrict for gross immorality, or for persistent violation of the regulations of the school, and to re-admit them, if he deems proper so to do; and shall visit the schools in his subdistrict at least twice during each term of said school. [R., § 2054; 9 G. A., ch. 172, § 51.]

[As to rules, etc., and dismissal or suspension of scholars, see § 2850 and notes to § 2849.]

2872. Contracts with teachers. 1757; 22 G. A., ch. 60. All contracts with teachers shall be in writing, specifying the length of time the school is to be taught, in weeks; the compensation per week, or per month of four weeks, and such other matters as may be agreed upon; and shall be signed by the subdirector or secretary and teacher, and be approved by and filed with the president before the teacher enters upon the discharge of his duties; and a copy of all such contracts shall also be filed with the secretary of the board by the subdirector, before the teacher enters upon the discharge of his duties. [R., § 2055; 9 G. A., ch. 172, § 52.]

The approval of the president is essential, and a resolution of the board for the employment of a teacher will not be binding, nor amount to a valid ratification of a previous contract: *Gambrell v. District T'p*, 54-417.

A contract of directors with a teacher, even

though originally not binding, because not properly executed, will be ratified and become binding by partial payment to the teacher who has properly performed his contract, such payment being in accordance with the terms of the contract for services rendered under it with knowledge of the facts and without dissent: *Athearn v. Independent Dist.*, 33–105.

Where a verbal contract of employment of a teacher was partly performed on each side, *held*, that there was such ratification by the district as to be binding upon it: *Cook v. Independent School Dist.*, 40–444.

Where the contract was signed the day school commenced and left with the subdirector, *held*, that it was his duty to file it with the president and secure his approval, and the teacher being permitted to enter upon the performance of her duties might presume that it was approved; and that the absence of such approval would not deprive her of the right to recover compensation thereunder: *Conner v. District T'p*, 35–375.

A contract of a teacher with a person assuming to be a subdirector, but not so either *de facto* or *de jure*, as the teacher knew or had reason to believe, *held* not to be binding upon the district: *Bennett v. District T'p*, 53–687.

It is the duty of the president to determine whether the contract of the subdirector conforms to the provisions of law, and give or withhold his approval accordingly. If he withhold approval, though erroneously, the contract is incomplete. An action, however, may be maintained on the contract if it has been performed without objection on the part of the district, or part payment has been made thereunder for services rendered, or there have been other acts upon the part of the district evincing an intention to ratify the contract and waive its formal approval. But where the services were rendered after notification by the president that he would not approve the contract, and there is no proof that the services were accepted or the contract ratified, the mere rendering of the services will not entitle plaintiff to recover: *Place v. District T'p*, 56–573.

2873. Certificate. 1758. No person shall be employed to teach a common school which is to receive its distributive share of the school fund, unless he shall have a certificate of qualification signed by the county superintendent of the county in which the school is situated, or by some other officer duly authorized by law; and any teacher who commences teaching without such certificate, shall forfeit all claim to compensation for the time during which he teaches without such certificate. [R., § 2062; 9 G. A., ch. 172, § 59.]

2874. Keep register. 1759. The teacher shall keep a correct daily register of the school, which shall exhibit the number or other designation thereof, township and county in which the school is kept; the day of the week, the month and year; the name, age, and attendance of each pupil, and the branches taught. When scholars reside in different districts, a register shall be kept for each district. [R., § 2062; 9 G. A., ch. 172, § 60.]

2875. File copy with secretary. 1760. The teacher shall, immediately after the close of his school, file in the office of the secretary of the board of directors, a certified copy of the register aforesaid. [R., § 2062; 9 G. A., ch. 172, § 61.]

GENERAL PROVISIONS.

2876. School month. 1761. A school month shall consist of four weeks of five school days each. [R., § 2077; 9 G. A., ch. 172, § 74.]

2877. Institutes. 1762. During the time of holding a teachers' institute in any county, any school that may be in session in such county shall be closed; and all teachers, and persons desiring a teacher's certificate, shall attend such institute, or present to the county superintendent satisfactory reasons for not so attending, before receiving such certificate. [L. B. E., 1861.]

2878. Foreign language. 1763. The electors of any school district at any legally called school meeting, may, by a vote of a majority of the electors present, direct the German or other language to be taught as a branch in one or more of the schools of said district, to the scholars attending the same whose parents or guardians may so desire; and thereupon such board of directors shall provide that the same be done; *provided*, that all other branches taught in said school or schools shall be taught in the English language; *provided, further*, that the person employed in teaching the said branches shall satisfy the county superintendent of his ability and qualifications, and receive from him a certificate to that effect. [Same.]

2879. Bible. 1764. The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian. [R., § 2119.]

It is a matter of individual option with school teachers as to whether they will read the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian, and such provision is not unconstitutional: *Moore v. Monroe*, 64-367.

COUNTY SUPERINTENDENT.

2880. Cannot hold another office. 1765. The county superintendent shall not hold any office in, or be a member of the board of directors of a district township or independent district, or of the board of supervisors during the time of his incumbency.

Women are eligible to the office: See §§ 2828, 2829.

2881. Examination of teachers. 1766; 17 G. A., ch. 143. On the last Saturday of each month, the county superintendent shall meet all persons desirous of passing an examination, and for the transaction of other business within his jurisdiction, in some suitable room provided for that purpose by the board of supervisors at the county seat, at which time he shall examine all such applicants for examination as to their competency and ability to teach orthography, reading, writing, arithmetic, geography, English grammar, physiology, and history of the United States; and in making such examination he may, at his option, call to his aid one or more assistants. Teachers exclusively teaching music, drawing, penmanship, book-keeping, German or other language, shall not be required to be examined except in reference to such special branch, and in such case it shall not be lawful to employ them to teach any branch, except such as they shall be examined upon and which shall be stated in the certificate. [R., §§ 2066, 2068; C., '51, § 1148; 9 G. A., ch. 172, § 64; 11 G. A., ch. 143, § 7.]

There is no authority for the superintendent charging the county for examining teachers on any other days than those here specified. (See § 2887): *Farrell v. Webster County*, 42-248.

2882. Certificates. 1767. If the examination is satisfactory, and the superintendent is satisfied that the respective applicants possess a good moral character, and the essential qualifications for governing and instructing children and youth, he shall give them a certificate to that effect, for a term not exceeding one year. [R., § 2067; 9 G. A., ch. 172, § 65.]

[As to state board of examiners and the certificate thereof, see §§ 2598-2606.]

It is discretionary with the superintendent to grant a certificate, and he cannot be compelled to do so by *mandamus: Bailey v. Ewart*, 52-111.

2883. Record. 1768. Any school officer or other person shall be permitted to be present at the examination; and the superintendent shall make a record of the name, residence, age, and date of examination of all persons so examined, distinguishing between those to whom he issued certificates, and those rejected. [9 G. A., ch. 172, § 66.]

2884. Physiology; stimulants and narcotics. 21 G. A., ch. 1, § 1. Physiology and hygiene, which must in each division of the subject thereof include special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system shall be included in the branches of study now and hereafter required to be regularly taught to and studied by all pupils in common schools and in all normal institutes, and normal and industrial schools and the schools at the soldiers' orphans' home, and home for indigent children.

2885. Duty of officers. 21 G. A., ch. 1, § 2. It shall be the duty of all boards of directors of schools and of boards of trustees, and of county super-

intendents in the case of normal institutes, to see to the observance of this statute and make provision therefor and it is especially enjoined on the county superintendent of each county that he include in his report to the superintendent of public instruction the manner and extent to which the requirements of section one of this act [§ 2884] are complied with in the schools and institutes under his charge, and the secretary of school boards in cities and towns is especially charged with the duty of reporting to the superintendent of public instruction as to the observance of said section one hereof, in their respective town and city schools, and only such schools and educational institutions reporting compliance, as above required, shall receive the proportion of school funds or allowance of public money to which they would be otherwise entitled.

2886. Examinations. 21 G. A., ch. 1, § 3. The county superintendent shall not after the first day of July 1887 issue a certificate to any person who has not passed a satisfactory examination in physiology and hygiene with especial reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system, and it shall be the duty of the county superintendent as provided by section one thousand seven hundred and seventy-one [§ 2889] to revoke the certificate of any teacher required by law to have a certificate of qualification from the county superintendent, if the said teacher shall fail or neglect to comply with section one of this act [§ 2884], and said teacher shall be disqualified for teaching in any public school for one year after such revocation, and shall not be permitted to teach without compliance.

2887. Normal institute. 1769; 15 G. A., ch. 57; 17 G. A., ch. 54. The county superintendent shall hold, annually, a normal institute for the instruction of teachers and those who may desire to teach, and with the concurrence of the superintendent of public instruction procure such assistance as may be necessary to conduct the same, at such time as the schools in the county are generally closed. To defray the expenses of said institute, he shall require the payment of a registration fee of one dollar from each person attending the normal institutes, and shall also require the payment, in all cases, of one dollar from every applicant for a certificate. He shall monthly, and at the close of each institute, transmit to the county treasurer all moneys so received, including the state appropriation for institutes, to be designated the "institute fund," together with a report of the name of each person so contributing, and the amount. The board of supervisors may appropriate such additional sum as may by them be deemed necessary for the further support of such institute. All disbursements of the institute fund shall be upon the order of the county superintendent; and no order shall be drawn except for bills presented to the county superintendent and approved by him for services rendered, or expenses incurred, in connection with the normal institute.

2888. Deputy. 1770. If, for any cause, the county superintendent is unable to attend to his official duties, he shall appoint a deputy to perform them in his stead, except visiting schools and trying appeals. [R., § 2069; 9 G. A., ch. 172, § 68.]

2889. Revocation of certificate. 1771. The superintendent may revoke the certificate of any teacher in the county which was given by the superintendent thereof, for any reason which would have justified the withholding thereof when the same was given, after an investigation of the facts in the case, of which investigation the teacher shall have personal notice, and he shall be permitted to be present and make his defense. [R., § 2070; 9 G. A., ch. 172, § 69; 14 G. A., ch. 133, § 2.]

[As to revocation of certificate for failure of teacher to comply with the law with reference to instruction as to the effects of stimulants and narcotics, see § 2886.]

The superintendent cannot, by injunction, restrain a teacher whose certificate he has revoked, from teaching school, nor the officers from paying for such services; but it seems a resident of the district might do so: *Perkins v. Wolf*, 17-228.

2890. Report. 1772. On the first Tuesday of October of each year, he shall make a report to the superintendent of public instruction, containing a full abstract of the reports made to him by the respective district secretaries, and such other matters as he shall be directed to report by said superintendent, and as he himself may deem essential in exhibiting the true condition of the schools under his charge; and he shall, at the same time, file with the county auditor a statement of the number of persons between the ages of five and twenty-one years in each school district in his county. [R., § 2071; 9 G. A., ch. 172, § 70; 11 G. A., ch. 143, § 12.]

2891. Penalty. 1773. Should he fail to make either of the reports required in the last section, he shall forfeit to the school fund of his county the sum of fifty dollars, and shall, besides, be liable for all damages caused by such neglect. [R., § 2072; 9 G. A., ch. 172, § 71.]

2892. Duties. 1774; 19 G. A., ch. 161, § 2. He shall at all times conform to the instructions of the superintendent of public instruction, as to matters within the jurisdiction of the said superintendent. He shall serve as the organ of communication between the superintendent and township or district authorities. He shall transmit to the townships, districts, or teachers, all blanks, circulars, and other communications which are to them directed; he may, at his discretion, visit the different schools in his county, and shall, at the request of a majority of the directors of a district, visit the school in said district at least once during each term. [R., § 2073; 9 G. A., ch. 172, § 72; 10 G. A., ch. 102, § 4.]

2893. Report as to blind and deaf. 1775. He shall report on the first Tuesday of October of each year to the superintendent of the Iowa college for the blind the name, age, residence, and postoffice address of every person blind to such an extent as to be unable to acquire an education in the common schools, and who resides in the county in which he is superintendent, and also to the superintendent of the Iowa institution for the deaf and dumb, the name, age, and postoffice address of every deaf and dumb person between the ages of five and twenty-one who resides within his county, including all such persons as may be deaf to such an extent as to be unable to acquire an education in the common schools. [13 G. A., ch. 31; 14 G. A., ch. 114, § 1.]

2894. Compensation. 1776; 19 G. A., ch. 161, § 1. The county superintendent shall receive from the county treasurer the sum of four dollars per day for every day necessarily engaged in the performance of official duties, and also the necessary stationery, and postage for the use of his office, and he shall be entitled to such additional compensation as the board of supervisors may allow; *provided*, that he shall first file a sworn statement of the time he has been employed in his official duties with the county auditor. [R., § 2074; 9 G. A., ch. 172, § 73; 11 G. A., ch. 143, § 8.]

The sworn statement of the superintendent is not conclusive upon the board, and it cannot be compelled by *mandamus* to allow the amount so shown to be due: *Bean v. Board of Supervisors*, 51–53.

TAXES.

2895. Board of directors to estimate. 1777. The board of directors shall, at their regular meeting in March of each year, or at a special meeting convened for that purpose, between the time designated for such regular meeting and the third Monday in May, estimate the amount required for the contingent fund, and also such sum as may be required for the teachers' fund, in addition to the amount received from the semi-annual apportionment, as shown by the notice from the county auditor, to support the schools of the district for the time required by law for the current year; and shall cause the secretary to certify the same, together with the amount voted for school-house pur-

poses, within five days thereafter to the board of supervisors, who shall, at the time of levying taxes for county purposes, subject to the provisions of section seventeen hundred and eighty of this chapter [§ 2898] levy the per centum necessary to raise the sum thus certified upon the property of the district township, which shall be collected and paid over as are other district taxes. [R., §§ 2037, 2044; 9 G. A., ch. 172, §§ 31, 40; 11 G. A., ch. 143, § 14; 14 G. A., ch. 132.]

The directors are only to determine and certify what amount of contingent fund is necessary to meet contracts which they are authorized to make; but they cannot include therein an amount to meet a contract for apparatus for which they are not authorized to contract any debt: *Manning v. District T'p*, 28-332.

The duty of the board of supervisors to levy the tax so certified is purely ministerial. When each of two districts claims certain territory, and asks a levy accordingly, the board cannot investigate as to the legality of organization, etc., but must make the levy asked by the one first taking steps to organize: *Independent Dist. v. Board of Supervisors*, 51-658.

The board of directors, and not the electors, are authorized to fix the rates to be levied for the teachers' and contingent fund. Action of the latter in such matter is void: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153, 179.

Although the tax must be levied by the board of supervisors, their action is based solely upon the action of the board of directors, and if the action of the board of directors is void because made after the date specified by § 2853, the levy by the supervisors will be of no effect: *Standard Coal Co. v. Independent Dist.*, 73-304.

Where certain lands in one township were set over into another for school purposes and both townships certified a percentage of tax for school purposes differing in amount, and the township in which the lands were situated received the money under its levy and the other levy was never collected, *held*, that as the tax collected was not the one levied by the township to which the lands were attached, the latter could not maintain an action for money had and received against the former on account of the tax collected: *District T'p v. District T'p*, 27-323.

2896. Apportionment of school-house tax; limitation. 1778. They shall apportion any tax voted by the district township meeting for school-house fund, among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of such fund; *provided*, that if the electors of one or more subdistricts at their last annual meeting shall have voted to raise a sum for school-house purposes greater than that granted by the electors at the last annual meeting of the district township, they shall estimate the amount of such excess on such subdistrict or subdistricts, and cause the secretary to certify the same within five days thereafter to the board of supervisors, who shall, at the time of levying taxes for county purposes, levy the per centum of such excess on the taxable property of the subdistrict asking the same, *provided* that not more than fifteen mills on the dollar shall be levied on the taxable property of any subdistrict for any one year for school-house purposes. [R., §§ 2033-4, 2037, 2088; 9 G. A., ch. 172, §§ 17, 30; 11 G. A., ch. 143, §§ 4, 5; 12 G. A., ch. 183.]

The duty of determining what is a just and equitable apportionment of the school-house fund rests, at least in the first instance, upon the board. They can be compelled to act, but their discretion cannot be controlled: *Cooper v. Nelson*, 38-440, 445.

The provision with reference to taxes voted by electors of subdistricts for school-house purposes gives implied authority to vote such taxes, although the power is not elsewhere expressly conferred: *Wood v. Farmer*, 69-533.

2897. School tax levy. 1779. The board of supervisors of each county, shall, at the time of levying the taxes for county purposes, levy a tax for the support of schools within the county of not less than one mill, nor more than three mills on the dollar, on the assessed value of all the real and personal property within the county, which shall be collected by the county treasurer at the time and in the same manner as state and county taxes are collected, except that it shall be receivable only in cash. [R., §§ 2057, 2059; 9 G. A., ch. 172, § 53.]

2898. District tax; levy; limit. 1780. They shall also levy at the same time, the district school tax certified to them from time to time by the

respective district secretaries; *provided*, that the amount levied for school-house fund shall not exceed ten mills on the dollar on the property of any district, and the amount levied for contingent fund shall not exceed five dollars per pupil, and the amount raised for teachers' fund, including the amount received from the semi-annual apportionment, shall not exceed fifteen dollars per pupil for each pupil residing in the district, as shown by the last report of the county superintendent. And if the amount certified to the board of supervisors exceeds this limit, they shall levy only to the amount limited; *provided*, that they may levy seventy-five dollars for contingent fund, and two hundred and seventy dollars, including the amount received for the semi-annual apportionment, for the teachers' fund for each subdistrict. [9 G. A., ch. 172, § 54; 14 G. A., chs. 21, 132.]

The provision as to the levy of the tax by the board of supervisors is directory, and if the levy is not made at the proper time it may be made at the time fixed for making the succeeding tax levy: *Perrin v. Benson*, 49–325.

The limit of taxation for school-house fund of ten mills on a dollar includes the tax to pay judgments, as provided for under § 2906, and that section does not authorize the levying of a tax beyond the limit of this section: *Sterling School Furniture Co. v. Harvey*, 45–466.

The limitation of taxation to ten mills does not limit the amount which may be voted to pay interest upon a bonded debt contracted for school-house purposes by vote of the electors of an independent district; and where the electors have failed to vote a sufficient tax to pay interest on the outstanding bonds it is lawful for the supervisors to do so: *Richards v. Supervisors*, 69–612.

There is no fixed limit to the rate of taxation when it is necessary to raise funds to meet the interest and principal of bonds lawfully issued under authority of a vote of the electors of the school district. The supervisors may be compelled to levy any tax for that purpose certified to by the directors: *United States ex rel. v. Board of Directors*, 20 Fed. Rep., 294.

Where a new township was formed in March and a tax levied therein, *held*, that in the absence of proof that said tax exceeded the limit imposed by statute it was legal, although the report of the county superintendent, being made before the creation of the township, did not show the number of pupils therein: *Milwaukee & St. P. R. Co. v. Kossuth County*, 41–57.

Where one school district is organized out of part of the territory included in another, and the entire amount of the taxes is received by the old district, an action for money had and received can be maintained against it by the new district: *District T'p v. District T'p*, 11–506.

Where, in the division of a school district, it was provided that one district should recover taxes due from property included in another district, *held*, that the district entitled to such taxes might draw the same, and that the other district, in wrongfully drawing them from the county treasurer, did not become trustee of an express or implied trust: *District T'p v. District T'p*, 62–62.

Two other school districts having been carved out of an original school district, and the agreement being that the original school district should collect taxes then due and make certain application thereof, *held*, that it was entitled to the proceeds of a railroad tax which should have been assessed prior to that time by the county board of supervisors, but was not in fact assessed until afterward: *District T'p v. District T'p*, 49–183.

Where the treasurer in refunding a school district tax illegally exacted improperly refunded it all out of the taxes due to one of three districts, which had been formed out of the territory of the original district to which the illegal tax had been paid, *held*, that such district might maintain an action for contribution against the other districts: *District T'p v. District T'p*, 56–85.

It seems that where a district township has exercised jurisdiction over certain territory claimed by another district, by collecting taxes therefrom and providing schools for the children therein for several years, during a portion of which time the other district has withheld its school privileges from such children and made no claim to said territory, the latter will be estopped from afterward asserting a claim to the territory in dispute: *Independent School Dist. v. Hobson*, 25–275.

2899. Districts in two counties. 15 G. A., ch. 67, § 1. All school districts lying in two adjoining counties shall have the right to vote mills instead of specific sums for school purposes.

COUNTY AUDITOR.

2900. Apportionment of taxes and interest. 1781. The county auditor shall, on the first Monday in April and the fourth Monday in September of each year, apportion the county school tax, together with the interest of the permanent school fund to which his county is entitled, and all other money in the hands of the county treasurer belonging in common to the

schools of his county and not included in any previous apportionment, among the several subdistricts therein, in proportion to the number of persons between five and twenty-one years of age, as shown by the report of the county superintendent filed with him for the year immediately preceding. [R., § 2060; 9 G. A., ch. 172, § 55.]

2901. Notice. 1782. He shall immediately notify the president of each school district of the sum to which his district is entitled by said apportionment, and shall issue his warrant for the same to accompany said notice, which warrant shall be also signed by the president and countersigned by the secretary of the district in whose favor the same is drawn; and shall authorize the district treasurer to draw the amount due said district from the county treasurer; and the secretary shall charge the treasurer of the district with all warrants drawn in his favor, and credit him with all warrants drawn on the funds in his hands, keeping separate accounts with each fund. [R., § 2061; 9 G. A., ch. 172, § 56.]

2902. Report to auditor of state. 1783. He shall forward to the superintendent of public instruction, a certificate of the election or appointment and qualification of the county superintendent; and shall, also, on the second Monday in February and August of each year, make out and transmit to the auditor of state, in accordance with such form as said auditor may prescribe, a report of the interest of the school fund then in the hands of the county treasurer, and not included in any previous apportionment; and also the amount of said interest remaining unpaid. [9 G. A., ch. 172, § 57.]

COUNTY TREASURER.

2903. Pay over taxes. 1784. The county treasurer shall, on the first Monday in April of each year, pay over to the treasurer of the district the amount of all school district tax which shall have been collected, and shall render him a statement of the amount uncollected, and shall pay over the amount in his hand quarterly thereafter. He shall also keep the amount of tax levied for school-house purposes, separate in each subdistrict, where such levy has been made directly upon the property of the sub-district making the application, and shall pay over the same quarterly to the township treasurer for the benefit of such subdistrict. He shall, in all counties wherein independent districts are organized, keep a separate account with said independent districts, in which the receipts shall be daily entered, which books shall at all times be open to the inspection and examination of the district board of directors, and shall pay over to the said independent districts the amount of school taxes in his possession on the order of the board, on the first day of each and every month. [9 G. A., ch. 172, § 58; 10 G. A., ch. 102; 12 G. A., ch. 29.]

2904. Notice of tax collected. 1785. On the first day of each quarter, the county treasurer shall give notice to the president of the school board of each township in his county of the amount collected for each fund; and the president of each board shall draw his warrant, countersigned by the secretary, upon the county treasurer for such amount, who shall pay the amount of such taxes to the treasurers of the several school boards only on such warrants. [12 G. A., ch. 122.]

MISCELLANEOUS.

2905. Fines and penalties. 1786. All fines and penalties collected from a school district officer by virtue of any of the provisions of this chapter, shall inure to the benefit of that particular district. Those collected from any member of the board of directors, shall belong to the district township, and

those collected from county officers, to the county. In the two former cases, suit shall be brought in the name of the district township; in the latter, in the name of the county, and by the district [county] attorney. The amount in each case shall be added to the fund next to be applied by the recipient for the use of common schools. [R., § 2081; 9 G. A., ch. 172, § 77.]

2906. Judgments. 1787. When a judgment has been obtained against a school district, the board of directors shall pay off and satisfy the same from the proper fund, by an order on the treasurer; and the district meeting at the time for voting a tax for the payment of other liabilities of the district shall provide for the payment of such order or orders. [R., § 2095; 9 G. A., ch. 172, § 79.]

[As to issuing bonds to pay off judgment or bonded indebtedness, see §§ 2965–2974.]

The issuance of the order on the treasurer does not satisfy the judgment. The district is required to vote a tax to pay such orders, but if it fail to do so the board of directors of the district may be compelled by *mandamus* to levy such tax: *Boynton v. District T'p*, 34–510.

The issuance of an order upon the treasurer does not amount to a payment of a debt or judgment of the school district, but where an order has been issued to pay a demand upon the district and there are no funds in the treasury to pay such order, the board may be compelled by *mandamus* to take measures for the levy of a tax to provide the necessary funds: *Stevenson v. District T'p*, 35–462.

The recovery of a judgment against a school district does not entitle the creditor to have all the funds of the district applied to his judgment to the exclusion of other creditors. He can only have a *pro rata* allowance out of such funds, but he may, by *mandamus*, compel the levy of a special tax up to the maximum limit for the payment of his judgment: *Chase v. Morrison*, 40–620.

This section contemplates the right of a creditor to a judgment against a school district, and the issuance to him of an order in payment of his claim does not prevent his obtaining judgment, nor is he required to resort first to an action of *mandamus* to enforce the levying and collection of a tax: *Cross v. District T'p*, 14–28.

That the board cannot accurately specify the amount which should be paid from each fund is no excuse for not issuing orders in payment of a judgment: *District T'p v. Board of Directors*, 52–287.

This section does not authorize the levy of a tax in excess of the ten-mill limit: See § 2898 and notes.

2907. Tax to pay money borrowed. 1788. In case a school district has borrowed money of the school fund, the board of supervisors shall levy such tax, not exceeding five mills on the dollar in any one year, on the taxable property of the district as constituted at the time of making such loan, as may be necessary to pay the annual interest on said loan, and the principal when the same falls due, unless the board of supervisors shall see proper to extend the time of said loan. [R., § 2092; 9 G. A., ch. 172, § 80.]

2908. Hours of meeting and adjourning. 1789; 22 G. A., ch. 51. No district township or subdistrict meeting shall organize earlier than nine o'clock A. M., nor adjourn before twelve o'clock M., and in all independent districts having a population of three hundred and upward, the polls shall remain open from twelve o'clock M. to seven o'clock, P. M. [9 G. A., ch. 172, § 81.]

Where an election is not ordered and held during the hours specified, the action of the electors thereat is void: *District T'p v. Independent Dist.*, 34–306; and see note to § 2826.

2909. Oaths. 1790. Any school director, or director elect, is authorized to administer to any school director elect the official oath required by law, and said official oath may be taken on or before the third Monday in March following the election of directors.

2910. Delivering records, money, etc. 1791. When any school officer is superseded by election or otherwise, he shall immediately deliver to his successor in office, all books, papers, and moneys pertaining to his office, taking a receipt therefor; and every such officer who shall refuse to do so, or who shall wilfully mutilate or destroy any such books or papers, or any part thereof, or shall misapply any moneys intrusted to him by virtue of his office, shall be liable to the provisions of the general statutes for the punishment of such offense. [R., § 2080; 9 G. A., ch. 172, § 82.]

2911. Jurisdiction. 1792. Nothing in this chapter shall be so construed as to give the board of directors of a district township jurisdiction over any territory included within the limits of any independent district. [R., § 2085; 9 G. A., ch. 172, § 83.]

2912. Children attending in another district. 1793; 16 G. A., ch. 64; 17 G. A., ch. 41. Children residing in one district may attend school in another in the same or adjoining county or township, on such terms as may be agreed upon by the respective boards of directors; but in case no such agreement is made, they may attend school in any such adjoining district, with the consent of the county superintendent of the county where said pupil resides and the board of directors of said adjoining district, when they reside nearer the school in said district, and one and a half miles or more, by the nearest traveled highway, from any school in their own. The board of directors of the township, in which such children reside, shall be notified in writing, and the district in which they reside shall pay to the district in which they attend school, the average tuition of said children per week, and an average proportion of the contingent expenses of said district where they attend school; and in case of refusal so to do, the secretary shall file the account for said tuition and contingent expenses, certified to by the president of his board, with the county auditor of the county, in which said children reside, and the said county auditor shall at the time of making the next semi-annual apportionment thereafter, deduct the amount so certified, from the sum apportioned to the district in which said children reside, and cause it to be paid over to the district in which they have attended school. [R., § 2024; C., '51, § 1143; 9 G. A., ch. 172, § 13.]

When a district fails to provide school for the period prescribed in § 2842, children residing therein may attend school in another district as here provided, and the district where they reside will be liable for their tuition; and where, upon being notified in writing, the directors of the district where children resided, at a meeting called to consider the question, determined not to pay such tuition, *held*, that demand on them before filing the account with the auditor was unnecessary: *District T'p v. District T'p*, 49–231.

2913. Residence of pupils. 1794. Pupils who are actual residents of a district shall be permitted to attend school in the same, regardless of the time when they acquired such residence, whether before or after the enumeration, or of the residence of their parents or guardians; but pupils who are sojourning temporarily in one district, while their actual residence is in another, and to whom the last preceding section is not applicable, may attend school upon such terms as the board of directors may deem just and equitable. [9 G. A., ch. 172, § 14.]

2914. Pupils; where attend school. 1795. Pupils may attend school in any subdistrict of the district township in which they reside with the consent of the subdirector of such subdistrict, and of the subdirector of the subdistrict in which such pupils reside. [Same, § 15.]

2915. Divide townships. 1796. The board of directors shall, at their regular meeting in September, or at any special meeting called thereafter for that purpose, divide their townships into subdistricts, such as justice, equity, and the interests of the people require; and may make such alterations of the boundaries of subdistricts heretofore formed, as may be deemed necessary; and shall designate such subdistricts, and all subsequent alterations, in a distinct and legible manner, upon a plat of the district provided for that purpose; and shall cause a written description of the same to be recorded in the district records, a copy of which shall be delivered by the secretary to the county treasurer, and also to the county auditor, who shall record the same in his office; *provided*, that the boundaries of subdistricts shall conform to the lines of congressional divisions of land; and that the formation and alteration of subdistricts as contemplated in this section, shall not take effect until the next

subdistrict election thereafter, at which election a subdirector shall be elected for the new subdistrict. [Same, § 29.]

The district board may in the exercise of its discretion change the subdistricts and dispense with a new district previously created, if, in the exercise of its legal discretion, it finds such action to be to the best interest of all parts of the district: *Morgan v. Wilfley*, 70–238.

Where an election to determine whether the subdistricts of a district township should be made independent districts under §§ 2950–2955 was ordered, and before it was held a new subdistrict was formed, *held*, that the subsequent election at which the subdistricts were constituted independent districts applied also to the new district, although it had not yet elected a director: *Independent School Dist. v. Independent School Dist.*, 48–157.

The provisions as to change of boundaries of subdistricts does not apply to independent districts, the boundaries of which can be changed, if at all, only under other statutory provisions: *Eason v. Douglass*, 55–390: *Independent Dist. v. Independent Dist.*, 65–590.

Where a restoration of territory is agreed to, and no time fixed therefor, it will be considered as taking place the first of March following; and taxes collected prior to that time should be paid to the township to which the territory had previously been attached: *District T'p v. Floete*, 59–109.

2916. Where obstacles interfere. 1797. In cases where, by reason of streams or other natural obstacles, any portion of the inhabitants of any school district cannot, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in their township, the said county superintendent, with the consent of the board of directors of such district as may be affected thereby, may attach such part of said township to an adjoining township, and the order therefor shall be transmitted to the secretary of each district, and be by him recorded in his records, and the proper entry made on his plat of the district. [11 G. A., ch. 143, § 16; 13 G. A., ch. 94.]

There is now no authority for attaching territory situated within one district township to another district township for school purposes except as provided in case of streams or other natural obstacles: *Large v. District T'p*, 53–663.

The same rule existed prior to 11 G. A., ch. 143, § 16; and *held*, that the portion of that statute which legalized the organization of subdistricts previously formed in accordance therewith only legalized the incorporation of territory of one district township into the subdistrict of another township where streams or other obstacles existed, and that where no such ground was shown, the action of the directors of two townships in attaching part of one to another would not be valid, and the township to which territory was attached could not recover from the other township taxes collected within such territory: *District T'p v. District T'p*, 53–667.

To warrant the action of the county superintendent in attaching a portion of a district township to another township, the consent of the directors of the township from which the territory is detached, and the existence of natural obstacles, must both appear. Otherwise such action is unauthorized and void. Some action may, however, be legalized by a curative act. But the district township cannot be deprived, by such curative act, of taxes already levied on the territory at the time the transfer was made: *Independent Dist. v. Independent Dist.*, 62–616.

Whether a portion of one district township which is annexed to another district township for school purposes is properly so annexed or not, taxes levied and collected upon the certificate of the township to which the territory is attached should be paid to such township, and not to the township to which the territory properly belongs: *District T'p v. Floete*, 59–109.

2917. Restoration of territory. 1798; 18 G. A., ch. 111; 19 G. A., ch. 160. In all cases where territory has been or may be set into an adjoining county or township, or attached to any independent school district in any adjoining county or township for school purposes, such territory may be restored by the concurrence of the respective board[s] of directors; but on the written application of two-thirds of the electors residing upon the territory within such township or independent district in which the school-house is not situated, the said boards shall restore the territory to the district to which it geographically belongs. *Provided, however*, that no such restoration shall be made unless there are fifteen or more pupils between the ages of five and twenty-one years actually residing upon said territory sought to be restored, and not until there has been a suitable school-house erected and completed within the limits of said territory suitable for school purposes. [14 G. A., ch. 125, § 1; 13 G. A., ch. 94.]

If one of the townships has no district board, the restoration cannot be made even upon the written application here provided for, as the concurrence of the board is neces-

sary though they are given no discretion: *Independent Dist. v. Durland*, 45–43.

Where a restoration of territory is agreed to and no time fixed therefor, it will be considered as taking place the first of March following; and taxes collected prior to that time should be paid to the township to which the territory had previously been attached: *District T'p v. Floete*, 59–109.

The provision for restoration of territory applies as well to territory incorporated into an independent district at the time of its organization as to such as is subsequently attached thereto: *Albin v. Board of Directors*, 58–77.

This provision seems to be peremptory; and when two-thirds of the electors ask it to be done, or when the school-house has been removed, or when the territory is inhabited, it shall remain under the jurisdiction and form a part of the district township to which it geographically belongs, and the respective boards of directors in either case shall divide their districts accordingly. The refusal to make such divisions may be corrected on appeal under § 2985: *Barnett v. Directors*, 73–134.

Under a statute providing that a school district formed of parts of two or more civil townships should become disorganized and the portions of the different townships should fall to the jurisdiction of the townships to which they belong upon the removal of the school-house, *held*, that the tearing down or removal of the school-house in such a district for the purpose of the erection of another was not a removal such as would work the disorganization of the district: *State v. McCormick*, 37–142.

2918. District not to be divided. 1799. The boundary lines of a civil township shall not be changed by the board of supervisors of any county, so as to divide any school district by changing the boundary lines thereof, except when a majority of the voters of such district shall petition therefor; *provided, however*, that this shall not prevent the change of the boundary lines of any civil township, when such change is made by adopting the lines of congressional townships. [14 G. A., ch. 122.]

For similar provision as to dividing school districts, see § 516.

INDEPENDENT DISTRICTS.

2919. Contiguous territory included. 1800; 18 G. A., ch. 139. Any city, town or village containing not less than two hundred inhabitants within its limits, may be constituted a separate school district and territory contiguous to such city, town or village may be included with it as a part of said separate district in the manner hereinafter provided. The village herein mentioned shall be understood to be a collection of inhabitants residing within the limits of a town plat and not organized into a city or incorporated town. [R., §§ 2097, 2105; 9 G. A., ch. 172, § 84; 12 G. A., ch. 28, § 1; 13 G. A., ch. 8, § 1.]

It is a prerequisite that there shall be the specified number of inhabitants, and that matter may be inquired into by *quo warranto*: *State v. Independent School Dist.*, 29–264.

No village of less than two hundred inhabitants within its limits may be organized into an independent district. The inhabitants of contiguous territory are not to be added to the village proper in order to increase the number to two hundred: *Allen v. District T'p*, 70–436.

An independent district may be formed from territory lying in adjoining townships, either in the same or different counties, and no concurrent action of the school authorities of the two townships is necessary: *Independent School Dist. v. Board of Supervisors*, 25–305; *District T'p v. Independent Dist.*, 41–30.

It is not essential that the boundaries of the city and the school district should coincide, and the extension of the limits of the city does not have the effect of enlarging the limits of the school district before existing: *State v. Independent School Dist.*, 46–425.

The extent of the territory which may be included with the city or town in the independent district is not limited: *Ft. Dodge City School Dist. v. District T'p*, 15–434.

Whether territory is so contiguous to a town as to be properly included with it in the same independent district is a question to be settled, at least in the first instance, by the school officers: *Independent Dist. v. Board of Supervisors*, 51–658.

2920. What territory included. 19 G. A., ch. 118, § 1. All the territory of an incorporated city or town, whether included within the original incorporation or afterward attached thereto in accordance with the provisions of law, shall be or become a part of the independent district or districts of said city or town.

2921. Assets and liabilities. 19 G. A., ch. 118, § 2. When boundaries are changed by the taking effect of this act, the respective boards of directors

shall make an equitable settlement of the then existing assets and liabilities of their districts, as provided for by section one thousand seven hundred and fifteen of the code [§ 2821].

2922. Vote of people. 1801. At the written request of any ten legal voters residing in such city or town, the board of directors of the district township shall establish the boundaries of the contemplated school district, including such contiguous territory as may best subserve the convenience of the people for school purposes, and shall give at least ten days' previous notice of the time and place of meeting of the electors residing in said district, by posting written notices in at least five conspicuous places therein; at which meeting the said electors shall vote by ballot for or against a separate organization. [R., § 2098; 9 G. A., ch. 172, § 85; 14 G. A., ch. 73, § 1.]

An election upon the question as to the organization of an independent district must be conducted as to the time of opening the polls, etc., according to the provisions as to other school elections, and if not so conducted the proceedings will be void: *District T'p v. Independent Dist.*, 34-306.

Where the question of a separate organization was submitted only to the voters within the city, and not to those within the territory included in the contemplated district, but outside of the city, the election was held void, although the majority in the city was greater than the total number of voters in such other territory: *Fort Dodge City School Dist. v. District T'p*, 17-85.

Where territory is included in each of two independent districts the one first taking steps to organize is entitled to it: *Independent Dist. v. Board of Supervisors*, 51-658.

Where a subdistrict had been formed but no director elected, and in pursuance of steps taken before the formation of the new district the subdistricts of the township, including the new one, voted for organization into independent districts, and the new subdistrict then properly completed its organization as an independent district, *held*, that it was properly organized: *Independent School Dist. v. Independent School Dist.*, 48-157.

Where the legislature legalized the organization of an independent district, *held*, that such legalization did not operate to make a part of the district territory which had previously been organized into a separate independent district: *Ibid.*

2923. Election of directors; organization of board. 1802; 15 G. A., ch. 27; 17 G. A., ch. 113; 18 G. A., ch. 143. Should a majority of votes be cast in favor of such separate organization, the board of directors of the district township shall give similar notice of a meeting of the electors for the election of six directors. Two of these directors shall hold their office until the first annual meeting after their election, and until their successors are elected and qualified, two until the second, and two until the third annual meeting thereafter, their respective terms of office to be determined by lot. The six directors shall constitute a board of directors for the district, and they shall, at their first regular meeting in each year, elect a president from their own number, and at their meeting on the third Monday of September in each year a secretary and treasurer, to be chosen outside of the board. *Provided*, that in all independent districts having a population of less than five hundred there shall be three directors elected, who shall organize by electing a president from their own number, also a secretary, who may or may not be a member of the board, and a treasurer who shall not be a member of the board. *And provided further*, that in all independent districts already organized the terms of office of such directors as may have been chosen previous to the taking effect of this section for two or three years shall not be interfered with by its passage. [R., §§ 2099, 2100, 2106; 9 G. A., ch. 172, § 86; 12 G. A., ch. 28, § 2; 13 G. A., ch. 8, § 1; 14 G. A., ch. 76, § 1.]

[As to duty of directors with reference to barb wire fences around school grounds, see §§ 2839-2841. As to insuring school property, see § 2836. As to setting out shade trees, see §§ 2837, 2838. The board is required to make provision for teaching physiology and hygiene with special reference to stimulants and narcotics, and the secretary is to report to the superintendent of public instruction as to the observance of such provisions: See §§ 2884-2886.]

The treasurer is an officer of the district, and service of notice upon him will be good, under § 3817: *Kennedy v. Independent School Dist.*, 48-189.

2924. Method of election. 1803. Said meeting for the first election of directors shall organize by appointing a president and secretary, who shall

act as judges of the election and issue a certificate of election to the person elected. [9 G. A., ch. 172, § 87.]

2925. When organization completed; taxes. 1804. The organization of such independent district shall be completed on or before the first day of August of the year in which said organization is attempted, and when such organization is thus completed, all taxes levied by the board of directors of the district township of which the independent district formed a part in that year, shall be void so far as the property within the limits of the independent district is concerned; and the board of directors of such independent district shall levy all necessary taxes for school purposes as provided by law for that year at a meeting called for that purpose, at any time before the third Monday of August of that year, which shall be certified to the board of supervisors on or before the first Monday of September, and said board of supervisors shall levy said tax at the time and in the manner that school taxes are required to be levied in other districts. [11 G. A., ch. 143, § 11.]

Whether the organization of an independent district will render void taxes levied prior to such organization to pay debts for the erection of a school-house therein, *quære;* but such organization cannot prejudice the rights of a party having a valid claim against the whole district prior to such organization: *Stevenson v. District T'p*, 35-462.

2926. District in two townships. 1805. In case such district is formed of parts of two or more civil townships in the same or adjoining counties, the duty of giving the notice shall devolve upon the board of directors of the township in which a majority of the legal voters of the contemplated district reside. [R., § 2105; 9 G. A., ch. 172, § 88; 12 G. A., ch. 28, § 2.]

2927. Number of schools. 1806. Said district may have as many schools, and be divided into such wards or other subdivisions for school purposes, as the board of directors may deem proper; and shall be governed by the laws enacted for the regulation of district townships, so far as the same may be applicable. [R., § 2101; 9 G. A., ch. 172, § 89.]

Contracts which the directors are authorized to make will be binding upon the district although executed by them individually and not while acting as a board. Their powers, etc., are the same as those of a subdirector under § 2868: *Athearn v. Independent Dist.*, 33-105.

The directors may authorize the teaching of music and contract for the purchase of an organ out of any unappropriated funds on hand: *Bellmeyer v. Independent Dist.*, 44-564.

2928. Subdistricts. 22 G. A., ch. 61, § 1. The subdistricts of a district township may be constituted independent districts in the manner hereinafter provided.

2929. Meeting called. 22 G. A., ch. 61, § 2. At the written request of one-third of the legal voters in each subdistrict of any district township the board of directors shall call a meeting of the qualified electors of each subdistrict by giving at least thirty days' notice thereof by posting three written notices in each subdistrict in the township, at which meeting the electors shall vote by ballot for or against independent district organization.

2930. Majority vote. 22 G. A., ch. 61, § 3. If a majority of the votes cast in each subdistrict shall be favorable to such independent organization then each subdistrict shall become an independent district.

2931. Election of directors. 22 G. A., ch. 61, § 4. The board of directors of the old district township so voting shall then call a meeting in each independent district for the election of three or more directors as may be required by law, and the organization of the said independent district shall be completed and governed in the same manner as other and similar independent districts.

The formation of a subdistrict into an independent district cannot prejudice the rights of persons holding claims against the district township for compensation for building schoolhouses in the original subdistrict. So far as such creditors are concerned the district town-

ship is to be treated as if no part of it had been organized into independent districts: *Stevenson v. District T'p*, 35–462.

When a district township is thus divided into independent districts, the old district township ceases to exist: *District T'p v. Independent Dist.*, 36–220.

The new independent district is not liable for the debts of the original subdistrict from which it is formed. Such debts, being claims against the district township, may be enforced by action against all the independent districts which have been formed out of it, and a judgment may be rendered against them jointly, which may be enforced against any one of them, leaving the question as to the apportionment of such judgment to be settled between the districts themselves: *Knoxville Nat. Bank v. Independent Dist.*, 40–612; *Independent School Dist. v. District Court*, 48–182; *Kennedy v. Independent School Dist.*, 48–189; *District T'p v. District T'p*, 52–73.

2932. Change of boundary line. 22 G. A., ch. 62, § 1. The boundary lines of contiguous independent districts within the same civil township, may be changed by concurrent action of the respective boards of directors at their regular meeting in September, or at special meetings thereafter called for that purpose; *provided*, that the district so formed, from which territory has been detached, shall not contain less than four government sections of land; and *provided, further*, that the boundary lines of said districts shall conform to the lines of congressional divisions of land.

Prior to the passage of this statute the board of directors of an independent district had no power to change its boundaries: *Eason v. Douglass*, 55–390; *Independent Dist. v. Independent Dist.*, 65–590.

2933. School-house tax. 1807; 21 G. A., ch. 131, § 1. It shall be lawful for the electors of any independent district, at the annual meeting of such district, to vote a tax, not exceeding ten mills on the dollar in any one year, on the taxable property of such district, as the meeting may deem sufficient for the purchase of grounds and the construction of the necessary school-houses for the use of such independent district, and for the payment of any debts contracted for the erection of such school-houses, and for procuring a library and apparatus for the use of the schools of such independent district. And said electors may direct the sale or other disposition to be made of any school-house or the site thereof or any part of such site and of such other property, real and personal as may belong to the independent district and direct the manner in which the proceeds arising therefrom shall be applied. [10 G. A., ch. 57.]

Where a levy of a three per cent. tax was made, it was held valid to the extent of one per cent. and void as to the excess: *McPherson v. Foster*, 43–48, 73.

The limitation of taxation to ten mills does not limit the amount which may be voted to pay interest upon a bonded debt created for school-house purposes by vote of the electors; and where the electors have failed to vote a sufficient tax to pay interest on the outstanding bonds, it is lawful for the supervisors to levy such tax: *Richards v. Supervisors*, 69–612.

2934. Certain acts legalized. 21 G. A., ch. 131, § 2. All acts of independent districts heretofore done in authorizing or making sales of real estate, where done as provided in paragraph two of section seventeen hundred and seventeen of the code of Iowa [§ 2823], or submitted and carried under section two of chapter eight of the laws of A. D. 1880, of Iowa [§ 2937], are hereby legalized and made valid in all respects as duly authorizing or making such sales and conveyances thereunder, the same as though said paragraph two of section seventeen hundred and seventeen of the code has been incorporated in and made part of said section eighteen hundred and seven [§ 2933].

2935. Election of directors. 1808; 18 G. A., ch. 7, § 2. The annual meeting of all independent districts shall be held on the second Monday in March for the transaction of the business of the district, and for the election by ballot of two directors, as the successors of the two whose term expires, who shall continue in office for three years; and the president, secretary, and one of the directors then in office shall act as judges of the election, and shall issue certificates of election to the persons elected for the ensuing term; *provided*,

that in all independent districts, having a population of less than five hundred, there shall be elected, annually, one director, who shall continue in office for three years. In cases of a tie vote in the election of director or directors, the secretary shall notify them to appear at the regular meeting of the board on the third Monday in March to determine their election by lot before one or more members of the board elected, and the certificate of election shall be given accordingly. Should either party fail to appear or take part in the lot, the secretary shall draw for him. [9 G. A., ch. 172, § 90; 13 G. A., ch. 8, § 5; 14 G. A., ch. 76.]

2936. Election precincts. 18 G. A., ch. 8, § 1. Independent school districts having a population of not less than fifteen thousand inhabitants shall be divided into not less than three, nor more than six, election precincts, in each of which a poll shall be held at a convenient place, to be appointed by the board of directors, for the reception of the ballots of the electors residing in such precinct at said election.

2937. Questions submitted. 18 G. A., ch. 8, § 2. The board of directors shall provide for the submission of all questions relating to the powers reserved to the electors under section one thousand eight hundred and seven of the code [§ 2933], which questions shall be decided by ballot, returns to be made on questions submitted as hereinafter provided.

2938. Registration of voters. 18 G. A., ch. 8, § 3. A register of the electors residing in each precinct shall be prepared by the board of directors from the register of the electors for any city, town, or township, which is in whole or in part included within such independent school district; and, for that purpose, a copy of such register of electors shall be furnished by the clerk of each such city, town, or township, to the board of directors. Said board shall, in each year, before the annual election for directors, revise and correct such school election registers by comparison thereof with the last register of elections for such cities, towns, and townships; and the register provided for by this section shall have the same force and effect at elections held under this act and in respect to the reception of votes at said elections as the register of elections has by law at general elections.

2939. Notice of election. 18 G. A., ch. 8, § 4. Notice of every election under this act shall be given in each district in which the same is to be held, by the secretary thereof, by posting up the same in three public places in said district, and by publication in a newspaper published therein, for two weeks preceding such election; such notice shall also state the respective election precincts and the polling place in each precinct.

2940. Judges and clerks; opening and closing. 18 G. A., ch. 8, § 5. The board of directors shall appoint one of their own number and another elector of the district to act as judges of election, and a clerk for each polling place, who shall be sworn as provided by section six hundred and nine of the code [§ 1070] in case of general elections. The polls shall be open from nine o'clock A. M. to six o'clock P. M. If either of the judges or clerk fail to attend, his place may be filled by the others, by appointing an elector attending in his place, and, if all fail to attend in time, or refuse to serve or be sworn, the electors present shall choose two judges and a clerk from the electors attending. A ballot-box and the necessary poll book shall be provided by the board of directors for each precinct, and the election shall be conducted in the same manner, and under the same rules and regulations, so far as applicable, as, or [are] provided by chapter three, of title five of the code for general elections.

2941. Canvass; returns; certificate. 18 G. A., ch. 8, § 6. The judges of election and clerk in each precinct shall canvass the vote therein, and shall, as soon as possible, make out, sign and return, to the secretary of the district, a certificate showing the whole number of votes cast in such precinct, and the

number of votes in favor of each person voted for, and questions submitted. The board of directors shall meet on the next Monday after the election and canvass the returns and ascertain the result of the election, the whole number of votes cast, and the number in favor of each person voted for shall be entered in their record, and the persons respectively receiving the highest two numbers of votes shall be declared elected, and all questions submitted, receiving a majority of votes cast, shall be recorded as carried. The secretary shall issue to each person so elected a certificate of his election.

2942. 18 G. A., ch. 8, § 7. All acts and parts of acts inconsistent with this act are hereby repealed.

2943. Remainder of township. 1809. When an independent district has been formed out of a civil township, or townships, as herein contemplated, the remainder of such township, or of each of such townships, as the case may be, shall constitute a district township as provided in section seventeen hundred and thirteen of this chapter [§ 2819], and the boundaries between such district township and independent district may be changed, or the independent district abandoned at any time, with the concurrence of their respective boards of directors. [R., § 2104; 9 G. A., ch. 172, § 9; 14 G. A., ch. 133, § 3.]

The power and jurisdiction to act with reference to a change of boundaries being here given to the board of directors of the district township, from which action an appeal will lie to the county superintendent, it is implied that when a proper application is made it is the duty of the board to act, and that duty may be enforced by *mandamus* at the suit of a private citizen, although they cannot be thus compelled to act in any particular manner: *Hightower v. Overhaulser*, 65–347; *District Tp v. Independent Dist.*, 72–687.

A party will not be estopped, by a refusal of the board to allow the application, from presenting a subsequent application and insisting upon its consideration: *Hightower v. Overhaulser*, 65–347.

2944. Independent district embracing township. 1810. In case an independent district embraces a part or the whole of a civil township which has no separate district township organization, upon the written application of two-thirds of the electors residing upon the territory of such independent district and within such civil township to the board of directors, they shall set off such territory, whether provided with school-houses or not, to be organized as a district township in the manner provided for such organization when a new civil township is formed. [14 G. A., ch. 125, § 2.]

2945. Consolidation of districts. 1811; 22 G. A., ch. 63, § 1. Independent districts located contiguous to each other, may unite and form one and the same independent district, in the manner following: At the written request of any ten legal voters residing in each of said independent districts, or, should there not be ten legal voters in one of such districts, then at the written request of the majority of such voters, their respective boards of directors shall require their secretaries to give at least ten days' notice of the time and place for a meeting of the electors residing in such districts, by posting written notices in at least five public places in each of said districts, at which meetings the said electors shall vote by ballot for or against a consolidated organization of said independent districts; and if a majority of the votes cast at the election in each district, shall be in favor of uniting said districts, then the secretaries shall give similar notice of a meeting of the electors as provided for by the law for the organization of independent districts. The independent district thus consolidated shall be completed, and its directors governed by the same provisions of the law which apply to other independent districts. Where from the courses of Iowa rivers, and the contour of the adjoining territory, the proper school facilities cannot be given to the school children of each territory by forming school districts from the territory in any one county, independent school districts may be formed from the contiguous territory in adjoining counties. [13 G. A., ch. 8, § 2.]

Where there is no written request of electors nor proper action of the board of directors looking toward the consolidation of independent districts, and the notice of election does

not properly specify its object, an election on the question of consolidation will be void, and the original and independent districts will be still in existence: *State v. Leverton*, 53-483.

2946. Legalizing. 22 G. A., ch. 63, § 2. Any independent school districts heretofore formed under said section one thousand eight hundred and eleven [§ 2945], where there were less than ten legal voters residing therein at the time of the consolidation is hereby legalized and made valid *provided* that two-thirds of the legal voters then residing in such independent district petitioned for such consolidation.

2947. School districts in two counties. 1812. Where, under the school laws of the state heretofore in force for the convenience and accommodation of the people, school districts were formed of portions of two counties of territory lying contiguous to each other, at the written request of five legal voters residing in portions of said territory in each county, the board of directors of the district township to which such territory belongs, having a majority of the legal voters, shall fix the boundaries of an independent school district composed of such sections of land, or portions thereof, as may be described in the petition therefor, and shall give at least ten days' notice of the submission of the question of the formation of said independent district, at a special election for said purpose, specifying the boundaries of the district, the time and place of the meeting of the electors for such election, at which meeting the electors in the contemplated district shall vote by ballot for or against the separate organization. Should a majority of the votes be cast in favor of such separate organization, the said board of directors shall proceed by ballot to elect officers in the mannner provided by law, and organize such independent district. [14 G. A., ch. 137.]

These provisions do not apply in case of the formation of an independent district out of contiguous territory situated in different counties, under § 2919: *District T'p v. Independent Dist.*, 41-30.

2948. Statement. 1813. The boards of directors of the several independent school districts are hereby required to publish, two weeks before the annual school election in such district, by publication in one or more newspapers, if any are published in such district, or by posting up in writing in not less than three conspicuous places in such independent district, a detailed and specific statement of the receipts and disbursements of all funds expended for school and building purposes for the year preceding such annual election. And the said boards of directors shall also, at the same time, publish in detail an estimate of the several amounts which, in the judgment of such board, are necessary to maintain the schools in such district for the next succeeding school year; and failure to comply with the provisions of this section shall make each director liable to a penalty of ten dollars. [14 G. A., ch. 46.]

2949. Districts consolidated. 1814. Township districts may be consolidated and organized as independent districts, in the following manner: Whenever the board of directors of any existing district township shall deem the same advisable, and also whenever requested to do so by a petition signed by one-third of the voters of the district township, the board shall submit to the voters of said district township, at a regular election, or one called for the purpose, the question of consolidation, at which election the voters of the district township shall vote for or against consolidation. If a majority of votes shall be in favor of such consolidated organization, such district township shall organize on the second Monday of March following as an independent district; *provided*, that in townships which have been divided into independent districts, the duties in this section devolving on the board of directors shall be performed by the trustees of the township to whom the petition shall in such cases be addressed; *and provided further*, that nothing in this section shall be construed to affect independent districts composed wholly or mainly of cities or

incorporated towns. Independent districts may in like manner change their boundaries so as to form any number of districts less than the number of districts existing at the time such change is asked for, and such changes shall be specified in the notices for a vote thereon.

Section considered: *Independent Dist. v. Durland*, 45–53, 56.

2950. Independent districts may become district township. 1815; 16 G. A., ch. 155, § 1. The independent districts of a civil township may be constituted a district township in the manner hereinafter provided.

As bearing upon the original section, see *State v. Independent School Dist.*, 29–264.

2951. Question of district township organization submitted to electors. 1816; 16 G. A., ch. 155, § 2. At the written request of one-third of the legal voters residing in any civil township, which is divided into independent districts, the township trustees shall call a meeting of the qualified electors of such civil township at the usual place of holding the township election, by giving at least ten days' notice thereof, by posting three written notices in each independent district in the township, and by publication in a newspaper, if one be published in such township, at which meeting the said electors shall vote by ballot for or against a district township organization.

2952. When district township organization is agreed to. 1817; 16 G. A., ch. 155, § 3. If a majority of the votes cast at such election be in favor of such district township organization, each independent district shall become a subdistrict of the district township, and shall organize as such subdistrict, on the first Monday in March following, by the election of a subdirector.

2953. Election of subdirectors. 1818; 16 G. A., ch. 155, § 4. Each subdistrict so formed shall hold a meeting on the first Monday in March for the election of a subdirector, five days' notice of which meeting shall be given by the secretary of the old independent district, by posting written notices in three public places in each district, which notices shall state the hour and place of meeting.

2954. Government of district townships. 1819; 16 G. A., ch. 155, § 5. District townships organized under the provisions of the preceding four sections shall be governed and treated in all respects as other district townships: *provided*, that nothing in this act shall be construed to affect independent districts composed wholly or mainly of cities or incorporated towns.

2955. Meeting of board of directors. 1820; 16 G. A., ch. 155, § 6. When any district township is organized under the provisions of the preceding five sections, the subdirectors shall organize as a board of directors, on the third Monday in March, and make an equitable settlement of the then existing assets and liabilities of the several independent districts.

2956. Subdivision of independent districts. 17 G. A., ch. 133, § 1; 18 G. A., ch. 131. Any independent school district, organized under any of the laws of this state, may subdivide for the purpose of forming two or more independent school districts, or have territory detached to be annexed with other territory, in the formation of independent district or districts; and it shall be the duty of the board of directors of said independent district to establish the boundaries of the districts so formed; the districts so formed not to contain less than four government sections of land each; this limitation shall not apply when, by reason of a river, or other obstacle, a considerable number of pupils will be accommodated by the formation of a district containing less than four sections, or where there is a city, town, or village, within said territory, of not less than one hundred inhabitants, and, in such cases, the independent districts so formed shall not contain less than two government sections of land, such subdivision to be effected in the manner provided

for in sections two, three, and four of this chapter [§§ 2957–2959]; *provided*, that where either of the districts so proposed to be formed contains less than four government sections, it shall require a majority of the votes of each of the proposed districts to authorize such subdivision.

2957. Submission to vote. 17 G. A., ch. 133, § 2. At the written request of one-third of the legal voters residing in any independent school district, the board of directors of said independent district shall call a meeting of the qualified electors of the independent district, at the usual place of holding their meeting, by giving at least ten days' notice thereof by posting three notices in the independent district sought to be divided, and by publication in a newspaper, if one be published in the independent district, at which meeting the electors shall vote by ballot for or against such subdivision.

2958. Election of directors. 17 G. A., ch. 133, § 3. Should a majority of the votes cast be in favor of such subdivision, the board or boards of directors shall call a meeting in each independent district so subdivided or formed as aforesaid, for the purpose of electing by ballot three directors, who shall hold their offices one, two and three years respectively, the length of their respective terms to be determined by lot; and but one director shall be chosen annually thereafter, who shall hold his office for three years.

2959. Name of district. 17 G. A., ch. 133, § 4. At the meeting of the electors of each independent school district, as provided in the last section, they shall also determine by ballot the name to be given to their district, and each independent district, when so organized, shall be a body corporate, and the name so chosen shall be its corporate name; *provided*, that the board of directors of any district organized under the provisions of this act may change its name if any other district in the township shall have chosen the same name.

2960. How governed. 17 G. A., ch. 133, § 5. Independent districts organized under the provisions of this act shall be governed by the laws relating to independent districts.

MAY ISSUE BONDS.

2961. Power given; limit. 1821; 16 G. A., ch. 121. Independent school districts shall have the power and authority to borrow money for the purpose of redeeming outstanding bonds and erecting and completing schoolhouses, by issuing negotiable bonds of the independent district, to run any period not exceeding ten years, drawing a rate of interest not to exceed ten per centum per annum, which interest may be paid semi-annually; which said indebtedness shall be binding and obligatory on the independent district for the use of which said loan shall be made; but no district shall permit a greater outstanding indebtedness than an amount equal to five per centum of the last assessed value of the property of the district. [12 G. A., ch. 98, § 1.]

In an action on such bonds it will be presumed, until the contrary appears, that they are within the limit of indebtedness, and issued in proper manner and for proper purpose: *Mosher v. Independent Dist.*, 42–632. But if issued in excess of the limit, such bonds are void, even in the hands of an innocent holder for value: *McPherson v. Foster*, 43–48, 55.

2962. Question submitted. 1822; 18 G. A., ch. 59. The directors of any independent district may submit to the voters of their district at the annual or a special meeting, the question of issuing bonds as contemplated by the preceding section, giving the same notice of such meeting as is now required by law to be given for the election of officers of such districts, and the amount proposed to be raised by the sale of such bonds; which question shall be voted upon by the electors, and if a majority of all the votes cast on that question be in favor of such loan, then said board shall issue bonds to the amount voted, in denominations of not less than twenty-five dollars, nor ex-

ceeding one thousand dollars, due not more than ten years after date, and payable at the pleasure of the district at any time before due; which said bonds shall be given in the name of the independent district issuing them, and shall be signed by the president of the board and attested by the secretary and delivered to the treasurer, taking his receipt therefor, who shall negotiate said bonds at not less than their par value, and countersign the same when negotiated. The treasurer shall stand charged upon his official bond with all bonds that may be delivered to him; but any bond or bonds not negotiated may be returned by him to the board. [Same, § 2.]

[The word "any" in the second line is erroneously printed "the" in the Code.]

2963. Tax to pay. 1823. If the electors of an independent school district which has issued bonds, shall, at the annual meeting in March for any year, fail to vote sufficient school-house tax to raise a sum equal to the interest on the outstanding bonds which will accrue during the then coming year, and such proportionate portion of the principal as will liquidate and pay off said bonds at maturity, then it shall be lawful for the board of such district to vote a sufficient rate on the taxable property of the district to pay such interest, and such portion of the principal as will pay said bonds in full by the time of their maturity, and shall cause the same to be certified and collected the same as other school taxes. [Same, § 3.]

2964. Orders to bear interest. 1824. All school orders shall draw lawful interest after having been presented to the treasurer of the district and not paid for want of funds, which fact shall be indorsed upon the order by the treasurer. [Same, § 4.]

2965. Bonds to fund judgment. 18 G. A., ch. 51, § 1. Any school district or district township against which judgments have been rendered prior to the passage of this act, and which such judgments remain unsatisfied, may, for the purpose of paying off such judgment indebtedness, issue negotiable bonds of such district township, upon a resolution of the board of directors of the district township, running not more than ten years, and bearing a rate of interest not exceeding eight per cent. per annum, payable semi-annually, which bonds shall be signed by the president of the district and countersigned by the secretary, and shall not be disposed of for less than their par value, nor for any other purpose than that provided by this act, and such bonds shall be binding and obligatory upon the district township.

2966. Levy to pay. 18 G. A., ch. 51, § 2. It shall be the duty of the board of directors of any district township which issues bonds under this act, to provide for the payment of the same by the levy of tax therefor, in addition to the other taxes provided by law; and they are hereby required to levy such an amount each year as shall be sufficient to meet the interest on such bonds promptly as it accrues.

2967. Form. 18 G. A., ch. 51, § 3. The bonds issued under this act shall be in the name of the district township, and in substantially the same form as is by law provided for county bonds; shall be payable at the pleasure of the district township; shall be registered in the office of the county auditor; shall be numbered consecutively and redeemed in the order of their issuance.

[An act almost identical with the foregoing, but applying only to school districts, was passed in 1878, 17 G. A., ch. 132, but is omitted and the later act inserted.]

2968. Funding of indebtedness. 18 G. A., ch. 132, § 1; 21 G. A., ch. 95. Any independent school district or district township now or hereafter having a bonded or judgment indebtedness outstanding, is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent. per annum, payable semi-annually, for the purpose of funding said indebtedness; said bonds to be issued upon a resolution of the board of directors of

said district, provided that said resolution shall not be valid unless adopted by a two-thirds vote of said directors.

2969. Sale of bonds. 18 G. A., ch. 132, § 2; 21 G. A., ch. 95. The treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded or judgment indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par: but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded or judgment indebtedness. The actual cost of the engraving and printing of such bonds to be paid for out of the contingent fund of said district.

2970. Time to run; notice to stop interest. 18 G. A., ch. 132, § 3. Said bonds shall run not more than ten years, and be payable at the pleasure of the district after five years from the date of their issue; *provided*, that in order to stop interest on them, the treasurer shall give the owner of said bonds ninety days' written notice of the readiness of the district to pay and the amount it desires to pay, said notice to be directed to the postoffice address of the owner of the bonds; *provided further*, that the treasurer shall keep a record of the parties to whom he sells the bonds and their postoffice address, and notice sent to the address as shown by said record shall be sufficient.

2971. Form of bond. 18 G. A., ch. 132, § 4. Said bonds shall be in denominations of not less than one hundred dollars, and not more than one thousand dollars: and said bonds shall be given in the name of the independent district or district township, and signed by the president and countersigned by the secretary thereof; and the principal and interest may be made payable wherever the board of directors may by resolution determine.

2972. Treasurer to account for. 18 G. A., ch. 132, § 5. When said bonds are delivered to the treasurer to be negotiated, the president shall take his receipt therefor, and the treasurer shall stand charged on his official bond with the amount of the bonds so delivered to him.

2973. Levy of tax. 18 G. A., ch. 132, § 6. The tax for the payment of the principal and interest of said bonds shall be raised as provided in section one thousand eight hundred and twenty-three, chapter nine, title twelve, of the code [§ 2963]; *provided*, that if the district shall fail or neglect to so levy said tax, the board of supervisors of the county in which said district is located, shall upon application of the owner of said bonds, levy said tax.

2974. 18 G. A., ch. 132, § 7. All acts and parts of acts in conflict with this act are hereby repealed.

INDUSTRIAL EXPOSITIONS IN SCHOOLS.

2975. School directors may establish. 15 G. A., ch. 64, § 1. It shall be the duty of the board of directors of independent school districts, and the subdirector of each subdistrict, if they should deem it expedient, under the direction of the county superintendent, to introduce and maintain an industrial exposition in connection with each school under their control within this state.

2976. To consist of what. 15 G. A., ch. 64, § 2. These expositions shall consist of useful articles made by the pupils, such as samples of sewing, and cooking of all kinds, knitting, crocheting, and drawing, iron and woodwork of all kinds, from a plain box or horse-shoe to a house or steam-engine in miniature; also, all other useful articles known to the industrial world, or that may be invented by the pupils, in connection with farm and garden products in their season, that are the results of their own toil.

2977. Pupils to explain. 15 G. A., ch. 64, § 3. The pupils [shall] be required to explain the use and method of their work, and kind and process of culture [of] farm and garden products.

2978. Parents and friends. 15 G. A., ch. 64, § 4. The parents and friends of the pupils [shall] be allowed and requested to be present at said exposition.

2979. Ornamental work. 15 G. A., ch. 64, § 5. Ornamental work shall be encouraged when accompanied by something useful made by the same pupil.

2980. How often. 15 G. A., ch. 64, § 6. These expositions [shall] be held in the school-room upon a school-day as often as once a term, and not oftener than once a month.

CHAPTER 10.

OF SCHOOL-HOUSE SITES.

2981. Districts may take real estate for. 1825. It shall be lawful for any district township, or independent district, to take and hold under the provisions contained in this chapter, so much real estate as may be necessary for the location and construction of a school-house and convenient use of the school; *provided*, that the real estate so taken, otherwise than by the consent of the owner or owners, shall not exceed one acre. [13 G. A., ch. 124, § 1.]

2982. Where located. 1826. The site so taken must be on some public highway, at least forty rods from any residence, the owner whereof objects to its being placed nearer, and not in any orchard, garden, or public park. But this section shall not apply to any incorporated town. [Same, § 2.]

2983. May condemn; proceedings. 1827. If the owner of any such real estate refuse or neglect to grant the site on his premises, or if such owner cannot be found, the county superintendent of the county in which said real estate may be situated, shall, upon application of either party, appoint three disinterested persons of said county, unless a smaller number is agreed upon by the parties, who shall, after taking an oath to faithfully and impartially discharge the duties imposed on them by this chapter, inspect said real estate and assess the damages which said owner will sustain by appropriation of his land for the use of said house and school, said county superintendent giving to the owner of such real estate the same notice as is required for the commencement of a suit at law in the district court of the time of such assessment of damage, and make a report in writing to the county superintendent of said county, giving the amount of damages, description of land, and exact location, who shall file and preserve the same in his office. If said board shall, at any time before they enter upon said land for the purpose of building said house, deposit with the county treasurer for the use of said owner, the sum so assessed as aforesaid, they shall be thereby authorized to build said house, and maintain the right to said premises; *provided*, that either party may have the right to appeal from such assessment of damages to the circuit [district] court of the county where such real estate is situated, within twenty days after receiving notice that such assessment is made, which appeal shall be final; but such appeal shall not delay the prosecution of work upon said house if said board shall pay, or deposit with the county treasurer, the amount so assessed by such appraisers, and in no case shall said board be liable for costs on appeal, unless the owner of said real estate shall be adjudged a greater amount of damages than was awarded by said appraisers. The board shall in all cases pay costs of the first assessment. [Same, § 3.]

The holder of a tax certificate upon property sought to be condemned under these provisions is an "owner" in such sense that he is entitled to notice: *Cochran v. Independent School Dist.*, 50-663.

Notice by publication is not sufficient as against a party residing in the county: *Ibid.*

2984. For school purposes; reversion. 1828. The title acquired by said school districts in and to said real property, shall be for school purposes only, and in case the same should cease to be used for said purpose for the space of two years, then the title shall revert to the owner of the fee, upon the repayment by him of the principal amount paid for said land by said districts, without interest, together with the value of any improvements thereon erected by said districts; *provided*, that during the time said site is used for school purposes, the owners of the fee shall not injure or remove the timber standing and growing thereon. [Same, § 4.]

CHAPTER 11.

OF APPEALS.

2985. To county superintendent. 1829. Any person aggrieved by any decision or order of the district board of directors, in matter of law or of fact, may, within thirty days after the rendition of such decision, or the making of such order, appeal therefrom to the county superintendent of the proper county. [R., § 2133.]

This section does not clothe the superintendent with judicial powers: *School Dist. T'p v. Pratt*, 17-16.

Mandamus to compel action by a district board will not lie where the aggrieved party has a right of appeal to the county superintendent: *Marshall v. Sloan*, 35-445.

An appeal is authorized from the decision or order of the directors. It cannot be taken where they simply refuse or neglect to act where they should do so: *Case v. Blood*, 71-632.

Where a positive, official duty is enjoined upon a board of directors, which is not discretionary, an appeal from the board is not such a plain, speedy and adequate remedy that such duty may not be enforced by *mandamus: Benjamin v. District T'p*, 50-648.

A teacher, claiming that he is wrongfully discharged by the board for incompetency without being heard, should appeal. He cannot, without doing so, maintain an action for his salary on the ground that such dismissal is void: *Kirkpatrick v. Independent School Dist.*, 53-585.

Cases wherein the jurisdiction and power of directors are brought in question, and wherein questions arise involving the construction of statutes conferring power upon school officers, may properly be brought in the courts, as by *mandamus*, for instance, without prosecuting the appeal here provided. S *held* as to power of directors to make certain rules, under which plaintiff was excluded from school: *Perkins v. Board of Directors*, 56-476.

An appeal will lie from an action of the board in refusing in a proper case to attach a portion of a district township to an independent district for school purposes. If the board refuses to act upon the application action can be compelled by *mandamus: Hightower v. Overhaulser*, 65-347.

Appeal from action of directors in apportioning the assets and liabilities of new districts under § 2821, may be taken as here provided, and the final judgment of the county superintendent enforced by action: *Independent School Dist. v. Independent School Dist.*, 45-391.

Although a county superintendent cannot, on appeal, render a judgment, his action in a proper case is conclusive upon the parties. The remedy for the collection of the amount awarded where money is claimed would be by action: *Ibid.*

An appeal to the county superintendent lies from an order of the district board changing the site of the school-house: *Atkinson v. Hutchinson*, 68-161.

In determining an appeal the superintendent is not confined to the exact record made, but may look into the situation as it is at the time of the hearing, and, upon new evidence or such information as he sees fit to consider, may make such determination as will do justice at the time: *Ibid.*

It seems that an appeal will lie from the action of the board of directors of an independent district as well as from similar action by the directors of the district township: *Barnett v. Directors*, 73-134.

2986. Affidavit. 1830. The basis of the proceeding shall be an affidavit, filed by the party aggrieved with the county superintendent, within the time for taking the appeal. [R., § 2134.]

2987. Errors stated. 1831. The affidavit shall set forth the errors complained of in a plain and concise manner. [R., § 2135.]

2988. Notice to district. 1832. The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper district, in writing, of the taking of such appeal. And the latter shall, within ten days after being thus notified, file in the office of the county superintendent a complete transcript of the record and proceedings relating to the decision complained of, which transcript shall be certified to be correct by the secretary. [R., § 2136.]

2989. Parties notified. 1833. After the filing of the transcript aforesaid in his office, he shall notify in writing all persons adversely interested of the time and place where the matter of the appeal will be heard by him. [R., § 2137.]

2990. Hearing; take testimony. 1834. At the time thus fixed for hearing, he shall hear testimony for either party, and for that purpose may administer oaths if necessary, and he shall make such decision as may be just and equitable, which shall be final, unless appealed from as hereinafter provided. [R., § 2138.]

2991. Appeal to superintendent of public instruction. 1835. An appeal may be taken from the decision of the county superintendent, to the superintendent of public instruction in the same manner as provided in this chapter for taking appeals from the district board to the county superintendent, as nearly as applicable, except that he shall give thirty days' notice of the appeal to the county superintendent, and the like notice shall be given the adverse party. And the decision when made shall be final. [R., § 2139.]

The decision of the superintendent of public instruction in questions properly before him on appeal is final and cannot be reviewed by the courts: *Wood v. Farmer*, 69–533. It may be enforced by *mandamus: Newby v. Free*, 72–379.

2992. No money judgment. 1836. Nothing in this chapter shall be so construed as to authorize either the county or state superintendent to render a judgment for money, neither shall they be allowed any other compensation than is now allowed by law. All necessary postage must first be paid by the party aggrieved. [R., § 2140.]

CHAPTER 12.

OF THE SCHOOL FUND.

2993. Permanent fund; what constitutes. 1837. The following are hereby declared to be and remain perpetual funds for common school purposes, the interest of which only can be appropriated:

1. The five per cent. upon the net proceeds of the public lands in the state of Iowa;
2. The proceeds of the sales of the five hundred thousand acres of land which were granted to the state of Iowa under the eighth section of the act of congress, passed September fourth, A. D. 1841, entitled "An act to appropriate the proceeds of all sales of public lands, and to grant pre-emption rights;"
3. The proceeds of all sales of intestate estates which escheat to the state;
4. The proceeds of the sales of the sixteenth section in each township, or lands selected in lieu thereof. [R., § 1962.]

The school fund belongs to the state, which has solemnly pledged itself to maintain the same inviolate: *Des Moines County v. Harker*, 34–84.

The state is the legal owner of the school fund, and actions for the benefit of such fund are to be conducted in accordance with the rules pertaining to actions by the state: *Ibid.*

2994. Temporary fund. 1838. The following are declared to be and remain temporary funds for common school purposes, to be received and ap-

propriated annually in the same manner as the annual interest of the perpetual fund:

1. All forfeitures of ten per cent. which are authorized to be made for the benefit of the school fund.

2. The proceeds of all fines collected for violations of the penal laws.

3. The proceeds of all fines collected for the non-performance of military duty.

4. The proceeds of the sales of lost goods and estrays. [R., § 1963.]

A prosecution to recover a fine should be in the name of the state and not in the name of the treasurer of the county to which the fine would go when recovered: *Rogers v. Alexander*, 2 G. Gr., 443.

The statute giving the owner of stock killed by a railroad company double damages does not conflict with the provision that all fines and penalties shall go to the school fund. Such damages do not constitute fines or penalties: *Mackie v. Central R. of Iowa*, 54-540.

See as to fines for violations of the penal laws, Const., art. 9, § 4, and § 4606.

2995. Five per cent. fund. 1839. The five per centum of the net proceeds of all sales of the public lands is hereby made payable to the state treasurer, and the state auditor shall apportion the same among the several counties, taking into consideration the amount of the permanent school fund already in possession of and steadily loaned in said counties. [R., § 1964.]

2996. Permanent fund. 1840. Those portions of the permanent school fund enumerated in the second and fourth subdivisions of section eighteen hundred and thirty-seven of this chapter [§ 2993], are hereby made payable to the county treasurer of the county in which the lands sold are situated, and the proceeds of subdivision third of said section to the treasurer of the county where said escheated estates are. [R., § 1965.]

2997. Temporary fund. 1841. The temporary funds enumerated in section eighteen hundred and thirty-eight of this chapter [§ 2994], are hereby made payable to the county treasurers of the several counties in which they arise respectively, and shall be accounted for to the board of supervisors, who shall apportion the same among the several school districts of said county as provided by law. [R., § 1966.]

The board of supervisors cannot make an agreement as to the time of paying the fine payable to the school fund. The governor alone can remit fines: *State v. Stewart*, 74-336.

2998. Auditor to audit losses of. 1842. The auditor is required to audit all losses to the school fund as provided in section three of article seven of the constitution; and, for this purpose, he shall prescribe such regulations for the conduct of officers having such funds in charge as he shall deem necessary to ascertain such losses. [10 G. A., ch. 134, § 3.]

2999. To issue bonds. 1843. Whenever any amount, not less than one thousand dollars, is audited in favor of the permanent school fund for losses of the same, whereby the state becomes indebted to said fund, the state auditor shall issue the bond or bonds of the state in favor of said fund, bearing interest at the rate of eight per cent., payable semi-annually, on the first day of January and July after the issuing of the same, and the amount required to pay the interest on said bonds, as the same becomes due, is hereby appropriated out of any revenue in the state treasury. [Same, § 2.]

3000. To keep account with different funds. 1844. The state auditor shall keep the school fund accounts in books provided for that purpose, separate and distinct from the revenue books, and immediately after making the apportionment required by section sixty-six of chapter three of title two [§ 70], he shall notify the auditor of each county of the sum to which his county is entitled by said apportionment, and in those cases where the counties have less of such interest than they are entitled to by apportionment, he shall, by such notice, authorize the treasurer of each of such counties to

transfer the amount of such deficiency from the state revenue in his hands to such interest fund, and said notice shall be filed by the treasurer and be his proper voucher to the state for the amount of said revenue so transferred. And in those cases where the counties have an excess of such interest over the amount apportioned to each, such notice shall authorize the county treasurer to transfer such excess from the interest fund to the state revenue, and such notice shall be filed and be his proper voucher for such amount of the interest fund; and such excess so transferred shall be paid into the state treasury as revenue. [R., § 1969.]

[The words between "from the interest fund," in the fourteenth line, and the words "and such excess," etc., in the next to the last line, are erroneously omitted in the printed Code. By § 2885 only such schools as comply with the requirement as to giving instruction as to the effects of stimulants and narcotics can receive an allowance from the school fund.]

SALE OF LANDS.

3001. Sale of sixteenth section. 1845. The board of supervisors may, at such time as they deem best, authorize the trustees of any township where the sixteenth section, or land selected in lieu thereof, has not been sold, to lay out the same in such tracts as in their judgment will be for the best interests of the school fund, conforming, as far as the interests of said fund will permit, to the legal subdivisions of the United States surveys; and they shall appraise each tract at what they believe to be its true value, and certify to the said board of supervisors the divisions and appraisements made by them; said division and appraisement shall be approved or disapproved by said board at their first meeting after such report, and in case they disapprove the same, they may at once order another division and appraisement, should they deem it best. Where the board of supervisors approve, the county auditor shall make and keep a record of such division, appraisement, and approval. [R., § 1970.]

3002. Notice. 1846; 18 G. A., ch. 12, § 4. Whenever the board of supervisors shall offer for sale the sixteenth section, or lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand acre grant, the county auditor shall give at least forty days' notice by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated; and also publish a notice of said sale for four weeks preceding the same, in a newspaper, should one be published in the county; if there is none published in said county, then in some newspaper authorized by the board of supervisors; and he shall describe the land to be sold, and state the time and place of sale; then at such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and shall sell either for cash, or one-third cash, and the balance on a credit not exceeding ten years, with interest on the same at the rate of eight per cent. per annum; said interest to be paid at the office of the county treasurer of said county, on the first day of January in each year; but in no case shall the land so offered be sold for less than its appraised value; nor shall any member of the board of supervisors, or county auditor, township trustee, or any person who was engaged in the division and appraisement of said land, be, directly or indirectly, interested in the purchase thereof; and any sale made where such parties, or any of them, are so interested shall be void and of no effect. [R., § 1971.]

3003. Minimum price. 1847. No school lands shall be sold for less than the minimum price of six dollars per acre, except as hereinafter provided, and in no case for less than the amount at which it has been appraised. [10 G. A., ch. 118, § 3; 13 G. A., ch. 29, § 1.]

3004. Prerequisites of sale. 1848. No school lands of any kind shall be sold until there shall be at least twenty-five legal voters resident in the congressional township in which said school land is situated, and in a fractional township of less than thirty-six sections the number of voters residing therein must have at least the same ratio to twenty-five as the number of sections, or parts of sections, in said township has to thirty-six, which fact in all cases must be shown to the satisfaction of the board of supervisors. [13 G. A., ch. 29, § 2.]

3005. Sale for less. 1849. Where the board of supervisors of any county shall have once, at least, offered for sale any school lands in compliance with the requirements of section eighteen hundred and forty-five, and eighteen hundred and forty-six of this chapter [§§ 3001, 3002], and are unable to sell the same for the minimum price of six dollars per acre, and if, in the opinion of said board, it is for the best interests of the school fund that the same be sold for a less price, then said board may instruct the auditor of said county to transmit by mail or otherwise to the register of the state land office, a certified copy of the proceedings of said board of supervisors in relation to the order of sale of said land, and subsequent proceedings in relation thereto, including the action of the township trustees, and the price per acre at which said land shall have been appraised, which transcript the register of the state land office shall submit to the executive council; and if a majority of said council, including the register, shall approve of the sale of said land for less than the minimum price of six dollars per acre, then the register shall certify such approval to the auditor of the county from whence said transcript came, which certificate shall be transcribed in the minute book of the board of supervisors of said county, and, thereupon, said land may again be offered and sold to the highest bidder, as provided in section eighteen hundred and forty-six of this chapter [§ 3002] without being again appraised; but in no case under the provisions of this section, shall any school land be sold for less than one dollar and twenty-five cents per acre. [Same, § 3.]

3006. Lands bid in on execution. 1850. When any lands have been bid in by the state in behalf of the school fund, on execution founded on a judgment in favor of said fund, such land shall be sold in the same manner as other school lands. Whenever any such lands shall have been conveyed to the counties in which the same are situated for the use of the school fund, instead of to the state as required by law, such conveyance shall be considered valid and binding, and on the proper certificates being made as hereinbefore provided, patents shall be issued to the purchasers of said lands in like manner as in cases where the conveyances were made to the state for the use of the school fund. [9 G. A., ch. 148, § 11; 12 G. A., ch. 78, § 2; 13 G. A., ch. 29, § 5.]

This section applies to land purchased upon judgments recovered upon mortgages or contracts, such as the county authorities are authorized to take or make with relation to the school fund. Where the school fund was loaned by the state under the provision of a special statute, and not by the county under the general statutes, *held*, that the county had no authority to bid in such land at the sale thereof under foreclosure of such mortgage: *Carter v. Sherman*, 63–689.

3007. Patent to issue. 1851. When any purchaser shall pay the full amount of his purchase money at the time of purchase, or, whenever full payment shall be made for lands previously purchased belonging to the school fund, the auditor shall forthwith issue a certificate of that fact, which shall be transmitted to the state land office and entitle the purchaser to a patent which shall be issued by the governor. [R., § 1972; 9 G. A., ch. 148, § 12.]

3008. Contracts. 1852. In case the lands are purchased upon a partial credit as hereinbefore provided, the contract shall at once be reduced to writ-

ing, signed by the parties, and recorded in the office of the recorder, after which it shall be filed in the office of the county auditor, and during the continuance of such contract, it shall be lawful for such purchaser, his heirs, or assignees, at any time to pay the principal and interest due upon such contract, and receive a certificate of purchase as mentioned in the preceding section. [R., § 1973.]

3009. Sale on credit. 1853. When, in the judgment of the board of supervisors, any school lands are of such a character that a sale upon partial credit would be unsafe or incompatible with the interest of the school fund, and especially in the case of timbered lands, the board of supervisors may, in their discretion, exact the whole of the purchase money in advance; or, if they sell such land upon a partial credit as hereinbefore prescribed, they shall require good collateral security for the payment of the purchase money upon which credit is given. [R., § 1974.]

3010. Suit to collect. 1854. Whenever any purchaser of any school lands, sold under the provisions of this chapter upon a partial credit, or any person to whom a portion of the school fund has been loaned, fails to pay the interest upon the amount due the school fund from him on the first day of January, and such payment is not made within six months thereafter, then the entire amount, both of principal and interest, owing to the school fund from such person, shall be deemed to have become due, and the county auditor shall report the name of the delinquent, together with the sum total due from such delinquent, to the district [county] attorney of his judicial district [county], who shall immediately commence suit for the collection of the amount thus reported. The provisions of this section, in so far as they provide for the principal owing for the purchase of school lands, or for money borrowed from the school fund becoming due and being collected at an earlier day than that stipulated in the contract upon failure to pay the interest, are hereby declared to be a part of every contract made under and by virtue of this chapter, whether expressed in such contract or not. [R., § 1975.]

3011. Collection of university funds. 1855. The provisions of the last section shall be of force, as far as applicable, to all cases where land is purchased or money borrowed from the university fund, and, in case of delinquency as provided for in said section, the treasurer of the state university shall make the report therein required to the district [county] attorney of the district [county] where the party so purchasing or borrowing resides, or where the real estate given as security for said purchase or loan is situated. [R., § 1979.]

3012. Lands taxable. 1856. All school lands, the sale of which is provided for under this chapter, shall be subject to taxation from and after the execution and delivery of the contract to the purchaser. [R., § 1976.]

3013. Waste punished. 1857. All contracts relative to the sale of school lands provided for in this chapter, shall be subject to such laws as now are, or may hereafter be in force relative to the prevention or punishment of waste. [R., § 1977.]

3014. Township trustees; duty. 1858. The township trustees in each township, shall see that no waste be committed upon any school lands lying in their township, and in case any such waste be attempted, they shall apply by petition to the district [or circuit] court, or to any judge thereof, for an injunction to stay waste, and the same, if granted, shall be without bond. The court may make such order in the premises as shall be equitable and calculated to secure the school lands from waste or destruction and may adjudge damages against the party for injuries done in such cases; the costs shall abide the event of the suit, and the damages shall be paid to the county treasurer and constitute a part of the permanent school fund. [R., § 1978.]

3015. Survey. 1859. When, in the opinion of the board of supervisors, it may be necessary to have a portion of the school lands within their county surveyed, they may employ the county surveyor for the purpose, who shall be paid out of the county treasury upon proof made of the request and performance of the service. [R., § 1980.]

FUNDS AND SECURITIES.

3016. Supervisors to manage. 1860. The several boards of supervisors shall hold and manage the securities given to the school fund in their respective counties, and also all judgments and lands therein belonging to said fund for the use of said fund; and to that end such counties shall have power to sue in their own name, for the use of said fund, either by the district [county] attorney, or such other attorney as such board shall select, and to do all other acts in relation to the same necessary for the protection of said fund, and such counties shall be severally liable for all losses upon loans of such fund made in such county. But any county may discharge itself from any liability in any case wherein its liability is not made absolute by sections eighteen hundred and eighty-one, and eighteen hundred and eighty-two of this chapter [§§ 3042, 3043], by showing that the alleged loss was not incurred by reason of any default of its officers or by taking insufficient or imperfect securities. The state auditor shall examine and adjust any claim by a county for exemption from liability under the foregoing proviso, upon proof in writing submitted to him in behalf of the county, within three months after he shall notify the county auditor of his readiness to receive it. In the absence of such proof, or, if the same is insufficient, the state auditor shall charge the amount of such loss against the county as a final adjustment. If found sufficient, he shall present the facts thereof in his report to the general assembly next ensuing. [9 G. A., ch. 148, § 1; 14 G. A., ch. 68.]

As the lien of a school-fund mortgage is superior to that of a tax title subsequently acquired on the property, the county has no authority to buy in such tax title, such an act not being necessary for the protection of the fund; and *held*, that it had no authority to buy in such title for the purpose of defeating the lien of a mortgage held by a third party and prior to the one in favor of the fund: *Miller v. Gregg*, 26–75.

The county being liable for all losses upon loans of the school fund made in the county may sue in behalf of such fund, in its own name, as trustee of an express trust: *Madison County v. Tullis*, 69–720.

In the management of the school fund the board of supervisors have authority to do acts which, in the exercise of wisdom and care, men of affairs ordinarily do for the security and collection of debts. Therefore, *held*, that a compromise, in a particular case, of a claim in behalf of the school fund was valid: *Poweshiek County v. Buttles*, 70–246.

3017. Fund loaned. 1861. The permanent school fund shall be loaned out as hereinafter provided, as the same may come into the hands of the county treasurer, but no loan to any one person or company shall exceed the sum of five hundred dollars, nor shall any loan of the school fund be made to the county auditor, treasurer, or to any member of the board of supervisors. Said loans shall not be made for a shorter time than one year, nor for more than five years. [R., § 1981.]

[This section is modified by § 3023.]

3018. How secured; interest. 1862; 19 G. A., ch. 174, § 2. The payment of the money thus borrowed, together with interest thereon at the rate of ten per cent. per annum, shall be secured by promissory notes executed by the party borrowing, and by mortgage on unincumbered real estate, which, exclusive of any buildings, is appraised by the appraisers hereinafter provided for at double the value of the amount of money loaned; which real estate

must be situated in the county where such loan is made. [R., § 1982; 10 G. A., ch. 118, § 1; 13 G. A., ch. 46.]

[Rate of interest changed to eight per cent.: See § 3020.]

A loan made by an officer out of the school fund, without first taking the security provided by the statute, may be repudiated by the proper authorities and the officer and his sureties held liable, or the loan may be ratified and its collection enforced against the borrower and sureties on the note given for the money: *Bremer County v. Barrick*, 18–390.

3019. Value of security. 1863. The value of real estate offered as security for money loaned as herein provided, shall be fixed by three appraisers under oath, who shall be selected by the county auditor, and, in making the valuation provided for, the appraisers shall not take into consideration any buildings that may be on the land; said appraisers shall be allowed for their services the sum of fifty cents each, to be paid by the party borrowing, and the party borrowing shall pay for recording the mortgage given to secure such loan. [R., § 1983.]

3020. Rate of interest. 18 G. A., ch. 12, § 1. The rate of interest on all permanent school funds loaned after January first, A. D. 1880, shall not exceed eight per cent. per annum from date of such loan.

3021. Interest on interest. 18 G. A., ch. 12, § 2. Interest not paid when due shall bear interest at the same rate as the principal.

3022. Interest charged to counties. 18 G. A., ch. 12, § 3. After July first, A. D. 1880, the counties having permanent school funds in control shall be charged only six per cent. instead of eight per cent. as now provided by the code.

3023. Amount of loan to one person. 18 G. A., ch. 12, § 6. Loans may hereafter be made to one person, or one company, to the amount of one thousand dollars; *provided*, it is found impracticable to keep the whole amount of the funds loaned in sums of five hundred dollars or less.

3024. 18 G. A., ch. 12, § 7. All laws inconsistent with this act are hereby repealed.

3025. Legalizing acknowledgments. 21 G. A., ch. 163, § 1. All acknowledgments of school-fund mortgages and contracts heretofore taken and certified by any county auditor or deputy county auditor in any county in this state are hereby legalized and declared to be as legal, valid and binding, as though such officer had been authorized to take such acknowledgment when taken.

LOANS.

3026. Permanent fund. 1864. When any person desires to borrow from the permanent school fund, he shall apply to the county auditor, and if, in the opinion of said auditor, it would be to the interest of the school fund to grant such application, he shall order the necessary papers to be made out to secure the amount thus to be borrowed, as required by sections eighteen hundred and sixty-two and eighteen hundred and sixty-three of this chapter [§§ 3018, 3019]. When the same are made out, they shall be presented to said auditor, who shall, if he approves the same, indorse thereon, "accepted," and sign his name below the same, and he shall examine the title to any real estate offered as security, and make and preserve an abstract of such title, which shall be certified by him and submitted to the board of supervisors at the first meeting thereafter; he may charge a fee not to exceed two dollars for his services in making such abstract of title, to be paid by the party borrowing. He shall then give to the party borrowing a copy of the promissory note, certifying over his hand and official seal, that it is a correct copy of the same,

which, together with a mortgage securing it, has been filed in his office, and upon the parties presenting said certificate to the treasurer, he shall pay the amount specified in said copy of note out of the permanent school fund in his possession, and retain the said certified copy as his voucher. The said auditor shall file the original note in his office, and also the mortgage, after having it recorded. [R., § 1984.]

The county auditor is not authorized to receive money paid into the school fund: *Mahaska County v. Searle*, 44-492; *Mahaska County v. Ruan*, 45-328.

The fact that the clerk of the court previously made payment of money collected for the school fund to the auditor, *held* not sufficient to relieve him from liability for a subsequent payment, made in the same manner, which did not reach the treasurer: *Mahaska County v. Searle*, 44-492.

The board of supervisors has power over the management of the school fund, but the auditor has the custody of the securities thereof: *Madison County v. Tullis*, 69-720.

It is the duty of the auditor to preserve and safely keep the notes and mortgages, and when he fails to do so without sufficient excuse he becomes liable on his bond: *Ibid.*

The auditor has no authority to release a portion of the premises covered by a school-fund mortgage upon the payment of the *pro rata* amount secured thereby: *Madison County v. Kridler*, 56-32.

[Sec. 1865 is repealed by 19 G. A., ch. 174, § 1.]

3027. Report of loans; approval. 1866. At each meeting of the board of supervisors, the auditor shall make a full statement of all money received for and loaned out of the school fund under his control, and shall also submit for their examination all notes, mortgages, and abstracts of title connected with the school fund which have come into his possession since their last meeting. Said board, at the first meeting after such report and papers are submitted to them, shall either approve or disapprove of each loan made by said auditor. Should they disapprove of any loan or security thus reported, they may require the party borrowing to give additional security within thirty days; and in case of failure so to do, the entire amount, both of principal and interest, owing to the school fund, shall be deemed to have become due, and the district [county] attorney shall be directed immediately to collect the same; and in such case, should it be found impossible to collect the entire amount due, and the security prove insufficient, then the county auditor and his bondsmen shall be liable for the deficiency. The provision herein contained with regard to principal and interest becoming due on the failure to give additional security when required for money borrowed from the school fund, is hereby declared to be a part of every contract made under and by virtue of this chapter, whether expressed in the contract or not. [R., § 1985.]

3028. How paid. 1867. When any person desires to pay either principal or interest due the school fund, he shall obtain a certificate from the county auditor specifying the amount due from such person to the school fund, stating whether it is principal or interest, or both, and setting forth distinctly the amount of each. Upon the presentation of which certificate to the county treasurer, the treasurer shall receive the amount so specified from the person presenting the certificate, and shall indorse on said certificate the date and his name, and upon the return to the auditor of such certificate so indorsed, the party returning it shall have a receipt from him for the amount so paid. [R., § 1986.]

The auditor is not authorized to receive payments: See notes to § 3026.

3029. Prior incumbrances. 1868. Whenever any portion of the school fund has been loaned upon real estate security, upon which exists a prior incumbrance other than for taxes, the board of supervisors shall have authority, in their discretion, if they deem it necessary to remove said prior incumbrance in order that said fund may ultimately realize the money upon said loan, to appropriate so much money out of the school fund, if any there be within said county, as shall be necessary to remove said incumbrance; *provided*, said incumbrance shall not exceed one-half the actual cash value of said real estate. [9 G. A., ch. 148, § 2.]

GENERAL PROVISIONS.

3030. Assignment of claim. 1869. The board of supervisors may, by resolution, assign without recourse any school fund claim to any person having a subsequent lien on the premises affected by such claim, upon the full payment of the amount due the said fund, but not otherwise. [10 G. A., ch. 118, § 4.]

3031. Agents to examine securities. 1870. Such board may, when deemed necessary, employ some competent person to examine the securities aforesaid, make abstracts of titles to the lands mortgaged, and make out complete statements thereof for such boards, and under the direction of said boards, or committee thereof, to procure the renewal of such notes and mortgages, when demanded by persons entitled thereto, upon such terms as to time and security in all respects as in making new loans. And such agent may, with the consent of said board or committee, take from any person responsible for any loan, any additional security by way of bond or mortgage, or both, in cases where the property mortgaged is inadequate security for the sum loaned, and the applicant shall pay up all interest and procure the written consent of the securities on the note; but in all cases of the continuance of loans, as well as in cases of new loans, abstracts of title shall be presented and filed with the mortgage, which shall show that the title to the mortgaged premises is in the mortgagor, free and clear of any incumbrance or debt. [9 G. A., ch. 148, § 3.]

3032. Reloaning. 1871. Any person responsible to the school fund for any part of the principal thereof, who shall promptly pay all interests and costs, if any, thereon, whether the same may be rendered into a judgment or not, shall be permitted to borrow such principal upon complying in all respects with the requirements of law relating to new loans. [Same, § 4.]

The right to reborrow the principal must be exercised under such regulations as the board of supervisors may establish by virtue of § 3016. Such right cannot be set up as a defense in an action for the principal sum, but may be enforced, if it exists, by action of *mandamus* against the auditor: *Emmett County v. Skinner*, 48-244.

3033. Notice of delinquency. 1872. Every county auditor in whose county there are outstanding contracts on the sale of school lands, which are due, shall immediately publish a notice requiring all persons holding any such lands, to at once pay up the amount due thereon, or otherwise make satisfactory arrangements for an extension of time. He shall also give a like notice to all mortgagors to said fund on whose notes either principal or interest is due. Such notices shall be printed for four weeks in a newspaper published in the county, if there be one; if there be none, then in such newspaper published in this state as will be most likely, in the opinion of said auditor, to give notice to all concerned; and a copy of such notice shall be posted for the same time at the outer door of the building in which the last district court in said county was held. [Same, § 5.]

3034. Suit brought; injunction; attorney's fee. 1873; 18 G. A., ch. 12, § 5. In case the person holding lands so contracted or mortgaged shall neglect to pay the sums due thereon, or make an arrangement for an extension of time within three months from the first publication of such notice, the board of supervisors may cause suit to be brought and prosecuted with the utmost diligence to secure said fund, and in any action in favor of a county for the use of the school fund, an injunction may issue without bond, and in any such action, where service is made by publication, default and judgment may be entered and enforced without the bond required of individuals. In all such suits the court shall give the plaintiff, as a part of the costs, such an amount as will be a sufficient compensation for the plaintiff's attorney in the case, but in no case to exceed ten per cent. on the amount for which

judgment is rendered, and in no case to exceed the sum of twenty-five dollars. [Same, § 6.]

The provision of this section as amended relating to attorneys' fees pertains to the mere question of costs, and is therefore not unconstitutional as referring to mortgages executed prior to its passage: *Kossuth County v. Wallace*, 60–508.

3035. Land bid off. 1874. In case of sales of lands on execution founded on any such mortgage or contract, the attorney for said board, or other person authorized by said board, shall bid on behalf of the state or county, as the case may be, for the use of said fund, such sum as the interests of said fund may require, and if struck off to the state, the same shall be held and disposed of in all respects the same as other lands belonging to said fund, except as hereinafter provided. [Same, § 7.]

3036. Contracts and notes payable to county. 1875. All contracts, notes and mortgages given to said fund shall be made payable to the county controlling them, but no such contracts, notes, or mortgages shall be invalid because they are made payable to any other payee, but the same shall be deemed and taken to belong to said county for the use of said fund, and suits may be maintained thereon in the name of the said county, with the same effect as if they were drawn payable to the said county. [Same, § 9.]

3037. Treasurer to keep accounts. 1876. Each county treasurer shall, immediately upon receiving or paying out any moneys belonging to the school fund, enter a correct account thereof on proper books kept by him for the purpose in all cases where money is received, distinguishing between principal and interest, and shall keep an account showing all money due the school fund, whether principal or interest, and designating the amount of each and from whom due, and his books shall at all times present a clear and intelligible statement of the school fund in his hands. Said books shall at all times be open to the inspection and examination of any householder or tax payer in the county. [R., § 1990.]

3038. Auditor to keep accounts; settlement; report. 1877. Each county auditor shall keep in his office, in books provided for that purpose, an account to be known as the school fund account, in which he shall enter all notes, mortgages, bonds, and assets of every kind and description which may come into his hands, and he shall open accounts with the county treasurer in which he shall charge him with all money in his hands at the time such account is opened, and also with all money which may thereafter be paid to him, as shown by the certificates duly indorsed as hereinbefore provided for, distinguishing between principal and interest, which shall be kept in distinct accounts; and shall, on the third Monday in May, the first Monday of October, and the third Monday of December, in each and every year, make a complete settlement of the school fund account with the county treasurer, from the time of the last settlement, and at each regular meeting of the board of supervisors, he shall submit a full report of his last settlement with the county treasurer, and also of all notes, mortgages, bonds, and assets of every kind and description which have come into his hands since the last meeting of the board. [R., § 1991.]

3039. Penalty. 1878. Any county treasurer, or auditor, failing or neglecting to perform any of the duties which are required of him by the provisions of this chapter, shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment to be entered against the party and his bondsmen and the proceeds to go to the school fund. [R., § 1992.]

3040. Extending time. 1879. Whenever it shall be evident to the board of supervisors, that the interest of the school fund will be endangered by im-

mediate prosecution of any mortgage, or the sale of mortgaged premises, they may give such reasonable time as they may deem for the best interests of the school fund. [R., § 1993.]

3041. No limitation. 1880. Lapse of time shall in no case bar any action brought, or to be brought, on any contract for any part of the school fund, nor shall such lapse of time prevent the introduction of evidence in any such action, any provision of this code to the contrary notwithstanding. [9 G. A., ch. 148, § 13.]

[For similar provision, see § 3747.]

COUNTIES RESPONSIBLE.

3042. Foreclosure of mortgages. 1881. On and after the first day of January, A. D. 1874, the board of supervisors of the several counties shall have sole control and management of all loans on mortgages then held or thereafter made, and shall, when necessary, have them foreclosed at the expense of the county; and any losses sustained or gains realized upon foreclosures and resales of mortgaged property, shall be made good by or inure to the benefit of the county, as the case may be; *provided, however*, that upon a foreclosure of contracts, when the land is bid in by the county, the auditor of state, as soon as notified by the county auditor that the foreclosure has been effected and the lands bid in, shall give the county credit for the original amount of the notes remaining unpaid; and on being notified by the county auditor that a resale has been effected, he shall charge the county with the full amount of resale; but when the land is purchased by a third party on the foreclosure for a less amount than due on the contract notes, the loss shall be sustained by the county. County auditors shall report annually on the first day of January, the amounts of all sales and resales of the sixteenth section, five hundred thousand acres grant, and escheated estates made the year previous; and the auditor of state shall charge up the same to said counties, and also charge interest on the same from the date of said sales or resales, at the rate of eight per cent. per annum. [14 G. A., ch. 34, § 3.]

3043. Liable for interest. 1882. On and after the first day of January, A. D. 1874, the auditor of state shall charge up to each county having permanent school fund under its control, interest on the whole amount in said county, at the rate of eight per cent. per annum, semi-annually, on the first day of January and July of each year, which amount so charged shall become due and payable on the first day of January and July of the year following, and be embraced in the semi-annual apportionment of interest collected for the year 1875 and each year thereafter, and shall be deemed the whole amount due from each county on account of interest accrued subsequent to the first day of January, 1874. Any surplus of interest collected over the eight per cent. charged to the counties, shall be paid into the county treasury for the benefit of the county. If any county should fail to collect the full amount of interest due the state, the deficiency shall be advanced from the county treasury, and if any county becomes delinquent in the payment of the full amount of interest due the state, the auditor of state shall charge to and collect from such county a penalty of one per cent. per month on the amount delinquent until paid. [Same, § 4.]

[Rate of interest is now six per cent.: See § 3022.]

3044. Transfers. 1883. Whenever there are funds belonging to the permanent school fund in any county amounting to one thousand dollars that cannot be loaned according to law, the county auditor may certify the fact to the auditor of state, who shall order a transfer of said funds to some other county, or counties, where, in his opinion, it can be loaned readily. Upon

such transfer being made, the auditor of state shall give the county making the transfer credit for the amount transferred, and shall charge the county or counties to which the transfer is made with the amount transferred, and shall afterwards charge interest on the actual amount in the possession of each county. [Same, § 5; 10 G. A., ch. 118, § 2.]

3045. County auditor to report. 1884. The county auditors shall continue to report to the auditor of state, semi-annually, as now required by law, the amount of interest collected and which accrued previous to the first day of January, A. D. 1874, until the amount of interest due up to that date has been collected. The amount collected from time to time shall be added to the semi-annual apportionment of interest heretofore provided for. The county auditor shall also embrace in said reports, in the year 1875 and thereafter, the amount of interest collected and which accrued subsequent to the first day of January, 1874, in a separate item. [14 G. A., ch. 34, § 6.]

CHAPTER 13.

OF THE STATE LIBRARY.

3046. Trustees. 1885. The governor, judges of the supreme court, secretary of state, and superintendent of public instruction, shall, by virtue of their office, constitute a board of trustees of the state library, of which the governor shall be president. [14 G. A., ch. 92, § 1.]

3047. Powers. 1886. The said trustees shall have full power to make and carry into effect such rules and regulations for the superintendence and care of the books, maps, charts, papers, and furniture contained in the state library, and for the arrangement and safe-keeping of the same as they may deem proper. [Same, § 2; 13 G. A., ch. 145.]

3048. Regulation as to use. 1887. The said trustees shall provide in their rules and regulations, that any member of the general assembly, any member or attorney of the supreme court, during the sessions of the same, the judges and attorneys of the courts of the United States, and the heads of departments of state, shall be permitted, under proper restrictions, penalties, and forfeitures, to take from the library any books, excepting such as the trustees shall determine ought not to be removed therefrom; but none of such persons shall be allowed to take such books or property from the library without executing a receipt therefor, nor to retain the same more than ten days at a time. [14 G. A., ch. 92, § 3.]

3049. Same. 1888. No books or other property shall be removed from the seat of government, and no person shall be entitled to take from the library more than two books at the same time; *provided*, that during the terms of the supreme court of the state, or the federal courts, the judges and attorneys of said courts may be permitted to take and use any number of books needed on the trial of causes, but such books shall not be taken from the seat of government, and shall be returned according to law. [Same, § 4.]

3050. Books not to be removed. 18 G. A., ch. 69, § 1. From and after the taking effect of this act, no books, maps, charts or papers, belonging to the state library, shall be removed from the capitol building, except to remove the same from the old capitol building to the new capitol building when such building shall have been prepared to receive the same.

3051. 18 G. A., ch. 69, § 2. All acts or parts of acts inconsistent with this act are hereby repealed, so far as the same conflicts with this act.

3052. Kept open. 1889. The state library shall be kept open every day during the sessions of the general assembly and the supreme court, and during such other days as the trustees shall direct, and during such hours as shall be determined by the trustees. [14 G. A., ch. 92, § 5.]

3053. Librarian; appointment; bond. 1890. The state library shall be in the custody of the state librarian, who shall be appointed by the governor, and who shall hold the office for the term of two years, commencing on the first day of May, and until his successor shall be appointed and qualified. Before entering upon the duties of his office, he shall give a bond with good and sufficient surety, in the penal sum of five thousand dollars, in such form as the governor shall approve, conditioned for the performance of all the duties required of him by law, and for the observance of all the rules prescribed by the trustees of the library. [Same, § 6.]

[The word "thousand," in the sixth line, is erroneously printed "hundred" in the Code.]

3054. Duties. 1891. The librarian shall give his personal attendance upon the library during the hours it shall be directed to be kept open, and shall perform such duties as shall be imposed on him by law or shall be prescribed by the rules and regulations of the trustees. [Same, § 7.]

3055. Prepare catalogue. 1892. The librarian shall prepare a complete alphabetical catalogue of the library, number the books therein, and report the same to the governor, who shall cause the same to be published for the use of the library. [Same, § 9.]

3056. Books labeled. 1893. The librarian shall cause each book in the library to be labeled with a printed label to be pasted on the inside of the cover, with the words "Iowa State Library," with the number of the volume in the catalogue of said library inscribed on said label, also to write the same words at the bottom of the thirtieth page of each volume. All books that may hereafter be added to the library shall be labeled in the same manner, and entered on the catalogue, immediately on their receipt, and before they can be taken therefrom. [Same, § 10.]

3057. Report of books taken out. 1894. The librarian shall make report to the governor five days before the adjournment of any session of the general assembly, of the number of books that have been taken out of the library by the members, giving the names of all members that have any books at the date of such report, with the name and number of such book. [Same, § 11.]

3058. Fines and penalties. 1895. All fines, penalties, and forfeitures, imposed by the rules and regulations of the library for any violation of such rules and regulations, may be recovered in any proper action or proceeding in the name of the state, before any court of competent jurisdiction; and all such fines, penalties, forfeitures, and recoveries shall be applied to the use of the library, under the direction of the trustees. [Same, § 12.]

3059. Books lost or injured. 1896. Any person injuring, defacing, destroying, or losing a book, shall pay to the librarian twice the value of the book, and, if it be one of a set, he shall be liable to pay the full amount of the value of the set, and the librarian shall prosecute such person on such liability; *provided*, that if such person shall, within a reasonable time, replace the book so injured or lost, he shall not be liable under this section. [Same, § 13.]

3060. Report. 1897; 22 G. A., ch. 82, § 33. The librarian shall report to the governor, whenever required, a list of books and other property missing from the library, an account of fines and forfeitures imposed and collected, and the amount uncollected, a list of the accessions to the library since the

last report, and all other information required by the governor. He shall also make a full and specific report to the governor biennially. [Same, § 14.]

[Further as to the report and its publication, see §§ 122-126.]

[Sec. 1898 is repealed by 16 G. A., ch. 159.]

3061. Appropriation for. 1899; 18 G. A., ch. 194; 19 G. A., ch. 13; 19 G. A., ch. 113; 20 G. A., ch. 191, § 3. There is hereby appropriated, out of any funds in the state treasury not otherwise appropriated, the sum of three thousand dollars, annually, commencing on the first day of January, 1881, to be expended by the board of trustees in the purchase of books for the library. [Same, § 16.]

3062. Assistants; messenger. 21 G. A., ch. 158, § 1. The state librarian is authorized to employ to aid in the library one first assistant at a salary of six hundred dollars a year, one second assistant at a salary of five hundred dollars a year, and one messenger at a salary of three hundred dollars a year.

3063. Salaries. 21 G. A., ch. 158, § 2. The salaries herein provided to commence on the fourteenth day of April A. D. 1886 and to be paid monthly on warrants to be drawn by the auditor on the state treasury.

3064. 21 G. A., ch. 158, § 3. All acts inconsistent with this act are hereby repealed.

CHAPTER 14.

OF THE STATE HISTORICAL SOCIETY.

3065. Appropriation; purposes. 1900; 18 G. A., ch. 71. There is hereby annually appropriated, until the legislature shall, by law, otherwise direct, to the state historical society at Iowa City, in connection with and under the auspices of the state university, the sum of ten hundred dollars, to be expended by that society in collecting, embodying, arranging, and preserving in authentic form, a library of books, pamphlets, maps, charts, manuscripts, papers, paintings, statuary, and other materials illustrative of the state of the history of Iowa, to rescue from oblivion the memory of its early pioneers, to obtain and preserve varieties of their exploits, perils, and hardy adventures; to secure facts and statements relative to the history, genius, and progress or decay of our Indian tribes; to exhibit faithfully the antiquities, past and present resources of Iowa; also to aid in the publication of such of the collections of the society as the society shall from time to time deem of value and interest; to aid in binding its books, pamphlets, manuscripts, and papers, and in paying other necessary and incidental expenses of the society. [R., § 1959.]

3066. Board of curators; appointment. 1901. The board of curators of said society at Iowa City shall consist of eighteen persons, of whom nine shall be appointed by the governor of the state, and nine elected by the members of the society. The term of office of said curators shall be two years, except as provided in the next section, and they shall receive no compensation for their services. The curators appointed by the governor, shall be appointed on or before the last Wednesday in June in each even-numbered year, and their term of office shall commence on that day. And at the annual meeting of said historical society, held next before the last Wednesday in June in each odd-numbered year, there shall be elected by ballot from the members of the society, nine curators for the term next ensuing. [14 G. A., ch. 109, § 1, 2.]

3067. Members admitted. 1902. The members of said society may be admitted at any time under the rules now in force, or such other rules as may hereafter be adopted by the board of curators. [Same, § 3.]

3068. Annual meeting. 1903. The annual meeting of the society shall be held at Iowa City, on the Monday preceding the last Wednesday in June of each year. [Same, § 4.]

3069. Officers; term and duties. 1904. The board of curators shall choose, annually, or oftener if need be, a corresponding secretary, recording secretary, a treasurer, and a librarian, who shall be selected from the members of the historical society outside of their own number, and shall hold office for one year, unless sooner removed by a vote of the board. Said officers shall be officers of the society as well as of the board of curators, and their respective duties shall be determined by said board. No officer of the society or of the board shall receive any compensation from the state appropriation to the society. [Same, § 5.]

3070. President. 1905. The board of curators shall also choose from their own number a president, who shall be the executive head of the board, and shall hold his office for one year, and until his successor is elected. [Same, § 6.]

3071. Residence of curators; powers; report. 1906; 22 G. A., ch. 82, § 34. The curators, a majority of whom shall reside in the vicinity of the state university, and five of whom shall constitute a quorum, shall be the executive department of the society, and shall have full power to manage its affairs. They shall keep a full and correct account of all their doings, and of the receipt and expenditure of all funds collected or granted for the purpose of the society, and shall report the same to the governor, on or before the fifteenth day of August, as required by law of other state institutions. [Same, § 7.]

[Further as to the report, see §§ 117–121.]

3072. Books delivered to. 1907. There shall be delivered to said society, twenty bound copies of the reports of the supreme court, and of all other books and documents published by the state, or at its order, for the purpose of effecting exchanges with similar societies in other states and countries, and for the preservation in its library, and the other purposes of the society. [Same, § 8.]

PART SECOND.

PRIVATE LAW.

TITLE XIII.

OF RIGHTS OF PROPERTY.

CHAPTER 1.

OF RIGHTS OF ALIENS.

[Sections 1908 and 1909 are repealed: See § 3080.]

3073. Non-resident aliens. 22 G. A., ch. 85, § 1. Non-resident aliens or corporations incorporated under the laws of any foreign country, or corporations organized in this country one-half of whose stock is owned or controlled by non-resident aliens, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise only as hereinafter provided except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years and no longer and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Iowa, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act.

Right to own and hold property: The provisions of Const., art. I, § 22, that foreigners who are or may hereafter become residents of the state shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native-born citizens, does not change the common-law rule as to non-resident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 408.

But this provision does not restrict the power of the legislature to extend the same privileges to other foreigners than those named: *Purczell v. Smidt*, 21-540.

It confers upon resident aliens the right to transmit as well as to acquire real property by descent: *Ibid.*

At common law an alien could not acquire real estate by purchase so as to convey a good title to his vendee: *Ibid.*

The act of 1858, respecting aliens (Rev., §§ 2488-2493), so far as it relates to personal property, is probably only declarative of the common law, and in this state, as at common law, aliens are capable of acquiring, holding and transmitting movable property in like manner as citizens: *Ibid.; Greenheld v. Morrison*, 21-538.

Taking by descent or devise: Prior to the adoption of the state constitution of 1846, the common-law rule was in force, and although it was then provided by statute that real property should descend in equal shares to the children, nevertheless an alien child had no inheritable blood and could not take by de-

scent; and the subsequent constitutional provision above referred to only changed the rule as to aliens who were aliens at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 408; *Krogan v. Kinney*, 15–242.

Also, *held*, that the provisions of the Revision above referred to were intended to apply only to residents in this state or the United States, except in the single instance of a devise by will to a non-resident alien who should afterwards become a resident: *Krogan v. Kinney*, 15–242; *Rheim v. Robbins*, 20–45.

Such provision giving aliens, wherever resident, the right to take or acquire property by bequest or devise, upon condition, in case of non-residents, that they shall become residents of this state, was retrospective as well as prospective: *Purczell v. Smidt*, 21–540.

The judges of the court were divided on the question as to the capacity of a non-resident alien to acquire real estate in this state by descent under the statutory provisions above referred to: *Greenheld v. Stanforth*, 21–595.

Such statutory provisions gave aliens resident in the United States who had declared their intention of becoming citizens, and all aliens resident in this state, the right to acquire real property by descent or purchase, the word purchase meaning acquisition by bargain and sale for a consideration; and this provision was prospective: *Purczell v. Smidt*, 21–540.

This statutory provision also gave every alien, wherever resident, the right to acquire real estate by bargain or sale from persons holding an absolute title, provided he in good faith sold the same within ten years to a person capable of holding an absolute title. And the heirs at law of the non-resident alien purchaser took a valid title subject to the same necessity of selling. This provision was retrospective: *Ibid.*

Subsequently to this decision the court united in adhering to the doctrine that under the statutory provision referred to a non-resident could not inherit: *Brown v. Pearson*, 41–481.

Under the statutory provisions just referred to, under which it was decided that an alien non-resident could not take lands in this state by inheritance, *held*, that the non-resident alien heirs of such owner could not inherit any share of such property, but that the whole would pass to heirs who were resident citizens of the state: *King v. Ware*, 53–97.

Under these provisions an alien resident could take nothing by will unless he, subsequent to the making of the bequest, became a resident: *Ware v. Wisner*, 4 McCrary, 66.

Granting of lands to: The disposal of the public land within the state being expressly reserved to the United States, a grant by the United States to an alien will confer upon him an inheritable estate: *King v. Ware*, 53–97.

Dower: The provisions of the Revision gave an alien married woman the same rights of dower as if a resident, provided her husband was capable, at the time of his decease, of holding an absolute title to lands in this state: *Purczell v. Smidt*, 21–540.

3074. Conditions. 22 G. A., ch. 85, § 2. Any non-resident alien may acquire and hold real property to the extent of three hundred and twenty acres, or city property to the amount of ten thousand dollars in value, providing that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser the occupant being related to such owner within the third degree of kindred or the husband or wife of such relative, and further provided, that such occupant become a naturalized citizen within ten years from the purchase of said property as aforesaid.

3075. Duty of county attorney. 22 G. A., ch. 85, § 3. It shall be the duty of the county attorney of the county in which such lands are situated to proceed by information in the name of the state of Iowa, against such alien in the district court of the county and summons may issue or service to be had upon such alien by publication as provided by statute for equitable proceedings and the court shall have power to hear and determine such information and declare such lands escheated to the state, and when such forfeiture is declared by the district court it shall be the duty of the clerk of the court to notify the governor of the state that the title to such lands is vested in the state by the decree of the said court, and the clerk of the court shall present the auditor of the state with the bill of costs incurred by the county in prosecuting such case and the auditor shall issue a warrant to the clerk of the court on the state treasury to repay the county for such costs incurred, and the lands shall be sold in the manner provided for the sale of school lands in chapter twelve, title twelve of the code, and the proceeds of such sale shall become a part of the permanent school fund of the state.

3076. Limitation of time. 22 G. A., ch. 85, § 4. No suit for the recovery of property after the execution and recording of the patent or conveyance by the state shall lie, unless said suit shall have been commenced within five years after the title to such property became vested in the grantee of the state, and all

persons who fail to bring their suits within the time limited are forever barred, saving however to infants and persons of unsound mind, the right to bring suit at any time within five years after disabilities cease or have been removed; providing, however, that the grantee of the state, immediate or remote, shall have the right to demand such restitution for improvements as provided by chapter seven title thirteen, of the code of Iowa.

3077. Sale of lands. 22 G. A., ch. 85, § 5. Any non-resident alien who owns land in this state at the time this act takes effect may dispose of the same during his life to *bona fide* purchasers for value and may take security for the purchase money with the same rights as to securities as a citizen of the United States.

3078. Holders of liens. 22 G. A., ch. 85, § 6. This act shall not prevent the holders of liens upon or interest in real estate heretofore or hereafter acquired from holding or taking a valid title to the real estate in which he has such interest, or upon which he has such lien, nor shall it prevent any alien from enforcing any lien or judgment from any debt or liability which may hereafter be created, or which he may hereafter acquire, or which may hereafter be adjudged in his favor or from becoming a purchaser at any sale by virtue of such lien or judgment, provided, however, that all lands so acquired shall be sold within ten years after the title shall be perfected in him under such sales, or in default thereof the same shall revert and escheat to the state as provided in this act.

3079. Resident aliens. 22 G. A., ch. 85, § 7. This act shall not apply to aliens who are residents of the state of Iowa, who shall have the same right to acquire, hold and dispose of property as natural-born citizens of the United States.

3080. 22 G. A., ch. 85, § 8. Sections one thousand nine hundred and eight and one thousand nine hundred and nine, chapter one, title thirteen of the code are hereby repealed, and all acts or parts of the acts in conflict with this act are hereby repealed.

CHAPTER 2.

OF TITLE IN THE STATE OR COUNTY.

3081. Conveyance to. 1910. Whenever, to secure the state or any county therein from loss, it shall become necessary to take real estate on account of a debt, either by bidding off the same at a sale on execution or otherwise, the conveyance thereof to the state, or to any county, shall vest in such grantee as complete a title as if such grantee were an actual person. [9 G. A., ch. 32, § 1; 14 G. A., ch. 103.]

[The word "any" before "county," in the first line, is erroneously omitted in the printed Code.]

3082. Bidding in at execution sale. 1911. The proper person to bid off such real estate shall be:

1. The attorney-general, or the proper district [county] attorney, in case the judgment is in the name of the state, and the proceeds thereof are payable into the state treasury;

2. In case the proceeds of the judgment are, by law, payable into the county treasury for the use of the county revenue, or the school or other fund of the county, the district [county] attorney of the district [county], or the president of the board of supervisors of the county, or any attorney employed or authorized by the board of supervisors to prosecute such claim. [9 G. A., ch. 156, § 1.]

3083. Appraisal; bid. 1912. In all cases where property is sold as above provided, it shall first be appraised in the manner provided by law for the appraisement of property levied on under execution, and the said officers shall bid upon and purchase said property for the lowest sum possible. If no other person shall bid therefor, they shall bid at least two-thirds of the appraised value thereof, or the full amount of the judgment and costs, if the same is less than two-thirds of such appraised value. [11 G. A., ch. 110, § 1.]

3084. Costs and expenses. 1913. In cases where the state becomes the purchaser of real estate, under execution issued upon judgments rendered in favor of the state, all costs and expenses attending the same shall be audited and allowed by the executive council, and paid out of any money in the state treasury not otherwise appropriated, whenever such costs and expenses cannot be collected out of the defendant in such judgments, and if the property is purchased by a county, the costs and expenses in like cases shall be paid by such county. [Same, § 3.]

3085. Lands may be leased. 1914. Whenever the state or any county holds any such lands undisposed of, it may, by its proper agent, lease and control the use of the same, as shall, in the opinion of the executive council, if belonging to the state, and the board of supervisors, if belonging to the county, be for the best interest of such owner; and the proceeds of such use shall belong to the fund to which the debt on which the land was taken belongs. [9 G. A., ch. 32, § 6.]

3086. Buildings insured. 1915. The officers invested with the control and management thereof, shall have full power, and shall keep any valuable buildings thereon insured against fire, for the benefit of the state or county, in some responsible insurance company or companies; and the expense of such insurance shall be paid out of the rents of such property or the proceeds thereof when sold. [11 G. A., ch. 110, § 2.]

3087. Executive council. 1916. In any case where the title to any real estate is vested in the state as above provided, the executive council shall have the care, custody, and management thereof, and may sell the same for such sum and upon such terms as to them seems best, and may take such adequate security for any deferred payments as they see proper; and the proceeds of such sale shall be paid to the proper officer and credited to the fund to which the debt on which such real estate was taken belonged. A patent shall be issued to the purchaser of such real estate. [9 G. A., ch. 32, § 3.]

3088. Board of supervisors. 1917. In cases where the title to any real estate is vested in any county as above provided, it shall be competent for the board of supervisors to sell and dispose thereof, as in their judgment shall be for the best interest of their county; if the same is sold on time for any part of the purchase money, the board shall require adequate security for the payment thereof besides the responsibility of the purchaser; and the proceeds of sales of all such lands shall belong to the fund to which the debt on which the land was taken belonged. [Same, § 4.]

3089. Conveyance by. 1918. In case of any such sale and conveyance by such board of supervisors, the resolution making the sale shall be entered on the minutes of the board, and the yeas and nays on the passage thereof shall be also there entered with the date; such resolution shall express the consideration paid for such land, and such a description thereof as shall be necessary to make a deed therefor; and a transcript of such proceedings relating to said sales, the resolution and yeas and nays on its passage made and certified under the hand of the county auditor and the seal of the said board, shall be a sufficient deed of conveyance by the said county, and shall be entitled to be recorded or received in evidence without further proof. [Same, § 8.]

3090. Sale; contract; security. 1919. The state, or county, on selling such lands, may, at the option of the officer making such sale, execute a contract of sale, or an absolute conveyance thereof, and may take notes, mortgages, contracts, or other securities, payable to the grantor, which shall be as valid as if made to an actual person. [Same, § 7.]

CHAPTER 3.

OF PERPETUITIES AND LAND IN MORTMAIN.

3091. Power of disposition. 1920. Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter. [R., § 3199.]

A lease for nine hundred and ninety-nine years *held* not invalid under this section: *Todhunter v. Des Moines I. & M. R. Co.*, 58-205.

3092. Churches may lease; taxation. 1921. Church organizations occupying property granted to them by the territory or state of Iowa, may lease the same for business purposes, and occupy other property with their church edifice; *provided*, that all of the income derived from such leased property shall be devoted to maintaining the religious exercises and ordinances of the church to which the grant was originally made, and to no other purpose; and such church and its affairs shall remain in the control of a board of trustees regularly chosen in accordance with its charter; but property so leased, shall, in all cases, be subject to taxation the same as the property of individuals. [13 G. A., ch. 133.]

CHAPTER 4.

OF THE TRANSFER OF PERSONAL PROPERTY.

3093. Conditional sales; recording. 1922. No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages. [14 G. A., ch. 63.]

Prior to the passage of the act embodied in this section it was held that if the purchaser of personal property acquired possession under such a sale, but failed to acquire title by reason of failure to comply with the conditions on which the sale was to become absolute, the purchaser from him, although in good faith and without notice, acquired no title to the property as against the original owner unless the original transaction was fraudulent: *Bailey v. Harris*, 8-331; *Robinson v. Chapline*, 9-91; *Baker v. Hall*, 15-277; *Moseley v. Shattuck*, 43-540.

Therefore, *held*, that where property was delivered to vendee under a contract reserving to the vendor the title in the property until paid for, the vendee had a claim thereon prior to that of an assignee for the benefit of creditors, at least in a case where the assignee had actual knowledge of the conditions of the sale: *Warner v. Jameson*, 52-70.

It was doubtless to prevent the injustice that parties were sometimes enabled to practice under the rules established by these cases that this statutory provision was enacted. To bring a case within this statute and take it out of the former rule there must be a purchaser from or creditor of the vendee who, at the time his interest in the property accrued, had neither actual nor constructive notice of the interest reserved in the vendor by the condition of the contract, and the vendee must, at the time the interest accrued, have been in actual possession under the contract. There-

fore, where the vendee was not in actual possession of the property, but it was still in the possession of a common carrier, through whom it had been shipped to the vendee, *held*, that the provisions of the statute were not applicable: *Warner v. Johnson*, 65–126.

The absence of notice, etc., does not render the sale invalid as to creditors and others. It is only the condition that is void: *Pash v. Weston*, 52–675.

Where one sold a wind-mill to a railroad company on condition that the seller should retain possession, and it was not alleged that the contract under which the sale was made was in writing, *held*, that the presumption was that it was not in writing, and was not valid against creditors without notice: *Taylor v. Burlington, C. R. & N. R. Co.*, 4 Dillon, 570, 580.

Mortgagees are creditors within the protection of the statutory provision above referred to: *Ibid.*

A conditional sale, although not binding as to subsequent creditors because not in writing or recorded, is nevertheless the taking of security so as to defeat the right of a mechanic's lien: *Ibid.*

This statutory provision is applicable in favor of execution or attaching creditors, but not in favor of a general creditor or a prior mortgagee: *Myer v. Car Co.*, 102 U. S., 1.

Where a contract of sale is to be fully executed by both parties at a subsequent time, and until fully executed the title to the property is not to pass, the fact that the intended vendee gains possession of the property does not bring the case within the statutory provision: *Budlong v. Cottrell*, 64–234.

Where a party has possession of property under a contract of conditional sale, by the terms of which the ownership of the property is not to be vested in him until it is paid for, such contract or conditional sale will be invalid as against a purchaser having no notice thereof, it not being acknowledged and recorded: *Moline Plow Co. v. Braden*, 71–141.

Where property was in the possession of a party on trial, with the agreement that at the expiration of a certain time he should have the privilege of buying, if satisfactory, *held*, that until the expiration of that time there was no conditional sale or contract such as would render the property liable for his debts; that the "contract" referred to in the statutory provision is one creating the relation of vendee or lessee: *Mowbray v. Cady*, 40–604.

It is competent to show by parol evidence that a written lease of a sewing machine, providing for periodical payments, is part of a transaction in which it was contemplated that upon completion of payments the title should vest in the lessee, and such transaction would constitute, therefore, a conditional sale, which cannot be enforced against a purchaser or lienholder without notice, in the absence of the execution and recording of a written instrument evidencing such transaction: *Singer Sewing Machine Co. v. Holcomb*, 40–33.

One who has had possession of a sewing machine under lease, with contract to become its owner upon fulfillment of certain conditions, has no such ownership as to entitle him to recover the property by replevin: *Hunt v. Winkel*, 55–623.

The statutory provision does not apply to a transaction in which property is placed by the principal in the hands of his agent for disposition, no transfer of the title being made, and in such case a purchaser from the agent without knowledge of the agency is not protected: *Conable v. Lynch*, 45–84.

Where lumber was shipped to a person to be sold by him in his own name, as agent, he to receive, as compensation for his services, a share of the profits, *held*, that until a sale was made there was no transfer of the property from the original owner, and that after the sale the title passed to the purchaser, and that the transaction was not a conditional sale to be recorded in order to be valid as against a purchaser without notice: *Crooker v. Brown*, 40–144.

This section is not retrospective and does not apply to conditional sales made before it took effect: *Knoulton v. Redenbaugh*, 40–114; *Moseley v. Shattuck*, 53–540.

3094. Sales or mortgages; recording. 1923. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides. [R., § 2201; C., '51, § 1193.]

Change of possession: A change in the "actual possession," which will be sufficient under the statute to render the mortgage valid as to third persons without recording, must be something to indicate the change of ownership; if the property be left with the seller, whose relations to it continue unchanged, so far as the world may know from the acts of the parties, the possession will be regarded as continuing in him: *Boothby v. Brown*, 40–104; *Sutton v. Ballou*, 46–517; *Hickok v. Buell*, 51–655; *McAfee v. Busby*, 69–328.

Therefore, *held*, that where cattle were bought and separated from others on the range and then left with the balance of the herd in care of the same party to be herded, there was not such change of possession as to constitute a notice to creditors and purchasers, and the transaction was void as to them: *Sutton v. Ballou*, 46–517.

Where a sewing machine was sold to B. and put in his house and by him sold to plaintiff, his servant, who allowed it to remain there, *held*, that in the absence of a recorded bill of sale such transfer would not be valid against a creditor: *Hickok v. Buell*, 51–655.

The use of the term "actual possession" implies that a change of possession sufficient to constitute a delivery and pass the property as between the parties may not be sufficient to

impart notice to others. To take a case out of the statute, something must be done to impart such notice. Therefore, where there was a sale of a field of corn standing on the farm of the vendor, the vendee not taking immediate charge of the corn nor control of the field, *held*, that the vendor retained actual possession within the meaning of the section: *Smith v. Champney*, 50–174; *Nuckolls v. Pence*, 52–581.

There must be an actual change of possession: *McKay v. Clapp*, 47–418.

The statute requires such transfer of dominion over the property as to imply notice to persons dealing with reference to the property that the title has been transferred; or such possession as will put such persons in possession of facts leading to inquiry as to the ownership. The possession need not necessarily be such as to imply notice to the public generally, but is sufficient if it implies notice to those who intend to purchase the property or deal with reference to it: *Deere v. Needles*, 65–101.

The question of possession of property in any case must of necessity depend upon its peculiar facts. All articles of personal property cannot be subject to the dominion and control of the owner in the same manner and to the same extent. When the owner exercises control over the property in the manner and to the extent usual in case of property of like character, and holds possession over it to the extent to which it is capable of being possessed according to the ordinary manner of using and handling such things, it is to be regarded as in his legal possession: *Pope v. Cheney*, 68–563.

Therefore, where the purchaser of corn in the crib was given formal possession thereof by the seller, who proceeded to nail up openings in the crib, *held*, that there was a sufficient change of possession under the statutory provision: *Ibid.*

An instrument assigning a judgment need not be recorded to be valid as to third parties. The *chose in action* so assigned cannot be regarded as in the possession of the assignor at the time of the transfer, or as retained in his possession afterward: *Howe v. Jones*, 57–130.

Not necessary where property is in the hands of third persons: Where the property is not in the actual possession of the mortgagor or vendor, or in his custody so that there may be manual delivery, an actual delivery is not necessary to the validity of the transaction. If the property is placed in the power of the purchaser that is sufficient: *Barrows v. Harrison*, 12–588.

Where personal property is not in the possession of the vendor, but in that of a third party, the statutory provision requiring a change of possession or notice to render the sale valid as to creditors or purchasers does not apply: *Case v. Burrows*, 54–679.

If the property at the time of the sale or mortgage is in the possession of a lessee, and remains in his possession, the vendor does not retain the "actual possession" of the property, so as to render recording necessary: *Thomas v. Hillhouse*, 17–67.

So *held*, also, where the goods were in the hands of a common carrier: *Alsberg v. Latta*, 30–442.

Where the property at the time of the sale is in the actual possession of a third person as lessee or the like, a sale without notice and without change of possession is valid, and it is wholly immaterial in such cases whether or not the owner has the right to the immediate possession: *Campbell v. Hamilton*, 63–293.

Where a landlord assigned his lease to his creditor, who thereupon became entitled to the landlord's share of the crops on the premises, *held*, such assignment was valid without record as to creditors and purchasers from the assignor without notice of the assignment, there being no retention of possession by the landlord: *Lufkin v. Preston*, 57–28.

Retention of possession by mortgagor not fraudulent: The retention of the mortgaged property by the mortgagor does not, as matter of law, render the mortgage fraudulent and void: *Torbert v. Hayden*, 11–435; *Jessup v. Bridge*, 11–572; *Fromme v. Jones*, 13–474; *Wilhelmi v. Leonard*, 13–330; *Smith v. McLean*, 24–332, 330.

Possession retained by vendor or mortgagor after recording the instrument is strictly lawful and not fraudulent or a badge of fraud, unless such retention is a part of the consideration of the sale: *Jordan v. Lendrum*, 55–478.

To make a bill of sale, duly recorded, valid as against subsequent purchasers as contemplated by statute, it is not necessary that it contain any express stipulation that the vendor is to retain possession of the property. Being recorded, the instrument is to have the same effect as if accompanied by actual delivery: *Kuhn v. Graves*, 9–303.

The mere retention of the possession of personal property by the mortgagor thereof, when the mortgage is duly recorded, is no longer either *per se* fraudulent or a badge of fraud in law, although it may be a circumstance with others to prove fraud in fact: *Hughes v. Cory*, 20–399.

The right given by statute to the mortgagor to retain possession of personal property implies the right to a reasonable use thereof, especially when the act of using does not necessarily consume it: *Ibid.*

Right to sell in ordinary course of trade: A chattel mortgage which contains a reservation by the mortgagor of the right to sell the mortgaged property in the usual course of retail trade, with an agreement to keep up the stock to its original value, and a reservation of the right to retain the avails of the sales under an agreement to apply a portion thereof to the payment of the mortgage, is not fraudulent *per se*, as a matter of law, and whether fraudulent in fact, or not, must be decided upon all the evidence: *Ibid.*; *Meyer v. Gage*, 65–606; *Maish v. Bird*, 22 Fed. Rep., 576.

Nor does the fact that the mortgage provides that the debtor shall remain in possession of the goods, receiving the proceeds and paying the same to the creditor's banker, render the mortgage void. Such fact might be considered in determining the question of fraud, but it is not fraud *per se*: *Adler v. Claflin*, 17–89.

The provision that the mortgagor shall have the right to retain possession and carry on the

business in the usual retail way for one year, paying costs and expenses of running the business and keeping up the stock to about what it was at the time of the execution of the mortgage, *held* not sufficient to render the mortgage fraudulent in law, although no provision was made for an application of the profits to the satisfaction of the mortgage debt. It might be otherwise if the mortgage should provide for sales that would exhaust the stock without any provision for such application: *Jaffray v. Greenbaum*, 64-492.

The fact that there is no agreement to account to the mortgagee for the proceeds of sales of the mortgaged property in the course of trade does not affect the validity of the mortgage: *Clark v. Hyman*, 55-14.

Reservation of the right to sell in the ordinary course of trade and apply the proceeds to the mortgagor's own use will not render the mortgage fraudulent in law: *Sperry v. Ethridge*, 63-543; *Meyer v. Evans*, 66-179.

Nor will the fact that the chattel mortgage containing such agreement with reference to reservation of possession and right to sell in the ordinary course of trade and apply the proceeds to mortgagor's own use, if given after the mortgagor becomes insolvent, render the mortgage necessarily fraudulent: *Sperry v. Ethridge*, 63-543.

In the federal courts it is held that a mortgage of chattels which permits the mortgagor to remain in possession until default in payment of the debt secured, with power to sell the goods as theretofore, is fraudulent and void in law, and cannot be enforced by a court of equity. This being a matter outside the state statute, the decisions of the United States supreme court will be followed independently of the state decisions: *Crooks v. Stuart*, 2 McCrary, 13; *Wells v. Langbein*, 20 Fed. Rep., 183.

Although the rule in the federal courts is that reservation by mortgagor of the right to sell in the usual course of trade renders the mortgage fraudulent and void as to creditors, yet a plaintiff who in proceedings in the federal courts levies upon such mortgaged property as that of the mortgagor, treating the mortgage as invalid, becomes liable in the state court to an action for trespass: *Meyer v. Gage*, 65-606.

Circumstances indicating fraud: The provisions as to application of the proceeds and the fact of insolvency may be considered as tending to prove that a mortgage reserving right of sale to mortgagor was executed with the intent to defraud or delay other creditors: *Sperry v. Ethridge*, 63-543.

The mere fact that creditors who are secured by chattel mortgages are intimate friends or relatives of the debtor does not necessarily show that their mortgages are fraudulent: *Jaffray v. Greenbaum*, 64-492.

Fraud in fact: Compliance with the provisions of the recording acts does not preclude the transaction being attacked on the ground that it is actually fraudulent as against creditors: *Singer v. Sheldon*, 56-354.

If the parties to the mortgage have a fraudulent intent, in creating the loan, to hinder and delay other creditors, and thereby confer advantages upon the mortgagor which he would not otherwise possess, this will be a fraud in fact which will render the mortgage void. The fact of fraudulent intent must, however, be shown by extrinsic evidence and found by the verdict of the jury. It cannot be inferred from the mere provisions of the mortgage: *Torbert v. Hayden*, 11-435.

If possession by mortgagor is accompanied by the power of disposition or use in any way inconsistent with the object of securing the rights of the mortgagee, that fact would be a badge of fraud, not absolute but *prima facie*, requiring explanation. Whether possession by the mortgagor with a right to deal with the property as his own is fraudulent constitutes a question of intent, and will depend entirely upon the circumstances explaining such acts of ownership: *Ibid.*

The fact that a chattel mortgage is filed for record by the mortgagor, if under circumstances showing good faith, is not evidence of fraud: *Mason v. Franklin*, 58-506.

The fact of a variance between the true consideration and that expressed in the instrument is at most but a badge of fraud, proper to be submitted to the consideration of the jury as a fact bearing upon the question of fraudulent intent: *Ibid.*

The fact that a mortgage is given by an insolvent person for more than is due, and that such insolvency is known to the mortgagee, is a badge of fraud, but not conclusive: *Wood v. Scott*, 55-114.

That fact, however, casts on the mortgagee the burden of showing that the mortgage was executed in good faith and for an honest purpose, and of satisfactorily explaining why the amount named was greater than the actual indebtedness: *Lombard v. Dows*, 66-243.

A chattel mortgage in a certain case, given by the debtor to his brother to secure existing indebtedness, *held* not fraudulent as to other creditors: *Clark v. Hyman*, 55-14.

The burden of establishing the invalidity of the chattel mortgage is upon the one who opposes its enforcement. This may be done by showing either that the provisions of the mortgage are such as to prove that the parties thereto intended to commit a fraud upon the rights of others, or by showing that the acts of the parties have been such that fraud is the necessary inference: *Maish v. Bird*, 22 Fed. Rep., 576.

Delay in recording the mortgage was held to be sufficiently explained by the fact that the mortgagor was trying to secure a large loan in New York, and if successful in so doing was then to pay off the mortgage before it was put on record, the mortgage debt not being created by the mortgage but already existing: *Ibid.*

Failure to record a chattel mortgage taken on a stock of goods, whereby other creditors are misled to give the mortgagor a credit which does not belong to him, will invalidate the mortgage as against such creditors without notice: *Simon v. Openheimer*, 20 Fed. Rep., 553.

After an assignment by the debtor, such mortgagee is on a like footing with other creditors without notice, of a date prior to the recording of the mortgage: *Rumsey v. Town*, 20 Fed. Rep., 558.

The federal courts do not differ from the state courts in regard to the effect of the state

statute, but even under the state decisions actual fraud, which may be inferred as matter of law from the facts of the case, including the provisions of the mortgage, will render it void. Delay of mortgagee to put his mortgage on record, or his allowing mortgagor to sell the property and apply the proceeds to his own use instead of reducing the mortgage debt, so as to defraud creditors, will constitute fraud such as to deprive the mortgagee of the priority of his claim: *Lyon v. Council Bluffs Savings Bank*, 29 Fed. Rep., 566.

Subsequent purchasers: A mortgagee of chattel property is a purchaser within the protection of the provisions requiring the recording of bills of sale or chattel mortgages: *Manny v. Woods*, 33–265.

Creditors without notice: The term "existing creditors" applies not only to creditors existing at the time the sale or mortgage of the chattel was made, but also to those who become such before change of possession, recording of the instrument, or giving of notice: *Fox v. Edwards*, 38–215.

The words "without notice" apply as well to creditors as to purchasers, and an unrecorded chattel mortgage is valid as against existing creditors with notice thereof at the time of its execution: *Allen v. McCalla*, 25–464; *Miller v. Bryan*, 3–58; *Crawford v. Burton*, 6–476.

The validity of a chattel mortgage is not made to depend solely on the fact of its being recorded before levy by the creditor; actual notice to the creditor is sufficient to give the mortgagee, by virtue of his unrecorded mortgage, duly executed, a preference over the claims of such creditor: *McGavran v. Haupt*, 9–83.

Such actual notice is just as effectual as due record of the instrument in charging the creditor or the officer making the levy with notice of the prior right of mortgagee: *Gordon v. Hardin*, 33–550.

Persons who become creditors of the vendor by a levy before change of possession or recording of the written instrument of sale or actual notice given are protected as existing creditors: *McAfee v. Busby*, 69–328.

A creditor who does not secure a levy under attachment or execution before notice of an unrecorded sale or mortgage is not protected: *Allen v. McCalla*, 25–464; *Cragin v. Carmichael*, 2 Dillon, 519; *Crooks v. Stuart*, 2 McCrary, 13.

The phrase "without notice" contemplates not only actual notice of the contents of the instrument, but also any notice sufficient to put a reasonable man upon inquiry: *Allen v. McCalla*, 25–464.

Notice such as will render a transaction valid without recording must be either actual or constructive. Such notice as to put a party on inquiry is actual notice; but if he does not have actual notice, negligence on his part in failing to make inquiry is immaterial unless, possibly, it amounts to fraud. A party is not to be affected by notice for the reason that he could have obtained knowledge of the transaction by the exercise of diligence: *Moline Plow Co. v. Braden*, 71–141.

If the bill of sale or chattel mortgage is executed and duly filed for record before levy under attachment or execution the creditor is affected with notice thereof: *Kuhn v. Graves*, 9–303.

To bind an officer levying an attachment with notice of an existing unrecorded mortgage thereon, it is not necessary that such notice be received by him subsequent to the writ being placed in his hands: *Stewart v. Smith*, 60–275.

The right of a creditor without notice of a sale or chattel mortgage not evidenced by recorded instrument, and where possession remains in vendor or mortgagor, attaches when he levies upon the property covered thereby, and notice after levy and before sale will not defeat his right to hold the property or transfer title thereto by a sale under such levy: *Boothby v. Brown*, 40–104.

Where a claim is asserted to property by reason of a purchase thereof, the right of the property as against the former owner is dependent upon the single fact of the sale; but, as against the creditors of such owner, who have caused it to be seized under process, it is dependent upon not only the fact of sale, but also the fact of notice of sale to the creditor before seizure, and the claimant of the property is not entitled to recovery in replevin against the sheriff who has seized it under process until he has established each of these facts: *West v. St. John*, 63–287.

An attaching creditor who makes a levy without notice of an unrecorded mortgage is protected against such mortgage although he receives notice thereof before the sale under his levy. (Overruling *Kessey v. McHenry*, 54–187): *Bacon v. Thompson*, 60–284.

Although a mortgage is given to secure an existing indebtedness, and no extension of time of payment is given, yet, if the mortgagee enter immediately into possession, he assumes a new responsibility, and the mortgage is not deemed to be without consideration: *Clark v. Barnes*, 72–563.

With notice: A chattel mortgagee having knowledge affecting him with notice of the ownership of the property by a third person cannot assert his claims as against the rights of such third person: *Bray v. Flickinger*, 69–167.

Actual notice of a mortgage void for uncertainty will not affect a person with liens or claims thereunder: *Barr v. Cannon*, 69–20.

Reference in a mortgage of both real and personal property to a mortgage of record in another county, *held* not sufficient to put mortgagee on inquiry as to an unrecorded bill of sale: *Clark v. Barnes*, 72–563.

A recital in a chattel mortgage that it is subject to a prior mortgage will prevent the recording of the second giving it precedence: *Simon v. Openheimer*, 20 Fed. Rep., 553.

Facts in a particular case *held* sufficient to affect the attachment creditor with notice of a chattel mortgage before the levy of his attachment: *Jaffray v. Thompson*, 65–323.

Where a manufacturer of buggies made a chattel mortgage upon buggies in his possession not quite finished, *held*, that the mortgagee acquired thereby a prior claim to that of a person for whom one of such buggies was being manufactured, and who advanced the purchase price thereof, the chattel mortgagee

having notice that the buggy was being manufactured for such person, but not that the price had been paid: *Hesser v. Wilson*, 36–152.

Sufficiency of description: The recording of a chattel mortgage upon animals described by color, age and name, but not stating the present or past ownership thereof, nor the place where they are or have been kept, will not impart notice: *Warner v. Wilson*, 73–719.

If a chattel mortgage describes a certain number of head of cattle, giving the ownership, possession and location, it will be sufficient, although in fact there are not so many cattle corresponding to the description as the mortgage calls for: *Kenyon v. Tramel*, 71–693.

Where the description of the property covered by the mortgage was "all the cut and growing and having grown on the" premises described, *held*, that the description was too uncertain to be of any validity against an officer who had levied upon the property, and that the court would not insert or understand the word "crops" for the purpose of curing the defect: *Cray v. Currier*, 62–535.

The description of the mortgaged property as "one oscillation thresher, size 6, 30-inch cylinder, and also one Chicago Pitts ten-horse power," *held* insufficient: *Hayes v. Wilcox*, 61–732.

A chattel mortgage upon "sixty head of hogs," without other description, does not contain anything which would justify inquiry leading to the identification of the property, and therefore the record of such mortgage is not notice to a subsequent purchaser of the property intended to be mortgaged: *Everett v. Brown*, 64–420.

A mortgage which is so indefinite as to the description of property that the record thereof would not constitute sufficient notice to a purchaser may, nevertheless, be valid as between parties who are aware of the facts. Therefore, *held*, that a description of the property in the mortgage as "eleven Smith farm wagons, four Ketchum farm wagons," was sufficient as between parties who were aware of the facts, it appearing that the mortgagor had only that number and description of wagons at that time: *Clapp v. Trowbridge*, 74–550.

It is not a sufficient location of property to say that it is in a county named: *Warner v. Wilson*, 73–719.

A chattel mortgage upon a horse, making no reference to future earnings, *held* not to cover earnings by way of premiums at a fair: *McArthur v. Garman*, 71–34.

A mortgage of crops already growing is not void for uncertainty in failing to designate the year in which the crops are to be grown: *Luce v. Moorehead*, 73–498.

A mortgage on crops to be grown in the future may be valid when the crops come into existence: *Norris v. Hix*, 74–524.

While a chattel mortgage will not be deemed to cover after-acquired property unless the intention that it should is clearly expressed, yet where the property is described as all crops grown during certain years on premises specified, and it is executed at such a time that no crops could be completely grown at that time, it will be sufficient to cover crops grown during that year: *Ibid.*

A chattel mortgage may be valid as to property sufficiently described and void for uncertainty of description as to other property: *Luce v. Moorehead*, 73–498.

Mortgage of fixtures: Whether fixtures which are a part of the realty as between the vendor and vendee are, in law, severed and made personalty by the execution of a chattel mortgage thereon, *quære*. But the chattel mortgage, when recorded and indexed as such, does not constitute constructive notice to a subsequent purchaser of the realty: *Bringholff v. Munzenmaier*, 20–513.

Where a saw-mill was erected upon leased ground, the boiler being encased in brick and the shed covering the mill resting on blocks, it being possible to remove both shed and mill without injury to the realty; and the mill was then mortgaged as personal property, *held*, that as between the mortgagor and his grantees and the mortgagee and his assignees, the mill must be regarded as personal property, and that the fact that the owner of the land became owner of the mill after the execution of the mortgage thereon would not merge the ownership of the mill with that of the realty so as to defeat the chattel mortage: *Denham v. Sankey*, 38–269.

Where the owner of real property executes a mortgage upon chattels, which may properly be made fixtures, and subsequently affixes them to the realty, a person purchasing or acquiring a lien upon such real property with knowledge of the facts takes subject to the mortgage; and *held*, that the mechanic who attached such fixtures to the realty was affected with notice by the recording of such chattel mortgage, and his lien was subject thereto: *Sowden v. Craig*, 26–156.

Where a chattel mortgage is executed on machinery not yet annexed to the mill in which it is intended to be placed, it becomes a prior lien as against a mortgage of the realty: *Miller v. Wilson*, 71–610.

Nursery trees planted by the owner of real estate become a part of the realty, and pass as such to the purchaser at the foreclosure of a mortgage executed by the owner, although the trees were planted after the execution of the mortgage: *Price v. Brayton*, 19–309.

A mortgagee of real property on which nursery trees are standing, who purchases such property at foreclosure sale, is entitled to the trees as against a chattel mortgage thereon given subsequently to the execution of the real property mortgage, but recorded before the foreclosure sale: *Adams v. Beadle*, 47–439.

Place of recording: The mortgage must be filed in the county where the mortgagor resides. It is not sufficient that it is filed in the county where the property is situated: *Stewart v. Smith*, 60–275.

Where the mortgaged property is in the possession of an agent of the mortgagee, an officer levying an attachment thereon is bound to take notice of the possession of such mortgagee, although the mortgage is not properly filed for record: *Ibid.*

A chattel mortgage will be valid in any county to which the property is removed, although not recorded there, if duly recorded in the county where the owner of the property resides. And the same holds true where a

mortgage is duly recorded in another state, *and the property is subsequently brought into* this state and sold: *Smith v. McLean*, 24-322.

In determining the validity of a chattel mortgage made in another state upon property in that state, the courts will follow the interpretation which the courts of that state give to its statutes in relation to the validity of such mortgages: *Fisher v. Friedman*, 47-443.

A mortgage of personal property, properly executed and recorded in another state where the property is, has the same force when the property is removed to this state as under the laws of the state where executed, and will be enforced here, and the possession of the property by the mortgagor beyond the time stipulated, against the consent of the mortgagee, and in spite of his efforts to recover it, will not defeat his rights thereto: *Simms v. McKee*, 25-341.

Effect of recording: Mere recording will *not constitute a delivery*, and the lien of the mortgage will not attach until there is an acceptance: *National State Bank v. Morse*, 73-174.

No presumption arises from the execution of a mortgage that the mortgagee owns the property therein described or that such property is in existence: *Warner v. Wilson*, 73-719.

An unrecorded bill of sale or mortgage is admissible in evidence against a subsequent purchaser, it being proper to introduce it for the purpose of following it with proof of notice: *Scharfenberg v. Bishop*, 35-60.

The fact that under the statute requiring the recording of a bill of sale it is defective on the ground of uncertainty will not preclude its being received in evidence: *Singer v. Sheldon*, 56-354.

3095. Index. 1924. The recorder must keep an entry book or index for instruments of the above description, having the pages thereof ruled, so as to show in parallel columns, in the manner hereinafter provided in case of deeds for real property:

1. The mortgagors or vendors;
2. The mortgagees or vendees;
3. The date of the filing of the instrument;
4. The date of the instrument itself;
5. Its nature;
6. The page and book where the record is to be found. [R., § 2202; **C., '51,** § 1194.]

[As to indexing, recording, etc., see notes to § 3115.]

3096. Note time of filing. 1925. Whenever any written instrument of the character above contemplated is filed for record as aforesaid, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his entry book all the particulars required in the preceding section, except the sixth; and from the time of said entry, the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged. [R., § 2203; C., '51, § 1195.]

3097. Recording. 1926. The recorder shall, as soon as practicable, record such instrument, and enter in his entry book, in its proper place, the page and book where the record may be found. [R., § 2204; C., '51, § 1196.]

3098. Mortgagee entitled to possession. 1927. In the absence of stipulations to the contrary in the mortgage, the mortgagee of personal property is entitled to the possession thereof. [R., § 2217; C., '51, § 1210.]

The mortgagee under a chattel mortgage is not, in this state, the absolute and unqualified owner of the mortgaged property before default in payment of the money secured by the mortgage: *Kern v. Wilson*, 73-490.

Under Revision, § 2217, providing that the mortgagee should hold the legal title as well as the right to possession, *held*, that the legal title was in him for the purpose of enabling him to enforce his lien, but that the ownership remained in the mortgagor: *Hubbard v. Hartford Fire Ins. Co.*, 33-325, 333, 341. Also *held*, that the mortgagor of personal property had no interest therein which could be levied upon and sold under execution: *Campbell v. Leonard*, 11-489; *Gordon v. Hardin*, 33-550; *Porter v. Knight*, 63-365. But see § 4189.

The mortgagor of personal property has no such interest therein as can be levied upon and sold. If the mortgagee is in possession the rights of the mortgagor may be reached by garnishment, and there is no occasion to appoint a receiver: *McConnell v. Denham*, 72-494.

If mortgagee has the right to take possession, he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59-658.

The mortgagor of exempt personal property may maintain an action for damage where the

same has been wrongfully seized and sold upon execution: *Evans v. St. Paul Harvester Works*, 63-204.

A mortgagor of personal property has a right to redeem, even after condition broken, and the mortgagee, although in possession after such breach, is liable to garnishment by creditor of mortgagor for any surplus remaining in his hands, in case of a sale of the property, beyond what is necessary to pay his claim: *Doane v. Garretson*, 24-351. But a mortgagee not in possession cannot be garnished. See note to § 4200.

The equity of redemption of the mortgagor of personal property after conditions broken is subject to sale or transfer as other property, and passes under a general assignment. After such general assignment the assignee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*. 58-414. So, also, where, by agreement between mortgagor, mortgagee and an attaching creditor, it was agreed that the mortgaged property be sold in bulk and the proceeds, after satisfying the mortgage, be applied upon the attachment, *held*, that this agreement transferred the mortgagor's equity of redemption and took priority over a subsequent attachment of such proceeds by another creditor: *Phelps v. Winters*, 59-561.

CHAPTER 5.

OF REAL PROPERTY.

3099. Who deemed seized. 1928. All persons owning lands not held by an adverse possession, shall be deemed to be seized and possessed of the same. [R., § 2207; C., '51, § 1199.]

This presumption of seizin continues until the owner is disseized: *Barrett v. Love*, 48-103.

3100. Estate in fee-simple. 1929. The term "heirs," or other technical words of inheritance, are not necessary to create and convey an estate in fee-simple. [R., § 2208; C., '51, § 1200.]

Applied: *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

3101. Conveyance passes grantor's interest. 1930. Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used. [R., § 2209; C., '51, § 1201.]

A conveyance passes any equitable interest the grantor may have in the land, although he have no legal interest: *White v. Butt*. 32-335, 345.

The dower interest of a wife is relinquished by a deed in which she joins with her husband in the granting clause and covenants, although there is no express relinquishment of dower: *Edwards v. Sullivan*, 20-502.

The fact that a conveyance is voluntary does not create a trust in the grantee in favor of the grantor: *Butler v. Nelson*, 72-732.

3102. After-acquired interest. 1931. Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee. [R., § 2210; C., '51, § 1202.]

This provision does not apply where a deed conveys the estate which the grantor at the time actually possessed, and he subsequently acquires a greater estate: *Collamer v. Kelley*, 12-319, 326.

Where the title which the grantor claimed when the first conveyance was made was absolutely void by reason of facts of which the grantee was affected with notice, *held*, that a court of equity was not bound to consider a subsequently acquired title as having inured to such grantee, who never made any claim to it, rather than to a subsequent grantee: *Viele v. Van Steenberg*, 31 Fed. Rep., 249.

In order that a conveyance may operate to pass an after-acquired title, it must be so executed that it would have passed such title at the time of execution if the grantor had then had such title: *Heaton v. Fryberger*, 38-185.

Where the wife simply joins with the husband in a conveyance for the purpose of relinquishing her dower, an interest afterward acquired by her will not inure to the benefit of the grantee in such conveyance. (See § 3108): *Childs v. McChesney*, 20-431; *O'Neil v. Vanderburg*, 25-104.

Where A. conveyed property to B. without having title thereto, and subsequently C., the owner of the title, conveyed to A., taking from him a mortgage for a part of the purchase money, *held*, that although the title thus conveyed to A. vested at once in B., nevertheless

C. would be allowed to enforce his mortgage against the property in B.'s hands: *Morgan v. Graham*, 35-213.

A mortgage will attach to an after-acquired title: *Rice v. Kelso*, 57-115.

Section applied, generally: *Rogers v. Hussey*, 36-664; *Bellows v. Todd*, 39-209, 217; *Prouty v. Tallman*, 65-354.

3103. Adverse possession. 1932. Adverse possession of real property does not prevent any person from selling his interest in the same. [R., § 2211; C., '51, § 1203.]

As things in action are assignable under our law the reason of the common-law rule, which prohibited a sale of property in the adverse possession of another, ceases, and it may well be doubted whether the rule itself, independently of this section, should longer apply: *Foster v. Young*, 35-27, 40.

3104. Future estates. 1933. Estates may be created to commence at a future day. [R., § 2212; C., '51, § 1204.]

A grant of an estate to commence *in futuro* would give the grantee a present interest in the property; therefore, *held*, that an instrument purporting to convey premises in the usual form of a deed, but containing the stipulation that the grantee "shall have no interest in the said premises as long as the said grantor shall live," did not transfer any estate to the grantee: *Leaver v. Gauss*, 62-314.

3105. Declarations of trust. 1934. Declarations, or creations of trusts or powers, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law. [R., § 2213; C., '51, § 1205.]

An agreement of the trustee of a resulting trust to hold as such, though not in writing, will not deprive such trust of the character imposed upon it by law: *Cotton v. Wood*, 25-43.

The conveyance of real property to a partnership in the name of the partners creates a resulting trust in such partners for the benefit of the partnership: *Paige v. Paige*, 71-318

Where a note and mortgage were executed by a parent to a third person with the parol agreement that it should be held for the benefit of the child of the mortgagor, *held*, that a trust was thereby created which was not affected by this statutory provision. A trust relating to a chose in action, and not to real estate, is not within the purview of this section. In such case the person for whose benefit the trust is made might maintain action thereon in his own name: *Patterson v. Mills*, 69-755.

The conveyance of land to be converted into money, and the entire proceeds to be paid out by the grantor, creates a trust in the grantee, and an agreement as to the disposal of the proceeds should be in writing: *McGinness v. Barton*, 71-644.

Though the conveyance to the trustee is absolute in form, a purchaser from the trustee, with knowledge of the trust, takes subject thereto: *Sleeper v. Iselin*, 59-379.

Section applied: *McHenry v. Painter*, 58-365.

3106. Married women. 1935. A married women may convey or incumber any real estate or interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons. [R., § 2215; C., '51, § 1207.]

A married woman may incumber or convey real property owned in her own separate right: *Sanborn v. Casady*, 21-77.

The mortgage of a married woman upon her separate property, to secure her husband's debt, if executed for a valuable consideration, would be binding: *Green v. Scranage*, 19-461.

Previous to the present statutory provision (§ 3397) declaring that a conveyance, transfer or lien executed by either husband or wife in favor of the other shall be valid to the same extent as between other persons, it was held that a conveyance from wife to husband in connection with an agreement to separate, for the relinquishment of dower, would be upheld if supported by a consideration and free from fraud: *Robertson v. Robertson*, 25-350.

But it was also held that, aside from an agreement to separate, neither husband nor wife had any interest in the property of the other which could be the subject of conveyance between them: *McKee v. Reynolds*, 26-578.

And by § 3394, any agreement between husband and wife, relative to any contingent interest of either in the property of the other, is void: *Linton v. Crosby*, 54-478.

The power of a married woman to acquire by purchase, and contract with reference to real property, discussed and previous cases cited: *Shields v. Keys*, 24-298.

For the history of previous legislation as to the power of a married woman to convey, and the method of executing instruments in such cases, see *Simms v. Hervey*, 19-273.

Where husband and wife agreed to sell the wife's interest in certain real estate, after which the husband alone executed, without delivering, a deed thereto, and received payment of the consideration with the wife's

knowledge and consent, and she, after the husband's death, voluntarily executed and delivered the dead, *held*, that the wife's title was thereby divested: *Pursley v. Hayes*, 22–11.

Where the title is in the wife, and she joins her husband in a warranty deed conveying it, the addition of a clause releasing her right of dower will not limit the estate conveyed by her to her dower interest: *Grapengether v. Fejervary*, 9–163.

A wife joining with her husband in a conveyance of his property merely to relinquish her dower right does not become bound by the covenants of such deed: *Childs v. McChesney*, 20–431, 436; *Lyon v. Metcalf*, 12–93.

And, therefore, an after-acquired title of the wife does not inure to the grantee in a previous deed of the husband without title, in which deed the wife has simply joined to relinquish dower: *Childs v. McChesney*, 20–431; *O'Neil v. Vanderburg*, 25–104; *Thompson v. Merrill*, 58–419; *Edwards v. Davenport*, 4 McCrary, 34.

Since the enactment of the Code of '51, conveyances by married women are to be executed as in other cases, and acknowledgment is not necessary to their validity: *Simms v. Hervey*, 19–273.

Under this section it seems that a wife may contract with the purchaser of property from her husband to relinquish her dower interest by a separate contract from that of the conveyance: *Dunlap v. Thomas*, 69–358.

3107. Conveyance by husband and wife. 1936. Every conveyance made by a husband and wife shall be deemed sufficient to pass any and all right of either in the property conveyed, unless the contrary appears on the face of the conveyance. [R., § 2255.]

Where the title is in the wife and she joins her husband in a warranty deed conveying it, the addition of a clause releasing her right of dower will not limit the estate conveyed by her to her dower interest: *Grapengether v. Fejervary*, 9–163.

3108. Covenants. 1937. In cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance, unless it is expressly so stated on the face thereof.

As to the wife, this is the rule generally recognized, aside from statute: *Childs v. McChesney*, 20–431, 436.

The fact that the land conveyed is not owned by the husband does not render the wife liable to any greater extent under the covenants of the deed than if it had been owned by him, in case the title is not in her, and such covenants will not work an estoppel as to her: *Thompson v. Merrill*, 58–419.

Section applied: *Lyon v. Metcalf*, 12–93.

3109. Mortgagor retains possession. 1938. In the absence of stipulations to the contrary, the mortgagor of real property retains the legal title and right of possession thereto. [R., § 2217; C., '51, § 1210.]

The interest of the mortgagor in lands mortgaged is an estate of inheritance: *White v. Rittenmyer*, 30–268.

The mortgaged property in the mortgagor's hands possesses all the incidents of real estate. It may be sold, will descend to heirs, and is subject to dower: *Barrett v. Blackmar*, 47–565.

The mortgagee does not have an estate in the land, but simply a specific lien or charge thereon to secure his debt: *Newman v. De Lorimer*, 19–244; *McHenry v. Cooper*, 27–137, 144.

A mortgagee is, at common law, entitled to the benefit of covenants running with the land, and that right is not affected by this section: *Devin v. Hendershott*, 32–192.

The mortgagor is not by this section placed in any different position nor has he any greater rights than he had or would have independently of these provisions: *Porter v. Green*, 4–571.

3110. Tenancy in common. 1939. Conveyances to two or more in their own right, create a tenancy in common unless a contrary intent is expressed. [R., § 2214; C., '51, § 1206.]

When an estate is held by two or more in their own right, nothing being expressed to the contrary, the tenancy is in common, and this rule applies in case of husband and wife: *Hoffman v. Stigers*, 28–302.

Where property is deeded to a partnership in the individual names of the partners it is held by them in trust for the firm: *Paige v. Paige*, 71–318.

3111. Vendor's lien. 1940. No vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee, is made after suit brought by the vendor, his executor, or as-

signs to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyances procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud.

How reserved: A contract to convey does not defeat a vendor's lien under this section: *Noyes v. Kramer*, 54–22; *Thropshire v. Lyle*, 31 Fed. Rep., 694.

A mortgage by vendee is not a conveyance in such sense as to prevent the enforcement of the vendor's lien. In such case the mortgage will take priority, but the vendor's lien may be enforced against the equity of redemption: *Tinsley v. Tinsley*, 52–14.

In particular cases, *held*, that there was not sufficient reservation of the vendor's lien to preserve it: *Rolch v. Hussey*, 52–694; *Dean v. Scott*, 67–233.

An assignment for the benefit of creditors is a conveyance within the meaning of this section, and cuts off any vendor's lien not preserved therein: *Prouty v. Clark*, 73–55.

When the vendor of real estate makes a conveyance and delays taking his mortgage for the purchase money until after a mortgage is made to another party without notice, the vendor's mortgage will be postponed to the other: *Davis v. Lutkiewiez*, 72–254.

This provision limiting the vendor's lien, as against third persons, to cases where it is reserved in a deed or mortgage, is unconstitutional so far as it applies to liens existing before its enactment: *Jordan v. Wimer*, 45–65; *Webster v. McCollough*, 61–496.

Priority: A mortgagee having knowledge that the purchase money was unpaid could not, before the enactment of this section, acquire a prior lien to that of vendor for such purchase money, whether he knew how much there was unpaid or not, it being his duty to inquire and ascertain the amount unpaid: *Jordan v. Wimer*, 45–65.

A mortgage made subsequently to a deed, for money advanced by a third party to pay the purchase price of the property, does not confer priority over a judgment existing against vendee at the time of the purchase of the property. The mortgagee is not entitled in such case to be subrogated to the rights of the vendor. Whether a simple vendor's lien is paramount to the lien of a judgment obtained without notice of the rights of the vendor, *quære: Gilman v. Dingeman*, 49–308.

Where the legal title is held subject to an agreement to convey, in the nature of a title bond, a judgment against the holder of such legal title does not become a lien thereon: *Scott v. Mewhirter*, 49–487.

The vendor's lien does not have priority over the lien of a judgment against vendee, in favor of a party who has no notice of the vendor's rights: *Cutler v. Ammon*, 65–281.

A purchaser under foreclosure of a vendor's lien, which was not commenced until after the execution of a mortgage of the property by vendee, which was recorded subsequently to the commencement of the foreclosure, but prior to sale thereunder, *held* not to have acquired priority over such mortgage: *Henry County v. Bradshaw*, 20–355.

The vendor's lien is superior to the claim of the widow of vendee for dower: *Noyes v Kramer*, 54–22.

Cancellation of a bond for a deed, and sale of the property to another, will defeat any claim of the person from whom the property was purchased under such bond, as against the subsequent purchaser: *McMillen v. Rose*, 54–522.

Assignment: A lien passes to the assignee of notes given for the purchase money as an incident thereof: *Blair v. Marsh*, 8–144; *Rakestraw v. Hamilton*, 14–147; *Puramore v. Nabers*, 42–659.

And such lien will be sufficient consideration for a mortgage executed in recognition thereof, and to make it a matter of record: *Reynolds v. Morse*, 52–155.

Waiver: The taking of a mortgage on the same property is a merger or waiver of the vendor's lien: *Stuart v. Harrison*, 52–511; *Escher v. Simmons*, 54–269.

The taking of a mortgage upon other property to secure unpaid purchase money is a presumptive waiver of the vendor's lien, and casts upon the vendor the burden of proving that no waiver was intended. Evidence in a particular case *held* not sufficient to overcome such presumption of waiver: *Gnash v. George*, 58–492.

The taking of distinct security is evidence that the vendor does not rely upon his lien, but intends to waive it, and this is true where the vendor accepts the note of a third person indorsed by the vendee, even though it afterwards appears that at the time the maker of such note was insolvent, if the parties supposed the security to be good at the time of the purchase: *Kendrick v. Eggleston*, 56–128.

Where the vendor of real estate takes collateral security for the purchase money he thereby waives presumptively his vendor's lien, and the fact that the security thus taken is of no value, or afterwards becomes valueless, does not defeat the waiver: *Akers v. Luse*, 56–346.

Where the vendor, without relying upon his lien, obtains judgment at law for the purchase money, and buys in the property at a sale thereof under execution, he does not thereby lose his superiority over liens that are inferior to his, but may, by an action in equity against such lienholders, have his title quieted: *Patterson v. Linder*, 14–414.

The fact that vendor's claim for purchase money has been presented to the administrators of vendee's estate, and a portion of the amount thereof has been received, will not operate as a waiver of the lien: *Hayes v. Horine*, 12–61.

Where the vendor conveyed title to the vendee, accepting payment of the debt in money and negotiable securities, which he transferred, *held*, that the vendor's lien was waived and could not be enforced by the purchaser of such securities: *Porter v. Dubuque*, 20–440.

In equity an unpaid vendor who has not

waived it will be entitled to a lien, and no waiver obtained by fraud will be effectual to destroy such lien. Accordingly *held*, that in an exchange of lands, the purchase money having failed in part by reason of fraudulent representations as to the land exchanged, a vendor's lien could be enforced against the land for which it was taken as payment: *McDole v. Purdy*, 23–277.

The taking of a note upon which, through fault of vendee, nothing is realized, does not constitute a waiver of the vendor's lien: *Johnson v. McGrew*, 42–555.

Where, as part consideration of a conveyance of real property, a bond for a deed was taken for the conveyance by the vendee to the vendor of another piece of real property, and subsequently the obligor in such bond induced the obligee to accept a valueless railroad bond in lieu thereof, *held*, that the delivery of such bond did not satisfy the purchase price of the property first conveyed, which was to have been satisfied by the conveyance of the property covered by the bond for a deed, and that the obligee in such bond might enforce a vendor's lien on the land originally conveyed by him: *Brown v. Byam*, 65–374.

Under particular circumstances, *held*, that a mortgage never accepted by the vendor would not defeat his right to a vendor's lien: *Huff v. Olmstead*, 67–598.

Against whom available: Aside from statutory provisions, the right of vendor to a lien for unpaid purchase money is well settled. It is an equitable mortgage and does not contemplate any writing to evidence it. It follows the property into the hands of the heir or future vendee with notice: *Pierson v. David*, 1–23.

A vendor's lien for unpaid purchase money may be enforced against the vendee and his heirs and other privies in estate as well as against subsequent purchasers, even where the title has passed to the vendee, and much more readily will this relief be granted when the title is still in the vendor, who has only given title bond for conveyance. Purchasers of vendee's right to the title bond are purchasers of an equity only and take with notice of the vendor's lien: *Blair v. Marsh*, 8–144.

Prior to the adoption of the present Code vendor had a lien upon the premises for any part of the purchase money which he might enforce against any purchaser with notice: *Webster v. McCollough*, 61–496.

In a particular case, *held*, that the evidence did not charge the grantee of property with knowledge of the existence of the vendor's lien thereon: *Harkleroad v. Waterhouse*, 69–702.

Nature of the right: Under the statutes existing prior to the present Code, the vendor's lien was recognized, and was not limited to cases where a bond for a deed had been executed: *Johnson v. McGrew*, 42–555; *Jordan v. Wimer*, 45–65.

The fact that by agreement vendor continues to reside upon the premises during life will not deprive him of his lien, it appearing that there was no reservation in his favor of any interest in the land: *Webster v. McCollough*, 61–496.

Where a party claims the vendor's land under an agreement or contract which is not a technical mortgage, a court of equity will recognize and sustain it, whenever it appears from the contract that it was so intended: *Whiting v. Eichelberger*, 16–422.

A vendor's lien upon real estate is not based upon contract, nor is it an equitable mortgage, nor a trust resulting to the vendor from non-payment of purchase money. It is a simple equity raised by courts of chancery, and not depending upon any particular facts: *Porter v. Dubuque*, 20–440.

A vendor's lien is a mere naked equity raised and administered by courts, to be enforced between the parties, where no counter-equities arise, but it is never to be allowed to override or take priority of equities or rights of third persons which have attached in ignorance of such vendor's equity: *Allen v. Loring*, 34–499.

A consolidation of railroad companies by which the stockholders in one acquire stock in the other, and real property belonging to one is transferred to the other, does not entitle such stockholders to a vendor's lien on such real property: *Cross v. Burlington & S. W. R. Co.*, 58–62.

The interest of vendor in real estate conveyed is not real estate but personal estate, and in case of his death it will descend to his administrators, and not to his heirs: *Baldwin v. Thompson*, 15–504.

In proposing this section the Code commissioners say: "The so-called vendor's lien owes its existence to peculiarities of the English law of real estate which have never been adopted by us; and it not only lacks any reason for its perpetuation, but is directly at variance with the whole spirit and interest of our system of land records. On these grounds it has been refused recognition by some American courts, even without legislative interposition, and although it has been sustained in Iowa ever since the important case of *Pierson v. David*, 1 Iowa, 23, yet the objections to it have been strongly stated in the recent case of *Porter v. City of Dubuque*, 20 Iowa, 440. Most of the Iowa cases usually cited to sustain it are not authorities for the vendor's lien in the proper sense of the words, but only for the right which a vendor has to enforce payment after he has delivered possession, but before conveyance. With this latter right we of course do not propose to interfere. The amendment suggested only cuts off the secret lien, after an absolute conveyance, enforced in equity. The language of the court in *Porter v. City of Dubuque* certainly throws enough doubt over the doctrine to call for the interposition of the legislature to settle the question one way or the other, and we think there cannot be much hesitation in which way this should be:" *Code Com'rs' Rep.*, p. 62.

CHAPTER 6.

THE CONVEYANCE OF REAL PROPERTY.

3112. Instrument affecting, recorded. 1941. No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the land lies, as hereinafter provided. [R., § 2220; C., '51, § 1211.]

I. EFFECT OF RECORDING.

Not essential to validity: Recording is not essential to the validity of the instrument, as to parties and those having notice, nor to its competency as evidence: *Clark v. Connor*, 28-311.

The recording laws were not designed for the benefit of the immediate parties to a conveyance, but as a protection and shield to third persons: *Hopping v. Burnam*, 2 G. Gr., 39.

As between the parties a mortgage of real property is binding without being recorded: *Brewer's Estate v. Crow*, 4 G. Gr., 520.

After the delivery of a properly executed conveyance the title of the vendor is completely and entirely divested, although the instrument is not recorded: *Norton v. Williams*, 9-528.

As to effect of instruments not properly acknowledged, see notes to § 3113.

Presumption from recording: The presumption is that a deed, beneficial to the grantee, properly acknowledged and recorded, has been delivered, and the knowledge and assent necessary to a valid delivery will be presumed in the absence of a negative showing: *Robinson v. Gould*, 26-89.

In such a case the burden of proof is upon the party claiming non-delivery to clearly rebut the presumption arising from the acknowledgment and recording: *Craven v. Winter*, 38-471.

Therefore, *held*, that delivery of a deed of voluntary conveyance to the wife of grantee, who was a son of grantor, would be presumed to be a delivery to the son: *Ibid.*

While the recording of a conveyance is not proof of its delivery, yet execution of the instrument, and delivery to the recorder in good faith and at the instance of the grantee, may constitute a delivery; but the presumption of delivery would not arise from the fact that the instrument is found recorded, if the grantee has done no act recognizing its existence or validity: *Foley v. Howard*, 8-56.

The fact that a grantor in a deed delivers it to the recorder for record may be a circumstance, with others, tending to show fraud, but does not, of itself, as a matter of law, make the deed fraudulent or void: *Ward v. Wehman*, 27-279.

Assent of the grantee to the conveyance will not relate back to the delivery of the deed to the recorder for record where it was without the knowledge of the grantee, and without previous agreement to execute a conveyance of the property referred to: *Day v. Griffith*, 15-104.

Subsequent acceptance by the grantee of an instrument delivered to the recorder without his knowledge will not relate back to such delivery so as to cut out the rights of an intervening attaching creditor: *Ibid.*

Filing a deed for record cannot be considered as a delivery unless it is filed in pursuance of a previous agreement: *Deer v. Nelson*, 73-186.

Record notice: The fact that a purchaser is charged with record notice of one lien does not affect him as to others not recorded. Though not a *bona fide* purchaser as to the one he may be as to the others: *Koons v. Grooves*, 20-373.

A fraudulent deed acquires no validity by recording, and does not bind a subsequent purchaser who has not actual notice: *Gardner v. Cole*, 21-205.

A grantor who becomes liable on covenants running with the land is charged with notice of subsequent conveyances or incumbrances of record, and cannot, by settlement with his immediate grantee, cut off the claims of subsequent parties: *Devin v. Hendershott*, 32-192.

The filing for record is notice to the world of grantee's rights, and a party claiming a right of action as against the conveyance on account of fraud is deemed to have had notice of such fraud from the date of the recording: *Laird v. Kilbourne*, 70-83.

A person having constructive notice of an instrument is affected with all that it contains, and if thereby put upon inquiry he is bound to take notice of all that he might have learned by pursuing the path indicated: *Thomas v. Kennedy*, 24-397.

The rights conferred by an instrument of which a subsequent purchaser has constructive notice only are to be determined by the instrument itself as recorded and indexed, and not by facts *aliunde* or other instruments not recorded: *Miller v. Ware*, 31-524; *Disque v. Wright*, 49-538.

II. WHAT INSTRUMENTS.

Assignment of mortgage: The recording laws are applicable to transfers of mortgages as well as to the mortgages themselves, and the assignee of a mortgage must record his assignment in order to protect himself against the act of the mortgagee in releasing the lien of such mortgage or subordinating it to the lien of another mortgage: *Parmenter v. Oakley*, 69-388; *Bank of Indiana v. Anderson*, 14-544; *McClure v. Burris*, 16-591; *Cornog v. Fuller*, 30-212; *Bowling v. Cook*, 39-200; *Van Gorder v. Hanna*, 72-572.

Where an assignment of a mortgage is not recorded, and a subsequent purchaser of the premises releases a mortgage which he holds upon other land in consideration of the release

by the mortgagee of the mortgage which has been assigned, such release will extinguish the mortgage as to the property, and it cannot be foreclosed by the assignee: *Daws v. Craig*, 62–515.

Although a release by the mortgagee who appears by record to be still the owner of the mortgage will be binding upon the assignee of the mortgage or a note secured thereby, yet the mere payment to the mortgagee, who has ceased to be owner of the notes and mortgage, will not extinguish the mortgage to that extent. A mortgagor can, by taking ordinary care, protect himself by requiring the mortgagee to produce and account for the notes upon which payment is made: *Brayley v. Ellis*, 71–155.

Although it is held that one who purchases property after satisfaction of the mortgage thereon has been entered of record by the mortgagee takes it discharged of the claims of the assignee of the mortgage, if the assignment was not recorded at the time of the purchase, and he had no actual notice of the rights of the assignee, yet this rule is not applicable where there is no change in the relation of the parties in reliance upon the satisfaction of record: *Rand v. Barrett*, 66–731.

Where the attorney of a party foreclosing a mortgage has knowledge before the foreclosure is terminated that a third person holds, by assignment, one of the notes secured by mortgage, such plaintiff should make such assignee a party to the proceedings or the decree will not bar the equity of redemption in such assignee: *Walker v. Schreiber*, 47–529.

Agreement as to real property: The record of an agreement reserving to mortgagor's grantor a continued interest in the land covered by the mortgage, which is indexed in the name of the mortgagor as grantor and the former owner as grantee, imparts constructive notice to the mortgagee: *Paige v. Lindsey*, 69–593.

Public land claims: The provisions of the state registration law have no application to conflicting entries of public lands. The recording of a certificate of purchase from the United States or of a transfer thereof is unnecessary. The regulations established by congress will govern until the title has passed from the government by patent: *Klein's Heirs v. Argenbright*, 26-493; *David v. Rickabaugh*, 32–540; *Harmon v. Clayton*, 51–36.

III. SUBSEQUENT PURCHASERS.

Independent title: The term subsequent purchaser in this section is used to describe purchasers claiming under some common grantor, that is, under the same chain of title. The recording laws have no application as against an independent title distinct from that upon which the recorded instrument is based: *Rankin v. Miller*, 43–11.

The record of a deed from a person not connected with the record chain of title will not charge a subsequent purchaser with notice of the rights of such grantor: *Huber v. Bossart*, 70–718.

Mortgagee: A mortgagee of real property is a purchaser within the meaning of the provisions relating to recording: *Porter v. Green*, 4–571; *Seevers v. Delashmutt*, 11–174; *Hewitt v. Rankin*, 41–35; *Koon v. Tramet*, 71–132.

From the moment the mortgagee parts with his money on the strength of the mortgage he is considered as occupying as high ground as an absolute purchaser, and is within the protection of the statute as a purchaser: *Barney v. McCarty*, 15–510.

So, where a prior mortgage, given to secure a joint note of mortgagor and another who was in fact a surety, was paid off by such surety, *held*, that although between the surety and the mortgagor the former was entitled to subrogation under such mortgage, yet a subsequent mortgagee without knowledge of that fact had a right to regard the payment by the surety as satisfaction, and such subsequent mortgagee would be protected against the mortgage: *Patton v. Eberhart*, 52–67.

Attaching creditor: An attachment lien does not take precedence over a prior unrecorded conveyance of which the creditor had no notice: *Norton v. Williams*, 9–528; *Savery v. Browning*, 18–246; *First Nat. Bank v. Hayzlett*, 40–659; *Eldred v. Drake*, 43–569.

It is otherwise as to chattel mortgages: See notes to § 3094.

Judgment creditor: The holder of a judgment lien is not a purchaser, and his claim is subject to prior equities and unrecorded instruments: *Norton v. Williams*, 9–528; *Bell v. Evans*, 10–353; *Seevers v. Delashmutt*, 11–174; *Hays v. Thode*, 18–51; *Chapman v. Coats*, 26–288; *Stuart v. Hines*, 33–60, 100.

A judgment lien does not take priority over an unrecorded mortgage, even though such unrecorded mortgage, by mistake, does not describe the land therein intended to be mortgaged: *Welton v. Tizzard*, 15–495.

A deed unacknowledged and unrecorded conveys title paramount to a subsequent judgment, and the same rule applies to an assignment for the benefit of creditors not acknowledged or recorded. A creditor cannot set up the fact of the want of registry of the deed of assignment to defeat assignee's title, for the reason that invalidity on that ground arises only as against a subsequent purchaser for value without notice: *Munson v. Frazer*, 73–177.

A judgment creditor or the assignee of a judgment is not protected against a prior equity if an action to enforce it is brought before the sale: *Rider v. Kelso*, 53–367.

Under a statute providing that no deed should be valid except between the parties, or between those having actual notice thereof until recorded, *held*, that the levy of an attachment or the lien of a judgment would take priority over an unrecorded conveyance: *Brown v. Tuthill*, 1 G. Gr., 189; *Hopping v. Burnam*, 2 G. Gr., 39.

The purchaser at judicial sale is bound to take notice of instruments recorded up to date of sale, although they may have been executed prior to the levy: *Chapman v. Coats*, 26–288; *Thomas v. Kennedy*, 24-397; *Norton v. Williams*, 9–528.

A third person purchasing at a sale under a judgment is protected as fully as if he had purchased and taken a deed from the judgment debtor: *Evans v. McGlasson*, 18–150; *Jones v. Brandt*, 59–332.

The judgment creditor purchasing at the sale is entitled to protection as any other purchaser: *Weaver v. Carpenter*, 42–343.

At least this is true in the absence of any controlling equities: *Evans v. McGlasson*, 18–150; *Halloway v. Platner*, 20–121; *Butterfield v. Walsh*, 21–97; *Wallace v. Bartle*, 21–346; *Walker v. Elston*, 21–529; *Gower v. Doheney*, 33–36.

If strong and controlling equities intervene they may perhaps be recognized by a court of equity as against the judgment creditor purchasing at his sale: *Walker v. Elston*, 21–529.

But this rule by which a purchaser at judicial sale is protected applies only in case of a sale of the legal title. When the sale is of an equity, the purchaser takes only such equity, if any, as the defendant may actually have: *Wallace v. Bartle*, 21–346; *Churchill v. Morse*, 23–229.

Heir: A purchaser from the heir is protected against a prior unrecorded deed of the ancestor: *McClure v. Tallman*, 30–515.

The heir himself is not protected against unrecorded deeds of his ancestor: *Morgan v. Corbin*, 21–117.

The heir takes subject, also, to an unrecorded contract to convey, made by his ancestor: *Montgomery v. Gibbs*, 40–652.

Devisees of the owner of the naked legal title, who have full knowledge of the possession of the property by one having the equitable title thereto, can occupy no better position than their testator, and will take subject to the same equities existing against him: *Peters v. Jones*, 35–512.

IV. FOR VALUABLE CONSIDERATION.

Purchasers for a consideration: This section implies that, except as to subsequent purchasers for a valuable consideration, instruments affecting real estate are not rendered invalid for the reason that they have not been recorded. To entitle a purchaser to priority over a prior purchaser who has failed to record his deed, the subsequent grantee must have purchased for a valuable consideration and without notice of the rights of the first purchaser: *Sillyman v. King*, 36–207.

Payment before notice: In order that the purchaser may hold property discharged of a prior lien or charge he must have paid the purchase money before notice: *Cummings v. Tovey*, 39–195.

A subsequent mortgagee will have priority over an earlier mortgage only where he has not had notice of such prior mortgage until after the completion of the contract or the payment of the money. The fact that the terms of the transaction have been agreed upon before notice is received by him will not entitle him to protection: *English v. Waples*, 13–57.

Extension of time: Where a purchase money mortgage, by reason of defective description, did not affect a subsequent mortgagee with notice, and such subsequent mortgagee, although taking his mortgage for a precedent debt, in consideration thereof extended the time of payment, and also bought in another mortgage on the same property, *held*, that the second mortgagee had a prior lien: *Port v. Embree*, 54–14.

Where a mortgage is given as security for an antecedent debt, and the time is extended, such extension will be sufficient consideration to constitute the mortgagee a purchaser for value, and entitle him to protection: *Sullivan Savings Institution v. Young*, 55–132; *Davis v. Lutkieweitz*, 72–254; *Koon v. Tramel*, 71–132.

Surrender of security: The surrender of a security for an indebtedness due from the grantor to the grantee is sufficient to make the grantee a purchaser for value as against third parties: *Seymour v. Harrison*, 20–592.

Pre-existing indebtedness: Where a mortgage is given to secure a pre-existing indebtedness and not in consideration of any extension of time, the mortgagee, even without notice of a prior unrecorded mortgage, does not acquire any rights superior thereto: *Phelps v. Fockler*, 61–340.

The mere expense of recording the mortgage will not be sufficient to render the holder thereof a holder for value: *Ibid.*

Actual payment is in general necessary to the character of a *bona fide* purchaser for value. The giving of security and executing a bond is not sufficient: *Kitteridge v. Chapman*, 36–348.

The execution of notes and a mortgage securing them will not constitute payment if the notes, though negotiable, remain in the hands of the person from whom title was acquired: *Rush v. Mitchell*, 71–333.

One who purchases property agreeing to pay a mortgage thereon as a part of the purchase money does not thereby acquire priority over the lien of a judgment upon the premises, even though such lien is subsequent to that of the mortgage paid: *First Nat. Bank v. Thompson*, 72–417.

Payment after notice: A purchaser of property who gives a mortgage back for the entire purchase money, and before making any payment thereon has notice of the title of a prior purchaser by unrecorded deed, cannot be protected as against such title. He is in a condition to refuse payment, and if he makes payment must be regarded as having made it voluntarily and with notice: *Brady v. Otis*, 40–97.

The fact that a purchaser in good faith has paid only a part of the purchase price cannot render him liable in any manner different from the liability which he assumed as to his grantor, but he may as to the purchase money unpaid, upon being indemnified against any liability, be required to pay the consideration to the person equitably entitled thereto: *Macomber v. Peck*, 39–351.

A party claiming under one who has assumed and paid a mortgage as part of the purchase price of the land cannot set up such claim as against the lien of a judgment of which the parties both had constructive notice: *Goodyear v. Goodyear*, 72–329.

Partial payment of the purchase money before notice, although not sufficient to vest the vendee with the character of a *bona fide* purchaser as regards the entire estate, will entitle him to invoke the aid of equity to the extent of reimbursement for the amount actually paid: *Kitteridge v. Chapman*, 36–348.

The claimant of a lien who has not paid any value therefor cannot be regarded as a good faith purchaser, but if he has paid a portion of the amount for which he claims a lien he may assert his lien to the extent of the sum paid: *O'Brien v. Harrison*, 59–686.

Recital of consideration in deed: The grantee of a fraudulent purchaser has the burden of proof cast upon him to show that he purchased in good faith and for a valuable consideration, and the recital of a valuable consideration in the deed is not evidence of payment thereof as against the person relying upon the fraud to defeat the conveyance. Such a recital is evidence only as between the parties and parties claiming through or under them: *Sillyman v. King*, 36-207; *Falconbury v. McIlravy*, 36-488; *Rush v. Mitchell*, 71-333.

The recital in a warranty deed that a consideration named was paid by grantee to grantor is not sufficient as against the holder of a prior title, who is a stranger to the conveyance, to show that the grantee is a purchaser for value: *Hogdon v. Green*, 56-733.

Burden of proof as to payment of consideration: Where the grantee of one who has purchased in fraud of the rights of a prior purchaser claims to be a *bona fide* purchaser without notice and for value, the burden of proving the payment of the consideration before notice of the fraud is upon him: *Sillyman v. King*, 36-207; *Throckmorton v. Rider*, 42-84; *Light v. West*, 42-138; *Anderson v. Buck*, 66-490.

So where plaintiff relied upon an unrecorded deed, and alleged that defendant, a subsequent purchaser, had notice thereof, *held*, that plaintiff's deed made a *prima facie* case, and that the burden was upon defendant to show that he paid a valuable consideration in order to defeat plaintiff's title: *Nolan v. Grant*, 53-392.

A purchaser claiming protection against a previous conveyance not properly recorded has the burden of proving that he is an innocent purchaser for value: *Fogg v. Holcomb*, 61-621.

If a purchaser is affected with notice the burden is upon his vendee, claiming to be an innocent purchaser, to show his own good faith and that he paid value: *Davis v. Nolan*, 49-683; *Hume v. Franzen*, 73-25.

A party claiming to be an innocent purchaser for value without notice has the burden to prove such facts: *Gardner v. Early*, 72-518.

Where in an action to foreclose a mortgage a sub-equent grantee is made a party, and he, by cross-bill, sets up the fact that he had no notice, actual or constructive, of the existence of the mortgage, and the plaintiff in answering such cross-bill avers that the mortgage was properly acknowledged and recorded, and that defendant had notice thereof, the fact that defendant was a purchaser for value, not being put in issue, will be presumed in the absence of evidence to the contrary on the part of the plaintiff: *Jones v. Berksmire*, 15-248.

Also *held*, that if it had been alleged by plaintiff that defendant, the subsequent purchaser, was not a purchaser for value, and the answer had denied such allegation, the burden of proof would have been upon the plaintiff to establish it: *Idid.*

Where by mistake a mortgage is executed upon different property than that intended to be covered, so that it cannot be enforced against the property intended until corrected by the parties or reformed in equity, the mortgagee under a subsequent mortgage upon the property does not have the burden of proving consideration and want of notice in order to establish his priority over the mortgage intended to have been executed on the same property: *Davis v. Lutkiewiez*, 72-254.

V. WITHOUT NOTICE.

Actual notice: A person having actual knowledge of an unrecorded instrument is bound thereby as fully as if the same were properly recorded: *Dussaume v. Burnett*, 5-95, 104; *Wilson v. Holcomb*, 13-110; *Coe v. Winters*, 15-481.

Actual notice of an outstanding conveyance takes the place of an acknowledgment and recording: *Miller v. Chittenden*, 2-315, 360.

A grantee having actual notice of an outstanding mortgage cannot take advantage of any defects in the recording thereof: *Coe v. Winters*, 15-481.

A purchaser who, upon examination of the records, would have seen that the party from whom he purchased had no title to convey, and that the attorney in fact who attempted to convey had no power to do so, *held* not to be an innocent purchaser: *Switz v. Black*, 45-597.

In order that a purchaser may be protected against a proceeding to set aside the conveyance of the property to his grantor as being in fraud of creditors, he must not only have paid a valuable consideration, but must have bought in good faith and without notice of the defects in the title: *Cooley v. Brown*, 30-470.

A mortgagee with knowledge of the existence of a prior unrecorded mortgage cannot, by assignment of his own mortgage after the record of such prior mortgage, confer upon his assignee equities superior to that of the prior mortgage: *Sims v. Hammond*, 33-368.

The fact that a mortgagee placed his own mortgage on record before the recording of an earlier one gives him no priority if he has actual notice of such prior mortgage: *Bell v. Thomas*, 2-384.

Where a purchaser of land from one having the apparent title had notice of a mortgage executed to such person, by another, upon the same land, *held*, that by such knowledge he was affected with notice of an unrecorded conveyance to the person by whom such mortgage was executed: *Clark v. Holland*, 72-34.

What sufficient notice: A purchaser will be affected by such notice as would be sufficient to put a reasonable man upon inquiry: *English v. Waples*, 13-57.

Notice is either knowledge or having the means of knowledge, although such means may not be used: *Ætna L. Ins. Co. v. Bishop*, 62-645.

Statements made to a grantee by parties claiming to have prior unrecorded deeds to the property will constitute notice, although such statements are not believed: *Hamilton v. Smith*, 57-15.

Facts in a particular case *held* sufficient to impute notice to a subsequent mortgagee that the indebtedness under a prior mortgage, though changed in form, was not paid: *Heively v. Matteson*, 54-505.

Facts in a particular case *held* sufficient to prove that a purchaser had notice of a prior

unrecorded conveyance: *Davis v. Nolan*, 49–683.

In a particular case, *held*, that the fact that the grantee had notice that another person set up a claim to the premises, although not informed of its precise extent and nature, was sufficient to affect him with notice of a resulting trust in favor of such person: *Zuver v. Lyons*, 40–510.

The fact that a party takes a mortgage upon property from one claiming to be the owner of such property under an unrecorded deed will not put him upon inquiry as to the rights of other persons in the premises: *Davis v. Lutkiewiez*, 72–254.

Vague rumors and suspicions, or general assertions made by strangers to the title, upon hearsay, will not be sufficient. The notice must be such as to bind the conscience of the party and put him upon such inquiry as would lead to the knowledge of the rights with which he is to be affected. But if he know of such rights, or fraudulently abstain from knowing them, he is not a *bona fide* purchaser: *Wilson v. Miller*, 16–111.

A simple disclaimer, by execution defendant, of having any interest in the property levied upon as his, will not put the officer upon inquiry as to its ownership: *West v. St. John*, 63–287.

Under a former statute making an unrecorded instrument valid only as between the parties thereto and such persons as should have actual notice thereof, *held*, that something more than mere rumor or knowledge of facts calculated to put a party on inquiry was required to constitute actual notice: *Wihelm v. Mertz*, 4 G. Gr., 54.

And under the statute last referred to, *held*, that the actual notice therein required could only be communicated by express information to, or personal service upon, the party interested in the notice, and that constructive or implied notice from possession or acts of ownership were not sufficient: *Hopping v. Burnam*, 2 G. Gr., 39.

Further as to what constitutes notice, see notes to § 3094.

Attachment: A purchaser in good faith for value from one to whom property has been fraudulently conveyed is not affected by an attachment in a suit against the grantor in such fraudulent conveyance: *Eldred v. Drake*, 43–569.

An entry in the incumbrance book of an attachment of an equitable interest in land, which interest does not appear of record, will not constitute notice to a vendee or mortgagee of the person holding the legal title: *Farmers' Nat. Bank v. Fletcher*, 44–252.

Grantee of bona fide purchaser: A purchaser from a grantee who has taken a conveyance in good faith for value without notice of equities or defenses will be protected even though he himself had notice of such equities or defenses: *Ashcraft v. De Armond*, 44–239.

One who holds title as an innocent purchaser free from equities as against his grantor may convey to a purchaser who has knowledge of such equities as good a title as he himself has: *Mast v. Henry*, 65–193; *Chambers v. Hubbard*, 40–432; *Rogers v. Hussey*, 36–664; *East v. Pugh*, 71–162.

To affect a purchaser with fraud in a conveyance through which he claims title, it must appear that the respective grantees intervening between the fraudulent conveyances and the grantee in question had notice of such fraud: *Brace v. Reid*, 3 G. Gr., 422.

Assignee of mortgage: A mortgagee with knowledge of the existence of a prior unrecorded mortgage cannot, by assignment of his own mortgage after the record of such prior mortgage, confer upon his assignee equities superior to that of the prior mortgage: *Sims v. Hammond*, 33–368.

Purchaser by quitclaim: A purchaser by quitclaim deed is not entitled to be considered a *bona fide* purchaser, and does not, therefore, acquire priority over equities or unrecorded conveyances which are valid against his grantor: *Smith v. Dunton*, 42–48; *Wightman v. Spofford*, 56–145; *Kaiser v. Waggoner*, 59–40; *Laraway v. Larue*, 63–407; *Fogg v. Holcomb*, 64–621; *Butler v. Barkley*, 67–491; *Bradley v. Cole*, 67–650; *Postel v. Palmer*, 71–157; *Rush v. Mitchell*, 71–333. But apparently *contra*, see *Pettingill v. Devin*, 35–344, 354.

A purchaser by quitclaim from the holder of a tax title which is void for fraud cannot claim protection against such fraud as an innocent purchaser: *Watson v. Phelps*, 40–482; *Besore v. Dosh*, 43–211; *Springer v. Bartle*, 46–688.

A party holding under a quitclaim deed is chargeable with notice of all the infirmities of the title acquired thereby: *Besore v. Dosh*, 43–211.

A party purchasing simply the right which his grantor has takes subject to all claims against such grantor: *Arnold v. Grimes*, 2–1.

A purchaser of property receiving conveyance of it by quitclaim deed for a consideration very much less than its value, with notice at the time that the land is claimed by another who has paid taxes thereon from the date of his conveyance, which is of record, takes with notice of such conflicting conveyance: *Ross v. Loomis*, 64–432.

A quitclaim deed to a person who knows that his grantor has no title to or interest in the property does not vest in the grantee any right whatever: *Curtis v. Smith*, 42–695.

A purchaser by quitclaim deed for an amount much less than the actual value of the property is not protected as a *bona fide* purchaser. Neither is the purchaser from him thus protected who has knowledge of the nature and consideration of the deed under which his grantor holds: *Hume v. Franzen*, 73–25.

A deed which does not purport to convey the property, but quitclaims the grantor's right, title, interest and estate therein, is a quitclaim deed, and the grantee therein cannot be regarded as a purchaser without notice of equities affecting grantor's title: *Wightman v. Spofford*, 56–145.

Purchaser by warranty from quitclaim purchaser: A purchaser by warranty deed from the grantee in a quitclaim deed is entitled to protection, and is not affected by unrecorded conveyances or outstanding equities of which he has no notice: *Winkler v. Miller*, 54–476; *Raymond v. Morrison*, 59–371; *Huber v. Bossart*, 70–718.

Notice to agent: Notice acquired by an agent previous to the time of agency and

while negotiating with reference to property for himself, and not shown to be present in the mind of the agent at the time of acting as such, in reference to the same property, will not be deemed notice to the principal: *Lunt v. Neeley*, 67-97; *Yerger v. Barz*, 56-77.

The person for whom land is purchased by an agent or trustee is charged with notice of equities with which the agent or trustee is affected: *Butler v. Barkley*, 67-491.

Notice imparted by possession; rights and equities of possessor: One who purchases land while it is in the actual possession of another takes it with notice of all the existing rights and equities of the person in possession: *Sears v. Munson*, 23-380; *Eli v. Gridley*, 27-376; *Harper v. Perry*, 28-57; *White v. Butt*, 32-335; *Phillips v. Blair*, 38-649; *Day v. Lown*, 51-364.

The possession of a vendee under parol contract of purchase operates as constructive notice of his rights: *Baldwin v. Thompson*, 15-504; *Watrous v. Blair*, 32-58.

A purchaser of real estate in the possession of a third person is bound to take notice of such person's title to the possession, whether such title be legal or equitable: *Moore v. Pierson*, 6-279.

The principle upon which one buying real estate in actual possession of a third person takes it subject to his equities is that good faith and reasonable prudence in dealing require the purchaser to inquire of such person what claim he asserts to the property, and the law conclusively presumes that the purchaser has acquired all the information which a timely and prudent inquiry would have given him: *Rogers v. Hussey*, 36-664.

Where a mortgagee took his mortgage with knowledge of possession by a third person, and of the fact that deeds were missing from the chain of title assumed by the record, *held*, sufficient to affect him with notice that the title was not perfect: *Jewell v. Reddington*, 57-92.

The purchaser of land in the possession of one who holds an equitable title thereto, and has erected valuable improvements thereon, has constructive notice of the latter's rights and equities: *Van Orman v. Merrill*, 27-476.

A subsequent purchaser is affected with notice of the title of a person in possession, although the conveyance under which he claims, by mistake in the record, does not afford constructive notice: *Hubbard v. Long*, 20-149.

Possession under a deed is constructive notice to all parties of the rights of the grantee to the same extent as if the deed had been duly placed on record: *Simmons v. Church*, 31-284.

Possession by grantee under an unrecorded deed *held* sufficient notice to a subsequent mortgagee of grantor, whose mortgage by mistake covered the premises conveyed: *Gum v. Equitable Trust Co.*, 1 McCrary, 51.

What sufficient possession: Possession of a portion of a tract of land imparts notice of the claim to the whole tract covered by the title or equity under which the land is held: *Watters v. Connelly*, 59-217; *Nolan v. Grant*, 51-519.

Possession of a tract of prairie land under a conveyance covering such land and a small tract of uninclosed woodland, *held* not to amount to constructive possession of the woodland: *Zent v. Picken*, 54-535.

L. sold two lots to D., and executed his bond for a deed, which was not recorded; D. built a house upon one lot, and a shed or stable in the alley near the line of the other; neither lot was fenced, and both were used together; while the property was in this condition, L. sold the two lots to T., who had no actual notice of the rights of D.; *held*, that there was no constructive notice to T. of D.'s equities in the unimproved lot: *Dickey v. Lyon*, 19-544.

There may be possession in fact of unimproved and uninclosed land: *Langworthy v. Myers*, 4-18.

Where a person claiming land exercises acts of ownership over it, by the use of it for the purposes to which it is adapted, such possession is sufficient to affect a purchaser with notice of his rights: *Clement v. Perry*, 34-564.

Where a person claiming land goes upon it and plows a furrow around it, which act is regarded as an assertion of claim in the neighborhood, he has such possession as to constitute notice to a subsequent purchaser: *Buck v. Holt*, 74-294.

Timber land: In a particular case, *held*, that the circumstances were such as to affect a subsequent purchaser with notice of the rights of an owner in timber land not actually occupied by him, the conveyance of which did not constitute constructive notice by reason of a mistake in the deed and record: *Hubbard v. Long*, 20-149.

Facts in a particular case, such as that plaintiff drove trespassers from timber land, took wood cut by them, etc., *held* sufficient to establish possession in him which would operate as notice to subsequent purchasers: *Nolan v. Grant*, 51-519.

Such use of timber land as it is susceptible of, such as cutting timber therefrom, etc., is sufficient possession to constitute notice: *Spiller v. Scofield*, 43-571.

Possession by a tenant is sufficient to put a subsequent purchaser upon inquiry as to the rights and equities of the landlord: *Nelson v. Wade*, 21-49.

Possession by a tenant is constructive notice of the title of the landlord: *Dickey v. Lyon*, 19-544.

Right of lessee in possession: Under particular facts, *held*, that a party contracting with reference to real property was affected with notice of the rights of a lessee in possession: *Leebrick v. Stahle*, 68-515.

Possession by lessee under a mining lease, indicated by his having windlasses, tools, etc., on the premises for the prosecution of his business, *held* sufficient to constitute notice to a purchaser; and *held* further, that leave obtained by such lessee from such purchaser, to work the mine to a limited extent, did not amount to a relinquishment of his full rights under the lease, such consent having been obtained on account of a threat of the purchaser to stop further work: *Chamberlain v. Collinson*, 45-429.

Possession notice of what: Possession under a recorded conveyance is not notice of rights existing prior to and independent of the conveyance: *Rogers v. Hussey*, 36-664.

Therefore, *held*, that a purchaser at judicial sale under a judgment antedating the convey-

ance of the legal title from the judgment debtor to the party in possession was not affected with notice of an equitable title in the party in possession, existing prior to the judgment: *Bonnell v. Allerton*, 51–166.

Where a vendee of property in the possession of another made inquiry of the party in possession as to the claims upon the property, and such party disclaimed any right or interest therein, and the fact of such possession was accounted for by facts stated by the vendor showing no interest or right of possession in such party, *held*, that the vendee was not affected with notice of any equity in such possessor: *Cavin v. Middleton*, 63–618.

While possession of realty is notice to purchasers at least so far as to put the vendee upon inquiry to ascertain upon what right the occupant holds, this rule is not extended so far as to give notice of the defects in his title nor of the defects in the title paramount to the person in possession: *Suiter v. Turner*, 10–517.

Possession after foreclosure: Where a party originally holding under a deed was found in possession after the sale of the property under foreclosure of a mortgage and the expiration of the time for redemption, *held*, that such possession was sufficient notice of a claim adverse to the deed made in pursuance of the sale: *Wrede v. Cloud*, 52–371.

Under conveyance from tenant in common: Although possession is to be construed with reference to the right under which the person in possession claims to hold, yet, where a grantee from one tenant in common of a portion of the common premises by metes and bounds had shown by unequivocal acts that he understood and claimed his right to the premises to be absolute, *held*, that a purchaser from the tenant in common with knowledge of the facts and circumstances was affected with notice of the adverse claim of the person in possession: *Laraway v. Larue*, 63–407.

Continuance in possession by a party who, as owner, has executed a conveyance, will not constitute notice of his want of capacity to make such conveyance: *Ashcraft v. De Armond*, 44–229.

The rule that possession is constructive notice of the rights of the party in possession applies only to a case where the equities of the parties are independent of or adverse to the legal title or record, and possession by the grantor after a full conveyance is not constructive notice to subsequent purchasers of any right reserved in the land of the grantor: *Koon v. Tramel*, 71–132.

Possession by husband or wife: Where the purchaser of real estate pays the purchase money and enters into actual possession of the property, a subsequent mortgagee of the vendor will be charged with notice of the rights of such purchaser, whether such possession be by the husband or wife: *Humphrey v. Moore*, 17–193.

Where the husband is in possession and control of land, such possession will not constitute notice of a claim of the wife to the land, although he is, in fact, acting as her agent: *Thomas v. Kennedy*, 24–397.

Possession by married woman: The rule that a wife's possession jointly with her husband will not impart notice of equities which she holds against him, to one acquiring title from the husband, does not apply to a possession by a married woman where another member of the family, such as a son, holds the legal title. Such possession will be notice of her rights: *Iowa Loan & Trust Co. v. King*, 58–598.

Easement: Where at the time of the purchase of land a ditch was being constructed thereon by a railway company for the improvement of its right of way, *held*, that a purchaser was affected with knowledge of the contract between his grantor and the railway company: *Cook v. Chicago, B. & Q. R. Co.* 40–451.

Recitals in title deeds: A purchaser is charged with notice of anything appearing in any part of the deeds or instruments which prove and constitute the title, which is of such nature that if brought directly to his knowledge it would amount to actual notice: *State v. Shaw*, 28–67; *Clark v. Stout*, 32–213.

A grantee is charged with notice of the recitals and conditions of the deed under which his grantor claims title, although there is a mistake in such recitals, provided it contains enough to put a prudent man upon inquiry: *Mosle v. Kuhlman*, 40–108.

The mortgagee is bound to know of recitals in the conveyances to the mortgagor, affecting the title of such mortgagor, whether the mortgagee see such conveyances or not: *Ætna L. Ins. Co. v. Bishop*, 69–645.

The reference in a mortgage by way of exception to another mortgage of a certain amount affects the mortgagee with notice of a prior mortgage for that amount, although the prior mortgage is not recorded: *Clark v. Bullard*, 66–747.

Where the conveyance by which a mortgagor holds title refers to a contract, the mortgagee will be held affected with notice of the terms of such contract and any equity arising therefrom: *Hall v. Orvis*, 35–366.

Where property was incorrectly described in a conveyance under which a grantor claimed title, but was there designated by the same description as in a prior recorded mortgage upon the property, *held*, that the grantee of such grantor had notice of the identity of the property in both instruments, and was therefore affected with notice of the mortgage: *State v. Shaw*, 28–67.

The fact that one of the notes covered by a mortgage is omitted in the record thereof will not relieve the purchaser from the lien of the mortgage as to the amount of such note, where the aggregate amount of the lien as recited in his deed referring to such mortgage is correct: *Dargin v. Beeker*, 10–571.

The grantee is affected with notice of a stipulation in a conveyance to his grantor that such conveyance is made subject to the lien of a mortgage, which the grantee in such prior conveyance does not undertake personally to pay: *Iowa Loan & Trust Co. v. Mowery*, 67–113.

Recitals not constituting notice: Where a deed recited the existence of a trust deed upon the property, and that it was paid and satisfied, *held*, that such recital did not charge the grantee with notice of a lien arising under such trust deed: *Newman v. Samuels*, 17–528.

The fact that a mortgage contains covenants of warranty does not amount to notice that it is to have priority of lien over another mortgage which is prior in time and first recorded: *Vandercook v. Baker*, 48–199.

A statement in a deed that it was made "per agreement of" a certain date does not constitute a sufficient incorporation of such agreement into the deed as to make the terms of the agreement binding upon a subsequent grantee of the property conveyed: *Close v. Burlington' C. R. & N. R. Co.*, 64–149.

Purchaser without notice: A *bona fide* purchaser for a valuable consideration without notice may acquire an interest in land free from any equity or trust with which it was charged in the hands of the grantor: *Hewitt v. Rankin*, 41–35.

One who purchases from the holder of the legal title and takes a conveyance without notice of outstanding equities, paying a valuable consideration, takes the property divested of such equities or any liens thereon. So *held* as to a vendee from the holder of the legal title subsequent to a judgment against the equitable owner, but without notice of such equitable ownership: *Farmers' Nat. Bank v. Fletcher*, 44–252.

Under evidence in a particular case, *held*, that the purchaser of real property from the vendee thereof took without notice of fraud in the original conveyance from vendor to vendee, and should be protected: *McDonald v. Hardin*, 55–620.

Under the facts in a particular case, *held*, that the assignee of a mortgage which was in fact, and as shown by the record, filed prior to the filing of another mortgage which by agreement of the parties was to have been the first recorded and treated as a first lien, was not chargeable with notice of the agreement between such parties, and was entitled to priority: *Cook v. Stone*, 63–352.

The failure to record a town plat until after the date and record of a mortgage on lots therein, *held* not sufficient to put a party upon his inquiry so as to charge him with knowledge of facts within the possible range of such inquiry: *Stewart v. Huff*, 19–557.

The fact that the grantee in a conveyance, made in accordance with a plat not yet recorded, has knowledge of a change in the plat before the recording thereof, does not estop him from claiming the land originally conveyed: *Watrous v. Blair*, 32–58.

A mortgage subsequent in date will take priority over any earlier mortgage unless the mortgagee had notice of such prior mortgage. Facts in a case considered and *held* insufficient to prove notice: *Brazleton's Adm'r v. Brazleton*, 16–417.

Deed absolute in form: A purchaser from the grantee under a deed absolute upon its face, who takes without knowledge of any equities between the original parties, is protected, although the instrument itself merely constituted a trust: *Gray v. Coan*, 40–327.

A purchaser with notice of equities in a third party takes subject to such equities: *Harris v. Stone*, 15–273.

A purchaser with notice of a right in another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase: *Phillips v. Blair*, 38–649.

One who purchases an estate after notice of a prior equitable right thereto makes himself a *mala fide* purchaser, and will not be enabled by getting the legal title to defeat the equitable interest: *Mitchell v. Peters*, 18–119.

A purchaser will not be protected against a prior deed which misdescribes the property, if he had actual notice of the prior grantee's equities, or such notice as would put a prudent man upon inquiry: *Nelson v. Wade*, 21–49.

Trusts: The purchaser of land with notice that his grantor holds the same in trust takes subject to the trust, and will be required to restore the estate for the purposes thereof: *Zuver v. Lyons*, 40–510.

Though the conveyance to a trustee is absolute in form, a purchaser from the trustee, with knowledge of the trust, takes subject thereto: *Sleeper v. Iselin*, 62–583.

Mortgage: One purchasing subject to a mortgage of which he has knowledge, and the amount of which is dependent upon the amount of the indebtedness remaining unpaid after the exhaustion of a prior mortgage, cannot claim to be an innocent purchaser free from the lien of such mortgage: *Kellogg v. Frazier*, 40–502.

A subsequent mortgagee with notice of the prior mortgage does not acquire priority by the fact that the mortgagor fraudulently applies the money received from such junior mortgagee to the satisfaction of another mortgage of which the junior mortgagee has no notice, instead of to the mortgage of which he has notice: *Barber v. Lyon*, 15–37.

Notice of invalid claim: One who acquires a legal title to lands with notice of an equity held by another who has the land subject to such equity, and conversely one who acquires a legal title without notice of an outstanding equity, holds the land free from the equitable title; but one who acquires an invalid legal title will not hold the land against another who has a valid legal title accompanied by the right in equity to the land on the ground that the first had no notice of the legal title and equity of the last: *Fallon v. Chidester*, 46–588.

Burden of proof as to notice: A party claiming to be protected as an innocent purchaser without notice and for value has the burden of proving such allegation: *Kibby v. Harsh*, 61–196.

Where the defendant in an action to foreclose a mortgage set up a prior unrecorded mortgage, alleging that the plaintiff had notice of such prior mortgage, *held*, that the defendant alleging the fact of notice had the burden of proof: *McCormick v. Leonard*, 38–272.

In a contest between a mortgagee claiming to have taken his mortgage without notice of a prior unrecorded mortgage, and the prior mortgagee, the burden of showing notice on the part of the subsequent mortgagee is upon such prior mortgagee: *Hoskins v. Carter*, 66–638.

A similar principle is applicable as between the mortgagee and the holder of a mechanic's lien whose statement has not been filed within the time required by law: *Ibid.*

The burden of showing bad faith on the part of a purchaser by warranty deed sufficient to affect him with notice of unrecorded conveyances is upon the party asserting such bad faith: *Raymond v. Morrison*, 59-371.

The evidence in a particular case *held* not sufficient to show bad faith: *Ibid.*

Whether, if payment of consideration is shown by a subsequent purchaser claiming to be without notice of a prior conveyance, want of notice will be presumed, *quære: Nolan v. Grant*, 53-392.

Where a purchaser has taken with actual notice of a prior unrecorded deed, the burden of proof is upon his vendee, claiming to be an innocent purchaser without notice, to show his own good faith and that he paid value: *Davis v. Nolan*, 49-683.

3113. Acknowledgment. 1942. It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner herein prescribed. [R., § 2221; C., '51, § 1212.]

While the acknowledgment is necessary for the admission of the instrument to record, it is not essential to its validity as between the parties or as to persons having notice in fact: *Gould v. Woodward*, 4 G. Gr., 82: *Miller v. Chittenden*, 2-315, 360; *Blain v. Stewart*, 2-378; *Dussaume v. Burnett*, 5-95, 104; *Brinton v. Seevers*, 12-389; *Haynes v. Seachrest*, 13-455; *Carleton v. Byington*, 18-482; *Simms v. Hervey*, 19-273, 287; *Lake v. Gray*, 30-415; *Morse v. Beall*, 68-463.

As to what is sufficient to constitute notice in fact, see notes to preceding section.

If an instrument is defective in the acknowledgment the recording thereof does not impart constructive notice: *Willard v. Cramer*, 36-22; *Woods v. Banks*, 34-599; *Reynolds v. Kingsbury*, 15-238; *Brewer's Estate v. Crow*, 4 G. Gr., 520.

The fact that the recorder, in recording an acknowledgment which is defective by reason of the omission of an essential word, inserts such word so that the record appears perfect, will not cure the defect: *Newman v. Samuels*, 17-528.

The want of an acknowledgment cannot be made the ground for objecting to the introduction of the instrument in evidence. It would be valid as between the parties and also as to third parties, provided notice could be brought home to such third party: *Jones v. Berkshire*, 15-248.

3114. Index. 1943. The recorder must keep an entry book or index, the pages of which are so divided as to show in parallel columns:

1. The grantors;
2. The grantees;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the land conveyed. [R., § 2222; C., '51, § 1213.]

See notes to next section.

3115. Entries. 1944. The recorder must indorse upon every instrument properly filed in his office for record, the time when it was so filed, and shall forthwith make the entries provided for in the preceding section, except that of the book and page where the record of the instrument may be found, and, from that time, such entries shall furnish constructive notice to all persons of the rights of the grantee conferred by such instrument. [R., § 2223; C., '51, § 1214.]

Failure to index or record: Although the instrument is filed, yet if, through fault of the officer or otherwise, it is not indexed or duly recorded, it will not constitute notice: *Barney v. McCarty*, 15-510; *Barney v. Little*, 15-527; *Whalley v. Small*, 25-184; *Miller v. Bradford*, 12-14: *Noyes v. Horr*, 13-570.

The language of the acts of 1839 and 1840, providing that from the time the instrument "is filed in the recorder's office for record," it it shall constitute notice, simply fixed the time from which notice should date, but did not render the filing alone sufficient to affect third persons with notice in case the further steps of indexing and recording, as required by statute, were not taken: *Ibid.*

Indexing; what sufficient: If the grantor's and grantee's names are given in the index with the book and page where the instrument is recorded, and the instrument is in fact there recorded, this, so far as the object of the recording act is concerned, is a substantial, though it may not be in all respects a literal, compliance with the law. The record book and the index book are not to be considered as detached and independent books, and if the index makes the requisite reference the party will be affected with notice of any facts which either book contains with respect to the title of the proposed grantor: *Barney v. Little*, 15-527.

If an ordinarily diligent search of the records will bring to the inquirer knowledge of a prior incumbrance or alienation, he is presumed to know of it, assuming the instrument to be one which may properly be recorded. The law charges the proposed purchaser with a knowledge of all facts which ordinary examination of the records would have made him cognizant of: *Ibid.*

Where the instrument is sufficiently indexed the defendants are charged with constructive notice of whatever appears of record, provided the instrument is one which, according to the statute, can be deemed lawfully recorded: *Greenwood v. Jenswold*, 69–53.

Failure to index: Where there is an entire failure to index the filing and recording will not constitute notice: *Barney v. McCarty*, 15–510; *Gwynn v. Turner*, 18–1.

Mistake in reference: But where there was a mistake in the reference in the index to the page of the record, and the examination of the index and the page of the record referred to would have led to a discovery of the correct page of the record, *held*, that the record would constitute notice: *Barney v. Little*, 15–527.

Description in the index: It is not essential to the validity of the indexing that a particular description of the property should be entered in the column for that purpose. An entry, such as "see record," or "part of lot," etc., will be sufficient: *Calvin v. Bowman*, 10–529; *Bostwick v. Powers*, 12–456; *White v. Hampton*, 13–59; *Hodgson v. Lovell*, 25–97; *Peirce v. Weare*, 41–378.

If the instrument covers two or more pieces of property, and in the column of the index for description only one of them is entered, the record will not be constructive notice as to the piece or pieces not entered or referred to: *Noyes v. Horr*, 13–570; *Stewart v. Huff*, 19–557.

Where an agreement, by which A. was to convey his interest in certain lands to B. was duly recorded, A. being named in the index as grantor and B. as grantee, and in the column headed "Character of Instrument" the entry was "Agreement," and in the entry headed "Description" the entry was "with regard to swamp and overflowed lands," *held*, that such indexing affected a subsequent purchaser with notice: *American Emigrant Co. v. Call*, 22 Fed. Rep., 765.

Mistake in description: Where the index misstates the section, township, or range, the record will not constitute notice even though in addition to the statement of the index a reference is made to the record for a fuller description: *Breed v. Conley*, 14–269.

So where a mortgage contained an entirely mistaken description and the index contained the same description, *held*, that a purchaser might rely upon the index and was not chargeable with notice of the mortgage although there were recitals therein which showed that it related to the land purchased: *Scoles v. Wilsey*, 11–261.

If a party is not charged with constructive notice by what appears in the index book he is not bound to look further and is not affected by what appears of record. So *held* as to a judgment lien where there was a mistake in the entry of the name in the index of judgments: *Thomas v. Desney*, 57–58.

Where the index erroneously describes the property, a subsequent purchaser will not be affected with notice, even though the examination of the record of the instrument would have disclosed facts which might have put him upon inquiry: *Peters v. Ham*, 62–656.

Names in index: Where the legal title was in W. T. B., the wife, and both husband and wife joined in a mortgage, which was indexed under the name of W. H. B., the husband, as grantor, *held*, that the index was sufficient to put a searcher of title upon inquiry, and therefore would impart notice: *Jones v. Berkshire*, 15–248.

A conveyance signed J. A. S. was indexed and entitled in the caption of the record as made by A. J. S., and it appeared that the property was conveyed to the party as A. J. S., and she was in the habit of signing her name in either way. *Held*, that the record constituted notice: *Huston v. Seeley*, 27–183.

A mortgage executed by "Furman" was indexed in the name of "Freeman;" *held*, that the record did not constitute notice, and that a purchaser need not look beyond the index: *Howe v. Thayer*, 49–154.

"Helen" and "Ellen" are not the same Christian name, and an index entry in the name of one does not impart notice of a lien against the other: *Thomas v. Desney*, 57–58.

In case of a conveyance of the homestead, in which the wife joins, it is not necessary that the index show the name of the wife as well as that of the husband: *Hodgson v. Lovell*, 25–97.

Indexing without recording: Where a mortgage, after being filed with the recorder and indexed, was withdrawn and not recorded for two years, *held*, that the indexing alone did not impart constructive notice to persons acquiring liens without other notice thereof. The index alone only amounts to constructive notice for the time intermediate the indexing and recording in the usual manner, while the instrument remains on file with the recorder: *Yerger v. Barz*, 56–77.

Sufficiency of recording: See notes to § 3117.

Priority: Where two mortgages are delivered to the recorder by substantially the same act the secret intention that the one first delivered shall have priority will not give it that effect, there being no prevailing equities in favor of such mortgage, and the two mortgages will be entitled to their *pro rata* share in the proceeds of the property; nor will the fact that the record of one of the mortgages is defective give priority to the other: *Koevenig v. Schmitz*, 71–175.

Where two mortgages were executed on the same day, and subsequently one of them was transferred to plaintiff before maturity of the note secured thereby, and at the time of such transfer both mortgages were recorded, the mortgage thus transferred having been recorded first, it not appearing from the record which mortgage was first executed, *held*, that plaintiff, as transferee of the mortgage first recorded, had priority over the other mortgage, there being nothing to indicate that the mortgage last recorded was intended to have priority in lien: *Powers v. Lafler*, 73–283.

3116. Arranged alphabetically. 1945. The entries in such entry book shall show the names of the respective grantors and grantees arranged in alphabetical order. [R., § 2224; C., '51, § 1215.]

3117. How recorded. 1946. Every such instrument shall be recorded, as soon as practicable, in a suitable book to be kept by the recorder for that purpose; after which he shall complete the entries aforesaid, so as to show the book and page where the record is to be found. [R., § 2225; C., '51, § 1216.]

What sufficient recording: It is not essential that the record should be a literal copy, in every respect, of the instrument in order to constitute notice, but it is essential that it should embody every material part of the instrument, and that the language of the instrument be so nearly copied into the record as that the subject-matter can be identified with certainty from the record itself: *Fogg v. Holcomb*, 64–621.

In a particular case, *held*, that although there was an omission of a portion of the instrument in the record, yet as the words omitted were not material the record was sufficient to constitute notice: *Ibid.*

But if essential parts are omitted, then the record imparts notice, if at all, only of an invalid instrument. If the instrument itself is valid, then the recording is defective and does not impart notice: *Greenwood v. Jenswold*, 69–53.

Knowledge of the record of a prior mortgage on real estate, with the same description except as to one word, *held*, if not of itself actual notice of the mortgage of the land correctly described, at least sufficient to put an ordinarily prudent person upon inquiry, and to charge him with notice of facts which such inquiry would develop: *Jones v. Bamford*, 21–217.

In recording an instrument, the record of the filing may as well be made in the margin of the record as preceding or following the record of the instrument, and the recorder, in giving a certified copy of the record, may authenticate the whole, including the record of the filing: *Laird v. Kilbourne*, 70–83.

Mistake in recording: Where the instrument is erroneously transcribed it will constitute notice only as recorded. Although the deed will itself, during the reasonable time between the date of filing and recording, constitute notice, yet when recorded it is the record which is the notice: *Miller v. Bradford*, 12–14.

Recording defective instrument: Where a chattel mortgage is not valid by reason of insufficient description, and delivery of the property to the mortgagee is not made, the mortgagee acquires no rights which will prevail as against persons having no notice of the transaction: *Barr v. Cannon*, 69–20.

Failure to transcribe: Under the provisions of the Code of '51, requiring the filing and record of plats, *held*, that failure on the part of the officer to record a plat until the lapse of some years, and until after the death of the grantor, would not enable those claiming under him to defeat a dedication therein made: *Scott v. Des Moines*, 64–438.

Erroneous description: A subsequent purchaser acquires priority over the lien of a prior mortgage in which the property is described by an erroneous description, and of which the subsequent purchaser had no actual notice: *Halloway v. Platner*, 20–121.

The record of an instrument in which property was described as "Lot and six," *held* not sufficient to impart constructive notice to a purchaser of "Lot one, block six:" *Nelson v. Wade*, 21–49.

A purchaser in a particular case, *held* not charged with constructive notice of a mortgage covering certain lots upon a town plat not recorded, which lots were described by different numbers in a plat subsequently recorded: *Stewart v. Huff*, 19–557.

That a lot described in a mortgage was occupied by a building of a certain description, *held* not sufficient to charge the mortgagee with notice of a senior mortgage upon the same lot and building in which the building was generally described, the lot being described by a different number, and the evidence not showing that the building was the only one answering to the same description in the town: *Ibid.*

The recorded instrument imparts constructive notice only of what might have been learned by an examination of the record. If the description is defective, third persons will not be bound although they did not read the record and were therefore not misled by the description: *Ivins v. Hines*, 45–73.

Instrument blank as to grantee: The recording of a mortgage in which the name of the mortgagee is left blank does not constitute notice: *Disque v. Wright*, 49–538.

Impeaching record: The record may be impeached by oral testimony, but will be held false and fraudulent only upon clear and satisfactory evidence: *Vandercook v. Baker*, 48–199.

Purchaser not affected with facts aliunde: The rights conferred by an instrument of which a subsequent purchaser has constructive notice only are to be determined by the instrument itself as recorded and indexed, and not by facts *aliunde* or other instrument not recorded: *Miller v. Ware*, 31–524.

Therefore, where the description in an instrument gave the number of the lot, and the addition in which it was situated, but did not give the number of the block in that addition, *held*, that the record did not impart constructive notice, although an examination of the other records in the recorder's office would have shown that two of the five blocks in that addition had been vacated, and of the other three only one contained a lot of the number given in the instrument: *Disque v. Wright*, 49–538.

But a person having constructive notice of an instrument is affected with all that it contains, and if thereby put upon inquiry he is bound to take notice of all that he might have learned by pursuing the path indicated: *Thomas v. Kennedy*, 24–397.

As to the effect of record notice, see, further, notes to § 3112.

Entry of decree of cancellation: It is not error in a decree canceling a deed to direct the entry of such fact on the margin of the record of such deed in the recorder's office: *Fenton v. Way*, 44–438.

3118. Town lots. 1947. The recorder shall record all deeds, mortgages, and other instruments affecting town lots in cities or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded. [R., § 2241.]

RECORDING LAND-GRANT TITLES.

3119. By railroads. 18 G. A., ch. 186, § 1. Each and every railroad company which owns or claims to own lands in the state of Iowa granted by the government of the United States or the state of Iowa, to aid in the construction of its railroad, where it has not already done so, shall place on file and cause the same to be recorded within three months after the taking effect of this act, in each county wherein the land[s] so granted are situated, evidence of its title or claim of title, whether the same shall consist of patents from the United States, or certificates from the secretary of the interior or governor of the state of Iowa, or the proper land office of the United States or state of Iowa. Where no patent was issued, reference shall be made in said certificate to the act or acts of congress, and the acts of the legislature of the state of Iowa granting such lands, giving the date of said acts, and date of their approval, under which claim of title is made; *provided*, that where the certificate of the secretary of the interior or the patents, as the case may be, contain lands situated in more than one county, *that* the register of the state land office shall, upon the application of any railroad company or grantee, prepare and furnish to be recorded, as aforesaid, a list of all the lands situated in any one county, so granted, patented or certified, and when so recorded said records, or a duly authenticated copy thereof may be introduced in any court as evidence as provided in section three thousand seven hundred and two of the code [§ 4953.]

3120. Duty of recorder. 18 G. A., ch. 186, § 2. Such evidence of title shall be filed with the recorder of deeds of the county in which the lands are situated, and it shall be the duty of the recorder to record the same and shall place an abstract thereof upon the index of deeds so as to show the evidence of title, and the evidence thereof shall be constructive notice to all persons as provided in other cases of entries upon said index, and the recorder shall receive same fees as for recording other instruments.

TRANSFER AND INDEX BOOKS.

3121. County auditor to keep. 1948. The county auditor shall keep in his office, books for the transfer of real estate, which shall consist of a transfer book, index book, and book of plats. [11 G. A., ch. 61, § 1.]

3122. Form of. 1949. Said transfer book shall be ruled and headed substantially after the following form; and entries thereupon shall be in numerical order, beginning with section one. [Same, § 2.]

SECTION NO. ——, TOWNSHIP ——, RANGE ——.

Grantee.	Grantor.	Date of instrument.	Description.	Page of Plats.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

THE INDEX BOOK THUS.

NAMES OF GRANTEES.	PAGES OF TRANSFER BOOK.
.....	.....
.....	.....
.....	.....

3123. Book of plats. 1950. The auditor shall so keep the book of plats as to show the number of lot and block, or township and range, divided into sections and subdivisions as occasion may require, and shall designate thereon each piece of land or town lot, and mark in pencil the name of the owner thereon in a legible manner. Said plats shall be lettered or numbered so that they may be conveniently referred to by the memoranda of the transfer book, and shall be drawn on a scale of not less than four inches to the mile. [Same, § 3; 12 G. A., ch. 160, § 3.]

The plat book here referred to is not admissible in evidence for the purpose of establishing title in the party whose name is entered on the plat as the owner of the premises in controversy: *Heinrich v. Terrell*, 65-25.

3124. Entries of transfers. 1951. Whenever a deed of unconditional conveyance of real estate is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns, the name of the grantee, the name of the grantor, date of instrument, the character of the instrument, the description of the property, and the number or letter of the plat on which the same is marked. [11 G. A., ch. 61, § 4.]

3125. Indorsement. 1952. After the auditor has made the entries contemplated in the preceding section, he shall indorse upon the deed the following words: "Entered for taxation this —— day of ——, A. D. ——," with the proper date inserted and sign his name thereto. [Same, § 6.]

3126. Essential to recording. 1953. The recorder shall not file for record any deed of real property, until the proper entries have been made upon the transfer books in the auditor's office and indorsed upon the deed. [12 G. A., ch. 160, § 3.]

3127. Corrections. 1954. The auditor shall correct the transfer books from time to time, as he shall find them incorrect. [11 G. A., ch. 61, § 8.]

ACKNOWLEDGMENT OF CONVEYANCES OR INCUMBRANCES.

3128. Before what officers. 1955; 22 G. A. ch. 99. Any deed, conveyance, or other instrument in writing, by which real estate in this state shall be conveyed or incumbered, if acknowledged within this state, must be so before some court having a seal, or some judge or clerk thereof, or some justice of the peace or notary public, or before the county auditor or his deputy. [R., §§ 201, 2226; C., '51, § 84.]

An acknowledgment before a deputy clerk acting in the name of his principal is good: *Abrams v. Ervin*, 9-87.

An acknowledgment certified to by an officer interested therein (as a member of the firm of grantees) is void, and the record of such instrument will not impart notice: *Wilson v. Traer*, 20-231.

While the acknowledgment of an instrument taken before the grantee as an officer will not be valid, yet the mere fact that the person for whom the acknowledgment is taken has an interest in the property conveyed will not necessarily render the acknowledgment void, although it might be a circumstance tending to show fraud: *Dussaume v. Burnett*, 5-95.

As to who may take acknowledgments, see also § 364.

3129. Out of state. 1956. When made or acknowledged out of this state but within the United States, it shall be acknowledged before some court of record or officer holding the seal thereof, or before some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or before some notary public or justice of the peace; and, when made by a justice of the peace, a certificate under the official seal of the proper authority of the official character of said justice, and of his authority to take such acknowledgments and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [R., § 2245.]

When no seal of the officer or certificate as to his official character is attached to the certificate of acknowledgment, as here contemplated, it is not valid: *Jones v. Berkshire*, 15–248.

3130. When out of the United States. 1957. When made or acknowledged without the United States, it may be acknowledged before any embassador, minister, secretary of legation, consul, charge d'affaires, consular agent, or any other officer of the United States in a foreign country who is authorized to issue certificates under the seal of the United States. Said instruments may also be acknowledged or proven before any officer of a foreign country who is authorized by the laws thereof to certify to the acknowledgments of written documents; but the certificate of acknowledgment by a foreign officer must be authenticated by one of the above-named officers of the United States, whose official written statement that full faith and credit is due to the certificate of such foreign officer, shall be deemed sufficient evidence of the qualification of said officer to take acknowledgments and to certify thereto, and of the genuineness of his signature or seal if he have any. All instruments in writing already executed in accordance with the provisions of this section are hereby declared effectual and valid in law, and to be evidence in any court of this state. [11 G. A., ch. 46; 14 G. A., ch. 32.]

3131. Certificate of acknowledgment. 1958. The court or officer taking the acknowledgment, must indorse upon the deed or other instrument, a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;

2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him;

3. That such person acknowledged the instrument to be his voluntary act and deed. [R., § 2227; C., '51, § 121.]

Form of certificate; what sufficient: The exact language of the statute need not be followed by the officer in his certificate, but words of the same import are sufficient: *Wickersham v. Reeves*, 1–413; *Tiffany v. Glover*, 3 G. Gr., 387: *Cavender v. Smith's Heirs*, 5–157.

Therefore, *held*, that the words "well known" were sufficient in place of "personally known," and the words "the within named," etc., sufficiently referred to the parties as being "the identical persons whose names are affixed," etc.: *Bell v. Evans*, 10–353.

A certificate which does not state that the party acknowledging the instrument was "personally known" to the officer "to be the identical person," etc., or use words of similar import, is fatally defective: *Reynolds v. Kingsbury*, 15–238; *Brinton v. Seevers*, 12–389.

The omission of the word "personally" before "known" renders the certificate defective: *Gould v. Woodward*, 4 G. Gr., 82.

But such omission is not fatal where the other words used necessarily imply personal knowledge in the official: *Todd v. Jones*, 22–146; *Rosenthal v. Griffin*, 23–263.

The word "voluntary" is of the essence of the acknowledgment, and in the absence of that or an equivalent word the certificate will be invalid: *Wickersham v. Reeves*, 1–413; *Newman v. Samuels*, 17–528.

But the fact that the party acknowledged the instrument to be his voluntary act and deed may be shown by the tenor and form of the certificate, as well as by the use of the very words of the statute: *Dickerson v. Davis*, 12–353.

The essentials of a certificate of acknowledgment considered generally: *Bell v. Evans*, 10–353.

The omission of even an essential word, where it is apparently a mere clerical error, will not invalidate the certificate: *Scharfenburg v. Bishop*, 35-60.

The certificate is not to the genuineness of the signature, but to the fact that the party *acknowledged* the instrument, and the acknowledgment is sufficient although the signature may have been written by another for the grantee: *Morris v. Sargent*, 18-90.

Evidence: The certificate is *prima facie* evidence of the fact of acknowledgment, but is not conclusive, and may be overcome by other evidence, the burden being upon the party seeking to rebut the effect of the certificate: *Ibid.*; *Van Orman v. McGregor*, 23-300; *Borland v. Walrath*, 33-130.

If a mortgage is duly acknowledged, the introduction thereof in evidence, accompanied by the notes referred to therein as executed by the same party, is *prima facie* sufficient to establish the execution of the mortgage and also of the notes: *Mixer v. Bennett*, 70-329.

The certificate of the officer, and his testimony as to the acknowledgment, are entitled to great weight. The presumption is very strong in his favor: *Bailey v. Landingham*, 53-722.

The certificate of the notary public as to the acknowledgment by the grantor, and the positive testimony of such officer as to the fact of such acknowledgment, will prevail over the denial, on the part of the grantor, of the fact of making such instrument. Deeds, mortgages and other instruments requiring an acknowledgment before an officer should not be set aside without clear and satisfactory evidence, and the seal and acknowledgment of the officer should in such cases be given proper consideration: *Herrick v. Musgrove*, 67-63.

Parol evidence: It is not proper to show by parol evidence, for the purpose of sustaining an acknowledgment, that matters required by statute to be done were done, although not shown by the certificate: *O'Ferrall v. Simplot*, 4-381.

But parol evidence may be introduced to show fraud in obtaining an acknowledgment, or when the certificate is alleged to be false, to show that the deed never was acknowledged: *Ibid.*

If the certificate does not recite the essential facts it is not competent to prove such facts by extrinsic evidence: *Ibid.*

Therefore, under the provisions of the act of 1846, requiring the certificate of acknowledgments by married women to show that the wife was made acquainted with the contents of the conveyance, and that she relinquished her dower, *held*, that a conveyance by a married woman, in which the acknowledgment did not show such facts, was void as to her, and that the requisite facts could not be shown by parol testimony: *O'Ferrall v. Simplot*, 4 G. Gr., 162.

Official title: The official title of a notary public is "A. B., a notary public for —— county," etc., and a failure to set forth the name of the county renders the certificate void. The fact that the name of the county appears from the impression of the seal will not remedy the defect: *Willard v. Cramer*, 86-22.

Notaries public in this state have jurisdiction only within the respective counties for which they are appointed, and the title of each must be defined to be a notary public of some county, naming it. The certificate must show the county of the notary public making it, and the failure of the certificate to so state will not be cured by the fact that the county appears in the seal, which is not required to show that fact: *Greenwood v. Jenswold*, 69-53.

But this rule does not apply to the official signature to the jurat of an affidavit: *Stoddard v. Sloan*, 65-680.

While the certificate should set forth the title of the court or officer before whom the acknowledgment is made, there is no requirement that the name of the officer shall be set out in the body of the certificate: *Fogg v. Holcomb*, 64-621.

Where the body of the certificate recites that the officer is a notary public in and for the county named it is not necessary that the name of the county be appended to his signature: *Colby v. McOmber*, 71-469.

When no seal of the officer or certificate as to his official character is attached to the certificate of acknowledgment, as contemplated by statute, it is not valid: *Jones v. Berkshire*, 15-248.

Amendment of certificate: Whilst a notary continues in office it is competent for him to amend his certificate of acknowledgment to supply a defect by making a new one, provided it is in accordance with the real facts: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

Attorney in fact: Prior to the act of 1858 an acknowledgment of a chattel mortgage by an attorney in fact as his voluntary act and deed would be the acknowledgment, in law, of his principal: *Sowden v. Craig*, 26-156.

Municipal officer: Where a deed offered in evidence purported to have been executed by one Q., as mayor of the city of D., having the seal of the city affixed and duly attested by the recorder, and was properly acknowledged and recorded, the certificate of the officer taking the acknowledgment showing that Q. was personally known to him as the identical person whose name was affixed to the deed as president *pro tempore* of the city council, and acting mayor of the city of D., *held*, that such deed was *prima facie* proof that Q. was at the time acting mayor of the city, and, coupled with what the court might take judicial notice of on this subject, rendered the introduction of the deed in question competent without further proof as to the official character of the said Q.: *Middleton Savings Bank v. Dubuque*, 19-467.

Officers of corporation: Where an assignment of a judgment in favor of a bank was signed by persons designating themselves as president and secretary, but the acknowledgment thereof did not state that they were such officers, *held*, that the assignment was not sufficient to establish the official character of the persons whose names were attached thereto or show that they had authority to act for the bank: *Klemme v. McLay*, 68-158.

By married woman: Where the certificate of acknowledgment to a trust deed appeared regular and in due form, but the evidence showed that the notary had certified to

the acknowledgment of the same by the wife without requiring her personal presence, but upon a previous verbal authority given by her, *held*, that the validity of the deed could not be questioned for that reason by the wife as against parties who had loaned money upon the strength of the security, regular upon its face: *McHenry v. Day*, 13–445.

As evidence of date: The date of an acknowledgment will be accepted as that of the execution of an instrument: *Henry County v. Bradshaw*, 20–355.

A strong presumption exists in favor of the certificate of acknowledgment as indicating the date of the execution of an instrument: *Bird v. Adams*, 56–292.

In a particular case, *held*, that the date of the certificate of acknowledgment should prevail over oral evidence of loose and random conversations and admissions in determining the date of the execution: *Ibid.*

Effect: That acknowledgment is only necessary in order that the instrument may be recorded and import constructive notice, and is not essential to its validity as between the parties, see notes to § 3113.

3132. Proof of execution and delivery. 1959. Proof of the due execution and delivery of the deed or other instrument may be made before the court, or officer authorized to take acknowledgments, by one competent person other than the vendee or other person to whom the instrument is executed in the following cases:

1. If the grantor die before making the acknowledgment;
2. Or, if his attendance cannot be procured;
3. Or, if having appeared, he refuses to acknowledge the instrument. [R., § 2228; C., '51, §§ 1220–21.]

[The words "may be" before "made," in the second line, are erroneously omitted in the printed Code.]

3133. Certificate; must state what. 1960. The certificate indorsed by them upon the deeds thus proved must state:

1. The title of the court or officer taking the proof;
2. That it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that having appeared he refused to acknowledge the deed or other instrument;
3. The names of the witnesses by whom proof was made, and that it was proved by them that the instrument was executed and delivered by the person whose name is thereunto subscribed as a party. [R., § 2230; C., '51, § 1222.]

3134. Form. 1961. The certificate of proof or acknowledgment as aforesaid, may be given under seal or otherwise, according to the mode by which the courts or officers granting the same, usually authenticate their solemn and formal acts. [R., § 2231; C., '51, § 1223.]

3135. Attorney in fact. 1962. The execution of any deed, mortgage, or other instrument in writing, executed by any attorney in fact, may be acknowledged by the attorney executing the same. [R., § 2251.]

3136. Certificate. 1963. The court or person taking the acknowledgment, must indorse upon such instrument a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;
2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is subscribed to the instrument as attorney for the grantor or grantors therein named, or that such identity was proved to him by at least one credible witness to him personally known and therein named;
3. That such person acknowledged said instrument to be the act and deed of the grantor or grantors therein named by him as his or their attorney thereunto appointed, voluntarily done and executed. [R., § 2252.]

3137. Liability of officer. 1964. Any officer, who knowingly misstates a material fact in either of the certificates above contemplated, shall be liable

for all damages caused thereby, and may be indicted and fined any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on which such certificate is indorsed. [R., § 2232; C., '51, § 1224.]

The fact that a notary makes a false certificate as a result of negligence will not render him liable. Whatever liability there is exists by reason of statute: *Scotten v. Fegan*, 62-236.

In an action against a notary for damages under the statute, it must be alleged that he knowingly misstated a material fact: *Ibid.*

The officer is only liable for such damages as are caused by his wrongful act and necessarily connected with it: *Wyllis v. Haun*, 47-614.

Where it does not appear that the officer taking the acknowledgment knowingly misstated a material fact, as, for instance, that the person making the acknowledgment was the identical person whose name was affixed to the instrument, the officer will not be liable. The law does not make the officer taking the acknowledgment a guarantor that the person signing the instrument is the person who is the owner of the land referred to therein: *Browne v. Dolan*, 68-645.

3138. Subpœnas. 1965. Any court or officer having power to take the proof above contemplated, may issue the necessary subpœnas, and compel the attendance of witnesses residing within the county by attachment if necessary. [R., § 2233; C., '51, § 1225.]

CONVEYANCES LEGALIZED.

3139. By laws of other states. 1966; 20 G. A., ch. 203, § 1. All deeds and conveyances of lands lying and being within this state heretofore executed, and which said deeds have been acknowledged or proved according to and in compliance with the laws and usages of the state, territory, or country, in which said deeds or conveyances were acknowledged and proved, are hereby declared effectual and valid in law to all intents and purposes as though the same acknowledgments had been taken or proof of execution made within this state and in pursuance of the acts and laws thereof; and such deeds so acknowledged or proved as aforesaid, shall be admitted to be legally recorded in the respective counties in which such lands may be, anything in the acts and laws of this state to the contrary notwithstanding; and all deeds and conveyances of lands situated within this state, which have been acknowledged or proved in any other state, territory, or country, according to and in compliance with the laws and usages of such state, territory, or country, and which deeds and conveyances have been recorded within this state, be and the same are hereby confirmed and declared effectual and valid in law to all intents and purposes as though the said deeds or conveyances, so acknowledged or proved and recorded, had, prior to being recorded, been acknowledged or proved within this state. [13 G. A., ch. 160, § 1; 14 G. A., ch. 110, § 1.]

3140. To what applicable. 20 G. A., ch. 203, § 2. This act shall apply to all deeds, mortgages and conveyances made, filed, recorded and proved as contemplated in section one of this act [§ 3139] prior to the first day of January, 1884.

Similar sections in Revision held only to apply to instruments acknowledged before they took effect: *Reynolds v. Kingsbury*, 15-238; *Jones v. Berkshire*, 15-248.

3141. When recorded without acknowledgment. 1967. That the acknowledgments of all deeds, mortgages, or other instruments in writing, taken and certified previous to the thirtieth day of April, A. D. 1872, and which have been duly recorded in the proper counties in this state, be and the same are hereby declared to be legal and valid in all courts of law and equity in this state or elsewhere, anything in the laws of the territory or state of Iowa in regard to acknowledgments to the contrary notwithstanding. [Same chs., § 2.]

A curative act of this kind is not unconstitutional as interfering with vested rights, but it can only affect rights of third persons accruing after its passage and not those prior

thereto: *Brinton v. Seevers*, 12–389; *Newman v. Samuels*, 17–528; *Ferguson v. Williams*, 58–717.

The phrase "duly recorded" does not mean "legally recorded" but "actually recorded:" *Brinton v. Seevers*, 12–389.

In a particular case, *held*, that the instrument was duly recorded so as to be within the effect of the legalizing act, although some immaterial words were omitted in the recording: *Fogg v. Holcomb*, 64–621.

Notwithstanding the fact that a conveyance by the grantor to a third person is executed before the taking effect of the curative act, the burden is upon such purchaser to prove that he is an innocent purchaser of the premises for value, in order to defeat the previous conveyance defectively recorded: *Ibid.*

Before an instrument can be regarded as duly recorded under this statute, it must appear from the record of the instrument that every material part of it has been transcribed into the record, and where the record fails to show a valid conveyance because no consideration is expressed for it, and it is not signed by the grantor, such defect will not be cured by these provisions. If it should appear from extrinsic evidence that the instrument was duly signed, then the record would be invalid, because the instrument has not been duly recorded: *Greenwood v. Jenswold*, 69–53.

A deed, the acknowledgment of which is legalized by this statute, is to be regarded as having the same effect from the day of its record that it would have had if it had been properly acknowledged: *East v. Pugh*, 71–162.

As the act to legalize defective acknowledgments applies only to cases where there was a legal deed antecedent to any attempt to acknowledge, it has no effect to render valid a tax deed which was previously invalid for want of acknowledgment: *Goodykoontz v. Olsen*, 54–174.

Section applied: *Buckley v. Early*, 72–289.

3142. When no seal affixed. 1968. All deeds, mortgages, or other instruments in writing, for the conveyance of lands which have heretofore been made and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment, such acknowledgment shall, nevertheless, be good and valid in law and equity, anything in any law heretofore passed to the contrary notwithstanding. [13 G. A., ch. 160, § 3.]

3143. Acknowledgments by deputy clerks, auditors and deputy auditors. 17 G. A., ch. 164, § 1; 18 G. A., ch. 103. All acknowledgments of deeds, mortgages, and contracts heretofore taken and certified by any county auditor, deputy county auditor, or deputy clerk of the district court within this state, are hereby declared to be as legal and valid as though the law had authorized such acknowledgments at the time they were made.

POWER OF ATTORNEY.

3144. Recording; revocation. 1969. All instruments containing a power to convey, or in any manner to affect real estate, shall be held to be instruments affecting real estate; and no such instrument, when certified and recorded as above prescribed, can be revoked as to third parties by any act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and filed for record in the same office in which the instrument containing such power is recorded. [R., § 2234; C., '51, § 1226; 9 G. A., ch. 123.]

FORMS OF CONVEYANCES.

3145. What sufficient. 1970. The following or other equivalent forms, varied to suit circumstances, are sufficient for the purposes therein contemplated:

FOR A QUITCLAIM DEED.

For the consideration of —— dollars I hereby quitclaim to A. B. all my interest in the following tracts of land (describing it).

FOR A DEED IN FEE-SIMPLE WITHOUT WARRANTY.

For the consideration of —— dollars I hereby convey to A. B. the following tract of land (describing it).

FOR A DEED IN FEE WITH WARRANTY.

The same as the last preceding form, adding the words "and I warrant the title against all persons whomsoever" (or other words of warranty as the party may desire).

FOR A MORTGAGE.

The same as deed of conveyance, adding the following: "To be void upon conditions that I pay," etc. [R., § 2240; C., '51, § 1232.]

The general covenant of warranty specified in the form for a warranty deed includes and implies the usual covenants in a deed of conveyance in fee-simple including one against incumbrances: *Funk v. Cresswell*, 5-62. And under this covenant the grantee has all the rights he would have had if the conveyance had contained express covenants of seizin, freedom from incumbrance, right to convey, and the like: *Van Wagner v. Van Nostrand*, 19-422.

RECORDS TRANSCRIBED.

3146. When ordered. 1971; 18 G. A., ch. 142. The board of supervisors of any county, whenever they shall deem it necessary and expedient, may have transcribed, indexed, and arranged, any deed, probate, mortgage, court, or county record or government survey belonging to said county, and have made a complete index thereof as contemplated by section nineteen hundred and forty-three of this chapter [§ 3114]; and may have correctly transcribed or copied any index of deeds, mortgages, or other records, and may have the said transcripts or copies compared and certified by the officer to whose office the original record belongs, but the provisions of this section shall not apply to any county which has been specially authorized to have such transcribing done. [14 G. A., ch. 60.]

3147. By new counties. 1972. Whenever any new county shall have been formed from other original and organized counties, or shall have been attached to another county for judicial or other purposes, and shall afterwards be fully organized and detached, and when any records of the kind mentioned in the preceding section are in the original county or counties which properly belong to such new county, the board of supervisors of such new or attached county shall have authority to have transcribed, indexed, and arranged, such records, or any of them, for the use of such new county. [R., § 2259.]

3148. Compensation. 1973. The board of supervisors may employ any suitable person to perform the labor contemplated in the two preceding sections; the amount of compensation therefor to be previously fixed by them, not exceeding six cents for each one hundred words of the records proper, and twelve and one-half cents for each one hundred words of indexing; such compensation to be paid out of the treasury of the county for which the records are transcribed and to be audited as other claims. [R., § 2260.]

3149. Officer to compare and certify. 1974; 18 G. A., ch. 142. When any such records as are contemplated in section nineteen hundred and seventy-two [§ 3147] are so transcribed the officer to whose office the original records belong, shall compare the copy so transcribed with the original; and, upon the same being found to be correctly transcribed, shall make a written certificate in each volume or book of such transcribed records, certifying that such transcribed records have been compared with the original by him, and are true and correct copies of the original records. [R., § 2261.]

This section will not authorize the making of a new set of tax books for the purpose of enabling officers in territory which has been separated from the county to which it was annexed for taxing purposes to collect such taxes: *Hilliard v. Griffin*, 72-331.

3150. Force and effect. 1975. Such transcribed records so certified, shall have the same force and effect in all respects as the original records, and be admissible as evidence in all cases, and of equal validity with the original records. [R., § 2262; 14 G. A., ch. 60.]

[Duly certified copies of records, etc., receivable in evidence, see § 4953.]

CHAPTER 7.

OF OCCUPYING CLAIMANTS.

3151. Proceedings. 1976. Where an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards in a proper action found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property after the filing of the petition hereinafter mentioned, until the provisions of this chapter have been complied with. [R., § 2264; C., '51, § 1233.]

Occupant: It was not necessary in order that the party be an "occupant of the land" that he be in personal possession, a possession by tenant being sufficient: *Parsons v. Moses*, 16–440.

But a party out of possession cannot maintain the action. The right is lost by yielding the occupancy: *Webster v. Stewart*, 6–401; *Claussen v. Rayburn*, 14–136.

To entitle a claimant to the benefit of these provisions the possession under and during which the improvements were made must have been adverse to the holder of the paramount title: *Keas v. Burns*, 23–235.

Good faith: Constructive notice of an adverse claim, especially such as is imparted by a *lis pendens* or record, does not exclude good faith in the claimant: *Read v. Howe*, 49–65.

It is sufficient if the claimant has an honest belief that he has a good title and has no actual notice of an adverse claim: *Ibid.*

Purchaser pendente lite: One who purchases land pending an action with constructive notice thereof is bound by the judgment, and must at his peril take notice of the service of the writ of possession and make his claim for improvements at the proper time: *Blanchard v. Ware*, 43–530.

The effect of these statutory provisions is to make an occupant of land practically the owner of his improvements, even though he be not the owner of the land on which they were made. The occupant in such a case is not to be considered a mere trespasser wantonly thrusting himself or his property in the way of danger. In an action for the injury of such property, it is immaterial, therefore, who was the owner of the land: *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S., 469.

Counter-claim: Claims for improvements cannot be pleaded by way of counter-claim, but only after the question of title has been fully adjudicated: *Walton v. Gray*, 29–440; *Fogy v. Holcomb*, 64–621; *Buck v. Holt*, 74–294.

In an equitable action to redeem from tax sale under § 1378, the question of improvements is to be determined in the case: *Serrin v. Brush*, 74–489

Claimant under pre-emption certificate: A party who, by satisfactory showing to the land office, has received a certificate that he is entitled to pre-empt land, has color of title thereto. One believing that he has title and making improvements on the land makes them in good faith and is consequently entitled to receive the value thereof: *Wells v. Riley*, 2 Dillon, 566.

So *held* as to occupants of Des Moines river lands: *Ibid.; Litchfield v. Johnson*, 4 Dillon, 551.

Occupant with notice: One who, cognizant of the facts, occupies land under title bond given by the assignee of a title bond from the original owner, is not entitled after foreclosure and sale under the first bond to the benefit of the occupying-claimant act for improvements made thereon: *Jones v. Graves*, 21–474.

Color of title, who deemed to have, see §§ 3157, 3158, and notes.

For what improvements allowed: The claim for improvements is assignable, and the occupant may recover for improvements made by those under whom he claims: *Crayton v. Wright*, 16–133; *Parsons v. Moses*, 16–440.

The occupying claimant is not entitled to compensation for improvements made after judgment against him in the main action, and after his proceedings under the occupying-claimant law are commenced: *Crayton v. Wright*, 16–133.

An occupying claimant is to be allowed the amount which the improvements have actually augmented the value of the property and not their cost: *Childs v. Shower*, 18–261.

Setting off rents and profits: As against the claim for improvements, the owner may set off rents and profits of the land accruing prior to the six years to which his recovery in the action for the possession of the property is limited by § 4491, and also rents and profits subsequent to the judgment in such action, and pending the action by the occupying claim-

ant for improvements: *Parsons v. Moses*, 16–440.

The occupant is not to be charged with the rent of improvements made by him, but with the rent of the land, estimated, however, not upon its rental value as he took it, but upon what the land has been worth to him, as brought into cultivation and made suitable for raising crops by his labor: *Dungan v. Von Puhl*, 8–263: *Wolcott v. Townsend*, 49–456.

Removal: The proceeding by the occupying claimant is ancillary to the main suit, and cannot be removed to the federal court as separate from such main action: *Chapman v. Barger*, 4 Dillon, 557.

Appeal: Plaintiff having obtained judgment for possession and the defendant having filed his claim for improvements, *held*, that plaintiff was not entitled to writs of possession in disregard of the petition for improvements, although defendant had taken the case by writ of error from the state supreme court to the supreme court of the United States, where it was still pending: *Chicago, R. I. & P. R. Co. v. Tharnish*, 54–690.

Remedy exclusive: A party who has made improvements upon the land of another cannot recover the value thereof from the owner, even when made by him in good faith and under color of title. His only remedy is under the statutory provisions in behalf of occupying claimants, which provisions are not available to a party not in possession. But if the owner has wrongfully taken possession, the claimant may recover such possession by action of forcible entry and detainer, and then against any legal proceedings to dispossess him may assert his right to compensation for improvements: *Webster v. Stewart*, 6–401.

By the common law there was no liability on the part of the property owner to pay for improvements made by an occupying claimant of property who had no title thereto when they were made. All improvements annexed to the freehold become part thereof and pass with its recovery. The right to recover for improvements thus made is based entirely upon statute: *Lunquest v. Ten Eyck*, 40–213.

If, therefore, an occupying claimant asks to recover for improvements made upon the land of another, he must see that the steps provided by statute to entitle him to such recovery are taken: *Blanchard v. Ware*, 43–530.

3152. Petition. 1977. Such petition must set forth the grounds on which the defendant seeks relief, stating with other things, as accurately as practicable, the value of the improvements upon the lands, as well as the value of the lands aside from the improvements. [R., § 2265; C., '51, § 1234.]

3153. Issues. 1978. All issues joined thereon must be tried as in ordinary actions, and if the value of the land or the improvements is in controversy, such value must be ascertained on the trial. [R., § 2666; C., '51, § 1235.]

The court in this proceeding has no authority to render a personal judgment against the owner of the land for the value of the improvements: *Dungan v. Von Puhl*, 8–263; *Wolcott v. Townsend*, 49–456.

3154. Plaintiff may elect. 1979. The plaintiff in the main action may thereupon pay the appraised value of the improvements, and take the property. [R., § 2267; C., '51, § 1236.]

During the time when the owner has the election to pay for the improvements the claimant in possession is a tenant at will: *Reilly v. Ringland*, 39–106.

The occupying claimant is entitled to have possession of the land until his claim is paid, for such uses as he may deem proper, but without making any additional improvements thereon: *Webster City & C. C. R. Co. v. Newson*, 70–355.

3155. Defendant may take land. 1980. Should he fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying the value of the land aside from the improvements. [C., '51, § 1237.]

3156. Tenants in common. 1981. If this be not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the land, including the improvements, each holding an interest proportionate to the value of his property as ascertained by the appraisement above contemplated. [C., '51, § 1238.]

A prior statute relating to the same subject, which authorized a money judgment against the owner of the land for the value of the improvements, on which, if not paid within three years, a general execution might issue, *held* unconstitutional: *Childs v. Shower*, 18–261.

3157. Color of title. 1982. The purchaser in good faith at any judicial or tax sale made by the proper person or officer, has color of title within the meaning of this chapter, whether such person or officer had sufficient authority to sell or not, unless such want of authority was known to such purchaser at

the time of the sale. And the rights of such purchaser shall pass to his assignees or representatives. [R., § 2268; C., '51, § 1239.]

The grantee is an "assignee" within the meaning of this section: *Childs v. Shower*, 18-26.

When the tax deed relied on to show color of title shows a sale in gross of distinct tracts, evidence *aliunde* may be received to show that the several tracts were not sold for a gross sum: *Ibid.*

A tax deed void on its face is sufficient to give color of title: *Colvin v. McCune*, 39-502.

3158. Occupancy. 1983. Any person has also such color of title, who has occupied a tract of land by himself, or by those under whom he claims, for the term of five years, or who has thus occupied the land for a less term than five years, if he, or those under whom he claims have, at any time during such occupancy, with the knowledge and consent, express or implied, of the real owner, made any valuable improvements thereon, or if he, or those under whom he claims have, at any time during such occupancy, paid the ordinary county taxes thereon for any one year, and two years thereafter have elapsed without a repayment or proffer of repayment of the same by the owner of the land, and such occupancy is continued up to the time at which the suit is brought by which the recovery of the land is obtained as above contemplated; but nothing in this chapter shall be construed to give tenants color of title against their landlords. [R., § 2269; C., '51, § 1240.]

Occupancy in the claimant's own right for a term of five years gives the color of title required by § 3157. Such possession need not be based on any kind of right or title to the land: *Lunquest v. Ten Eyck*, 40-213.

A lessee of premises from one holding a life estate does not have color of title as against the reversioner, nor will the payment of taxes give him such color of title if made in accordance with the terms of the lease: *Wiltse v. Hurley*, 11-473.

The vendee of real estate holding under a bond for a deed cannot take advantage of these provisions to recover from the vendor the value of improvements made while so holding: *Jones v. Graves*, 21-474.

A claimant having color of title by five years' occupancy at the time judgment is recovered against him may recover for his improvements, although they were made before the expiration of the period of possession necessary to constitute such color of title: *Litchfield v. Johnson*, 4 Dillon, 551.

Where defendant occupied the land when judgment was obtained, and at that time more than two years had elapsed since he had paid the tax on the land, and plaintiff at no time offered to pay the taxes, *held*, that defendant had color of title: *Finnegan v. Campbell*, 74-158.

3159. Settlers. 1984. When any person shall have settled upon any lands within this state, and shall have occupied the same for three years under or by virtue of any law of said state, or any contract with its proper officers for the purchase of said land, or under any law of, or by virtue of any purchase from the United States, and shall have made valuable improvements thereon, and shall have been, or shall hereafter be, found not to be the true owner thereof, or not to have acquired a right to purchase the same from the state or the United States, such person shall be deemed an occupying claimant within the meaning of this chapter. [13 G. A., ch. 88.]

3160. Waste by claimant. 1985. In the cases above provided for, if the occupying claimant has committed any injury to the land by cutting timber or otherwise, the plaintiff may set the same off against any claim for improvements made by such claimant. [R., § 2270; C., '51, § 1241.]

[As to setting off rents and profits, see notes to § 3151.]

3161. Execution. 1986. The plaintiff is entitled to an execution to put himself in possession of his property in accordance with the provisions of this chapter, but not otherwise. [R., § 2272; C., '51, § 1243.]

3162. Removal of improvements. 1987. Any person having improvements on any land heretofore granted to the state in aid of any work of internal improvement, including what is known as the Des Moines river lands, whose title to such land is questioned by another, shall be entitled to remove such improvements owned by him without injury otherwise to the land, at any time before he is evicted therefrom, or he may claim and have the benefit of this chapter by proceeding as herein directed. [14 G. A., ch. 85.]

CHAPTER 8.

THE HOMESTEAD.

3163. Exempt. 1988. Where there is no special declaration of the statute to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale. [R., § 2277; C., '51, § 1245.]

[As to exemption of homestead procured with pension money, see § 4306.]

Who entitled to exemption: The surviving widow of the owner of the homestead is as much the head of the family and entitled to control the rents and profits of the homestead as was the husband when living: *Floyd v. Mosier*, 1–512.

A widower without children acquiring and occupying property as a homestead for himself and mother, whom he supported, *held* to be entitled to the homestead right: *Parsons v Livingstone*, 11–104.

So *held*, also, as to an unmarried woman who had accepted, protected and was providing for the children of a deceased sister: *Arnold v. Waltz*, 53–706.

The fact that a divorce is granted to the wife, allowing her the custody of the only child, will not deprive the husband of the right to hold a homestead exemption: *Woods v. Davis*, 34–264.

In what property: Purchase, payments, and possession under a bond for deed, constitute sufficient ownership to make the property the homestead of such purchaser: *Stinson v. Richardson*, 44–373, 375.

A tenant in common may have a homestead right in his interest in the undivided premises: *Thorn v. Thorn*, 14–49.

And this is true even when he has only an equitable title thereto: *Hewitt v. Rankin*, 41–35, 44.

Nature of the interest: The wife's homestead interest in property owned by the husband is present, fixed and substantial, and not merely possible, remote and contingent, and is not in general liable to be affected by the omission, neglect or default of the husband: *Adams v. Beale*, 19–61.

Her interest in the husband's property used as a homestead is real property within the meaning of a former statute providing for the redemption from tax sale of the property of a married woman: *Ibid.*

The right of the wife in the homestead is of a higher character, and more in the nature of a vested interest or title, than is the dower right in the other real estate of her husband: *Chase v. Abbott*, 20–154.

The legal title to the homestead, upon actual occupancy by the husband and wife, does not vest jointly in them. The homestead title is one of exemption rather than one conferring affirmative rights: *Burns v. Keas*, 21–257.

Exemption, part of the contract: The homestead law in force at the time a contract is made enters into and becomes a part of it, and a subsequent repeal of the law will not impair the rights of parties thereunder: *Bridgman v. Wilcut*, 4 G. Gr., 563.

Pertains to remedy: The homestead exemption is a part of the remedy, and is not to be regulated by the law of the place of contracting: *Helfenstein v. Cave*, 3–287.

There may be a homestead right in a leasehold interest in real estate so as to render the assignment of the lease, by the husband alone, invalid: *Pelan v. De Bevard*, 13–53.

Where there is an exchange of homesteads, and one of the parties remains temporarily, after the exchange, in his former homestead, at the will of the other party, his right is less than and antagonistic to the possession required to constitute a homestead: *Windle v. Brandt*, 55–221.

One partner cannot acquire a homestead exemption in real estate belonging to the firm in which he is a member as against either the claims of firm creditors or copartners, even though he holds the legal title of the property: *Drake v. Moore*, 66–58; *Hoyt v. Hoyt*, 69–174.

One who purchases a pre-emption claim to public lands and takes possession thereof does not, before acquiring title from the government, have such an interest in the property as to support a homestead exemption: *De Land v. Day*, 45–37.

Where the house used as a home is situated upon lands of the wife the homestead may also include land owned by the husband. It is entirely immaterial whether the legal title be in the husband or wife, or whether one of them holds the title to one tract and the other to another tract, where the two tracts are used as a homestead: *Lowell v. Shannon*, 60–713.

A conveyance of the homestead property by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farrar*, 53–426.

Exemption: A judgment under which a homestead is not liable to sale does not attach as a lien thereon, and a conveyance of such homestead to a third person passes title free from such judgment: *Lamb v. Shays*, 14–567; *Cummings v. Long*, 16–41.

But when, by abandonment, the homestead loses its character, the liens of prior judgments attach in the same manner as the lien of a judgment attaches to property subsequently acquired by the judgment debtor: *Lamb v. Shays*, 14–567.

A voluntary conveyance of the homestead will not be fraudulent as to creditors having no lien thereon: *Delashmut v. Trau*, 44–613; *Officer v. Evans*, 48–557; *Aultman v. Heiney*, 59–654; *Butler v. Nelson*, 72–732.

As to liability for purchase money and ante-

cedent debts, see notes to § 3167. As to liability under contract, and enforcement of the same by foreclosure, etc., see notes to § 3168.

Proportional liability: Where a husband has contributed a portion of the purchase price of a homestead, the title of which is in the wife, the creditors of the husband under claims antedating the acquisition of the homestead may subject such property, to the extent of the husband's contribution thereto, to the payment of their claims, such proportion being treated as equitable assets and sold to satisfy judgments on such claims: *Cromp v. Morton*, 49–16; *S. C.*, 53–599; *Hamill v. Henry*, 69–752.

Earnings of the wife not derived from separate property or business, but acquired in connection with her husband's property and in the management of the family affairs, do not become the wife's separate property in such sense that when invested in a homestead that proportion thereof thus procured is exempt from indebtedness to which the homestead in the hands of the husband is liable: *Hamill v. Henry*, 69–752.

Taxes and repairs: A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as make expenditures for repairs, without becoming a creditor of the wife and acquiring any claim against the property which can be enforced by his creditors: *Ibid.*

Decree for divorce: Where a decree of divorce merely gives the wife a personal judgment for alimony, the homestead, which the husband still continues to occupy as the head of the family, cannot be sold to satisfy the judgment: *Byers v. Byers*, 21–268; *Whitcomb v. Whitcomb*, 52–715.

The homestead is for the benefit of the family and not of the husband alone, and the law of homestead has no application in a suit for divorce and alimony. The court in adjusting the rights of the parties may make such provision or disposition of it as may appear just and equitable, and the attachment authorized in actions for alimony (§ 3418) may therefore be levied on the homestead: *Daniels v. Morris*, 54–369.

Violation of liquor law: By reason of the provision of § 2419 the homestead, or that part of it used as a saloon, is subject to judgment obtained for violation of the laws against the sale of intoxicating liquors: *Arnold v. Golshall*, 71–572.

Exemption of proceeds: Where a portion of the homestead is, by proper proceedings, condemned for right of way, the damages allowed are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband of a portion of the homestead for right of way would be exempt, *quære: Kaiser v. Seaton*, 62–463.

The right of action against a railway company for damages caused to the homestead property by fire negligently set out by such company is exempt from execution for a reasonable time, to the same extent that the homestead is, and the railway company cannot be garnished for such indebtedness under a judgment which could not be enforced against the homestead: *Mudge v. Lanning*, 68–611.

The proceeds of the sale of the homestead are not exempt from execution unless the sale is for the purpose of procuring a new homestead (under § 3175): *Huskins v. Hanlon*, 72–37.

3164. Family defined. 1989. A widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife. [R., § 2278; C., '51, § 1246.]

Granting a divorce to the wife and giving her the custody of the children, *held* not to render the homestead in the hands of the husband liable to sale on execution: *Woods v. Davis*, 34–264.

3165. Conveyance or incumbrance. 1990. A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument. [R., § 2279; C., '51, § 1247.]

Consent of both husband and wife necessary: Neither the husband nor the wife can by any separate act affect the homestead rights of the other and change the homestead character of the property. When the right of a homestead is once attached to the property it can be relinquished or divested only by a joint conveyance or by an abandonment of the property as a homestead by both husband and wife: *Hunt v. Neeley*, 67–97.

But the subsequent purchaser without notice that property conveyed by the husband or wife holding the legal title thereto was [illegible] property was invested with the homestead character is not affected with notice of the invalidity of such conveyance, and will be protected: *Ibid.*

Where an unmarried man, owning and occupying property as a home, made application for a loan secured by mortgage upon the land, and before the execution of the mortgage, but without the knowledge of the lender, was married, *held*, that the mortgage was subsequent to the wife's homestead right: *Tolman v. Leathers*, 1 McCrary, 329.

A mortgage upon the homestead by the husband alone, even though given to secure a debt antedating the homestead, *held* void, and the record thereof not sufficient to constitute notice to a subsequent purchaser. The creditor whose claim antedates the homestead right has no lien as against a purchaser without notice until he recovers judgment on his claim: *Higley v. Millard*, 45–586.

A sale and conveyance of the homestead by husband and wife will transfer a valid title to the purchaser as against a prior sale by the husband alone, although the second purchaser had knowledge of the first conveyance: *Garlock v. Baker*, 46–334.

A contract by the husband to convey property which has been acquired by him in exchange for the homestead, with the intention of occupying it for a new homestead within the period reasonably required for making a removal, will be void, although the property acquired has not yet been actually occupied: *Cowgell v. Warrington*, 66–666.

Where the homestead right exists in property, the whole of which is greater in amount than can be claimed under the homestead law, the boundaries of the homestead not having been established, the owner of the fee cannot, by conveying a portion of the property by an instrument in which the other does not join, limit the homestead right to another portion thereof. No valid sale of any portion can be made until the provisions of law as to platting have been complied with: *Goodrich v. Brown*, 63–247.

The rights of the wife and family in the homestead cannot be affected by the fraudulent acts of the husband: *Eli v. Gridley*, 27–376.

The subsequent adoption of property as a homestead will not affect conveyances previously made: *Yost v. Devault*, 3–345.

Where, prior to the execution of a mortgage on real estate, no part thereof is occupied as a homestead, and an adjoining tract is used and held out as such, third persons being influenced by such representations, the mortgagor's wife, though not joining in the mortgage, cannot afterwards set out the homestead by plat, and record it so as to include part of the mortgaged premises: *Lucas v. Pickel*, 20–490.

Incumbrances: Under a statute not forbidding the incumbrance of the homestead, but only the conveyance thereof by one party alone, *held*, that a mortgage was a conveyance: *Babcock v. Hoey*, 11–375.

Assignment, lease or contract: Where premises held under a lease are occupied as a homestead, an assignment of the lease by the husband alone will not be valid: *Pelan v. De Bevard*, 13–53.

The rights of a wife in the homestead cannot be prejudiced by a lease made by her husband or by a holding by him in recognition of a mortgagee's title as against him: *Morris v. Sargent*, 18–90.

Where the title to the homestead is held under a contract of purchase, the husband having such contract cannot, without the consent of the wife, make an assignment thereof so as to divest the homestead right: *Drake v. Moore*, 66–58.

The verbal assent of the wife to a conveyance of the homestead or an assignment of the title bond under which it is held will not make it binding: *Donner v. Rodenbaugh*, 61–269; *Stinson v. Richardson*, 44–373.

An oral agreement by the parties to execute a mortgage upon the homestead, for money borrowed to redeem the same from execution, cannot be specifically enforced, nor can the money so advanced be made a lien upon the premises by judicial decree: *Clay v. Richardson*, 59–483.

The fact that the wife has knowledge of and approves the sale of the homestead, and even an express agreement on her part to convey the same, if it is not in writing, will not render a contract of sale by the husband alone valid: *Anderson v. Culbert*, 55–233.

Ratification: Where there is an attempt to execute a proper instrument, which, however, is void by reason of defects in form, the parties may bind themselves by a ratification of such instrument, either express, or presumed from their acts: *Spafford v. Warren*, 47–47.

Where it was attempted to show ratification by the wife of a parol contract to convey the homestead, made during the life-time of her husband, *held*, that mere acceptance of the benefits of such parol contract during the three or four weeks of ill-health following the death of the husband was not sufficient to prove such parol ratification: *Clark v. Evarts*, 46–248.

Duress: Where the concurrence of a wife in the mortgage of a homestead is procured by duress it cannot be enforced: *First Nat. Bank v. Bryan*, 62–42.

Insanity: Where the wife is insane at the time of a conveyance in which she attempts to join for the purpose of conveying the homestead, it will be void for want of her consent: *Alexander v. Vennum*, 61–160.

The fact that the wife, at the time of making a note secured by mortgage on the homestead, was mentally unsound, will not defeat the mortgage in the ordinary course of business, if the transaction is fair and reasonable, and the mental condition of the wife was not known to the other party: *Abbott v. Creal*, 56–175.

Fraud: If the wife actually signs an instrument of conveyance or incumbrance, she will not be allowed to dispute its validity on the ground that she was ignorant of its contents or that she was induced to do so by fraud or deception of her husband, in the absence of a showing that the grantee or mortgagee was cognizant of such deception and fraud: *Edgell v. Hayens*, 53–223; *Van Sickles v. Town*, 53–259; *Kubelman v. Rummel*, 72–40.

The fact that a wife's signature to a mortgage of the homestead is obtained by fraud and misrepresentation on the part of her husband will not defeat the mortgage, where no knowledge of the fraud can be imputed to the mortgagee: *Ætna. L. Ins. Co. v. Franks*, 53–618; *Miller v. Wolbert*, 71–539.

Where the husband, to whom the wife owning the fee of the homestead intrusted the entire control of the business, secured a loan thereon upon the representation that he would furnish a valid mortgage upon the property signed by the wife and himself, and afterwards furnished such security, *held*, that the wife was estopped by his action from relying upon a defense to such mortgage based upon erasures and interlineations claimed by her to have been made by her husband, but not readily apparent upon inspection: *Sawyer v. Perry*, 62–258.

Mortgage for husband's debts: The wife may join in a mortgage of the homestead for the payment of a note of her husband and will

be bound thereby to the extent of the property mortgaged, but she would not thereby become entitled to the proceeds of the loan effected or property purchased therewith: *Rock v. Kreig*, 39–239.

The homestead is bound by a mortgage executed by the husband and wife to secure their joint note, it being expressly stipulated that the intention is to bind the homestead: *Low v. Anderson*, 41–476.

A purchase-money mortgage given at the time of the acquisition of the homestead, to the vendor, is valid, though executed alone by the party taking the legal title: *Christy v. Dyer*, 14–438.

B. having become bound as surety for one L. L. to A. L., and being at the same time indebted by mortgage for the purchase money of land which included the homestead, an arrangement was made by which B. assumed the payment of the debt to A. L., securing it by a mortgage on the same property, and the amount thus assumed was, by the procurement of L. L., indorsed upon the purchase money notes; *held*, that A. L. could not claim to be the assignee of a portion of the purchase money, or of the vendor's rights, and took the mortgage subject to the unpaid residue of the first mortgage and subject to the homestead rights of B.'s wife, who had not joined in the mortgage: *Burnap v. Cook*, 16–149.

The renewal by the husband of a debt, by an admission or new promise sufficient to take the case out of the statute of limitations, will also keep in force a mortgage given on the homestead to secure the same, although such renewal is without the wife's consent: *Mahon v. Cooley*, 36–479.

A conveyance for right of way by the husband, owner of the legal title of the homestead, in which the wife does not join, is not necessarily invalid: *Chicago & S. W. R. Co. v. Swinney*, 38–182.

A husband can convey the right of way over the homestead without the concurrence or signature of the wife to the deed, if it does not defeat the enjoyment of the homestead as such: *Ottumwa, C. F. & St. P. R'y Co. v. McWilliams*, 71–164.

Damages assessed for the taking of a right of way through the homestead are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband for that purpose would be exempt, *quœre: Kaiser v. Seaton*, 62–463.

A license to mine upon the homestead, executed by the owner alone without concurrence of the wife, is not necessarily invalid, and even if her assent should be considered necessary, it would be presumed from knowledge on her part that work was being done thereunder or expenses incurred to which she made no objection: *Harkness v. Burton*, 39–101.

A lease to a mining company of the right to mine coal from the homestead does not constitute a severance such as to subject the unmined coal to judicial sale: *Sibley v. Lawrence*, 46–563.

How conveyance made: An instrument in which the wife only joins for the purpose of releasing her dower is not such a joint instrument as is required to convey or incumber the homestead: *Sharp v. Bailey*, 14–387; *Fuller v. Hunt*, 48–163; *Wilson v. Christopherson*, 53–481; *Eisenstadt v. Cramer*, 55–753; apparently *contra: Reynolds v. Morse*, 52–155.

It is not necessary that the conveyance or incumbrance should specifically state that the property sought to be conveyed or incumbered is the homestead: *Babcock v. Hoey*, 11–375; *O'Brien v. Young*, 15–5; *Reynolds v. Morse*, 52–155; *Van Sickles v. Town*, 53–259; *Waterman v. Baldwin*, 68–255.

A conveyance of the homestead property from the husband to the wife will not vest in her such title that she alone can make a valid conveyance thereof: *Spoon v. Van Fossen*, 53–494.

In a conveyance of the homestead by the husband to the wife, joinder of the wife is not necessary: *Harsh v. Griffin*, 72–608.

As to the rule under a different statutory provision, see *Luther v. Drake*, 21–92.

Effect of conveyance by one party alone: An agreement to convey, made by the husband or wife alone, is absolutely void, and a specific performance thereof cannot be enforced: *Yost v. Devault*, 9–60.

A mortgage upon the homestead executed by the husband alone while his wife is living is not binding upon him even after the death of the wife: *Larson v. Reynolds*, 13–579.

Where one party alone enters into a contract to convey the homestead no damages can be recovered for the breach of such contract from the party executing it: *Barnett v. Mendenhall*, 42–296; *Clark v. Evarts*, 46–248; *Cowgell v. Warrington*, 66–666.

Where the husband enters into a contract to convey, to which both parties expect to secure the assent of the wife, but such assent is not secured, the purchaser cannot recover from the husband the excess in the value of the land over the purchase price. The case is not one of fraud, and it is doubtful whether anything can be recovered except the purchase money paid and interest: *Donner v. Rodenbaugh*, 61–269.

The invalidity of a mortgage on the homestead executed by the husband alone may be set up by a junior mortgagee, in a proceeding to foreclose the senior mortgage, although such defense is not interposed by the owners: *Alley v. Bay*, 9–509.

Specific performance: Where the husband caused the homestead to be advertised for sale at auction and it was sold, *held*, in the absence of any consent to such sale by the wife, specific performance could not be enforced: *Garlock v. Baker*, 46–334.

Subsequent abandonment of the homestead will not make a conveyance or mortgage by the husband alone, while the property was occupied as a homestead, valid: *Bruner v. Bateman*, 66–488; *Lunt v. Neeley*, 67–97.

Improvements by purchaser in good faith: Where a party takes possession of a homestead under a void transfer thereof, but in good faith, believing that he has acquired a good title, and makes improvements which are judicious and necessary and not inconsistent with the circumstances of the owner, he is entitled to allowance for such improvements: *Stinson v. Richardson*, 44–373.

Rents and profits: Whether in such case the wife of the party who has attempted to

convey the homestead can maintain action for rents and profits against the person thus taking possession under such conveyance, *quære:* but *held*, in a particular case, that a decree applying such rents and profits on a judgment against the homestead was proper: *Ibid.*

Where plaintiff's husband before his death assigned to defendant a bond for a deed by which he held a tract of land, including the homestead, defendant agreeing to pay certain judgments and other considerations, in which assignment plaintiff did not join, *held*, that upon this being set aside, at the suit of plaintiff, and defendant declared entitled to be subrogated to the rights of the holder of the judgments which he had paid off in a supplemental proceeding by the wife after the husband's death, the rents and profits of the portion of the premises which was the homestead should be applied to the satisfaction of these judgments, but not the rents and profits from the portion not a part of the homestead, and that a like application should be made of the value of a horse given to defendant by plaintiff's husband in the trade: *Stinson v. Richardson*, 48–541.

3166. Liable for taxes. 1991. The homestead is liable for taxes accruing thereon, and, if platted as hereinafter directed, is liable only for such taxes and subject to mechanics' liens for work, labor, or material, done or furnished exclusively for the improvement of the same, and the whole or a sufficient portion thereof may be sold to pay the same. [R., § 2280; C., '51, § 1248; 9 G. A., ch. 173, § 9.]

[For similar provisions as to taxes, see § 1358.]

3167. For debts antedating purchase. 1992. The homestead may be sold on execution for debts contracted prior to the purchase thereof, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property of the debtor liable to execution. [R., § 2281; C., '51, § 1249.]

Unpaid purchase money: The homestead right is subordinate to the right of the vendor for unpaid purchase money: *Christy v. Dyer*, 14–438; *Cole v. Gill*, 14–527; *Burnap v. Cook*, 16–149; *Hyatt v. Spearman*, 20–510; *Campbell v. Maginnis*, 70–589.

In such case a general judgment and execution is the proper method of enforcing the vendor's lien: *Bills v. Mason*, 42–329.

The assignment of a note given for the purchase money of property constituting a homestead carries with it the vendor's lien and all the equities and rights which the vendor would have had if he had never parted with the debt: *Ibid.*

The satisfaction of a part of the judgment for the purchase money does not affect the lien of such judgment so far as the amount remaining unpaid is concerned: *Campbell v. Maginnis*, 70–589.

Fraud: Where the title to property has its inception in fraud, its homestead character cannot be set up to defeat the claims of the person from whom it was obtained: *Muir v. Bozarth*, 44–499.

Debts contracted prior to acquisition: The homestead is liable, under the statute, for debts contracted prior to its acquisition and occupancy as such, provided no other property is found subject to execution: *Greeley v. Sample* 22–338.

The provision that "the homestead may be sold for debts contracted prior to the purchase thereof" means that it may be thus sold for debts contracted prior to the time when the homestead right attaches by virtue of actual occupancy as a homestead. Debts contracted after the purchase of the property, but before it acquires the homestead character by occupancy as such, may be enforced against the property: *Hale v. Heaslip*, 16–451; *Hyatt v. Spearman*, 20–510; *Elston v. Robinson*, 23–208.

The entry of land under the United States homestead laws, which is afterwards occupied as a homestead, constitutes the purchase of the homestead within the meaning of this section. The exemption dates from such entry and not from the issuance of a patent: *Green v. Farrar*, 53–426.

A homestead is liable to foreign as well as domestic debts created prior to its acquisition: *Laing v. Cunningham*, 17–510; *Brainard v. Van Kuran*, 22–261.

Where a debt contracted prior to the acquisition of the homestead has become barred, and is renewed by a new note given subsequently to such acquisition, the homestead remains liable: *Sloan v. Waugh*, 18–224.

Where a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort and maintain action on an implied promise, the obligation to pay is a debt within the meaning of the statutory provision above referred to, from the time of the wrong; but if the wrong results in no pecuniary advantage and the action must be in tort, and sound only in damages, then the obligation is not a debt until ascertained by judgment: *Warner v. Cammack*, 37–642.

The homestead being liable for debts created before its acquisition, the execution of a mortgage thereon to secure such a debt creates no additional burden so far as the rights of the wife are concerned, and, therefore, such mortgage executed by the husband alone would be valid as to the wife, but it would not be valid as to innocent purchasers before judgment on the debt secured, and the recording of such a mortgage would therefore not affect them with notice: *Higley v. Millard*, 45–586.

The liability of the homestead to debts contracted before it acquires the homestead char-

acter attaches at the time they are contracted, and not merely from the time judgment is rendered thereon: *Bills v. Mason*, 42–329.

Where a voluntary conveyance of the homestead was made to another, but such conveyance was not fraudulent as to creditors for the reason that their claims were not liens thereon, and afterward, the premises having remained in the possession of the grantor, they were reconveyed to him by quitclaim, *held*, that such homestead was liable for debts contracted prior to such reconveyance: *Butler v. Nelson*, 72–732.

Lien of judgments: As between the parties, or as against persons chargeable with notice of the character of the debt, a judgment upon a debt contracted prior to the time when the property acquired a homestead character, although not rendered until after that time, becomes a lien upon the homestead, and a party claiming under the homestead right (as by mortgage) is bound to ascertain when such right began, and whether it was prior to the debt on which the judgment was rendered: *Hale v. Heaslip*, 16–451.

And where it does not appear from the judgment itself that the debt was contracted prior to the acquisition of the homestead, that fact may be shown by evidence *aliunde*: *Delavan v. Pratt*, 19–429; *Phelps v. Finn*, 45–447.

A judgment defendant who is surety for his co-defendant has such an interest, as against his co-defendant, that he may show that the judgment is for a debt antedating the acquisition of the homestead of his principal: *Delavan v. Pratt*, 19–429.

It is not sufficient, in order to make a judgment a lien upon the homestead otherwise than as a mechanic's lien, to show that it was for material furnished and labor performed upon the homestead property, unless the indebtedness arose before its acquisition as a homestead: *Ibid.*

A judgment for a debt antedating the homestead right is a lien on the homestead in such sense that the holder thereof may redeem from an execution sale by a senior creditor, and, as against such senior creditor purchasing at his own sale, may show by evidence *aliunde* that his debt antedates the homestead: *Phelps v. Finn*, 45–447.

A creditor whose claim antedates the homestead has no lien as against a purchaser without notice until the recovery of his judgment: *Higley v. Millard*, 45–586.

The homestead being subject to the lien of a judgment for a debt contracted before its acquisition from the time such judgment is rendered, a purchaser after the lien attaches takes subject thereto, and in case of sale of the property under such judgment has no other right than that of making statutory redemption from the sale: *Kimball v. Wilson*, 59–638.

That judgments in general are not liens on the homestead, see notes to § 3163.

Exhausting other property: It is the policy of the law to require all other property of the defendant in execution to be exhausted before the sale of the homestead: *Twogood v. Stephens*, 19–405.

The phrase "other property of the debtor liable to execution" applies to his interest in partnership property: *Lambert v. Powers*, 36–18.

Where the homestead is sold before other property is exhausted the sale may be set aside and a resale ordered: *Lay v. Gibbons*, 14–377.

Where the holder of a senior mortgage on property, including the homestead, took a conveyance of the entire property without releasing his mortgage or otherwise indicating his intention that it should be merged in his legal title, *held*, that as to junior mortgages he had the right to have his mortgage debt satisfied first, if possible, out of the portion not included in the homestead, to the exclusion of junior liens which were not a lien upon the homestead: *Linscott v Lamart*, 46–312.

Where a mortgage upon land, a portion of which constituted a homestead, was foreclosed and the land was all sold together, *held*, that a judgment lienholder whose judgment was a lien upon a portion of the property constituting the homestead, and who was not made a part to the foreclosure, could redeem the portion of the land on which his judgment was a lien upon paying the amount bid for the whole premises less the value of the homestead: *Sutherland v. Tyner*, 72–232.

A party claiming that the homestead is not liable because other property has not been exhausted must make such fact appear. It is not necessary to negative that fact in the first instance in order to make the sale valid: *Hale v. Heaslip* 16–451; *Stevens v. Myers*, 11–183.

The fact that a judgment creditor, under a claim prior to the homestead, has delayed until the other property of the debtor has been otherwise exhausted, will not release the homestead from his claim: *Denegre v. Haun*, 14–240.

The right to compel a creditor to exhaust other property subject to his mortgage before subjecting the homestead does not exist in favor of a third person who has purchased the homestead after the execution of the mortgage under which the sale is had: *Barker v. Rollins*, 30–412; *Kemerer v. Bournes*, 53–172.

If the mortgagor has sold the other property which might have been applied to the satisfaction of the debt, he cannot require that it be proceeded against in the hands of a third party before the homestead is sold: *Dilger v. Palmer*, 60–117.

When a mortgage is given covering the homestead and other land, and then a second mortgage is executed upon the same land so far as not included in the homestead, and the second mortgage is foreclosed and the land covered by it sold to the mortgagee therein, such mortgagee cannot insist that the homestead be first subjected to the payment of the first mortgage, but the mortgagor may insist, on the foreclosure of the senior mortgage, that the property covered thereby not included within the homestead shall first be applied to the satisfaction of such mortgage: *Equitable L. Ins. Co. v. Gleason*, 62–277.

Although by § 4559 a junior mortgagee is entitled to pay off a senior mortgage covering the same premises and other property, and have an assignment thereof and enforce it first as against the property not covered by his junior mortgage, yet if the property thus

embraced in the senior mortgage and not covered by the junior is the mortgagor's homestead, the junior mortgagee is not entitled to such assignment, as the homestead cannot be first subjected to the satisfaction of the senior mortgage: *Grant v. Parsons*, 67-31.

Where the sheriff at a sale on foreclosure of a mortgage covering the homestead and other tracts offers the land not included in the homestead in separate tracts without receiving bidders, that is a sufficient exhausting of other property as required by statute, and a subsequent sale of the entire property including the homestead is not irregular: *Burmeister v. Dewy*, 27-468; *Eggers v. Redwood*, 50-289; *Brumbaugh v. Shoemaker*, 51-148.

If the officer's return of the execution recites the sale of the whole for a certain sum, but does not state whether the portion not included in the homestead was first offered separately, it will be presumed that the officer did his duty, and that the portion not included in the homestead was first offered: *Eggers v. Redwood*, 50-289.

The debtor cannot restrain the sale of the homestead under execution upon the ground that his other property has not been exhausted without an averment or showing that he has other property: *Stevens v. Myers*, 11-183.

The right to compel a sale of other property before the homestead is sold is not to be enforced by a cross-action, but by a special direction in the execution, and the right may be set up in the answer or obtained upon a summary supplemental showing: *Barker v. Rollins*, 30-412.

Where a party who has the right to insist that other property before the homestead shall be applied to the satisfaction of the debt has notice of the proposed sale of the homestead and makes no objection thereto he will be regarded as acquiescing, and cannot afterwards object to the sale on that ground: *Foley v. Cooper*, 43-376.

The fact that land not included within the homestead, which is offered for sale, is bid in for a sum much below its value, will not entitle the parties to have the sale set aside in an action in equity: *Sigerson v. Sigerson*, 71-476.

Where a party attacked a judicial sale of his property on the ground that he owned no interest subject to execution, and it appeared incidentally merely that part of the premises were occupied as a homestead, but it did not appear whether the homestead right was acquired subsequently to the date upon which the judgment was rendered or not, *held*, that the sale of the property in a lump without setting off the homestead was not void: *McCleary v. Ellis*, 54-311.

Where it does not appear that defendant has other property subject to execution the sale of the homestead which is liable to the indebtedness will be valid unless defendant points out other property: *Owens v. Hart*, 62-629.

As to platting before sale on execution, see § 3173 and notes.

3168. Debts created by written contract. 1993. The homestead may be sold for debts created by written contract, executed by the persons having the power to convey and expressly stipulating that the homestead is liable therefor, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written contract. [R., § 2281; C., '51, § 1249.]

Written contract: The phrase "created by written contract" has reference to the manner in which the creation of the debt is to be evidenced rather than to the time when the liability arises. This section applies as well to debts evidenced by written contract subsequently to their creation as to debts so evidenced at the very time they are contracted: *Stevens v. Myers*, 11-183.

The written contract here specified need not be a mortgage or other conveyance; any writing containing necessary stipulations and executed by the proper persons is sufficient: *Foley v. Cooper*, 43-376.

The homestead cannot be rendered liable for the debts of its owner by mere verbal agreement to charge it with the payment thereof and to execute a writing to that affect, which by mistake is not done: *Rutt v. Howell*, 50-535.

A provision in a confession of judgment that execution might be issued thereon "against any property belonging to said defendants, homestead included," *held* not sufficient to render the homestead liable: *Ibid.*

The fact that the husband and wife execute a mortgage upon their homestead to secure a particular creditor does not subject it to the payment of the claims of other creditors, nor can a general creditor be subrogated to the rights of the mortgagee. If the owner afterwards makes a general assignment for the benefit of creditors, the holder of the mortgage is entitled to a *pro rata* share with the other creditors, and the homestead is only liable for the balance remaining unpaid: *Dickson v. Chorn*, 6-19.

Foreclosure of incumbrances against the homestead: The wife cannot be affected by any decree foreclosing a mortgage on the homestead to which she is not made a party: *Burnap v. Cook*, 16-149.

The lien of a mortgage of the homestead, executed by the owner before marriage, is prior to any claim the wife may have by the subsequent marriage; but in a foreclosure suit the wife must be made a party in order that the judgment be binding upon her, and that a sale thereunder may cut off her dower rights: *Chase v. Abbott*, 20-154.

Where a mortgage is invalid because not joined in by the wife, who afterwards dies, and the mortgagor, at the time of foreclosure, has a second wife, her rights cannot be cut off unless she is made a party: *Larson v. Reynolds*, 13-579.

But the wife is not a necessary party in every action affecting the homestead: *Ibid.*

Even where more property than can be held as a homestead is occupied, no foreclosure can

be had as to any part thereof under a mortgage not joined in by the wife; and therefore a foreclosure of such a mortgage cannot be had against the husband alone: *Goodrich v. Brown*, 63-247.

Where the occupancy of property as a homestead commences subsequently to the commencement of an action to foreclose a mortgage executed by the husband, before the property acquired the homestead character, a sale under such foreclosure cuts off the wife's homestead rights, although she is not made a party thereto. She has no rights in such homestead which she can assert as against the mortgage, even to compel plaintiff to first exhaust other property: *Kemerer v. Bournes*, 53-172.

Receiver: An application for the appointment of a receiver pending proceedings to foreclose a mortgage on a homestead may properly be refused where the amount due under the mortgage is in dispute: *Callanan v. Shaw*, 19-183.

Whether in any case a receiver should be appointed to take possession and charge of a mortgagor's homestead pending proceedings to foreclose, *quære: Ibid.*

Failure to set up homestead right in the foreclosure proceeding bars any such right: *Larson v. Reynolds*, 13-579.

And it cannot afterwards be set up against the purchaser at a sale under the judgment recovered under such proceeding: *Haynes v. Meek*, 14-320.

Where a defendant failed to set up his homestead right in an action to charge his property with a lien, *held*, that he could not, after judgment, maintain an action to prevent the enforcement of such lien on the ground that he was ignorant of his rights; and *held* also that his minor children had no interest which could be interposed in that manner: *Collins v. Chantland*, 48-241.

Where a homestead was sold under special execution and the surplus in the sheriff's hands was applied upon other executions against the defendant, and it was shown that such other executions were not upon judgments which could be enforced against the homestead, but such application of the surplus was made without objection on the part of plaintiff, *held*, that he could not recover such surplus in an action against the sheriff: *Brumbaugh v. Zollinger*, 59-384.

Where, in an action for divorce, the wife asked alimony, and a certain amount was granted and made a special lien on land otherwise involved in the suit, which land was afterwards sold to satisfy the decree, *held*, that the husband could not afterwards contest the sale on the ground that the property was his homestead. The homestead right should have been set up before the decree: *Hemenway v. Wood*, 53-21.

3169. What constitutes. 1994. The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places, he may select which he will retain as his homestead. [R., § 2282; C., '51, § 1250.]

Occupancy: The exemption of the homestead is based upon its actual occupancy as such, and is not dependent upon the marking out and platting: *Yost v. Devault*, 9-60.

Such marking and platting alone do not give property the character of a homestead; use by the family as a home is essential: *Cole v. Gill*, 14-527.

Assent of the wife to the action of the husband in fixing the homestead is not essential. If he adopts it as his home, the fact of absence of his wife will not make it any the less his homestead: *Williams v. Swetland*, 10-51.

The homestead character does not attach to property until it is actually occupied and used by the family as a home. The mere intention to occupy, though subsequently carried out, does not make the premises a homestead until there is actual residence: *Charles v. Lamberson*, 1-135; *Christy v. Dyer*, 14-438; *Elston v. Robinson*, 23-208; *Givans v. Dewey*, 47-414.

But where a portion of the furniture was placed in a house which was undergoing repairs, and the family moved to the neighborhood expecting to occupy it, but on account of repairs not being completed did not actually sleep and eat in the building, *held*, that it became invested with the homestead character: *Neal v. Coe*, 35-407.

Property acquired as a homestead in exchange for another homestead will remain exempt for a reasonable time for the purpose of effecting the removal of the family from the old homestead, although the new one is not yet actually occupied: *Cowgell v. Warrington*, 66-666.

If under the same roof with the homestead there shall be a floor or floors, room or rooms, which are not used for the purpose of a homestead, they are no more exempt than if under another roof; and if a portion of the building shall come within the definition of a homestead, and a portion not, then the one portion may be exempt and the other not. The use of other portions of the building cannot make that portion liable which would otherwise be exempt: *Rhodes v. McCormick*, 4-368.

So where the upper story or stories of a building in a city are used by the owner as a home and the first story is rented for store purposes, the portion rented as store-rooms may be sold under execution, while the portion used as a home will be exempt: *Ibid.; Mayfield v. Maasden*, 59-517.

Where the owner of a lot and building thereon used the first and fourth floors and the cellar for business purposes, the value of such portion of the premises being greatly in excess of the value of the shop which he would be entitled to hold exempt in connection with the homestead under § 3172, and occupied the second and third stories for a residence, *held*, that the portions occupied for business purposes might be sold under execution: *Johnson v. Moser*, 66-536.

In such case, *held*, that the purchaser of the portion of the premises including that part of the cellar not used as the homestead could not

have an action of partition to determine the respective rights of himself and the owner of the homestead: *Johnson v. Moser*, 72–523.

After a portion of a building has thus been sold and the owner remains in occupancy of the other portion as a homestead, the owners of the two portions are not tenants in common but are adjoining tenants possessing separate and distinct interests: *McCormick v. Bishop*, 28–233.

Where a two-story frame building, with cellar, was originally erected for a dwelling-house and occupied exclusively by the owner, who used the first floor for business purposes and the cellar jointly in connection with his business and residence, *held*, that the whole building was exempt: *Wright v. Ditzler*, 54–620.

In such case the exemption of the portion used for business is allowed on the same principle as where a shop situated within the requisite distance of the dwelling of the person occupying it is exempt as a part of the homestead: *Smith v. Quiggans*, 65–637.

In such case *held*, also, that the fact that the use of the lower story for business purposes passed to another person than the owner, the stock being taken possession of to be sold out by such other person, would not defeat the homestead exemption in such lower story, the intention of the owner being to abandon its use for business purposes and occupy it as a part of the residence: *Ibid.*

The building and the lot on which it is situated may be partly a homestead and partly subject to execution, depending on the purpose for which the respective parts are used: *Arnold v. Gotshall*, 71–572.

Abandonment: An actual removal from the homestead with no intention to return will forfeit the homestead right, even though no new homestead be acquired; but where the removal is temporary and with intention to return, unless others have been misled thereby to their prejudice, it will not work a forfeiture of the homestead right. Facts discussed, *held* to indicate an intention to return: *Fyffe v. Beers*, 18–4.

An averment that the party has abandoned the homestead and is a non-resident, and a resident of another state, is sufficient to make out a *prima facie* case of abandonment; such fact would not be conclusive if there were an intention of returning, but such intention should be set up in the answer and need not be negatived in the petition: *Orman v. Orman*, 26–361.

However, the premises do not lose the homestead character by being left for a merely temporary purpose: *Davis v. Kelley*, 14–523.

In such case they will remain exempt even though in the absence of the owner they are rented to a tenant: *Robb v. McBride*, 28–386.

A removal from the homestead for a temporary purpose will not amount to abandonment where no prejudice has resulted therefrom: *Morris v. Sargent*, 18–90.

In a particular case, *held*, that the fact that the wife left the homestead with the husband for a temporary purpose, with the intention of returning and occupying, did not constitute an abandonment by her: *Bradshaw v. Hurst*, 57–745.

In such case, *held*, also, that the intention to return must have existed and would be presumed to continue until a contrary intent was shown: *Ibid.*

The length of time of the absence is not conclusive as to abandonment, but it is an important fact in determining the intention to return, where there are no other acts or circumstances indicating such intention: *Dunton v. Woodbury*, 24–74.

Stronger proof of abandonment is required, where the lien set up is claimed to have attached during actual occupancy, than where it arises when the party claiming the premises was not in actual possession: *Ibid.*; *Davis v. Kelley*, 14–523.

Absence of the husband while working at his trade, and the wife while boarding their only child during his attendance upon school, the homestead farm being in the meantime leased with the reservation of two rooms for storing household goods, there being an intention to return, *held* not to constitute an abandonment of the homestead: *Shirland v. Union Nat. Bank*, 65–96.

The fact that the head of the family is absent from home does not deprive the property occupied by the family during his absence of the character of a homestead: *Griffin v. Sheley*, 55–513.

The homestead exemption being for the benefit of the family, so long as the family desires to retain the homestead as such, and does actually occupy it, it remains exempt, although the head of the family may have gone to another state and acquired property and a residence there with the intention of subsequently removing his family: *Savings Bank v. Kennedy*, 58–454.

The removal of the husband, even with intent to abandon the property, does not affect the homestead right so long as the wife, having the right to occupy, remains in such occupancy: *Lunt v. Neeley*, 67–97.

A subsequent abandonment will not render valid a conveyance by the husband or wife alone: *Ibid.*; *Bruner v. Bateman*, 66–488.

A conveyance by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farrar*, 53–426.

Conveyance of the homestead standing in the husband's name by the husband and wife to a third party in trust, to be reconveyed to the wife, is not an abandonment or fraudulent conveyance rendering the homestead subject to debts contracted subsequent to its acquisition and before such transfer: *Hugunin v. Dewey*, 20–368.

Where the husband, being the owner of the fee, conveyed the homestead to a third party who afterwards reconveyed it to the wife, the occupancy remaining unchanged, *held*, that such conveyance amounted to an abandonment, it not appearing that the conveyance was for the purpose of vesting the title in the wife and without intention of abandoning the homestead right: *Jones v. Currier*, 65–533.

Where the family did not cease to occupy the homestead, but another party took possession of a portion thereof under a transfer which was invalid, *held*, that the facts did not constitute an abandonment: *Stinson v. Richardson*, 44–373.

Where a wife, holding the title to a homestead under a voluntary conveyance from her husband, which is void for fraud as to creditors, dies, and the husband and children afterwards abandon the homestead, it becomes liable to the claims of such creditors: *Gardner v. Baker*, 25–343.

Where the owner leaves the premises and acquires a new home it will be presumed that he intended to abandon the old homestead: *Davis v. Kelley*, 14–523.

An actual removal from the homestead, with no intention to return, will amount to a forfeiture of the homestead right as against purchasers and creditors, even when a new homestead has not been gained: *Newman v. Franklin*, 69–244.

While the length of a person's absence may not be conclusive proof of his intention to abandon his homestead, yet where such absence is continued for some years, and there is no circumstance or act which indicates his intention to return and occupy the homestead, in such case the length of his absence may become a controlling circumstance: *Ibid.*

Absence from the homestead for about three years without any manifest intention to return, with repeated offers to sell or trade the property and frequent expressions of a purpose not to return to it, one of these being made at the time of the incurring of liability, *held* sufficient to constitute an abandonment as to the party to whom such liability was incurred. *Dunton v. Woodbury*, 24–74.

Where it appeared that a party owning and occupying a farm as a homestead moved to town to practice law, with the intention of pursuing his profession permanently if he was able to make a living by it, *held*, that the intention was such as to constitute an abandonment of the homestead: *Kimball v. Wilson*, 58–638.

Where the owner, though absent from the premises for seven years, had during that time retained possession of a portion of the house for the storage of household goods, *held*, that his absence did not constitute abandonment: *Repenn v. Davis*, 72–548.

Where the owner with his family removed permanently from the property, resided in different places, voted at elections where so residing, and had no definite intention of returning to the property, but intended to exchange it for another homestead when possible, *held*, that the facts showed an abandonment. Abandonment may be shown without proof of the acquisition of a new homestead: *Cotton v. Hamil*, 58–594.

The fact that the owner removed with his family to another county and repeatedly voted there, *held* conclusive evidence of the abandonment of the homestead: *Ross v. Hellyer*, 36 Fed. Rep., 413.

Testimony of the party claiming a homestead right as to his intention to return is admissible and entitled to consideration, though not conclusive as to such intent. If the homestead is left for the purpose of obtaining support for the family an intent to abandon permanently should not be inferred. An intent to return must always exist when the removal was made for a temporary business purpose: *Boot v. Brewster*, 75–631.

Upon sale of the portion of the homestead upon which the house is situated, without intention to build upon and occupy the residue as a homestead, the remaining portion loses its homestead character: *Givans v. Dewey*, 47–414; *Windle v. Brandt*, 55–221.

The mere intention to place the remainder of the property in condition for occupancy at a future time will not continue the homestead character: *Givans v. Dewey*, 47–414.

Continuing to occupy the house as a tenant at will after its conveyance will not continue the homestead right: *Windle v. Brandt*, 55–221.

Evidence that at the execution of a mortgage upon property which had been the homestead, by the wife alone, she being owner of the fee, she stated that she was not living upon it and did not intend to do so, *held* admissible to show that at the execution of a subsequent mortgage the homestead right did not exist, there having been no occupation of the premises in the meantime as a homestead: *Van Bogart v. Van Bogart*, 46–359.

Where the wife, while absent from the homestead, requested a creditor of the husband to levy an attachment thereon, *held*, that she thereby abandoned her homestead right and could not insist upon it as against such attachment: *Parsons v. Cooley*, 60–268.

A lease to a mining company of the right to mine coal from the homestead does not constitute such severance of the unmined coal as to subject it to judicial sale: *Sibley v. Lawrence*, 46–563.

Where defendant sets up a homestead right the burden of proving abandonment is upon plaintiff: *Bradshaw v. Hurst*, 57–745.

But where it is claimed that surrender of possession is not voluntary and does not constitute an abandonment, the burden of proof is upon the party claiming the homestead right to establish his intention to return: *Newman v. Franklin*, 69–244.

A homestead when acquired will be presumed to continue until the contrary appears, the burden in this respect being on the general creditor seeking to show abandonment. In case a judgment which is sought to be enforced against a homestead on the ground of its abandonment was rendered during the time the premises were occupied as a homestead, the proof of the intent to abandon should be clearer and more satisfactory than when the judgment relied on was obtained after the homestead had ceased to be actually used as such: *Boot v. Brewster*, 75–631.

Where a divorce is granted to a wife, even with the custody of the children, the homestead in the husband's hands remains exempt: *Woods v. Davis*, 34–264.

Facts in particular cases, as bearing upon the question of abandonment, considered: *Stewart v. Brand*, 23–477; *Leonard v. Ingraham*, 58–406; *Baker v. Jamison*, 73–698.

3170. Embraces what. 1995. It may contain one or more lots or tracts of land, with the buildings thereon and other appurtenances, subject to the limitations contained in the next section, but must in no case embrace differ-

ent lots and tracts unless they are contiguous, or unless they are habitually and in good faith used as part of the same homestead. [R., § 2283; C., '51, § 1251.]

The homestead may contain tracts not contiguous, but it must appear that they are "used as part of the same homestead." It is not sufficient for that purpose to show that the owner "used, worked and occupied them:" *Reynolds v. Hull*, 36-394.

3171. Extent. 1996. If within a town plat it must not exceed one-half an acre in extent, and if not within a town plat it must not embrace in the aggregate more than forty acres. But if, when thus limited, in either case its value is less than five hundred dollars, it may be enlarged till its value reaches that amount. [R., § 2284; C., '51, § 1292.]

The value is to be ascertained on the basis of the fee-simple title. The fact that a person claiming a homestead has less than the fee-simple title does not authorize the exemption of his interest in a larger amount of property: *Yates v. McKibben*, 66-357.

The statutory limitation as to the size of a homestead within a town plat does not apply unless the homestead is situated within the platted portion of a town, and if it is within the limits of a town, but remains unplatted, it may be of the same extent as though not within town limits: *McDaniel v. Mace*, 47-509.

So *held* where the limits of a town were so extended as to include a homestead previously existing and which was not platted: *Finley v. Dietrick*, 12-516.

To constitute a town plat in this sense the plat must be that of a city or incorporated village. The plat of an unincorporated village is not a town plat so as to limit the homestead right therein to one-half acre: *Truax v. Pool*, 46-256.

In an action attacking a sale on the ground of homestead exemption in the property sold, the party setting up the exemption must make such allegations as to the value of the property, and its not being within the limits of a city or town plat, as are necessary to show its exemption as a homestead: *Helfenstein v. Cave*, 3-287; *Helfenstein v. Cave*, 6-374.

Where the owner seeks to have exempt a tract of more than one-half acre within a town plat the burden is upon him to show that its value is less than five hundred dollars: *Boot v. Brewster*, 75-631.

3172. Dwelling; appurtenances. 1997. It must not embrace more than one dwelling-house, or any other buildings except as such are properly appurtenant to the homestead as such; but a shop or other building situated thereon, and really used and occupied by the owner in the prosecution of his own ordinary business, and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead. [R., § 2285; C., '51, § 1253.]

A stable kept for domestic use, in connection with the house, is appurtenant to the homestead, and exempt without regard to value: *Wright v. Ditzler*, 54-620.

The homestead cannot include buildings used as shops, etc., rented to tenants and a source of revenue: *Kurz v. Brusch*, 13-371.

A building or a portion of the building used in the prosecution of the business of keeping a saloon cannot be deemed exempt as a part of the homestead, under this section: *Arnold v. Gotshall*, 71-572.

A portion of the dwelling, used by the owner for business purposes, may be exempt on the same principle as a shop is exempt: *Smith v. Quiggans*, 65-637.

3173. Selecting; platting. 1998. The owner, or the husband or wife, may select the homestead and cause it to be marked out, platted, and recorded, as provided in the next section. A failure in this respect does not leave the homestead liable, but the officer having an execution against the property of such a defendant, may cause the homestead to be marked off, platted, and recorded, and may add the expense thence arising to the amount embraced in his execution. [R., § 2286; C., '51, § 1254.]

Failure to plat and record the homestead does not defeat the homestead right: *Sargent v. Chubbuck*, 19-37; *Nye v. Walliker*, 46-306; *Linscott v. Lamart*, 46-312.

Nor does the failure to plat deprive the parties of the right to claim more than forty acres by reason of the value not reaching the statutory limit: *Green v. Farrar*, 53-426.

To render a selection and platting of the homestead valid the plat must be recorded: *White v. Rowley*, 46-680.

A sale under execution of a tract of land in a lump, which includes the homestead or a part of it, without the homestead being platted by the owner or by the officer making the sale, is void: *Linscott v. Lamart*, 46-312; *Goodrich v. Brown*, 63-247; *Visek v. Doolittle*, 69-602.

A sale by the officer of any portion of the property which might have formed a part of the homestead without such platting is invalid: *White v. Rowley*, 46-680; *Lowell v. Shannon*, 60-713.

It is immaterial in such cases that no objection to the sale of the homestead *en masse* without platting is made: *Owens v. Hart*, 62-620.

The fact that the sale is made under a special execution is immaterial in this respect: *Ibid.*

Failure of the owner and the sheriff to select and designate the homestead before execution sale of property in which the homestead is included does not render the sale void. The statute is directory: *Newman v. Franklin*, 69-244.

It may be that in such case the sale is voidable; but where it appeared that after the sale the homestead was abandoned, *held*, that the trustee of the owner of the homestead could not maintain an action to set it aside: *Ibid.*

Where a portion of defendant's farm, upon which he resided, was sold without platting a homestead, but the dwelling and more than enough land for a homestead were left, *held*, that the sale might be set aside as between the parties, but was not void: *Martin v. Knapp*, 57-336.

Where a tract of land including the owner's homestead was sold on special execution in a lump, after first having been offered in forties, *held*, that there was no prejudice to the owner resulting from failure of the sheriff to mark out and plat the homestead: *Brumbaugh v. Zollinger*, 59-384.

Even though a homestead right may exist in the undivided interest of a tenant in common, yet, in case of an execution sale of such tenant's interest, it is not proper for the officer to set off any specific portion as a homestead: *Farr v. Reilly*, 58-399.

Failure to plat a homestead will be immaterial in case of a conveyance thereof, in which the husband and wife both join: *Quinn v. Brown*, 71-376.

3174. Description; recording. 1999. The homestead shall be marked off by fixed and visible monuments, and in giving the description thereof, the direction and distance of the starting point from some corner of the dwelling-house shall be stated. The description and plat shall then be recorded by the recorder in a book to be called the "homestead book," which shall be provided with a proper index. [R., § 2287; C., '51, § 1255.]

3175. Changes. 2000. The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her right or those of the children. [R., § 2288; C., '51, § 1256.]

A change of the homestead is permitted, and the new homestead will be exempt from execution to the extent in value of the old, as against an indebtedness contracted during the occupation of the latter, but such change cannot prejudice previous liens and conveyances: *Sargent v. Chubbuck*, 19-37.

The lien of a judgment which has already attached cannot be affected by a change of the homestead to property upon which it is a lien: *Elston v. Robinson*, 21-531.

Where the owner of two pieces of property changed his homestead from one to the other, *held*, that a judgment lien existing on the second would become a lien on the first; but that the homestead right in the second would be superior to such judgment lien, to the same extent that it was in the first: *Furman v. Dewell*, 35-170.

Where a party sells his homestead with the intention of purchasing a new one, he will be allowed a sufficient time within which to exercise that right, and, if he does not gain credit on account of the transaction, debts contracted in the interim cannot be enforced against the new homestead: *Benham v. Chamberlain*, 39-358.

The acts of acquiring a new homestead and moving into it cannot be simultaneous. After the purchase the owner should be allowed a reasonable time to make the change and to remove the family to his new home, and during the time intervening between the purchase of the new house and actual occupation it is exempt as a homestead: *Cowgell v. Warrington*, 66-666.

The new homestead is liable for debts contracted prior to the acquisition of the old one: *Bills v. Mason*, 42-329.

But not for those contracted subsequently and not put in judgment before the acquisition of the new one: *Pearson v. Minturn*, 18-36; *Robb v. McBride*, 28-386.

The purchase of a second homestead with the proceeds in part of the first and other means entitles the owner to hold it exempt from debts contracted subsequently to the occupancy of the old homestead, where the value of the second homestead does not exceed that of the first: *Lay v. Templeton*, 59-684; *Benham v. Chamberlain*, 39-358.

It is not necessary that the old homestead be sold for cash which is immediately invested in a new one. The sale may be on time, and if the intention is to invest the proceeds, when realized, in the new, such proceeds will be exempt: *State v. Geddis*, 44-537.

Where plaintiff owned a homestead and also a half-interest in other property subject to execution, and exchanged the homestead for the other half-interest in such property, *held*, that the half-interest originally owned remained liable to be sold under execution on a judgment for a debt existing at the time of the exchange: *Thompson v. Rogers*, 51-333.

Where defendant relies upon the fact that his homestead was procured with the proceeds of a previous homestead in order to establish

its exemption from a claim which antedates the last homestead, the burden of proof to establish that fact is upon him: *First Nat. Bank v. Baker*, 57-197; *Paine v. Means*, 65-547; *First Nat. Bank v. Thompson*, 72-417.

Where a farm exceeding in extent the amount which could be held exempt, and incumbered for a portion of its value, was exchanged for another tract of land no greater in value than was capable of exemption as a homestead, and the latter was occupied as such, *held*, that as it was not practicable to establish what portion of the value of the original tract was exempt, no portion of the new homestead could be held exempt from a debt existing at the time of the exchange: *Paine v. Means*, 65-547.

The proceeds of the homestead when invested in a new homestead in another state do not remain exempt. Therefore, where a party sold his homestead in Iowa and purchased one in Missouri, and thereafter sold his homestead in Missouri and invested the proceeds in a homestead in Iowa, *held*, that he could not hold the last homestead in Iowa exempt from debts existing at the time of its purchase, even though they did not antedate the first homestead: *Rogers v. Raisor*, 60-355.

Where a debtor holding a homestead exempt from execution for his debts exchanged the same for other property which he procured to be conveyed directly to his wife, *held*, that the property thus conveyed to the wife did not become subject to payment of his debts, and that such conveyance to the wife was not fraudulent: *Jones v. Brandt*, 59-332.

The change of metes and bounds which is authorized by statute has no reference to a conveyance or mortgage of a portion of the land which may be claimed as a homestead, and a change cannot be effected in that way without the consent of the husband or wife, unless it be for the acquisition of a new homestead: *Goodrich v. Brown*, 63-247.

Under particular facts, *held*, that a new homestead, practically of the same value as the old, remained exempt, but that other property, acquired and used in connection with the homestead, but not procured with the proceeds of the former homestead, was not exempt from prior indebtedness: *Atkinson v. Hancock*, 67-452.

Under particular facts, *held*, that the intention to change the homestead was not shown: *Coad v. Neal*, 55-528.

Money arising from the sale of the homestead is not exempt from garnishment unless the sale was in pursuance of a design to purchase another homestead: *Huskins v. Hanlon*, 72-37.

3176. New homestead exempt. 2001. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree. [R., § 2289; C., '51, § 1257.]

See notes to preceding section.

3177. Referees to determine exemption. 2002. When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualification of jurors. The parties then, commencing with the owner of the homestead, shall in turn strike off one juror each and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all the facts of the case, and shall report the same with their opinion thereon to the next term of the court from which the execution or other process may have issued. [R., § 2290; C., '51, § 1258.]

The reference here contemplated is not for the purpose of making a selection of the homestead, but to determine whether certain land claimed to be exempt really is so: *White v. Rowley*, 46-680, 682.

This section contemplates the case where it is conceded that the claimant of the homestead rights has rights of that character which he is entitled to set up, but there is a controversy as to where the line is to be drawn between what is exempt and what is not. It does not apply to a case where it is a question as to whether the debtor has any homestead rights at all as against the claims of the creditor: *McCrackin v. Weitzel*, 70-723.

3178. How selected. 2003. If either party fail to strike off jurors in the manner directed in the last section, the sheriff may strike off such jurors [R., § 2291; C., '51, § 1259.]

3179. Referring back. 2004. The court may also, in its discretion, refer the whole matter, or any part of it, back to the same referees, or to others to be selected in the same manner, or as the parties otherwise agree, giving them directions as to the report that is required of them. [R., § 2292; C., '51, § 1260.]

3180. Action of court. 2005. When the court is sufficiently possessed of the facts of the case, it shall make its decision, and may, if expedient, direct the homestead to be marked off anew, or a new plat and description to be made and recorded, and may take any further step in the premises which, in its discretion, it may deem proper for attaining the objects of this statute. It shall also award costs as nearly as may be in accordance with the practice observed in other cases. [R., § 2293; C., '51, § 1261.]

These provisions apply where the party claims more than forty acres exempt as a homestead: *Green v. Farrar*, 53-426.

3181. Change of circumstances. 2006. The extent or appurtenances of the homestead as thus established, are liable to be called in question in like manner, whenever a change in value or circumstances will justify such new proceeding. [R., § 2294; C., '51, § 1262.]

3182. Survivor to occupy. 2007. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law. [R., § 2295; C., '51, § 1263.]

Upon the death of the wife the husband is entitled to possess and occupy the whole homestead regardless of whether he or the wife is owner of the fee, or whether or not there is issue of the marriage: *Burns v. Keas*, 21-257.

Upon the death of the husband the wife, though she marries again, may continue to occupy the whole homestead, and it is not liable to partition at the suit of the husband's heirs at law: *Nicholas v. Purczell*, 21-265.

A survivor electing to retain the homestead in lieu of the distributive share has only the right to use and occupancy during life, and has no interest which can survive to a second husband or wife: *Stevens v. Stevens*, 50-491.

The survivor thus occupying cannot change the homestead for another: *Size v. Size*, 24-580.

The surviving widow is entitled to control the rents and profits of the homestead while she remains in possession thereof: *Floyd v. Mosier*, 1-512.

A widow continuing to occupy the homestead belonging to her former husband has such right to occupancy as to entitle her to sue for injuries to her enjoyment of the property by a wrong-doer, although it may not appear but that her right to the property is subject to be divested at any time: *Cain v. Chicago, R. I. & P. R. Co.*, 54-255.

The rights of occupancy and possession on the part of the survivor do not confer any title which can be conveyed or can become subject to the lien of a judgment: *Meyer v. Meyer*, 23-359; *Butterfield v. Wicks*, 44-310; *Smith v. Eaton*, 50-488.

A judgment against a surviving wife, recovered after the death of the husband, does not become a lien upon the homestead in her hands: *Briggs v. Briggs*, 45-318; *Nye v. Walliker*, 46-306.

The right of the wife to occupy the homestead after the death of the husband is not a right or interest in his estate which she takes by inheritance, but a mere personal right unaccompanied by title or property interest: *Mahaffy v. Mahaffy*, 63-55.

Therefore, *held*, that a stipulation in an antenuptial contract, by which the wife accepted the provision therein made in lieu of dower and inheritance, did not constitute a relinquishment of the right to occupy and possess the homestead during her life: *Ibid.*

The right of the survivor may be lost by abandonment of the homestead: *Butterfield v. Wicks*, 44-310.

And after such abandonment it ceases to have the homestead character, and the survivor becomes a tenant in common with other heirs: *Orman v. Orman*, 26-361.

And partition among such heirs may then be had: *Size v. Size*, 24-580.

While the survivor is entitled to occupancy the heirs cannot interfere therewith, nor claim partition: *Dodds v. Dodds*, 26-311.

3183. Election to retain; descent; exemption. 2008. The setting off of the distributive share of the husband or wife in the real estate of the deceased, shall be such a disposal of the homestead as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased; but if there be no such survivor, the homestead descends to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own. [R., § 2296; C., '51, § 1264.]

Setting off distributive share: The right of occupying the homestead or any part of it cannot be retained *in addition* to the distributive share: *Meyer v. Meyer*, 23-359 (explaining *Nicholas v. Purczell*, 21-265); *Butterfield v. Wicks*, 44-310.

The survivor has only the right to retain such occupancy in lieu of so much of the distributive share, or such share may be set off to include the homestead: *Whitehead v. Conklin*, 48-478.

The homestead right does not become ex-

tinct until the distributive share has been finally set off: *Burdick v. Kent*, 55-583.

Commencement by the heirs of action for partition of the estate, and the execution of a will by the widow devising her share, and her subsequent death, *held* not to constitute such a setting apart of the distributive share that it would pass to devisee: *Mobley v. Mobley*, 73-654.

Election to hold in lieu of dower: The survivor is entitled to occupy the homestead for a reasonable time in which to make an election whether to retain such possession for life, or take a distributive share of the property: *Cunningham v. Gamble*, 57-46.

During occupancy for such reasonable time the survivor should be allowed to receive the income and profits therefrom. So *held* as to rent of coal mine on premises: *Ibid.*

Where the entire homestead exceeds in extent the dower interest of the wife, and she continues occupying it for ten years without making claim to have dower admeasured, she will be regarded as having elected to take the homestead for life in lieu of the distributive share: *Conn v. Conn*, 58-747.

The occupancy of the property as a homestead will be considered as an election to hold it as a homestead and not merely a part of it as dower: *Butterfield v. Wicks*, 44-310.

The acts of a surviving husband in retaining possession of the homestead after his wife's death, where its value was greater than his one-third interest in her property would have been, *held* an election to occupy the homestead during life in lieu of dower: *Stevens v. Stevens*, 50-491.

While continued occupancy of the homestead in the absence of an election to take dower will be deemed an election to hold the homestead, the widow ought not to be compelled to make such election until the question of the indebtedness of the estate is determined, and it is known whether any portion, and if so how much, of the real property must be sold for debts, so that she may know what her distributive share would amount to. And proceedings among the heirs for partition or for admeasurement of dower should be postponed until the estate, as to the debts against it and legacies, may be found upon adjudication to be fully settled: *Thomas v. Thomas*, 73-657.

While the surviving husband is occupying the homestead in the absence of an election to take a distributive share, it is not competent for a court to dispose of his right to occupancy by forcing upon him in lieu thereof a distributive share. His continued occupancy as a survivor will be deemed an election to occupy as survivor, even though the distributive share should appear to be the more valuable: *Holbrook v. Perry*, 66-286.

The occupancy of a homestead under a devise of a life estate of land including the homestead will not be considered as an election defeating the widow's right to dower: *Blair v. Wilson*, 57-177.

The survivor electing to retain the homestead for life relinquishes his distributive share, but such relinquishment applies only to the one-third which the survivor is entitled to, where there are children or other descendants entitled to inherit, and not to the additional portion (one-sixth) which the survivor may be entitled to as heir at law, where there are no children: *Smith v. Zuckmeyer*, 53-14.

If the widow is entitled as heir at law to one-half of her husband's property the other heirs cannot, in the partition of the realty, insist that she include the homestead in her share: *Nicholas v. Purczell*, 21-265.

Where a widow has her distributive share in the real property of her deceased husband set out to her from the homestead she can continue to hold the same free from the lien of a judgment against her, not antedating the original homestead right: *Briggs v. Briggs*, 45-318: *Knox v. Hanlon*, 48-252.

Descent: The legal title of the homestead property, upon the death of the owner thereof, descends to the heirs of such owner, subject to the right of occupancy in the surviving husband or wife: *Burns v. Keas*, 21-257; *Cotton v. Wood*, 25-43.

Minor children have no such interest in their parents' homestead during the life of the latter as the law will enforce against the contracts or acts of the parents: *Collins v. Chantland*, 48-241.

Devise: A wife may devise the homestead in which she holds the legal title, and the right thereto will pass to the devisee subject to the rights of the surviving husband: *Stewart v. Brand*, 23-477.

A mortgage given by the devisee creates a lien and may be foreclosed, subject, however, to the homestead rights of the surviving husband or wife: *Ibid.*

Exemption in hands of heirs: The heir holds the property free from any debts of the ancestor which could not have been enforced against it in his life-time, but it remains liable to debts contracted by the ancestor prior to its acquisition as a homestead: *Moninger v. Ramsey*, 48-368.

It remains exempt in the hands of the heirs even from charges and expenses of the last sickness and funeral expenses: *Knox v. Hanlon*, 48-252.

Occupancy of such property by the heirs as a homestead is not essential to its exemption in their hands from antecedent debts: *Johnson v. Gaylord*, 41-362; *Baker v. Jamison*, 73-698.

Where the widow abandons the homestead it descends as free from the debts of the ancestor as if there had been no widow: *Johnson v. Gaylord*, 41-362.

Where, at the time of the death of the wife, owning the fee of the homestead, she and the husband were absent from the homestead, but without having as yet abandoned it, *held*, that there could not subsequently be an abandonment by the husband of his life interest, except by a setting off of a distributive share, and that upon his death the property descended to the heirs free from his debts: *Bradshaw v. Hurst*, 57-745.

After the death of the husband or wife there cannot be an abandonment of the homestead by the survivor, if the title was in the deceased, except by setting off the distributive share of said survivor in the real estate of the deceased: *Darrah v. Cunningham*, 72-103.

Where the husband or wife surviving the owner of the fee elects to take a distributive

share instead of the right of occupancy as a homestead during life, but such distributive share is not yet set off and the possession of the homestead continues in the survivor until death, the property descends or passes by devise free from the debts of such survivor: *Burdick v. Kent*, 52-583.

Where a conveyance of the homestead was made by the husband and wife to their son, subject to the right of either grantor to occupy during life, and the husband surviving resided until death with his son, who did not reside on the homestead, *held*, that the son did not acquire the property as a homestead and that it was not exempt from his debts: *Reifenstahl v. Osborne*, 66-567.

3184. When sold. 2009. If there is no such survivor or issue, the homestead is liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead. [R., § 2297; C., '51, § 1265.]

3185. Devise. 2010. Subject to the rights of the surviving husband or wife, as declared by law, the homestead may be devised like other real estate of the testator. [R., § 2298; C., '51, § 1266.]

CHAPTER 9.

OF LANDLORD AND TENANT.

3186. Apportionment of rent. 2011. The executor of a tenant for life, who demises real property so held, and dies on or before the day on which the rent is payable, and a person entitled to rent dependent on the life of another, may recover the proportion of rent which had accrued at the time of the death. [R., § 2299; C., '51, § 1267.]

3187. Tenant holding over. 2012. A tenant giving notice of his intention to quit the demised premises at a time named, and afterwards holding over, and a tenant or his assignee wilfully holding over the premises after the term, and after notice to quit, shall pay to the person entitled thereto the double rental value of the premises during the time he holds over. [R., § 2300; C., '51, § 1268.]

[The word "double" is inserted in the fifth line in accordance with the list of "errata" given in the printed Code, although it does not occur in the original rolls.]

3188. Attornment to stranger. 2013. The attornment of a tenant to a stranger is void, unless made with the consent of the landlord, or pursuant to or in consequence of a judgment at law or in equity, or to a mortgagee after the mortgage has been forfeited. [R., § 2301; C., '51, § 1269.]

A tenant will not, during the existence of the tenancy, be allowed to deny the title of his landlord. He may contest the title of the lessor if he has been evicted or has yielded the possession to one having a paramount title, but not when the adverse title has been asserted by his own procurement or bad faith: *Stout v. Merrill*, 35-47.

A tenant cannot, before the expiration of his lease, and while in possession under it, deny his landlord's title: *Bowdish v. Dubuque*, 38-341.

Where a party has possession as a mere trespasser, and afterwards, by compromise, accepts a lease of the premises of the real owner, his possession is to be deemed derived from the landlord in such sense that he cannot afterwards set up title against the landlord in an action for possession of the premises: *Ibid.*

In an action on a note given in consideration of a lease defendant may show that there was no consideration for the reason that plaintiff had no title to the leased premises, and defendant did not and could not have obtained possession under such lease. Such defense is not precluded by the rule that defendant cannot dispute the landlord's title: *Andrews v. Woodcock*, 14-397.

As the mortgagor has the right of possession until foreclosure and the expiration of the right of redemption, the tenant cannot attorn to the mortgagee until the expiration of that time. "After the mortgage has been forfeited" means after the right of possession of the mortgagor has been cut off by the expiration of the period of redemption: *Mills v. Hamilton*, 49-105; *Mills v. Heaton*, 52-215.

A tenant holding under an executor, and having, as tenant, paid rents to such executor, is estopped from denying the executor's right to recover a balance due on rent: *Sullivan v. Finn*, 4 G. Gr., 544.

Fraud on the part of the landlord in obtaining the lease cannot be set up for the purpose of defeating the landlord's title: *Simons v. Marshall*, 3 G. Gr., 502.

3189. Tenant at will. 2014. Any person in the possession of real property with the assent of the owner, is presumed to be a tenant at will until the contrary is shown. [R., § 2216; C., '51, § 1208.]

Continuance in possession by the tenant with consent of the landlord after the expiration of his term of years implies, in the absence of express agreement, that the premises are held on the former terms, but want of consent on the part of the landlord prevents the application of this rule. A tenant in possession under an agreement to lease, without having paid rent, is a tenant at will, and so is one who, after his lease has expired, is permitted to continue in possession pending a treaty for a further lease: *Dubuque v. Miller*, 11–583.

Where property is bought in at execution sale under such circumstances that there is no right of redemption, but the execution defendant is allowed to remain in possession during the year following the sale and thereafter, he becomes a tenant at will: *Dobbins v. Lusch*, 53–364; *Munson v. Plummer*, 59–130.

All the right and interest of a tenant is terminated by judicial sale without right of redemption made under a judgment which was a lien on the premises prior to the lease, and if the tenant continues in possession after the sale, and notice to him by the purchaser, he does so not as tenant under his lease, but as tenant at will of the purchaser, and is liable to account to the latter for the use of the premises after the sale: *Kane v. Mink*, 64–34.

A person in possession under a parol mining lease is a tenant at will and entitled to the notice to quit provided for in such cases by the next section: *Bush v. Sullivan*, 3 G. Gr., 344; *Beatty v. Gregory*, 17–109.

Where notice was served to terminate a tenancy at will, but the defendant continued in possession for some years thereafter, *held*, that he did not stand in any different position after such notice: *Newell v. Sanford*, 13–191.

A person in possession not recognizing the owner as landlord cannot be regarded as a tenant at will: *Martin v. Knapp*, 57–236.

Possession of premises by grantee after execution of conveyance thereof, though such conveyance be voluntary, is presumed to have been under a tenancy at will: *Butler v. Nelson*, 73–732.

3190. Notice to quit. 2015. Thirty days' notice in writing is necessary to be given by either party, before he can terminate a tenancy at will; but when, in any case, a rent is reserved payable at intervals of less than thirty days, the length of notice need not be greater than such interval between the days of payment. In case of tenants occupying and cultivating farms, the notice must fix the termination of the tenancy to take place on the first day of March; except in cases of field tenants or croppers, whose leases shall be held to expire when the crop is harvested; *provided*, that in case of a crop of corn it shall not be later than the first day of December, unless otherwise agreed upon. But where an express agreement is made, whether the same has been reduced to writing or not, the tenancy shall cease at the time agreed upon, without notice. [R., § 2218; 13 G. A., ch. 98.]

Where a tenancy is to cease at an agreed time, the tenant is not entitled to the thirty days' notice to quit: *Shuver v. Klinkenberg*, 67–514.

Where a tenant was in possession under an agreement to occupy as long as he was in the employ of the landlord, *held*, that after leaving such employ he was a tenant holding over after the expiration of his lease and not a tenant at will, and therefore was only entitled to three days' notice to quit before action of forcible entry and detainer: *Grosvenor v. Henry*, 21–269.

A tenant holding over after the expiration of his lease does not become entitled as tenant at will to thirty days' notice to terminate the tenancy, but only to three days' notice before expulsion by action of forcible entry and detainer: *Kellogg v. Groves*, 53–395.

A notice to quit the house is sufficient notice to quit the land upon which the house is situated: *Kuhn v. Kuhn*, 70–682.

The provision that a field tenant's lease shall terminate not later than the first day of December does not establish a rule for the government of parties in making their contract, but simply fixes the time at which, in the absence of express agreement to the contrary, the lease shall terminate. The time thus fixed by statute for the termination of the lease does not become a part of the contract with reference to the time for the payment of rent where no express time is stipulated: *Johnson v. Spink*, 67–115.

Where notice was served to terminate a tenancy at will, but the defendant continued in possession for some years thereafter, *held*, that he did not stand in any different position after such notice: *Newell v. Sanford*, 13–197.

A person in possession under a parol license to mine is a tenant at will and entitled to the thirty days' notice to terminate the tenancy required in other cases: *Bush v. Sullivan*, 3 G. Gr., 344; *Beatty v. Gregory*, 17–109; *Harkness v. Burton*, 59–161.

3191. How served. 2016. When such tenant cannot be found in the county, the notice above required may be given to any subtenant or other person in possession of the premises, or if the premises be vacant, by affixing

the notice to the principal door of the building, or in some conspicuous position on the land if there be no building.

3192. Landlord's lien. 2017. A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution, for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term. [R., § 2302; C., '51, § 1270.]

Possession: The same virtue exists under statutory liens in which the possession does not pass as under common-law liens accompanied by possession: *Grant v. Whitwell*, 9–152.

To what property applicable: The provisions as to landlords' liens apply to leases of town property as well as to those of agricultural land: *Ibid.*

Lien covers what: The phrase "used on the premises" is only intended to imply such use as is incident to the nature and purpose of the occupation of the premises and the object of the tenancy: *Ibid.*

Therefore, *held*, that the lien attached to cloths and goods of a merchant tailor, used for the purpose of selling and making up into garments for customers: *Ibid.*

A landlord has no lien upon property of third persons, although it may have been used by the tenant upon the premises during the term of the lease. So *held* as to household property belonging to the wife used in a hotel leased by her husband: *Perry v. Waggoner*, 68–403.

A lien attaches to all crops grown upon the demised premises, whether grown by the tenant or by others claiming under him: *Houghton v. Bauer*, 70–314.

Where a grocer used horses and wagons in connection with his business, but did not keep them on the premises leased for a grocery, *held*, that the landlord owning such premises did not have a lien upon such horses and wagons: *Van Patten v. Leonard*, 55–520.

The landlord does not, under the statute, acquire a lien upon notes, drafts, accounts, etc., kept upon the leased premises: *Ibid.*

Priority: A creditor of the tenant cannot, by levy on a growing crop, acquire priority over the landlord's lien for rent: *Atkins v. Womeldorf*, 53–150.

Where the rent is payable in a share of the crops the landlord has a lien for such share, and when the tenant is to gather such share and does not, the landlord has a lien, also, for the value of the labor necessary to gather the same: *Secrest v. Stivers*, 35–580.

While the right of property in growing crops planted on the shares is, as between landlord and tenant, in the tenant until division is made, yet a creditor of the tenant cannot seize upon the whole crop to the exclusion of the landlord's lien for rent: *Atkins v. Womeldorf*, 53–150.

The lien of the landlord is inferior to that of a recorded mortgage of personal property executed before such property is brought or used upon the leased premises, even when the mortgagee took his mortgage with notice that the property was to be so used: *Jarchow v. Pickens*, 51–381; *Rand v. Barrett*, 66–731.

Where, at the time of the acquisition by the tenant of title to chattel property used by him upon the leased premises, the landlord had notice of a mortgage thereon, *held*, that his lien for rents was inferior to the lien of the mortgage: *Perry v. Waggoner*, 68–403.

Where a chattel mortgage was executed by the tenant during the term of the lease, and afterwards, before the expiration of the term, a new lease was executed covering the remainder of the term and an additional period, *held*, that, for rent accruing during the unexpired term of the old lease, the landlord's lien remained paramount to the chattel mortgage: *Rollins v. Proctor*, 56–326.

A landlord cannot claim a lien prior to that of a mortgage, where he did not at the time of the execution of the mortgage have a subsisting contract by virtue of which the rent claimed was to accrue: *Thorpe v. Fowler*, 57–541.

The fact that the landlord consents to the substitution as lessee of a party who has been guarantor of a note of the first lessee, secured by chattel mortgage on the property prior to the landlord's lien, such mortgage appearing to be canceled, but being in fact the property of the guarantor who has paid it, will not entitle him to priority over such mortgage: *Rand v. Barrett*, 66–731.

A landlord cannot, by collusion with the tenant and antedating the lease, render his lien prior to that of a deed of trust previously executed upon the tenant's property: *Grey v. Hudson*, 5–554.

Following property into hands of purchaser: A lien exists upon crops raised by the tenant, and such crops may be followed by the landlord into the hands of the purchaser: *Holden v. Cox*, 60–447.

The lien of the landlord can be enforced against a purchaser from the tenant of property which in the ordinary course of business of the tenant is kept for use and not for sale, such as the team of horses used in cultivating a farm: *Richardson v. Petersen*, 58–724.

Where it appeared that the property of the tenant was purchased from him at a time when he was not in arrears for rent, and when he was not, in fact, upon the premises, although he had been there before, and there was no evidence of fraudulent purpose or knowledge on the part of the purchaser, who paid a consideration, *held*, that he took the property free from the landlord's lien: *Nesbitt v. Bartlett*, 14–485.

In case of a stock of goods kept for sale the lien is upon the stock *en masse* and not in detail, and does not attach to such goods as are sold in the ordinary course of business: *Grant v. Whitwell*, 9–152; *Gilbert v. Greenbaum*, 56–211.

When the lien attaches: The lien of the landlord is a security existing beforehand for

the payment of the rent as it comes due. It attaches at the commencement of the lease or when the property is brought on the demised premises, and not simply on the commencement of an action or on maturity of the rent: *Grant v. Whitwell*, 9-152; *Carpenter v. Gillespie*, 10-592; *Doane v. Garretson*, 24-351; *Gilbert v. Greenbaum*, 56-211.

For entire term: Under the statute the landlord acquires a lien for the rent of the entire term from the commencement of the lease upon all the property of the tenant then upon the premises, and upon all other property of his afterwards brought thereon, commencing as soon as it is brought: *Martin v. Stearns*, 52-345.

The lien of a landlord attaches to the property of a tenant used upon the premises for the rent of the entire term: *Gilbert v. Greenbaum*, 56-211.

However, the landlord can only enforce his lien for rent due: *Merritt v. Fisher*, 19-354.

Assignment of lien: The assignment of a lease carries with it the lien of the landlord, and all the remedies for its enforcement: *Haywood v. O'Brien*, 52-537; *Lufkin v. Preston*, 52-235.

Continuance of lien: While the claim for rent is held by the landlord, and within the term of one year after it falls due, the lien is in force for his benefit: *Farwell v. Grier*, 38-83.

Waiver of lien: The taking of personal security merely raises the presumption of a waiver of the landlord's lien, which may be rebutted by evidence that the landlord still relied upon the lien as security and did not intend to waive it: *Rollins v. Proctor*, 56-326.

A landlord's lien is not waived or forfeited by taking security which is such that it cannot be enforced against third parties, it appearing that such lien was not relied upon: *Pitkin v. Fletcher*, 47-53.

Negotiation of a note which is given for rent does not prevent the landlord (payee), who is afterward compelled to take up the note as indorser, from enforcing his lien for the rent for which the note was given: *Farwell v. Grier*, 38-83. And see *German Bank v. Schloth*, 59-316, 323.

If the landlord proceeds under the general attachment law for rent not due, he will be confined to the remedy there given, and cannot claim the benefit of his landlord's lien: *Clark v. Haynes*, 57-96.

Remedy for enforcement: The landlord may have an injunction to restrain the tenant from any wrongful or fraudulent acts tending to destroy his security, as by removing or disposing of property on the demised premises: *Garner v. Cutting*, 32-547.

But the fact that the landlord has a lien upon a stock of goods does not necessarily give him the right to have the goods held until the end of the term of the lease, or sold only in the course of retail trade. A court of equity has jurisdiction to make such order with reference to the disposal of the goods as will protect the plaintiff's right and at the same time do no injustice to other parties interested; and where such goods were the property of a partnership in the hands of a surviving partner who was proceeding to wind up the business, he himself being amply responsible, *held*, that an injunction to restrain the sale of the stock otherwise than in the usual course of trade should not be allowed: *Milner v. Cooper*, 65-190.

A landlord cannot have an injunction against the tenant to prevent disposal of property to secure rent already due, he having already a right under such circumstances to an attachment: *Rotzler v. Rotzler*, 46-189.

The landlord may maintain an action at law for the wrongful conversion of property on which he has a lien for the security of his rent: *Scallan v. Wait*, 64-705.

The landlord may set up a claim to property under his lien in a replevin suit therefor, brought by a third party against the tenant: *Edwards v. Cottrell*, 43-194.

Where the claim for a landlord's lien was set up in the answer to a replevin suit within six months after the termination of the lease, *held*, that this constituted an assertion of such lien within the proper time: *Ibid.*

Failure to bring an action within six months after the expiration of the term against a person who has bought from a tenant property subject to the lien will defeat any such action: *Nickelson v. Negley*, 71-546.

As to the remedy by attachment, see notes to the next section.

3193. Attachment. 2018. The lien may be effected by the commencement of an action within the period above prescribed for the rent alone, in which action the landlord will be entitled to a writ of attachment, upon filing with the proper clerk, or the justice, an affidavit that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the affidavit. [R., § 2303; C., '51, § 1271.]

The remedy by attachment is strictly statutory and takes the place of the common-law right of distress. It only applies to real property, and cannot be used to enforce a claim for damages for failure to till, for breach of covenants, etc.: *Merritt v. Fisher*, 19-354.

A landlord's lien may be enforced, by attachment, against all property subject thereto, whether belonging to the tenant or others: *Houghton v. Bauer*, 70-314.

The word "effected," as used in this section, must be regarded as the same as "enforced:" *Nickelson v. Negley*, 71-546.

The landlord may bring his action for rent and have his lien established without asking or having an attachment: *Bartlett v. Gaines*, 11-95.

Where it appears that nothing was due at the time of suing out the landlord's attachment, the party whose property is seized is entitled to recover the damages sustained: *Harger v. Spofford*, 46-11.

A landlord's attachment against a tenant will not give the court jurisdiction against the property of an assignee of such tenant not made party to the suit: *Wells v. Seguin*, 14-143.

CHAPTER 10.

OF WALLS IN COMMON.

3194. On neighbor's land. 2019. In cities, towns, and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor, may, if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of such wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest the one-half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of said wall. [R., § 1914.]

The provisions of this chapter give to the owner, building upon his own land, an easement upon the land of his neighbor for the purpose of resting one-half his wall thereon, and give to the other party an easement in the wall upon paying one-half its value, but until such payment by the latter the original builder is the owner of the entire wall. The party building and owning the wall cannot so deal with it as to diminish its capacity for serving as a wall in common without the consent of his neighbor upon whose land it partly rests, and he cannot, therefore, make openings in it: *Sullivan v. Graffort*, 35–531.

The resting of one-half of a party wall upon a vacant lot does not constitute an incumbrance thereon. In such a case it will be presumed that the wall belongs to the party building and using it, but when the owner of such lot builds thereon and makes use of the wall it will be presumed on conveyance that he has paid for his share thereof: *Bertram v. Curtis*, 31–46.

Where the owner of a lot on which a party wall is partially rested by an adjoining owner, who makes use of such wall without making payment therefor, afterwards conveys to a grantee who has knowledge that the amount due by the grantor for such wall has not been paid, such grantee will be liable for the payment of the amount: *Pew v. Buchanan*, 72–637.

The right to the one-half of the wall which stands on the neighboring lot, when the owner thereof has not contributed to its erection or paid for it, is a right not personal with the builder, but passes by a conveyance of the lot on which the building is erected, and such grantee, and not the original builder, may maintain action for the value of a half interest in the wall against the owner of the adjoining lot, who subsequently makes use thereof: *Thomson v. Curtis*, 28–229.

A pilaster may constitute a portion of a party wall: *Molony v. Dixon*, 65–136.

It is probable that a party who has erected a party wall may prevent an adjoining owner from making use of such wall until payment for one-half the value is made; but if such use is permitted without payment and without objection, and the adjoining owner recognizes the rights of the proprietor of the wall by paying for the use thereof, the statute of limitation against an action to recover does not commence to run until the owner's rights are denied: *Crapo v. Cameron*, 61–447.

A party building a wall is not bound to build it stronger than sufficient to support another building like his own: *Gilbert v. Woodruff*, 40–320.

These provisions as to party walls are probably but declaratory of the common law: *Zugenbuhler v. Gilliam*, 3–391.

This chapter as to walls in common is taken from the civil code of Louisiana: See note to *Bertram v. Curtis*, 31–46.

3195. Contribution by owners. 2020. If his neighbor be willing, and does contribute one-half of the expense of building such wall, then it is a wall in common between them; and if he even refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common, by paying to the person who built it one-half of the appraised value of said wall at the time of using it. [R., § 1915.]

3196. Openings in; presumption. 2021. No wall shall be built by any person partly on the land of another with any openings therein, and every wall being a separation between buildings, shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no titles, proof, or mark to the contrary; and if any wall is erected, which, under the provisions of this chapter, becomes, or may become at the option of another, a wall in common, such person shall not be compelled to contribute to the expense of any openings therein, but the same shall be closed at the expense of the owner of such wall. [R., § 1916.]

3197. Repairs; expense apportioned. 2022. The repairs and rebuilding of walls in common are to be made at the expense of all who have a right

to the same, and in proportion to the interest of each therein; nevertheless, every co-proprietor of a wall in common may be exonerated from contributing to the repairs or building, by giving up his right in common if no building belonging to him be actually supported by the wall thus held in common. [R., § 1917.]

3198. Beams, joists and flues. 2023. Every co-proprietor may build against a wall held in common, and cause beams or joists to be placed therein, and any person building such a wall, shall, on being requested by his co-proprietor, make the necessary flues, and leave the necessary bearings for the joists or beams, at such height and distance apart, as shall be specified by his co-proprietor. [R., § 1918.]

3199. Height of wall. 2024. Every co-proprietor is at liberty to increase the height of the wall in common; but he alone is to be at the expense of raising it, and of repairing and keeping in repair that part of the wall above the part so held in common. [R., § 1919.]

3200. Rebuilding. 2025. If the wall so held in common cannot support the wall to be raised upon it, he who wishes to have it made higher, is bound to rebuild it anew entirely and at his own expense, and the additional thickness of the wall must be placed entirely on his own land. [R., § 1920.]

3201. Sharing expense. 2026. The person who did not contribute to the heightening of the wall held in common, may cause the raised part to become common by paying one-half of the appraised value of such raising, and half of the value of the grounds occupied by the additional thickness of the wall, if any ground was so occupied. [R., § 1921.]

3202. Paying for share of adjoining wall. 2027. Every proprietor joining a wall, has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one-half of its value, or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built the wall has laid the foundation entirely upon his own ground. [R., § 1922.]

Where the owner of one lot uses as a party wall one built upon the adjoining lot by the owner thereof, he may be required to contribute to the expense of its construction although the wall may not be upon nor adjoining the division line. The agreement that the wall should be used as a party wall may be implied by the conduct and acts of the parties: *Molony v. Dixon*, 65–136.

If the party building into and using the wall already erected offers to pay one-half the expense, and the parties are unable to agree, then appraisers may be appointed to ascertain the cost of one-half of the wall, and the cost thus ascertained may be tendered, and thereupon persons making the tender will be authorized to use the wall: *Ibid.*

But where the wall has already been used, an action may be brought by the person thus using it for one-half the cost thereof, and no appraisement is necessary: *Ibid.*

3203. Cavities; fixtures. 2028. Neither of the two neighbors can make any cavity within the body of the wall held by them in common; nor can either affix to it any work without the consent of the other, or without having, on his refusal, caused the necessary precautions to be used so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building. [R., § 1923.]

3204. Disputes; delay; bonds. 2029. No dispute between neighbors, as to the amount to be paid by one or the other, by reason of any of the matters treated of in this chapter, shall delay the execution of the provisions of the same, if the party on whom the claim is made shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatever may be found to be his due on the settlement of the matter between them, either in a court of justice or elsewhere; and the said clerk of the district court is hereby required to indorse his approval on said bond when the same is approved by

him, and retain the same in his custody until demanded by the opposite party. [R., § 1924.]

3205. Agreements. 2030. This chapter shall not prevent adjoining proprietors from entering into special agreement about walls on the lines between them; but no evidence of such agreement shall be competent unless it be in writing, signed by the parties thereto, or their lawfully authorized agents, and whenever such proprietor is a minor, the guardian of his estate shall have full authority to act in all matters relating to walls in common. [R., § 1925.]

A contract which is the same in fact as that which the law makes for the parties is not within the meaning of this section: *Wickersham v. Orr*, 9-253.

Section applied: *Cravo v. Cameron*, 61-447.

CHAPTER 11.

OF EASEMENTS IN REAL ESTATE.

3206. Adverse possession; use. 2031. In all suits hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession of the same for the period of ten years or by prescription, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

Use of a highway, following a dedication thereof, will be presumed to be under the dedication, and therefore adverse: *Gerberling v. Wunnenberg*, 51-125.

It is not sufficient, in order to prove a highway by prescription, to establish use alone. The fact of adverse possession must be shown by evidence distinct from and independent of the use, and it must be shown that the person against whom the claim is made had express notice thereof: *Zigefoose v. Zigefoose*, 69-391; *State v. Mitchell*, 58-567.

The statutory provision that use shall not be admitted as evidence of adverse possession does not apply to highways existing by prescription before the statute took effect: *Baldwin v. Herbst*, 54-168.

An instruction as to the amount of use necessary to establish prescription and dedication, to the effect that no particular amount of travel would be necessary, and that the use would be sufficient if the highway was traveled as much or about as much as it would have been had it been laid out according to statute, and traveled as much as the circumstances of the surrounding population and their business required, *held* correct: *Ibid.*

The effect of this section is to require proof that the use of the real estate by the party claiming an easement was adverse and under a claim of right, and it provides that the use itself is not competent evidence of such fact: *State v. Birmingham*, 74-408.

Where a dedication of highway is claimed to have been made by the owner of the land over which it passes, proof of use may be considered competent to show an acceptance, and such proof is admissible although the use has not extended to ten years, in connection with other facts such as the conduct of the land owner tending to show dedication: *Ibid.*

Continued use of a stairway and hall under claim of right will not give rise to an easement: *Willard v. Calhoun*, 70-650.

This and the four following sections are taken from a statute in force in Massachusetts and Rhode Island: *Code Com'rs' Rep.*

3207. Light and air. 2032. Whoever has erected, or may erect, any house or other building near the land of another person with windows overlooking such land, shall not, by mere continuance of such windows, acquire any easement of light or air, so as to prevent the erection of any building thereon.

3208. Footway. 2033. No right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time.

3209. Use terminated by notice. 2034. When any person is in the use of a way, or other easement or privilege in the land of another, the owner

of the land in such case may give notice in writing to the person claiming or using the way, easement, or privilege, of his intention to dispute any right arising from such claim or use, and such notice served and recorded as hereinafter provided shall be deemed an interruption of such use, and prevent the acquiring of any right thereto by the continuance of such use for any length of time thereafter. Such notice, signed by the owner of the land, his guardian, or agent, may be served like a notice in a civil action, on the party, his agent, or guardian, if within this state, otherwise on the tenant or occupant, if there be any; such notice, with the return thereon, shall be recorded within three months thereafter in the recorder's office of the county in which the land is situated, and a copy of such record, certified by the recorder to be a true copy of the record of said notice, and the officer's return thereon shall be evidence of the notice and service of the same.

3210. Effect of. 2035. When notice is given to prevent the acquisition of a right to a way or other easement as aforesaid, such notice shall be considered so far a disturbance of such right or claim, as to enable the party claiming to bring an action for disturbing the same in order to try such right, and if the plaintiff in such suit prevails he shall recover full costs.

3211. Not retrospective. 2036. The provisions of this chapter shall not apply to easements already acquired.

TITLE XIV.

OF TRADE AND COMMERCE.

CHAPTER 1.

OF WEIGHTS, MEASURES, AND INSPECTION.

3212. Standard of. 2037. The standard weights and measures now in charge of the secretary of state, being the same that were furnished to this state by the government of the United States, shall be the standard of weights and measures throughout the state. [9 G. A., ch. 82, § 1.]

3213. Yard. 2038. The unit or standard measure of length and surface from which all other measures of extension, whether they be lineal, superficial, or solid, shall be derived and ascertained, shall be the standard yard now in possession of the secretary of state and furnished by the government of the United States. [Same, § 2.]

3214. Division of. 2039. The yard shall be divided into three equal parts called feet, and each foot into twelve equal parts called inches. For the measure of cloths and other commodities commonly sold by the yard, it may be divided into halves, quarters, eighths, and sixteenths. [Same, § 3.]

3215. Rod, pole, or perch. 2040. The rod, pole, or perch, shall contain five and a half such yards, and the mile, one thousand seven hundred and sixty such yards; the chain for measuring land shall be twenty-two yards long, and shall be divided into one hundred equal parts called links. [Same, § 4.]

3216. Land measure. 2041. The acre for land measure shall be measured horizontally, and contain ten square chains, and shall be equivalent in area to a rectangle sixteen rods in length and ten in breadth; six hundred and forty such acres being contained in a square mile. [Same, § 5.]

3217. Avoirdupois and troy pound. 2042. The units or standards of weight from which all other weights shall be derived and ascertained, shall be the standard avoirdupois and troy weights as furnished this state by the United States. [Same, § 6.]

3218. How divided. 2043. The avoirdupois pound, which bears to the troy pound the ratio of seven thousand to five thousand seven hundred and sixty, shall be divided into sixteen equal parts called ounces; the hundred weight shall consist of one hundred avoirdupois pounds, and twenty hundred weight shall constitute a ton. The troy ounce shall be equal to the twelfth part of a troy pound. [Same, § 7.]

3219. Liquids; measure of. 2044. The unit or standard measure of capacity for liquids from which all other measures of liquids shall be derived and ascertained, shall be the standard gallon, and its parts, as furnished this state by the government of the United States. [Same, § 8.]

3220. Barrel; hogshead. 2045. The barrel shall be equal to thirty-one and a half gallons, and two barrels shall constitute a hogshead. [Same, § 9.]

3221. Substances not liquids. 2046. The unit or standard measure of capacity for substances not being liquids, from which all other measures of such substances shall be derived and ascertained, shall be the standard half-bushel furnished this state by the United States. [Same, § 10.]

3222. Peck; divisions of. 2047. The peck, half-peck, quarter-peck, quart, and pint measures for measuring commodities which are not liquids, shall be derived from the half-bushel by successively dividing that measure by two. [Same, § 11.]

3223. Cream gauge. 21 G. A., ch. 50, § 1. An inch or gauge of cream shall be two standard quarts wine measure, one hundred and fifteen and one-half cubic inches.

3224. Contracts; construction. 2048. All contracts hereafter made within this state for work to be done, or for anything to be sold or delivered by weight or measure, shall be taken and construed according to the standards of weight and measure hereby adopted as the standard of this state. [Same, § 12.]

[The words "or delivered," in the second line, are omitted erroneously in the printed Code.]

Where a written contract for masonry work stipulated that it should be done at $3.50 per perch, *held*, that it was not proper to show a custom that a perch should be reckoned at sixteen and one-half cubic feet: *Harris v. Rutledge*, 19-388.

3225. Bushel by weight. 2049; 16 G. A., chs. 52, 89; 17 G. A., ch. 42; 18 G. A., ch. 21. A bushel of the respective articles hereafter mentioned will mean the amount of weight in this section specified; that is to say:

Of wheat, sixty pounds;
Of shelled corn, fifty-six pounds;
Of corn in the cob, seventy pounds;
Of rye, fifty-six pounds;
Of oats, thirty-two pounds;
Of barley, forty-eight pounds;
Of potatoes, sixty pounds;
Of beans, sixty pounds;
Of bran, twenty pounds;
Of clover seed, sixty pounds;
Of timothy seed, forty-five pounds;
Of flax seed, fifty-six pounds;
Of hemp seed, forty-four pounds;
Of buckwheat, fifty-two pounds;
Of blue grass seed, fourteen pounds;
Of castor beans, forty-six pounds;
Of dried peaches, thirty-three pounds;
Of dried apples, twenty-four pounds;
Of onions, fifty-seven pounds;
Of salt, fifty pounds;
Of stone coal, eighty pounds;
Of coke, thirty-eight pounds;
Of charcoal, twenty pounds;
Of sweet potatoes, forty-six pounds;
Of lime, eighty pounds;
Of sand, one hundred and thirty pounds;
Of Hungarian grass seed, forty-eight pounds;
Of millet seed, forty-eight pounds;
Of Osage orange seed, thirty-two pounds;
Of sorghum saccharatum seed, thirty pounds;
Of broom-corn seed, thirty pounds;
Of apples, peaches, or quinces, forty-eight pounds;
Of cherries, grapes, currants, or gooseberries, forty pounds;
Of strawberries, raspberries, or blackberries, thirty-two pounds. [R., §§ 1778, 1781-4; C., '51, § 940; 14 G. A., ch. 56.]

3226. Perch; mason work. 2050. The perch of mason work or stone, is hereby declared to consist of twenty-five feet cubic measure. [R., § 1777; C., '51, § 939.]

Aside from statute the amount of a perch is quite uncertain. The express provisions of the statute as to quantity control local custom. (See § 3224, and note): *Harris v. Rutledge*, 19-388.

3227. Hop boxes. 2051. The standard size for all boxes used in packing hops, shall be thirty-six inches long, eighteen inches wide, and twenty-three and one-fourth inches deep, inside measure. [12 G. A., ch. 195, § 4.]

SUPERINTENDENT OF WEIGHTS AND MEASURES.

3228. Appointment. 2052. A superintendent of weights and measures for this state, who shall be a scientific man, of sufficient learning and mechanical tact to perform the duties of his office, shall be appointed by the governor from the board of professors of the Iowa state university, and shall hold his office during the pleasure of the governor, and shall give a bond in the penal sum of five thousand dollars for the faithful discharge of his duties. [9 G. A., ch. 82, § 13.]

3229. Duties. 2053. The superintendent shall take charge of the standards adopted hereby, and see that they are deposited in the building built for this purpose now belonging to the state, from which they shall in no case be removed, and take all necessary precautions for their safe-keeping. He shall provide the several counties with such standards, balances, and other means of adjustment, as may be ordered by them, and as often as once in ten years and compare the same with those in his possession. He shall, moreover, have a general supervision of the weights and measures of the state. [Same, § 14.]

3230. Copies of standards. 2054. He shall procure and keep for the state a complete set of copies of the original standard of weights and measures adopted hereby, which shall be used for adjusting the county standards, and in no case shall the original standards be used for any other purpose than the adjustment of this set of copies. He shall also procure and keep such apparatus and fixtures as are necessary in the comparison and adjustment of county and town standards. [Same, § 16.]

3231. Impressions on weights. 2055. The state superintendent of weights and measures, shall cause to be impressed upon all standards of weights and measures furnished by him, the word "Iowa," and such other devices as he shall direct for the particular county, city, or incorporated town, and the county sealers shall see that, in addition to the above device, there is impressed on the town and city standards such other device as the board of supervisors shall direct for the several cities and incorporated towns. [Same, § 22.]

3232. Deliver to successor. 2056. Whenever the state superintendent of weights and measures shall resign, be removed from office, or remove from Iowa City, or whenever any city, county, or incorporated town sealer shall resign, be removed from office, or remove from the city, county, or town in which he shall have been appointed or elected, the person so resigning, removed, or removing, shall deliver to his successor in office all the standard beams, weights, and measures in his possession. [Same, § 24.]

SEALER.

3233. Appointment. 2057. The board of supervisors of any county may, at any regular meeting, provide for obtaining from the state superintendent of weights and measures, such standards of weights and measures as they may deem necessary for their county, and in case they order such standards,

they shall appoint a county sealer of weights and measures, who shall hold his office during the pleasure of the board. [Same, § 17.]

3234. Duties. 2058. The county sealer shall take charge of the county standards and standard balances, and provide for their safe-keeping; shall provide cities and incorporated towns with such standard weights and measures, and standard balances, as may be wanting, and shall compare the cities and incorporated towns standards with those in his possession as often as once every five years. [Same, § 18.]

3235. Sealer for cities and towns. 2059. A sealer of weights and measures may be appointed in every city and incorporated town by the town council thereof, and shall hold his office during their pleasure, and said council may obtain from the sealers of weights and measures of their respective counties, such standards of weights and measurers as they may deem necessary for their respective cities or incorporated towns; and in case the board of supervisors of any county in which any city or town may be situated shall not have obtained such standards, then said council may obtain the same from the state superintendent of weights and measures. [Same, § 19.]

3236. Duties. 2060. Each sealer in cities and incorporated towns shall take charge and provide for the safe-keeping of the town or city standards, and see that the weights, measures, and all apparatus used for determining the quantity of commodities used throughout the town or city, which shall be brought to him for that purpose, agree with those standards in his possession. [Same, § 20.]

3237. Expenses. 2061. All expenses directly incurred in furnishing the several counties, cities, and incorporated towns with standards, or in comparing those that may be in their possession, shall be borne by the respective counties, cities, and incorporated towns for which such expenses shall have been incurred. [Same, § 21.]

3238. Deliver to successor. 2062. In case of the death of any such sealer of weights and measures, his representatives shall, in like manner, deliver to his successor in office such beams, weights, and measures. [Same, § 25.]

3239. Penalty. 2063. In case of refusal or neglect to deliver such standards entire and complete, the successor in office may maintain an action against the person or persons so refusing or neglecting, and recover for the use of such county, city, or incorporated town, double the value of such standards as shall not have been delivered. And in every such action in which judgment shall be rendered for the plaintiff, he shall recover double costs. [Same, § 26.]

3240. Using false weights or measures. 2064. If any person or persons shall hereafter use any weights, measures, beams, or other apparatus, for determining quantity of commodities, which shall not be conformable to the standards of this state, in any counties whose standards have been obtained by the board of supervisors, or in any city or incorporated town after such standards have been obtained therein, whereby any person shall be injured or defrauded, he shall be subject to a fine not exceeding five dollars for each offense, to be sued for and collected by the city, county or town sealer. He shall also be subject to an action at law, in which the defrauded person shall recover treble damages and costs, and every person keeping any store, grocery, or other place, for the sale or purchase of such commodities as are usually sold by weight or measure, shall once in each year, procure the weights and measures used by him to be compared with the standard herein provided; and he shall be subject to a fine of five dollars for every neglect to comply with this provision, to be recovered by any one who shall prosecute therefor. [Same, § 27.]

WEIGHMASTERS OF PUBLIC SCALES.

3241. Oath. 2065. All persons keeping public scales, before entering upon their duties as weighmasters, shall be sworn before some person having authority to administer an oath, to keep their scales correctly balanced; to make true weights; and to render a correct account to the person or persons having weighing done. Every scale shall be deemed a public one for the use of which a charge is made. [10 G. A., ch. 56, § 1.]

3242. Correct weights; certificate. 2066. All weighmasters are required to make true weights and to keep a correct register of all weighing done by them, giving the amount of each weight, date of weighing, and the name of the person or persons for whom such weighing was done, and to give upon demand, to any person or persons having weighing done, a certificate, showing the weight, date of weighing, and for whom weighed. [Same, § 2.]

3243. Standard for testing. 2067. Weighmasters, or keepers of public scales kept for the purpose of weighing stock or grain, shall provide and keep a standard of weight not less than fifty pounds avoirdupois for the purpose of testing such scales, and they shall at least once a month, or oftener if requested, make a satisfactory test of the correctness of such scales. [14 G. A., ch. 129, § 1.]

3244. Penalty. 2068. Any weighmaster, or keeper of public scales, violating any of the provisions of the two preceding sections, upon complaint made before any justice of the peace having jurisdiction of the offense, may, upon conviction thereof, be fined in any sum not more than twenty dollars and not less than five dollars for each offense, and shall be liable to the person or persons injured, for the full amount of damages by them sustained. [10 G. A., ch. 56, § 3; 14 G. A., ch. 129, § 2.]

OF THE INSPECTION OF SHINGLES AND LUMBER.

3245. Inspector appointed. 2069. The board of supervisors of each county, as often as may be necessary, shall appoint one inspector of lumber and shingles, who shall have the power to appoint one or more deputies to act under him. For the conduct of the deputies, the principal shall be liable. [R., § 1906.]

3246. Oath; bond. 2070. Before any inspector, or deputy inspector, shall enter upon the duties of his office, he shall take an oath or affirmation that he will faithfully and impartially execute the duties required of him by law; and each inspector shall, moreover, enter into a bond with sufficient security to be approved by the county auditor, in such sum as the board of supervisors may require, made payable to the state of Iowa, which bond shall be deposited with the treasurer of the county, conditioned for the faithful and impartial performance of his duties, as required by law. [R., § 1907.]

3247. Suit on bond. 2071. Any person who may think himself aggrieved by the incapacity, neglect, or misconduct of such inspector or his deputy, may institute a suit on a copy of the bond certified by the treasurer in his own name. And in case the persons suing shall obtain judgment, he may have execution as in other cases; but the suit shall be commenced within one year after the cause of action accrues. [R., § 1908.]

3248. Duties. 2072. The inspectors or their deputies, within their respective counties, shall inspect all lumber, boards, and shingles, on application made to them for that purpose; and when inspected, stamp on the lumber, boards, and shingles, with branding-irons made for that purpose, the name of the state and county where inspected, and the kind and quality of the articles inspected, which branding-iron shall be made and lettered as directed by the board of supervisors. And every inspector shall make, in a book for that

purpose, fair and distinct entries of articles inspected by him or his deputies, with the names of the persons for whom said articles were inspected. [R., § 1909.]

3249. Penalty for counterfeiting. 2073. If any person shall counterfeit the aforesaid brands or marks, or either of them, upon conviction thereof, he shall be deemed guilty of forgery, and shall be punished accordingly. [R., § 1911.]

See § 5241.

3250. Size of shingles; qualities of lumber; branding. 2074. A lawful shingle shall be sixteen inches in length, four inches wide, and half an inch thick at the butt end; and all lumber shall be divided into four qualities, and shall be designated clear, first common, second common, and refusal. Shingles shall be clear of sap, and designated as first and second quality. The shingles to be branded on each bundle with the quality and the name of the inspector. [R., § 1912.]

CHAPTER 2.

MONEY OF ACCOUNT AND INTEREST.

3251. How expressed. 2075. The money of account of this state is the dollar, cent, mill, and all public accounts and the proceedings of all courts in relation to money, shall be kept and expressed in money of the above denomination. [R., § 1785; C., '51, § 943.]

3252. Terms of contract. 2076. The above provisions shall not in any manner affect any demand expressed in money of another denomination, but such demand, in any suit or proceeding affecting the same, shall be reduced to the above denomination. [R., § 1786; C., '51, § 944.]

3253. Rate of interest. 2077. The rate of interest shall be six cents on the hundred by the year, on:

1. Money due by express contract;
2. Money after the same becomes due;
3. Money lent;
4. Money received to the use of another, and retained beyond a reasonable time without the owner's consent, express or implied;
5. Money due on the settlement of matured accounts from the day the balance is ascertained;
6. Money due upon open accounts after six months from the date of the last item;
7. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated. In all of the cases above contemplated parties may agree in writing for the payment of interest not exceeding ten cents on the hundred by the year. [R., § 1787; C., '51, § 945.]

[The word "rate," in the first line, is erroneously printed "rule" in the Code.]

When recoverable: Interest is chargeable upon all debts, unless exempted therefrom by contract. When money is paid for the use of another, imposing an obligation upon the party who receives the benefit of the payment to reimburse the party paying, interest is recoverable from the date of the payment: *Goodnow v. Litchfield*, 65-275; *Goodnow v. Wells*, 67-654.

When the payment exceeds the interest, calculate interest on the principal up to the date of payment, add this interest to the principal and then deduct the payment. If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will exceed the interest due on the principal debt, and then deduct the payment, so as to avoid taking interest upon interest: *Huner v. Doolittle*, 3 G. Gr., 76.

To recover interest on an account it should be averred in the declaration and specified in the bill of particulars: *David v. Conard*, 1 G. Gr., 336.

As to whether a debt due from a resident of

a loyal state to a resident of a state in secession continued to draw interest while payment was rendered impossible by reason of the war, the court were equally divided: *Griffith v. Lovell*, 26–226.

An attorney who receives money for his client, and neither puts it upon deposit nor keeps it ready for demand, but uses it as his own, will be chargeable with interest thereon: *Mansfield v. Wilkerson*, 26–482.

Where money was paid into court to await its order, and there detained because of the erroneous order of the court, *held*, that the party finally found entitled thereto could not recover interest for the time of detention, it not appearing that the opposite party had not acted in good faith: *Van Gordon v. Ormsby*, 60–510.

Where it was agreed by the mortgagee that the mortgaged premises should be reconveyed to him in satisfaction of the mortgage, and by fraud of the mortgagee's agent, and without wrong on the part of the mortgagee, such reconveyance was made to the agent instead of to the mortgagee, *held*, that although the reconveyance was void and the mortgage still in force, yet the mortgagee could not recover interest subsequent to the date that the reconveyance was made: *Hart v. Ensign*, 61–724.

In an action against a railway company for double damages for stock killed, it is error to allow interest in addition to the damages allowed: *Brentner v. Chicago, M. & St. P. R. Co.*, 58–625.

A debtor under a deed of trust was found to have assented to certain settlements made during the existence of the trust deed, by which settlements he allowed compound interest at short rests, and also certain attorneys' fees, for the purpose of preventing a sale of the trust property at inopportune times and at a sacrifice. *Held*, that the debtor was not concluded by the settlements so made, but that he should be charged with simple interest compounded only according to the legal rule at each payment exceeding the interest then due: *Fockler v. Beach*, 32–187.

As the consideration of a note, illegal interest, unlike usury, cannot be urged against an innocent assignee before maturity: *Burrows v. Cook*, 17–436.

Where damages result from breach of a contract of bailment, the value of property lost becomes an indebtedness from the day of the loss, and interest is recoverable thereon: *Mote v. Chicago & N. W. R. Co.*, 27–22.

This is so where the amount of damages is capable of exact computation, as in the case of destruction of grain of a certain grade and quality: *Arthur v. Chicago, R. I. & P. R. Co.*, 61–648.

Where notes had been given for the purchase price of personal property and had passed out of the possession of the vendor, *held*, that the rate of interest to be allowed on a sum recovered for breach of warranty in such sale was that borne by the notes: *Pitsinowsky v. Beardsley*, 37–9.

Interest is a common and legitimate element of damage, and, in the absence of proof to the contrary, it will be presumed that the jury took it into consideration in computing the damages resulting from false representations in the sale of real estate as to its location and quality, when the fact of such false representations is set up by defendant as a counterclaim in the foreclosure of a purchase-money mortgage: *McNally v. Shobe*, 22–49.

In an action for unliquidated damages, interest should not be allowed *eo nomine* and assessed as a part of the damages, but may be considered as an element of damage under the rule which permits its allowance in order to arrive at that which will be a just and lawful compensation for the injury sustained: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 502.

While the jury in assessing damages in an action for injury to property caused by negligence of a railway company may include interest in their verdict, it is error in the court to render judgment for an amount additional to the verdict for the purpose of including interest: *Garrett v. Chicago & N. W. R. Co.*, 36–121.

Interest upon interest: Where the interest upon a note is made payable annually, each instalment of interest will draw interest at six per cent. from the time it is payable: *Mann v. Cross*, 9–327; *Preston v. Walker*, 26–205; *Burrows v. Stryker*, 47–477; *White v. Savery*, 50–515.

If the interest is not made payable annually or at a specified time it will not draw interest even from the time of the maturity of the principal: *Aspinwall v. Blake*, 25–319.

The parties may, by contract, stipulate that interest which is made payable annually, quarterly, or otherwise, shall bear interest at the rate of ten per cent. from the time it is due: *Ragan v. Day*, 46–239.

A contract providing for interest at the rate of ten per cent., payable semi-annually, and that the semi-annual instalments of interest shall draw interest at the rate of ten per cent. after they become due, is not usurious: *Hawley v. Howell*, 60–79.

Interest upon annual instalments of interest may be collected under the decisions of this state, and it matters not that the contract itself was made under the laws of a state where interest on instalments of interest was not allowed or collectible: *Burrows v. Stryker*, 47–477.

Rate: A note providing for interest at ten per cent. per annum from date draws interest at that rate after as well as before maturity: *Hand v. Armstrong*, 18–324; *Lucas v. Pickel*, 20–490.

Where it was provided in a contract that a sum of money advanced and invested in behalf of one party by the other should be repaid within one year with interest thereon, *held*, that upon a subsequent waiver of the provisions of the contract requiring repayment to be made within a year, the sum of money advanced continued to draw interest at the same rate until repaid: *Warren v. Ewing*, 34–168.

Where a party holding a bond for a deed accepted, in conditional payment of the purchase money provided for therein, obligations of third parties which were not paid, and afterwards brought suit against the other party to the bond to recover the amount thus remaining unpaid, *held*, that he might thus recover the rate of interest stipulated in the bond: *Huse v. McDaniel*, 33–406.

Where a note stipulated that if interest was not paid annually the same should become a part of the principal and bear the same rate of interest, and the mortgage contained the condition that if default should be made in the payment of the sums of money specified therein or any part thereof, principal or interest, then the whole amount of the indebtedness should become due, *held*, that payment of annual interest was not required, and that the whole amount of the indebtedness did not become due on failure to pay such interest annually: *Wood v. Whisler*, 67-676.

In an action on a bond to indemnify an officer for a levy of an execution upon property claimed by a third person, the measure of liability is the value of the interest of claimant in the property at the time the damages are paid, and the judgment should therefore bear the rate of interest borne by notes secured by mortgages upon the chattels sold: *Rand v. Barrett*, 66-731.

Under a contract not in writing to pay ten per cent. interest, the plaintiff may set up and recover upon a contract to pay six per cent. interest: *Brockway v. Haller*, 57-368.

When commences to run: When money is paid for the use of another, imposing an obligation upon the party who receives the benefit of the payment to reimburse the party paying, interest from the date of the payment is recoverable: *Goodnow v. Litchfield*, 63-275; *Goodnow v. Wells*, 67-654.

When county warrants or orders are drawn with words of limitation as to payment, interest is allowed thereon from date; but if payable out of a particular fund not otherwise appropriated, interest will not commence to run until after such fund shall be exhausted: *Brown v. Johnson County*, 1 G. Gr., 486.

A note providing for "ten per cent. interest if not paid when due" draws interest from date if not paid at maturity: *Parvin v. Hoopes*, Mor., 294.

The custom of a creditor, known and acquiesced in by the debtor, to charge interest on accounts after the end of the year, may be shown as evidence of an agreement to pay interest: *Veiths v. Hagge*, 8-163, 182.

The custom of banks that interest shall be charged on balances due the bank from the dates of monthly settlements will be upheld where known to the debtor, and such computation will not be objectionable on the ground of allowing compound interest, even though the interest on the previous balance is carried into the next month's account: *Isett v. Oglevie*, 9-313.

While it may be that the presentation of an account showing a balance due to which the person charged makes no objection will raise a presumption of its liquidation, and that interest thereon will be chargeable afterwards, yet continuous dealings represented in one account cannot be divided into separate accounts, which will be presumed liquidated simply by presenting bills of items covering parts of the transaction so that interest will run on the balance of such separate bills: *Raymond v. Williams*, 40-117.

For labor performed: In an action for money due on contract or for labor performed the amount should draw interest from the filing of the petition: *Swails v. Cissna*, 61-693.

3254. On judgments and decrees. 2078. Interest shall be allowed on all moneys due on judgments and decrees of any competent court or tribunal, at the rate of six cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered; in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding ten cents on the hundred by the year, which rate must be expressed in the judgment or decree. [R., § 1789; C., '51, § 946.]

It is necessary that the rate of interest be "expressed in the contract" in order to authorize a judgment bearing a greater rate of interest than six per cent.; therefore, *held*, that, although, as it seems, coupons made in Iowa but payable in New York, in which no rate of interest is specified, would draw interest from maturity at seven per cent. (the rate in the latter state), yet a judgment in Iowa upon such coupons could only draw interest at the rate of six per cent.: *Rogers v. Lee Co.*, 1 Dillon, 529.

Judgment on a contract stipulating for the payment of interest will draw interest at the same rate as that stipulated in the contract: *Wilson v. King*, Mor., 106.

But so far as the judgment covers interest only, in the absence of any agreement in the contract that interest shall draw interest, the judgment will draw interest only at six per cent.: *Burkhart v. Sappington*, 1 G. Gr., 66.

Ten per cent. should not be allowed upon a judgment where the contract specifies no rate: *Easley v. Redpath*, 9-300.

Where a member of a partnership which had previously been dissolved paid a portion of a judgment against the partnership which the other partner, by the terms of the dissolution, was bound to pay, and then sought to recover from such other partner the amount so paid, *held*, that the rate of interest to be allowed was not the rate drawn by the judgment paid, but merely the legal rate, there being no evidence of an agreement to pay any particular rate: *Myers v. Smith*, 15-181.

Unless a different rate of interest is expressed in the judgment or the decree, but six per cent. can be collected thereon, although the contract on which the judgment is rendered bears ten per cent. If the failure to express the higher rate of interest in the judgment is owing to mistake or oversight of the clerk, the judgment may be corrected in that respect by timely and proper proceedings. But after the amount of judgment with six per cent. interest thereon has been paid, the judgment cannot be enforced for an additional amount against the property upon which it was a lien: *Rice v. Hulbert*, 67-724.

Prima facie the rate of interest upon a foreign judgment is governed by the law of this state. If it is claimed that the rate of interest

is different in the state in which the judgment is rendered that fact must be averred and proved: *Crafts v. Clark*, 38-237.

It is incompetent for the court to allow a higher rate than six per cent., even as damages on a money demand, unless the parties otherwise agree in writing: *Venmum v. Gregory*, 21-826.

Where the jury are directed to allow interest, without any instruction as to the amount, it will be presumed that they understand that interest is to be allowed at six per cent.: *Davis v. Walter*, 70-465.

Affidavits of jurors are receivable to show whether or not the jury included interest in their verdict: *Swails v. Cisna*, 61-693.

3255. Illegal rate prohibited. 2079. No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum of value for the loan of money, or upon contract founded upon any bargain, sale, or loan of real or personal property than is in this chapter prescribed. [R., § 1790.]

In contracts of sale: This section applies not only to contracts for loans, but also to any contract of purchase or sale of property where an unlawful rate of interest is provided for: *Callanan v. Shaw*, 24-441.

But a party may lawfully sell on time for a larger sum than his cash price, with lawful interest thereon to the time of payment, would amount to: therefore, *held*, that a sale of sheep for a sum to be paid at a future day, wherein it was agreed to pay annually two pounds of wool per sheep until time of payment (the value of the wool being greater than legal interest on the sum to be paid), was not usurious, in the absence of any showing that there was any intention to evade the usury law: *First Nat. Bank v. Owen*, 23-185; *Gilmore v. Ferguson*, 28-220.

Penal: The law of usury is in its nature penal, and is therefore to be strictly construed: *Dickerman v Day*, 31-444.

Intent: Where there is no evidence of an intent or agreement to contract for usurious interest, a jury would not be justified in finding usury: *Jones v. Berryhill*, 25-289.

Sale of commercial paper: Statutes against usury are aimed against the receiving or contracting to receive a greater rate of interest than authorized upon a loan or forbearance of money, and do not apply to the sale of a note or any other vendible commodity which may, in good faith, be sold or transferred for any price fixed by agreement of the parties. Where the contract is neither a loan nor a contract for extension of time on a note already due, but a sale of commercial paper without any corrupt or unlawful intent, it cannot be held usurious simply because the paper is an accommodation note: *Dickerman v. Day*, 31-444.

Purchase and repurchase of realty: Where land was purchased by A. without any previous agreement to hold it for B., and afterwards A. agreed to sell it to B. at an agreed time for an amount which was more than the purchase price with the legal rate of interest, *held*, that such a contract of sale would not amount to usury: *Casad'y v. Scallen*, 15-93.

Contract to reconvey: Where an absolute conveyance was made as security and the grantee executed an agreement to reconvey on payment of the debt at maturity, *held*, that an indorsement on the contract by which the grantee agreed to receive payment at thirty-seven and one-half per cent. on the face of the bond from its date to time of payment, without any other evidence or explanation, though both parties were witnesses, would not raise the presumption of usury: *Brush v. Peterson*, 54-213.

A *bona fide* purchaser of a note or bond may take it at any rate of discount without violating the statute of usury, but if the note is made to be negotiated, and the intention is to arrange the transaction so as to place the subsequent transferee who has knowledge in the possession of an innocent holder, and thus avoid the statute of usury, the payee giving no consideration and being a mere go-between, the contract will be deemed usurious if the amount of the discount is greater than ten per cent., and is taken for the purpose of usury: *Nichols v. Lecius*, 10-394.

Under particular facts, *held*, that a deed absolute in form was intended as a mortgage and included usurious interest: *Johnson v. Smith*, 59-549.

Evidence in an action in which usury was set up *held* not sufficient to sustain the specific findings of the jury: *First Nat. Bank v. Elliott*, 54-419.

Exchange: The charging of exchange in addition to the legal interest in discounting foreign bills of exchange is not usury unless resorted to for the purpose of covering up a usurious transaction, but it is otherwise as to domestic bills: *Burroughs v. Cook*, 17-426.

Additional loan: Where a party, in order to raise an additional loan of money, agreed that if the person who already held his note and mortgage for a certain sum would sell it and then take another loan under a mortgage for a similar amount, the bearer would repay to him whatever discount he was compelled to suffer in selling the first note and mortgage, *held*, that such a transaction was not usurious: *Comstock v. Wilder*, 61-274.

Usurious balance: A note given in payment of a balance due on a usurious note is itself usurious: *National Bank v. Eyre*, 52-114; *Callanan v. Shaw*, 24-441; *Garth v. Cooper*, 12-364.

Extension of time: Where the maker of a note drawing ten per cent. interest after maturity desired an extension of time, which was granted for a definite period upon the execution of a note, in addition to the ten per cent. embraced in the original note, as consideration for the extension of time, it was held that the note given in extension was usurious: *Ferrier v. Scott's Adm'rs*, 17-578.

The extension of time of a loan is a loan within the meaning of the usury laws, and a new note given by the surety to obtain an extension of time on the original undertaking would be usurious: *Kendig v. Linn*, 47-62.

An agreement, after the maturity of the note, to pay more than a legal rate of interest for forbearance does not, alone, affect the note, but such contract itself is usurious, and anything paid thereon will be applied as a general payment on the note: *Mallett v. Stone*, 17-64.

Partial revival: Where a usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57-39.

Note including usurious interest: Facts in a particular case *held* sufficient to show that the maker of a note bearing ten per cent. interest executed and delivered the same in consideration of a loan of a less amount of money, and that the transaction was therefore usurious: *Goodhue v. Teetshorn*, 65-403.

The fact that notes are dated and bear interest from a time preceding the receipt of the money thereon by the mortgagor will not be sufficient to show usury, it appearing that the date of the notes corresponds to the time of negotiating and making the loan, and it not appearing what was the cause of the delay in paying the money nor that there was any corrupt agreement: *Waterman v. Baldwin*, 68-255.

Renewed promise: Where a note is given for money advanced, to be used in the repurchase of property, which has been sold under a mortgage covering usurious interest, and the property has been bought in by the mortgagee, the note is subject to the defense of usury: *Switz v. Platts*, 15-298.

Where the plaintiffs purchased a usurious note, and subsequently the defendant, who was the maker, promised plaintiffs to pay the same, *held*, that such promise did not estop the maker from setting up the defense of usury in an action on a promise to pay the note, plaintiffs having parted with nothing on the strength of the promise: *Allison v. Barrett*, 16-278.

Transfer from old to new firm: Where there was a change in the membership of a firm and a settlement made of plaintiff's account, which was transferred to the new set of books, and paid by the new to the old firm, it was held that this did not affect the question of usury between the parties prior to the change: *Burrows v. Cook*, 17-436.

Money borrowed to pay usury: If A. executes a security to B., for the purpose of raising money to pay C. a usurious debt, B. will not be affected by the question of usury. Nor would the case be altered by an agreement between A., B. and C., that in case the paper is not sold, B. shall retain it as evidence of that amount of indebtedness to C.: *Ibid.*

If money be borrowed to pay off a usurious debt, the lender, even if with notice, is not affected with usury in the original debt: *Wendlebone v. Parks*, 18-546; *Mason v. Searles*, 56-532; *Cottrell v. Southwick*, 71-50.

Where the promisor in a usurious contract makes it the consideration of a new contract with a third party, not party to the original contract or to the usury paid or reserved, if the new contract is not a contrivance to evade the statutes against usury, it will not be illegal or usurious: *Call v. Palmer*, 116 U. S., 98.

Where the maker of a usurious note, which was secured by a deed of trust, borrowed money of a third person to pay the same, and, instead of executing new securities for the money so borrowed, caused the note to be transferred by the payee to the lender as evidence and security of the new debt, *held*, that the note was not tainted with usury in the hands of the second holder: *Ibid.*

Attorneys' fees: A stipulation for reasonable attorneys' fees, to be taxed up as a part of the costs in case of suit, does not constitute usury: *Nelson v. Everett*, 29-184; *Weatherby v. Smith*, 30-131.

Commissions to agent: The act of an agent for a loan in exacting a commission for himself beyond the legal rate of interest, without authority or consent of his principal, will not render the loan usurious: *Gokey v. Knapp*, 44-32; *Brigham v. Myers*, 51-397.

But a party making a loan to another in person cannot, under the name of commission, exact more than a legal rate of interest: *Pond v. Waterloo Agl. Works*, 50-596.

Under the facts in a particular case, *held*, that a note in suit did not appear to be given for usurious interest, but for advances and commissions to maker's agent, and was not therefore usurious: *Wyllis v. Ault*, 46-46.

Where a person loans money for another party, retaining a sum in addition to legal interest for his own services, the transaction is not usurious. But where a person contracts with the debtor to pay interest coming due on such loan, and takes notes in excess of the amount of interest so paid and legal interest thereon, the transaction is usurious, and the additional amount cannot be considered as commission: *White v. Lucas*, 46-319.

The payment of the lender's traveling expenses in going to view the property offered as security will not constitute usury: *Smith v. Wolf*, 55-555.

The fact that the agent of the lender divides the commission received by him in excess of the legal interest with the agents of the borrower will not constitute usury: *Dickey v. Brown*, 56-426.

Where the plaintiff negotiated the loan in person, and under the guise of commission exacted more than the legal rate of interest, *held*, that he was chargeable with usury: *Pond v. Waterloo Agl. Works*, 50-596.

Facts in a particular case considered, and *held* not to show usury in connection with the payment of commission to a loan agency: *Hawley v. Howell*, 60-79.

Usury by agent; principal's knowledge: When an agent who is authorized by his principal to lend money for lawful interest exacts more than the legal rate without the authority or knowledge of his principal, the loan is not thereby rendered usurious. It is immaterial in such a case whether the agent discloses his authority or not: *Call v. Palmer*, 116 U. S., 98.

Where the agent is the husband of the principal, although knowledge on the part of the wife would perhaps be assumed on slighter evidence than in other cases, yet the same rule is applicable, and knowledge on her part will not be presumed without evidence: *Brigham v. Myers*, 51-397.

The facts in a particular case *held* not sufficient to show that the party with whom the usurious transaction was had was the agent of the party whose money was loaned: *Weiser v. McKay*, 51-417.

Where a note for borrowed money is given to an agent without knowledge of the agency, but supposing the agent to be the lender, it will be usurious if it includes illegal interest, although it might not be usurious between the borrower and the principal if the principal had been disclosed: *Erickson v. Bell*, 53-627.

Gold premium: A note and mortgage given for a loan of gold coin, in which a greater per cent. premium was allowed for gold than its market value, *held*, under the circumstances, to have been a cloak for usury: *Austin v. Walker*, 45-527.

Agreement to pay more than debt: A transaction in a particular case by which one party redeemed certain property from sale and gave title bond to the wife of the original owner, *held* to be in the nature of a loan, and that the amount mentioned in the title bond being greater than the amount paid in redemption with the legal interest, the transaction was usurious: *Wormley v. Hamburg*, 46-144.

Penalty for non-payment: A note providing for an illegal rate of interest from and after the maturity of the indebtedness is not usurious: *Wight v. Shuck*, Mor., 425; *Shuck v. Wight*, 1 G. Gr., 128; *Gower v. Carter*, 3-244; *Wilson v. Dean*, 10-432; *Conrad v. Gibbon*, 29-130.

But in such cases the court will not allow a recovery, either by way of penalty or liquidated damages, for more than the legal rate of interest for failure to pay when due: *Gower v. Carter*, 3-244; *Vennum v. Gregory*, 21-326.

A provision in a note that, if not paid when due, the principal shall draw ten per cent. interest from date, will not constitute usury unless it be shown that interest is included in the face of the note. But if interest is so included, the parties will not be allowed, by thus liquidating the damages for the mere non-payment of money, to evade the usury law: *Fisher v. Anderson*, 25-28.

As to interest on premium in building association, see notes to § 1786.

As to interest on interest, see notes to § 3253.

Purging usury: Before petitioner in a court of equity can obtain relief upon a contract including usury he must aver and show a willingness to abandon the usurious part of the contract: *Phelps v. Pierson*, 1 G. Gr., 121.

If by consent of both parties to a usurious contract the unlawful interest already paid is refunded with the agreement that thereafter lawful interest only shall be charged, the contract is thereby purged of usury: *Phillips v. Columbus City Building Ass'n*, 53-719.

The word contract, as used in this section, refers to the entire transaction in which usurious interest has been reserved. The substitution of one contract for another, or the substitution of a new note for an old one, will not purge the usury: *Smith v. Coopers*, 9-376; *Campbell v. McHarg*, 9-354.

However it may be covered by changes and substitutions, if usury be found to exist in the contract, directly or indirectly, its taint continues and affects all the parts through which it runs. The substitution of one contract for another, or the taking of a new note for an old one, will not purge it: *Garth v. Cooper*, 12-364.

If it satisfactorily appears that the parties at the time of making the second note intended to purge the contract of its usurious taint, and to so reform and correct it that no part of the original illegal consideration entered into the new note, such new note will not be affected by the previous usury; but if it is designed merely to cover up the usury the taint attaches to it: *Ibid.*

Consent of debtor: A contract may be purged of usury only by making substantially a new contract with the consent of the debtor. The indorsement of usurious interest on the note as a payment, without the assent of the debtor, will not have that effect: *National Bank v. Eyre*, 52-114.

Usurious payments: Usurious interest voluntarily paid cannot be recovered back: *Nichols v. Skeel*, 12-300; *Quinn v. Boynton*, 40-304.

Where there is no contract for an illegal rate of interest the mere receiving of such interest will not render the contract itself usurious, but the receiving of the usurious interest is itself unlawful, and the amount so received will be presumed to be applied to the payment of the debt and legal interest thereon: *Sexton v. Murdock*, 36-516.

Whether, after the lapse of two years from the payment of usurious interest, an action can be maintained to recover it back, or an application thereof to the extinguishment of the principal debt can be enforced, *quære: National Bank v. Eyre*, 52-114.

If money is paid on a usurious indebtedness it shall be applied on the discharge of what the debtor was owing legally, and not that which (so to speak) he was owing illegally. Therefore, where it appears in a usurious transaction there has been a renewal of notes, in which interest was included, and also at the time separate notes were given for usurious interest, all the payments will be applied to the extinguishment of the legal indebtedness: *Smith v. Coopers*, 9-376.

Usury once paid cannot be recovered back. If two notes are given in separate transactions, both usurious, and one is paid, the unlawful interest thus paid cannot be set up in an action on the note remaining unpaid: *Philips v. Gephart*, 53-396.

A note given in payment of a balance due on a usurious note is itself usurious, for the debtor has the right to have all the payments made on the original note in discharge of usurious interest applied upon the principal: *National Bank v. Eyre*, 52-114; *Callanan v Shaw*, 24-441; *Garth v. Cooper*, 12-364.

Where deposits were made from time to time by a debtor with his creditor, such creditor being a bank which held his notes, and from time to time balances were struck and new notes were given, usurious interest being included in the computation, *held*, that the deposits must be regarded, in the absence of evidence to the contrary, as having been applied *pro rata* upon interest and principal, notwith-

standing the entry upon the books of the bank showing application of such payments to the extinguishment of the interest: *Kinser v. Farmers' Nat. Bank*, 58-728.

Usurious interest paid on a note afterwards put in judgment cannot subsequently be applied as payment on other notes. In the absence of collusion or attempt to cover usury, a judgment is conclusive between parties and privies: *Philips v. Gephart*, 53-396.

Where usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57-39.

If, after payment of the valid portion of the indebtedness, a note is given, which includes usurious interest, such note does not represent any legal indebtedness. If the other notes were given for the purchase price of real property, the purchaser will be entitled to a conveyance of the property without payment of the note given solely for usurious interest: *Knight v. Judd*, 34-483.

Conflict of laws: Where a contract is made in one state to be performed in another, the interest will be computed according to the law of the place of performance, but the parties may stipulate that interest shall be calculated according to the laws of the place where the contract is made: *Butters v. Olds*, 11-1.

In such cases the parties may adopt the rule of either state as to interest; and where the note was executed in one state, to be performed in another, and the maker resided in still another state, and the property pledged as security was there situated, *held*, that the law of that state might be adopted as to interest, provided such provision was not resorted to merely as a means of evading the usury law: *Arnold v. Potter*, 22-194.

While the courts of this state will not enforce the penal statutes of another state, yet where a contract made with reference to the laws of another state is usurious there, the forfeiture provided by such laws will be enforced: *Ibid.*

A note executed and dated in Missouri, but delivered and the consideration thereof received in Iowa, is an Iowa contract and subject to the Iowa law of usury: *Hart v. Wills*, 52-56.

Where a resident of Iowa negotiated a loan in Massachusetts from a resident thereof, executing a promissory note dated in Iowa and payable in New York, securing the same by a trust deed on real estate in Iowa to a trustee there resident, *held*, that if the parties in good faith, without intending to evade the usury laws, stipulated for the rate of interest allowable in Iowa, although greater than the legal rate in Massachusetts or New York, the contract should be enforced: *Arnold v. Potter*, 22-194.

In such case the form of the transaction is immaterial, the cardinal inquiry being, did the parties resort to it as the means of disguising usury in violation of the laws of the state where the contract was made or to be executed: *Ibid.*

Effect on contract: A contract reserving usurious interest is not void: *Haggard v. Allee*, 1 G. Gr., 44; *Shack v. Wight*, 1 G. Gr., 128.

3256. Usury; penalty. 2080. If it shall be ascertained in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or property, the same shall work a forfeiture of ten cents on the hundred by the year upon the amount of such contract, to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum without either interest or cost. The court in which said suit is prosecuted, shall render judgment for the amount of interest forfeited as aforesaid against the defendant, in favor of the state of Iowa for the use of the school fund of said county, whether the said suit is contested or not; and in no case where unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not. [R., § 1791.]

Who may set up usury: The defense of usury is personal to the debtor, and cannot be interposed by one who is not a party nor privy to the usurious contract: *Drake v. Lowry*, 14-125; *Sternburg v. Callanan*, 14-251; *Carmichael v. Bodfish*, 32-418; *Miller v. Clarke*, 37-325.

An agent with whom money is deposited by his principal, to be loaned on terms constituting usury, cannot set up usury by way of defense in an action by his principal for the balance in his hands: *Sternburg v. Callanan*, 14-251.

The defense of usury cannot be set up by one who has converted a note and collected the full amount, when sued by the true owner for the amount so collected: *Allison v. King*, 25-56.

The grantee of land mortgaged to secure a usurious debt cannot interpose the defense of usury in an action to foreclose: *Green v. Turner*, 38-112; *Greither v. Alexander*, 15-470; *Hollingsworth v. Swickard*, 10-385; *Frost v. Shaw*, 10-491; *Perry v. Kearns*, 13-174; *Burlington Mut. Loan Ass'n v. Heider*, 55-424.

The grantee of mortgaged land who assumes the payment of the mortgage cannot set up the defense of usury: *Sullivan Savings Institution v. Copeland*, 71-67.

A judgment creditor of an insolvent cannot set up usury in behalf of his debtor in a proceeding to which he is not a party: *Carmichael v. Bodfish*, 32-418.

A junior mortgagee, in an action to redeem from the judgment in a foreclosure proceed-

ing to which he was not made a party, and in which usury was not pleaded, cannot set up the defense of usury and compel the holder of the judgment to accept less than the amount of his lien: *Powell v. Hunt*, 11-430.

In an action on a copartnership note, either partner, without the consent of the other, may set up usury, and so may a partner who has undertaken to pay the firm debts, in a suit brought against him alone after dissolution. If usury is set up by either partner the penalty should be enforced against both: *Machinists' Bank v. Krum*, 15-19.

A renewal of a partnership note by one of the partners will not deprive him of the right to set up usury as to such note: *Ibid.*

Whether the usurer is liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15-414.

In an action to foreclose a mortgage, a subsequent purchaser of the premises cannot plead usury, but he may show payment of the debt, and hold the mortgagee liable for neglect in collecting rents: *Huston v. Stringham*, 21-36.

In an action to foreclose a mortgage upon the homestead, given by the husband and wife to secure a note of the husband, the plea of usury may be set up by the wife: *Lyon v. Welsh*, 20-578.

Where R., having mortgaged certain premises, conveyed the same to O., who agreed to pay the mortgage debt, *held*, that O. could not set up usury in an action to foreclose, where personal judgment against R. was expressly waived by the mortgagee. The fact that O. had an action pending against R. for the purpose of setting aside the mortgage as fraudulent, *held* not to alter the case: *National L. Ins. Co. v. Olmsted*, 52-354.

A surety may avail himself of the defense of usury to the same extent that the principal can, and so may a guarantor, guarantors being deemed sureties: *Conger v. Babbett*, 67-13; *Kenaig v. Lunn*, 47-62.

But the surety may pay the usurious debt when it becomes due, and need not wait until suit is brought, so as to set up usury; and, in an action by him to recover from the principal the amount so paid, the principal cannot plead usury: *Culver v. Wilbern*, 48-6.

However, a surety who has paid a portion of the original usurious debt, and given his own note for the balance, cannot as against his own note interpose the plea of usury: *Ibid.*

Where the surety takes up the note of his principal and gives his own note it must be regarded as payment or purchase and not as a renewal, and the surety cannot in such case interpose the plea of usury to such new note: *Ibid.*

Action by national bank: Although no penalty can be enforced against a national bank for taking usury except as provided by the national banking act, and that perhaps only in a federal court, yet, in an action by such bank in a state court, the defendant may deny the validity of the claim by showing that it is for usurious interest: *National Bank v. Eyre*, 52-114.

Usury may not only be relied upon as a defense, but may in proper circumstances be made a ground of affirmative relief, and in such case the party is not required to tender the principal sum and legal interest. (Overruling *Phelps v. Pierson*, 1 G. Gr., 121): *Morrison v. Miller*, 46-84.

Neither the rights of the defendant nor the duty of the court to enter up judgment in favor of the school fund should depend upon the form of the proceeding: *Ibid.*

As affecting third parties: Usury may be pleaded against a *bona fide* holder for value of a negotiable instrument as well as against the payee: *Bacon v. Lee*, 4-492.

But illegal interest as a consideration, unlike usury, cannot be urged against an innocent transferee before maturity: *Burrows v. Cook*, 17-136.

A *bona fide* purchaser of a note or bond may take it at any rate of discount without violating the statute of usury, but if the note is made to be negotiated, and the intention is to arrange the transaction so as to place the subsequent transferee who has knowledge in the position of an innocent holder, and thus avoid the statute of usury, the payee giving no consideration and being a mere go-between, the contract will be deemed usurious if the amount of discount is greater than ten per cent, and is taken for the purpose of usury: *Nichols v. Levins*, 15-562.

The payee of a promissory note, who has acquired the right to sue the maker thereof, may dispose of it at any rate of discount from its face, and the purchaser will have the right to enforce its full amount against the maker without any defense on the ground of usury: *Dickerman v. Day*, 31-444.

No defense of usury can be set up against the purchaser of an accommodation note taken at a greater amount of discount than legal interest, unless such purchaser have knowledge of the character of the paper: *Ibid.*

Where a creditor is enforcing collection of collaterals pledged to him for the security of a usurious debt, the debtor may enjoin him from transferring such collaterals as are not necessary for the security of the legal indebtedness: *Binford v. Boardman*, 44-53.

Where the assignee of a usurious note procured the same to be taken up by the maker and a new note made payable to him directly, and then transferred it to another, *held*, that the last assignee was limited in his right to recover to his immediate assignor, and could not recover from the assignor of the first note: *Brown v. Wilcox*, 15-414.

An indorsee who takes with knowledge that the note is tainted with usury is not to be protected by § 3257, which protects *bona fide* assignees without notice of the usury: *Ibid.*

Under the facts of a particular case, *held*, that the transferee of a note which included usurious interest had knowledge of the fact of usury, although the maker advised him that the note was all right, and that no defenses to it existed: *Watson v. Hoag*, 40-142.

Where the holder of a note takes it upon the representations of the maker that it is not usurious, the latter will be estopped from setting up the plea of usury against such holder: *French v. Rowe*, 15-563; *Callanan v. Shaw*, 24-441.

But if the transaction is merely a device to evade the usuary law, to which the assignee is privy, he will not be protected: *Nichols v. Levins*, 15-362.

How pleaded: Where usury is apparent upon the face of a bill in equity, and a decree including usury is prayed for, a demurrer to the bill will lie: *Phelps v. Pierson*, 1 G. Gr., 121.

Usury may be set up as a defense in an equitable action without first tendering the amount legally due. The maxim, "He who seeks equity must do equity," is not applicable in such case: *Kuhner v. Butler*, 11-419; *Cox v. Douglas*, 12-185.

The question of usury may be raised in a proceeding for the foreclosure of a chattel mortgage, which is by action of injunction transferred to the court: *Hanlin v. Parsons*, 33-207.

Usury cannot be shown as a defense in the foreclosure of a mortgage, when the debt itself is reduced to judgment: *Kendig v. Marble*, 58-529.

Where an action is dismissed before answer, there is no right, either in the behalf of the defendant nor of the school fund, to interpose a plea of usury: *Tufts v. Bauserman*, 46-241.

Evidence. The burden of establishing the defense of usury is upon the party setting it up: *Hough v. Hamlin*, 57-359.

Where the execution of a lost note is shown, and there is a conflict in the evidence as to the rate of interest stipulated therein, the burden of proving that the rate was usurious is upon the party affirming it: *Richards v. Burden*, 59-723.

Evidence of a usurious contract is admissible under an answer which alleges that the payee of a note received a greater rate of interest than the law allows: *Kurz v. Holbrook*, 13-562.

Evidence of the intemperance and financial embarrassment of the borrower and of the lender's acknowledgment thereof is not competent and relevant on the subject of usury: *Woodford v. Blood*, 32-600.

The indorser of a promissory note is a competent witness to prove usury in the inception of the note: *Richards v. Marshman*, 2 G. Gr., 217.

Usury, as other frauds, may be shown by any evidence, in other respects competent, tending to establish the real character of the transaction. The conditions, covenants and recitals of any and all instruments under which usury is hidden may be contradicted, impeached and assailed by evidence, parol or written, in order to disclose the real facts and uncover the usury: *Seekel v. Norman*, 71-264.

Under the provisions of Revision, § 1791, that the person contracting to pay unlawful interest should be a competent witness to prove that the contract was usurious, such witness was competent, notwithstanding the provisions of Revision, § 3982, which rendered the party incompetent to testify in a proceeding when the adverse party was the executor of a deceased person and the facts to be proved transpired before the death of such deceased person: *Rinehart v. Buckingham*, 34-409.

But this section of the Code omits the provision of Revision, § 1791, as to the person contracting being a competent witness to testify. If he falls within the provisions of § 4889, relating to actions by or against executors, administrators, etc., he is not now competent: *Wormley v. Hamburg*, 40-22.

"In such cases," the Code commissioners say, "the party agreeing to pay the usurious interest should pay what he agreed to, rather than make an exception to the general rule:" *Code Com'rs' Rep.*

Forfeiture: In computing the forfeiture, the ten per cent. interest should be reckoned on the balance of the original sums loaned remaining unpaid, in the same manner as if the interest was going to the plaintiff; and not upon the entire sum originally loaned: *Smith v. Coopers*, 9-376.

It should be computed up to the date of judgment and not simply to the maturity of the contract: *Ficklin v. Zwart*, 10-387.

Computation should be made from the time the money was borrowed, notwithstanding the fact that the form of the indebtedness has been changed to that of a note bearing a later date: *Drake v. Lowry*, 14-125.

In computing the penalty which is to go to the school fund, the amount due is to be calculated exactly as between the borrower and the lender, and proper indorsements of credit allowed: *Sheldon v. Mickel*, 40-19.

The forfeiture is not a lien upon the premises mortgaged to secure the usurious debt, but becomes a lien only from date of judgment therefor: *Lewis v. Barmby*, 14-88.

In an action on a copartnership debt, if usury is set up by either partner, the penalty should be enforced against both: *Machinists' Bank v. Krum*, 15-49.

It is not on the plea or for the benefit of the borrower that the court decrees a forfeiture; but whenever usury is brought to its knowledge: *Ibid.*

And when the usury is found, the penalty in favor of the school fund will be enforced although the parties agree in asking a different judgment: *Burrows v. Cook*, 17-436.

The judgment in favor of the school fund for the penalty should be against the surety as well as against the principal, and it seems that the surety, if compelled to pay, may have action against the principal for reimbursement of such penalty, or against his co-surety for contribution, and may be subrogated to the rights of the state with respect to the judgment and any security held by it: *McIntosh v. Likens*, 25-555.

The state, representing the school fund, has no absolute or vested right to the forfeiture. Its right is qualified and incidental, and accrues only when an unpaid usurious contract is brought before the court for adjudication, and the usury is in a legitimate way brought to the knowledge of the court. Where suit was brought for a balance of usurious interest, the principal and legal interest having been paid, *held* erroneous to render a judgment against the defendant in favor of the school fund for ten per cent. of the amount originally loaned: *Easley v. Brand*, 18-132.

It is not competent for parties to settle a suit in which usury appears, in such a manner as to deprive the state of a judgment on account of the usury: *Reynolds v. Babcock*, 60-289.

While the courts of this state will not enforce the penal statutes of another state, yet where a contract made with reference to the laws of another state is usurious there, the forfeiture provided by such laws will be enforced: *Arnold v. Potter*, 22–194.

Judgment: On appeal in an action in which usury was pleaded, *held*, that plaintiff might, in the supreme court, remit the usury and have judgment entered there for the principal, judgment being also entered there in favor of the school fund for the penalty, and the costs in the court below, and on appeal being taxed to the plaintiff: *Thompson v. Purnell*, 10–205.

Usurious interest paid on a note afterwards put in judgment cannot subsequently be applied as a payment on other notes. In the absence of collusion or intent to cover usury a judgment is conclusive as between parties and privies: *Philips v. Gephart*, 53–396.

The proceedings and adjudication with reference to the judgment in favor of the school fund may be subsequent to the rendition of judgment against the debtor in favor of the creditor. If the case is reversed for error in the judgment as between the parties and is remanded for new trial the question of liability to judgment in favor of the school fund will again arise if the issues of the case involve the question of usury: *Seekel v. Norman*, 71–264.

Confession of judgment: The defense of usury must be set up before judgment, and a judgment by confession cannot be attacked on the ground that usurious interest is included therein: *Troxel v. Clarke*, 9–201: *Twogood v. Fence*, 22–543; *Miller v. Clarke*, 37–325.

But a confession of judgment entered into for the purpose of evading the usury laws is void as between the parties so far as the amount in excess of the sum the plaintiff may lawfully recover is concerned: *Mullen v. Russell*, 46–386: *Ohm v. Dickerman*, 50–671

The answer of the defendant in an action on a confession of judgment alleging that the confession was a fraudulent device to evade the statute against usury, *held* sufficient on demurrer. It matters not at what time the confession is made so that it be a device or part of a plan for evading the statute: *Kendig v. Marble*, 55–386.

The existence of usury in the note, upon which a judgment by confession is rendered, does not alone authorize the conclusion that the parties caused the judgment to be entered for the purpose of concealing it or evading the statute against it: *Kendig v. Marble*, 58–529.

A written statement authorizing entry of judgment upon a note does not, before judgment is entered, estop the party making it from setting up the plea of usury: *Lyon v. Welsh*, 20–578.

Costs: Costs are not to be recovered by the party making the loan: *Binford v. Boardman*, 44–53.

Although there is no declaration that judgment shall be rendered against the plaintiff for costs, yet where the defendant on the issue joined as to usury is successful, the costs may be taxed to plaintiff. It was not intended to leave each party to pay his own costs in such cases: *Garth v. Cooper*, 12–364.

Attorney's fee: The plaintiff in an action on a usurious note should not be allowed to recover an attorney's fee provided therein: *Miller v. Gardner*, 49–234.

3257. Assignee. 2081. Nothing in this chapter shall be so construed as to prevent the proper assignee, in good faith and without notice, of any usurious contract, recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money, but the same may be recovered of the usurer in the proper action before any court having competent jurisdiction. [R., § 1792.]

An assignee cannot have recourse against his assignor in such cases until he has sustained loss by reason of the usurious character of the note: *Culver v. Wilbern*, 48–26.

Whether the usurer is, under this section, liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15–414.

CHAPTER 3.

OF NOTES AND BILLS.

3258. Negotiable. 2082. Notes in writing, made and signed by any person, promising to pay to another person or his order or bearer, or to bearer only, any sum of money, are negotiable by indorsement or delivery in the same manner as inland bills of exchange, according to the custom of merchants. [R., § 1794; C., '51, § 947.]

A provision in a note making it negotiable and payable at a certain place does not restrict its negotiability elsewhere, nor is demand at the specified place necessary in order to charge the maker: *Scoharie, etc., Bank v. Bevard*, 51–257.

Where a note payable to payee or order is transferred without indorsement, the trans-

feree, although he may bring action in his own name (§ 3748), is not an indorsee, but an assignee, and as such is subject to equities existing against his assignor (§ 3751): *Younker v. Martin*, 18–143; and see note to § 3260.

As to what the transferee after maturity takes subject to, see notes to § 3751.

3259. Action. 2083. The person to whom such sum of money is made payable, may maintain an action against the maker, and any person to whom such note is so indorsed or delivered, may maintain his action in his own name against the maker or the indorser, or both of them. [R., § 1795; C., '51, § 948.]

[As to joint action against maker and indorser, see notes to § 3755.]

3260. Assignment of non-negotiable instruments. 2084. Bonds, due bills, and all instruments in writing, by which the maker promises to pay to another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon or by other writing, and the assignee shall have a right of action in his own name, subject to any defense or counter-claim which the maker or debtor had against any assignor thereof before notice of his assignment. [R., § 1796; C., '51, § 949.]

The indorsement of a non-negotiable note is equivalent to the making of a new note, and is a direct undertaking, and not a conditional one. Demand on the original maker, and notice thereof, are not necessary in order to charge such assignor, and the holder may write an absolute guaranty or a waiver of demand and notice over the blank indorsement of the assignor and hold him thereunder: *Wilson v. Ralph*, 3–450; *Long v. Smyser*, 3–266.

Where parties on the one part in a contract, without notice of any assignment, make an agreement with the original parties on the other part for the alteration of the terms of such contract, such agreement will be binding upon the assignees of the latter parties. The want of such notice is a matter to be shown by the parties claiming to have been relieved from liability by the new contract, to be shown as a matter of defense when their liability, under the terms of the old contract, is sought to be established by such assignees: *Steele v Mills*, 68–406.

The assignee of a judgment takes subject to equities against his assignor: *Burtis v. Cook*, 16–194; *Ballinger v. Tarbell*, 16–491.

The assignee of a non-negotiable note is subject to any defense or counter-claim which the maker had against the assignor before notice of the assignment: *Sayre v. Wheeler*, 31–112.

The assignee of negotiable paper stands in the same position as the assignee of a non-negotiable instrument and is subject to the same defenses: *Franklin v. Twogood*, 18–515.

And therefore such assignee is subject to any defense or set-off existing in favor of the maker against the assignor at the time of notice of assignment: *Younker v. Martin*, 18–143.

As to defenses available against an assignee of negotiable paper transferred after maturity, see notes to § 3751.

If, after an assignment of which the debtor has no notice, another person obtains a second assignment, and first gives notice of his right, he will be preferred to the first assignee: *Merchants', etc., Bank v. Hewitt*, 3–92.

An instrument of guaranty is assignable: *First Nat. Bank v. Carpenter*, 41–518, 521.

So is an attachment bond: *Moorman v. Collier*, 32–138.

So is a judgment: *Burtis v. Cook*, 16–194; *Ballinger v. Tarbell*, 16–491.

A policy of insurance, the assignment of which is expressly prohibited, is assignable after loss, the same as any other debt: *Walters v. Washington Ins. Co.*, 1–404; *Mershon v. National Ins. Co.*, 34–87.

Although a mining lease makes no provision for assignment, it is nevertheless assignable: *Steele v. Mills*, 68–406.

An assignment of a lease carries with it all the rights of the grantee, as well where the words "or assigns" are omitted after the grantee's name as where they are inserted: *Frederick v. Callahan*, 40–311.

In a particular case, *held*, that a certain contract did not import or contain a promise on the part of one of the makers to pay to the other any money or property, and was therefore not assignable: *Sales v. Kier*, 50–699.

A time-check, drawn in the form of an account against a railroad company in favor of a contractor, signed by a subcontractor, and indorsed, does not transfer to the indorsee any claim against the contractor: *Nash v. Chicago, M. & St. P. R. Co.*, 62–49.

A license to keep a grocery store under statute requiring such licenses, and providing that it should be issued only upon giving bond, etc., *held* not assignable: *Lewis v. United States*, Mor., 199.

The statutory provisions do not limit the assignability of claims to those specifically mentioned: *Weire v. Davenport*, 11–49.

3261. What negotiable. 2085. Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are

negotiable instruments with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words "order" or "bearer" alone will not manifest such intent. [R., § 1797; C., '51, § 950.]

The use of the words "without defalcation," *held* sufficient to manifest the intent of the maker that the instrument should be negotiable: *Council Bluffs Iron Works v. Cuppey*, 41-104.

A note payable "in currency" or "in current funds" is not *prima facie* a negotiable instrument, even though made payable at a banking house: *Rindskoff v. Barrett*, 11-172; *Huse v. Hamblin*, 29-501; but it may be shown by parol evidence that by those words the parties meant "money," and that therefore the instrument is negotiable: *Haddock v. Woods*, 46-433.

The use of the words "or bearer" *held* not sufficient to make the instrument negotiable: *Peddicord v. Whittam*, 9-471; and so *held* also, in regard to the use of the words "or order" in a receipt for corn: *Merchants', etc., Bank v. Hewitt*, 3-93.

3262. Assignment prohibited. 2086; 20 G. A., ch. 183, § 1. When by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or counter-claim against the assignees, which he may have against any assignor thereof before notice of the assignment thereof is given in writing to the maker of such instrument. [R., § 1798; C., '51, § 951.]

The assignment of a policy of insurance, by the terms of which an assignment thereof is expressly prohibited, would, under this section, be valid: *Mershon v. National Ins. Co.*, 34-87.

A stipulation in an agreement to convey, that no assignment of the premises by the vendor should be valid unless indorsed on the agreement and countersigned by the vendee or his assignees, *held*, to be for the benefit of the vendee and not enforceable by his assignees: *Wilson v. Reuter*, 29-176.

This section does not render assignable a railway ticket issued to a particular person by name and expressly made non-transferable, and another person attempting to ride upon such ticket would be guilty of fraud: *Way v. Chicago, R. I. & P. R. Co.*, 64-48.

As to what causes of action are assignable, see notes to § 3730.

3263. Open account assignable. 2087; 20 G. A., ch. 183, § 2. An open account of sums of money due on contract may be assigned, and the assignee will have the right of action in his own name, but subject to the same defenses and counter-claims as the instruments mentioned in the preceding section, before notice of such assignment is given in writing by the assignee to the debtor. [R., § 1799; C., '51, § 952.]

The assignment of an open account as here contemplated must be in writing. An assignment by delivery or in parol will not be sufficient: *Andrews v. Brown*, 1-154; *Williams v. Soutter*, 7-435, 448.

The mere drawing and delivery of an order by one person upon another for money due will not constitute an assignment, giving the right of action against the drawee, in the absence of any acceptance or even presentment: *Poole v. Carhart*, 71-37.

Save for this section, an open account is not assignable, and it was therefore wholly immaterial under the section, as it stood prior to the amendment, whether a debtor had a defense against an assignor, when he received notice of the assignment, or whether such defense arose afterwards, for the reason that the statute created no right, by reason of notice. The point of time fixed by the statute was the commencement of suit. If at that time the debtor had a defense against the assignor he might interpose it against the assignee: *Wing v. Page*, 62-87; *Zugg v. Turner*, 8-223; *Reynolds v. Martin*, 51-324.

While the debtor under such statute might voluntarily pay the assignor at any time before action brought, and thus avoid liability to the assignee, he was not under obligation to do so, and the assignor could not enforce such payment: *Bailey v. Union Pacific R. Co.*, 62-354.

The rights of parties under a mining lease, providing for monthly payments of royalty, do not constitute an open account under the statutory provisions referring to the assignment of such account: *Steele v. Mills*, 68-406.

Under the statute, the assignment of an open account for money due on contract passes to the assignee the legal title to the account assigned: *Knadler v. Sharp*, 36-232.

The assignor of an account loses all legal interest therein: *Platt v. Hedge*, 8-392.

As to what is an account, see notes to § 3736.

3264. Assignor liable. 2088. The assignor of any of the above instruments, not negotiable, shall be liable to the action of his assignee without notice. [R., § 1803; C., '51, § 956.]

This section does not limit the action of an assignee in such cases to his immediate assignor: *Huse v. Hamblin*, 29-501.

A guarantor by written instrument, as well as an assignor, is liable without notice: *Henderson v. Booth*, 11-212.

GUARANTY.

3265. Blank indorsement by one not party. 2089. The blank indorsement of an instrument for the payment of money, property, or labor by a person not a payee, indorsee, or assignee thereof, shall be deemed a guaranty of the performance of the contract. [R., § 1800; C., '51, § 953.]

This section and the one following do not apply to an express guaranty entered into otherwise than by the blank indorsement of a person not a party to the instrument: *Peddicord v. Whittam*, 9-471.

An indorsement *in full*, made by one who is not payee, indorsee or assignee, makes such person an *indorser* within the rules of commercial paper, and not a guarantor as here contemplated: *Stout v. Noteman*, 30-414; and so of an indorsement not in blank and made by an indorsee: *Greene v. Thompson*, 33-293.

An indorsement such as is here referred to imports a consideration, and an accomodation indorser, although not bound in the absence of consideration as between the immediate parties, cannot raise the defense of want of consideration as against a good-faith purchaser for value, even when such party took with full knowledge of that fact: *Jones v. Berryhill*, 25-289.

The contract of guaranty contemplated in this and the following sections is different from that of suretyship: *Robinson v. Reed*, 46-219.

These provisions are not applicable to other forms of guaranty: *Griffin v. Seymour*, 15-30; *Peddicord v. Whittam*, 9-471; *Sabin v. Harris*, 12-87.

This statutory provision is not affected by § 3268 as to notice of non-payment of negotiable paper: *Sibley v. Van Horn*, 13-209.

Where a person becoming guarantor by blank indorsement of an instrument to which he was not a party, afterward indorsed an extention of time on such guaranty, *held*, that such second indorsement did not change the nature of his liability: *Picket v. Hawes*, 14-460.

This section and the following applied: *Rodabaugh v. Pitkin*, 46-544.

In the absence of such statutory provision, such an indorsement renders the indorser liable in accordance with the contract, in pursuance of which the indorsement is made, and the blank indorsement may be filled up accordingly. If that contract is one of guaranty, proof of demand and notice is not necessary, but want of demand and notice may be set up as a defense, to the extent to which such guarantor can show himself to have been injured by want of such demand and notice: *Fear v. Dunlap*, 1 G. Gr., 331.

Where there is testimony tending to show affirmatively that the guarantor by blank indorsement of an instrument to which he is not a party received no detriment from want of notice, that question should be left to the jury: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

A blank indorsement imports a consideration: *Veach v. Thompson*, 15-380.

3266. Notice. 2090. To charge such guarantor, notice of non-payment by the principal must be given within a reasonable time; but the guarantor is chargeable without notice, if the holder show affirmatively that the guarantor has received no detriment from the want of notice. [R., § 1801; C., '51, § 954.]

Demand of the maker is not necessary to hold the guarantor: *Marvin v. Adamson*, 11-371; *Knight v. Dunsmore*, 12-35.

Proof of the maker's insolvency at maturity of the note and continuously afterwards is *prima facie* sufficient to show that the guarantor has received no detriment from want of notice: *Knight v. Dunsmore*, 12-35.

This section only applies to a person deemed a guarantor as contemplated in the preceding section. A guarantor generally is liable without proof of demand and notice, or of diligence, but he may show by way of defense that he has been damaged by the want of such notice or the failure to use diligence in prosecuting the claim: *Sabin v. Harris*, 12-87; *Griffin v. Seymour*, 15-30.

The provisions of this section as to notice are not modified by § 3268: *Sibley v. Van Horn*, 13-209.

3267. Diligence. 2091. A guarantor, as contemplated in the two preceding sections, is also liable to the action of an indorsee, assignee, or payee, if due diligence in the institution and prosecution of a suit against the maker or his representative has been used. [R., § 1802; C., '51, § 955.]

Due diligence, in the absence of peculiar facts, would require the assignee of the note to bring suit at the first regular term of court after maturity, and obtain judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court: *Vorhies v. Atlee*, 29-49.

The facts constituting due diligence must be averred: *Leas v. White*, 15-187.

GRACE — PROTEST.

3268. Grace; notice. 2092. Grace shall be allowed upon negotiable bills or notes payable within this state, according to the principles of the law

merchant; and notice of non-acceptance or non-payment, or both, of said instruments shall be required according to the rules and principles of the commercial law. [R., § 1813.]

Where exemption from liability on a bill of exchange was asserted under a statute of another state which changed the rule of the law merchant as to days of grace, *held*, that the defendants must show themselves within such statute to obtain its exemption: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26–306.

Non-negotiable instruments are not entitled to days of grace: *Peddicord v. Whittam*, 9–471.

Notes payable in property are not entitled to days of grace, unless they are negotiable within the provisions of § 3261, allowing such notes to be made negotiable in terms: *McCartney v. Smalley's Adm'rs*, 11–85.

A note is not overdue until days of grace are passed. Therefore, *held*, that a transfer on the second day of grace was before maturity: *Goodpaster v. Voris*, 8–334.

An action on a promissory note brought before the expiration of the days of grace cannot be maintained: *Sealon v. Hinneman*, 50–395; *Whitney v. Bird*, 11–407.

A note payable in current funds is not *prima facie* negotiable; but evidence of custom or an understanding among the parties that by such term is meant money may be received to impart to it the attributes of negotiability. And thereby it will become subject to days of grace: *Haddock v. Woods*, 46–433.

The law merchant having generally been recognized by courts of this country will be considered as existing until it is shown not to prevail. The courts will take notice of the usage of allowing three days of grace, and in the absence of proof to the contrary will presume that such was the understanding of the parties: *Hudson v. Matthews*, Mor., 94.

3269. What entitled to. 16 G. A., ch. 81, § 1. All bills of exchange, drafts and orders payable within this state, except those drawn payable on demand, shall be entitled to grace.

A draft or bill in which no time for payment is mentioned, is payable on demand and therefore not affected by this statute, and is not entitled to grace: *First Nat. Bank v. Price*, 52–570.

3270. Demand. 2093. A demand at any time during the days of grace, will be sufficient for the purpose of charging the indorser. [R., § 1804; C., '51, § 957.]

3271. Holidays. 2094; 18 G. A., ch. 31. The first day of the week, called Sunday; the first day of January; the thirtieth day of May; the fourth day of July; the twenty-fifth day of December; and any day appointed or recommended by the governor of this state, or by the president of the United States, as a day of fasting or of thanksgiving, shall be regarded as holidays for all purposes relating to the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes; and any bank or mercantile paper falling due on any of the days above named, shall be considered as falling due on the preceding day. [9 G. A., ch. 116.]

3272. Notice of protest. 2095. In case of a demand of payment of any promissory note, bill of exchange, or other commercial paper, by a notary public, and a refusal by the maker, drawer, or acceptor, as the case may be, the notary making said demand may inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest postoffice to the parties to be charged on the day of demand, and no other notice shall be necessary to charge said party. [R., § 213.]

Aside from this statutory provision, a notice sent by mail to a party living in the same town is not good unless it appears that he actually received it: *Grinman v. Walker*, 9–426.

But an agreement between parties that notice through the mails should be deemed sufficient may be shown by proving usage to that effect known to the party to whom notice is to be given: *Ibid.*

Where a notary after making demand, instead of notifying an indorser residing in the same place, either personally or by notice deposited in the postoffice there, returned to a neighboring town and from there mailed a notice to the indorser, *held* that the notice was not sufficient under this section: *Fahnestock v. Smith*, 14–561.

This section adds another method of giving notice when the party resides in the same town: *Ibid.*

3273. Damages. 2096. The rate of damages to be allowed and paid upon the non-acceptance or non-payment of bills of exchange, drawn or

indorsed in this state, when damage is recoverable, shall be as follows: If the bill be drawn upon a person at a place out of the United States, or in California, Oregon, Nevada, or any of the territories, five per cent. upon the principal specified in the bill, with interest on the same from the time of the protest; if drawn upon a person at any other place in the United States other than in this state, three per cent. with interest. [R., § 1812; C., '51, § 965.]

This section relates to foreign and not inland bills: *First Nat. Bank v. Owen*, 23–185.

CONTRACTS.

3274. Payable in property; demand. 2097. No contract for labor, or for the payment or delivery of property other than money, in which the time of performance is not fixed, can be converted into a money demand, until a demand of performance has been made and the maker refuses, or a reasonable time is allowed for performance. [R., § 1806; C., '51, § 959.]

If the time of payment is fixed, the property should be tendered, as provided in the next section, and no demand is necessary: *Barker v. Brink*, 4 G. Gr., 59.

Where an order is given by one person upon another for property, demand thereof must not only be made of the drawee, but also of the drawer, before suit can be brought thereon against the latter: *Whipple v. Abbott*, 4 G. Gr., 66.

Where the time and place of delivery are fixed in the contract, if the debtor set apart the property at the time and place stipulated, although the creditor is not there to receive, or refuses to accept, the property tendered, the title passes to him, and the debt is discharged: *Games v. Manning*, 2 G. Gr., 251; *Hambel v. Tower*, 14–530.

Where the instrument provided for the payment of a certain sum in cabinet furniture at the maker's shop, no date for the payment being specified, *held*, that action thereon could not be maintained without demand being shown: *Frederick v. Remking*, 4 G. Gr., 56.

Where a lease to a field tenant provided that the tenant should pay a portion of the crop raised as rent, but there was no stipulation as to the time when such payment should be made, *held*, that there could be no action for a money judgment upon failure of the tenant to deliver the portion of the crop due as rent until demand therefor had been made, even though by the terms of statute such a lease terminates upon the first day of December of the year for which the lease is made: *Johnson v. Shank*, 67–115.

3275. Tender. 2098. When a contract for labor, or for the payment or delivery of property other than money, does not fix a place of payment, the maker may tender the labor or property at the place where the payee resided at the time of making the contract, or at the residence of the payee at the performance of the contract, or where the assignee of the contract resides when it becomes due. [R., § 1807; C., '51, § 960.]

Where defendant notified plaintiff of his readiness to deliver the property as provided in the contract, and plaintiff refused to receive it, *held*, that by such refusal defendant was released from the necessity of any further tender: *Williams v. Triplett*, 3–518.

3276. Exception. 2099. But if the property in such case be too ponderous to be conveniently transported, or if the payee had no known place of residence within the state at the making of the contract, or if the assignee of a written contract has no known place of residence within the state at the time of performance, the maker may tender the property at the place where he resided at the time of making the contract. [R., § 1808; C., '51, § 961.]

3277. When contract assigned. 2100. When the contract is contained in a written instrument which is assigned before due, and the maker has notice thereof, he shall make the tender at the residence of the holder if he resides in the state, and no farther from the maker than did the payee at the making thereof. [R., § 1809; C., '51, § 962.]

3278. Effect of tender. 2101. A tender of the property as above provided, discharges the maker from the contract, and the property becomes vested in the payee or his assignee, and he may maintain an action thereto as in other cases. [R., § 1810; C., '51, § 963.]

3279. Perishable property. 2102. But if the property tendered be perishable, or require feeding or other care, and no person be found to receive

it when tendered, the person making the tender shall preserve, feed, or otherwise take care of the same, and he has a lien on the property for his reasonable expenses and trouble in so doing. [R., § 1811; C., '51, § 964.]

3280. Holder absent from state. 2103. When the holder of an instrument for the payment of money is absent from the state when it becomes due, and when the indorsee or assignee of such an instrument has not notified the maker of such indorsement or assignment, the maker may tender payment at the last residence or place of business of the payee before the instrument became due, and if there be no person authorized to receive payment and give the proper credit therefor, the maker may deposit the amount due with the clerk of the district court in the county where the payee resided at the time it became due, paying the clerk one per cent. on the amount deposited, and the maker shall be liable for no interest from that time. [R., § 1805; C., '51, § 958.]

CHAPTER 4.

OF TENDER.

3281. When not accepted. 2104. When a tender of money or property is not accepted by the party to whom it is made, the party making it may, if he sees fit, retain in his own possession the money or property tendered; but if afterwards the party to whom the tender was made see proper to accept it and give notice thereof to the other party, and the subject of tender be not delivered to him within a reasonable time, the tender shall be of no effect. [R., § 1815; C., '51, § 966.]

What constitutes: A mere readiness or proposition to pay a certain sum does not, without more, amount to a tender: *Eastman v. District T'p*, 21-590.

One who pleads tender must prove a tender in full. So, where it was proposed to prove that defendant had in good faith tendered what was believed to be the value of a colt killed on its track, *held*, that such evidence was properly rejected: *Helphrey v. Chicago & R. I. R. Co.*, 29-480.

Evidence of a mere offer to pay is not sufficient to establish a tender: *Collins v. Jennings*, 42-417.

How kept good: A tender is lost by a subsequent demand and refusal: *Hambel v. Tower*, 14-530.

A tender once made will not stop interest accruing thereafter unless it be shown that defendant was always ready and willing to pay: *Jones v. Mullinix*, 25-198.

To keep a tender good after suit brought the money must be paid into and remain in court. The statutory provision as to tender does not change the rule in that respect: *Johnson v. Triggs*, 4 G. Gr., 97; *Freeman v. Fleming*, 5-460; *Mohn v. Stoner*, 11-30; *S. C.*, 14-115; *Werrington v. Pollard*, 24-281; *Shugart v. Pattee*, 37-422.

Where, however, the indebtedness is conditional and dependent, and the party is under no obligation to make payment until the performance of some act on the part of the other party, the showing of readiness and ability to perform is sufficient without the tender being kept good by the deposit of the money in court: *McDaneld v. Kimberell*, 3 G. Gr., 335.

A tender of property to plaintiff in an action of replevin is not sufficient unless it is continued and the property brought into court or placed under its control and subject to its order: *Hayden v. Anderson*, 17-158.

A reasonable time is to be allowed defendant for bringing the money into court in order to keep his tender good; and where a tender had been properly made in an action before a justice of the peace, and on appeal the justice failed to turn over the amount in his hands to the clerk, *held*, that the appellant was not in fault for such failure of the justice in the absence of any showing that he did not exercise reasonable diligence in procuring an order upon the justice to send up the money: *Waide v. Joy*, 45-282.

Where a tender is pleaded, the party pleading it must show a continued readiness to pay, and that the money is brought into court to keep the tender good: *Long v. Howard*, 35-148.

Tender must be specially pleaded. Such a plea must not only aver an offer to pay, but show a continued readiness to keep good the tender made: *Barker v. Brink*, 5-481.

An objection that a plea of tender is not supported by payment of money into court should be raised before going to trial and not for the first time on the final hearing: *Freeman v. Fleming*, 5-460.

In equity: The rule that in order to entitle a party to rely upon a tender he must bring the money into court is of questionable propriety in view of the statutory provisions, even in a case at law. In an equitable proceeding such a rule is not applicable: *Hayward v. Munger*, 14-516.

There is not the same necessity for tender in actions in equity as at law, and a court of equity having control over the subject may so mould the decree as to costs and the conditions under which relief will be granted as to fully guard and protect the interests of all parties, although no formal tender is made before the bringing of suit: *Jones v. Hartsock*, 42–147.

In equitable actions a formal tender of performance by plaintiff of that which he is required to do before he is entitled to performance from defendant is not thought necessary. It is sufficient that a readiness and willingness to perform be averred: *Taylor v. Ormsby*, 66–109.

In an equitable action the party who offers and avers willingness to pay whatever is found due in order to redeem securities from a usurious loan may recover, although he does not make actual tender in advance: *Binford v. Boardman*, 44–53.

A party entitled to redeem who does not show a tender of the amount necessary, but merely expresses readiness and willingness to pay such amount, will be required to pay the costs of the action to recover possession of the land, which is defeated by the establishment of the right to redeem from the title therein set up by the plaintiff: *Shoemaker v. Porter*, 41–197.

In the foreclosure of an equitable interest in real estate existing under an agreement to convey, tender of deed before suit brought is not essential when the decree gives authority to execute one upon payment of the purchase money: *Barrett v. Dean*, 21–423.

Unliquidated damages: As to whether the provisions as to tender apply in an action for unliquidated damages, *quære: Guengerich v. Smith*, 36–537.

Legal tender: Whatever is constitutionally made a legal tender for all debts by congress must be received in payment of a debt, and a party cannot, by inserting an obligation to pay in one rather than another of such legally equivalent values, compel payment in the coin or currency so named: *Wornibold v. Schlicting*, 16–243.

An offer to pay in bank bills and not in legal tender is not a tender, and when made in payment of a note does not entitle the one who offers the money to demand the delivery of the note to him: *Jones v. Mullinix*, 25–198.

Where the lease of a market stall was sold by a city at auction, with the stipulation that the payment should be made in cash, *held*, that the tender of city scrip was not a compliance with the contract: *Dubuque v. Miller*, 11–583.

Costs: A tender after suit brought, which does not include costs then accrued, is not sufficient: *Freeman v. Fleming*, 5–460; *Warrington v. Pollard*, 24–281: *Barnes v. Greene*, 30–114; *Young v. McWard*, 57–101.

In order to make a sufficient tender after action brought, the amount tendered should be sufficient to cover the sum admitted to be due and costs accrued at the time: *Martin v. Whisler*, 62–416.

Effect: A tender does not operate to discharge the debt: *Mohn v. Stoner*, 11–30.

But if kept good, tender stops interest and saves cost: *Johnson v. Triggs*, 4 G. Gr., 97.

Where defendant deposited with the clerk a sum sufficient for the payment of a judgment and costs entered against him, *held*, that it was the duty of the clerk, at the request of defendant, to so apply the money in his hands, and defendant was entitled to an injunction preventing issuance of execution on such judgment: *Fisher v. Moore*, 19–84.

Admits indebtedness: A tender admits plaintiff's cause of action to the amount of the tender, and plaintiff is entitled to judgment to that amount: *Johnson v. Triggs*, 4 G. Gr., 97; *Phelps v. Kathron*, 30–231; *Gray v. Graham*, 34–425; *Sheriff v. Hull*, 37–174; *Frink v. Coe*, 4 G. Gr., 555: *Babcock v. Harris*, 37–409.

Where before or at the commencement of suit defendant makes a tender of an amount he believes to be due he is bound thereby: and if a trial ensues plaintiff is entitled to recover at least the amount of the tender, but without costs: *Fisher v. Moore*, 19–84.

A tender may not be in the way of a compromise or settlement of a disputed claim, but for the discharge of the obligation under the contract and for the payment of the indebtedness arising thereon. Such tender is an admission of liability to the amount of the indebtedness: *Rand v. Wiley*, 70–110.

A tender is an admission that the amount tendered is due to the party in whose favor the tender is made, and it is error not to render judgment in favor of such party to the amount of such tender: *Wright v. Howell*, 35–288; *Rump v. Schwartz*, 56–611; *Brayton v. Delaware County*, 16–44.

A judgment against the party making the tender in favor of the party to whom it is made, for the amount tendered, cannot be questioned: *Wilson v. Chicago, M. & St. P. R. Co.*, 68–673.

Where a tender is pleaded plaintiff is entitled to a verdict for that amount, and in a particular case, *held*, that a verdict by a jury which failed to award to plaintiff the amount due was cured by judgment of the court for that amount, and that the error in the verdict was therefore without prejudice: *Sheriff v. Hull*, 37–174.

Where a tender is pleaded as to one branch of a counter-claim, leaving undetermined the original action and another branch of the counter-claim, there is no ground for rendering judgment for defendant on such tender: *Wolmerstadt v. Jacobs*, 61–372.

The pleading of a tender by defendant does not admit allegations of plaintiff's petition, but only that the amount is due on a cause of action included in the suit: *Griffin v. Harriman*, 74–436.

3282. Offer in writing. 2105. An offer in writing to pay a particular sum of money, or to deliver a written instrument, or specific personal property, if not accepted, is equivalent to the actual tender of the money, instrument, or property, subject, however, to the condition contained in the preceding section; but if the party to whom the tender is made, desire an inspection of

the instrument or property tendered, other than money, before making his determination, it shall be given him on request. [R., § 1816; C., '51, § 967.]

This statutory provision simply dispenses with the production and actual tender of the money. In other respects the rule of the common law prevails and the tender must be unconditional. If it be in full of all demands, or condition that a receipt be given, or if it be offered by way of bonus with a denial that any debt is due, or accompanied by a threat of consequences to follow upon its refusal, it cannot be regarded as sufficient: *Kuhns v. Chicago, M. & St. P. R. Co.*, 65–528.

The offer here contemplated must be in writing; otherwise it does not dispense with the necessity of producing the money: *Cassady v. Bossler*, 11–212.

As the tender may be made in writing, a person knowing the residence and address of another may make him a tender although he is beyond the state: *Crawford v. Paine*, 19–172.

A party making a tender in writing, if sued, must, to keep his tender good, pay the money into court: *Shugart v. Pattee*, 37–422. And see notes to preceding section.

Where defendant in a cross-petition offers to pay a sum of money, it amounts to a tender, and judgment should be rendered against him for that amount: *Corbin v. Woodbine*, 33–297, 301.

Where a contract for the delivery of butter provided that such delivery should be made within a specified time upon demand, *held*, that in the absence of demand within the time specified, a written offer in accordance with this provision was sufficient, although the party making the offer had not at the time any butter on hand with which to fill the offer: *Holt v. Brown*, 63–319.

Where defendant notified plaintiff of his readiness to deliver the property as provided in the contract, and plaintiff refused to receive it, *held*, that by such refusal defendant was released from the necessity of any further tender: *Williams v. Triplett*, 3–518.

Where the time and place of delivery are fixed in the contract, if the debtor set apart the property at the time and place stipulated, although the creditor is not there to receive, or refuses to accept the property tendered, the title passes to him and the debt is discharged: *Games v. Manning*, 2 G. Gr., 251; *Hambel v. Tower*, 14–530.

Under the plea of tender in the contract for the delivery of property, coupled with an averment of readiness and willingness to perform, the party may introduce evidence to show that the property was set apart for the use of the promisee: *Hambel v. Tower*, 14–530.

3283. Receipt. 2106. The person making a tender may demand a receipt in writing, duly signed, for the money or article tendered, as a condition precedent to the delivery thereof. [R., § 1817; C., '51, § 968.]

3284. Objection. 2107. The person to whom a tender is made, must, at the time, make any objection which he may have to the money, instrument, or property tendered, or he will be deemed to have waived it. [R., § 1818; C., '51, § 969.]

By "objection to the money" is meant objection to the kind of money, and the phrase has no reference to the amount. Want of objection as to the amount would not preclude recovery of the amount actually due: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38–377.

A party making no objection to the amount of the tender cannot afterwards set up that the tender was insufficient: *Sheriff v. Hull*, 37–174.

A tender of less than the amount due will be sufficient as a tender unless objection be made to the amount, and will relieve the party from liability for interest and costs, but will not prevent a recovery by the other party for the actual amount due: *Hayward v. Munger*, 13–516; *Guengerich v. Smith*, 36–587.

Where the party to whom the tender is made does not object to the amount, it will be presumed that the amount tendered was that which the party making the tender offered to pay: *McDaneld v. Kimbrell*, 3 G. Gr., 335.

The party objecting to the terms of an instrument tendered must specify what terms he requires: *Gilbert v. Mosier*, 11–498.

The clerk of the court is liable for money paid into court by way of tender whether it was paid in legal tender money or not. The objection to the kind of money can be raised only by the party against whom the tender is sought to be established: *Billings v. Teeling*, 40–607.

CHAPTER 5.

OF SURETIES.

3285. May require creditor to sue. 2108. When any person bound as surety for another, for the payment of money or the performance of any other contract in writing, apprehends that his principal is about to become in-

solvent, or to remove permanently from the state without discharging the contract, if a right of action has accrued on the contract, he may, by writing, require the creditor to sue upon the same, or to permit the surety to commence suit in such creditor's name and at the surety's cost. [R., § 1819; C., '51, § 970.]

The statutory provisions as to notice to the creditor to sue are in abrogation of the common law. A surety relying upon a discharge by reason of them should show that he has complied with the statute with reasonable strictness: *Hill v. Sherman*, 15–365; *Moore v. Peterson*, 64–423.

Therefore a notice given by the surety to the creditor to begin suit against the principal debtor for the amount due, or notice to permit such surety to begin suit in the name of the creditor, is not enough. The notice should require the creditor to bring suit upon the contract against the parties liable thereon (including the surety) or permit such suit to be brought: *Moore v. Peterson*, 64–423; *Harriman v. Egbert*, 36–270.

Under the above section there must be a request or notice to bring suit, but where the guarantor's attorney merely requested the creditor to send a copy of the bond guarantied, and stated that if the creditor did not have an attorney or collector to collect the indebtedness the writer would do so, *held*, that this was not notice to sue as required by the statute: *Davis Sewing Machine Co. v. McGinnis*, 45–538, 545.

The notice by the surety must be in writing: *Stevens v. Campbell*, 6–538.

Failure to object to oral evidence of a notice to the creditor to sue does not waive the requirement of the statute: *Davis v. Payne*, 45–194.

The creditor has the right of election to sue in his own name or permit the surety to do so. A notice requiring him to sue will not release the surety if such notice is not complied with: *Hill v. Sherman*, 15–365.

A joint maker of a note who is in fact a surety may have the benefit of these provisions: *Piper v. Newcomer*, 25–221.

Before a right of action has accrued on the contract against the principal the provisions of these sections are not applicable: *Dennison v. Soper*, 33–183.

Where a principal makes a note payable at a fixed future time as collateral to a bond, and the creditor reserves his right to an immediate action on the bond, and it is expressly agreed that the remedy on the bond is not suspended by the note, the sureties can, notwithstanding the acceptance of the note, require the creditor to commence suit on the bond as provided under the above sections: *Jones v. Sarchett*, 61–520.

The fact that before the giving of the notice by the surety to the creditor the principal has been insolvent, and has removed from the state, will not defeat the object of the notice, it not appearing that the principal is insolvent at the time the notice is given: *Graham v. Rush*, 73–451.

Under these provisions a surety may, by giving proper notice, compel the creditor to sue, and § 4267 gives him the right, when he and the principal are joined in a suit, to have the judgment on his motion specify him as surety, the effect of such judgment then being to exempt the surety's property from execution until the principal's property is exhausted. But where a surety has failed to act under either of these provisions, and both principal and surety are joined in a suit, the creditor may dismiss as to the principal, and pursue the surety alone: *Dorothy v. Hicks*, 63–240.

3286. Refusal. 2109. If the creditor refuse to bring suit, or neglect so to do for ten days after the request, and does not permit the surety so to do, and furnish him with a true copy of the contract or other writing therefor, and enable him to have the use of the original when requisite in such suit, the surety shall be discharged. [R., § 1820; C., '51, § 971.]

After making the demand upon the principal in writing, the surety has nothing further to do, and, if not notified by the principal within due time of his permission to sue, he is discharged: *First Nat. Bank v. Smith*, 25–210.

The fact of the surety's apprehension of his principal's insolvency cannot be put in issue. The existence of the fact of insolvency or removal is not necessary to give the surety the right to make the demand upon the creditor: *Ibid.*

The personal right of a surety to be discharged from a note upon failure of the creditor to sue upon notice cannot be taken away by his official relation to the creditor, it not appearing that it was his official duty to institute suit, or that he had custody of the note, or was guilty of fraud or negligence in the transaction. *Ibid.*

The election to sue or to allow the surety to sue is a right of the creditor incident to the debt itself, and passes to an agent authorized to collect the debt. If not exercised by him on notice from the surety it is lost and the surety discharged: *Thornburgh v. Madren*, 33–380.

When the surety serves his notice on the creditor to sue, the creditor must see that suit is actually commenced within the time fixed by statute, otherwise the surety will be discharged. Thus where a creditor, on receipt of a notice from the surety, directed a justice to bring suit and the justice failed to do so within the ten days, *held*, that the creditor was chargeable with the neglect of the justice and the surety was discharged: *German Am. Bank v. Denmire*, 58–137.

3287. Surety may sue. 2110. When the surety commences such suit, he shall file his undertaking to pay such costs as may be adjudged against the creditor, and the suit shall be brought against all the obligors, but those joining in the request to the creditor shall make no defense to the action, but may be heard on the assessment of the damages. [R., § 1821; C., '51, § 972.]

3288. Executor; official bonds. 2111. The provisions of this chapter extend to the executor of a deceased surety and holder of the contract, but they do not extend to the official bonds of public officers, executors, or guardians. [R., § 1822; C., '51, § 973.]

CHAPTER 6.

OF PRIVATE SEALS.

3289. Abolished. 2112. The use of private seals in written contracts, except the seals of corporations, is abolished; and the addition of a private seal to an instrument in writing, shall not affect its character in any respect. [R., § 1823; C., '51, § 974.]

3290. Consideration implied. 2113. All contracts in writing, signed by the party to be bound, or his authorized agent or attorney, shall import a consideration. [R., § 1824; C., '51, § 975.]

A consideration is implied in a written contract, and none need be expressed: *Peddicord v. Whittam*, 9-471.

A written contract implies a consideration, and want or failure of consideration must be averred and shown by way of defense: *Goodpaster v. Porter*, 11-161.

Such a contract imports a consideration in the same manner that sealed instruments formerly did: *Jones v. Berryhill*, 25-289, 297.

So *held* as to a written guaranty: *Sabin v. Harris*, 12-87.

A covenant in writing imports a consideration: *Arnold v. Kreutzer*, 67-214.

It is not ground of demurrer to a petition on a written instrument that no consideration is alleged or appears on the face thereof. Such objection must be set up as a defense: *Linder v. Lake*, 6-164; *Towsley v. Olds*, 6-526; *Goodpaster v. Porter*, 11-161; *Henderson v. Booth*, 11-212; *State v. Wright*, 37-522.

The consideration need not appear upon the face of the contract; it may be proved by parol, or inferred from the terms and obvious import of the agreement: *Attix v. Pelan*, 5-336.

Parol evidence is admissible to show a consideration other than that expressed on the face of the contract: *Taylor v. Wightman*, 51-411.

The consideration of a written contract may be shown by parol, and if such consideration is found in an unwritten agreement it may be proved by oral testimony: *Simpson Centenary College v. Bryan*, 50-293.

3291. Failure of; fraud. 2114; 22 G. A., ch. 90. The want or failure, in whole or in part, of the consideration of a written contract, may be shown as a defense total or partial, as the case may be, except to negotiable paper transferred in good faith and for a valuable consideration before maturity. *Provided*, that if said paper shall have been procured by fraud upon the maker thereof, no holder of such paper shall recover thereon of the maker a greater sum than he paid therefor with interest and costs. [R., § 1825; C., '51, § 976.]

While a written contract imports a consideration, it is competent to aver and prove that there was in fact no consideration: *Briggs v. Downing*, 48-550; *Byers v. Harris*, 67-685.

Although a written contract imports a consideration, it is competent to show a failure of consideration to defeat the contract, the burden of proof being upon the defendant: *University of Des Moines v. Livingston*, 57-307.

The phrase "value received" does not necessarily import a consideration, and evidence is competent to show that no consideration has been in fact received: *Osgood v. Bringolf*, 32-265.

Extrinsic evidence of a consideration to a written contract adverse to that expressed upon the face thereof is incompetent: *Gelpcke v. Blake*, 19-263.

A defendant relying on want of consideration in a written contract must aver and show not only that he did not receive the consideration specified therein, but also that he did not receive any other consideration: *Taylor v. Wightman*, 51-411.

This section relates to the remedy, and is not unconstitutional as impairing a contract when applied to an instrument made in another state, where the common-law rule as to the conclusiveness of a seal upon the question of consideration is still in force: *Williams v. Haines*, 27-251.

CHAPTER 7.

OF ASSIGNMENTS FOR CREDITORS.

3292. Must be general. 2115. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims. [R., § 1826; C., '51, § 977.]

The language of the statute clearly implies a trust and contemplates the intervention of a trustee, and the transfer of property by the debtor to the creditor in payment of indebtedness is not an assignment within the terms of such statute, and is not thereby rendered invalid, although it is not for the benefit of all the creditors: *Cowles v. Ricketts*, 1-582.

Under the common law, in both England and America, a debtor in failing circumstances might dispose of his property in trust for the benefit of his creditors, and by such conveyance or otherwise give preference in payment to one creditor before another: *Lampson v. Arnold*, 19-479; *Cowles v. Ricketts*, 1-582.

The statute does not make general transfers of a debtor's property invalid, but relates only to general assignments, and uses the latter word in its technical sense: *Lampson v. Arnold*, 19-479.

The debtor may, if he acts without fraud, transfer property in payment of debts to certain creditors before making a general assignment, and such transfer will be valid even though made in contemplation of insolvency: *Ibid.*; *Van Patten v. Burr*, 52-518.

A sale of property to a creditor in payment of his debt is valid, although other creditors remain unpaid: *Hutchinson v. Watkins*, 17-475.

The statutory provision has no application where a debtor, without fraud, sells property to a creditor absolutely for a fixed consideration, a portion of which is the discharge of a debt due such creditor, and the balance is money paid to the debtor and to other creditors in discharge of debts due them: *Johnson v. McGrew*, 11-151.

An absolute sale in good faith for a valuable consideration of the entire property of an insolvent corporation will not be held to be void as a general assignment: *Buell v. Buckingham*, 16-284.

A debtor may in good faith secure the claims of a creditor at any time without reference to the claims of other creditors, and for that purpose may give a chattel mortgage: *Fromme v. Jones*, 13-474.

A trust deed not purporting to be a general assignment, made to secure a present loan of money, *held* not void: *Whittaker v. Lindley*, 14-598.

The execution of a mortgage to one or more creditors is not made void by the fact that the mortgage is executed in contemplation of insolvency and that the mortgagor immediately afterwards executes a general assignment: *Lyon v. McIlvane*, 24-9.

Therefore, *held*, that a mortgage of property in this state was not rendered invalid by the fact that a general assignment of all the debtor's property was on the same day executed in another state: *Ibid.*

A debtor may give all his property in payment or security to one of his creditors without violating the statutory provision, provided the transaction is free from fraud: *Davis v. Gibbon*, 24-257; *Farwell v. Howard*, 26-381.

Knowledge by the creditor who is preferred that other creditors are left unprovided for will not render the transaction void: *Cowles v. Ricketts*, 1-582.

A partial assignment in good faith, preferring certain creditors, is not void: *Gray v. McCallister*, 50-497; *Cole v. Dealham*, 13-551.

An insolvent debtor may lawfully make such a disposal of the property as to entitle one or more creditors to a preference over others. This he may do by mortgage, sale or conveyance, and the fact that such mortgages, sales and conveyances embrace all his property does not necessarily constitute the transaction a general assignment. And where the creditors secured by mortgages and deeds were *bona fide* creditors, whom the parties had contemplated securing from the time their debts were contracted, and who accepted the security offered, *held*, that the transaction was valid: *Aulman v. Aulman*, 71-124.

A debtor in failing circumstances may mortgage the whole of his property for the security of a portion of his creditors, even though the effect of the transaction is to defeat the collection of his debts: *Southern White Lead Co. v. Haas*, 73-399.

Where a party executes a chattel mortgage to secure creditors under the belief that the property will be more than sufficient to satisfy the claims of such creditors, even though it may appear that in this respect he was mistaken, he cannot be deemed by such chattel mortgage to have made complete disposition of his property nor to have thereby intended a general assignment: *Van Patten v. Thompson*, 73-103.

Where an insolvent debtor made transfers of specific portions of his property, and for the payment and security of specified creditors respectively, who accepted the provisions thus made for them, and on the following day made a general assignment, *held*, that such transfers were valid: *Bolles v. Creighton*, 73-199.

If the assignment does not cover all the insolvent's property it will not be a general assignment, even though it purports to be general: *Meeker v. Sanders*, 6-51.

Where several instruments are executed consecutively, each one subject to those preceding, and together constituting a disposition of all the debtor's property for the benefit of his creditors, but not in proportion to the

amount of their claims, the various instruments will be considerd as constituting one transaction and as therefore void under the statute: *Burrows v. Lehndorff*, 8-96.

So *held*, also, as to mortgages and a general assignment executed at the same time: *Cole v. Dealhman*, 13-551; *Van Patten v. Burr*, 52-518.

So *held*, also, as to an assignment and a deed in fee executed on the same day: *Moore v. Church*, 70-208.

To justify the court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor, at the time he made the mortgage, had the intention to make an assignment: *Perry v. Vezina*, 63-25.

The fact that mortgages and an instrument purporting to be a general assignment were all made on the same day, acknowledged before the same officer, and delivered to the recorder by the same person, *held* not sufficient to show that the mortgages were a part of the assignment, it being proved by positive evidence that the mortgages were executed in the forenoon, when the party did not contemplate making the assignment, and that the purpose to do so was conceived after noon, when the parties to whom the mortgages were given had separated. To render the instruments in such cases void as constituting a general assignment not for the equal benefit of all creditors it must appear that they were all parts of the same transaction: *Farwell v. Jones*, 63-316.

Where chattel mortgages and assignments to secure particular creditors are followed by a general assignment, and it appears that the instruments were executed with the *bona fide* intention of securing such creditors, the law will not give to such acts a different character from that intended: *Gage v. Parry*, 69-605.

Therefore, where chattel mortgages and the assignment of books of account were executed to different creditors, and within an hour after their execution a general assignment was made, and it was shown that the general assignment was not contemplated at the time of the execution of the other instruments, but that such general assignment was executed when the debtor was advised that the recording of the prior instruments would probably cause a levying of attachment, *held*, that the various instruments should be deemed valid: *Ibid.*

Where a debtor conveyed a stock of merchandise to his wife, who thereupon, and in consideration thereof, executed a chattel mortgage upon the same to secure the payment of her husband's indebtedness, in which mortgage certain creditors were preferred to others, *held*, that the transaction was in the nature of a general assignment and therefore void: *Van Horn v. Smith*, 59-142.

The question whether a conveyance by a debtor of all his property for the benefit of a portion of his creditors shall be regarded as an assignment for the benefit of creditors or a mortgage for the security of particular debts is to be determined by the intention as it may be ascertained from the circumstances of the transaction. If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title of the property, but of all control over it, for the purpose of securing the distribution of all his property among his creditors, or a portion of them, it is an assignment for the benefit of creditors, no matter what name the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as void, even though the debtor is insolvent at the time and it covers all his property, and but a portion of his debts are secured by it: *Cadwell's Bank v. Crittenden*, 66-237.

A chattel mortgage, though executed by an insolvent person, and covering all his property, is not necessarily an assignment. Whether it is to be construed as such or not depends upon the intent with which it is made. It is not to be considered an assignment where there is nothing to indicate that the mortgagor intended anything but the giving of security: *Kohn v. Clement*, 58-589.

A chattel mortgage given to one creditor to secure his claim will not operate as a general assignment, it appearing that none of the parties intended at the time that it should have such an operation, and that it does not include all of the property of the debtor: *Carson v. Byers*, 67-606.

The execution of a mortgage by the directors of a corporation to secure its indebtedness, although at a time when the corporation had become insolvent, *held* not to constitute a general assignment for the benefit of creditors so as to be void because not for the benefit of all: *Garrett v. Burlington Plow Co.*, 70-697.

The fact that in an instrument or instruments making general disposition of all the debtor's property for the benefit of his creditors no trustee is appointed will not prevent its being an assignment, and therefore void as such, if not made for their benefit proportionally: *Burrows v. Lehndorff*, 8-96.

Under the facts in a particular case, *held*, that mortgages to creditors were not shown to be intended as a full disposition of the debtor's property, and therefore were not to be treated as an assignment: *Jaffray v. Greenbaum*, 64-492.

That a conveyance of real estate to one creditor in payment or security of his debt was executed by the debtor at the same time he executed a general assignment for the benefit of his creditors does not make the two conveyances parts of one transaction: *Lamson v. Arnold*, 19-479.

The fraudulent intent of the assignor in a general assignment for the benefit of creditors will render the assignment invalid, notwithstanding the assignee was not a party to such intent: *Ibid.*

In order to render void an instrument of general assignment on the ground that it was made to defraud creditors, it is not necessary to show knowledge of the fraud on the part of the assignee: *Ruble v. McDonald*, 15-493.

To render a sale to a creditor invalid, as constituting a preference, it must appear not only

that the debtor was insolvent, but also that the sale was with intent to give such preference: *Graves v. Alden*, 13–573.

It is competent for the assignor after making a deed of assignment to make a new promise in writing which will have the effect of reviving a debt barred by the statute of limitations and subject the property assigned to the payment of such debt: *Hellman v. Kiene*, 73–448.

If it appears that the debtor has kept back a portion of his property not exempt from execution, the assignment will be treated as void although sufficient in form: *Moss v. Humphrey*, 4 G. Gr., 443.

No assignment is valid which contains a reservation or condition for the benefit of the assignor, such as requiring an absolute discharge upon part payment or partial distribution: *Williams v. Gartrell*, 4 G. Gr., 287.

An assignment is not rendered invalid by the fact that a reservation is therein made as to property exempt from execution: *Perry v. Vezina*, 63–25.

Where the intention of the grantor can be ascertained with reasonable certainty, the want of minute accuracy of language and the disregard of the usual forms will not render the instrument void: *Meeker v. Sanders*, 6–61.

The fact that the deed contains no schedule of the debts intended to be secured, that no inventory is given of the property intended to be conveyed, that the rights of the creditors are not distinctly defined, and that no specific directions are given to the trustee as to the time within which the property is to be converted into money, will not be sufficient to render the deed void: *Ibid.*

The fact that a party is unable to pay his debts according to the usage of trade, or proceed in business without general arrangement with his creditors or indulgence by way of extension of time of payment, is sufficient to constitute an insolvency, so that he may rightfully make an assignment for the benefit of creditors: *Savery v. Spaulding*, 8–239.

An assignment may be void as made in contemplation of insolvency if it is not for the benefit of all the creditors proportionally, although the assignor was not at the time actually insolvent: *Loving v. Pairo*, 10–282.

The validity of assignments, so far as they affect real property, must be judged by the law of the place where the property is situated: *Ibid.*; *Moore v. Church*, 70–208; *King v. Glass*, 73–205.

A deed of assignment for the benefit of creditors may be made in a sister state by a non-resident of this state, and if executed and acknowledged in accordance with our statutes it is valid, and the powers of the assignee being derived directly from the assignor, and not by reason of the appointment of the court, may be exercised outside of the state in which it was made: *King v. Glass*, 73–205.

An assignment by one partner without the consent of his copartner, who might be consulted and is capable of giving assent or dissent, is void, and does not prevent attachment by a creditor, although no proceedings are taken by the partner not consenting to set the assignment aside: *Loeb v. Pierpoint*, 58–469.

But if both partners have agreed to an assignment it will be valid though signed by but one: *Osborne v. Barge*, 29 Fed. Rep., 725.

A direction to the assignee to sell the property when convenient, and as soon as it can be done without material sacrifice, will not constitute conclusive badge of fraud: *Wooster v. Stanfield*, 11–128.

An assignment executed for the payment of debts "as fast as they become due," *held* not to necessarily imply a payment otherwise than *pro rata* and therefore not void: *Meeker v. Sanders*, 6–61.

It seems that a provision in the assignment authorizing the assignee to sell for credit will render it void, but authority to dispose of property upon such terms as in his judgment seem best will not have that effect: *Ibid.*; *Berry v. Hayden*, 7–469.

Nor will a provision authorizing the assignee to compound with debtors render the assignment void: *Ibid.*

A creditor or a co-debtor may be made assignee: *Wooster v. Stanfield*, 11–128.

The fact that the assignee is offering to sell the goods on credit or to exchange them will not render the conveyance void. No neglect of duty by the assignee, and no misapplication of the trust fund by him can have that effect. The remedy for such negligence or misfeasance is by application to the court: *Meeker v. Sanders*, 6–61.

Failure of the assignee to report the amount and condition of the assets will not affect the validity of the assignment: *Savery v. Spaulding*, 8–239.

The fact that the grantor in a deed of assignment is employed in the business by the assignee in the capacity of clerk will not in itself be evidence of fraud in making the assignment: *Ibid.*

Delivery of the assignment to the attorney of the assignor with direction to file it for record is, in effect, delivery to the assignee: *American v. Frank*, 62–202.

It has been held by our supreme court as sound in principle, and in the absence of an authoritative adjudication by the United States supreme court, in accordance with the weight of authority, that the enactment of the federal bankrupt law did not operate to nullify, supersede or suspend the insolvent laws of the states: *Reed v. Taylor*, 32–209.

3293. Assent presumed. 2116. In the case of an assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed. [R., § 1827; C., '51, § 978.]

The assent of the creditors to a general assignment for their benefit will be presumed: *Price v. Parker*, 11–144.

The assent of creditors will not be presumed to a conditional assignment: *Williams v. Gartrell*, 4 G. Gr., 287.

Where a debtor transferred a note to a creditor, with the understanding that he should collect it and apply so much of the proceeds as should be necessary for the satisfaction of his own claim, and pay the balance upon another claim, *held*, that the provision in favor

of the second creditor as to the balance did not constitute an assignment to him, he not being a party to the agreement, and therefore the excess remained in the hands of the first assignee liable to garnishment by other creditors: *Witter v. Little*, 66-431.

Where certain accounts were by the debtor assigned to a trustee to be collected and applied *pro rata* to the payment of debts due certain creditors, *held*, that the trustee in such assignment was not subject to garnishment at the suit of other creditors, and that assent of the creditors of the assignor would be presumed, they having been notified of the arrangement and having made no objection thereto: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245.

3294. Inventory; effect; recording. 2117. The debtor shall annex to such assignment an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and also a list of his creditors and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate; and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment. Every assignment shall be duly acknowledged in the same manner as conveyances of real estate and recorded in the county where the person making the same resides, or where the business in respect of which the same is made has been carried on. [R., § 1828.]

Recording: The provision as to recording the assignment is intended for the protection of subsequent purchasers. Where the assignment was duly executed and acknowledged, and the assignee consented to accept the trust before the levy of an attachment, the failure to record it until thirty seconds after the writ of attachment came into the sheriff's hands, *held*, not to render it invalid: *American v. Frank*, 62-202.

An assignment for the benefit of creditors though unacknowledged and unrecorded takes priority over a judgment rendered after its execution: *Munson v. Frazer*, 73-177.

What passes by assignment: The right of action for damages for the wrongful suing out of an attachment upon property subsequent to a general assignment thereof is in the assignee, and not in the person making the assignment: *Rumsey v. Robinson*, 58-225.

The equity of redemption of a mortgagor of personal property passes by an assignment. *Gimble v. Ferguson*, 58-414.

The assignee may maintain an action for possession of personal property of the assignor as against third parties, although it is covered by a chattel mortgage conferring upon the mortgagee the right of possession: *Goldsmith v. Willson*, 67-662.

By a general assignment, the property of which the assignor is at the time possessed is passed to the assignee for the benefit of creditors; therefore, *held*, that such general assignment would destroy a partial assignment by an instrument intended to secure a creditor and made prior to the execution of the general assignment, but not delivered until after general assignment: *Gage v. Parry*, 69-605.

A deed of assignment headed "General Assignment," and deeding "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed and marked Schedule A," etc., *held*, an assignment of the property mentioned in the schedule merely, and not to include property not mentioned therein; so that if any property of the assignor was omitted from the schedule the assignment was not a general but a special one: *Bock v. Perkins*, 28 Fed. Rep., 123.

An assignment for the benefit of creditors is a conveyance cutting off any vendor's lien not preserved therein as provided by § 3111: *Prouty v. Clark*, 73-55.

Rights of assignee: The assignee and the creditors have no higher rights under the assignment than the assignor had. The assignee cannot question a prior chattel mortgage on the ground that it was given to secure an antecedent indebtedness: *Meyer v. Evans*, 66-179.

The assignee may maintain an action to set aside a fraudulent conveyance by his assignor and subject the property thus conveyed to the payment of the creditors' claims. The debtor who has made a fraudulent conveyance must be deemed, as to the creditors, to have an interest in the property which passes to the assignee: *Schaller v. Wright*, 70-667.

While an assignee cannot, either at the common law or under the statute, set aside a conveyance made by his debtor on the ground of fraud, he may defeat the enforcement of a mortgage against the realty of the assignor, the title of which is in the assignee, by showing that the mortgage is a mere sham, given without consideration and in fraud of creditors: *Sandwich Mfg. Co. v. Wright*, 22 Fed. Rep., 631; *Rumsey v. Town*, 20 Fed. Rep., 558.

Under the Code a deed of assignment for the benefit of creditors does not confer upon the assignee the right to enforce special equities on behalf of one or more creditors, so as to deprive a creditor of his right to assert, in his own name and right, such equity against a third party: *Rumsey v. Town*, 20 Fed. Rep., 558.

An assignee holding under a deed of assignment cannot deny and defend against the validity of chattel mortgages which, though not recorded, yet represent a valid subsisting indebtedness, in the interest of general creditors. Such right is confined to creditors having a lien upon the property, or having a judgment at law with a right to perfect their lien upon property they may discover: *Simon v. Openheimer*, 20 Fed. Rep., 553.

3295. Inventory and appraisement; removal of assignee. 2118; 21 G. A., ch. 115, § 1. The assignee shall also forthwith file with the clerk of the district [or circuit] court of the county where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath, so far as the same has come to his knowledge, and shall, then and there, enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment. *Provided*, however, that on application of two-thirds of the creditors, in number and amount, the court shall remove the assignee and appoint in his stead a person as assignee approved by the creditors in number and amount as aforesaid; and, when any assignee is removed, he shall immediately turn over to the clerk of the district court, or any person appointed by the court, all money and property of the estate in his hands. [R., § 1830.]

If an assignee take possession of property it is evidence of an acceptance, and he may bring action in relation to such property even before filing an inventory and bond: *Price v. Parker*, 11-144.

Where the assignee filed a valuation, signed and sworn to by other disinterested persons, instead of by himself as required by statute, *held*, that such inventory should not be treated as a nullity: *Drain v. Mickel*, 8-438.

The court can appoint another assignee only where the one appointed refuses to serve: *Ibid.*

Jurisdiction of proceedings to test the validity of an assignment is not exclusive in the court in which the assignee files his bond and inventory, but exists in any court, state or federal, of otherwise competent jurisdiction: *Kohn v. Ryan*, 31 Fed. Rep., 636.

3296. Notice. 2119. The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks: and shall also forthwith send a notice by mail to each creditor of whom he shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims, under oath, to him within three months thereafter. [R., § 1829.]

The assignee should give the creditor sufficient opportunity to present proof of his claim within the time allowed, but that duty is discharged if the assignee is at his usual place of business during business hours and receives all proofs of claims presented to him during that time. If the plaintiff relies upon the mail for the delivery of his proof of claim he does so at his own risk, and the receipt of the letter containing such proof of claim directed to the assignee at the postoffice of the latter after business hours, and not received by or delivered to him until the next day and after expiration of the time for filing claims, will not entitle the creditor to have his claim allowed in the same class with those filed within proper time: *Conlee Lumber Co. v. Meyer*, 74-403.

A creditor under a general assignment, who has a special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he has such special lien: *Wurtz v. Hart*, 15-515.

The provisions as to requiring security for costs from a non-resident plaintiff are not applicable in proceedings under an assignment for the benefit of creditors: *Meyer v. Evans*, 66-179.

3297. List of creditors. 2120. At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court, a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims, and also an affidavit of publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing duly verified. [R., § 1831.]

The report and proof by assignee of the service of notice can be taken notice of by the court without its being formally introduced in evidence: *Conlee Lumber Co. v. Meyer*, 74-403.

3298. Objection to claims. 2121. Any person interested may appear within three months after filing such report, and file with said clerk any ex-

ceptions to the claim or demand of any creditor; and the clerk shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice, returnable at the next term; and the said court shall at such term proceed to hear the proofs and allegations of the parties in the premises, and shall render such judgment thereon as shall be just, and may allow a trial by jury thereon. R., § 1832.]

There being no provision for pleadings in contesting claims, further than exceptions by creditors objecting to claims of other creditors, it is quite probable that no further pleadings are required by the statute: *In re Assignment of Guyer*, 69–585.

The court having jurisdiction of proceedings in an assignment for the benefit of creditors has authority to determine priority among creditors, and a party objecting to the right of the creditor should make such objection in that proceeding. An order of the court as to the jurisdiction of the property will be an adjudication, binding in a collateral proceeding, although erroneous: *Perry v. Murray*, 55–416.

An original and independent action in equity may be brought in the same or another court for the purpose of determining equities and priorities of the creditors to the fund in court under the assignment. Therefore, *held*, that where the validity of a chattel mortgage was involved in determining the rights of creditors, an independent action with reference thereto might be brought in another court and transferred to a federal court, and that the adjudication of the federal court on such question, of which it had jurisdiction, would be final: *Knoxville Nat. Bank v. Hanirick*, 67–583.

The fact that a deed of assignment has been executed, and that the assignee gives bond and files the proper schedules and inventory in the state court, does not *ipso facto* confer upon that court the exclusive jurisdiction to hear and determine all questions existing between the creditors of the assignor: *Rumsey v. Town*, 20 Fed. Rep., 558.

Any one whose legal rights are affected thereby may contest the validity of an assignment, and to that end invoke the aid of the state courts; and if he is a citizen of another state, and the amount exceeds five hundred dollars, he may invoke the aid of the United States circuit court: *Fleisher v. Greenwald*, 20 Fed. Rep., 547.

An order made by a state court in an action of replevin, wherein it was found that several mortgages were valid liens upon the property, paramount to the assignment, and entitled to be first paid out of the proceeds realized from a stock of goods, *held* not an adjudication binding on the complainants in the federal court who were not parties to the proceedings in the state court, whose right to contest the validity of the mortgages was not derived from the deed of assignment, and was not represented by the assignee: *Ibid.*; *Rumsey v. Town*, 20 Fed Rep., 565.

An order made by a court having control of assignment proceedings, approving payment of a mortgage debt by the assignee, is not an adjudication of the validity of the mortgage as against creditors not appearing in the assignment proceedings, and whose rights, as against the mortgage, are not conferred by the deed of assignment: *Rumsey v. Town*, 20 Fed. Rep., 558.

3299. Dividends; account; compensation. 2122. If no exception be made to the claim of any creditor, or if the same have been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims, and as soon as may be, to render a final account of said trust to said court, who may allow such commissions to said assignee in the final settlement as may be considered just and right. [R., § 1833.]

3300. Claim for services. 20 G. A., ch. 124, § 1. Upon making order for the distribution of the assets in the hands of the assignee of an insolvent, as provided in section two thousand one hundred and twenty-two of the code, [§ 3299], the court shall order to be paid in full, as a preferred claim, the earnings of any creditor for his personal services rendered to the assignor at any time within ninety days next preceding the execution of the assignment.

3301. Unclaimed dividends. 20 G. A., ch. 124, § 2. If upon the making of the final dividend to the creditors of the estate of an insolvent by the assignee, he shall be unable, after proper efforts, to ascertain the place of residence of any creditor, or any person who is authorized to receive the dividend due such creditor, he shall report the same to the court, with evidence showing diligent attempt to find the creditor, or person authorized to receive the dividend. Whereupon the court may, in its discretion, order the distribution of the unclaimed dividend among the other creditors.

3302. Reports; settlement. 2123; 21 G. A., ch. 115, § 2. The assignee shall at all times be subject to the order and supervision of the court or judge, and the said court or judge may, by citation and attachment, compel the as-

signee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter. The assignee shall dispose of all personal property, and divide the proceeds of the same among the creditors, as they may be entitled thereto, within six months of the date of the assignment, and shall dispose of real estate within one year from the date of assignment, and make full settlement at that date unless the court, or judge, for good reason shown, shall extend the time within which such disposition shall be made. [C., §§ 1834, 1842.]

3303. Not void; citation to debtor. 2124. No assignment shall be declared fraudulent or void, for want of any list or inventory as provided in this chapter. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may then and there be inquired of him, and such debtor may then and there be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and amounts due to each, with their places of residence; and may compel the delivery to the assignee of any property or estate embraced in the assignment. [R., § 1835.]

Assignment not void for want of inventory: *Wooster v. Stanfield*, 11-128; *Price v. Parker*, 11-144.

3304. Additional inventory. 2125. The assignee shall, from time to time, file with the clerk of the court, an inventory and valuation of any additional property which may come into his hands under said assignment after the filing of the first inventory, and the clerk may thereupon require him to give additional security. [R., § 1836.]

3305. Claims not due. 2126. Any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest, and all creditors who shall not exhibit their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the court. [R., § 1837.]

Claims entitled to share in the first dividends are only those filed within three months from the first publication of notice: *In re Assignment of Holt*, 45-301.

It is the duty of the assignee to resist the payment of a claim filed after the expiration of three months until the claims filed within that time are fully paid, although no objection or exception to such claim is made by any creditor: *Conlee Lumber Co. v. Meyer*, 74-403.

A claim filed after the expiration of the time allowed cannot share in the divisions of the estate with the claims filed in time, although it is actually presented to the assignee in time to be considered with the other claims: *Ibid.*

Where the claim is not filed within the requisite time after the publication of notice and after the report of the assignee, the creditor cannot participate in the benefits of the assignment, and there is no provision by which such a creditor can have equitable relief from the bar thus created: *Ibid.*; *McKindley v. Nourse*, 67-118.

3306. Sale of property. 2127. Any assignee as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of such assignee everything belonging or appertaining to said estate, and generally do whatsoever the debtor might have done in the premises; but no sale of real estate belonging to said trust shall be made without notice, published as in case of sales of real estate on execution, unless the court shall order and direct otherwise. [R., § 1838.]

The sale of real property by an assignee is a judicial sale, and cuts off contingent right of dower in the property: *Stidger v. Evans*, 64-91.

Where defendants had foreclosed a chattel mortgage, invalid as to the general creditors of the mortgagor, who had made an assignment for the benefit of his creditors, *held*, that a decree in equity would be rendered declaring the mortgage void, and estopping the defend-

ants from any prior right to the proceeds of the sale of the mortgaged property at the suit of a creditor, who, without delay, after the assignment, procured judgment at law against the mortgagor, and brought his action in equity against the mortgagees, although the mortgagees would thereby be deprived of all security for their debt: *Rumsey v. Town*, 20 Fed. Rep., 558

If the assignee procures money for the purpose of paying creditors by a pledge or mortgage of the property assigned, the assignor has no right to complain, provided, as between him and the assignee, such a power under the assignment existed and the proceeds thereof have been properly applied, and it was for the interest of the assignor that the money should be so procured instead of by a sale of the property: *Waterman v. Baldwin*, 68–255.

In general, as to rights of assignee, see notes to § 3294.

3307. Death or failure of assignee. 2128. In case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this chapter, the district [or circuit] court, or any judge thereof, of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust embraced in such assignment; and such person, on giving bond with sureties as required above of the assignee, shall possess all the powers conferred upon such assignee, and shall be subject to all the duties hereby imposed, as fully as though named in the assignment; and in case any security shall be discovered to be insufficient, or, on complaint before the court or judge, it should be made appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee and may appoint others instead; and such person so appointed, on giving bond, shall have full power to execute such duties and to demand and sue for all estate in the hands of the person removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied which he may neglect or refuse to make satisfaction for, from such person and his sureties. [R., § 1839.]

Where the inventory is merely imperfect or defective, the court does not possess the power to appoint another assignee. The statute only contemplates cases where there is such failure as to amount to a refusal to accept: *Drain v. Mickel*, 8–438.

3308. Priority of taxes. 16 G. A., ch. 14, § 1. Hereafter in all assignments of property for the benefit of creditors, whether under chapter seven, of title fourteen, of the code, or at common law, assessments or taxes levied under the laws of the state, including municipal corporations, shall be entitled to priority or preference and be first paid in full.

A tax levied upon personal property, at least if subsequent to the assignment, should be paid by the assignee, rather than allowed to become a lien upon real property as against a mortgagee: *Brooks v. Eighmey*, 53–276.

It is the duty of the assignee, to the extent of the property which comes into his hands, to devote the same to the payment of taxes, subject possibly to the payment of expenses of executing the trust. No claim for taxes is required to be filed, nor need any demand be made. The assignee must, at his peril, inquire whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Albert*, 60–421.

Under this provision, although its primary object is the protection of the public revenue, it would doubtless be the duty of the assignee to protect the purchaser of the property of the estate against taxes levied upon it before the sale. It would also be his duty to protect the mortgagee of real estate against taxes upon other property of the estate which under the law have become a lien upon the mortgaged property. But it clearly would be competent to sell the property subject to the lien of the taxes: *Brown v. Kiene*, 72–342.

This statute does not apply to property in the hands of a receiver: *Howard County v. Strother*, 71–683.

CHAPTER 8.

OF MECHANICS' LIENS.

[Secs. 2129 to 2146 are repealed by the following act:]

3309. Repealing clause. 16 G. A., ch. 100, § 1. Chapter eight, of title fourteen of the code, titled "Of Mechanics' Liens," is hereby repealed; *provided*, that this repeal shall not *effect* [affect] any contract already made, executed, or executory, or impair any right whatever, arising under the law hereby repealed.

Liens arising prior to the taking effect of this act must be enforced under the law as it then stood: *Brodt v. Rohkar*, 48–36; *Conrad v. Starr*, 50–470.

3310. Collateral security. 16 G. A., ch. 100, § 2. No person shall be entitled to a mechanic's lien, who, at the time of executing or making the contract for furnishing material or performing labor, as hereinafter provided, or during the progress of the work, erection, building or other improvement, shall take any collateral security on such contract. But after the completion of such work, and when the contractor or other person shall have become entitled to claim, or have a lien, the taking collateral or other security shall not affect the right to such mechanic's lien, unless such new security shall be by express agreement given and received in lieu of the mechanic's lien. [C., '73, § 2129; R., § 1845; C., '51, § 1009.]

Collateral security may be a separate obligation guarantying the performance of a contract, or a transfer of property or other contracts to insure such performance; but the contract, promise or property must have been intended and accepted as collateral security: *Mervin v. Sherman*, 9–331.

Taking a mortgage on the same property upon which the lien is claimed will not defeat the right to a lien, unless it appears to have been the intention to look to such security and not to the lien: *Gilcrest v. Gottschalk*, 39–311; *Hale v. Burlington, C. R. & N. R. Co.*, 2 McCrary, 558.

Nor will the taking of a promissory note, in the absence of an express agreement to the contrary, have that effect: *Ibid.*; *Greene v. Ely*, 2 G. Gr., 503; *Mix v. Ely*, 2 G. Gr., 513; *Logan v. Attix*, 7–77.

But if the note be actually negotiated, the lien will be lost: *Scott v. Ward*, 4 G. Gr., 112.

The mere attempt, however, to negotiate such note will not discharge or waive the lien: *Hawley v. Warde*, 4 G. Gr., 36.

Where the person entitled to a lien takes a negotiable note for the amount of his claim and negotiates it, but upon its dishonor is compelled, as indorser, to take it up, he may enforce his original right to a lien: *German Bank v. Schloth*, 59–316.

The acceptance of bonds of a railway company, secured by a mortgage upon a branch line covering rolling stock, is a waiver of a mechanic's lien for the construction of such branch line: *Hale v. Burlington, C. R. & N. R. Co.*, 2 McCrary, 558.

Where one who holds a mechanic's lien participates by petition of intervention in a foreclosure sale, alleging therein that "no mechanic's lien is claimed," purchasers will be justified in assuming that none will be claimed: *Ibid.*

A mechanic's lien is waived by taking security in the form of a conditional sale, although the instrument is not recorded so as to be valid as to creditors or purchasers: *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570, 580.

Where, in accordance with stipulations in a contract under which machinery was furnished, a sum of money was deposited as security, *held*, that such stipulation, acted upon by the parties, waived a mechanic's lien for such machinery: *Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed. Rep., 170.

Facts in a particular case, *held* to show the taking of collateral security defeating a lien: *Shickle, etc., Iron Co. v. Council Bluffs Water Works Co.*, 33 Fed. Rep., 13.

Provision in a contract for the building of a railroad, that all the money specified should be paid by the citizens of the county through which the road was to be built, *held* not to amount to taking collateral security: *Delaware R. Const. Co. v. Davenport & St. P R. Co.*, 46–406; *Meyer v. Construction Co.*, 100 U. S., 457.

Where a contract was made for the wife owning the land by her husband for the erection of a building, and the contractor took a joint note of the husband and wife, *held*, that this did not constitute taking collateral security such as would waive a lien: *Bissell v. Lewis*, 56–231.

The object of the provision that collateral security shall not be taken until after the completion of the work and the party has become entitled to a lien is doubtless to prevent any one from obtaining a lien who takes security for the amount due or to become due at any time before he completes his contract. Where the material to be furnished by the contract of a person agreeing to furnish material had

all been delivered, *held*, that the taking of collateral security at that time did not waive the lien, although the building remained still incomplete: *Ibid.*

The statutory provision against taking collateral security may be waived by agreement, or the owner of the building may by his acts estop himself from objecting to a lien on that account: *Getchell v. Musgrove*, 54–744.

The fact that a mechanic agrees to take his pay in property will not defeat his right to a lien: *Reiley v. Ward*, 4 G. Gr., 21.

3311. Who may have lien. 16 G. A., ch. 100, § 3. Every mechanic, or other person, who shall do any labor upon, or furnish any materials, machinery, or fixtures for, any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished. [C., '73, § 2130; R., § 1846; C., '51, §§ 981, 1010.]

Under contract with the owner: If there has been no contract with the owner of the land, no lien can attach by virtue of labor done or material furnished in the erection of a building thereon. The amount of interest held by the owner does not seem to be material, but the lien will attach only to such interest: *Redman v. Williamson*, 2–488.

The statute gives no mechanic's lien upon any interest except by virtue of a contract between the mechanic and the owner of such interest, and the acceptance by the owner of land of improvements placed thereon under a contract with a person having no interest therein does not give the right to a lien as against such owner, the improvements having been made for the benefit of the person in possession and not for the benefit of the owner: *Wilkins v. Litchfield*, 69–465.

It is only under contract with the owner that a party can be allowed a lien as an original contractor: *Templin v. Chicago, B. & P. R. Co.*, 73–548.

The contract under which the services were performed or material furnished should be set forth in the petition to enforce the lien: *Logan v. Attix*, 7–77.

It must be shown that the materials for which a lien is claimed were furnished upon a contract especially for the purpose of being used for or about a building; but the particular building for which they were to be used need not be mentioned or understood: *Cotes v. Shorey*, 8–416.

Parol evidence is admissible to show the purpose for which the material was furnished, even where the contract is in writing: *Neilson v. Eastern Iowa R. Co.*, 51–184.

Implied contract: In order to entitle a party furnishing material to a lien it is not necessary that it appear that there was an express contract that the material should be furnished, or that it should be used in the construction of the building or improvement on which the lien is claimed: *Ibid.*

While the work must be performed or the material furnished under a contract it is not necessary that every item should be contemplated and specifically named: *Jones v. Swan*, 21–181; *Stockwell v. Carpenter*, 27–119.

It need not be expressly understood that the mechanic is to have a lien: *Jones v. Swan*, 21–181.

Improvements on wife's land by contract with husband: Where the title to land is in the wife, a mechanic cannot have a lien thereon for material furnished the husband, without the acquiescence of the wife, to erect a building upon such land; and it will not be presumed from the marital relation alone that the husband is authorized to act in the matter as the agent of the wife: *Miller v. Hollingsworth*, 33–224; *S. C.*, 36–163: *Price v. Seydel*, 46–696; *Nelson v. Cover*, 47–250.

A wife's premises cannot be charged with a lien for improvements erected thereon by her husband against her protest. If she knows or has reason to suspect that material is being bought by her husband in her name, it may be her duty to notify the person from whom it is bought that she repudiates the agency, but where the material is bought by her husband in his own name, she is under no obligation to take any action: *Getty v. Tramel*, 67–288.

In such case the person furnishing the material can have no lien upon the improvements: *Ibid.*

If the wife's acquiescence is shown, an equitable lien may be established: *Miller v Hollingsworth*, 36–163.

A subcontractor having no direct contract with the wife on whose property the labor and material are used, and who has not taken the steps required by statute for securing his mechanic's lien, cannot assert an equitable lien against the property of the wife: *Nelson v. Cover*, 47–250.

However, if the material is furnished for the use and benefit of the wife, and at the request of the husband acting as her agent, a lien may be had upon the property of the wife: *Kidd v. Wilson*, 23–464; *Burdick v. Moon*, 24–418.

The property of a married woman will be subject to a mechanic's lien for improvements made under a contract with herself and husband jointly: *Greenough v. Wiggington*, 2 G. Gr., 435.

Where a contract is made for the wife holding the legal title by her husband acting as her agent, a lien may be established as against her property: *Bissell v. Lewis*, 56–231.

In a particular case, *held* that the evidence did not show that the husband was contractor for the erection of the building for the wife on her property, and plaintiff a material-man under such contractor, but rather that plaintiff furnished the material under contract made with the husband and wife jointly or with the husband as agent for the wife: *Rand v. Parker*, 73–396.

Co-tenant: Where defendant had a life estate and a one-third interest in fee, *held*, that he could create a mechanic's lien against the property only to the extent of his right and interest therein: *Conrad v. Starr*, 50–470.

Who deemed owner: A party in possession under contract of purchase, or a bond for a deed, is an "owner," as contemplated by the statute: *Monroe v. West*, 12–119; *Stockwell v. Carpenter*, 27–119.

Proof that defendant contracted for material for the erection of a building, and procured it to be erected or has since its erection used it as a place of residence, is sufficient as against him to constitute *prima facie* evidence of ownership: *Lewis v. Saylors*, 73–504.

Ratification: Facts in a particular case *held* sufficient to show acquiescence in improvements made thereon by contract with another, and the adoption and recognition of his contract for the material as made in behalf of the owner: *Burdick v. Moulton*, 53–761.

Lien upon improvements: Although material furnished for or labor performed upon an improvement upon land, under contract with one having no interest therein nor authority to contract for the owner, will not give any lien upon the land, the right of a lien upon the improvements may exist in such case, and for that purpose it is immaterial whether or not the person with whom the contract was made had any right to improve the land: *Lane v. Snow*, 66–544.

Equitable interest: A mechanic's lien will attach upon an equitable title, and will follow the title into whosesoever hands it may pass, and a mere substitution of another contract for that under which the property is held will not defeat the lien if the new contract was given as evidence of the same rights which were held under the old: *Clark v. Parker*, 58–509.

Extent of lien: A lien which has attached to the land will remain thereon after the materials have been destroyed or removed: *Ibid.*

The lien attaches to the building and not to the material furnished; a purchaser of such material, even with knowledge that it is not paid for, takes free from any lien: *Heaton v. Horr*, 42–187.

A party furnishing material for a building or improvement under contract has a lien for all the material furnished whether used or not: *Neilson v. Iowa Eastern R. Co.*, 51–184; *S. C.*, 51–714.

The rolling stock of a railway is not a part of the realty, and a party furnishing ties for the construction of the road does not acquire any lien upon such rolling stock: *Ibid.* (But the statute now provides otherwise.)

Public buildings or improvements: The provisions of the statute are only intended to apply to property which may be sold on execution, and a mechanic's lien cannot be enforced against public property, such as public buildings, bridges, etc., which are exempt from execution sale under § 4273: *Loring v. Small*, 50–271; *Lewis v. Chickasaw County*, 50–284; *Charnock v. District T'p*, 51–70; *Whiting v. Story County*, 54–81; *Breneman v. Harvey*, 70–479.

It is not proper, where it is attempted to enforce a lien against a public building or improvement, to render a judgment not a lien, to be enforced in the usual way by a tax. The lien can be enforced only in the manner prescribed: *Loring v. Small*, 50–271; *Whiting v. Story County*, 54–81.

As to whether a mechanic's lien can be placed upon the property of a private water company engaged in supplying the inhabitants of a city with water, *quære: Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed. Rep., 170.

As to provisions for enforcing claims of contractors or subcontractors for work or materials on public buildings or bridges, see §§ 3324–3329.

For what improvements or materials: Breaking the sod is not such "improvement upon land" as to entitle the person performing such labor to a mechanic's lien: *Brown v. Wyman*, 56–452.

A person who furnishes and erects lightning-rods attached to a house or other structure is entitled to a mechanic's lien therefor: *Harris v. Schultz*, 64–539.

A mechanic or material-man does not acquire a mechanic's lien upon property by doing work upon and furnishing material for a sidewalk upon a street in front of such property: *Coenen v. Staub*, 74–32.

Where material is furnished for the erection of two buildings, and the person furnishing it is not able to designate what items were sold for one and what for the other, all the material being sold under a single contract for the two buildings, a lien on both buildings for the entire amount may be claimed: *Bowman Lumber Co. v. Newton*, 72–90.

It is not necessary for plaintiff to designate either in his sworn statement of the account or in his petition the particular material which goes into each of two or more buildings for which material is furnished. It is, however, not thereby intended that a person furnishing material will be entitled to a lien upon one building for material which it is shown went into another; all that is intended is that, so far as the question is of any materiality to the defendant, the burden is upon him to show in what building the materials were used: *Lewis v. Saylors*, 73–504.

To whom lien allowed: Proof of performance of labor upon a building is sufficient to entitle a party to a lien; he is not required to show a special agreement that the labor was to be performed about that building. An implied contract will support a lien: *Foerder v. Wesner*, 56–157.

A party should not be denied a lien for labor performed merely from the fact that, in addition to the performance of the labor, he rendered services as overseer of the work: *Foerder v. Wesner*, 56–157.

A laborer employed for days' wages in the construction of a railroad is entitled to a lien

on the road for such wages: *Mornan v. Carroll*, 35–22.

A subcontractor under a subcontractor is also entitled to a lien: *Mears v. Stubbs*, 45–675.

Where a railroad is a unit in every respect except in its construction, a subcontractor who builds only a part of the road has nevertheless a right to a lien on the whole road: *Brooks v. Railway Co.*, 101 U. S., 443.

A creditor is not entitled to a lien for money paid out for the use of a debtor, although embraced in the same account with charges for services rendered: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65–513.

Indebtedness for work or material: Where there was an exchange of property, and one party agreed to build a house for the other as a part of the contract, while the latter undertook to satisfy a mortgage, *held*, that upon failure of the latter to satisfy the mortgage, the former could not claim a mechanic's lien for the building of the house, the indebtedness not being for the work or material, but for failure to perform the contract with reference to the mortgage: *Brown v. Rodocker*, 65–55.

Nature of the interest: A mechanic's lien is an insurable interest: *Carter v. Humboldt F. Ins. Co.*, 12–287.

A mechanic's lien is not an interest in real estate; it is the right to a remedy against the property whereby the real estate may be subjected to a specific lien for the payment of the claim: *Andrews v. Burdick*, 62–714.

3312. Extent of lien. 16 G. A., ch. 100, § 4. The entire land upon which any such building, erection, or other improvement is situated, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in said land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as concerns such buildings, erections and improvements, but the same may be sold to satisfy said lien, and be moved within thirty days after the sale thereof by the purchaser. [C., '73, § 2140; R., § 1854.]

Where defendants, lessees of a mill under verbal lease for five years, put in machinery and fixtures, and afterward gave a chattel mortgage thereon, *held*, that the plaintiffs who furnished such machinery, and filed their statement within proper time, had a mechanic's lien upon such machinery, and were prior to the claims of the chattel mortgagee. Although, as between lessor and lessee, such machinery and fixtures were chattel property, yet in connection with a leasehold interest they were subject to the lien: *Nordyke v. Hawkeye Woolen Mills Co.*, 53–521.

3313. Extent of lien on work of internal improvement. 16 G. A., ch. 100, § 5. And when such material shall have been furnished or labor performed, in the construction, repair, or equipment of any railroad, canal, viaduct, or other similar improvement, the lien therefor shall extend and attach to the erection, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging; all of which, except the easement or right of way, shall constitute the building, erection or improvement provided and mentioned in this statute.

3314. Filing statement. 16 G. A., ch. 100, § 6. Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this statute shall file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, and verified by affidavit. Such verified statement or account must be filed by a principal contractor, within ninety days, and by a subcontractor within thirty days from the date on which the last of the material shall have been furnished, or the last of the labor was performed. But a failure or omission to file the same within the periods last aforesaid, shall not defeat the lien, except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety

days, as the case may be, and before any claim for the lien was filed; *provided*, that where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished, within which to file his claim therefor. [C., '73, § 2137; R., § 1851; 9 G. A., ch. 11.]

What statement sufficient: A simple statement that a sum is due the person claiming a lien is not the "statement or account" required by statute to be filed. It should show the account whereon the demand is founded. The claim should show that the party is entitled to a lien, and the nature of the demand, and the time when it accrued should therefore appear: *Valentine v. Rawson*, 57–179.

It is not required that the name of the owner of the property against which the lien is claimed should be mentioned in the statement. Where the owner had died before the filing of the statement for a lien, *held*, that the statement was sufficient if made out against the estate, though the names of the heirs owning the property were not mentioned: *Welch v. McGrath*, 59–519.

Where the claim shows a contract between a contractor and the owner of property for the building of a house thereon, and the purchase by the contractor of the lumber to be used in building the house and the furnishing of such lumber by the party claiming the lien, such claim sufficiently shows the use of the lumber in building the house: *Ewing v. Folsom*, 67–65.

The statement for the mechanic's lien should contain a bill of particulars: *Greene v. Ely*, 2 G. Gr., 508.

If the bill of particulars is as definite as the circumstances of the case will allow it will be sufficient: *Mix v. Ely*, 2 G. Gr., 513.

If all the items constitute in fact parts of one account, that is, relate to one and the same transaction, respecting which the contract to furnish material was made, they may be included in one statement, although intermediate balances may have been struck in the account: *Lamb v. Hanneman*, 40–41.

One who furnishes material to a contractor to be used in making an improvement may make a claim in a single lien for all the material furnished for a single building, although the work performed by the contractor upon such building may be under different contracts. It would be a great hardship upon a subcontractor to require him to take notice of, and bear in mind at his peril, precisely where, in the construction of a building and use of material, one contract ends and the other begins. In such cases service of notice by subcontractors made within thirty days after the furnishing of the last material is sufficient: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

Application of payments: Where a contractor, indebted to a lumber dealer on two accounts for material furnished for two different buildings on premises of distinct owners, made a payment which was at first applied by the creditor on one account, but afterward charged to the other, *held*, that it not appearing that the first application was made by mistake, the lien under the first account was thereby released to that extent as to the property covered thereby, and was not revived by the subsequent change in the application: *Chicago Lumber Co. v. Woods*, 53–552.

What part of account: Where the account for material amounted to $800 and had been carried along with a reasonable continuity, and afterwards an item of $4.45 was charged more than seven months after the other items, *held*, that such item was not to be deemed a part of the account: *Gilbert v. Tharp*, 72–714.

Sufficiency of affidavit: An affidavit for a mechanic's lien commencing "A. B., agent for C. D., being duly sworn, says that on, etc., he made a parol contract, etc., to furnish material, etc., for which he claims a mechanic's lien," etc., *held* sufficient to support a mechanic's lien in behalf of C. D.: *Lamb v. Hanneman*, 40–41.

Incorrect statement: The party filing the statement for the mechanic's lien should be held to the strictest exercise of good faith, and if it appears that he has included within his statement items of account for which he is not entitled to a lien, for the purpose of securing a lien for such items, his entire claim for the lien should be rejected: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65–513.

Therefore, where items for money expended were included in an account in such way as to make it appear that they were for services rendered, *held*, that the plaintiff was not entitled to a lien, even for services which he had rendered: *Ibid.*

Mistake in description of property: The fact that in the statement a lien is claimed upon a larger tract of land than that owned by the person contracting for the improvement, but including the tract upon which the improvement is made, and owned by the person making the contract, will not defeat the lien as to the property properly subject thereto: *Bissell v Lewis*, 56–231.

A mistake in the description of the property in the account filed is not irremediable, and a lien may still be claimed by filing a new account containing a correct description. The foreclosure of a lien misdescribing the property will not so merge the account but that it may furnish the basis for a claim for a lien upon the property for which the material was furnished: *Gray v. Dunham*, 50–170.

As a failure to file a statement does not defeat a lien except as against purchasers and incumbrancers, such statement, even if filed, will not limit the right of recovery against the person with whom the contract is made: *Neilson v. Iowa Eastern R. Co.*, 51–184.

Where the filing of a statement is not necessary to a lien, the filing of an incorrect statement will not defeat it: *Bissell v. Lewis*, 56–231.

The description of the property to be charged as "thirty lengths of corn-cribbing at Mills Station," *held* too indefinite: *Roose v. Billingsly*, 74–51.

Who may file statement: The holder of a claim which is in his hands may constitute the foundation of a lien, or one bound by a contract to furnish labor or material, may do all things necessary to enforce the lien allowed by law; therefore, *held*, that where a firm made a contract to furnish, and did furnish, materials, and a part of the members of the firm afterward transferred their interest in the partnership to others, one of such members had authority, in the name of the original firm, to perfect the lien for the material so furnished, and the assignee of such firm might enforce the lien thus perfected: *German Bank v. Schloth*, 59-316.

An assignee for the benefit of creditors may enforce a mechanic's lien existing in favor of the assignor: *Ibid.*

Whether a statement filed subsequently to the assignment of the claim, but in the name of the assignor, would be sufficient, *quære: Ford v. Independent Dist.*, 46-294.

Method of filing: Under the statutory provisions for filing, requiring the clerk to make an abstract of the statement in a book by him to be kept for that purpose and properly indexed, *held*, that the requirement that the clerk's abstract shall contain the name of the person against whose property the lien was filed amounts to no more than that it shall contain the name of the person against whom the account is filed and the claim for the lien is made, and it does not require, by inference, that the claim shall state the name of the owner of the property against whom the lien is claimed: *Welch v. McGrath*, 59-519.

Therefore, *held*, that where the person against whom the lien existed was dead the claim for a lien was properly filed against the administrator of the estate without naming the heirs who were the owners of the property against whom it was sought to establish a lien: *Ibid.*

Where it appears by the signature of the clerk that the claim is filed, and by a jurat to the claim that the person thus filing it is the clerk of the district court, it is sufficiently shown that the claim is filed in the district court: *Ewing v. Folsom*, 67-65.

Time for filing statement: The proviso that, where a lien is claimed upon a railway, a subcontractor shall have sixty days from the last day of the month in which the labor was performed or material furnished in which to file his claim for a lien, means that he shall have sixty days from the last day of the calendar month: *Sandval v. Ford*, 55-461.

But this distinction between railroad subcontractors and others as to time for filing claims does not release the former from the other provisions of the statute as to the time within which such subcontractors must serve notice upon the owner of the filing of their claims: *Ibid.*

The time for filing statement in order to effect notice is not within ninety days from the time of each item of work done or material furnished, but from the time of completion of the entire contract: *Jones v. Swan*, 21-181.

Where a lien is claimed on the ground that material furnished was used in a particular building within ninety days prior to the time of asserting the lien, such claim cannot be enforced against the purchaser of the property without proof that the material was used in the particular building as claimed: *Roose v. Billingsly*, 74-51.

The statute of limitations begins to run from the expiration of the thirty or ninety days allowed by statute for the filing of the statement for a lien, whether the statement be filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinkley*, 57-757.

Failure to file a statement does not defeat the lien as against the owner: *Kidd v. Wilson*, 23-464; *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570.

An incumbrancer acquiring a lien upon the property within the ninety days allowed for filing a statement for a lien takes subject to the mechanic's lien, though no statement thereof has been previously filed; until the expiration of the ninety days no record notice of a mechanic's lien is necessary: *Evans v. Tripp*, 35-371; *Lamb v. Hanneman*, 40-41.

Judgment lien: Failure to file a statement for a lien within the ninety days allowed by statute will not defeat the lien as against a judgment creditor whose judgment was rendered after the commencement of the improvement and before the expiration of the ninety days: *Curtis v. Broadwell*, 66-662.

Notice: By failing to file his claim within the time provided by statute, the claimant loses his preference or priority over a purchaser or incumbrancer whose rights have accrued subsequently to the time within which the statement is directed to be filed, and who had no actual notice of the claim: *Noel v. Temple*, 12-276.

Notice to officer of corporation: A corporation purchasing a railroad at a foreclosure sale, *held* not to be affected with a notice of the claim for labor and material furnished prior to the mortgage under which the sale was had, but which had not been filed as a lien, although such claim appeared on the books of the receiver of the road, who afterwards became an officer of the corporation purchasing: *Bear v. Burlington, C. R. & M. R. Co.*, 48-619.

Burden of proof: As between a party claiming a mechanic's lien, who has not filed his statement until after the expiration of the ninety days allowed therefor, and a prior mortgagee whose mortgage was not executed until after the expiration of such period, the burden of proving that the mortgagee had notice at the time of taking his mortgage of the existence of a mechanic's lien is upon the person claiming such lien: *Hoskins v. Carter*, 66-638.

So a person claiming a mechanic's lien upon an open account has the burden of showing that his statement was filed within the ninety days, or that the mortgagee taking his mortgage after the expiration of the ninety days had notice at the time of the execution of the mortgage: *Ibid.*

Purchaser for value: A lien filed after the expiration of the ninety days cannot be enforced against one purchasing after the ninety days without notice, even though he has made no actual payment, but only executed his note for the purchase price: *Weston v. Dunlap*, 50-183.

3315. Notice by subcontractor. 16 G. A., ch. 100, § 7. To preserve his lien as against the owner and to prevent payments by the latter to the principal contractor or to intermediate subcontractors, but for no other purpose, the subcontractor must, within the thirty days as provided in section six [§ 3314] serve upon such owner, his agent or trustee, a written notice of the filing of said claim, which notices may be served by any sheriff or constable, or other person; and if the party to be served, his agent or trustee, is out of the county wherein the property is situated a return of that fact by the officers shall constitute sufficient service from and after it is filed with the clerk. But the lien of the subcontractor may at any time be vacated and discharged by the owner, contractor, or intermediate subcontractor, *filed* [filing] with the clerk of the said district court a bond in twice the amount of the sum for which the mechanic's lien is claimed and filed with two or more sureties to be approved by the clerk, conditioned for the payment of any sum for which the mechanic may obtain judgment upon the demand of which such statement or account has been filed. But if no claim for a lien is filed within the periods hereinbefore provided and the notice thereof is not served, or if such thing being done and the bond as above provided is filed, then the owner or contractor may thereafter proceed, make payments and adjust their claims, without regard to the lien of the subcontractor, and nothing in this act contained shall be construed to require the owner to pay a greater amount or in any other manner, or at earlier dates than those provided in his contract. But the liens created by this act are for the full enforcement thereof for the use and benefit of the holders of said liens. [C., '73, § 2131; 15 G. A., ch. 49; 13 G. A., ch. 140, § 1.]

The provisions of the statutes requiring notice to the owner by the subcontractor are intended to protect the owner from the payment of any sum greater than that contemplated in his contract. The lien of the subcontractor can be enforced against any sum due from the owner at the time of service of the notice provided for or thereafter becoming due under the contract: *Cutler v. McCormick*, 48–406; *Brooks v. Railway Co.*, 101 U. S., 443.

Such notice should be in writing: *Jeure v. Perkins*, 29–262.

A laborer employed by a subcontractor cannot enforce a lien except so far as the contractor may be indebted to the subcontractor, even though the owner be still indebted to the contractor: *Utter v. Crane*, 37–631.

In the absence of an averment that something is due from the subcontractor to the laborer claiming a lien, the latter cannot recover in an action to foreclose his mechanic's lien as against the owner: *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 62–280.

The owner cannot be made liable to a subcontractor in any other manner than he is, under his contract, liable to the principal contractor, and if, by his contract, the indebtedness is to be satisfied in property, the subcontractor is bound by such arrangement: *Kilbourne v. Jennings*, 38–533.

Where the contract between the owner and contractor stipulates that a claim by the owner against the contractor for professional services shall be accepted as part payment on such contract, such agreement is binding upon the subcontractor: *Ewing v. Folsom*, 67–65.

Where the contractor has the right under his contract to take note and mortgage in part payment of his claim, and does so, the subcontractor cannot claim a lien inconsistent with the exercise of such a right by the contractor: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

If the principal contractor by the terms of his contract is entitled to compensation in full before the work is completed, and this compensation is fully paid to him before that time, and without any notice of claims for liens, no liens can be enforced against the property owner or the property: *Roland v. Centerville, M. & A. R. Co.*, 61–380; *Nash v. Chicago, M. & St. P. R. Co.*, 62–49.

If a subcontractor stand by and permit the owner to make full payment to the contractor without asserting his claim he will be estopped from afterward setting up a claim for a lien: *Vreeland v. Ellsworth*, 71–317.

The subcontractor is chargeable with notice of the contract between the owner and the principal contractor, and is bound by any payments made, even within the thirty days given him by statute to file his lien, if such payments are made according to the terms of the contract: *Stewart v. Wright*, 52–335.

But when the contract between the owner and contractor provides that subcontractors shall be paid by orders drawn by the contractor on the owner, and the owner knows that subcontractors have furnished material, he is liable for any liens of subcontractors of which he is duly notified before the expiration of the thirty days, although previous to the expiration of that period he has paid the contractor without actual knowledge of the indebtedness of the contractor to such subcontractor: *Winter v. Hudson*, 54–376.

Where an owner seeks to escape liability to a subcontractor of whose claim he has notice within the thirty days, on the ground that,

before notice of such claim, he had settled with such contractor in accordance with the terms of his contract, the question as to whether he is to be protected in having made such settlement with the contractor is determined by whether he could probably, in the exercise of reasonable diligence, have discovered that the subcontractor was entitled to a lien; and where it appeared that the owner knew that the contractor had to buy material, although he did not know from whom he bought it, *held*, that if he might have ascertained that fact from inquiry, he should have done so, and would not be protected: *Gilchrist v. Anderson*, 59–274; *Martin v. Morgan*, 64–270.

It appearing that the owner of property before making the last payment under a contract had knowledge that the contractor had procured the materials used from the plaintiff, *held*, that as such owner could, in the exercise of ordinary care, have obtained knowledge of plaintiff's claim by inquiring whether the material had been paid for, the subcontractor might have his lien for materials furnished: *Fay v. Orison*, 60–136.

The court, liberally construing the statute so as to protect the owner, who in good faith pays the contractor within the thirty days in accordance with the agreement between them, has held that such payment to the contractor, made without knowledge of the claim of the subcontractor, will defeat the lien of the latter; but that if payment is made within the thirty days, with knowledge of the subcontractor's claim, even though such knowledge be merely through verbal notice, the lien of the subcontractor is not defeated: *Andrews v. Burdick*, 62–714.

Delay in the completion of the work under a contract, with acquiescence of the owner, will delay the time of the payment until the work is done and accepted. Where the contract provides for payment at the completion of the work, in case no time is fixed for payment, the price becomes due when the building as contracted is completed and accepted: *Ibid.*

Notwithstanding no notice has been served by the subcontractor before payment under the contract, and within the thirty days, the owner is not justified, if he has knowledge of the labor and material having been furnished by a subcontractor, or has knowledge of facts which should put him upon inquiry in making payment, and he is not thereby relieved from liability to the subcontractor: *Othmer v. Clifton*, 69–656; *Chicago Lumber Co. v. Woodside*, 71–359.

Where payments are made in strict accordance with the contract prior to the filing of the lien by a subcontractor or material-man, or service of notice that a lien is claimed, the owner is not liable for material purchased merely upon knowledge that the contractor had procured material from some person unknown unless it is stipulated in the contract that he has a right to pay liens of subcontractors or material-men: *Fullerton Lumber Co. v. Osborn*, 72–472.

It is immaterial whether such payment is made directly to the contractor or to other subcontractors who might establish liens if they had not been paid: *Ibid.*

After the expiration of the thirty days, if no notice be served upon the owner by a subcontractor, he may, of course, proceed to pay off the contractor, whatever his knowledge may be as to the claims of such subcontractor, for he will be justified in assuming that the right to the lien is waived: *Jones, etc., Lumber Co. v. Murphy*, 64–165.

Where a contractor is under obligation to pay all subcontractors, and the owner has paid such contractor in full according to the contract, a subcontractor who has served no notice of claim for a lien upon the owner until after the settlement and expiration of the time given by statute cannot recover from such owner: *Robinson v. State Ins. Co.*, 55–489.

If the owner is not served with "written notice of the filing of said claim" he is not affected thereby, whatever notice he may have otherwise: *Lounsbury v. Iowa, M. & N. P. R. Co.*, 49–255.

Where a subcontractor undertakes to enforce a lien against the owner he should show in his petition such indebtedness on the part of the owner to the contractor, either at the time the subcontractor's account commenced, or later, as will justify a court in decreeing a lien: *Martin v. Morgan*, 64-270.

Where the contractor gave bond for the discharge of his contract, and the owner paid him in full before the expiration of the time for filing liens by subcontractors, and was afterwards compelled to pay additional sums to satisfy such liens, *held*, that the owner could not recover such additional sums from the sureties on the contractor's bond, for the reason that the owner was guilty of laches in paying the contractor until the time for filing subcontractor's liens had expired: *Lucas County v. Roberts*, 49–159.

A failure to give a copy of the settlement to the owner and contractor at the time of performing the work, as required by a former statute, would not defeat the laborer's lien, the filing of the claim for a lien, which includes a copy of the statement, being sufficient notice to them: *Bundy v. Keokuk & D. M. R. Co.*, 49–207.

Under the same statute, also, *held*, that a lien claimed by a subcontractor upon the making and giving to the owner of his own statement could not be enforced when it appeared that the contractor had not refused to make such statement: *Mears v. Stubbs*, 45–675.

3316. Subcontractor's claim, after thirty days. 16 G. A., ch. 100, § 8. A subcontractor may at any time after the expiration of said thirty days, file his claim for a mechanic's lien, with the clerk of the district court, as hereinbefore provided, and given written notice thereof to the owner, his agent or trustee, as provided in section seven [§ 3315], and from and after the service of such notice his lien shall have the same force and effect, and be prosecuted or vacated by bond, as if filed within the thirty days; but shall be

enforced against the property or upon the bond, if given by the owner only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon the owner, his agent or trustee. But if in such case the bond is given by the contractor or person contracting with the subcontractor filing the claim for a lien, such bond shall be enforced to the full extent of the amount found due the subcontractor. [C., '73, § 2133; 15 G. A., ch. 49; 13 G. A., ch. 140, § 1.]

See notes to preceding section.

3317. Priority. 16 G. A., ch. 100, § 9. The mechanic's lien provided for by this statute shall take priority as follows:

First. As between persons claiming mechanic's liens upon the same property, according to the order of the filing of the statements and accounts therefor.

Second. They shall take priority to all garnishments upon the person of the owner for the contract debt, made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for mechanic's lien.

Third. They shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection or other improvements, or either of them, and to the land upon which they are situated, made subsequent to the commencement of said building, erection or other improvement. *Provided*, that the rights of purchasers, incumbrance[r]s and other persons, who acquire interests in good faith for valuable consideration, and without notice after the expiration of the time for filing claims for liens as provided in section six [§ 3314], shall be prior and paramount to the claims of all contractors or subcontractors, who have not, at the date such rights and interests were acquired, filed their claims for mechanics' liens.

Fourth. The liens for the things aforesaid or the work, including those for additions, repairs and betterments, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which such erection, building, or improvement belongs, or is erected or put. If such material was furnished or labor performed in the erection or construction of an original and independent building, erection, or other improvement commenced since the attaching or execution of such prior lien, incumbrance, or mortgage, the court may in its discretion order and direct such building, erection, or improvement to be separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if in the discretion of the court such building should not be separately sold, the court shall take an account and ascertain the separate values of the land, and the erection, building, or other improvement, and distribute the proceeds of sale so as to secure to the prior mortgage or other lien, priority upon the land, and to the mechanic's lien, priority upon the building, erection, or other improvement. If the material furnished or labor performed was for addition to, repairs of, or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs, or betterments, and, upon the sale of the premises, distribute the proceeds of sale so as to secure to the prior mortgage or lien priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lien priority upon the enhanced value caused by such additions, repairs or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens. [C., '73, §§ 2139-41; R., §§ 1853-5; C., '51, § 981.]

Lien covers entire structure: Liens for material furnished or labor performed in the erection of a building attach in their order upon the whole structure, and not upon the particular part of the work performed or material furnished. So, if machinery is furnished to be attached to and used in the building, the person furnishing it acquires a lien upon the whole improvement, and does not retain a separate lien upon the machinery: *Equitable L. Ins. Co. v. Slye*, 45–615.

Leasehold interest: Where plaintiff furnished machinery to defendant to be attached to and used in connection with real property, of which defendant had possession under a verbal lease for five years, *held*, that plaintiff was entitled to a mechanic's lien on such interest, including the machinery, and might enforce such lien against an incumbrance executed within the ninety days after furnishing the machinery: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53–521.

As to rights of lessor where a lien is sought to be enforced on improvements made by lessee, see *Oswold v. Buckholz*, 13–506, decided under former statutory provisions.

Portion of railway line: Where a contract for material was for a projected line, a part only of which was constructed, and a lien was claimed only on that part, *held*, that the road was not in such sense an entirety as that a lien on that part constructed might not be granted: *Neilson v. Iowa Eastern R. Co.*, 51–184.

Priority over chattel mortgage: Where defendants, lessees of a mill under verbal lease for five years, put in machinery and fixtures, and afterward gave a chattel mortgage thereon, *held*, that the plaintiffs who furnished such machinery, and filed their statement within proper time, had a mechanic's lien upon such machinery, and were prior to the claims of the chattel mortgagee. Although, as between lessor and lessee, such machinery and fixtures were chattel property, yet in connection with a leasehold interest they were subject to the lien: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53–521.

Mortgage: Priority of a mechanic's lien over the lien of a mortgage cannot be maintained unless it appears that the person with whom the contract was made was the owner of the property. Proof of possession alone will not be sufficient: *Dierks v. Walrod*, 66–354.

Interest and attorneys' fees: Where the contract on which a lien is claimed does not provide for interest or attorneys' fees, the parties cannot enter into a contract covering such items which shall be binding upon a mortgage executed after the lien attaches and prior to the making of such supplemental contract: *Bissell v. Lewis*, 56–231.

Vendor's lien: If a party goes into possession of property subject to a vendor's lien, a mechanic's lien for material subsequently furnished for improvements does not take priority of the lien of the vendor: *Logan v. Taylor*, 20–297.

Under a statute giving priority to the mechanic's lien as to the improvements, a vendor's lien for purchase money takes priority as to the land, but as to the building erected is inferior to the mechanic's lien: *Stockwell v. Carpenter*, 27–119.

A mechanic's lien does not acquire priority over a mortgage given in renewal of a vendor's lien held prior to the time that the mechanic's lien accrues: *Thorpe v. Durbon*, 45–192.

Merger of lien: If the holder of a mechanic's lien buys in the property at judicial sale under his judgment on such lien, the lien is not merged so as to render it subordinate to an intervening mortgage: *Delaware R. C. Co. v. Davenport & St. P. R. Co.*, 46–406.

When the lien attaches: The mechanic's lien attaches at the commencement of his work, and the time for notice expires ninety days from the conclusion thereof: *Jones v. Swan*, 21–181: *Delaware R. Const. Co. v. Davenport & St. P. R. Co.*, 46–406, 413.

The commencement of a building is the first work done upon the ground which is made the foundation thereof, and is to form part of the work suitable and necessary for its construction: *Conrad v. Starr*, 50–470.

Priority over liens acquired during progress of work: The mechanic's lien dates from the day that he commences work under his contract, or furnishes material, and attaches for all the work done and material furnished under such contract, whether before or after liens subsequently acquired by third persons, provided the work or delivery was commenced before: *Monroe v. West*, 12–119.

A mechanic's lien may attach under a contract to complete a partially erected building, which shall be superior to a prior mortgage executed upon the premises at a time when the building is in an incomplete condition: *Bissell v. Lewis*, 56–231.

A mechanic's lien has priority over a mortgage which was executed subsequently to the commencement of any building, erection or other improvement, though the particular work for which the lien is claimed was subsequent to such mortgage: *Neilson v. Iowa Eastern R. Co.*, 44–71; *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570; *Myer v. Construction Co.*, 100 U. S., 457; *Brooks v. Railway Co.*, 101 U. S., 443; *Meyer v. Hornby*, 101 U. S., 728.

The statement being filed within ninety days from the furnishing of the last item, the whole being furnished under one contract, a lien accrues binding the property, as against the mortgagee, for all the material furnished under the contract from the time of the furnishing of the first item, and such lien will be prior to a mortgage executed after the furnishing of the first item: *Iowa Mortgage Co. v. Shanquest*, 70–124.

Where one mortgage was executed less than ninety days after the last item, and a subsequent mortgage more than ninety days after such item, the last mortgage was held to be the first lien to the extent of the mechanic's lien, the measure of the rights of the first mortgage being a lien upon the property after the satisfaction of the mechanic's lien: *Gilbert v. Tharp*, 72–714.

Lien upon improvements: Under the provision that the lien should attach to the building, erection or improvement for which they were furnished or done, in preference to

any prior lien or incumbrance upon the land upon which the same was erected or put, and that the person enforcing the lien might have the building, erection, or other improvement sold under execution, *held*, that the word improvement there used referred to an independent erection upon the land, and not to an addition or betterment of the building, and that the lien for such addition or betterment was subject to a prior mortgage on the premises: *Getchell v. Allen*, 34-559; *O'Brien v. Pettis*, 42-293.

And that a party furnishing material, etc., for the repair and enlargement of a building would get a lien subject to any liens already existing thereon, even though but little of the original building remained: *Equitable L. Ins. Co. v. Slye*, 45-615.

Under the same statute, *held*, that a mechanic's lien for repairs, such as new piers and abutments in a railroad bridge, which become integral parts of the road, would not attach to such bridge, piers, etc., as prior to a mortgage previously given on the whole road: *Bear v. Burlington, C. R. & M. R. Co.*, 48-619.

If a prior mortgage applies to land, rolling stock and buildings of a railroad, any lien of mechanics or material-men for repairs attaches from the time repairs are begun, and attaches against the prior mortgagee at the same time as against the owner. Repairs on a completed railroad do not give rise to a lien which will override a prior mortgage: *Taylor v. Burlington, C. R. & M. R. Co.*, 4 Dillon, 570 and 579.

The statutory provision for a lien upon improvements superior to the lien of a prior mortgage upon the land has no application where the mortgage has been foreclosed and the premises sold thereunder before the materials for which the lien is claimed have been furnished; in such case the statutory right to redeem is the only right which can be enforced: *Shepardson v. Johnson*, 60-239.

The provision giving priority of lien as to improvements, *held* not to be limited in its application to cases where improvements are made by a tenant on leased premises: *Stockwell v. Carpenter*, 27-119.

Sale and removal of improvements: Under a statute providing for enforcing the priority of a mechanic's lien as to the improvement by sale and removal, that is the only method allowed, and if the nature of the improvement is such that it cannot be removed, the lien of the mechanic must be postponed to that of prior incumbrances upon the land: *Conrad v. Starr*, 50-470.

Where, in a suit to foreclose a mortgage, certain parties were made defendants who had mechanics' liens upon buildings erected subsequently to the giving of the mortgage, and where the rights of all the parties accrued under the Revision, by which the rights of the holder of a mechanic's lien were to be determined by an action at law, *held*, that it was erroneous to decree a sale of the land and buildings together and the payment of a certain portion of the proceeds to the holders of the mechanics' liens. It seems that the same would be true under the Code, although the proceedings to enforce a mechanic's lien are now to be brought in equity: *Brodt v. Rohkar*, 48-36.

One asking the sale and removal of a building has the burden of showing that it would be proper, in view of all the circumstances: *Miller v. Seal*, 71-392.

Where the mechanic's lien attaches to the land as well as the building, and there is no prior incumbrance, it is the right of the owner to have the whole property sold for the satisfaction of the debt so that he may have opportunity of redeeming as in other cases of sale of real property, and it is error in such case to order the sale of the building alone, and its removal from the premises: *Early v. Burt*, 68-716.

Where a party had two liens, one prior and the other equal to a lien held by another, and foreclosed, making the other lienholder a party, and it was decreed that the plaintiff should take the property, if not redeemed, subject to the other lien, *held*, that the other lienholder should have the same right to redeem, and for the same time, as if not made a party, and that the latter had not a right to elect, instead of redeeming, to claim a proportionate share of the amount for which the property was sold above the amount of the first lien, the pleadings not being framed with a view to such relief: *Phelps v. Pope*, 53-691.

Sale upon execution against a lot and the building thereon, under a judgment on a mechanic's lien, *held* improper where the lien was upon building alone: *Wilson v. Reuter*, 29-176

Apportionment: If the premises do not sell for more than enough to pay for the prior mortgage or other lien, the accounting or distribution of proceeds of sale is not required, and the entire proceeds are to be applied to the prior lien: *German Bank v. Schloth*, 59-316; *Miller v. Seal*, 71-392.

Were it not for the provision giving the mechanic's lien priority as to the improvement, and providing for an apportionment of the proceeds, where the court does not deem it expedient to allow the removal of the building or improvement, a prior mortgage would prevail in all cases against a subsequent mechanic's lien for buildings or improvements, which become a part of the realty, under the plain language of the statute. The same rule applies alike to improvements, betterments or additions to buildings, and to new and independent structures, and if the amount for which the property sells does not exceed the amount of the lien of the prior mortgage, no apportionment between the mortgagee and the holder of a mechanic's lien is required: *Curtis v. Broadwell*, 66-662.

In a case where the statute provided for enforcement of the mechanic's lien as a superior claim on the improvement as against a prior mortgage upon the land only by removal of the improvement, *held*, that it was error to decree the sale of the property as an entirety and the apportionment of the proceeds: *First Nat. Bank v. Elmore*, 52-541.

3318. Definition of "owner." 16 G. A., ch. 100, § 10. Every person for whose immediate use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians of minors,

or other persons, shall be included in the word "owner" thereof. [C., '73, § 2144; R., § 1866; C., '51, § 982.]

A party in possession under contract of purchase, or a bond for a deed, is an "owner" as here contemplated: *Monroe v. West*, 12–119; *Stockwell v. Carpenter*, 37–119. And see notes to § 3311.

3319. Definition of "subcontractor." 16 G. A., ch. 100, § 11. All persons furnishing things or doing work provided for by this act shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee. [C., '73, § 2146; R., § 1871.]

A laborer employed by a subcontractor, when the latter has been paid in full by the contractor, cannot enforce a lien against the owner, although such owner be still indebted to the contractor. The rights of the parties in such cases are the same as though the subcontractor had contracted directly with the owner: *Utter v. Crane*, 37–631.

3320. Lien; how enforced. 16 G. A., ch. 100, § 12. Any person having filed a claim for a lien by virtue of this chapter, may at once bring suit to enforce the same, or upon any bond given in lieu thereof, in the district [or circuit] court of the county wherein the property is situated. [C., '73, § 2142; R., § 1856; 15 G. A., ch. 44.]

Foreclosure; petition: A mechanic's lien should not be decreed where the pleadings contain no averment that plaintiff furnished material or performed work for or upon the improvement, or that anything is due: *Roberts v. Campbell*, 53–675.

Redemption: A party who is entitled to a lien at the time of the foreclosure of a previous lien, and is not made party to such foreclosure, may maintain an equitable action to redeem from such prior lien; and this is true although the claim for a lien be not filed before the bringing of the action to foreclose the prior lien. So *held* where the action to foreclose was brought within the ninety days in which the mechanic might have filed his lien, and his lien was afterward filed within the ninety days: *Jones v. Hartsock*, 42–147.

Joinder of actions: It is improper in an action on a promissory note to allow an amendment joining therewith an action to foreclose a mechanic's lien, and in such case plaintiff may be required to elect on which cause of action he will proceed, or on his failure to do so the amendment may be stricken from the files: *Sweetzer v. Harwick*, 67–488.

Parties: Where the owner of property on which there is a mechanic's lien conveys it, taking a mortgage to secure the purchase money, and dies, his administrator and not the heir is the proper party defendant to a proceeding to enforce the lien. Where suit was brought to enforce a mechanic's lien against property which had been conveyed by the owner subject to the lien, and a mortgage was taken for the purchase money, the administrator of the grantor, being party defendant, *held*, that judgment in that action would estop such administrator from selling the property under a judgment of foreclosure of the junior mortgage, he having failed to assert the rights of a mortgagee in the action enforcing the mechanic's lien: *Shields v. Keys*, 24–298.

The owner of the property is a necessary party to an action to foreclose a mechanic's lien: *Keller v. Tracy*, 11–530.

The principal contractor is a necessary defendant in an action by subcontractor against owner: *Vreeland v. Ellsworth*, 71–347.

In an action to foreclose a mechanic's lien against the mains, etc., of a water company, the city is a necessary party: *Harrison, etc., Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed. Rep., 170.

Where, as in the above case, the contract was made with a construction company, and assigned to the water company, *held*, that the construction company was not a necessary party: *Ibid.*

Where the holder of a lien prior to the mechanic's lien was made a party to the foreclosure thereof, *held*, that plaintiff should have been required to pay off such prior lien free from costs before proceeding with the sale of the property, and in the event of failure to pay within a time to be named the lien should have been declared barred: *Millard v. West*, 50–616.

Time for bringing action: Under a statute requiring that action to enforce a mechanic's lien be brought by the person claiming it within thirty days after service upon him of notice by owner or contractor requiring him to so proceed, *held*, that where an attempt to commence action within the thirty days was made, but the steps taken were not sufficient by reason of defect in the notice of the action, another notice served after the expiration of the thirty days, to which defendant appeared, would not constitute a compliance with the statutory requirement, and a lien could not be established in such action: *Jones, etc., Lumber Co. v. Boggs*, 63–589.

Change of statute: Where the statute as to the mode of enforcing mechanics' liens was changed, *held*, that liens arising prior to the change should be enforced in accordance with the previous statute: *Brodt v. Rohkar*, 48–36; *Conrad v. Starr*, 50–470.

Evidence: Where, in the statement and affidavit filed for the purpose of preserving a mechanic's lien, it was alleged that the buildings upon which the labor was performed were situated on certain described lands, and that the person against whom the lien was claimed owned said lands, and in an action to foreclose such lien such allegations were denied, introduction in evidence of the statement

and affidavit without proof that the buildings therein referred to were situated on the land described, or that defendant owned such land, *held* not sufficient to entitle plaintiff to foreclosure of his lien: *Hutton v. Maines*, 68–650.

Evidence in a particular case *held* sufficient to identify the property on which the lien was claimed as that upon which the work for which the lien was claimed was performed: *Pease v. Thompson*, 67–70.

An appeal from the judgment establishing a mechanic's lien and the filing of a *supersedeas* bond do not destroy or impair the lien: *Julien Gas-light Co. v. Hurley*, 11–520.

Limitation of action: A failure to enforce the mechanic's lien until it is barred by the statute of limitations will not defeat the right of the lienholder upon the debt which he has against any person bound therefor: *Black v. Howell*, 56–630.

As to time for bringing action, see § 3734, and notes.

3321. Demand for bringing suit; assignment. 16 G. A., ch. 100, § 13. Upon the written demand of the owner, his agent or contractor, served on the person claiming the lien requiring him to commence suit to enforce such lien, such suit shall be commenced in thirty days thereafter, or the lien shall be forfeited. The mechanics' liens are assignable, and shall follow the assignment of the debt; and where such lien is for personal services, the same shall be exempt from execution, as now provided for such services. [15 G. A., ch. 44.]

Where an attempt to commence action within the thirty days was made, but the notice served was void because not stating the term at which defendant was required to appear, *held*, that another notice served after the expiration of the thirty days, to which defendant appeared, would not constitute a compliance with this section, and a lien could not be established in such action: *Jones, etc., Lumber Co. v. Boggs*, 63–589.

Before the enactment of the statutory provision that the lien shall be tranferable and assignable, it was held that the assignment of the debt alone would not operate to transfer the lien: *First Nat. Bank v. Day*, 52–680.

Under the statutory provision making the lien assignable, it was held that the mere assignment by a subcontractor of an order for one instalment of his claim before the completion of his main contract did not carry with it the right to a lien for such portion: *Merchant v. Ottumwa Water Power Co.*, 54–451.

Under a statute declaring that the lien is assignable and shall follow the assignment of the debt, *held*, that it is the lien which is assignable and follows the debt, and not the mere right to a lien which the mechanic has not yet availed himself of by filing a claim therefor as required by statute: *Brown v. Smith*, 55–31; *Langan v. Sankey*, 55–52.

The drawing of a draft by the holder of a mechanic's lien, upon a person lawfully bound for the payment of the lien, which draft is transferred to a third person and accepted by the drawee, does not constitute an assignment to such third person of the lien: *First Nat. Bank v. Day*, 64–118.

3322. Duty of clerk. 16 G. A., ch. 100, § 14. The clerk of the district court shall indorse upon every account or statement the date of its filing, and make the abstract thereof in a book by him to be kept for that purpose, and properly indexed, containing the date of its filing, the name of the person filing the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the same. [C., '73, § 2138; R., § 1852.]

Under the provisions of Revision, § 1852, similar to this section, *held*, that the requirement that the clerk's abstract shall contain the name of the person against whose property the lien was filed really amounts to no more than that it shall contain the name of the person against whom the account was filed and the claim for lien was made, and that it did not require, by inference, the claim should state the name of the owner of the property against which the lien was claimed. Therefore, *held*, that where the person against whom the claim existed was dead, the claim for a lien was properly filed as against the administrator of his estate, without naming the heirs, who were owners of the property against which it was sought to establish the lien: *Welch v. McGraff*, 59–519.

3323. Acknowledgment of satisfaction. 16 G. A., ch. 100, § 15. Whenever a lien has been claimed by filing the same in the clerk's office, and is afterwards paid, the creditor shall acknowledge satisfaction thereof upon the proper book in such office, or otherwise, in writing; and if he neglect to do so for ten days after the demand, he shall forfeit and pay twenty-five dollars to the owner or contractor and be liable to any person injured, to the extent of his injury. [C., '73, § 2145; R., §§ 1867-9.]

LIENS UPON PROPERTY OF POLITICAL CORPORATIONS.

3324. By bondholder. 15 G. A., ch. 23, § 1. Where a corporation has issued bonds in payment of an indebtedness exceeding five per centum on the value of the taxable property of such corporation for labor upon, and materials furnished in the erection and furnishing a building and making improvements for such corporation, the holders of said bonds or any of them, including the assignees thereof, shall have a lien upon such building and furniture and fixtures therein, and upon the land of such corporation on which such building and improvements are situated to the amount of such indebtedness.

3325. Enforcement of lien. 15 G. A., ch. 23, § 2. Any person having a lien by virtue of this act may enforce the same by equitable proceedings in any district [or circuit] court of the county where the property is situated, at any time before the maturity of said bonds, as though the action was for the labor done and materials furnished and used in and about the erection of said building. All persons owning such bonds shall be made parties plaintiffs or defendants, and if the names of such owners are unknown they shall be made parties defendant as provided by section twenty-six hundred and twenty-two of the code [§ 3828]. The plaintiff shall set forth and the court shall ascertain and determine the entire amount of the indebtedness on such bonds and order that the property be sold to pay such indebtedness, and the proceeds of the sale shall be paid to the court to be by it distributed pro rata among the holders of such indebtedness; but no money judgment shall be rendered against such corporation, and the clerk shall not pay the proceeds of such sale to the holders of such indebtedness until they deliver him their bonds which shall be by him canceled.

This act is unconstitutional as making the corporations referred to liable in an amount exceeding the limit of indebtedness fixed by Const., art. 11, § 3: *Mosher v. Independent School Dist.*, 44–122.

PUBLIC BUILDINGS OR BRIDGES.

3326. Claim of subcontractor. 20 G. A., ch. 179, § 1. Every mechanic, laborer or other person who as subcontractor shall perform labor upon, or furnish materials for the construction of any public building or bridge or other improvement not belonging to the state, shall have a valid claim against the public corporation constructing such building, bridge or other improvement for the value of such services and material, in an amount not in excess of the contract price to be paid for the building, bridge or other improvement, nor shall any such corporation be required to pay any such claim, at any time before, or in any manner different from that provided in the principal contract.

3327. How made. 20 G. A., ch. 179, § 2. Such claim shall be made by filing with the public officer through whose order the payment is to be made, an itemized and sworn statement of the demand within thirty days after the performance of the last labor, or the furnishing of the last portion of the material, and claims shall have priority in the order in which they shall be filed.

There is no proceeding authorized for subjecting the indebtedness of the county to the contractor to the claim of the subcontractor or laborer for work done upon a county building or bridge under the contract: *Breneman v. Harvey*, 70–479.

Under this section, *held*, that a statement filed after the expiration of thirty days would not entitle the party filing it to any lien: *Ibid.*

3328. How adjudicated. 20 G. A., ch. 179, § 3. Any party in interest may cause the adjudication as to the amount, validity, priority and mode and time of payment of such claim by equitable proceedings in any court having jurisdiction. In such case the court may assess a reasonable sum to be taxed as attorney's fees against the party failing in such action in favor of such corporation.

3329. Release of claim. 20 G. A., ch. 179, § 4. The contractor may at any time release such claim by filing with the treasurer of such corporation a bond, to such corporation, for the benefit of such claimants in sufficient penalty with sureties to be approved by such treasurer, conditioned for the payment of any sum which may be found due such claimant. And such contractor may prevent the filing of such claim by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims. Suit may be brought on said bond by any claimant within one year after the cause of action accrues, and judgment shall be rendered against the principal and sureties for any amount due said claimant.

CHAPTER 9.

OF LIMITED PARTNERSHIP.

3330. Authorized. 2147. Limited partnerships for the transaction of any lawful business within the state, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein described. [R., § 1874; 9 G. A., ch. 128.]

3331. General and special partners. 2148. Such partnerships may consist of one or more persons who shall be called general partners, and who shall be responsible as general partners; and of one or more persons who shall contribute in actual cash a specific sum as capital who shall be called special partners, and shall not be liable for the debts of the partnership beyond the funds so contributed. [R., § 1875.]

3332. Powers. 2149. The general partners only shall be authorized to transact business and sign for the partnership, and bind the same. [R., § 1876.]

3333. Certificate signed; what it must contain. 2150. The persons desirous of forming such partnership, shall make and severally sign a certificate, which shall contain:

1. The name or firm under which such partnership is to be conducted;
2. The general nature of the business intended to be transacted;
3. The names of all general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence;
4. The amount of capital which each special partner shall have contributed to the common stock;
5. The period at which the partnership is to commence, and the period at which it will terminate. [R., § 1877.]

3334. Certificate acknowledged. 2151. The certificate shall be acknowledged by the several persons signing the same, before some one authorized to administer oaths and take acknowledgment of deeds. [R., § 1878.]

3335. Filed and recorded. 2152. The certificate so acknowledged shall be filed in the office of the clerk of the district court of the county in which the principal place of business of the partnership is situated, and shall be recorded by him in a book to be kept for that purpose. If the partnership shall have places of business situated in different counties, a transcript of the certificate, and of the acknowledgment thereof duly certified by the clerk in whose office it shall be filed, shall be filed and recorded in like manner in the office of the clerk of the district court of every such county. [R., § 1879.]

3336. Affidavit attached. 2153. At the time of filing the original certificate, an affidavit of one or more of the general partners shall be attached

thereto, stating that the sums specified in the certificate to have been contributed by each of the special partners, had been actually and in good faith paid in cash. [R., § 1880.]

3337. Effect of false statement. 2154. If any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. [R., § 1881.]

3338. Publication. 2155; 19 G. A., ch. 8. When the certificate and affidavit is filed, there shall be published forthwith, for six weeks, in two newspapers published in the senatorial district in which the business is carried on, to be designated by the clerk of the district court of the county where the certificate and affidavit is filed, a notice which shall contain the facts required to be set out in said certificate; and if such publication is not made, the partnership shall be deemed general. [R., § 1882.]

3339. Affidavits of publication. 2156. Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published, may be filed with the clerk of the district court directing the same, and shall be evidence of the facts therein contained. [R., § 1883.]

3340. Renewals. 2157. Every renewal of such partnership beyond the time originally fixed, shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership. [R., § 1884.]

3341. Alterations. 2158. Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares, or in any other matter specified in the certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration has been made, shall be deemed a general partnership according to the provisions of the last section. [R., § 1885.]

3342. Firm name. 2159. The business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted, without the addition of the word "company" or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner. [R., § 1886.]

3343. Suits against. 2160. Suits in relation to the business of the partnership, may be brought and conducted by and against the general partners in the same manner as if there were no special partners. [R., § 1887.]

3344. Capital not withdrawn. 2161. No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital, and if, after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits. [R., § 1888.]

3345. Capital restored. 2162. If it shall appear that, by the payment of interests or profits to any special partner, the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital, with interest. [R., § 1889.]

3346. Special partners; powers. 2163. A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, at-

torney, or otherwise. If he shall interfere, contrary to these provisions, he shall be deemed a general partner. [R., § 1890.]

3347. Accounting. 2164. The general partners shall be liable to account to each other, and to the special partners. [R., § 1891.]

3348. Penalty for fraud. 2165. Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable, civilly, to the party injured to the extent of his damage, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried. [R., § 1892.]

3349. Assignment. 2166. Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership. [R., § 1893.]

3350. Preferences void. 2167. Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent or in contemplation of insolvency, or after, or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership, and every judgment confessed, lien created, or security given by any such partner under the like circumstances and with the like intent shall be void, as against the creditors of the partnership. [R., § 1894.]

3351. Liability of special partners. 2168. Every special partner who shall violate any provisions of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner. [R., § 1895.]

3352. Insolvency. 2169. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied. [R., § 1896.]

3353. Dissolution. 2170. No dissolution of such partnership by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the office of the clerk of the district court in which the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business. [R., § 1897.]

CHAPTER 10.

OF WAREHOUSEMEN, CARRIERS, KEEPERS OF STOCK AND INNKEEPERS.

3354. Warehouse receipts. 2171. All warehouse receipts, certificates, or other evidences of the deposit of property, issued by any warehouseman, wharfinger, or other persons engaged in storing property for others, shall be, in the hands of the holder thereof, presumptive evidence of title to said property both in law and equity. [10 G. A., ch. 120.]

A warehouse receipt which expresses a contract of bailment cannot be varied by parol evidence of a custom or usage or understanding for the purpose of showing that the intention of the parties was that the transaction should be regarded as a sale: *Marks v. Cass County Mill, etc., Co.*, 43–146; *Sexton v. Graham*, 53–181.

3355. Property in store. 2172. No warehouseman, wharfinger, or other person shall issue any receipt or other voucher for any personal property to any person unless such property is in store and under his control at the time of issuing the receipt or other voucher. [9 G. A., ch. 84, § 1.]

Under this section *held*, that a warehouse receipt for grain issued merely as collateral security for a loan of money was in contravention of the statute and invalid: *Sexton v. Graham*, 53–181.

Whether a warehouse receipt will be valid if the intention in executing it is to create a mere lien, *quære: Lowe v. Young*, 59–364.

3356. Order of holder. 2173. Such property shall remain in store until otherwise ordered by the holder of the receipt or voucher, subject only to the condition thereof, and the contract between the parties as to the time of its remaining in store. [Same, § 2.]

3357. Second receipt. 2174. No such person shall issue any second receipt or voucher for any such property while any former receipt or voucher for the same property, or any part thereof, is outstanding and uncanceled. [Same, § 3.]

3358. Sale or disposal. 2175. No such person shall sell or incumber, ship, transfer, or in any manner remove beyond his immediate control, any personal property for which a receipt or voucher has been given as aforesaid without the written consent of the person holding the same, except to enforce his lien thereon for storage and warehouse charges, as provided for in this chapter. [Same, § 4.]

Where a depositor received only scale tickets showing the amount of grain weighed, but did not receive any warehouse receipt, and the warehouseman shipped away the grain deposited until there was no grain remaining to answer for the claim of the depositor, *held*, that such scale tickets were not warehouse receipts, and that a person taking an assignment of the depositor's claim would be subject to the warehouseman's right to set off against the depositor's claim an indebtedness due from such depositor, which he could not have done under §§ 3354–3359 if receipts had been issued and transferred: *Cathcart v. Snow*, 64–584.

3359. Penalty. 2176. Every person aggrieved by the violation of any of the four sections next preceding, may have and maintain an action at law against the person violating any of the provisions of said sections, before any court of competent jurisdiction, and shall not only recover actual damages, but shall be entitled to exemplary damages which he may have sustained by reason of any such violation, whether such person shall have been convicted under a criminal charge for the same act or not. [Same, § 5.]

SALE AND TRANSFER OF GRAIN.

3360. License; how procured. 21 G. A., ch. 165, § 1. All persons owning and dealing in corn, wheat, oats, rye, barley, and other grain, who may desire to sell, transfer, assign, pledge or hypothecate the same, or any part thereof, by issuing elevator or warehouse receipts, or certificates, are hereby required to file with the recorder of deeds, in the county where any such grain is stored, a written declaration, setting forth the name and residence of such person; that such person designs to own, keep or control a warehouse, elevator, crib, or other place for the storage and keeping of grain, an accurate description of the place and locality where the same is to be kept, owned or controlled, and of the elevator, warehouse, crib, or other place, the dimensions and quality thereof, and the names of any other persons than the one making the declaration, having any interest in the land or structure; such declaration shall be duly acknowledged and filed for record in the same manner as instruments for the conveyance of personal property.

3361. Warehouse receipts; transfer. 21 G. A., ch. 165, § 2. Any person owning, keeping or controlling any such elevator, warehouse, crib, or other place for the storage of grain, and who has filed the declaration as pro-

vided in section one hereof [§ 3360], may execute and issue bills, certificates, or warehouse receipts, for any grain that may actually be in said elevator, warehouse, crib, or other place described in his said declaration, or for any part or quantity thereof, and may hereby sell, convey, assign, transfer, pledge, or incumber said grain, or any part or quantity thereof. But such bill, certificate, or warehouse receipt, shall have written or printed on it a statement that the one issuing it has complied with section one hereof [§ 3360], with the book and page in the recorder's office where the same is recorded, the name and address of the party issuing it, and to whom issued, the location and description of the premises and elevator, warehouse, crib, or other place where the grain is stored, the date of issuance, and the quantity of grain and its kind, and shall be signed by the person issuing it; and bills, certificates and receipts issued in the manner and form aforesaid, shall operate and have the effect to transfer the title to the grain described in them, and vest the same in the holder thereof, and the holders thereof may sell, assign, transfer or otherwise dispose of the same in like manner, without the purchaser, assignee or holder being required to have the same recorded, or give notice to protect himself against existing creditors or subsequent purchasers, as required in other cases where property is left to the possession of the vendor.

3362. Record of receipts and transfers. 21 G. A., ch. 165, § 3. Every person making the declaration and issuing receipts and certificates for grain as herein contemplated, shall keep a regular well-bound book, wherein shall be kept and entered, at the date of issuance thereof, a full account of each and every receipt or certificate, with the date of issuance, number, name of person to whom issued, the quantity and kind of grain covered by such; and such book shall be subject to the inspection and examination of each and every person holding any such receipt or certificate, his agent or attorney. Any person wrongfully altering, changing, or wilfully destroying any such book, shall, upon conviction, be fined not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year; and any person issuing any receipt or certificate, without entering and preserving in such book the required memorandum, shall be fined, upon conviction, not to exceed one hundred dollars for each certificate so issued, and be liable for all damages sustained in consequence of such omission.

3363. Fraudulent receipts. 21 G. A., ch. 165, § 4. Any person who shall knowingly issue any such receipt or certificate for grain, when the grain described is not actually in the elevator, warehouse, crib, or other place mentioned therein, or shall knowingly, with intent to defraud, issue a second receipt or certificate for grain, for which, or part of which, any former receipt or receipts, certificate or certificates, are outstanding, uncanceled and valid and subsisting, shall, besides being liable for all damages caused by such second issue be guilty of felony, and for each offense be fined not to exceed one thousand dollars, and imprisonment in the penitentiary not exceeding five years.

UNCLAIMED PROPERTY — SALE.

3364. Lien for charges. 2177. Personal property transported by, or stored or left with any warehouseman, forwarding and commission merchant, or other depository, express company, or carriers, shall be subject to a lien for the just and lawful charges on the same, and for the transportation, advances, and storage thereof. [13 G. A., ch. 178, § 1.]

As to lien of livery-stable keepers, see §§ 3372, 3373 and notes.

3365. Unclaimed goods. 2178. If any such property shall for six months remain in the possession, unclaimed, of any of the persons named in the preceding section, with the just and legal charges unpaid thereon, the person

having the same in charge or possession shall first give notice to the owner or consignee, if his whereabouts is known, and if not known, shall go before the nearest justice of the peace and make affidavit, stating the time and place where such property was received, the marks or brands by which the same is designated, if any, and, if not, then such other description as may best answer the purpose of indicating what the property is, and shall also state the probable value of the same, and to whom consigned; also the charges paid thereon, accompanied by the original receipt for such charges and by the bill of lading, also the other charges, if any, due and unpaid, and whether the whereabouts of the owner or consignee of such goods is known to the affiant, and if so, whether notice was first given to him as hereinbefore provided; which affidavit shall be filed by the said justice of the peace in his office, for the inspection of any one interested in the same, and he shall also enter in his estray book a statement of the contents of the affidavit, and time and place where and by whom the same was made. [Same, § 2.]

3366. Sale; notice. 2179. If such property still remain unclaimed, and the charges are not paid thereon, then the person in possession of the same, either by himself or his agent, where the probable value does not exceed one hundred dollars, shall advertise the same for sale for the period of fourteen days, by posting five notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; but when the goods exceed the probable value of one hundred dollars, then the length of notice shall be four weeks, and, in addition to the five notices posted, there shall be a publication of the notice of sale for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and if not, then in the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed, or charges unpaid, the agent or party in charge shall sell the same at public auction, between the hours of ten o'clock A. M. and four o'clock P. M., for the highest price the same will bring in cash, which sale may be continued from day to day by public announcement to that effect at the time of adjournment until all the property is sold, and from the proceeds of such sale, the said party who held the same shall take and appropriate a sufficient sum to pay all charges thereon, and all costs and expenses of sale; the cost of advertising to be no more than in the case of a constable or sheriff's sale, and the same to be conducted in a similar manner. [Same, § 3.]

3367. Perishable property. 2180. Fruit, fresh fish, oysters, game, and other perishable property, shall be retained twenty-four hours, and if not claimed within that time and charges paid, after the proper affidavit is made as required by section twenty-one hundred and seventy-eight of this chapter [§ 3365], may be sold either at public or private sale, in the discretion of the party holding the property, for the highest price that the same will bring, and the proceeds of the sale disposed of as above provided. But in both cases, if the owner or consignee of said unclaimed property shall reside in the same city, town or locality in which the same shall be, and shall be known to the agent or party having the same in charge, then personal notice shall be given to said owner or consignee, in writing, that said goods are held subject to his order, on payment of charges, and that unless he pays said charges, and removes the property, the same will be sold as provided by law. [Same, § 4.]

DISPOSITION OF PROCEEDS.

3368. Surplus deposited. 2181. After the charges due and unpaid on the property, and the expenses and costs of sale have been taken out of the proceeds, the excess in the hands of the agent or person who was in charge thereof,

shall be by him forthwith deposited with the county treasurer of the county where the goods were sold, subject to the order of the owner, said ownership being properly authenticated under oath, and such person shall take from such treasurer a receipt for such money, and deposit the same with the county auditor. He shall also file with the county treasurer a schedule of the property, with the name of the consignee or owner, if known, of each piece of property sold, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement as hereinbefore provided, and a full statement of the receipts of the sale, and the amount disbursed to pay charges, costs, and expenses of sale, all of which shall be under the oath of the party or his agent, which schedule, statement, oath, and advertisement shall all be filed and preserved in the treasurer's office, for the inspection of any one interested in the same. [Same, § 5.]

3369. Duty of treasurer. 2182. Should the owner of the property sold not make a demand upon the county treasurer for any money that may be in the treasury to his credit, according to the provisions of this chapter, the sum so unclaimed shall be accounted for by the county treasurer, and placed to the credit of the county in the next subsequent settlement made by the treasurer with the county; and should the money, or any part thereof, remain unclaimed during the period of one year, it shall then be paid into the school fund, to be distributed as other funds may be by law, which may be raised by tax on other property of the county. But nothing herein contained shall be a bar to any legal claimant from prosecuting and proving his claim for such money at any time within ten years, and, the claim being within that period prosecuted and proved, it shall be paid out of the county treasury in which it was originally placed without interest. [Same, § 6.]

COMMON CARRIERS — LIABILITY.

3370. For damages to baggage. 2183. The proprietors of all omnibuses, transfer companies, or other common carriers, doing business within the limits of this state, and their agents, shall be liable for damages occasioned to baggage or other property belonging to travelers, through careless or negligent handling while in possession of said companies or carriers. And in addition to the damages recoverable therefor, the parties recovering the same shall also be entitled to an allowance of not less than five dollars for every day's detention caused thereby or by a suit brought to recover the same. [13 G. A., ch. 165.]

This section gives a remedy for damages to baggage, and for detention caused thereby. It does not authorize a recovery on account of detention of baggage or failure to deliver the same, nor for detention of the traveler unless it be on account of damages done to baggage: *Anderson v. Toledo, W. & W. R. Co.*, 32-86.

3371. Cannot limit liability. 2184. No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made and entered into. [11 G. A., ch. 113.]

See, also, § 2007, applicable to railroads.

LIENS OF LIVERY-STABLE KEEPERS AND HERDERS.

3372. For expenses. 18 G. A., ch. 25, § 1. Keepers of livery and feed stables, herders, and feeders, and keepers of stock for hire, shall have a lien on all stock and property coming into their hands as such, for their proper charges, and for the expense of keeping, when the same have been received

from the owner, or from any person, provided, however, this lien shall be subject to all prior liens of record.

In the absence of statutory provision, a livery-stable keeper has no lien for the care and feeding of horses left with him, and no such lien is given by § 3363, which confers a lien upon personal property left with a depositary for the just and lawful charges thereon: *McDonald v. Bennett*, 45–456.

Where services in keeping a horse at a livery-stable commenced before the enactment of the statute just referred to, and continued afterward, *held*, that there being no express contract, the livery-stable keeper might assert his lien for charges after the statute took effect, but not for charges previously incurred: *Munson v. Porter*, 63–453.

If, under any circumstances, the lien should be deemed forfeited by the assertion of a claim for a lien for too large an amount, the assertion should be clear and distinct, and operate to interfere in the present with a claimed right on the part of the owner: *Ibid.*

3373. Release of lien. 18 G. A., ch. 25, § 2. The owner or claimant of the property may release the lien, and shall be entitled to the possession of the property on tendering to the person claiming the lien a good and sufficient bond, signed by two sureties, residents of the county, who shall justify, the penalty in the bond being at least three times the amount of the lien claimed, and conditioned to pay any judgment the person claiming the lien shall obtain, for which the property was liable under the lien.

HOTEL AND INNKEEPERS.

3374. Liability. 18 G. A., ch. 181, § 1. All keepers of hotels, inns and eating-houses who shall keep therein a good and sufficient vault or iron safe for the deposit of moneys, jewels and other valuables, and also provide a safe and commodious place therein for the baggage, clothing and other property belonging to their guests and patrons, and shall keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices stating that such places for safe deposit are so provided for the use and accommodation of the inmates thereof, shall not be held liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them for safe keeping, unless such loss shall occur through the fault or negligence of such landlord, keeper, or their agents, servants or employees; *provided*, that nothing herein contained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guest to have and retain in their apartments or about their persons.

3375. Lien. 18 G. A., ch. 181, § 2. All hotel, inn, or eating-house keepers shall have a lien upon, and may take and retain possession of all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn, or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the proper and reasonable charges of such hotel, inn, or eating-house keeper against such guest, and the costs of enforcing the lien thereon.

TITLE XV.

OF THE DOMESTIC RELATIONS.

CHAPTER 1.

OF MARRIAGE.

3376. A contract. 2185. Marriage is a civil contract, requiring the consent of parties capable of entering into other contracts, except as herein otherwise declared. [R., § 2515; C., '51, § 1463.]

3377. Between what ages valid. 2186. A marriage between a male person of sixteen and a female of fourteen years of age is valid, but if either party has not attained the age thus fixed, the marriage is a nullity or not at the option of such party made known at any time before he or she is six months older than the age thus fixed. [R., § 2516; C., '51, § 1464.]

The statute declaring the ages after which parties may contract a valid marriage does not repeal the common-law rule fixing the age of marriage consent for males at fourteen and females at twelve years of age. The statute is merely cumulative in its operation: *Goodwin v. Thompson*, 2 G. Gr., 329.

3378. License. 2187. Previous to any marriage within this state, a license for that purpose must be obtained from the clerk of the circuit [district] court of the county wherein the marriage is to be solemnized, agreeable to the provisions of this chapter. [R., § 2517; C., '51, § 1465.]

The rule of the common law that any mutual agreement between the parties to be husband and wife, *in presenti*, followed by cohabitation, constitutes a valid binding marriage if there is no legal disability on the part of either to contract matrimony, is still in force. The statute providing punishment for solemnizing marriages otherwise than in the form prescribed by law does not make such marriages void: *Blanchard v. Lambert*, 43-228.

Cohabitation does not of itself constitute marriage, but it is sufficient if the parties cohabiting intend marriage, and it is immaterial how the intention is expressed: *McFarland v. McFarland*, 51-565.

3379. Under age; consent of parent. 2188. Such license must not in any case be granted where either party is under the age necessary to render the marriage absolutely valid, nor shall it be granted where either party is a minor without the previous consent of the parent or guardian of such minor, nor where the condition of either party is such as to disqualify him for making any other civil contract. [R., § 2518; C., '51, § 1466.]

3380. Proof of age. 2189. Unless such clerk is acquainted with the age and condition of the parties for the marriage of whom the license is applied for, he must take the testimony of competent and disinterested witnesses on the subject. [R., § 2519; C., '51, § 1467.]

3381. Entry of record. 2190. He must cause due entry of the application for the issuing of the license to be made in a book to be procured and kept for that purpose, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such fact was made to him by one or more witnesses, stating their names, which book shall constitute a part of the records of his office. [R., § 2520; C., '51, § 1468.]

3382. Proof of consent of parent. 2191. If either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after

being acknowledged by the said parent or guardian, or proved to be genuine, and a memorandum of such facts must also be entered in said book. [R., § 2521; C., '51, § 1469.]

3383. Penalty. 2192. If the clerk of the circuit [district] court grants a license contrary to the provisions of the preceding sections, he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured, the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor. [R., § 2522; C., '51, § 1470.]

Punishment for the misdemeanor here described is provided in § 5275, and a justice of the peace has not jurisdiction to try such offense (§ 6058): *White v. State*, 1-449.

The solemnizing of a marriage without a license being first procured subjects the parties to punishment for a misdemeanor, but not to the fine of fifty dollars provided in § 3386: *Ibid.*

3384. Who may solemnize. 2193; 21 G. A., ch. 4. Marriages must be solemnized either:

1. By a justice of the peace or mayor of the city or incorporated town wherein the marriage takes place;

2. By some judge of the supreme, district [or circuit] court[s] of this state;

3. By some officiating minister of the gospel, ordained or licensed according to the usages of his denomination. [R., § 2524; C., '51, § 1472.]

3385. Certificate. 2194. After the marriage has been solemnized, the officiating minister or magistrate shall, on request, give each of the parties a certificate thereof. [R., § 2525; C., '51, § 1473.]

3386. Penalty. 2195 Marriages solemnized with the consent of parties in any other manner than is herein prescribed, are valid; but the parties themselves, and all other persons aiding or abetting, shall forfeit to the school fund the sum of fifty dollars each. [R., § 2526; C., '51, § 1474.]

Solemnizing a marriage without license does not subject the parties to the forfeiture here provided. See note to § 3383.

As to marriages by consent only, see notes to § 3378.

3387. Return. 2196. The person solemnizing marriage shall forfeit a like amount, unless within ninety days after the ceremony he make return thereof to the clerk of the circuit [district] court. [R., § 2527; C., '51, § 1475.]

3388. Register of marriages. 2197. The clerk of the circuit [district] court shall keep a register containing the names of the parties, the date of the marriage, and the name of the person by whom the marriage was solemnized, which, or a certified transcript therefrom, is receivable in all courts and places as evidence of the marriage and the date thereof. [R., § 2528; C., '51, § 1476.]

The marriage register is sufficient evidence to establish the marriage without other proof that the person solemnizing the marriage was officially authorized, and it is permissible to show a mistake in the wife's name: *Verholf v. Van Houwenlengen*, 21-429.

The record may be introduced to establish the marriage of parties charged with incest under § 5351: *State v. Schaunhurst*, 34-547.

The law makes marriage a matter of public record, and the record is evidence of the fact of marriage, which may be introduced in a prosecution for bigamy: *State v. Matlock*, 70-229.

To prove a marriage contract in a state where the law requires the officiating minister or officer to return a certificate of the fact, which is to be recorded, an exemplification of the certificate and not of the clerk's record is the proper evidence: *Niles v. Sprague*, 13-198.

In an action for criminal conversation, marriage may be proven by the testimony of the parties or others. Record evidence is not necessary: *Kilburn v. Mullen*, 22-498.

The same is true in a prosecution for bigamy: *State v. Williams*, 20-98; *State v. Hughes*, 58-165.

In a prosecution for adultery or bigamy, record evidence is not indispensable, but the marriage may be proven by the testimony of either the husband or the wife, corroborated by cohabitation: *State v. Wilson*, 22-364; *State v. Nadal*, 69-478.

In a prosecution for adultery, evidence of admissions of defendant as to the fact of marriage, if voluntary, is admissible: *State v. Sanders*, 30-582.

3389. Peculiar mode. 2198. The provisions of this chapter, so far as they relate to procuring licenses and to the solemnizing of marriages, are not

applicable to members of any particular denomination having, as such, any peculiar mode of entering the marriage relation. [R., § 2529; C., '51, § 1477; 12 G. A., ch. 191.]

3390. Husband responsible for return. 2199. But where any mode is thus pursued which dispenses with the services of a clergyman or magistrate, the husband is responsible for the return directed to be made to the clerk, and is liable to the above-named penalty if the return is not made. [R., § 2530; C., '51, § 1478.]

3391. Illegitimates. 2200. Illegitimate children become legitimate by the subsequent marriage of their parents. [R., § 2531; C., '51, § 1479.]

3392. When void. 2201. Marriages between persons whose marriage is prohibited by law, or who have a husband or wife living, are void; but if the parties live and cohabit together after the death of the former husband or wife, such marriage shall be deemed valid.

Such marriages as here contemplated confer no rights upon either party as to the property of the other: *Carpenter v. Smith*, 24-200.

Where a woman, after marriage with a man having a wife living, again married, *held*, that the first marriage was absolutely void and the second valid, and that in such cases no proceedings to have the first marriage declared void by law are necessary: *Drummond v. Irish*, 52-41.

CHAPTER 2.

OF HUSBAND AND WIFE.

3393. Property rights of married women. 2202. A married woman may own in her own right, real and personal property acquired by descent, gift, or purchase, and manage, sell, convey, and devise the same by will, to the same extent and in the same manner that the husband can property belonging to him.

Where the husband and wife take property jointly they take as tenants in common: *Hoffman v. Stigers*, 28-302.

Where property is owned jointly by husband and wife the interest of the husband may be sold on execution for his debts, and the wife cannot have an injunction to entirely prevent the sale: *McTighe v. Bringolf*, 42-455.

When household furniture, pictures and the like property are used in the house occupied by the husband and wife, such property is considered as being in the possession of the husband, and under his control: *Smith v. Hewett*, 13-94; *Odell v. Lee*, 14-411; *Miller v. Steel*, 39-527.

The fact that the wife claims to own personal property and treats it as her own, and her husband has knowledge thereof and acquiesces therein, is sufficient to establish her title thereto: *Woolheather v. Risley*, 38-486.

The husband is, as matter of law, the head of the family, and a wife having a husband who is not under disability cannot hold property exempt from execution under § 4297: *Van Doran v. Marden*, 48-186.

3394. Interest of either in other's property. 2203. When property is owned by either the husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife who is not the owner of the property, except as provided in this chapter.

This section renders invalid any agreement between husband and wife, even in contemplation of a separation, for the relinquishment of their respective interests, including dower interest in each other's real property: *Linton v. Crosby*, 54-478.

The wife's right to alimony in case of divorce is not property within the meaning of the statutory provision above referred to, and a contract between the husband and wife to convey property to the wife in lieu of alimony may be valid: *Martin v. Martin*, 65-255.

Before the enactment of this statutory provision it was held that, while the law would not sanction an agreement between husband and wife contemplating a future separation, nor enforce an agreement to separate if one of the parties was unwilling to do so, yet an agreement fairly entered into under a resolution of present separation, as to property rights

and terms of separation, and partly executed in good faith, would be upheld against the other party, where justice should demand it: *McKee v. Reynolds*, 26–578.

And *held* that a conveyance by wife to husband under an agreement of separation, relinquishing her right of dower in his real estate and releasing all claim for support and maintenance, would be upheld in the absence of fraud when supported by a consideration: *Robertson v. Robertson*, 25–350.

Held, also, that a deed of separation by which, in consideration of a release from liability of the wife's debts and relinquishment by her of claim of dower, the husband undertakes to pay the wife a sum by way of maintenance, couched in such language as not to be calculated to encourage separation, might be supported, and an action for the maintenance agreed upon might be maintained: *Goddard v. Beebe*, 4 G. Gr., 126.

Where a husband has contributed to the purchase and improvement of property standing in the name of the wife, his interest therein, proportionate to the amount of such contribution, may be subjected to the payment of his debts to the extent to which his money has been invested therein: *Croup v. Morton*, 49–16; *S. C.*, 53–599; *Hamill v. Henry*, 69–752.

A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as expenditures for repairs, without becoming a creditor of the wife or rendering her property liable to that extent for his debts: *Hamill v. Henry*, 69–752.

Creditors of the husband have no lien upon the land of the wife by reason of improvements made thereon by him to the extent of the money thus invested if she is not guilty of collusion or fraud, although she has knowledge of, and assents to, the expenditure: *Corning v. Fowler*, 24–584.

The increase of the personal property of the wife belongs to her, and is not subject to her husband's debts, although he expends labor and care in the keeping thereof: *Russell v. Long*, 52–250.

Any devise whose object is to enable a married woman to accumulate property in her own name through the labor of her insolvent husband will be looked upon with suspicion, and may, under proper circumstances, be considered an intent to defraud the husband's creditors; but the mere fact that the insolvent husband performs labor upon the farm owned or rented by his wife will not necessarily evince such intent. An insolvent man should, as a matter of duty, provide himself and family with food and clothing, and if the design of performing labor upon the farm owned or rented by his wife is merely to furnish reasonable family support, the intention will not be considered fraudulent: *Carn v. Royer*, 55–650.

The wife may buy in a mortgage upon the homestead standing in the name of the husband and hold such mortgage against the homestead: *Knox v. Moser*, 69–341.

The property of the wife cannot be taken in payment of the husband's debts, even where it is reduced to the possession of the husband and the creditor has no notice of the wife's ownership: *Schmidt v. Holtz*, 44–446.

But in so far as this section renders property of the wife which would, under the previous statute, have been liable to execution on a judgment against the husband, exempt therefrom, it does not apply to contracts made before the taking effect of the Code: *Ibid.*

The previous statutory provisions have no application to a case where the creditor has become such after the taking effect of the present Code provisions: *Jones v. Brandt*, 59–332.

3395. Remedy by one against the other. 2204. Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried.

Where a wife knowingly permits her property to be applied by her husband to payment of debts contracted for family expenses for which it would be liable under § 3405, she does not thereby become a creditor of her husband for the amount so applied: *Courtright v. Courtright*, 53–57.

If property or money of the wife in the husband's hands is used by him with her knowledge and consent, for purposes connected with the support of the family, without any agreement to repay her, she cannot recover therefor from his estate: *Patterson v. Hull*, 61–534.

This section does not give to the husband or wife the right to an action against the other for tort: *Peters v. Peters*, 42–182.

3396. Husband not liable for wife's torts. 2205. For all civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in cases where he would be jointly responsible with her if the marriage did not exist.

The common-law presumption, that a criminal act committed by the wife in the presence of her husband was done under his compulsion, is recognized in this state: *State v. Kelly*, 74–383.

Prior to the enactment of this section the husband was liable for torts of the wife as at common law: *McElfresh v. Kirkendall*, 36–224; *Luse v. Oaks*, 36–562.

3397. Conveyances to each other valid. 2206. A conveyance, transfer, or lien executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons.

An antenuptial contract freely and voluntarily entered into, without any fraud or imposition, by which it is provided that each party is to retain control of his or her own property, and also making provision for descent of the property to children by a former marriage, upheld in a particular case: *Jacobs v. Jacobs*, 42–600.

Under an antenuptial contract, by which it was agreed that each should have the untrammeled and sole control of his or her own property, real and personal, as though no such marriage had taken place, *held*, that the dower right of the wife was completely waived: *Ibid.*

An antenuptial contract cannot be enforced by a wife who after marriage abandons her husband and lives apart from him without his consent and without lawful cause, that is, without cause which would be a good ground for divorce. In so doing the wife does not discharge the duties and obligations of a wife: *York v. Ferner*, 59–487.

An antenuptial contract, by which the proposed wife, in consideration of an agreed sum to be paid out of the estate of the proposed husband on his death, relinquishes and renounces all rights of dower and inheritance, *held* not sufficient to bar the right which she had to the occupancy of the homestead after the death of the husband: *Mahaffy v. Mahaffy*, 6[illegible]–55.

Facts in a particular case *held* not sufficient to show fraud in an antenuptial contract by which the proposed wife accepted a sum of money in lieu of dower: *Ibid.*

Conveyances before marriage: A voluntary settlement or conveyance of property by husband or wife in favor of a third person prior to marriage will be held fraudulent as to the marital rights of the other party to the marriage only when made in contemplation of matrimony and pending a treaty of marriage between the parties: *Gainor v. Gainor*, 26–337.

A wife cannot, on account of the marriage relation, set aside and overthrow the husband's contracts and conveyances made by him before marriage, and of which by the registry laws she is chargeable with notice: *Patterson v. Mills*, 69–755.

Contracts between husband and wife: The promise by the husband to pay or give money to his wife to induce her to again live with him is not binding, especially where it does not appear that she had any ground for not living with him: *Owen v. Owen*, 22–270.

A contract for the purpose of enabling the husband to obtain a divorce without having any legal cause for it will confer no rights upon the wife enforceable at law against the husband. If the wife agrees for a consideration that she will interpose no defense to an action for divorce by her husband, he having a legal cause of divorce, and then makes defense, she cannot enforce the contract against her husband: *Pearson v. Cummings*, 28–344.

Where a deed from the husband to the wife was given in consideration of a dismissal by the wife of a proceeding for divorce, *held*, that, no fraud being made to appear, the deed was valid: *Chew v. Chew*, 38–405.

Where a wife places money in the hands of her husband upon an agreement by him to account to her for it the transaction creates a debt between them which will constitute a valid consideration for a conveyance of real estate by the husband to the wife, if made before any lien thereon attached: *Jones v. Brandt*, 59–332.

The wife cannot insist in a court of equity, as against *bona fide* creditors whose rights have intervened, upon a secret, parol agreement with her husband to repay money received from her, and, under such agreement, receive and hold his estate for their mutual benefit. As between husband and wife the rule is otherwise: *Hatch v. Gray*, 21–29.

Where the legal title to the homestead was in the husband, and means derived from the wife's father had gone towards the purchase and improvement thereof, *held*, that an agreement between the husband and wife, by which she joined in the mortgage thereof, and was to have the residue remaining after the incumbrance was paid out of the proceeds of the sale, was valid, and could be enforced against the creditors of the husband as well as himself: *Wright v. Wright*, 16–496.

While courts of equity recognize the rule that contracts between husband and wife after marriage are a mere nullity, yet they will, under particular circumstances, give full effect and validity to such contracts, although they are not executed by the intervention of a trustee; but to sustain such contract as against the wife the husband must be held to the utmost good faith. A slight circumstance of fraud or circumvention would be sufficient to render it invalid: *Blake v. Blake*, 7–46.

Therefore, *held*, that a contract between husband and wife, by which the latter, for a valuable consideration, after decree of divorce, released to the former all her dower interest in his real estate, was binding: *Ibid.*

The wife may make a loan of money which she has in her own right to her husband, and take security therefor upon land owned by him: *Doyle v. McGuire*, 38–410.

A post-nuptial contract is valid as to parties and creditors, if made for an honest purpose and a good consideration: *Butler v. Rickets*, 11–107.

Transfers of property between husband and wife: While, in dealings between husband and wife with reference to her property, by which the wife's property passes into the husband's hands, the husband will be held to the strictest fairness and integrity, yet if no fraud, circumvention or undue influence appears, the transaction will be upheld: *McCrory v. Foster*, 1–271.

If a husband purchases land and takes the title in the name of the wife, or if he permits the wife to use his money in the purchase in her own name, the presumption is very strong, if not conclusive, as between them, and as between the wife and the heirs of the husband, that it was intended as an advancement and provision for the wife, and not as a trust in favor of the husband: *Sunderland v. Sunderland*, 19–325.

A secret parol transfer of notes by the husband to the wife will not necessarily be void if for a consideration: *Nicholas v. Higby*, 35–401.

Where land is bought by the husband and the legal title taken in the wife's name, and the purchase money paid from products of the estate, such facts will not give the wife an equity or claim thereto paramount to that of existing creditors from whom the property is sought to be secreted: *Ticonic Bank v. Harvey*, 16-141.

3398. Abandonment of either. 2207. In case the husband or wife abandons the other and leaves the state, and is absent therefrom for one year without providing for the maintenance and support of his or her family, or is confined in jail or the penitentiary for the period of one year or upward, the district [or circuit] court of the county where the husband or wife so abandoned or not confined resides, may, on application by petition setting forth fully the facts, authorize him or her to manage, control, sell, and incumber the property of the husband or wife for the support and maintenance of the family, and for the purpose of paying debts. Notice of such proceedings shall be given as in ordinary actions, and anything done under or by virtue of the order or decree of the court, shall be valid to the same extent as the same was done by the party owning the property.

This section does not affect the common-law rule of agency by which the wife, being abandoned by her husband without her fault, may pledge his credit for necessaries, and if left by him in the management of his business, may make all contracts reasonably incident to such management. Therefore, *held*, that a wife thus abandoned by her husband could make a valid sale of a cow belonging to him for the purpose of procuring support, the cow being of such character as not otherwise to furnish family support, and that this might be done before the destitution of the family became complete and absolute: *Rawson v. Spargler*, 62-59.

The wife of an absconding husband holding property which was exempt in his hands may sell the same and appropriate the proceeds, free from any claim for his debts, in the same manner that he might have done: *Waugh v. Bridgeford*, 69-334.

The wife cannot recover from the husband for expenses of supporting the children after abandonment. See notes to § 3405.

3399. Contracts and sales binding. 2208. All contracts, sales or incumbrances made by either the husband or wife by virtue of the power contemplated in the preceding section, shall be binding on both, and, during such absence or confinement, the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable and execution may be levied or attachment issued accordingly. No suit or proceedings shall abate or be in anywise affected by the return or release of the person confined, but he or she may be permitted to prosecute or defend jointly with the other.

3400. Decree set aside. 2209. The husband or wife affected by the proceedings contemplated in the two preceding sections, may have the order or decree of the court set aside or annulled by filing a petition therefor, and serving a notice on the person in whose favor the same was granted as in ordinary actions. But the setting aside of such decree or order shall in nowise affect any act done thereunder.

3401. Attorney in fact. 2210. A husband or wife may constitute the other his or her attorney in fact, to control and dispose of his or her property for their mutual benefit, and may revoke the same to the same extent and manner as other persons.

The husband may act as agent for the wife, but in order to bind her he must be previously authorized to so act, or she must subsequently, with express or implied knowledge of his act, ratify it. The evidence necessary to establish such ratification must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of her acts as his agent, or as between independent parties: *McLaren v. Hall*, 26-297.

A wife who has knowledge of the fact that debts are contracted by her husband for the improvement of her separate property, and acquiesces in the appropriation of the property purchased to the improvement of her own separate estate, subjects her property to an equitable lien for the value of the material furnished: *Miller v. Hollingsworth*, 36-163.

While the husband is not, by virtue of the marital relation, agent of the wife in respect to the wife's property, yet as to the shipment or preservation of the household goods jointly used by them, something may be inferred from the marital relation, and the agency of the husband may be inferred from slighter circumstances than would be necessary to establish agency on the part of a stranger. In such case, it is error to charge the jury that

the proof of agency must be of the same character and the same weight as between husband and wife as is required to show agency in any other person: *Furman v. Chicago, R. I. & P. R. Co.*, 62–395.

Where the husband delivered household goods of a wife to a railroad company for shipment, taking a bill of lading in the name of the wife, and transacted with the company the entire business relating to the shipment, and afterwards had such bill of lading in his possession and exhibited it to the agent of the company, and gave directions as to the reshipment of the goods, *held*, that such facts were entitled to consideration as tending to prove the authority of the husband to act for the wife in the premises, and that under such circumstances the company had the right to consider the husband as the wife's duly authorized agent in regard to the shipment, unless notified to the contrary: *Ibid.; S. C.*, 68–219.

3402. Wages of wife; actions by. 2211. A wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right; and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property, as if unmarried. [11 G. A., ch. 24.]

Wife's earnings: Where the husband is resting under no disability, he, and not the wife, is, as a matter of law, the head of the family. He is bound for her support and entitled to her earnings when she is not engaged in business on her own account: *Van Doran v. Marden*, 48–186.

The wife is entitled to her wages for services performed for others, but the husband is entitled to her labor and assistance in the discharge of those duties and obligations which grow out of the marriage relation: *Mewhirter v. Hatten*, 42–288.

The wife is entitled to no claim against the husband or his estate for services rendered him, such as caring for him during insanity, etc., and a contract for such services would be void: *Grant v. Green*, 41–88.

The wife cannot recover wages from a third party for work performed for the husband, as boarding hands, etc., under a contract between the husband and such party. The husband may, under such circumstances, contract for the services of his wife and receive compensation in discharge thereof without her consent: *Lyle v. Gray*, 47–153.

Where boarding for a prisoner, whom it was impracticable, by reason of his condition, to confine in the county jail, was furnished in the family of the sheriff, *held*, that the sheriff, as husband, had authority to claim and collect the charges for the services of his wife as well as himself in the boarding of such prisoner, and that an assignment of the claim of the wife for her services was not necessary: *Miller v. Dickinson County*, 68–102.

The wife's earnings, unless acquired in carrying on an independent business of her own, cannot be made the basis of a claim against the husband which will support a conveyance by him to the prejudice of his creditors: *Triplett v. Graham*, 58–135.

The wife cannot regard earnings made in connection with her husband's property in the management of family affairs, where she has no separate property, as her individual earnings, and where such earnings are expended in the purchase of property it does not become exempt from her husband's debts: *Hamill v. Henry*, 69–752.

Under former statutory provisions, *held*, that while the property of the wife owned by her at the time of the marriage, and such as was subsequently acquired by her by gift or inheritance, was not subject to the debts of her husband, yet that property acquired by her during marriage, whilst she was receiving the protection and support of her husband, vested in him, and if taken by her in her own name was held in trust for her husband and his creditors: *Duncan v. Roselle*, 15–501.

Where the wife has separate property, she may use it for trading in real estate without subjecting the re-invested profits to seizure for the payment of the husband's debts: *Mitchell v. Sawyer*, 21–582.

Where property was purchased by the wife, partly with her earnings and partly with the income from her separate property, *held*, that so far as her earnings (which by the law then existing belonged to her husband) had been used in the purchase, the property was liable to the payment of the husband's debts: *McTighe v. Bringolf*, 42–455.

Recovery for tort: The provisions of the statutes with reference to rights of married women would seem to effect their complete emancipation from the disabilities of coverture to which they were subjected by the common law with respect to the rights of property, its freedom from control of the husband or its liability for his debts and the right to sue and be sued in respect thereto. The right of action in favor of the wife, whether arising upon contract or tort, is her's in the same sense that it would be if she were unmarried, and is to be prosecuted in her own name without the joinder of her husband. So *held* in case of an action for malicious prosecution: *Musselman v. Gallagher*, 32–383.

So *held* also in case of libel: *Pancoast v. Burnell*, 32–394.

In a suit by the wife for personal injuries, it is not necessary that the husband join with her as plaintiff: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42–518.

When the wife has a separate and independent employment, which she habitually follows and for which she receives compensation from her employers, she may be deemed to have a business or occupation independent of her husband, and may recover in an action in her own name for loss of time occasioned by personal injuries: *Fleming v. Shenandoah*, 67–505.

However, the husband is still entitled to the labor and assistance of the wife, and may recover in his own right for any injury to her which deprives him thereof: *Mewhirter v. Hatten*, 42–288.

He may recover for loss of time caused by injury to her unless she is engaged in the prosecution of a separate business, which thereby suffers detriment; and therefore, in an action by a married woman, not carrying on a separate business, to recover damages for personal injuries, loss of time cannot be shown as an element of damages: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42–518: *Nichols v. Dubuque & D. R. Co.*, 68–732.

Instructions in an action by a wife against a railway company to recover damages for personal injuries, *held* to sufficiently limit the recovery to such damages as were strictly personal to the wife, and for which she might recover: *Tuttle v. Chicago, R. I. & P. R. Co.*, 48–236.

Unless a married woman has a separate business, the averments of the inability to work and labor by reason of the injuries sustained by the negligence of defendant will render her petition liable to be assailed as claiming elements of damage for which her husband alone is entitled recovery: *Dickens v. Des Moines*, 74–216.

Damages resulting from the death of the wife are damages to her estate, and the right of action therefor exists only in favor of her administrator, but for loss of services, loss of society and expenses of treatment, the husband may recover: *Mowry v. Chany*, 43–609.

The damages accruing to the estate of a married woman because of a wrongful act which causes her death should not be assessed on the same basis as though she were unmarried, even though she may have been engaged to some extent in a separate business. Damages should not be allowed in such case for services which would have been rendered for the benefit of her husband and family: *Stulmuller v. Cloughly*, 58–738.

At common law it was a well-settled rule that for injuries to the wife during coverture she must join with the husband in an action. But whenever the injury was such that the husband received special damage, such as loss of society or expense, he might sue in his own name: *McKinney v. Western Stage Co.*, 4–420.

The husband may recover for medicine and medical attendance and expenses incurred on account of the injury to the wife. But if the husband authorizes the wife to prosecute a suit for such expenses, and aids her therein, and permits her to recover and receive the amount recovered, he will be estopped afterwards to claim recovery for the same matters: *Neumeister v. Dubuque*, 47–465.

In such case, the fact that the wife has claimed in a former action to have been carrying on a separate business in her own name, and has sought to recover for a loss occasioned to her in such business by the injury, will not preclude the husband from setting up loss of services of the wife: *Ibid.*

In an action by the husband to recover for loss of services of the wife resulting from an injury to her he may show the inability of the wife to perform labor or service resulting from the injury and the value of the service thus lost: *Ibid.*

Action by wife against husband: Under a former statutory provision giving a married woman the right to sue in her own name, when the action concerned her separate property, *held*, that a wife, compelled to leave her husband for cause, or driven away by him without cause, might maintain an action of replevin against him in her own name to obtain possession of her separate property: *Jones v. Jones*, 19–236.

The fact that there has been a separation of the husband and wife without cause will not authorize the wife to maintain an action against the husband to recover property owned by her before marriage: *McMullen v. McMullen*, 10–412.

Whether an action at law will lie during coverture by the wife against the husband for the recovery of a money judgment, *quære*: *Owen v. Owen*, 22–270.

The statutory provision authorizing the wife to sue in her own name does not give a right of action generally against her husband. Such right of action exists only under § 3395, which authorizes the husband or wife to maintain an action against the other for the recovery of property, or for any right growing out of the same: *Peters v. Peters*, 42–182.

Therefore the husband or wife has no right of action against the other for tort: *Ibid.*

Claims of the one against the estate of the other: Where the husband borrows the separate money of the wife and promises to repay it, especially where the promise is reduced to writing and the rights of creditors are not prejudiced or defeated, equity will enforce the contract against him, or, if he is deceased, against his estate: *Logan v. Hall*, 19–491.

So where the wife loaned to the husband money out of her separate estate, with the expectation and promise that it should be repaid to her, and the husband afterwards executed and delivered to her notes for the amount received, *held*, that such notes constituted a valid and binding claim against the husband, which after his death could be enforced against his estate: *Ibid.*

But in such case, *held*, that the wife was not entitled to interest on the sum loaned: *Ibid.*

Where the wife took from her husband while sick a large sum of money, subsequently evading his request to return it except as to a small portion, and after her death the husband's assignee filed a claim for the sum against her estate, *held*, that the possession of the money by the wife was the possession of the husband during her life, and after her death the husband or his assignee might assert his right to its possession as against her executor: *Davidson v. Smith*, 20–466.

Where the wife gives the husband money for the purpose of aiding in purchasing a homestead, which is so used, his estate cannot be held liable for the money advanced: *Garrett v. Baldwin*, 40–688.

3403. Property of one not liable for debts of the other. 2212. Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the separate debts of each other; nor are the wages, earnings, or

property of either, nor is the rent or income of such property, liable for the separate debts of the other. [R., § 2505; C., '51, § 1453; 13 G. A., ch. 126.]

The husband is liable on an implied undertaking for necessaries supplied to the wife. Whatever is suitable and proper for the wife, considering her station in life, is included in necessaries, and that term is not confined to the supply of things demanded for her sustenance, apparel and health, but extends to whatever is necessary for her happiness, comfort and enjoyment in the station she occupies as to wealth and fashion: *Porter v. Briggs*, 38–166.

Therefore, *held*, that the husband was liable for services rendered to the wife by an attorney in establishing her innocence of the charge of adultery made by the husband in an action for divorce: *Ibid.*

And see as to attorney's fees in such cases, notes to § 3420.

In order to enable a party to recover against a husband for necessaries furnished to the insane wife, it need only be shown that she was compelled to leave the husband's house on account of cruel treatment or improper conduct on his part. In such case the husband is presumed to extend to his wife a general credit for necessaries, such as meat, drink, clothes, medicine, etc., suitable to his degree and circumstances: *Descelles v. Kadmus*, 8–51.

Before the adoption of the Code it was held that the husband was liable for the torts of the wife as at common law, notwithstanding the statute embodied in this section: *McElfresh v. Kirkendall*, 36–224; but now see § 3396.

Under the statute embodied in this section, *held*, that the property of the wife was not liable for the debts of the husband contracted before marriage, even though she did not take the steps then required by statute to prevent her property left in his hands to become liable for his debts contracted after marriage: *Patterson v. Spearman*, 37–36.

3404. Contracts of wife. 2213. Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried. [R., § 2506; C., '51, § 1454.]

By this section, by which the wife is clothed with the same property rights and charged with the same liabilities as the husband, she is completely emancipated from all the bonds recognized by the common law, save those of affection and moral obligation. Being clothed with all the natural rights enjoyed by the husband, which she may exercise free from his control, she is subject to the same rules which restrict and control the rights of the husband and enforce his obligations assumed by contract and imposed by law for the protection of other members of society. As she has all the rights of the husband, she must assume all his obligations as well by implied as by express contract: *Spafford v. Warren*, 47–47.

Therefore, *held*, that the conveyance of a homestead, in which the wife joined with the husband, but which was void as being an absolute deed instead of a mortgage as contemplated when it was executed, and also for the reason that the name of the grantee and the description of the property were left blank at the time of the execution and subsequently filled in by the husband, was ratified by her subsequent action in reference thereto and thus became valid and binding upon her: *Ibid.*

A married woman may make a valid contract for the purchase of real property. Previous cases in Iowa upon the power of a married woman to contract, discussed: *Shields v. Keys*, 24–298.

A married woman may execute a valid mortgage upon her property as security for the debt of another in the same manner as though unmarried: *Low v. Anderson*, 41–476.

3405. Family expenses. 2214. The expenses of the family and the education of the children, are chargeable upon the property of both husband and wife, or of either of them, and in relation thereto they may be sued jointly or separately. [R., § 2507; C., '51, § 1455.]

Although this section provides that the family expenses are chargeable upon the property of both husband and wife, it has been treated the same as if it provided that both shall be personally liable for family expenses. The evident object and purpose of the statute is that the property and means of the husband and wife shall be devoted to the support of the family so far as necessary for that purpose: *Devendorf v. Emerson*, 66–698.

In the absence of fraud and collusion between the husband and the creditor, the acts, agreements and promises of the husband in relation to family expenses, etc., are binding upon the wife without any express consent or action on her part. The husband may change the form of indebtedness, as by giving a new note, without releasing her: *Lawrence v. Sinnamon*, 24–80.

A change by the husband contracting the indebtedness of the evidence thereof from oral contract to note, and from note to judgment, will not terminate the liability of the wife, and the debt will continue enforceable against her property as long as the right of action against the husband exists: *Frost v. Parker*, 65–178.

The statute of limitations commences to run in favor of the wife only from the maturity of the indebtedness as contracted by the husband, and the action against the wife is not barred as long as it subsists against the husband: *Lawrence v. Sinnamon*, 24–80; *Davidson v. Biggs*, 61–309; *Waggoner v. Turner*, 69–127.

This rule applies even where the note for

the indebtedness has been put in judgment against the husband: *Phillips v. Kirby*, 73-278.

The fact that a creditor has brought an action against the husband alone, and obtained judgment thereon by consent, does not extend the statute of limitations as against the wife until the judgment shall become barred: *Polly v. Walker*, 60-86.

Where the husband, after the indebtedness was contracted, gave a note therefor, drawing interest at ten per cent. and providing for an attorney's fee, *held*, that a recovery could not be had against the wife for the attorney's fee nor for interest at that rate: *Fitzgerald v. McCarty*, 55-702.

The wife is liable although the vendor made the contract with, and extended the credit to, the husband alone: *Smedley v. Felt*, 41-588.

In the cases contemplated in this section, the wife is jointly liable with the husband and the indebtedness is the debt of both: *Smedley v. Felt*, 43-697; and she may be sued thereon alone: *Farrar v. Emery*, 52-725.

A personal judgment may be rendered against the wife where she is sued jointly with the husband for family expenses, notwithstanding the husband has a discharge in bankruptcy: *Jones v. Glass*, 48-345.

A creditor may, if he sees proper, join the wife and husband in the same action. The allowance of a separate action to be brought against the wife is simply an additional remedy which may or may not be adopted: *Waggoner v. Turner*, 69-127.

The remedy against the wife for family expenses incurred by the husband is not limited to a personal judgment. By a proper proceeding her property may be pursued without such judgment being had: *Frost v. Parker*, 65-178.

Where the proceeding against the wife is brought by an assignee of the claim against the husband for family expenses, the remedy against the property of the wife will not be defeated by the fact that no assignment of the claim against the wife is shown: *Ibid.*

"Expenses of the family" are not limited to necessary expenses. Any expenditure is contemplated which is incurred on account of articles to be used in the family; and the purchase of a piano, *held* to be a family expense: *Smedley v. Felt*, 41-588.

So *held* as to the purchase of an organ: *Frost v. Parker*, 65-178.

So the purchase of a cook stove and fixtures comes properly under the head of family expenses: *Finn v. Rose*, 12-565; but the purchase of a reaping machine, used by the husband in prosecuting his business of farming, by which he supports his family, is not a family expense: *McCormick v. Muth*, 49-536; nor is the purchase of a plow: *Russell v. Long*, 52-250. The expenses of treatment of a wife at a hospital for the insane, *held* not to be a family expense: *Delaware County v. McDonald*, 46-170.

Where the husband purchased a watch and chain and other jewelry, a part of which was presented to his wife and the remainder used in the family, the wife was held liable therefor as family expenses, although she had no knowledge that they were not paid for until sometime afterwards: *Marquardt v. Flaughter*, 60-148.

To constitute a family expense it is essential that the thing for which the expenditure was incurred should have been used or kept for use in the family: *Fitzgerald v. McCarty*, 55-702.

A father not being liable for necessaries furnished an adult son or daughter who lives with him, is not liable for such necessaries as being part of the family expenses. The purpose of this section is not to declare what charges or expenditures would be regarded as expenses of the family, but to provide a remedy therefor against both husband and wife: *Blachley v. Laba*, 63-22.

Where the wife has purchased goods of a merchant with whom the husband has no account, and to whom he has given notice in writing not to sell goods to his wife and charge them to him, it not appearing but that the husband otherwise provides necessaries for the family, the merchant cannot hold the husband liable as for family expenses: *Devendorf v. Emerson*, 66-698.

A party who furnishes money to the husband to pay indebtedness for family expenses has no right of action against the wife therefor, where the money is not furnished at her request nor upon an assignment of the account: *Sherman v. King*, 51-182.

Money borrowed for and used in purchasing articles which, if obtained on credit, would constitute proper items of family expense, cannot itself be treated as a family expense: *Davis v. Ritchey*, 55-719.

An action to make an indebtedness for family expenses a lien upon real property of the wife may be brought in the county where the property is situated: See § 3783 and notes.

If the duty of supporting the family is performed by the wife she cannot claim re-imbursement from him for the money expended. This duty is cast equally upon both: *Johnson v. Barnes*, 69-641.

That the wife cannot recover from the husband or his estate money or property of hers used by him, or otherwise devoted to payment of family expenses, see notes to § 3395.

3406. Removal from homestead. 2215. Neither husband nor wife can remove the other, nor their children, from their homestead without his or her consent, and if he abandons her she is entitled to the custody of their minor children, unless the district [or circuit] court, upon application for that purpose, shall, for good cause, otherwise direct. [R., § 2514; C., '51, § 1462.]

INSANITY OF EITHER.

3407. Conveyance of property. 2216. Where either the husband or wife is insane, and incapable of executing a deed, and relinquishing or convey

ing his or her right to the real property of the other, the sane person may petition the district [or circuit] court of the county where such petitioner resides, or of the county where said real estate is situated, setting forth the facts and praying for an order authorizing the applicant or some other person to execute a deed of conveyance and thereby relinquish the interest of either in the real property of the other. [R., § 1500.]

3408. Proceedings. 2217. The petition shall be verified by the oath of the petitioner, and shall be filed in the office of the clerk of the district [or circuit] court of the proper county. The court shall appoint some discreet person or attorney guardian for the person alleged to be insane, who shall ascertain as to the propriety, good faith, and necessity of the prayer of the petitioner, and who shall have power to resist said application, and subpœna witnesses, or to take depositions to disprove the petition and prove the impropriety of granting said petition, which guardian or attorney shall be allowed by the court a reasonable compensation to be paid as the other costs. [R., § 1501.]

3409. Decree. 2218. Upon the hearing of said petition, if the court is satisfied that the same is made in good faith, and that the petitioner is the proper person to exercise the power and make the coveyances, and that such power is necessary and proper, said court shall enter up a decree, thereby fully authorizing the execution of all such conveyances for and in the name of such husband or wife, by such person as the court may appoint. [R., § 1502.]

3410. Appointment; revocation. 2219. All deeds executed as provided in the three preceding sections shall be valid in law, and shall convey the interest of such insane person in the real estate so conveyed; provided said power shall cease and become void as soon as he or she shall become sane and of sound mind, and apply to the court to revoke said power, and the same shall be revoked; but such revocation shall in nowise affect conveyances previously made. [R., § 1503.]

CHAPTER 3.

OF DIVORCE, ANNULLING MARRIAGES, AND ALIMONY.

3411. Jurisdiction. 2220. The district [or circuit] court in the county where either party resides, has jurisdiction of the subject-matter of this chapter. [R., § 2532; C., '51, § 1480; 13 G. A., ch. 127.]

Jurisdiction; residence: The action is not local, but transitory, and the court being satisfied of the residence of plaintiff, has power to try the case irrespective of the residence of defendant: *Smith v. Smith*, 4 G. Gr., 266.

The residence on the part of plaintiff required by statute is a legal and not merely an actual residence; such a residence as that, when a man leaves it, he has an intention of returning to it: *Hinds v. Hinds*, 1-36.

A mere temporary sojourn for a season, without intention of domiciliation and citizenship, is insufficient: *Smith v. Smith*, 4 G. Gr., 266; *Whitcomb v. Whitcomb*, 46-437, 443. And see *Rush v. Rush*, 48-701.

A Utah divorce obtained without jurisdiction, or where neither party was resident of the territory, is absolutely void: *State v. Fleak*, 54-429.

It is competent to establish by parol that a decree of divorce rendered in another state is void for want of jurisdiction in the court rendering it, for the reason that neither plaintiff nor defendant were residents of the state where the decree was rendered as required by the laws of that state: *Neff v. Beauchamp*, 74-92,

The rule that the domicile of the wife and children is to be considered the same as that of the husband is subject to the exception that, in a proceeding for a divorce, the law recognizes the husband and wife as having separate domiciles, and a valid divorce may be decreed in a suit where only one of the parties resides: *Kline v. Kline*, 57-386.

Where the proceeding is brought by the husband in one state against the wife living in another state, and jurisdiction is acquired by service of publication, the court may declare the *status* of the parties and grant the decree, but it cannot make a valid decree as

to the custody of the children, who are non-residents of the state where the divorce proceedings were had: *Ibid.*

Jurisdiction as to children: The provisions as to the custody of a child, made in the decree of divorce regularly obtained and still in force in another state, such child being within the jurisdiction of the court at the time the decree was rendered, will be regarded as binding and conclusive by the courts of this state, when the right to the custody of the child is called in question here, until such decree is modified or reversed or set aside for cause shown to the jurisdiction which rendered it: *Wakefield v. Ives*, 35-238.

Waiver of want of jurisdiction: Want of jurisdiction of a court to entertain an action for divorce, owing to the non-residence of plaintiff, cannot afterwards be interposed by such plaintiff as an objection to the decree, where it appears that plaintiff authorized the cause to be prosecuted and received the money allowed as alimony: *Ellis v. White*, 61-644.

Decree against non-resident: Where the action for divorce is brought by a resident of one state, in the courts of that state, against a non-resident, and service is had by publication only, without appearance by defendant, the court acquires jurisdiction only to declare the *status* of the parties before it, but cannot render a valid decree as to the custody of minor children who are non-residents of the state where the decree is rendered: *Kline v. Kline*, 57-386.

The policy and laws of the two states of Nebraska and Iowa being substantially the same as to the mode of procedure that may be adopted to obtain a divorce, it being provided in both states that a divorce may be obtained in some other state or country, *held*, that a divorce granted in Nebraska in accordance with its laws to a resident of that state and against a resident of Iowa, upon personal service, being valid in the state where it was granted, would be recognized as valid in Iowa: *Van Orsdal v. Van Orsdal*, 67-35.

Presumption: Where parties, who have been husband and wife, separate and the former lives with a woman claiming to be, and held out by him to be, and reputed to be, his wife, the presumption will be entertained that such cohabitation is legal, and that he has been divorced from his former wife, and this presumption will be entertained when the legality of a subsequent marriage by such former wife is called in question: *Blanchard v. Lambert*, 43-228.

Where acts are shown which would amount to a crime if a divorce from a previous marriage had not been obtained, such proof will be admissible to support an allegation of divorce, where by reason of destruction of records the record itself cannot be produced: *In re Estate of Edwards*, 58-431.

The presumption of divorce, in the absence of any record evidence thereof, can only be invoked in aid of innocence and the legitimacy of offspring, nor does it always obtain even in such cases; but such rule is not applicable in any case where neither party has been married again or has lived in cohabitation with another person as husband or wife. Therefore, *held*, that the mere fact of long separation would not give rise to a presumption of divorce such as to defeat the wife's dower right: *Cruize v. Billmire*, 69-397.

Legislative divorces: The courts have no inherent common-law jurisdiction over the matter of divorce. All the authority they can exercise in that respect is derived from legislative enactment. In England, at the time the common law was adopted in this country, a marriage could not be dissolved for any cause without special act of parliament. And after the independence of the states there was no method of obtaining a divorce except by virtue of general or special legislative enactment. Therefore, *held*, that the legislatures of the states are deprived of the power to grant divorces only so far as that power has been conferred on the courts of the state: *Levins v. Sleator*, 2 G. Gr., 604.

3412. Petition. 2221. Except where the defendant is a resident of this state served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the town and county in which he has so resided, and the entire length of his residence therein, after deducting all absences from the state; that he is now a resident thereof; that such residence has been in good faith and not for the purpose of obtaining a divorce only; and it must in all cases state that the application is made in good faith, and for the purpose set forth in the petition. [R., § 2533; C., '51, § 1481.]

The fact that the plaintiff is not a resident of the state cannot be taken advantage of by her for the purpose of defeating the judgment, where it appears that she authorized suit to be brought and accepted alimony allowed by the decree: *Ellis v. White*, 61-644.

3413. Verification; evidence; hearing. 2222. All the statements above required, and all other allegations of the petitioner must be verified by the oath of the plaintiff, and proved to the satisfaction of the court by competent evidence. Unless the court is satisfied that the allegations of residence are fully proved, the hearing shall proceed no further, and the action shall be dismissed by the court on its own motion. No divorce shall be granted on the testimony of the plaintiff alone, and all such actions shall be heard in

open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commission appointed by the court. [R., § 2533; C., '51, § 1481.]

Verification: That a petition for a divorce is not sworn to does not deprive the court of jurisdiction or render subsequent proceedings invalid: *McCraney v. McCraney*, 5–232, 254.

Defects in the verification of the petition are not jurisdictional and cannot be urged in a collateral attack: *Ellis v. White*, 61–644.

This provision as to the verification of the petition by plaintiff is doubtless mandatory and intended to prevent looseness of practice in actions of divorce, and its requirements should be strictly enforced. The fact that defendant answers the petition without objecting to a want of verification will not constitute a waiver of such requirement, for the reason that it is enacted not for the benefit of defendant, but as a hindrance to easy divorce, and therefore cannot be waived. But such provision does not relate to the jurisdiction of the court. It prescribes a rule of action intended only to govern as to the final judgment in the case. Therefore the fact that the petition is not verified will not deprive the court of jurisdiction to make an order as to temporary alimony: *Van Duzer v. Van Duzer*, 65–625.

Method of trial: The provision that the trial is to be in open court is not complied with by trial to referee, and a subsequent hearing of the report of such referee on exceptions thereto. A reference in such cases cannot be made even by consent, but the testimony taken by such referee, appointed in such case, may be treated as taken before a commissioner in accordance with the provisions in this section, and the evidence so taken may be used on the trial in court: *Hobart v. Hobart*, 45–501.

As the parties to a proceeding for divorce had the right under the Revision to a jury trial, such right was not taken away by the Code in proceedings commenced before its adoption: *Wadsworth v. Wadsworth*, 40–448.

Consent of parties will not warrant the granting of a divorce unless proper ground therefor is shown: *Lyster v. Lyster*, 1–130.

3414. Causes of. 2223. Divorces from the bonds of matrimony may be decreed against the husband for the following causes:

1. When he has committed adultery subsequent to the marriage;
2. When he wilfully deserts his wife and absents himself without a reasonable cause for the space of two years;
3. When he is convicted of felony after his marriage;
4. When, after marriage, he becomes addicted to habitual drunkenness;
5. When he is guilty of such inhuman treatment as to endanger the life of his wife. [R., § 2534; C., '51, § 1482.]

In general: To justify the granting of a divorce it must appear that defendant has been guilty of some of the acts mentioned in the statutes as grounds therefor. It is not sufficient that the court finds defendant's conduct is such as to manifest a disregard on his part of the marriage vows and his obligations to plaintiff: *Miller v. Miller*, 43–325.

The causes enumerated in the statute are the only ones which will justify either party to the marriage in refusing to live with the other: *York v. Ferner*, 59–487.

Where the ground for divorce is a continuing one, although it may have begun before the enactment of the statute providing for a divorce on that ground, yet if continued afterward for the period required, it will be sufficient to justify the divorce: *McCraney v. McCraney*, 5–232, 254.

Impotency, insanity and idiocy are not grounds for divorce: *Wertz v. Wertz*, 43–534.

Under a previous statute providing for divorce, when it was made fully apparent to the court that the parties could not live in peace and happiness together, and that their welfare required a separation, *held*, that it must be made fully apparent to the court, not only that the parties could not live in peace and happiness, but also that their welfare required their separation: *Inskeep v. Inskeep*, 5–204.

Further *held*, that a divorce on this ground could not be granted to the wrong-doer: *Ibid.*

It is probably correct to say that a decree in an action for divorce is an adjudication of all causes for divorce then existing: *Rivers v. Rivers*, 65–568.

Adultery: Where divorce is sought on the ground of adultery, it is not necessary to prove the direct fact of adultery, but it may be inferred from the circumstances. These, however, must be such as would lead the guarded discretion of a just mind to the conclusion of the truth of the facts. If the adulterous disposition of the parties is once established the crime may be proven from their afterward being together under circumstances authorizing such inference: *Inskeep v. Inskeep*, 5-204.

The circumstances are to be taken together, and when combined must tend to establish the criminal disposition of the party charged, a like disposition of the alleged *particeps criminis*, and an opportunity to commit the act: *Ibid.*

Adultery can seldom be proven by other than circumstantial evidence, and evidence thereof is sufficient when the circumstances proved lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence: *Names v. Names*, 67–383.

Evidence of adultery in a particular case *held* sufficient to warrant a divorce on that ground: *Ibid.*

In a particular case, *held*, that the evidence

did not sufficiently establish the truth of the charge of adultery: *Haggard v. Haggard*, 62–82.

When the wife deserts the husband without reasonable ground, and before she has been absent long enough to entitle him to a divorce he commits adultery, the wife is entitled to divorce and alimony: *Wilson v. Wilson*, 40–230; *Dupont v. Dupont*, 10–112.

While the adultery of plaintiff will debar her from procuring a divorce on the ground of a like crime on the part of defendant, yet where the marriage of plaintiff, which was claimed to be adulterous, was contracted in ignorance of the fact that defendant was alive, and in fact he had not been heard of for ten years, *held*, that such marriage on the part of plaintiff would not defeat her action against defendant for divorce: *Smith v. Smith*, 64–682.

Desertion: A reasonable cause for desertion must be one which would *prima facie* entitle the party so deserting to a divorce: *Pierce v. Pierce*, 33–238.

Whether the desertion and absence must both be without reasonable cause, *quære;* though it may well be questioned whether the true meaning of the statute is not "when the defendant wilfully deserts her without reasonable cause and absents himself for two years." But the reasonable cause here contemplated is wrongful conduct on the part of the wife, amounting to a good excuse for the husband's desertion and absence. No other cause can be shown than one arising from the fault of the wife. The statute does not require that the absence shall be wilful, and therefore, *held*, that if the desertion occurred while the defendant was sane, his subsequent insanity was no excuse: *Douglass v. Douglass*, 31–421.

In case of application for a divorce on the ground of desertion, the petition must state that such desertion was "without reasonable cause:" *Pinkney v. Pinkney*, 4 G. Gr., 324.

Where the parties mutually agree to separate, neither one is entitled to divorce on the ground of the absence of the other until such party offers to and expresses a willingness to live with the other, and such offer must appear to be made in good faith: *Farber v. Farber*, 64–362.

Facts in a particular case *held* sufficient to constitute a wilful desertion of the husband on the part of the wife: *Pilgrim v. Pilgrim*, 57–370.

Evidence in a particular case *held* sufficient to show such desertion of the husband by the wife as to entitle the former to a divorce: *Lane v. Lane*, 67–76.

In another case, *held*, that the evidence was not sufficient: *Atkinson v. Atkinson*, 67–364.

A conviction of felony from which an appeal has been prosecuted and which is liable to reversal is not sufficient ground for a divorce. The conviction must be final and absolute: *Vinsant v. Vinsant*, 49–639.

Where it appeared that defendant was convicted on an indictment for felony, but the cause was appealed, and at the time of the trial in the divorce suit such appeal was undetermined, *held*, that there was no ground for divorce upon such conviction: *Rivers v. Rivers*, 60–378.

But in such case, *held*, that after the affirmance of such conviction a new action for divorce might be brought on the ground of such conviction, and would not be barred by the first action: *Rivers v. Rivers*, 65–568.

Habitual drunkenness: To constitute a person an habitual drunkard it is not necessary that he be in that condition during business hours: *Wheeler v. Wheeler*, 53–511.

Inhuman treatment: In order to constitute inhuman treatment within the statutory provision there must be two ingredients: first, such treatment must be inhuman, and, second, it must be such as to endanger life: *Freerking v. Freerking*, 19–34.

In an action for divorce on the ground of inhuman treatment, past treatment is not of itself a ground, and is material only as showing a just foundation for the apprehended danger to life. Threats of violence, where there is danger of harm to the life, will be sufficient; but threatened injury, causing apprehension of bodily harm merely, will not be sufficient. The question is whether there is reasonable apprehension of danger to the life: *Beebe v. Beebe*, 10–133.

Although it is not shown that any act has been done in the way of an attempt to inflict the apprehended injury, yet the court may see that there is danger in such case as well as though there had been many attempts: *Ibid.*

There may be inhuman treatment endangering life, although no physical injury is shown to have been sustained. Therefore, *held*, that where the husband had searched for a revolver with the intention of killing his wife, her life had been in danger within the meaning of the statute, and her husband had exhibited such a criminal disposition that her life would continue to be in danger if she continued to live with him, and she was entitled to a divorce: *Sackrider v. Sackrider*, 60–397.

Treatment calculated to affect the mind of plaintiff so as to destroy her health and ultimately endanger her life, or which involves by natural consequence a permanently injurious and prejudicial effect upon her health, will be sufficient: *Caruthers v. Caruthers*, 13–266; *Cole v. Cole*, 23–433.

Cruel treatment will not justify a divorce unless it be such as to furnish reasonable ground to apprehend physical danger in the further continuance of the marriage relation, and must not be such as is caused by the party's own misconduct: *Knight v. Knight*, 31–451.

The acts complained of must be of such a nature as to justify a belief that the continuance of cohabitation would be dangerous to her life and health: *Vanduzer v. Vanduzer*, 70–614.

Persistent abuse of the wife in the presence of her children, and also in the presence of neighbors and others, by applying to her epithets imputing to her unchastity, must necessarily wound the feelings and utterly destroy her peace of mind in such sense as to impair her bodily health: *Wheeler v. Wheeler*, 53–511.

Inhuman treatment which is the result of insanity will not be a ground of divorce: *Wertz v. Wertz*, 43–534.

Acts of cruelty, coupled with failure to fur-

nish suitable food and clothing, *held* sufficient, in a particular case, to constitute ground for divorce: *Harnett v. Harnett*, 55–45.

Evidence in a particular case *held* sufficient to show cruel and inhuman treatment on the part of the husband entitling the wife to divorce: *Platner v. Platner*, 66–378; *Sesterhen v. Sesterhen*, 60–301.

In a particular case, *held*, that the evidence was not sufficient to show such cruel and inhuman treatment as to entitle the wife to a divorce: *Rivers v. Rivers*, 60–378; *Whaley v. Whaley*, 68–647; *Maben v. Maben*, 72–658.

Failure of the husband to contribute or to offer to contribute anything to the support of the wife and child considered as bearing on the question of cruel and inhuman treatment: *Hart v. Hart*, 74–487.

The facts showing the treatment is inhuman, and such as to endanger life, must be stated. General allegations to that effect will not be sufficient: *Freerking v. Freerking*, 19–34.

To entitle complainant to a divorce on the ground of inhuman treatment it is enough to show that fact, although the specifications of the petition are not proved as laid: *Cole v. Cole*, 23–433.

Misconduct of plaintiff: While plaintiff may be denied relief on the ground of misconduct, notwithstanding the wrong charged on the part of defendant, yet, in a particular case, *held*, that the misconduct of plaintiff was not such as to show that she was not entitled to relief: *Marsh v. Marsh*, 64–667.

Condonation: Sexual intercourse of a wife with her husband after suit was commenced against the husband on the ground of cruel treatment endangering life, *held* not to be a condonation, where it was procured by the husband without the wife's voluntary consent: *Harnett v. Harnett*, 55–45.

The fact that a wife seeking divorce remains in the same house with her husband and does the household work for the husband does not amount to condonation sufficient to defeat her action: *Harnett v. Harnett*, 59–401.

In a particular case, *held*, that the condonation of the wife in regard to adultery of the husband was not such as to show assent thereto on her part: *Cochran v. Cochran*, 35–477.

Facts in a particular case *held* not sufficient to show condonation: *Sesterhen v. Sesterhen*, 60–301.

3415. Husband from wife. 2224. The husband may obtain a divorce from his wife for like cause, and also when the wife at the time of the marriage was pregnant by another than her husband, unless such husband have an illegitimate child or children then living, which was unknown to the wife at the time of their marriage. [R., § 2535; C., '51, § 1483.]

3416. Cross-petition. 2225. The defendant may obtain a divorce for like causes as above stated, by filing a cross-petition.

The cross-petition here contemplated may be based on causes of divorce occurring subsequently to the commencement of the original action: *Wilson v. Wilson*, 40–230.

The cross-petition for a divorce by defendant is to be regarded as a counter-claim: *Ibid.*

3417. Maintenance during litigation. 2226. The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

Temporary alimony: To warrant an order granting temporary alimony the fact of marriage between the parties must be admitted or proved: *York v. York*, 34–530.

In a proceeding to vacate a decree of divorce the court has no power to require defendant to pay plaintiff a sum of money to enable her to prosecute the action. To authorize such an order it is essential that the marriage relation should exist: *Wilson v. Wilson*, 49–544.

But the acts of the parties in living together again as husband and wife, after a divorce, were held sufficient to establish such marital relation as to justify the granting of an order for temporary alimony: *McFarland v. McFarland*, 51–565.

The proof of marriage in a particular case *held* sufficient to authorize the allowance of temporary alimony: *Smith v. Smith*, 61–138.

Upon the question of an allowance of suit money plaintiff is not bound to show that she is entitled to a divorce. The making of such allowance is a matter of discretion, and the appellate court will not set it aside unless it shall appear that the discretion has been abused: *Campbell v. Campbell*, 73–482.

Orders made for temporary alimony for support of the wife and for attorneys' fees cannot be regarded as a final adjudication as to the rights of the parties: *Clyde v. Peavy*, 74–47.

By court, not judge: The power to make the order for temporary alimony is conferred upon the court, and not upon the judge in vacation: *Prosser v. Prosser*, 64–378.

In proceeding for alimony: Where the wife brings action for alimony without divorce, a temporary allowance may be made for the prosecution of the action in the same manner as provided by statute in proceedings for divorce: *Finn v. Finn*, 62–482.

Application; allowance: If the application for temporary alimony does not fairly present the facts necessary to enable the court understandingly to pass upon it, all the inferences and presumptions which naturally arise out of the defect of such application will be indulged in against the party preferring it. But the opposite party cannot, by motion for more specific statement, require the number, names and residences of witnesses, and facts expected to be proved by each, to be shown to

the court in determining the proper amount to be allowed for the purpose of enabling the cause to be tried. In a particular case, *held*, that the allowance for temporary alimony was excessive: *Champlin v. Champlin*, 42–169.

The court may have jurisdiction to make an order as to temporary alimony, although the averments of the petition are not verified as required by § 3413: *Van Duzer v. Van Duzer*, 65–625.

Temporary alimony may be granted to either party in a divorce proceeding as against the other; and, in a particular case, where the husband sought a divorce from the wife, *held*, that an allowance of temporary alimony to the wife was proper: *Small v. Small*, 42–111.

An allowance to the wife of the means of defraying expenses of a suit in which she is plaintiff may properly be made: *Briggs v. Briggs*, 36–383.

But *held* that the amount allowed in a particular case was excessive: *Ibid.*

In a particular case, *held*, that an allowance of three hundred dollars for attorneys' fees for the prosecution of the action, and two hundred dollars for the payment of witness fees and other expenses, to be paid over to the clerk and used for that purpose, together with an allowance of twenty-five dollars per month for the support of plaintiff during the action, was not excessive: *Van Duzer v. Van Duzer*, 65–625.

In a particular case, *held*, that allowance for support pending appeal was not proper, and that the allowance made in the case was excessive: *Miller v. Miller*, 43–325.

In a particular case an allowance to the wife was upheld: *Maben v. Maben*, 67–284.

The husband cannot offset as against the amount which he is required to pay as temporary alimony the value of household goods appropriated by the wife: *Dayton v. Drake*, 64–714.

An agreement for division upon separation will not preclude the wife in a suit for divorce from having an allowance of suit money: *Campbell v. Campbell*, 73–482.

Failure to pay: While failure of plaintiff to pay a sum ordered by the court to be paid to defendant to enable her to defend and to establish her innocence may well be punished by dismissing the action or striking the petition from the files, a similar failure of defendant to pay a sum similarly ordered to plaintiff should only in extreme cases be punished by striking the answer from the files. A full investigation of the merits should not thus be prevented, if the party can show a good excuse, such as misfortune or poverty, for failure to comply with the order: *Peel v. Peel*, 50–521.

Failure to pay money awarded as temporary alimony, and for which judgment has been rendered, does not constitute contempt depriving defendant of the right to file a pleading in the case: *Baily v. Baily*, 69–77; *Allen v. Allen*, 72–502.

Custody and support of children: Pending a proceeding for divorce the court has power to provide for the custody and maintenance of children, and may take them from the custody of the father, defendant, if he is shown to be an unfit person: *Green v. Green*, 52–403.

An appeal may be taken from an order allowing temporary alimony: *Blair v. Blair*, 74–311.

Attorneys' fees: See notes to § 3420.

3418. Attachment. 2227. The petition may be presented to the court or judge for the allowance of an order of attachment; and said court or judge may, by indorsement thereon, direct such attachment and the amount for which the same may issue and the amount of the bond, if any, that shall be given, and the clerk shall issue the same accordingly; and any property taken by virtue thereof shall be held to satisfy the judgment or decree of the court, but may be discharged or released as in other cases.

The provisions of the Code as to attachment in ordinary actions are not applicable to the attachment here authorized: *Smith v. Smith*, 61–138.

In a particular case, *held*, that an attachment without a bond was properly allowed: *Ibid.*

The remedy by attachment is not exclusive of that by injunction, to restrain the disposition of property by the defendant: *Wharton v. Wharton*, 57–696.

The attachment may be levied on the homestead: *Daniels v. Morris*, 54–369.

Such an attachment may be granted in a suit to annul a legal marriage as well as one for a divorce: *Ibid.*

This attachment will not affect the lien of a creditor of the husband whose judgment is obtained prior to the decree; nor can the decree be dated back to the time of attachment so as to cut out intervening judgments: *Daniels v. Lindley*, 44–567.

It is not improper to allow an attachment to compel the performance of an order to pay temporary alimony, on the ground that it interferes with the power of defendant to comply with the order for alimony, it appearing that the means of defendant are ample without taking into consideration the property attached: *Van Duzer v. Van Duzer*, 65–625.

3419. Showing. 2228. In making such orders, the court or judge shall take into consideration the age, condition, sex, and pecuniary condition of the parties, and such other matters as are deemed pertinent, which may be shown by affidavits in addition to the pleadings or otherwise, as the court or judge may direct

3420. Alimony; custody of children; changes. 2229. When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right and proper. Subsequent changes may be made by the court in these respects when circumstances render them expedient. [R., § 2537; C., '51, § 1485.]

Custody of children: A provision under a decree giving to one of the parties the custody of children ceases to have any effect upon the death of such party. The right of such custody cannot survive the death of the party entitled thereto, nor be transferred to any other person, and upon such death, the other parent stands in such relation to such children as he would have occupied had such decree never been made: *Barney v. Barney*, 14–189.

As to provisions for custody of children in particular cases, see *Hunt v. Hunt*, 4 G. Gr., 216; *Cole v. Cole*, 23–433; *Zuver v. Zuver*, 36–190.

Permanent alimony: The power to allow alimony is an incident of the power to grant a divorce, and such relief may be given in an action for divorce, although there is no statement in the original notice of any claim therefor: *McEwen v. McEwen*, 26–375.

And this is true although service of notice is had by publication only; and in such case the court may declare and enforce a lien for alimony against real estate of the defendant situated in another county: *Harshberger v. Harshberger*, 26–503.

Alimony, custody of the children, etc., may be regulated by order of the court, although no reference thereto is made in the pleadings: *Zuver v. Zuver*, 36–190.

The party to whom the divorce is granted cannot have any further right or interest in the property of the other party than that which is given under this section, and cannot claim any share by way of dower in case of survival: *Marvin v. Marvin*, 59–699; *Boyles v. Latham*, 61–174.

An agreement for settlement in view of separation will not bar a claim for alimony in a subsequent action for divorce: *Wilson v. Wilson*, 40–230. But such agreement may be taken into account in determining the amount of alimony to be allowed: *Campbell v. Campbell*, 73–482.

Alimony is an allowance out of the estate of the husband for the maintenance of the wife after the dissolution of the marriage relation. The right to alimony is not property in itself, and a contract between the husband and the wife by which the wife accepts a provision in lieu of alimony may be binding: *Martin v. Martin*, 65–255.

The relation of husband and wife must exist either *de jure* or *de facto* to justify an order for alimony: *Blythe v. Blythe*, 25–266.

When allowance of alimony proper: Where the wife, without sufficient excuse, had left the husband, and the latter had afterwards committed adultery, for which a divorce was granted the wife, *held*, that she was also entitled to alimony: *Dupont v. Dupont*, 10–112.

Where a divorce is granted the husband on account of the adultery of the wife, she will not be entitled to alimony, unless under peculiar circumstances: *Fivecoat v. Fivecoat*, 32–198.

Alimony is rarely and only under peculiar circumstances granted to the party in fault, even when that party is the wife; and where a suit was brought by the husband against the wife for divorce on the ground of inhuman treatment, and the wife in a cross-petition asked divorce from the husband on the same ground, and divorce was granted to the wife and denied to the husband, *held*, that it was error to allow to the husband a sum as alimony and make it a lien on the homestead, which was in the wife's name and acquired from her separate means: *Barnes v. Barnes*, 59–456.

As to the amount and kind of alimony proper to be allowed under particular circumstances, see *Abey v. Abey*, 32–575; *Farley v. Farley*, 30–353.

Allowance in a particular case *held* not excessive: *Sesterhen v. Sesterhen*, 60–301.

In a particular case, *held*, that the divorce had been improperly granted, but no objection to the divorce being raised on appeal, but only an objection to the alimony, the amount thereof was disallowed: *Ensler v. Ensler*, 72–159.

Allowing specific property: The court may give the wife as alimony a specific portion of the husband's property in fee: *Jolly v. Jolly*, 1–9. But see *contra*, *Russell v. Russell*, 4 G. Gr., 26.

While it is entirely competent for the court to give to the wife a portion of the husband's property absolutely and in her own right, this should not be done if the husband is in condition to pay money, unless there is something in the condition of the wife which would render it equitable and just to give her the property in lieu of money: *Inskeep v. Inskeep*, 5–204, 221.

It is competent for the court to set apart for the plaintiff a specific portion of the defendant's estate as alimony, and this may be done even though no prayer to have this specific property set off as alimony is contained in the petition, and notice of the action is served by publication only: *Twing v. O'Meara*, 59–326.

The various cases in Iowa relating to the proportion of the husband's property which can be given to the wife as alimony discussed, and *held* that in no case had more than about one-third of such property been set apart in that manner, and that where the wife was the defendant against whom divorce was decreed, the proportion should be less: *Zuver v. Zuver*, 36–190.

Liability of homestead: The court may, in rendering judgment for alimony in an action for divorce, declare such judgment a lien upon the homestead of the opposite party; but such lien cannot be extended to cover the costs taxed in the case: *Wilson v. Wilson*, 40–230.

Where the husband was given the custody of the children and a general judgment for alimony was rendered in favor of the wife, *held*, that such judgment could not be enforced against the homestead which the hus-

band and children continued to occupy: *Byers v. Byers*, 21-268.

But where the decree makes the alimony a lien upon specific property, the fact that such property is a homestead cannot be taken advantage of after decree. It should be set up in the action: *Hemenway v. Wood*, 53-21.

Lien of judgment: Under peculiar facts indicating fraud on the part of the mortgagee under a mortgage in which the wife did not join, *held*, that a decree directing the allowance of alimony should be a lien upon the premises prior to such mortgage: *Sesterhen v. Sesterhen*, 60-301.

A judgment for alimony declared a lien as against property of defendant in another county will take priority over a subsequent attachment of such property, although the attachment is prior to the filing of a transcript of the lien in the county where the property is situated: *Harshberger v. Harshberger*, 26-503.

Setting aside decree: A decree of divorce may be set aside for fraud in obtaining it, although plaintiff has remarried and the rights of subsequent innocent parties have intervened: *Whitcomb v. Whitcomb*, 46-437; *Rush v. Rush*, 46-648; *S. C.*, 48-701.

A decree of divorce which is subsequently declared void for fraud in its procurement is no defense to a prosecution for adultery in cohabiting with a woman to whom the party securing the divorce was married after the divorce was granted and before it was set aside. Such a decree is void not merely from the time of setting aside, but from the beginning: *State v. Whitcomb*, 52-85.

Where a wife procured a decree of divorce in this state by publication, and defendant, after having known for nearly a year of such decree, and after having himself procured a decree of divorce from his wife in another jurisdiction, and, after the wife had remarried, commenced proceedings to set aside the wife's divorce on the ground of fraud and obtained a new trial, *held*, that he had no interest in the matter entitling him to any relief, especially in view of the fact that he had taken no steps after learning of the decree to assert any rights as against it until after the remarriage of the former wife: *Webster v. Webster*, 54-153.

Costs; attorneys' fees: The court may tax an attorney's fee as part of the costs in favor of the successful party, but such item of costs cannot be made a lien upon the homestead of the opposite party: *Wilson v. Wilson*, 40-230.

The attorney for the wife defending a divorce suit may recover his fees from the husband as for necessaries furnished the wife: *Porter v. Briggs*, 38-166. But see *contra*, *Johnson v. Williams*, 3 G. Gr., 97.

An attorney who brings an action for divorce in behalf of the wife against the husband may recover attorneys' fees from the husband upon showing that he acted in good faith, and that there was no collusion or oppression in the bringing of the action. He is not required to establish that the wife was entitled to a divorce: *Preston v. Johnson*, 65-285.

An allowance of temporary alimony to the wife will not defeat recovery by her attorney from the husband of an additional sum: *Clyde v. Peavy*, 36 N. W. Rep., 883.

Abatement by death: Upon the death of the defendant, a proceeding for divorce abates, and with it all claim for alimony: *O'Hagan v. O'Hagan's Ex'r*, 4-509; *Barney v. Barney*, 14-189.

Suit for alimony without divorce: A court of equity will entertain a suit for alimony alone, without divorce, where the wife is separated from the husband on account of misconduct on his part justifying the separation: *Graves v. Graves*, 36-310; *Whitcomb v. Whitcomb*, 46-437; *Finn v. Finn*, 62-482; *Farber v. Farber*, 64-362; *Platner v. Platner*, 66-378.

A wife resident in Iowa, against whom a valid decree of divorce is rendered in another state according to the laws of that state, cannot afterwards maintain an action in Iowa for alimony out of property not belonging to her former husband at the time of the granting of such divorce: *Van Orsdal v. Van Orsdal*, 67-35.

An action for alimony cannot be maintained as an independent proceeding after the divorce of the parties: *Wilde v. Wilde*, 36-319.

Subsequent changes: The provision as to allowance of alimony, etc., is doubtless declaratory of the common law, but the portion of the section authorizing subsequent changes to be made by the court in these respects, when circumstances render them expedient, doubtless effectuates a change in the law or at least in the method of enforcing it: *Fivecoat v. Fivecoat*, 32-198.

The right to a change in a previous decree as to alimony does not exist after the death of the party against whom the change is sought, and proceedings already commenced therefor abate upon the death of such party: *O'Hagan v. O'Hagan's Ex'r*, 4-509.

The power of the court to modify the decree is not limited to one year after the rendition thereof, but it retains jurisdiction for that purpose as long as the original judgment remains unexecuted and under its control, and even though the parties may have removed from the state: *Andrews v. Andrews*, 15-423.

The time and manner of application for subsequent changes are left largely within the discretion of the court: *Jungk v. Jungk*, 5-541.

The provisions in the original decree as to alimony, custody of children, etc., are conclusive as to the circumstances of the parties at that time, and it is only upon a change in such circumstances that the power to make subsequent changes in the decree is to be exercised. The power to make such changes is not a power to grant a new trial or retry the same case: *Blythe v. Blythe*, 25-266; *Wilde v. Wilde*, 36-319.

Where the matter of alimony has once been fairly settled, an application for a change ought to be carefully scrutinized, and where an alteration of circumstances is alleged, the court will consider whether it has been brought about by improper conduct of the party asking the change: *Fisher v. Fisher*, 32-20.

Where a divorce was granted after due acceptance of service by defendant and upon default, and no alimony was claimed or intended to be claimed, *held*, that defendant could not, in a subsequent proceeding, have a

modification of the decree, so as to allow alimony: *Rouse v. Rouse*, 47–422.

Whether any other court than the one granting the divorce can make subsequent changes in the provisions of the decree, *quære*. But the jurisdiction of the court granting the divorce is not exclusive in such sense that a judge of another court cannot make an order in a *habeas corpus* proceeding as to the custody of a child, and the judge of the court granting the divorce cannot interfere with such order in the *habeas corpus* proceeding: *Shaw v. McHenry*, 52–183.

The statutory provision as to subsequent change of decree evidently contemplates a proceeding brought for the purpose of obtaining such change. In the absence of this being done, a decree entered must amount to an adjudication. Therefore, *held*, that the rights of a parent to the custody of the children as provided for in the decree of divorce not having been waived or surrendered, and the parent still being in condition to take care of and have the custody of the children, such decree could not be attacked or changed in a collateral proceeding for the custody of the children: *Jennings v. Jennings*, 56–288.

The facts in a particular case *held* sufficient to show that the father, to whom the custody of children was given in a decree of divorce against him, was not a proper person to have charge of them, and a change in the decree was made, giving the custody of the children to the wife and awarding her alimony for their keeping: *Boggs v. Boggs*, 49–190.

Circumstances of a particular case *held* sufficient to justify modification of a decree of divorce, so as to change the custody of a child from one parent to another: *Sherwood v. Sherwood*, 56–608.

The provision allowing subsequent changes in the decree *held* applicable under previous statutes to divorces *a vinculo matrimonii*, as well as those *a mensa et thoro*: *Jungk v. Jungk*, 5–541.

3421. Forfeiture. 2230. When a divorce is decreed, the guilty party forfeits all rights acquired by the marriage. [C., '51, § 1486.]

A decree of divorce against the wife as the guilty party bars any claim to dower in the property of the husband: *McCraney v. McCraney*, 5–232, 250.

ANNULLING ILLEGAL MARRIAGES.

3422. Causes specified. 2231. Marriages may be annulled for the following causes:

1. Where marriage between the parties is prohibited by law;
2. Where either party was impotent at the time of marriage;
3. Where either party had a husband or wife living at the time of the marriage, provided they have not lived and cohabited together, as provided in section two thousand two hundred and one [§ 3392], of chapter one of this title;
4. Where either party was insane or idiotic at the time of the marriage.

Husband or wife living: The presumption of death of the husband does not arise until he has been absent without intelligence concerning him for seven years. Whether cohabitation by the wife with a husband, under a marriage celebrated before the expiration of this period, continued until after such expiration, will constitute a valid marriage, *quære*: *State v. Henke*, 58–457.

A marriage which is void *ab initio*, by reason of a former wife of the husband being alive, has no effect upon the property rights of the parties, and they stand in the same relation as though it had never occurred: *Carpenter v. Smith*, 24–200.

Effect of void marriage: Marriage of a person having a husband or wife living is void, and therefore where a woman having married a man having a wife living, subsequently married a husband who afterwards died, *held*, that she was the widow of such deceased: *Drummond v. Irish*, 52–41.

Fraud: A marriage contract rests upon the consent of the parties thereto, and if one of them is legally incapable of consenting, or by the exercise of fraud or force the marriage was celebrated without his or her consent, it is void, and may be so declared by a court of chancery, but the force or fraud relied upon must be clearly established. Mere false representations by one of the parties as to his fortune, character or social standing will not avoid the marriage: *Wier v. Still*, 31–107.

Action to annul: Where a marriage is by provision of law absolutely void, and not merely voidable, it is not necessary that an action to annul it be brought before a subsequent legal marriage can be made: *Drummond v. Irish*, 52–41.

Impotency, insanity and idiocy are not grounds for divorce: *Wertz v. Wertz*, 43–534.

3423. Petition. 2232. A petition shall be filed in such cases as in actions for divorce, and all the provisions of this chapter shall apply to such cases except as otherwise provided.

3424. Validity determined. 2233. When the validity of a marriage is doubted, either party may file a petition, and the court shall decree it annulled or affirmed according to the proof.

3425. Children; legitimacy. 2234. When a marriage is annulled on account of the consanguinity or affinity of the parties, or because of impotency, the issue shall be illegitimate; but when on account of non-age or insanity, or idiocy, the issue is the legitimate issue of the party capable of contracting marriage.

3426. Prior marriage. 2235. When a marriage is annulled on account of a prior marriage, and the parties contracted the second marriage in good faith, believing the prior husband or wife to be dead, that fact shall be stated in the decree of nullity; and the issue of the second marriage begotten before the decree of the court, is the legitimate issue of the parent capable of contracting.

3427. Alimony. 2236. In case either party entered into the contract of marriage in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree, and the court may decree such innocent party compensation as in cases of divorce.

In an action to annul a marriage plaintiff may have alimony as in an action for divorce. In a proper case an attachment may issue as provided in § 3418 in cases of divorce: *Daniels v. Morris*, 54-369.

One who enters into the marriage relation with another under the belief that the latter is sane cannot be held to be affected with notice of insanity by reason of the record of the proceedings for the appointment of a guardian for such person as insane: *Barber v. Barber*, 74-301.

The question of the provision for compensation in a particular case, considered: *Ibid.*

CHAPTER 4.

OF MINORS.

3428. Majority. 2237. The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage. [R., § 2539; C., '51, § 1487.]

The disability of minority is terminated by death, and the year which by § 1377 is allowed a minor for redeeming his land from tax sale after his disability is removed commences from that time and not from the time he would have become of age: *Gibbs v. Sawyer*, 48-443.

If by reason of the minor having obtained majority by marriage or by the provisions of § 3430 he is entitled to his own time and earnings, he may, in a suit for injuries, recover damages for loss of time prior to reaching the age of majority: *Nelson v. Chicago, R. I. & P. R. Co.*, 38-564.

3429. Contracts; disaffirmance. 2238. A minor is bound, not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after his attaining his majority. [R., § 2540; C., '51, § 1488.]

The rule respecting the contract of an infant is, that when the court can pronounce it to be to the infant's prejudice, it is void, and when to his benefit, as for necessaries, it is good, and when of uncertain nature, it is voidable at the election of the infant only: *Green v. Wilding*, 59-679.

At common law the general rule was that the minor was not bound unless by some act he had positively affirmed the contract, but under the statute a disaffirmance within a reasonable time is necessary to release him from obligation: *Wright v. Germain*, 21-585; *Murphy v. Johnson*, 45-57.

What will be a reasonable time within which to disaffirm must be determined by the peculiar circumstances of each case: *Stout v. Merrill*, 35-47.

As to what is a "reasonable time," see *Jenkins v. Jenkins*, 12-195; *Wright v. Germain*, 21-585; *Weaver v. Carpenter*, 42-343.

Where a minor made a contract releasing his prospective share in his father's estate, and upon his becoming of age, by marriage, did not disaffirm such contract within four months following and prior to his father's death, nor until two months after that time, *held*, that the disaffirmance was not within a reasonable time, and that the contract was binding: *Jones v. Jones*, 46-466.

A disaffirmance, after the expiration of six months from the time of attaining majority, *held* not to be within a reasonable time, no circumstances being averred to excuse delay in the disaffirmance: *Hoover v. Kinsey Plow Co.*, 55–668.

Disaffirmance by an action brought three or four years after plaintiff, a female, attained her majority, the only excuse offered for the delay being that she was informed by her mother and neighbors that she could not disaffirm the contract until her minor brother became of age, *held* not within a reasonable time, especially in view of the further facts that she did not ask legal advice, and delayed at least three months after she was informed that she could disaffirm the contract before bringing action: *Green v. Wilding*, 59–679.

In case of the marriage of the minor, a reasonable time for disaffirmance commences to run from the time of such marriage: *Jones v. Jones*, 46–466.

The right of an infant to avoid his contracts is absolute and paramount to all equities in favor of third persons, even purchasers without notice: *Jenkins v. Jenkins*, 12–195.

The restoration of the fruits of the contract is essential to the disaffirmance thereof: *Stout v. Merrill*, 35–47.

But the minor is only bound to restore money or property received by virtue of the contract remaining under his control after attaining majority: *Jenkins v. Jenkins*, 12–195.

The statute makes no distinction as between property and money remaining under the control of the minor. He may disaffirm without tendering back either property or money under his control unless it is the identical property or money received by him by virtue of the contract: *Hawes v. Burlington, C. R. & N. R. Co.*, 64–315.

The agreement of an infant for the repayment of money of which he has had and retains the benefit, not having been disaffirmed within a reasonable time after attaining majority, is binding: *Stucker v. Yoder*, 33–177.

The minor may disaffirm his contract before attaining majority. (Overruling *Murphy v. Johnson*, 45–57): *Childs v. Dobbins*, 55–205.

A minor is bound by his deed unless he disaffirms it within a reasonable time after he becomes of age: *Weaver v. Carpenter*, 42–343.

Where a person, many years after becoming of majority, claimed the right to disaffirm, *held*, that he was not entitled to disaffirm upon showing that the deed was procured by fraud, diligence to discover the fraud not being shown: *Ibid.*

Where an infant holds title in trust and is compellable to convey, a voluntary conveyance by him will bind him and cannot be disaffirmed: *Prouty v. Edgar*, 6–353.

A conveyance by an infant is voidable and not void. If founded on a valuable consideration, it is a valid contract until regularly avoided: *Jenkins v. Jenkins*, 12–195.

A minor who has made a voluntary conveyance of his estate which does not correctly describe the land to be conveyed cannot be held to the execution of a corrected conveyance upon a promise to do so made after his attaining his majority. Such promise being without consideration, the transaction stands as an uncompleted gift: *Oxley v. Tryon*, 25–95.

3430. Misrepresentations; engaging in business. 2239. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting. [R., § 2541; C., '51, § 1489.]

The cases enumerated in this section are exceptions to those contracts which may be affirmed as provided in the preceding section: *Oswald v. Broderick*, 1–380.

The fact that an infant is engaged in business as an adult does not make his contracts binding unless the party with whom he contracts is thereby deceived and believes that he is of age. If the fact of minority is known to the other party the minor is not bound: *Beller v. Marchant*, 30–350.

The exception here made as to the power of a minor to disaffirm his contracts by reason of his having engaged in business as an adult applies not only to contracts made by him in the conduct of such business, but to all contracts. The fact that the minor is engaged in business as an adult is evidence authorizing one dealing with him to conclude that he is an adult: *Jaques v. Sax*, 39–367.

Therefore, *held*, that a minor who was a member of a partnership, but without capital invested, and rendering his services only, as his contribution to the capital of the firm, was still to be considered as engaged in business as an adult: *Ibid.*

Where a minor is entitled to his own time and earnings he may recover damages for personal injury prior to the time of attaining majority: *Nelson v. Chicago, R. I. & P. R. Co.*, 38–564, 568.

3431. Payments. 2240. Where a contract for the personal service of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of the contract, is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time. [R., § 2542: C., '51, § 1490.]

The provisions of this section do not change the rule that the father has the right to the custody, control and services of the minor, and may recover damages against another who deprives him of such right, unless the minor has been emancipated; and even after emancipation the father may re-assert his control. The emancipation sets the son free and gives him capacity to manage his own affairs as if of age, and may be shown by circumstances

as well by direct proof: *Everett v. Sherfey*, 1-356.

Where a minor with the consent of the father has engaged in business for himself his earnings are not subject to his father's debts: *Walcott v. Rickey*, 22-171.

A minor may recover under a contract for personal services, and if payment has been made to the minor under such contract, it is a full satisfaction for such services and precludes a second recovery by the parent or guardian: *Murphy v. Johnson*, 45-57.

In such case, his next friend has no more right to recover a second time for such services than a parent or guardian has: *Ibid.*

If a minor has been paid for his personal services according to contract, his parent or guardian cannot recover a second time therefor: *Nixon v. Spencer*, 16-214.

Where a contract is made with a minor under the belief that he is of age and payment is made to him, the parent may be still entitled to recover the amount so paid, although as against the minor the contract is binding: *Darling v. Noyes*, 32-96.

CHAPTER 5.

OF THE GUARDIANSHIP OF MINORS, DRUNKARDS, SPENDTHRIFTS, AND LUNATICS.

3432. Natural guardian. 2241. The parents are the natural guardians of their minor children, and are equally entitled to the care and custody of them. [R., § 2543; C., '51, § 1491.]

Natural guardians: A minor is not bound by any contract made for him by his parent as natural guardian, without formal guardianship having been granted: *Jones v. Jones*, 46-466.

A step-father of minor children who are members of his family stands *in loco parentis* to such children: *Latham v. Myers*, 55-519.

But such person, although their natural guardian, is under no obligation to preserve their property by paying off incumbrances thereon, and is not debarred from acquiring title to such property under foreclosure proceedings: *Otto v. Schlapkahl*, 57-226.

As to removal of natural guardian for misconduct, see §§ 3492-3496.

Liability for support: The duty of a parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty, but the liability of a child to support its parent when indigent, destitute, or aged, is wholly created by statute, and therefore an express promise on the part of the child to pay for past expenditures made by a third person for the parent is not binding on the child: *Dawson v. Dawson*, 12-512.

While the obligation of parents to support their children at common law is somewhat uncertain, ill-defined and doubtful, the rule seems to be in this country that, independently of any statute, parents are bound to contribute to the support of their minor children, and such obligation rests mainly on the father; and that in favor of a third person who supports the child, a promise to pay may and should be inferred on the ground of the legal duty imposed. But in view of the statutory provision rendering the property of both husband and wife chargeable for family expenses (§ 3405), the wife who has furnished the support of the children after she has been abandoned by her husband cannot recover for such support: *Johnson v. Barnes*, 69-641.

A father is not legally bound for the support of his adult children either at common law or under the statutes of the state: *Monroe County v. Teller*, 51-670.

At common law the father is not liable for necessaries, such as medical treatment furnished to an adult child at the request of such child, even though the child be at the home of the father, when the necessaries are furnished to a member of his family; and this rule is not changed by the provisions of the Code with reference to family expenses: *Blachley v. Laba*, 63-22

One who marries a woman with children by a previous husband, and receives such children into his family, stands in the position of parent toward them, and is entitled to their services, and is responsible for their education and maintenance; and, if he is appointed their guardian, cannot claim compensation for their support: *Bradford's Heirs v. Bodfish*, 39-681. And see *Gerdes v. Weiser*, 54-591.

Where articles of adoption were properly executed, but afterwards canceled by agreement, with the arrangement that other articles should be executed, revesting in the parent his parental right, and pending the proposed arrangement it was agreed that the adopting parent should retain the child, receiving from the natural parent compensation for its support, *held*, that the adopting parent had a valid claim against the natural parent for such agreed support, such as would serve as a consideration for the execution of a mortgage by the natural parent to secure such compensation: *Clayton v. Whitaker*, 68-412.

A parent of limited means may have an allowance out of the estate of his child, when ample for that purpose, for the maintenance of such child: *Gerdes v. Weiser*, 54-591.

Services: The fact that a child lives in the family of the parent after becoming of age, receiving support as one of the family, creates no liability on the part of the parent, in the absence of express contract, to pay for services rendered by the child during that time: *Hart v. Flinn*, 36-366.

The father cannot recover for the destruction of a child *in ventre sa mere*, unless on the basis of loss of service; and whether he could on that ground *doubted: Kansz v. Ryan*, 51–232.

Custody: At common law, the father, being under legal obligation to support the child, is entitled to its custody unless his disability is shown: *Hunt v. Hunt*, 4 G. Gr., 216.

Although, ordinarily, when parents are living apart, the father is entitled to the custody of the child, such right is not absolute, and, in a proceeding for divorce, temporary provision may be made for the custody of the children: *Green v. Green*, 52–403.

In an action of *habeas corpus* by the mother against the father for the custody of an infant child of fifteen months of age, taken by the father from the mother by stealth, *held*, that the right of the father to the care and custody of such child was not paramount to that of the mother: *State v. Kirkpatrick*, 54–373.

In habeas corpus proceedings: Although a parent is entitled to the custody of his child, yet when he seeks such custody in a *habeas corpus* proceeding the welfare of the child will be considered, and the custody will not be given him if inconsistent with the best interests of the child: *Ibid.; Drumb v. Keen*, 47–435; *Fouts v. Pierce*, 64–71.

The principal object which the court seeks to secure in *habeas corpus* proceedings for the custody of a child is its welfare: *State v. Noble*, 70–174.

Where the father of an illegitimate child two years of age sought to recover the custody of the same from its mother, it appearing that his moral character was not better than hers, *held*, that it was error to deprive her of its custody: *Pratt v. Nitz*, 48–33.

Where the right to the custody of a child, under the decree in an action of divorce, has not been waived or surrendered, and the person decreed to be entitled to such custody is able to take care of the child, the right of custody under the decree cannot be changed in an action of *habeas corpus* on the ground that the welfare of the child requires that the other parent should have its custody and care: *Jennings v. Jennings*, 56–288.

A father has the right to the care and custody of his minor children and to superintend their education and nurture; and where he is deprived of such care and custody, and of this superintendence, by the act of another, he has his remedy by proper action against such person: *Everett v. Sherfey*, 1–356.

By emancipation is to be understood such act of the father as sets the son free from his subjection and gives him the capacity of managing his own affairs as if he were of age. Such emancipation need not be evidenced by any formal or record act of manumission, but it is a question of fact which may be proved by direct or circumstantial evidence: *Ibid.*

Although the father has once so far emancipated his son as that he would have the right of contract for his own services and seek his own place of employment, yet the father might afterwards assert his control and bring action for the subsequent harboring or retaining in employment against his will. After a party has notice that the parent does not consent to the surrender of control of his child, it is his duty to refuse such child a residence and employment, and by not refusing to give him such residence and employment he will render himself liable to an action for harboring such child: *Ibid.*

Marriage of child: A parent cannot recover damages against a person for procuring the marriage of his daughter in good faith and without force and imposition, at an age when the marriage is binding according to the common law, although it is without his consent and while the daughter is a minor: *Goodwin v. Thompson*, 2 G. Gr., 329.

Agreement as to custody: Where the father of a child had, by written agreement with a third person, placed such child in the custody of such person for a limited time, and at the expiration of that time sought to recover custody by writ of *habeas corpus*, *held*, that the feelings of defendant were not to be considered in view of the fact that he took the child under an express written agreement providing for its surrender, and that the preferences and wishes of the child, while not to be ignored, were not entitled to a controlling influence, the paramount interest of the child being the primary consideration: *Shaw v. Nachtwey*, 43–653.

The right of parents to the custody of a child is not absolute under all circumstances. The parent can by agreement surrender the custody of his infant child so as to make the custody of him to whom he surrenders it legal: *Bonnet v. Bonnet*, 61–199.

At common law the father could not, by consent or agreement, so dispose of his child as to discharge himself of the obligation to support it or to deprive himself of the right to its custody: *Hunt v. Hunt*, 4 G. Gr., 216.

While a parent may provide by will for the care and custody of a minor child, and may make a disposition of it by assenting to an act of adoption, he cannot, by mere oral gift, convey the right to such custody: *Burger v. Frakes*, 67–460.

3433. Surviving parent; guardian appointed. 2242. Either parent dying before the other, the survivor becomes the guardian. If there be no parent or guardian qualified and competent to discharge the duty, the circuit [district] court shall appoint a guardian. [R., § 2544; C., '51, § 1492.]

[As to powers of clerk to appoint guardians, see §§ 245, 3513.]

The guardian thus appointed is the guardian of the person as well as of the property of the ward: *Burger v. Frakes*, 67–460.

In case of the death of the father the mother has the right to sue as guardian for the earnings of the minor: *Cain v. Devitt*, 8–116.

The court at the place of domicile of a child has jurisdiction of the matter of a guardian of its person. The domicile of the child is to be

determined by the domicile of the parents, and when the domicile is once fixed it remains until another is lawfully acquired: *Jenkins v. Clark*, 71–552.

By his appointment the guardian is vested with the same right to the custody of a ward as a parent has of his own child, and this right to such custody cannot be defeated by a provision in the will of a parent, for such a provision cannot create any legal relation between the person designated and the child, nor impose any obligation upon such person: *Ibid.*

As a parent cannot by will impose any liability upon another with reference to the custody of a child, such a provision in the will cannot defeat the power of the guardian appointed by the proper court: *Ibid.*

3434. Of property. 2243. If the minor has property not derived from either parent, a guardian must be appointed to manage such property, which may be either parent if suitable and competent. [R., §§ 2545–6; C., '51, §§ 1493–4.]

3435. Minor may choose. 2244. If the minor be over the age of fourteen years and of sound intellect, he may select his own guardian, subject to the approval of the circuit [district] court of the county where his parents, or either of them, reside; or if such minor is living separate and apart from his parents, the circuit [district] court of the county where he resides has jurisdiction. [R., § 2547; C., '51, § 1495.]

3436. Power of court and guardian. 2245. The guardian and court making the appointment, have power and authority over any property of the minor situate or being in any other county to the same extent and in the manner as if the same was situate in the county where the appointment was made. But when any order is made by such court affecting the title of lands lying in another county, a certified copy of the same, and of all the papers on which it is founded, shall be transmitted to the clerk of the circuit [district] court in the county where such lands are situated, and such clerk shall enter such order on the proper docket and index the same, and make a complete record thereof in the same manner as if the cause in which the order is made had been commenced in his court. [9 G. A., ch. 27, § 1.]

[The word "his" before "court," in the last line, is omitted erroneously in the printed Code.]

3437. Bond and oath. 2246. Guardians appointed to take charge of the property of a minor must give bond, with surety, to be approved by the court, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardians according to law. They must also take an oath of the same tenor as the condition of the bond. [R., § 2548; C., '51, § 1496.]

[As to powers of clerk to appoint guardians in vacation, see § 3513; and to approve bond of guardian, see §§ 245, 3515 and 3516. By §§ 342–344, the guardian may be relieved from liability on his bond upon making final report and depositing with the clerk all funds in his hands.]

It is proper to appoint one guardian for several wards jointly and to take a bond for their joint security, when the wards hold by common title, as, for instance, as tenants in common: *Pursley v. Hayes*, 22–11.

Where the guardian gave a joint bond as to four different wards, *held*, that the sureties thereon could not be liable as to the funds received for any one ward to more than a proportional amount of the sum mentioned in the bond: *Hooks v. Evans*, 68–52.

When a bond is given for the benefit of several wards, and the defalcation of the guardian is for an amount in excess of the penalty, neither of the wards is entitled to recover as against the sureties more than his *pro rata* share of the penalty: *Knox v. Kearns*, 73–286; *Edmonds v. Edmonds*, 73–427.

The duty of passing upon the sufficiency of the guardian's bond devolves upon the court and cannot be performed by the clerk in vacation. Therefore, *held*, that the clerk was not liable in damages for the acceptance of the bond of a guardian appointed in vacation without requiring sureties. The duty of approving the bond should have been performed by the court at the term following the appointment: *Reno v. McCully*, 65–629; *Reno v. McCully*, 66–730. (But see now, § 245.)

The sureties upon a guardian's general bond are not liable for moneys received by him in the sale of the ward's real estate, under the order of the court, a special bond being required in such cases (§ 3452): *Madison County v. Johnston*, 51–152; *Bunce v. Bunce*, 65–106.

The fact that a sale bond is given, or that an

order of sale is wrongfully made, or the proceeds converted, will not render the sureties on the general bond liable: *Bunce v. Bunce*, 65–106.

Where a sale of real property was made by a referee in a proceeding for partition, *held*, that the guardian was liable under his general bond for the proceeds of such sale, there being no provision for a special bond in such case: *Hooks v. Evans*, 68–52.

Where a guardian is required by order of court to give additional bond, on account of insufficiency of the first bond, the sureties on the additional bond are liable for default of the guardian previous to the giving of the new bond: *Douglass v. Kessler*, 57–63.

The sureties upon the guardian's bond become liable for money received by the guardian previous to his appointment and in his hands at the time of the appointment and giving of bond: *Bockenstedt v. Perkins*, 73–23.

The court has the sole right to determine what is a guardian's duty under the law, and nothing but a failure to obey its orders can be deemed a breach of the guardian's bond: *O'Brien v. Strang*, 42–643.

The surety's liability on the bond does not commence simultaneously with the ward's majority, but only upon failure of the guardian to comply with an order of the court in a proper proceeding for settlement of his accounts: *Ibid.*

A failure to pay over money by the guardian will not constitute a breach of his bond until the guardianship accounts are settled, or until he has failed to obey a mandate of the court requiring him to account: *Vermilya v. Bunce*, 61–605.

A surety in a guardian's bond should not be absolutely discharged upon his application, upon the minor's coming of age. The most that he is entitled to is a conditional discharge. If, after the majority of the ward and the final settlement with the guardian, the ward unreasonably delays to enforce what rights he may have against sureties on the bond, he may, upon application of the sureties, be ordered to commence and prosecute proceedings within a time to be named, and in the event of a failure to do so the sureties may be regarded as discharged: *Ibid.*

To constitute a breach of the bond it is necessary that there shall be a failure to obey an order of the court. An action will not lie against the surety until there has been a settlement of the guardian's account and failure to obey his order. And where such settlement was made and entered into in another county than that in which the guardian was appointed, *held*, that such settlement was not binding on the surety: *Gillespie v. See*, 72–345.

Right of action by a ward against his guardian arises when the guardianship ceases by the guardian's resignation or removal, or by reason of the ward arriving at full age, and such an action must be brought within the time limited by statute thereafter: *Humphreys v. Matloon*, 43–556.

The guardian having conveyed certain land in trust for his ward as partial security for the ward's funds in his hands, but which was not actually purchased with such funds, *held*, that the ward having a remedy against his guardian and his bondsman should pursue such remedy, and not insist upon the trust deed as against creditors seeking to make their debts out of such property: *Thomas v. Pyne*, 55–348.

Where the sureties to the bond become obligated not only to pay all moneys coming into the hands and possession of the guardian, but also that such guardian shall faithfully discharge the office and trust according to law, they are liable not only for funds received by the guardian after the giving of the bond, but for the payment by such guardian of any sums found due on eventual settlements whether arising out of transactions prior or subsequent to the giving of the bond: *Knox v. Kearns*, 73–286.

The order of court for the settlement of the guardian's accounts is an adjudication as between the guardian and the ward or his representatives of all questions as to the liability of the guardian and the extent of that liability. Such an order made for the payment of a sum of money is necessarily a determination that the guardian at the date of his appointment had in his hands a sum of money which, with the interest thereon, after deducting the credits allowed, would amount to the sum which he is ordered to pay over, and such an adjudication is binding on the guardian and the surety on his bond: *Knepper v. Glenn*, 73–730.

3438. Supplemental security. 2247. The court may also direct guardians to give new or supplemental security, or may remove them for good cause shown, which cause must be entered on the records. [R., § 2562; C., '51, § 1510.]

3439. Inventory and appraisement. 2248. Within forty days after their appointment, they must make out an inventory of all the property of the minor, which shall be appraised in the same manner as the property of a deceased person. The inventory must be filed in the office of the clerk of the circuit [district] court. [R., § 2549; C., '51, § 1497.]

3440. Powers. 2249. Guardians of the persons of minors, have the same power and control over them that parents would have if living. [R., § 2550; C., '51, § 1498.]

See notes to § 3432.

3441. Duties. 2250. Guardians of the property of minors must prosecute and defend for their wards. They must also, in other respects, manage their

interests under the direction of the court. They may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards. [R., § 2551; C., '51, § 1499.]

Powers: The power to manage the estate of an infant can only emanate from the court authorized to appoint a guardian: *Young v. Gammel*, 4 G. Gr., 207.

Where a guardian receives notes of third parties in satisfaction of an indebtedness, and afterwards as guardian receives the money upon such notes, such satisfaction of the original indebtedness is sufficient in equity: *Jones v. Jones*, 20-388.

Under the statute the powers of the guardian over his ward's property are more limited than at common law. The guardian can only act in pursuance of the direction of the court first obtained, and an act done without such direction will not bind the ward's property: *Bates v. Dunham*, 58-308.

A guardian cannot loan the ward's money to himself, nor without the order of the court invest it in land; and where, without authority, money of the wards was thus invested, and the probate court refused to recognize the transaction as binding upon the wards, *held*, that the property did not vest in them but remained in the guardian: *McReynolds v. Anderson*, 69-208.

A lease made by a guardian is invalid, or voidable at least, unless ordered or approved by the proper probate court: *Alexander v. Buffington*, 66-660.

A guardian has no authority to pay, out of the proceeds of the sale of the ward's property, claims of third persons against such ward: *Cassedy v. Casey*, 58-326.

The guardian has the power, under direction of the court, to superintend the education and nurture of the ward, and for that purpose he may pay out such portion of the ward's money as the probate court may, from time to time, order and direct. For this purpose the rents and profits of the real estate, and after that the interest of the ward's money, are to be first resorted to, but the guardian will not be permitted, without an order of the court to that effect, to encroach upon the principal sum of the ward's estate. As a general rule the expense of the ward must be kept within the income of the ward's estate: *Foreaux v. Lepage*, 6-123.

Where the ward has received no consideration for a conveyance, the guardian may bring action for him to set the same aside without first procuring an order of court authorizing him to do so, and without any formal act of revocation: *Gates v. Carpenter*, 43-152.

In such a case, if the validity of the guardian's appointment is not properly put in issue, evidence that the ward was not an inhabitant of the county at the time of the guardian's appointment, and that he had no foreign guardian, is not admissible: *Ibid.*

A guardian has authority to compromise a suit for his ward upon obtaining leave of court, and notice to the ward of an application for such permission is not essential, the proceeding not being one adversary as to the ward: *Hagy v. Avery*, 69-434.

The power of the guardian ceases on the death of the ward. The settlement of the estate devolves on the administrator: *Ordway v. Phelps*, 45-279.

Liability: It is proper to render a personal judgment against a guardian who executes a bond for his ward in his individual capacity: *Oliver v. Townsend*, 16-430.

Proceedings to establish a claim against the ward's estate should be brought against the ward: *Bently v. Torbert*, 68-122.

Where a guardian collected pensions due to his ward, so far as they were necessary to support the ward, *held*, that it was not negligence on his part to allow arrears of pensions to accrue uncollected, although by the subsequent death of the ward the collection of such arrears from the government was, by reason of the provision of the statutes of the United States, impossible: *Maltox v. Patterson*, 60-434.

Where a tax title was conveyed to the guardian as such, *held*, that the conveyance inured to his ward's benefit, and that subsequent purchasers of the property from the guardian were chargeable with notice of the rights of the ward: *Rankin v. Miller*, 43-11.

Where a person who had stood *in loco parentis* to a minor, and was his guardian, soon after the coming of age of the minor, and before he had become emancipated from the habit of obedience and deference, secured an unconscionable contract from him by the exercise of authority and solicitation, or by fear excited by false representations, *held*, that such contract would be regarded as procured by undue influence, and would be set aside in a proper action: *Tuckc v. Buckolz*, 43-415.

3442. Order of court; penalty. 2251. A failure to comply with any order of the court in relation to guardianship, shall be deemed a breach of the condition of the guardian's bond, which may accordingly be put in suit by any one aggrieved thereby, for which purpose the court may appoint another guardian of the minor if necessary. The court may also commit him to jail until he complies with such order. [R., 2561; C., '51, § 1509.]

Section considered: *O'Brien v. Strang*, 42-643.

3448. New guardian. 2252. Where a new guardian is appointed, the court may order the effects of the minor which are in the hands of his predecessor to be delivered up to such new guardian, and failure to comply with such order for three months thereafter, shall subject such guardian to a penalty of

one hundred dollars to be recovered in an action on his bond for the benefit of such minor's estate. [R., § 2563; C., '51, § 1511.]

3444. Non-resident minors. 2253; 19 G. A., ch. 100, § 1. A guardian may be appointed for non-resident minors who have property in this state, on proper application made to the circuit [district] court of the county in which such property or any part thereof may be, who shall qualify in the same manner and shall have the same powers, and be subject to the same rules as guardians of resident minors. In all cases where a non-resident idiot, lunatic, or person of unsound mind has property in this state requiring care and protection, the circuit [district] court in any county where such property or any part thereof is situated may appoint a guardian of the property of such person, who shall have the same power and authority in relation thereto, and be subject to the same liability, as the guardian of a resident minor. [11 G. A., ch. 125.]

3445. Account. 2254. All guardians of minors are required to appear at least once each year before the circuit [district] court, and render an account of all moneys or other property in their possession, together with all the interest which may have accrued on moneys loaned belonging to the minor or minors. [R., § 2568.]

[As to power of clerk to approve intermediate reports, see § 245.]

Intermediate reports of the guardian approved by the court must be regarded as at least *prima facie* correct: *Warfield v. Warfield*, 74-184.

Further as to reports and accounting, see notes to § 3447, and as to liability on bond, see notes to § 3437.

3446. Penalty. 2255. In case the said guardian shall fail to appear before said court within the time above specified, he shall forfeit and pay into the county treasury the sum of fifty dollars, as in other actions of misdemeanor. [R., § 2569.]

3447. Compensation. 2256. Guardians shall receive such compensation as the court may from time to time allow. The amount allowed, and the service for which the allowance was made, must be entered upon the records of the court. [R., § 2567; C., '51, § 1515.]

Accounting; support: A guardian standing *in loco parentis* toward the ward cannot in ordinary cases have compensation for the ward's maintenance: *Latham v. Myers*, 57-519.

And on this point, see notes to § 3432.

Claims for support of the ward may be allowed by the probate court without notice to the ward. Such proceedings are not adversary, but the court simply directs the guardian in the discharge of his duty as it would its officers: *Brewer v. Stoddard* 49-279.

To justify an allowance being made from the ward's funds for past support by the parent, all the facts necessary to a future allowance must be shown, and a satisfactory showing must be made why application for such allowance was not made in advance: *Welch v. Burris*, 29-186

Pension money granted to the ward's father while living, and passing to the ward on his death, is not exempt from liability for the ward's support: *Ibid.*

The fact that the record of an order made upon the application of a guardian giving him an allowance for the maintenance of the wards is imperfect or wanting will not prevent him from having credit for an expenditure on that account approved by the court: *Latham v. Myers*, 57-519.

It is unquestionably the duty of the guardian, when there are more wards than one, to keep the account of each one separate and to keep the estate of each to itself: *Foteaux v. Lepage*, 6-123.

If judgment is to be rendered against the guardian in such case, it should be for such sum, to be ascertained by the court, as each ward is entitled to, and not for the whole amount in his hands due to all the wards: *Ibid.*

Report: The report of the guardian as to his account cannot properly be demurred to. If necessary in order to bring out the facts, a motion for more specific statements should be made and the case determined on the facts thus shown: *Gerdes v. Weiser*, 54-591.

The fact that an intermediate report by the guardian charges him with money improperly invested in land in the name of his ward is an error which cannot be corrected on an appeal by the guardian to which the ward is not a party. If the ward should retain the title to the property until majority, the charge would be erroneous: *Cassedy v. Casey*, 58-326.

Where the guardian reports a sale of property and investment of proceeds in other property in the name of the ward, the failure of the ward, until after coming of age, to disaffirm such transaction will prevent him

from objecting to the report in that respect: *Ibid.*

Settlement: Where the accounts of a guardian have been settled in the probate court and a balance found due him, such settlement will bind the ward until it is set aside or in some way lawfully attacked, and a proper expenditure in behalf of the ward cannot be called in question in an action by the guardian against the ward to recover the amount found to be due on such settlement: *King v. King*, 40–120.

Where the ward, after becoming of age, accepted from the surety on the guardian's bond, in settlement of the indebtedness of the guardian, at that time deceased, a note received by the guardian for money of the ward loaned by such guardian, *held*, that the fact that at the time such note was accepted the maker and surety thereon were insolvent, that fact not being known to the parties, would not prevent the acceptance being binding upon the ward: *Smith v. McKee*, 67–161.

Following proceeds: Where the guardian has improperly invested the money of the ward the latter may, at his election, instead of holding the guardian accountable, follow the money and claim the property in which it has been invested: *Robinson v. Robinson*, 22–427.

Liability for interest: Where the guardian has failed to account, and has encroached upon property of the ward's estate, he may be required to pay interest, compounded at the end of each year, at six per cent.: *Foteaux v. Lepage*, 6–123.

Where certain charges of a guardian for support of his ward were disallowed, *held*, that, as it was the duty of the guardian to invest the money, he should be charged with six per cent. interest thereon, compounded annually: *Bradford's Heirs v. Bodfish*, 33–681.

Where a guardian has improperly expended money of the ward in his hands he may be charged with the amount received and thus improperly expended with eight per cent. interest thereon with annual rests: *In re Mells*, 64–391.

Compensation: Where a guardian had delayed for ten years to make a settlement, and, instead of putting out the money of the ward at interest, had used the same himself, *held*, that, although he could not be charged a higher rate of interest than six per cent. compounded annually, he might properly be denied compensation: *Foteaux v. Lepage*, 6–123.

The action of the court in allowing the guardian no compensation, but in lieu thereof not charging interest on the balance in his hands, *held* proper: *Mattox v. Patterson*, 60–434.

PROPERTY OF — SOLD.

3448. Real estate; sale or mortgage of. 2257. When not in violation of the terms of a will by which a minor holds his real property, it may, under the direction of the circuit [district] court, be sold or mortgaged on the application of the guardian, either when such sale or mortgage is necessary for the minor's support or education, or where his interest will be thereby promoted by reason of the unproductiveness of the property, or of its being exposed to waste, or of any other peculiar circumstances. [R., § 2552; C., '51, § 1500.]

Where the application to the court is for power to sell, the court has no jurisdiction to make an order authorizing the guardian to mortgage the property: *McMannis v. Rice*, 48–361.

The term "mortgage" means the granting of an estate, as pledge for the payment of money, without reference to the form which the grant assumes: *Foster v. Young*, 35–27.

A father merely as natural guardian has no authority to sell land of his child, even when authorized to do so by order of the probate court, and a deed made by him will not be valid, even as against him when he subsequently acquires the title by inheritance from the child: *Shanks v. Seamonds*, 24–131.

A sale or mortgage of the ward's property will cover a reversionary interest therein owned by the ward, although he does not have a fee-simple title: *Foster v. Young*, 35–27.

A refusal by the court to order a sale when proper grounds therefor are shown is an error which will be corrected on appeal. The discretion with which the court is clothed is not absolute, but a legal discretion: *Dickinson v. Hughes*, 37–160.

The proceedings for the sale are not abated by the resignation of the guardian who files the petition and the appointment of another guardian: *Wade v. Carpenter*, 4–361.

In the absence of anything in the record showing the order of sale or the sale itself to be void, the proceedings will be presumed regular: *Pursley v. Hays*, 17–310.

If the court has jurisdiction of the subject-matter and the parties, its judgment, in the absence of fraud, is conclusive, and cannot be collaterally attacked: *Pursley v. Hayes*, 22–11.

Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59 533.

Where it appears that there was service of notice, and the record of the court recites that notice, according to law, has been given, the regularity of the manner of giving notice cannot be inquired into collaterally: *Wade v. Carpenter*, 4–361.

As to the validity of proceedings as affected by defect in the notice, and as to what presumptions are to be indulged in in favor of their regularity, see *Cooper v. Sunderland*, 3–114. Also, on a parallel question, see *Shauchan v. Loffer*, 24–217.

The validity of the sale cannot be attacked collaterally on account of insufficiency of the

oath of the guardian: *Frazier v. Steenrod*, 7-339.

A minor who, after attaining his majority, with full knowledge of all the facts attending the sale of his property by the guardian and its alleged invalidity and of his rights in the premises, elects to receive and still retains the purchase money, thereby ratifies the sale, and is estopped from claiming that it is void: *Pursley v. Hays*, 17-310; *Deford v. Mercer*, 24-118.

3449. Petition; notice. 2258. The petition for that purpose must state the grounds of the application, must be verified by oath, and a copy thereof, with a notice of the time at which such application will be made to the court, must be served personally upon the minor at least ten days prior to the time fixed for such application. [R., § 2553; C., '51, § 1501.]

A general averment in the petition, in regard to the necessity of a sale of the ward's property, is sufficient to give the court jurisdiction to order such sale: *Bunce v. Bunce*, 59-533.

When the petition for authority to sell alleges the necessary jurisdictional facts, it is not requisite, after the hearing is had, that the final order by the court should recite them in detail: *Pursley v. Hayes*, 22-11.

Where the petition in an application for leave to sell did not set out the names of the wards, but described them simply as heirs, although the notice was to them by name and was served upon each, *held*, that the defect was not jurisdictional, and that proceedings thereunder could not be collaterally attacked, especially where the minor heirs named were the only ones, and the whole record showed that they were sufficiently named and described: *Ibid.*

The proceeding does not abate by the resignation of the guardian filing the petition and the appointment of another guardian: *Wade v. Carpenter*, 4-361.

The notice is essential to the jurisdiction of the court: without it the sale will be void; but a defective notice will be sufficient to give jurisdiction, and the proceedings thereunder cannot be collaterally attacked: *Lyon v. Vanatta*, 35-521.

The proceeding for the sale of the ward's property is not *in rem*, but an adversary proceeding, and a sale without the notice required by law is void for want of jurisdiction: *Ibid.*

A notice fixing the time for hearing at a time not during a term of court, or which does not fix any time, is no notice, and proceedings thereunder will be void: *Ibid.*; *Haws v. Clark*, 37-355.

If there is no service of notice the proceedings will be void: *Rankin v. Miller*, 43-11.

But if there is defective service, which is by the court held sufficient, any error in such holding cannot be the subject of collateral attack: *Pursley v. Hayes*, 22-11, 38.

Where the notice of the sale contained an entirely erroneous description of the property, *held*, that the sale was entirely void. The fact that the court has properly acquired jurisdiction to appoint a guardian will not render subsequent want of notice as to the sale a mere irregularity. Jurisdiction as to the one matter does not necessarily confer jurisdiction as to the other: *Frazier v. Steenrod*, 7-339.

Where actual personal service of notice upon a minor was shown, and it appeared that the court had determined that the service had been duly made, as provided by law, and such determination was of record, *held*, that even though it did not appear that a copy of the petition was filed, as required by statute, the proceedings were not void: *Bunce v. Bunce*, 59-533.

Under a statute requiring notice to a minor of an application by his guardian for sale of his lands, *held*, that in the absence of proof of notice, or the finding by the court that notice had been given, the proceedings were void and no title passed: *Rankin v. Miller*, 43-11.

Where the application was for authority to sell, *held*, that the guardian had no power to mortgage: *McMannis v. Rice*, 48-361.

As to want or insufficiency of notice as affecting jurisdiction, see notes to preceding section.

3450. Postponement and publication. 2259. The court, in its discretion, may direct a postponement of the matter, and may order such farther publication through the newspapers or otherwise, as it may deem expedient. [R., § 2554; C., '51, § 1502.]

3451. Reference. 2260. It may also direct a reference for the purpose of ascertaining the propriety of ordering the sale or mortgage as applied for. [R., § 2555; C., '51, § 1503.]

3452. Bond. 2261. Before any such sale or mortgage can be executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold, or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duty in that respect, and account for and apply all moneys received by him under the direction of the court. [R., § 2556; C., '51, § 1504.]

While it would be better to make the guardian's bond payable to the parties interested, the fact that it is payable to the county will not vitiate it, nor will the fact of its being

thus made payable, or the failure of the judge to enter of record its approval, invalidate the title derived from the sale: *Pursley v. Hayes*, 22-11.

Action on the bond cannot be brought until the guardian has failed to obey some order of the court in respect to the proceeds of the sale: *O'Brien v. Strang*, 42-643.

Where real estate was sold by the guardian under order of court for the purpose of investing the proceeds, and on the settlement the guardian was ordered to pay over to the ward a sum in excess of the amount received from the sale of the real estate, *held*, that the surety on the bond for the sale was liable for the amount received therefrom, although in the settlement it did not expressly appear what portion of the amount ordered to be paid over was received from the real estate: *McWilliams v. Kalbach*, 55-110.

Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59-533.

The sureties on this bond and not those upon the general bond are liable for failure of guardian to account for proceeds of the sale: See note to § 3437.

3453. Costs. 2262. When the application for the sale of property is resisted, the court may, in its discretion, award costs to the prevailing party; and, when satisfied that there was no reasonable ground for making the application, may direct the costs to be paid by the guardian from his own funds. [R., § 2557; C., '51, § 1505.]

3454. Deeds; approval. 2263. Deeds may be made by the guardian in his own name, but they must be returned to the court and the sale or mortgage be approved before the same are valid. [R., § 2558; C., '51, § 1506.]

The approval of the sale by the court as required by the statute is not a mere formality, but is essential to its validity. The approval is of the sale and not merely of the deed: *Wade v. Carpenter*, 4-361.

The record in a particular case *held* to sufficiently show the approval of the mortgage made by order of the court: *McMannis v. Rice*, 48-361.

Under a former statute allowing the clerk of the probate court to transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, *held*, that the indorsement upon the deed of approval by the clerk of the sale and deed, and the approval by the judge of the sale when reported by the guardian, constituted a sufficient approval to render the deed valid: *Bunce v. Bunce*, 59-533.

It is at least doubtful whether, between the time of sale and the approval of the deed, the purchaser has any taxable interest in the property sold: *Ordway v. Smith*, 53-589.

Representations made by the guardian at a sale of real property on his application, with reference to the legal title, which was a matter of record, *held* no defense in an action against the purchaser for the price: *Findley v. Richardson*, 46-103.

3455. Evidence. 2264. The same rule that is prescribed in the sale of real property by executors, shall be observed in relation to the evidence necessary to show the regularity and validity of the sales above contemplated. [R., § 2559; C., '51, § 1507.]

3456. Limitation of right to question. 2265. No person can question the validity of such sale after the lapse of five years from the time it was made. [R., § 2560; C., '51, § 1508.]

To avail himself of the limitation here provided the defendant must show that he has been in continuous possession of the property for five years: *Washburn v. Carmichael*, 32-475.

The limitation does not apply when the sale is void, as in case of failure to notify the minor as provided in § 3449: *Rankin v. Miller*, 43-11. But if the sale is made pursuant to an order of a court having jurisdiction it cannot be attacked after five years for irregularities in the proceedings: *Pursley v. Hayes*, 22-11, 24.

The limitation has no application to appeals or other proceedings bringing the matter of the validity of the sale up for review in the superior court: *Ibid.*

Nor does it prevent the heir from questioning, after five years, the validity of a sale by a person having no pretense of authority as guardian, or one where there has been no notice to the heir, and which is therefore made without jurisdiction, and where no possession has been taken under the purchase: *Ibid.*

A purchaser under a guardian's sale who has been in possession for five years from the time of sale will be protected from objections as to the regularity of the sale, not jurisdictional in character, especially when raised in a collateral proceeding: *Ibid.*

See generally, as applicable to this section, notes to § 3605; the opinion of Beck and Cole, JJ., in *Good v. Norley*, 28-188, being stated by Beck, J., as applicable to this section: *Washburn v. Carmichael*, 32-475.

FOREIGN GUARDIANS.

3457. Property here. 2266; 19 G. A., ch. 100, § 2. The foreign guardian of any non-resident minor, may be appointed the guardian in this state of such minor by the circuit [district] court of the county wherein he has any property, for the purpose of selling or otherwise controlling that and all other property of such minor within this state, unless a guardian has previously been appointed under the preceding section. The foreign guardian of any non-resident idiot, lunatic or person of unsound mind may be appointed the guardian in this state of such ward by the circuit [district] court, in like manner and with like effect in all cases where the foreign guardian of a non-resident minor could be appointed the guardian of such minor in this state. Such guardian shall have the same powers and be subject to the same liabilities as guardians of resident minors. [R., § 2564; C., '51, § 1512; 11 G. A., ch. 125.]

3458. Appointment; qualifying. 2267. Such appointment may be made upon his filing with the clerk of the circuit [district] court of the county wherein there is any such property, an authenticated copy of the order for his appointment. He shall thereupon qualify like other guardians, except as in the next succeeding section. [R., § 2565; C., '51, § 1513.]

3459. Bond. 2268. Upon the filing of an authenticated copy of the bond and the inventory rendered by the guardian in a foreign state, if the court is satisfied with the sufficiency and the amount of the security, it may dispense with the filing of an additional bond. [R., § 2566; C., '51, § 1514.]

3460. Personal property. 2269. Foreign guardians of non-resident minors may be authorized by the circuit [district] court of the county wherein such minor has personal property, to receive the same on complying with the provisions of the following sections. [12 G. A., ch. 83, § 1.]

[Further as to evidence of appointment and qualification in another state or country, and power to release judgment, etc., see §§ 3571–3573.]

3461. Copy of bond. 2270. Such foreign guardian shall file in the office of the clerk of the circuit [district] court in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting the letters of guardianship, and shall also execute a receipt for the property received by him. [Same, § 2.]

3462. Order of court. 2271. Upon the filing of the bond as provided by the last section, and the court being satisfied with the amount of said bond, said court shall order the personal property of the minor to be delivered to the guardian; and the court shall spread the bonds and receipt on its records, and direct the clerk to notify, by mail, the court granting the letters of guardianship, of the amount of property allowed to the guardian, and the date of the delivery of the same. [Same, § 3.]

OF DRUNKARDS, SPENDTHRIFTS, AND LUNATICS.

3463. Guardians of. 2272. When a petition is presented to the circuit [district] court, verified by affidavit, that any inhabitant of the county is:

1. An idiot, lunatic, or person of unsound mind;
2. An habitual drunkard incapable of managing his affairs;
3. A spendthrift who is squandering his property; and the allegations of the petition have been satisfactorily proved upon the trial provided for in the following section, such court may appoint a guardian of the property of any such person, who shall be the guardian of the minor children of his ward, unless the court otherwise orders. [R., § 1449.]

The appointment of a guardian for an insane person is based upon the fact of insanity: *Wilson v. Shorick*, 21–332.

The appointment of a guardian upon a petition charging insanity will be regarded as a determination of the fact of insanity: *Ocken-*

don v. Barnes, 43-615; *Seerley v. Sater*, 68-375.

The record of the proceeding for the appointment of a guardian of an insane person will not constitute notice to one who marries such person under the belief that the latter is sane; *Barber v. Barber*, 74-301.

The statutory provision with reference to guardianship of persons of unsound mind relates to a condition different from idiocy, lunacy or insanity. Weakness of mind is not necessarily unsoundness, but there may be a weakness short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness: *Smith v. Hickenbottom*, 57-733.

A person of unsound mind is one who is incapable of transacting the particular business in hand. It is not necessary that he be insane or a distracted person, and he may be capable of transacting some kinds of business and yet be of unsound mind and incapable of transacting business of magnitude, or of some degree of intricacy: *Seerley v. Sater*, 68-375.

The duties of guardians of insane persons in respect to the management of their property are, by statute, substantially the same as those of guardians of minors: *Gates v. Carpenter*, 43-152.

A tenant renting property belonging to a landlord who is under guardianship will be considered as holding the property under such insane owner, and as having notice of the rights of such owner, and a release by the guardian will not be regarded as defeating the rights of his ward: *Thode v. Spofford*, 65-294.

The guardian of an insane wife has not the power, on her behalf, to waive the right to have her dower interest in the estate of her deceased husband so set off as to include the homestead: *Ratcliff v. Davis*, 64-467.

3464. Petition; trial. 2273. Such petition shall set forth as particularly as may be, the facts upon which the application is based, and shall be answered as in other ordinary actions, all the rules of which shall govern so far as applicable and not otherwise provided in this chapter. The applicant shall be plaintiff and the other party defendant, and either party may have a trial by jury. The petition may be presented to the judge, who may appoint a temporary guardian.

3465. Provisions made applicable. 2274. The provisions of this chapter, and all other laws relating to guardians for minors, and regulating or prescribing the powers, duties, or liabilities of each and of the court, so far as the same are applicable, shall be held to apply to guardians and their wards appointed under section two thousand two hundred and seventy-two of this chapter [§ 3463.] [R., § 1451.]

3466. Suits by. 2275. Such guardian may sue in his own name, describing himself as guardian of the ward for whom he sues; and when his guardianship shall cease by his death, removal, or otherwise, or by the decease of his ward, any suit, action, or proceeding then pending shall not abate; but his successor, or the person for whom he was guardian, or the executor or administrator of such person, as the case may require, shall be made party to the suit or other proceedings, in like manner as is or may be provided by law for making an executor or administrator party to a proceeding of a like kind when the plaintiff dies during its pendency. [R., § 1452.]

3467. Real estate sold; allowance to family. 2276; 22 G. A., ch. 70. Whenever the sale of the real estate of such ward is necessary for his support, or the support of his family, or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell the same under like proceedings as required by law to authorize the sale of real estate by the guardian of a minor. The court shall, if necessary set off to the wife, and children under fifteen years of age of the insane person or to either, sufficient of his property of such kind as it shall deem appropriate, to support them for twelve months from the time he was adjudged insane. [R., § 1453.]

The right of the wife and minor children to support out of the estate, is subordinate to the rights of the creditors as to property not exempt from liability for debts: *Dutch v. Marvin*, 72-663.

3468. Guardian to complete contracts. 2277. The guardian of any person contemplated in section two thousand two hundred and seventy-two of this chapter [§ 3463], whether appointed by a court in this state or elsewhere, may complete the real contracts of his ward, or any authorized contracts of a a guardian who has died or been removed, in like manner and by like proceed-

ing as the real contract of a decedent may, under an order of court, be specially performed by his executor or administrator. [R., § 1454.]

3469. When estate is insolvent. 2278. If the estate of such person is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had as is or may be required by law for the settlement of the insolvent estate of a deceased person. [R., § 1455.]

3470. Custody. 2279. The priority of claim to the custody of any insane person, habitual drunkard, or spendthrift aforesaid, shall be:

1. The legally appointed guardian;
2. The husband or wife;
3. The parents;
4. The children. [12 G. A., ch. 179, § 12.]

CHAPTER 6.

MASTER AND APPRENTICE.

3471. Minors. 2280. Any minor child may be bound to service until the attainment of the age of legal majority as hereinafter described. [R., § 2573; C., '51, § 1516.]

3472. Indenture. 2281. Such binding must be by written indenture, specifying the age of the minor and the terms of agreement. If the minor is more than twelve years of age and not a pauper, the indenture must be signed by him of his own free will. [R., § 2574; C., '51, § 1517.]

3473. Consent of parent or guardian. 2282. A written consent must be appended to or indorsed upon such agreement, and signed by one of the following persons, to-wit:

1. By the father of the minor; but if he is dead, or has abandoned his family, or is for any cause incapacitated from giving his assent, then,
2. By the mother; and if she be dead, or unable, or incapacitated for giving such assent, then,
3. By the guardian; and if there be no guardian, then by the clerk of the circuit [district] court. [R., § 2575; C., '51, § 1518.]

3474. Paupers. 2283. The clerk of the circuit [district] court may bind minors who are paupers till they have attained the age of majority, without obtaining their assent. [R., § 2576; C., '51, § 1519.]

3475. Indenture. 2284. The written indenture must, in that case, be signed by the master and said clerk. [R., § 2577; C., '51, § 1520.]

3476. In triplicate. 2285. The indenture must, in all cases where there is a parent or guardian, be in three parts, one being left with the master, another with the clerk of the circuit [district] court, and the third with the person by whose assent he is bound. [R., § 2578; C., '51, § 1521.]

3477. Powers; rights; liabilities. 2286. The powers, liabilities, and duties of the master, and the rights of the apprentice are the same as those of parent and child respectively, except as to inheritances and except as is otherwise provided by law. [R., § 2579; C., '51, § 1522.]

3478. Interests of minor protected. 2287. The parent, guardian, or officer by whose act or consent any minor is thus bound, must watch over the interest of the minor, and, if the case require, must enter complaint as provided for in the following section. [R., § 2580; C., '51, § 1523.]

3479. Complaint against master. 2288. Upon complaint by the minor or by any other person made to the judge of the district [or circuit] court, stating under oath that the master is ill-treating his apprentice or is in any other manner palpably failing in the discharge of his duty in regard to him, and stating the particulars with reasonable certainty, the court shall summon the master to appear and answer such complaint. [R., § 2581; C., '51, § 1524.]

[The word "to" is erroneously inserted before "such" in the last line in the printed Code.]

3480. Notice. 2289. The complaint, with the proper notice indorsed thereon, must be served and returned in the same manner as in the commencement of an action, and the time for appearance shall be regulated by the same rules. [R., § 2582; C., '51, § 1525.]

3481. Answer; issue; trial. 2290. The answer of the master must also be under oath, and, if any other issue be joined thereon, it must be tried as in other cases in court. [R., § 2583; C., '51, § 1526.]

3482. Judgment; discharge. 2291. If the court or jury before whom the cause is pending finds the cause of complaint admitted by the master, or proved upon the trial to be of sufficient magnitude to justify the discharge of the minor from farther service, judgment shall be rendered accordingly, and a certificate of such judgment placed in said minor's hands. [R., § 2584; C., '51, § 1527.]

3483. Appeal. 2292. From any judgment in such cases either the minor or the master may appeal in the same manner as provided for in ordinary cases. [R., § 2585; C., '51, § 1528.]

3484. Suit for damages. 2293. The above proceedings form no bar to the bringing of a suit by or on behalf of the minor for damages, or for compensation for services. [R., § 2586; C., '51, § 1529.]

3485. Complaint against apprentice. 2294. If the apprentice bound as aforesaid, refuses to serve according to the terms of the indenture, upon complaint made in the manner aforesaid, the judge shall issue a warrant to cause the apprentice to be brought forthwith before him, and shall also cause notice of the proceedings to be given to the parent, guardian, or officer, by whose act or consent the minor was bound as an apprentice, if to be found in the county. [R., § 2587; C., '51, § 1530.]

3486. Answer; when made. 2295. A reasonable space of time, not exceeding three days, shall be allowed to the minor to consult his parent, guardian, or other friends, previous to making his answer to the complaint. [R., § 2588; C., '51, § 1531.]

3487. Issue; trial. 2296. The answer must be made, and the issues thereon tried in the manner hereinafter provided. [R., § 2589; C., '51, § 1532.]

3488. Discharge. 2297. If he shows sufficient cause for refusing to serve, he may be discharged from service in the manner hereinbefore provided. [R., § 2590; C., '51, § 1533.]

3489. Master released. 2298. Instead of proceeding as aforesaid, the master may, for any refusal to serve or for any gross misbehavior on the part of the apprentice, file a complaint for the purpose of releasing himself from the force and effect of the indenture aforesaid. [R., § 2591; C., '51, § 1534.]

3490. Proceedings. 2299. Proceedings thereupon shall be had similar to those provided in case of a complaint by or in behalf of the apprentice, and judgment rendered in like manner with the same right of appeal. [R., § 2592; C., '51, § 1535.]

3491. Dissolution; allowance. 2300. The death of the master, or his removal from the state, works a dissolution of the indenture unless otherwise provided therein, or unless the apprentice elects to continue in his service. And in the event of a dissolution, the apprentice shall receive such allowance

for services previously rendered as may be thought necessary under the circumstances of the case. [R., § 2593; C., '51, § 1536.]

3492. Natural guardian removed. 2301. Upon complaint being made to the circuit [district] court of the proper county, verified by affidavit, that the father or mother of a minor child is, from habitual intemperance and vicious and brutal conduct, or from vicious, brutal, and criminal conduct towards said minor child, an unsuitable person to retain the guardianship and control the education of such child, the court may, if it find the allegations in the complaint manifestly true, appoint a proper guardian for the child, and may, if expedient, also direct that such child be bound as an apprentice to some suitable person until he attains his majority. But nothing herein shall be so construed as to take such minor child, if the mother be a proper guardian. [R., § 2594; C., '51, § 1537.]

Where the father of an illegitimate child two years of age sought under this section to recover the custody of the same from its mother, it appearing that his moral character was not better than hers, *held*, that it was error to deprive her of its custody: *Pratt v. Nitz*, 48–33.

As to custody, in general, see notes to § 3432.

3493. Proceedings. 2302. The same proceedings may take place, and a like order be made where the mother, who has for any cause become the guardian of her minor child, is in like manner found to be manifestly an improper person to retain such guardianship. [R., § 2595; C., '51, § 1538.]

3494. Complaint. 2303. The complainant in such cases must be sworn to his complaint and file it in the office of the clerk, and a copy thereof, with a notice thereon indorsed, stating the time when the matter will be brought before the circuit [district] court for adjudication, must be served personally on the parent from whom the guardianship is sought to be taken, at least ten days before the time so fixed for the adjudication. [R., § 2596; C., '51, § 1539.]

3495. Trial. 2304. Issues joined shall be tried in the same manner as in ordinary civil actions. [R., § 2597; C., '51, § 1540.]

3496. Preference. 2305. Preference shall be given to such cases over the ordinary business of the court, but trials actually commenced need not be suspended for that purpose. [R., § 2598; C., '51, § 1541.]

3497. Schooling and treatment of minors. 2306. The master shall send said minor child, after the same be six years old, to school at least four months in each year, if there be a school in the district, and at all times the master shall clothe the minor in a comfortable and becoming manner. [R., § 2599; C., '51, § 1542.]

CHAPTER 7.

OF THE ADOPTION OF CHILDREN.

3498. Who may adopt. 2307. Any person competent to make a will is authorized in manner hereinafter set forth, to adopt as his own the minor child of another, conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock. [R., § 2600.]

3499. Consent of parents or officer. 2308. In order thereto, the consent of both parents, if living and not divorced or separated, and if divorced or separated, or, if unmarried, the consent of the parent lawfully having the care and providing for the wants of the child, or if either parent is dead, then the consent of the survivor, or if both parents be dead, or the child shall have been and remain abandoned by them, then the consent of the mayor of the city where the child is living, or, if not in a city, then the clerk of the circuit [district] court of the county where the child is living, shall be given to such

adoption by an instrument in writing signed by the parties or party consenting, and stating the names of the parents, if known, the name of the child, if known, the name of the person adopting such child, and the residence of all, if known, and declaring the name by which such child is thereafter to be called and known, and stating also that such child is given to the person adopting, for the purpose of adoption as his own child. [R., § 2601.]

3500. Instrument acknowledged and recorded. 2309. Such instrument in writing shall be also signed by the person adopting, and shall be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged; and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantor, and the child as grantee, in its original name if stated in the instrument. [R., § 2602.]

Where there is an entire failure to execute the instrument of adoption as contemplated by statute, a court of equity will not carry out the mere intention to do so: *Long v. Hewitt*, 44–363.

Rights of inheritance can only be acquired through the adoption by a full compliance with the provisions of the statute: *Shearer v. Weaver*, 56–578.

Where the articles of adoption are properly executed, but not recorded during the lifetime of the adopting parent, the adoption does not take effect so as to entitle the child to inherit from the adopting parent, although the child and his natural parents have complied with the terms of the articles: *Ibid.*

The filing for record is as essential to the validity of the adoption as is the execution of the acknowledgment, and a filing for record after the death of the adopting parent will not make the adoption valid: *Tyler v. Reynolds*, 53–146.

So where the written instrument of adoption was almost entirely destroyed by accident soon after execution, by reason of which it became impossible to make record of it, *held*, that the adoption was not valid: *Gill v. Sullivan*, 55–341.

It would seem that failure to record articles of adoption renders them voidable only. As to whether the natural parent may, on account of such failure to record, avoid the articles, and whether the execution of new articles which are recorded before the recording of the prior articles would constitute an avoidance, *quære: Fouts v. Pierce*, 64–71.

The adoption cannot be made when the minor has a guardian, at least without his consent: *Burger v. Frakes*, 67–460.

3501. Effect. 2310. Upon the execution, acknowledgment, and filing for record of such instrument, the rights, duties, and relations between the parent and child by adoption, shall, thereafter, in all respects, including the right of inheritance, be the same that exists by law between parent and child by lawful birth. [R., § 2603.]

A child by adoption cannot inherit from the parent by adoption, unless the act of adoption has been done in strict accord with the statute: *Tyler v. Reynolds*, 53–146.

Even though the fact of the existence of the instrument of adoption is known to the prospective heirs before the death of the ancestor, the adopted child cannot inherit, unless the instrument of adoption is recorded as required by law: *Ibid.*

The adopted child does not lose the right to inherit from its natural parents; where a father adopted the child of his deceased daughter, *held*, that such child would inherit from him as his own child and also take the share of its deceased mother: *Wagner v. Varner*, 50–532.

Whether foster-parents will inherit from adopted children, *quære: Burger v. Frakes*, 67–460.

Adoption in another state, in a method not such as is authorized in this state, will not entitle the child to inherit real property here: *Estate of Sunderland*, 60–732.

3502. Maltreatment. 2311. In case of maltreatment committed or allowed by the adopted parent, or palpable neglect of duty on his part toward such child, the custody thereof may be taken from him and intrusted to another at his expense, if so ordered by the circuit [district] court of the county where the parent resides, and the same proceedings may be had therefor, so far as applicable, as are authorized by law in such a case in the relation of master and apprentice; or the court may, on showing of the facts, require from the adopted parent, bond with security, in a sum to be fixed by him, the county being the obligee, and for the benefit of the child, conditioned for the proper treatment and performance of duty toward the child on the part of the parent; but no action of the court in the premises shall affect or diminish the acquired right of inheritance on the part of the child, to the extent of such right in a natural child of lawful birth. [R., § 2604.]

HOMES FOR THE FRIENDLESS.

3503. Powers. 17 G. A., ch. 176, § 1. Any home for the friendless, incorporated under the laws of this state, shall have authority to receive, control and dispose of minor children, under the following provisions: In case of the death or legal incapacity of a father, or in case of his abandoning or neglecting to provide for his children, the mother shall be considered their legal guardian for the purpose of making surrender of them to the charge and custody of such corporation; and in all cases where the person or persons legally authorized to act as the guardian or guardians of any child, are not known, the mayor of the town or city where such "home" is located, may, in his discretion, surrender such child to said "home."

3504. Surrender of child to. 17 G. A., ch. 176, § 2. In case it shall be shown to any judge of a court of record, or to the mayor, or to any justice of the peace within such city or town, that the father of any child is dead, or has abandoned his family, or is an habitual drunkard, or imprisoned for crime, and the mother of such child is an habitual drunkard, or is in prison for crime or is an inmate of a house of ill-fame, or is dead, or has abandoned her family, or that the parents of any child have abandoned or neglected to provide for it, then such judge, mayor or justice of the peace may, if he thinks the welfare of the child requires it, surrender such child to said "home."

3505. Upon complaint; appeal. 17 G. A., ch. 176, § 3. Whenever complaint shall be made to the judge of any court of record, or to the mayor, or any justice of the peace in the city or town where said "home" is located, that any girl under the age of fourteen years or boy under the age of twelve years is abandoned by, or is sustaining relations to his or her parents or guardians, mentioned or contemplated in section two hereof [§ 3504], it shall be the duty of such judge, mayor or justice to issue a warrant for the arrest of such child, and if on testimony satisfactory to said judge, mayor or justice, it shall appear that such child has no parents, or is abandoned by its parents or guardians, as contemplated in section two of this act, the said mayor, judge or justice may, if he believes the best interest of the child requires it, surrender such child to the care of said "home." The right of appeal, within twenty days, to the district [or circuit] court, from the judgment of any mayor or justice of the peace shall be secured; and in any hearing before a court of record the party charged may have a trial by jury as is provided by law.

3506. Habeas corpus. 17 G. A., ch. 176, § 4. Upon the hearing of any *habeas corpus* for the custody of any child, if it appears that such child has been surrendered to said "home," under the provisions of this act, such surrender shall be taken by all courts of justice as presumptive that such child was legally and properly surrendered to said "home," and that said "home" was entitled to the custody and guardianship of such child under the provisions of this act.

3507. Guardianship. 17 G. A., ch. 176, § 5. Such home for the friendless shall be the legal guardian of the persons of all children that shall be surrendered to it under the provisions of this act, and shall have and exercise all the right and authority of the parents of such children, under the provisions of chapter six and seven, title fifteen of the code of Iowa, and amendments thereto, regulating the apprenticing and adoption of children.

3508. Religious instruction. 17 G. A., ch. 176, § 6. If religious instruction is given any child while an inmate of such home, it shall be in the religious faith of the parents of such child, if the same be known; and when any home shall dispose of the custody of any child, it shall be to some person and of the same religious faith as its parents, unless the parent or former guardian consent otherwise.

TITLE XVI.

OF THE ESTATES OF DECEDENTS.

CHAPTER 1.

OF PROBATE JURISDICTION.

3509. Where vested. 2312. The circuit [district] court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators, or trustees, as may be required to carry the same into effect; of the settlement of the estate of deceased persons, and of the persons and estates of minors, insane persons, and others requiring guardianship, including applications for the sale of real property belonging to any such estates, except as prescribed in chapters one and three, of title fifteen. [12 G. A., ch. 86, § 3; 13 G. A., ch. 153, § 4.]

The probate court has not jurisdiction to appoint an administrator of the personal property of a person who was not a resident of the county at the time of his death, and held no property there, merely on the ground that the property was brought into the county after his death for a special purpose and removed again before the appointment of such administrator: *Christy v. Vest*, 36–285.

If there is any claim due the estate of decedent on which action might be maintained in the courts of this state by an administrator properly appointed, the courts of this state have jurisdiction to appoint such administrator. So *held* as to a cause of action accruing in another state under the laws of that state for causing the death of decedent, defendant being suable in Iowa: *Morris v. Chicago, R. I. & P. R. Co.*, 65–737.

The fact that a court, in granting administration upon the estate of a foreign decedent, appoints an administrator for the sale of real estate in that county, does not limit its jurisdiction as to property in other counties of the state: *Lees v. Wetmore*, 58–170.

Jurisdiction of the probate court is not exclusive as to land belonging to an intestate, which is not required for the payment of debts, and remains in the possession of the heirs after administration is concluded, and an action against heirs in possession by a person claiming to be heir may be brought in another court: *In re Seaton's Estate*, 58–523.

Where the relief sought is the enforcement of a lien, the action may properly be brought in equity, there being no method of obtaining relief in probate proceedings: *Goodnow v. Wells*, 67–654.

In an action to foreclose a mortgage given by decedent, no personal judgment can be rendered against the executor although made a party to the action. Proceedings to enforce a claim against the estate must be prosecuted in the probate court: *Orcutt v. Hanson*, 71–514.

The adjudication of a claim against the estate is to be deemed a part of the settlement of the estate, and action cannot be brought in the district court against the administrator of the estate on an indebtedness of decedent: *Tillman v. Bowman*, 68–450.

The court having taken jurisdiction to appoint an administrator, such action cannot be attacked collaterally by showing that there was no property in the county to warrant such appointment: *Murphy v. Creighton*, 45–179; *Lees v. Wetmore*, 58–170.

The probate court has exclusive jurisdiction of an action to probate a will, but such probate is not conclusive on adverse parties, and an original action to set the will aside may be instituted in the district court: *Leighton v. Orr*, 44–679.

The probate court does not have exclusive jurisdiction of the question of the validity of a will: *Kohn v. Ryan*, 31 Fed. Rep., 636.

The court of probate does not have exclusive jurisdiction of a suit on an administrator's bond: *Wheelhouse v. Bryant*, 13–160; *Jenkins v. Shields*, 36–526.

An order of a probate court approving the report of an administrator, in which he certifies to a distribution of all the funds to certain heirs, is not an adjudication that there are no other heirs: *Crosley v. Calhoon*, 45–557.

A probate court may appoint a referee in the matter of the examination of administrator's accounts: *In re Heath's Estate*, 58–36.

The jurisdiction of a court of probate relates to probate matters exclusively, and no chancery powers are thereby conferred upon it. It may regulate the distribution of property to legatees, but cannot supervise the management of such property by the legatees charged with a trust duty in respect thereto by the will, the execution of trusts being within the jurisdiction of a court of equity: *Perry v. Drury*, 56–60.

The provisions as to the probate jurisdiction

do not defeat or oust the general equity jurisdiction of the district court: *Harlin v. Stevenson*, 30–371.

The jurisdiction of the probate court in relation to estates of insane persons does not exclude that of the district court in an action of right between an insane person and others: *Flock v. Wyatt*, 49–466.

The authority given by § 3513 to the clerk of the court to appoint guardians, etc., in vacation, does not confer upon him authority to approve a guardian's bond in vacation: *Reno v. McCully*, 65–629. But see now § 245.

The court of probate may authorize expenditures by a guardian for the support and education of a ward without notice to the ward. Such a proceeding is not adversary in its nature, and does not partake of the character of an action: *Brewer v. Stoddard*, 49–279.

Where a probate court directed that notice of an application by the administrator for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which order was complied with, *held*, that the court thereby acquired jurisdiction as against non-resident defendants to act upon such application: *Casey v. Stewart*, 60–160.

The hearing of a probate matter may be ordered to be had at a place other than the county seat: *Ibid.*

The court cannot sit outside of the county for the transaction of probate business, and an order made in such matter outside of the county will be void: *Capper v. Sibley*, 65–754. But see now § 3510, as amended.

An order with reference to the settlement of the account of a guardian appointed in one county entered of record in the court of another county is not valid: *Gillespie v. See*, 72–345.

Where a proceeding which should have been in probate is brought in law or equity, the error is merely one as to the form of the action, and cannot be raised on appeal, if not interposed in the lower court: *Goodnow v. Wells*, 67–654.

Nor can such objection be taken advantage of by demurrer, but it must be raised by motion to transfer the proceeding to the proper docket as provided in § 3724: *Ashlock v. Sherman*, 56–311.

Where the parties submitted to the court a controversy involving the allowance of claims against the estate upon an agreed state of facts, *held*, that the court might determine such question, although it was not one involving the exercise of probate jurisdiction: *Baugh v. Barrett*, 69–495.

The jurisdiction of the probate court in allowing claims is not exclusive: See notes to § 3612.

Proceedings to probate a will are not triable *de novo* on appeal: See notes to § 3540.

3510. Always open; hearing. 2313; 21 G. A., ch. 144. The court shall be always open for the transaction of probate business; but the hearing of any matter requiring notice shall be had only in term time, or at such time and place as the judge may appoint, and in case there is no contest, such hearing may be had at any place within the judicial district to which belongs the county in which business is pending. [12 G. A., ch. 86, § 12.]

The hearing may be ordered to be had at a place other than the county seat, notwithstanding the provisions of § 255: *Casey v. Stewart*, 60–160.

3511. Notice. 2314. When the judge fixes a time and place of hearing, as contemplated in the preceding section, he shall determine what notice shall be given thereof, and no such hearing shall be had until proof is made of the giving of such notice. [12 G. A., ch. 86, § 12.]

Where a probate court directed that notice of an application by the administrator for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which order was complied with, *held*, that the court thereby acquired jurisdiction as against non-resident defendants to act upon such application: *Casey v. Stewart*, 50–160.

3512. Legalizing act. 21 G. A., ch. 41, § 1. In all cases where matters or proceedings in probate have been heard by the circuit courts, or judges outside the county in which such matters or proceedings were pending, and in all cases where orders, and judgments in probate matters, and proceedings have been made by the circuit courts, and judges outside the county in which such proceeding or matter was pending, and where such hearing was had or order or judgment made within the circuit to which the county belonged in which such proceeding or matter was pending, such hearing order or judgment shall be held, and deemed to be of the same validity and force and effect as if such hearing was had or such order or judgment was made within the county in which such proceeding or matter was pending, and that all titles and rights acquired under such, orders and judgments shall be held and deemed to be of the same legal force, and effect, and to be as valid as if such order or judgment had been made within the county in which proceeding or matter was pending.

3513. Clerk; power in vacation. 2315; 15 G. A., ch. 43. The clerk, in vacation, shall have power to appoint executors, administrators, guardians, and appraisers; to issue citations and other notices, and to discharge such other duties in relation to estates of decedents as are in this title specially devolved on him. [12 G. A., ch. 86, § 12.]

The fact that the letters of administration are signed by the clerk does not show that the appointment of the administrator was made by the clerk. Such letters are not the evidence of the administrator's appointment, and the letters would be issued in that form although the appointment was made by the court during term time: *Citizens' Bank v. Rhutasel*, 67–316.

3514. Action of court. 2316. Any act of the clerk, as contemplated in the preceding section, shall be binding on all parties interested therein until the next term of the court after they are entered of record, when they shall be read in open court and approved, set aside, or modified, but until so set aside or modified, it shall have the same force and effect as if done by the court. [Same.]

3515. Clerks may approve bonds. 21 G. A., ch. 51, § 1. The clerks of the circuit [district] court in their respective counties may approve the bonds of guardians of minors, or of other persons subject to guardianship.

[For similar provisions, see §§ 245–247.]

3516. Examination of bonds. 21 G. A., ch. 51, § 2. Such clerks shall during the month of January, 1887, and during the same month in each even-numbered year thereafter examine as to the sufficiency of the sureties upon all executor's and guardian's bonds in force in his office and having been executed more than one year prior to such time, and if he finds the same sufficient he shall note upon such bond his examination and re-approval. If he shall not find the same sufficient, or if the sureties shall not re-qualify on being by him so required to do, he shall note his disapproval on such bond and notify the executor or guardian of such disapproval and place the matter upon the calendar of the court at the next term thereof for proper order.

3517. Causes transferred to district court. 2317. Where the judge is a party, or connected by blood or affinity with any person so interested nearer than the fourth degree, or is personally interested in any probate matter, he shall order the same transferred to the district court, which shall have jurisdiction therein the same as the circuit court would otherwise have, and its proceedings shall be entered on the records of the circuit court. [13 G. A., ch. 153, § 3.]

[Since the abolition of the circuit court (see § 233) this section would seem to be of no effect.]

3518. Jurisdiction of court. 2318. When a case is originally within the jurisdiction of the courts of two or more counties, that court which first takes cognizance thereof by the commencement of proceedings, shall retain the same throughout. [R., § 2306; C., '51, § 1274.]

3519. Same. 2319. The court of the county in which a will is probated, or in which administration is granted, shall have jurisdiction co-extensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate. [R., § 2472.]

[The word "real," in the last line, is not in the enrolled Code in the secretary of state's office, but is in the Code as reported by the commissioners, and is therefore retained as in the printed Code, being probably an omission in the original supplied by the editor.]

The fact that a court in granting administration upon the estate of a foreign decedent appoints an administrator for the care of real estate in that county does not limit its jurisdiction under this section as to property in other counties of the state: *Lees v. Wetmore*, 58–170.

3520. Process revoked. 2320. Any process or authority emanating from the court in probate matters, may, for good cause, be revoked and a new one issued. [R., § 2307; C., '51, § 1275.]

3521. Bonds filed; approval of. 2321. All bonds relating to probate matters shall be filed in the office of the clerk of the circuit [district] court, and shall not be deemed sufficient until examined by the clerk and his approval indorsed thereon. [R., § 2308; C., '51, § 1276; 13 G. A., ch. 158, § 2.]

This section has no reference to the bonds of guardians, which are provided for by § 3437. Guardianship is not a probate matter, within the meaning of this section: *Reno v. McCully*, 65-629.

CHAPTER 2.

OF WILLS AND LETTERS OF ADMINISTRATION.

3522. Who may make; of what property. 2322. Any person of full age and sound mind may dispose, by will, of all his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property to his wife and family.

Right to dispose: Under this section testator may so dispose of his property as to deprive an heir of any share or interest therein without any express declaration to that effect: *Stennett v. Hall*, 74-279.

The wife's contingent interest in her husband's property cannot be defeated by his will: See notes to §§ 3640 and 3656.

Testamentary capacity: The law regards other conditions of mind as well as absolute unsoundness, and such conditions may materially affect the validity of a will; and while nothing short of absolute imbecility or incompetency will make a will void, yet if the testator had a weak mind so as to be imposed upon and unduly influenced, this is a material thing going to affect its validity: *Bates v. Bates*, 27-110.

A party competent to make a valid will should possess a mind capable of exercising judgment, reason and deliberation, and capable of weighing the consequences of his will to a reasonable degree, and the effect of it upon his estate and family; and all persons devoid of such reason are incompetent to make a legal will: *Ibid.*

In order that testator may be held to have due testamentary capacity, it is not necessary that it appear that he possessed the intellectual vigor of youth or that usually enjoyed by him while in perfect health. It is enough if he was capable of comprehending his property interests, and determining the disposition he desired to make of such property and making it: *Webber v. Sullivan*, 58-260.

An instruction was held unobjectionable which stated that a person of sound mind as here contemplated is one who has full and intelligent knowledge of the act he is engaged in, and full knowledge of the property he possesses, and intelligent perception and understanding of the disposition that he desires to make of it, and of the persons that he desires shall be the recipients of his bounty, and the capacity to recollect and apprehend the nature of the claims of those that are excluded from participating in his bounty, but it is not necessary that he should have sufficient capacity to make contracts and to transact business generally, nor to enable him to engage in complex and intricate business matters: *Meeker v. Meeker*, 74-352.

Proof of monomania exhibiting itself in an insane and unfounded dislike to a particular person, either expressly recited in the will or to be inferred in its peculiar dispositions, may be sufficient to overturn it. The evidence that such dislike was groundless must be satisfactory or it will not be sufficient: *Pelamourges v. Clark*, 9-1.

On the issue of sanity raised on the probate of a will, *held*, that facts connected with the personal history of testator, his deportment, conversation and acts, and his confession during sanity, just preceding death, that he had been insane for twenty years preceding, during which time the will was executed, *held* competent; also *held*, that a subsequent will, executed while testator was unquestionably insane, and decedent's conversation while sane in reference thereto, were competent evidence of his insanity when executing the first will, the second will showing as intelligible an exercise of the power to dispose of property as the first: *Ross v. McQuiston*, 45-145.

In a particular case, *held*, that the testamentary capacity of a person executing a will made upon being roused from a state of stupor might well be doubted: *Davis v. Davis*, 43-687.

The fact that devisees and legatees in the will are not relatives of the testator but friends only, is, in the absence of other evidence, of no weight to show want of capacity to make a will: *Smith v. James*, 72-515.

The fact that testator was a spiritualist, and entertained the peculiar views of that sect, is not sufficient, in itself, to establish insanity such as to invalidate his will: *Otto v. Doty*, 61-23.

A subscribing witness to a will can state whether the testator was sane at the time the will was executed, although he is not shown to be an expert: *Parsons v. Parsons*, 66–754.

A non-expert witness who is well acquainted with the testator and has had the care of him is competent to testify that he saw no difference in his mental condition in sickness and his mental condition in health: *Severin v. Zack*, 55–28.

Expressions of opinions by the witness in regard to the appearance, conversation and acts of the testator, whose mental capacity is brought in question, are admissible: *Meeker v. Meeker*, 74–352.

It is not erroneous to instruct the jury that the testimony of medical men of experience, given after a careful examination of testator's mental condition, touching such condition at the time of the execution of the will, may be given more weight than the testimony of unprofessional witnesses: *Blake v. Rourke*, 74–519.

The burden of proof of the unsoundness of mind of the testator is upon the party impeaching the validity of his will: *In re Will of Coffman*, 12–491; *Webber v. Sullivan*, 58–260.

Where it appears that testator was capable of making a will except at such times when he was suffering under temporary paroxysms of pain, it is incumbent upon the contestants to prove that the will was made while the deceased was suffering temporary derangement: *Blake v. Rourke*, 74–519.

In a contest as to the probate of a will, the true rule is that the burden of proof of insanity is upon the party alleging it, and who claims the benefit of the fact when established: *Stephenson v. Stephenson*, 62–163.

Undue influence: The influence exercised over a testator, sufficient to defeat his will, must go to the extent of destroying in some degree his free agency. A bequest made at the request of the devisee is not for that reason alone void, because of undue influence: *McIntire v. McConn*, 28–480.

The burden is upon the contestants to establish undue influence, and the fact that the will is unjust or unreasonable is not sufficient evidence that such influence was exercised, nor does it change the burden of proof: *Webber v. Sullivan*, 58–260.

Evidence of undue influence, exercised by testator's wife over him before marriage, cannot be received to show undue influence during marriage at the time of the execution of the will: *Ibid.*

Where undue influence or false representations have not been shown, evidence of facts showing recitals in the deed in regard to the circumstances inducing the disposition made to be erroneous cannot be received. If the conclusion is the result of erroneous convictions engendered in the mind of the testator on his own motion it cannot be said to be the result of undue influence: *Ibid.*

The fact that the devisee's name was written in the will by himself, that he took charge of the will immediately upon its execution, and that it was not read by the subscribing witnesses nor to decedent in their presence, are suspicious circumstances, and evidence of the further facts that devisee refused to produce the will when requested to do so by decedent, and the declarations of decedents respecting his children, should be admitted to bear upon the question of fraud and undue influence: *In re Will of Hollingsworth*, 58–526.

The fact that before the will was executed testator said that persons had advised him to cut contestant out, *held* not to tend to show undue influence: *In re Will of Convey*, 52–197.

Under the evidence in a particular case, *held*, that there was nothing to show undue influence over testator, whose mental capacity had been claimed to be impaired: *Collins v. Brazill*, 63–432.

Instructions as to what should be considered in determining the competency of testator to execute a will, and whether he did so under undue influence, *held* correct: *In re Will of Convey*, 52–197.

The fact that the disposition made of the property is unreasonable cannot be considered as showing undue influence. Neither can prior declarations of an intent to otherwise dispose of the property be shown for that purpose. Physical condition and age of deceased considered apart from the condition of his memory and other mental faculties are not proper matters to be shown for that purpose. Nor will relationship between the parties alone support a claim of undue influence: *Muir v. Miller*, 72–585.

Declarations of testator showing that he believed certain persons, mentioned in the will as legatees, were lacking in due affection for him, *held* admissible in a contest as to the probate of a will in support of the claim that it was executed under undue influences, as tending to show that in some manner his feelings toward such legatees had been changed: *Stephenson v. Stephenson*, 62–163.

Evidence that a testator, when in health and long before his will was executed, and when he was not probably under the influence of other persons, expressed his intention to make disposition of his property substantially as he subsequently did in the will, is admissible to show that the will was not made under undue influence: *Dye v. Young*, 55–433.

The declarations of a testator are not competent evidence to show a revocation of a will admitted to have been once valid or to impeach the validity of a will for a cause not involving his mental condition. But such declarations, whether made before or after making the will, are competent evidence to show the mental incapacity of the testator or that the will was procured by undue influence: *Bates v. Bates*, 27–110.

Declarations of a testator made after the execution of the will are admissible, as bearing on the question of undue influence: *In re Will of Hollingsworth*, 58–526; *Parsons v. Parsons*, 66–751.

Declarations of testator made after the execution of the will *held* admissible in evidence, not as showing undue influence, but as showing the effects on testator's mind of whatever influence, if any, was exerted upon him to procure him to execute the will: *Stephenson v. Stephenson*, 62–163.

Declarations of legatees, made before or after the execution of a will, are not receiv-

able, in a proceeding to which they are not parties, to affect the validity of the will: *In re Will of Ames*, 51-596.

The declarations of an executor who is a legatee and a party to the record are equally inadmissible: *Ibid.*

Where there are several legatees, declarations of one of them are not admissible to impeach the will: *Dye v. Young*, 55-433.

A contestant cannot introduce in evidence declarations of one of the legatees of a will, nor can declarations of one of the contestants be introduced in evidence by or in behalf of the legatees: *Parsons v. Parsons*, 66-754.

Knowledge of legatee's misconduct: A bequest by wife to husband with knowledge of facts as to the husband's previous conduct and connections, which might be such as to render the marriage void, will not be invalid on that account, however it might be if the bequest were made in ignorance of such facts: *In re Will of Donnely*, 68-126.

3523. Subsequent property. 2323. Property to be subsequently acquired, may be devised when the intention is clear and explicit. [R., § 2310; C., '51, § 1278.]

The bequest in a will of "the remainder of all my personal property and the whole of my real estate," *held* to cover subsequently acquired property, whether real or personal: *Briggs v. Briggs*, 69-617.

The provision of this section with relation to after-acquired property means that such property shall pass by the bequest whenever the intention of the testator to have it so pass is fairly to be inferred from the provisions of the will, when construed according to the established rules for the construction of such instruments, and it is not necessary that the intention be expressed in direct language: *Ibid.*

Bequests in this form of the residue of testator's estate have always been held to carry the residuum of all the personal property owned by the testator at the time of his death. As to that class of property the rule has been that the will speaks from the time of his death and not from the date of execution, and it was not the intention of the legislature in enacting this statutory provision to change the rule, but it was enacted for the purpose of extending the rule and making it applicable to real as well as personal property: *Ibid.*

3524. Verbal wills. 2324. Personal property to the value of three hundred dollars may be bequeathed by a verbal will, if witnessed by two competent witnesses. [R., § 2311; C., '51, § 1279.]

[The word "if," in the second line, is erroneously printed "it" in the Code.]

The fact that a decedent in making a nuncupative will attempts to dispose of real property and of personal property to a greater amount than can be legally disposed of in that manner will not render the disposition entirely void, but it will be carried out so far as such a disposition would be valid. In such a case, *held*, that a sum equal to the amount which might legally be disposed of by nuncupative will should be paid out of decedent's personal estate to the persons designated: *Mulligan v. Leonard*, 46-692.

Where it was sought by verbal will to dispose of a promissory note of the value of $400, *held*, that such will was invalid, not only as to the excess of the amount that might be legally disposed of in that manner, but as to the whole: *Stricker v. Oldenburgh*, 39-653.

It need not appear in case of an invalid will that the witnesses were expressly called on by decedent to attest his will: *Mulligan v. Leonard*, 46-692.

Where it appeared that deceased, in answer to questions as to the disposition of his property, answered that he wanted a certain person named to have it, *held*, that the intention to make a disposition of his property was sufficiently shown, and it would be presumed that he spoke with an understanding of the effect of his words, so that the *animus testandi* would be inferred: *Ibid.*

3525. Soldier or mariner. 2325. A soldier in actual service, or a mariner at sea, may dispose of all his personal estate by a will so made and witnessed. [R., § 2312; C., '51, § 1280.]

3526. In writing; witnessed; signed. 2326. All other wills, to be valid, must be in writing, witnessed by two competent witnesses and signed by the testator, or by some person in his presence and by his express direction. [R., § 2113; C., '51, § 1281.]

"Witnessed by two competent witnesses" means that such witnesses must subscribe the will. It is not sufficient to prove the will by witnesses who were present but did not subscribe it: *In re Will of Bojens*, 23-354.

It is not necessary that the testator should state to the witnesses the character and purpose of the instrument which he causes them to witness: *In re Will of Hulse*, 52-652.

Nor need they be shown to have been requested by the testator to attest his will: *Mulligan v. Leonard*, 46-692.

It is not necessary that the witnesses should see the testator subscribe the will. If the signature be adopted or acknowledged in their presence it is sufficient: *In re Will of Convey*, 52-197.

Where a will has only one competent attesting witness, but a codicil is added on the same sheet of paper, referring to and identifying

the original and the codicil is duly witnessed, the proof of execution will be held sufficient as to both the will and the codicil: *In re Murfield's Estate*, 74–479.

The interest of a witness to a will, in order to disqualify him, must be present, certain and vested: *Quinn v. Shields*, 62–129; *Bates v. Officer*, 70–343.

A corporator in a charitable corporation in which it is not contemplated that any profits shall arise, whose only interest therein is contingent upon a possible termination of the corporation and division of its assets, has no such interest as to be disqualified from being a witness to a will in which a bequest to such corporation is made: *Quinn v. Shields*, 62–129.

The interest which a husband may have in real estate devised to his wife is not such an interest as to disqualify him as a witness: *Hawkins v. Hawkins*, 54–443; *Bates v. Officer*, 70–343.

A will made in another state, and valid where made, but not executed in compliance with the laws of this state, will not be effectual to dispose of real property situated here: *Lynch v. Miller*, 54–516; *Ware v. Wisner*, 4 McCrary, 66.

The signing and executing of a will creates no right and vests no title, not even an inchoate one, in the devisee. His rights, if any, first accrue upon the death of the testator. *Lorieux v. Keller*, 5–196.

A will has no effect upon the rights of any one until the death of the testator. Prior to that time it is inoperative: *Stephenson v. Stephenson*, 64–534.

While a legacy or distributive share in an estate vests in the heir or legatee at the death of the testator or intestate, a general legacy does not operate as payment of a debt due from the legatee. The payment of such debt is not regarded as having been made at the date of testator's death: *Bowen v. Evans*, 70–368.

3527. Interest of witness. 2327. No subscribing witness to any will can derive any benefit therefrom, unless there be two disinterested and competent witnesses to the same. [R., § 2314; C., '51, § 1282.]

See notes to preceding section.

3528. Same. 2328. But if, without a will, he would be entitled to any portion of the testator's estate, he may still receive such portion to the extent in value of the amount devised. [R., § 2315; C., '51, § 1283.]

3529. Revocation. 2329. Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator with the intention of so revoking them, or by the execution of subsequent wills. [R., § 2320; C., '51, § 1288.]

The manner of revocation thus provided for must be observed, and *held*, that the drawing of a scroll through the name of the testator, not obliterating the signature, did not constitute a destruction of the will, and not being witnessed was not a cancellation: *Gay v. Gay*, 60–415.

Evidence of declarations of testator is not admissible to prove a cancellation of his will where such will has not been destroyed or canceled in such manner as is required by statute: *Ibid.*

Where a testator undertakes to dispose of personal property and real estate, and he subsequently conveys the real estate, it will not, in general, work a revocation of his will as to the personal property of which he dies seized. The conveyance of a part of the devised property works a revocation *pro tanto* only: *Warren v. Taylor*, 56–182.

The birth of a child after the execution of a will and prior to the death of the decedent will operate as an implied revocation thereof: *McCullum v. McKenzie*, 26–510; *Negus v. Negus*, 46–487; *Fulton v. Chidester*, 46–588; *Ware v. Wisner*, 4 McCrary, 66; *Alden v. Johnson*, 63–124.

This rule is not changed by the fact that the testator had children living at the time of making the will: *Negus v. Negus*, 46–487.

The subsequent birth and recognition of an illegitimate child by its father operates in the same manner to revoke a previous will: *Milburn v. Milburn*, 60–411.

In the absence of statutory provision upon the subject, the same formalities are required for the republication as for the publication of a will. So *held* as to a will which had been revoked by the subsequent birth of a child: *Carey v. Baughn*, 36–540.

3530. Cancellation. 2330. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. [R., § 2321; C., '51, § 1289.]

3531. Deposit. 2331. Wills, duly sealed up and indorsed, may be deposited with the clerk of the court, who shall file and preserve the same until the death of the testator, unless he sooner demand them. [R., § 2322; C., '51, § 1290.]

3532. Executors. 2332. If no executors are named in the will, one or more may be appointed to carry it into effect. [R., § 2334; C., '51, § 1302; 13 G. A., ch. 158, § 7.

If an executor is named in the will, a general administrator should not be appointed to supersede him: *Pickering v. Neiting*, 47–242.

3533. If no executors. 2333. If no executors are named therein, or if the executors named fail to qualify and act, it shall be retained until an executor is appointed and qualified in the manner herein prescribed. [R., § 2331; C., '51, § 1299.]

POSTHUMOUS CHILDREN — DEVISEE.

3534. Posthumous children. 2334. Posthumous children unprovided for by the father's will, shall inherit the same interest as though no will had been made. [R., § 2316; C., '51, § 1284.]

Birth of a child after execution of will and prior to the death of the testator acts as an implied revocation: See note to § 3529.

3535. Allowance. 2335. The amount thus allowed to a posthumous child, as well as that of any other claim which it becomes necessary to satisfy, in disregard of or in opposition to the contemplation of the will, must be taken ratably from the interests of heirs, devisees, and legatees. [R., § 2317; C., '51, § 1285.]

3536. Devise; legacy; bequest. 2336. The word "devisee" as used in this title, shall, when applicable, be construed to embrace "legatees," and the word "devised" shall, in like cases, be understood as comprising the force of the word "bequeathed." [R., § 2318; C., '51, § 1286.]

3537. Heirs of devisee. 2337. If a devisee die before the testator, his heirs shall inherit the amount so devised to him unless from the terms of the will a contrary intent is manifest. [R., § 2319; C., '51, § 1287.]

The widow of a deceased husband cannot inherit property devised by him to a child who died before the death of the husband (following the cases cited in notes to § 3658): *Will of Overdieck*, 50–244.

The word "heir," as used in this section, includes the brother of decedent, but does not include the widow: *Blackman v. Wadsworth*, 65–80.

CUSTODIAN — PROBATE.

3538. Filing. 2338. Any person having the custody of a will, shall, as soon as he is informed of the death of the testator, file the same with the clerk, who shall open and read the same. [R., § 2323; C., '51, § 1201; 13 G. A., ch. 158, § 3; 14 G. A., ch. 71.]

3539. Penalty. 2339. If any person having the custody of a will fail to produce the same as required by the preceding section after receiving a reasonable notice so to do, the court may commit him to jail until he produce the same; and he shall be liable for all damages occasioned by his failure to produce such will. [R., § 2324; C., '51, § 1292.]

3540. Probate; jury trial. 2340; 16 G. A., ch. 11. After the will is produced and read, a day shall be fixed by the court or clerk for proving the same, which day shall be during a term of court, and may be postponed from time to time in the discretion of the court. Whenever the proving of a will is contested, either party shall be entitled to demand a jury and to the verdict of a jury on the issues involved. [R., § 2325; C., '51, § 1293; 13 G. A., ch. 158, § 4.]

While probate of a will is necessary to perfect it as an instrument of title, yet, without probate, it is capable of conveying an interest in land devised, and may be the foundation of an equity and claim therein: *Olleman v. Kelgore*, 52–38.

The title of a devisee vests at the death of the testator, and, while a probate of the will is necessary to enable such devisee to introduce it in evidence, it is sufficient if the probate is had before its introduction in evidence, although not prior to the bringing of action by the devisee claiming thereunder: *Otto v. Doty*, 61–23.

Under the facts in a particular case, *held*, that there had been a change of domicile on the part of the decedent after the execution of his will, but prior to his death, such as to entitle his will to be probated in the county of his death: *In re Will of Olson*, 63–145.

Before the amendment of this section, expressly providing for a jury trial, *held*, that

there was no right to a jury trial: *Gilruth v. Gilruth*, 40–346.

Under the section as amended the parties may demand a jury trial as a matter of right, and the verdict of the jury in such cases will be as conclusive as is the verdict of the jury in an action at law. It cannot be treated like a verdict upon issues in chancery, which were referred to a jury for the purpose of informing the conscience of the court: *Collins v. Brazill*, 63–432.

Since the amendment of this section authorizing a jury trial there is no right to institute an original proceeding or action at law to again try the same questions which have been fully adjudicated in a jury trial under this section: *Smith v. James*, 74–462.

The proceedings in probate cannot be tried *de novo* on appeal in the supreme court: *Ross v. McQuiston*, 45–145: *Sisters of Visitation v. Glass*, 45–154: *In re Will of Donnely*, 68–126: *In re Will of Norman*, 72–84.

The question in a proceeding to probate a will is simply whether the writing is the last will of the deceased, and whether it was duly executed and published by him as such. Admission of the will to probate decides no question but that relating to its due execution and publication: *Lorieux v. Keller*, 5–196.

The probate establishes the execution of the will and renders it admissible as evidence in the courts of the state, and nothing more. It does not establish the testamentary character of the instruments and give validity to a title based upon it. The effect of the will and its interpretation are matters for adjudication when rights of property are claimed under it: *Fallon v. Chidester*, 46–588; *Ware v. Wisner*, 4 McCrary, 66.

When a will is admitted to probate it is to be regarded as a contract of record: *Quinn v. Shields*, 62–129.

A purchaser from devisee in a will which has been probated does not stand in the position of a purchaser without notice as to persons claiming adversely to the will. The question as between the two parties is simply as to which holds the legal title: *Fallon v. Chidester*, 46–588.

As to the jurisdiction of the probate court, see notes to § 3509.

Where the will is not admitted to probate because of want of testamentary capacity on the part of testator it is not error to refuse to tax the costs to the proponents: *Meeker v. Meeker*, 74–352.

A subscribing witness cannot testify as to his understanding of the purpose and object of making the will: *Stephenson v. Stephenson*, 62–163.

A contestant having admitted that testator signed the paper purporting to be his will, and the same was properly witnessed, should not be permitted to introduce testimony tending to show that the will was not witnessed at the request of testator: *Ibid.*

The probate court having general and original jurisdiction of probate of wills, and having exercised such jurisdiction, its proceedings are not void when collaterally assailed, although the certificate of its action might fail to show a direct compliance with the provision of the statute: *Latham v. Latham*, 30–294.

It being by statute provided that the probate court may grant probate upon the testimony of one subscribing witness if no objection is made to the probating, *held*, where the record showed that but one witness was examined in the proceeding it would be presumed that the court properly exercised its discretion in allowing the probate upon such testimony: *Barney v. Chittenden*, 2 G. Gr., 165.

It is not a part of the duty of the probate court to place a construction upon a will when it is offered for probate: *Murphy v. Black*, 41–488.

A contract on the part of a legatee in a will to allow the will to be defeated, when offered for probate, in order to deprive others of their rights under such will, is illegal: *Gray v. McReynolds*, 65–461.

As to setting aside the probate, see notes to § 3554.

3541. Notice of hearing. 2341. The clerk shall give notice of the time thus fixed by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in the county where the will is filed, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing; but the court in its discretion may prescribe a different kind of notice. [R., § 2326; C., '51, § 1294; 13 G. A., ch. 158, § 5.]

Publication of the notice here required need not be by the affidavit of the foreman or publisher of the newspaper in which the publication is made, but may be by any one having knowledge of the fact: *Farrell v. Leighton*, 49–174.

The notice of the probate of a will given by publication is all that is required to be given, and such notice will be binding upon a minor and authorize the court to appoint a guardian *ad litem*: *Ibid.*

No other or further notice than by publication is required to give the court jurisdiction in the proceeding: *In re Will of Middleton*, 72–424.

3542. Certificate. 2342. Wills, when proved and allowed, shall have a certificate thereof indorsed on or annexed thereto, signed by the clerk and attested by the seal of the court; and every will so certified, or the record thereof, or the transcript of such record duly authenticated, may be read in evidence in all courts without further proof. [R., § 2332; C., '51, § 1300.]

The probate of a will does not determine its testamentary character and give validity to a title based thereon, but its effect and interpretation are matters for adjudication when rights arise thereunder: *Fallon v. Chidester*, 46-588.

Although the certificate fails to show a compliance with all the directory provisions of the statute in regard to the probate of wills, yet it will entitle the will to be read in evidence: *Latham v. Latham*, 30-294.

3543. Recorded. 2343. After being approved and allowed, the will, together with the certificate hereinafter required, shall be recorded in a book kept for that purpose. [R., § 2327; C., '51, § 1295.]

3544. Executor to have copy. 2344. When proved and recorded, the court shall direct the will, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. [R., § 2330; C., '51, § 1298.]

Where real estate is devised to executors as individuals, with power to sell whenever they shall think it advisable to do so, there cannot be a sale of such land for distribution to beneficiaries until the persons named have renounced their trust: *In re Van Brocklin's Estate*, 74-412.

EXECUTORS — TRUSTEES.

3545. Married women. 2345. A married woman may act as executor independent of her husband. [R., § 2336; C., '51, § 1304.]

3546. Minors. 2346. If a minor under eighteen years of age is appointed an executor, there is a temporary vacancy as to him until he reaches that age. [R., § 2337; C., '51, § 1305.]

3547. Vacancies. 2347. If a person appointed executor refuses to accept the trust, or neglects to appear within ten days after his appointment and give bond as hereinafter prescribed, or if an executor removes his residence from the state, a vacancy will be deemed to have occurred. [R., § 2335; C., '51, § 1303; 13 G. A., ch. 158, § 8.]

An executor may surrender his trust by resignation, and after a reasonable time for filling his place he will be released from the duty of participating in the settlement of the estate without any formal order accepting such resignation, and a service of notice upon him thereafter as executor will not be good: *U. S. Rolling Stock Co. v. Potter*, 48-56.

The provisions of this section, as to removal from the state, apply also to administrators. In ordinary cases a non-resident should not be appointed administrator: *In re Estate of O'Brien*, 63-622.

And further, see notes to § 3555.

3548. How filled. 2348. In case of a vacancy, letters of administration, with the will annexed, may be granted to some other person; or if there be another executor competent to act, he may be allowed to proceed by himself in administering the estate. [R., § 2339; C., '51, § 1307; 13 G. A., ch. 158, § 9.]

[As to the power of the clerk to appoint, see §§ 245-247, 3513.]

In case of a vacancy by resignation the person appointed succeeds to the duties and obligations as well as the powers of the first executor, and can discharge such duties and obligations without delay or interruption: *Shawhan v. Loffer*, 24-217.

As a general rule the power conferred by will upon an executor to sell real property does not pass to an administrator with the will annexed, and this rule is not affected by this section: *Hodgin v. Toler*, 70-21.

An administrator *de bonis non* at common law derived title from the deceased and not from the former administrator, and was entitled only to the goods and personal property remaining in specie, but in this state the powers and duties of a substituted administrator are determined by this section: *Stewart v. Phenice*, 65-475.

A substituted administrator may sue his predecessor on his bond for funds received by him and not applied to the payment of debts of the estate, where there are such debts. It is not necessary that the action be brought by the creditors entitled to such funds: *Ibid.*

But if there are no claims against the estate, then the parties entitled to share in the assets and not the administrator *de bonis non* must sue: *Ibid.*; *Kelley v. Mann*, 56-625.

Where the will designates an executor, the court has no jurisdiction to appoint a general administrator. It can only appoint a special administrator, to serve until the will is proved and the executor is authorized to act: *Pickering v. Weiting*, 47-242.

3549. Substitution. 2349. The substitution of other executors shall occasion no delay in the administration of the estate. The periods hereinafter mentioned within which acts are to be performed after the appointment of executors, shall all, unless otherwise declared, be reckoned from the issuing of the commission to the first general executor. [R., § 2340; C., '51, § 1308.]

3550. Trustees to give bond. 2350. Trustees appointed by will, or by the court, must qualify and give bonds the same as executors, and shall be subject to control or removal by the court in the same manner. [13 G. A., ch. 153, § 5.

Persons to whom property is bequeathed in trust, to be applied as directed in the will, are legatees, and not trustees, within the meaning of this section, and the probate court cannot require them to give bonds as here provided: *Perry v. Drury*, 56-60.

FOREIGN WILLS.

3551. Probated in other states. 2351. Wills probated in any other state or country, shall be admitted to probate in this state without the notices required by law in the case of domestic wills, on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probation was made; or, if there be no clerk, by the attestation of the judge thereof, and by the seal of office of such officers, if they have a seal. [R., § 2328; C., '51, § 1296.]

The probate court having adjudicated the sufficiency of the authentication on the copy presented to it for probate, such adjudication cannot be questioned collaterally when the will is offered in evidence. (See § 3554): *Stanley v. Morse*, 26-454.

An allowance of a foreign will is conclusive of the due execution of the will unless set aside by original or appellate proceedings: *Vance v. Anderson*, 39-426.

The order of probate of a foreign will may be set aside by original action on the ground that the will, although valid in the state where executed, is not in compliance with the requirements of our law, and therefore not valid as a disposition of real property here situated: *Lynch v. Miller*, 54-516.

The proceedings of the court of another state in the probate of a will will be presumed to be regular: *Otto v. Doty*, 61-23.

Where a will probated in another state empowered the executors at their discretion to sell real and personal property and appropriate the proceeds in the manner indicated, *held*, that such power might be exercised by an executor appointed in this state where property was situated, and that the power conferred was not in the nature of a personal trust: *Lees v. Wetmore*, 58-170.

The ancillary administrator should proceed without reference to the condition of the principal estate, at least until such condition is shown: *Ashton v. Miles*, 49-564.

Under the ancillary administration, claims filed under the principal administration may be proved, and if the ancillary estate is solvent the administrator may proceed to pay the claims against that estate in full, unless it is made to appear that the principal estate is insolvent: *Miner v. Austin*, 45-321.

3552. Sale of real estate by foreign executors. 2352; 18 G. A., ch. 162, § 1. All provisions of law relating to the carrying into effect of domestic wills after probate, shall, so far as applicable, apply to foreign wills admitted to probate in this state as contemplated in the preceding section; *provided*, that where by any will, first admitted to probate in any other state or country and then admitted to probate in Iowa, the executors or trustees under said will are empowered to sell and convey real estate; then upon production of and recording in the proper probate record a copy of the original record of the appointment, qualification and giving bond, unless such bond was waived in the will, of such executors or trustees by the foreign court granting the original probate of the will, duly authenticated in the same manner as foreign wills are required to be; then in conformity with the power granted in such wills, such executors or trustees may sell and convey real estate within any county in this state where such probate of will and proof of qualification may be so of record, without further qualifying in this state, and without reporting such sale to the circuit [district] courts in this state for approval; and such sales and conveyances shall have the same force and validity as if made by executors and trustees duly qualified within this state and reported to and approved by

the circuit [district] courts; unless at the time of the execution and delivery of said deed, letters testamentary or of administration upon the estate of such decedent shall have been granted in this state and remain in force and unrevoked, and due notice of such letters be given in such county in this state, if other than the one in which such letters were originally granted here, as required by section twenty-six hundred and twenty-nine of the code [§ 3835], in reference to actions affecting real estate; in which case any conveyance made shall be subject to all the rights acquired under the appointment and letters granted in Iowa; *provided* that no such conveyance shall be made by such executor or trustee until three months after the recording of a duly authenticated copy of the will, original record *of* appointment, qualification and bond (unless bond was waived in the will), in the proper probate record of the county where the land is situated. [11 G. A., ch. 139, §§ 1, 2.]

3553. Legalizing. 18 G. A., ch. 162, § 2. All conveyances heretofore made by foreign executors or trustees in which the requirements of this act have been complied with, or in which such proof of authority at the date of conveyance shall be hereafter made of record as provided in section one of this act [§ 3552], are hereby declared to be legal and valid in law and equity from the date of such deed; *provided*, that the provisions of this section shall in no manner affect adverse rights vested at the date of such conveyance and prior to the taking effect of this act, or the performing the additional requirements of this section.

Under this provision, *held*, that where such executors had under a will a right to sell the land sold, and any defect in the sale was due merely to want of formality, the sale was rendered legal: *Smith v. Callaghan*, 66–552.

3554. Probate conclusive; setting aside. 2353. Wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding. [R., § 2329; C., '51, § 1297; 13 G. A., ch. 158, § 6.]

The probate of a will does not prevent a subsequent action to set it aside. Such action is legal and not equitable in its nature: *Leighton v. Orr*, 44–679.

An original action to set aside the probate of a will may be brought in the district court: *Lynch v. Miller*, 54–516.

Any person who would have an interest in the property if the will were set aside may maintain an action in probate to have it set aside on the ground that it has been revoked by the subsequent birth of a child: *Alden v. Johnson*, 63–124.

In an action brought in a probate court by the executor of a will to obtain an interpretation thereof, the defendants may set up, in a cross-petition, facts showing that the will is invalid; such proceeding will constitute a direct and not a collateral attack: *Kelsey v. Kelsey*, 57–383.

In determining whether an instrument is a contract or will, the rule is: If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract, but if the instrument does not pass an interest or right till the death of the maker, it is a will, or testamentary paper. An instrument may be partly a deed and partly testamentary: *Burlington University v. Barrett*, 22–60.

In determining whether an instrument is testamentary or contract, the use of language peculiar to either class of instruments, or the belief of the maker as to its character, does not control inflexibly the construction. But, weighing all the language as well as the facts and circumstances attending its execution, the courts will give it such construction as will effectuate the manifest intention of the maker: *Ibid.*

An agreement for the disposition of property intended to continue after the death of the owner cannot be given testamentary force and allowed to have operation unless in such form as to be valid as a will: *Crispin v. Winkleman*, 57–523.

A motion to set aside the probate of a will supported by affidavits is not authorized: *In re Will of Middleton*, 72–424.

As to the effect of an order of probate, see notes to § 3540.

ADMINISTRATION.

3555. Who entitled; order of. 2354. In other cases where an executor is not appointed by will, administration shall be granted:

1. To the wife of the deceased;

2. To his next of kin;
3. To his creditors;
4. To any other person whom the court may select. [R., § 2343; C., '51, § 1311.]

[The clerk may appoint administrators: See §§ 245–247, 3513.]

The fact that there was an agreement of separation between husband and wife will not deprive the latter of her preference in the matter of administering on the estate of her deceased husband: *Read v. Howe*, 13–50.

After the lapse of the time allowed to relatives of different degrees to apply for administration, the court may appoint any proper person even though not next of kin nor a creditor: *Crossan v. McCrary*, 37–684.

The court has some discretion as to appointing a person designated by this section, and may properly refuse to make the appointment where the party is a non-resident: *In re Estate of O'Brien*, 63–622.

The mere fact of non-residence will not necessarily disqualify a person from being appointed as an administrator. But it should be considered in determining the qualifications of an applicant: *Chicago, B. & Q. R. Co. v. Gould*, 64–343.

The provision of § 3547, that the removal from the state of an administrator shall create a vacancy, does not disqualify a non-resident for holding the office, but simply enables the court to take into account the fact of non-residence occurring after the original appointment, and the administrator who has become a non-resident may, nevertheless, be re-appointed, if deemed advisable: *Ibid.*

The grant of letters of administration to a person is not in itself an adjudication that such person is an heir, and that there are no other heirs having a better right to administer: *Anson v. Stein*, 6-150.

Administration upon the estate of a non-resident may be granted in any county in which real property of decedent is situated, provided there are debts of decedent, and it does not appear that there is personalty, or sufficient personalty, to satisfy them: *Little v. Sinnett*, 7–324; *Lees v. Wetmore*, 58–170.

As the administrator has nothing to do with the real property of decedent unless it be found that it is necessary for the payment of debts, an application for the grant of letters of administration upon real estate alone should show that such debts exist: *Little v. Sinnett*, 7–324.

Where a court assumes jurisdiction to appoint an administrator, such appointment cannot be collaterally attacked by showing that there was no property upon which administration could be granted: *Murphy v. Creighton*, 45–179.

3556. Classes united. 2355. Individuals belonging to the same or different classes, may be united as administrators whenever such course is deemed expedient. [R., § 2344; C., '51, § 1312.]

An appointment of an additional administrator (even against the objection of the one first appointed) will not be disturbed on appeal unless an abuse of the discretion of the court in such matters can be shown: *Read v. Howe*, 13–50.

3557. Time allowed. 2356. To each of the above classes in succession, a period of twenty days, commencing with the burial of the deceased, is allowed within which to apply for administration upon the estate. [R., § 2345; C., '51, § 1313.]

3558. Special administrators. 2357. When from any cause general administration cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased. [R., § 2352; C., '51, § 1320; 13 G. A., ch. 158, § 13.]

In the absence of a direct review, by appeal or otherwise, of the action of the circuit court in appointing a special administrator, it will be presumed that a proper occasion existed for his appointment: *Masterson v. Brown*, 51–442.

3559. Appeal. 2358. No appeal from the appointment of such special executors, shall prevent their proceeding in the discharge of their duties. [R., § 2353; C., '51, § 1321.]

3560. Inventory. 2359. They shall make and file an inventory of the property of the deceased, in the same manner in all respects as is required of general executors or administrators, and shall preserve such property from injury. [R., § 2354; C., '51, § 1322.]

3561. Duties. 2360. For this purpose they may do all needful acts under the direction of the court, but shall take no steps in relation to the allowance of claims against the estate. [R., § 2355; C., '51, § 1323.]

A special administrator does not represent the estate in such manner that the statute of limitations will commence to run against claims from the time of his appointment: *Pickering v. Weiting*, 47–242.

A special administrator may be substituted as plaintiff in a suit pending in behalf of the deceased, and may prosecute the same: *Masterson v. Brown*, 51–442.

The court has no authority to order a sale of real estate upon the petition of a special administrator, and such sale would be without jurisdiction and absolutely void: *Long v. Burnett*, 13–28.

3562. Special; when powers cease. 2361. Upon the granting of full administration, the powers of the special administrators shall cease, and all the business shall be transferred to the general executor or administrator. [R., § 2356; C., '51, § 1324.]

3563. Bond. 2362. Every executor or administrator, except as herein otherwise declared, before entering on the discharge of his duty, must give bond in such penalty as may be required, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law, according to the best of his ability. [R., § 2348; C., '51, § 1316; 13 G. A., ch. 158, § 10.]

[As to approval of bonds by clerk, see §§ 245–247, 3513, 3515. As to summary proceedings on the bond, see § 3639.]

The fact that the administrator's bond is signed and sworn to before his appointment will not affect the validity of the appointment: *Morris v. Chicago, R. I. & P. R. Co.*, 65–727.

Action against an administrator for money in his hands which should be paid to the distributees is to be brought by the persons entitled to the money, and not by the administrator *de bonis non: Kelley v. Mann*, 56–625.

But if claims against the estate remain unpaid, the administrator *de bonis non* may sue for funds in the former administrator's hands which should have been applied to the payment of such claims: *Ibid.*

Where, by the failure of the administrator to give notice of his appointment, the time within which claims must be filed does not expire, and it does not become known whether or not the assets are sufficient to pay all the claims, an action against the administrator on his bond may be brought by the new administrator appointed on his removal, and the right of action is not confined to creditors having claims: *Stewart v. Phenice*, 65–475.

Where, however, all claims are paid, and the funds remaining in the hands of the administrator are due only to the next of kin, the action on the bond should be brought by the persons entitled thereto, and not by a new administrator: *Ibid.*

An allegation that an administrator fraudulently pretended that he would consent to the allowance of a claim, and proposed to secure the claimant by a conveyance of real property in satisfaction thereof, which was not done, *held* not sufficient to show fraud on the part the administrator, rendering him personally liable: *Hazlett v. Burge*, 22–535.

If property not belonging to the estate be wrongfully seized by the administrator he is personally liable, and a claim therefor need not be filed as a claim against the estate: *Adkinson v. Breeding*, 56–26.

Where an administrator by a fraudulent concealment secures a receipt from a claimant for the amount of his claim against the estate, he does not thereby become necessarily liable in an action for the amount of such claim, but the action against him must be as administrator, and must be brought in a court having jurisdiction of the administrator: *Shropshire v. Long*, 68–537.

A suit against an administrator for non-feasance or malfeasance may be brought in the district court: *Jenkins v. Shields*, 36–526.

Costs of administration should not be charged up to the administrator except so far as they are occasioned by a contest arising upon exceptions to his report: *In re Heath's Estate*, 58–36.

Where it appears that the administrator has received money belonging to the estate, and he fails to show lawful excuse for not paying it over upon the order of the court, he may be punished for contempt, although he shows that he has otherwise distributed the money in payment of claims and demands which he had no authority to pay, and has no money of his own with which he can repay the amount required: *Wise v. Chaney*, 67–73.

Failure to file an account within one year after appointment, as required by statute, will constitute breach of the bond for which at least nominal damages can be recovered: *Clark v. Cress*, 20–50.

3564. Oath. 2363. He must also take and subscribe an oath, the same in substance as the condition of the bond aforesaid; which oath and bond must be filed with the clerk. [R., § 2349; C., '51, § 1317; 13 G. A., ch. 158, § 11.]

3565. New bond. 2364. New bonds may be required by the court to be given, and in a new penalty and with new sureties whenever the same is deemed expedient. [R., § 2350; C., '51, § 1318.]

3566. Letters. 2365. After the filing of the bond aforesaid, the clerk shall issue letters testamentary or of administration, as the case may be, under

the seal of the court, giving the executor or administrator the power authorized by law. [R., § 2351; C., '51, § 1319; 13 G. A., ch. 158, § 12.]

Letters: The fact that letters of administration are signed by the clerk will not show that the appointment of the administrator was made by the clerk. Such letters are not the evidence of the administrator's appointment, and they would be issued in that form, although the appointment was made by the court during trial term: *Citizens' Bank v. Rhutasel*, 67–316.

If the clerk issues letters giving greater power than authorized by law, the grant of such excessive power is void: *Pickering v. Weiting*, 47–242.

A foreign administrator cannot sue in our courts without taking out letters of administration: *McClure v. Bates*, 12–77; *Karrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

The appointment of an administrator in another state will be presumed to be regular: *Woodruff v. Schultz*, 49–430.

Where the record of the appointment of a person as executor was not given, but he was referred to and mentioned throughout the record of the court as the executor, and made the report of a sale as executor, and finally resigned as such, *held*, that this was *prima facie* sufficient to satisfy the court on appeal that he was executor in fact: *Shawhan v. Loffer*, 24–217.

Powers conferred; liability: To establish title under an executor's deed, the grantee must, in addition to introducing it in evidence, prove the will and the probate thereof, and lawful proceedings ending in the execution of the deed: *Miller v. Miller*, 63–387.

An executor authorized by the will to convert property into money and put the same at interest has no authority to mortgage the land for the purpose of raising money, and the approval by the court of such proceeding will not render it valid, but the estate having received the money advanced upon such mortgage will be required to repay it with legal interest: *Deery v. Hamilton*, 41–16.

An executor or administrator cannot give a promissory note which will be binding as such upon the estate. Such a note if executed will be individually binding upon him, and he may be sued thereon and an individual judgment recovered against him: *Winter v. Hite*, 3–142.

In such case, even though he signs the note with the addition of words indicating his representative capacity, he will nevertheless be personally liable: *Dunne v. Deery*, 40–251.

The addition of the word "administrator" to the signature of an instrument will not render the maker liable in a representative capacity when there is nothing in the instrument itself indicating that it was given in such capacity: *Tryon v. Oxley*, 3 G. Gr., 289.

An administrator is liable individually on a note given by him in satisfaction of a claim due from the estate. The giving of the note is *prima facie* evidence of a consideration, and an admission that he has assets in his hands sufficient to pay the amount: *Thompson v. Maugh*, 3 G. Gr., 342.

Where the widow of deceased owner of real property and his father, each being entitled to a half interest therein, enter into negotiations with reference to the purchase by the former of the interest of the latter, *held*, that the widow, although administratrix of the estate of her deceased husband, was not charged with the duty of protecting or regarding the interest of the other in the property: *Herron v. Herron*, 71–428.

Actions by: An administrator may bring action to set aside a voluntary conveyance of property by decedent if his estate is insolvent, and the property or its value is required for the payment of his debts: *Cooley v. Brown*, 30–470; *Doe v. Clark*, 42–123.

And such action may be maintained against a purchaser from the grantee in such conveyance who took the property with knowledge of the facts: *Cooley v. Brown*, 30-470.

The right of the administrator to bring an action to set aside a fraudulent conveyance by his intestate does not defeat the right of the creditor himself to maintain such action: *Harlin v. Stevenson*, 30–371.

A foreign administrator or executor cannot maintain an action without authority of the court of probate in the jurisdiction in which the debtor resides: *Karrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

Under the provisions of the Code of '51, a foreign administrator could not sue in our courts without taking out letters af administration. But the letters of such foreign administrator are admissible in evidence in an action by him: *McClure v. Bates*, 12–77.

A foreign administrator who has acquired possession of a note belonging to deceased is entitled to its control and proceeds, which he does not lose by sending it for collection to a county in this state in which ancillary jurisdiction has been granted, and such administrator may maintain action for the proceeds of such note in his own name and personal right: *Chamberlin v. Wilson*, 45–149.

A foreign executor may make such an assignment of a note due to his testator as will enable the assignee thereof to bring action thereon, as owner, against the maker in the courts of any state in which such action might have been brought by the testator himself. Such right of action is not limited to the state in which the executor making the assignment is appointed: *Campbell v. Brown*, 64–425.

Where an administrator is made party to an action in the state in which he is appointed, and therein recovers judgment against the opposite party, he may sue upon such judgment in another state without re-appointment: *Greasons v. Davis*, 9–219.

The administrator of a decedent's estate may maintain an action grounded upon a fraudulent alienation of property by the decedent, when the estate is insolvent and the property or its value is required for the payment of debts: *Cooley v. Brown*, 30–470; *Doe v. Clark*, 42–123; *Harlin v. Stevenson*, 30–371.

Actions against: As an administrator has a right to resort to the real property for the purpose of paying debts, he is a proper party to the proceeding to set aside a sheriff's sale of such property: *Crawford v. Ginn*, 35–543.

An administrator is not concluded by a judg-

ment rendered in a cause to which the heirs were parties, but in which he was not joined: *Dorr v. Stockdale*, 19–269.

When a judgment is against an administrator in his representative capacity, and is to be finally paid from the assets of the estate, for which he has already given the required security, the appeal bond should be light: *In re Pierson's Ex'rs*, 13–449.

In an action against an administrator in his representative capacity, it is error to render judgment against him personally: *Tyler v. Langworthy*, 37–555.

But advantage cannot be taken of such error on appeal unless a motion for the correction of the error has been made and overruled in the lower court: *Wile v. Wright*, 32–451.

Counter-claims: In an action by an administrator for money due decedent, demands against the estate acquired by defendant after the death of intestate cannot be pleaded as a set-off: *Cook v. Lovell*, 11–81; *Woodward v. Laverty*, 14–381; *Lucore v. Kramer*, 22–387.

In an action by an executor to enforce a claim due from defendant to decedent in his life-time, defendant may set up any claim existing in his favor against decedent before decedent's death: *Lucore v. Kramer*, 22–387.

A person sued for funds in his hands belonging to the estate cannot set up by way of counter-claim a demand which he has against the estate for personal services rendered prior to the death of decedent. He must file and establish his claim therefor in the mode prescribed by statute: *Crispin v. Winkleman*, 57–523.

A creditor of the estate who purchases personal property of the estate cannot have his claim against the estate deducted in full from the purchase price. If the estate is insolvent he must pay the full price of the property and accept upon his demand a *pro rata* share of the assets: *Eldredge v. Bell*, 64–125.

A claim against the estate not filed within the time required may still be used as a counter-claim against an action for an indebtedness due to the estate: *Ware v. Hawley*, 68–633.

An executor cannot make any agreement for the discharge of his individual liability by the discharge of his creditor's liability to the estate of which he is executor, and he cannot set up the indebtedness to the estate as a counter-claim in an action brought against him individually: *Gourley v. Walker*, 69–80.

3567. Notice of appointment. 2366. The executors or administrators first appointed and qualified for the settlement of an estate, shall, within ten days after the receipt of their letters, publish such notice of their appointment as the court or the clerk may direct; which direction shall be indorsed on the letters when issued. [R., §§ 2389, 2390; C., '51, § 1357; 13 G. A., ch. 158, § 18.]

Special administrators are not intended to be included herein, and need not give notice: *Pickering v. Weiting*, 47–242.

This provision as to giving notice is directory, and omission to give the notice does not have the effect to annul the appointment, or prevent the administrator from discharging the duties pertaining thereto: *Johnson v. Barker*, 57–32.

Under § 4949 the affidavit of the executor is competent to prove the fact of his having posted notice of his appointment: *Brownell v. Williams*, 54–353.

3568. Limitation. 2367. Administration shall not be originally granted after the lapse of five years from the death of the decedent, or from the time his death was known in case he died out of the state. [R., § 2357; C., '51, § 1325.]

Under this section, *held*, that where it appeared that administration on the estate of a person dying out of the state was granted after five years from the time of his death, it would be presumed that it was shown to the court that such grant of administration was within five years from the time his death was known: *Lees v. Wetmore*, 58–170.

An administrator *de bonis non* may be appointed after the lapse of five years from the death of decedent. This section refers to the first assumption of management of the estate by the probate court in the appointment of the first administrator: *Crossan v. McCrary*, 37-684.

Ancillary administration in this state may be granted after the expiration of five years to an administrator appointed in another state as provided in the next section: *Woodruff v. Schultz*, 49–430; *Dolton v. Nelson*, 3 Dillon, 469.

The failure to take out letters of administration until the period specified has expired does not operate to vest title to personal property in the heirs: *Haynes v. Harris*, 33–516. As to rights of heirs in personal property when no administration is granted, see notes to § 3640.

A judgment creditor who has failed to have administration granted within the time specified cannot afterwards maintain an action to revive his judgment against the heirs or others holding property which belonged to such decedent. Whether any equitable circumstance would warrant the granting of original administration after the expiration of five years, *quœre: Bridgman v. Miller*, 50–392.

Before the expiration of the time for granting administration the heirs have no power to bind the estate by the submission of a question to arbitration: *Stahl v. Brown*, 72–720.

3569. Foreign administration. 2368. If administration of the estate of a deceased non-resident has been granted in accordance with the laws of

the state or country where he resided at the time of his death, the person to whom it has been committed, may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed to administer upon the property of the deceased in this state, unless another has been previously appointed. [R., § 2341; C., '51, § 1309.]

Under the ancillary administration, claims filed under the principal administration may be proved, and if the ancillary estate is solvent the administrator may proceed to pay the claims against that estate in full, unless it is made to appear that the principal estate is insolvent: *Miner v. Austin*, 45–221.

Until it is shown that the principal estate is insolvent the ancillary administrator should proceed with the payment of the claims properly filed before him, and the settlement of his affairs, without reference to the principal estate: *Ashton v. Miles*, 49–564.

The allowance of a claim before a foreign administrator is not binding on an administrator appointed in this state. There is no privity between such administrators, and the allowance of the claim in the foreign jurisdiction is not evidence as against the administrator here: *Creswell v. Slack*, 68–110.

A foreign administrator cannot sue in our courts without taking out letters of administration: *McClure v. Bates*, 12–77; *Carrick v. Pratt's Ex'rs*, 4 G. Gr., 144.

The appointment of an administrator in another state will be presumed to be regular: *Woodruff v. Schultz*, 49–430.

3570. Same. 2369. The original letters, or other authority, conferring his power upon such executor, or an attested copy thereof, must be filed with the clerk of the proper court before such appointment can be made. [R., § 2342; C., '51, § 1310.]

3571. Certificate and attestation of. 21 G. A., ch. 103, § 1. A copy of the original record of the appointment and qualification of any administrator, executor or guardian in any other state or country including the will of decedent if any, as probated, together with the certificate of the custodian of such record that such appointment is then in full force, which copy of the record shall be duly attested and authenticated as is now provided by law in the case of judicial records of another state, may be recorded in the proper probate record of any county in this state, such record or a duly certified copy thereof shall be presumptive evidence in all cases of such appointment and qualification.

3572. Releases of record. 21 G. A., ch. 103, § 2. Any administrator, executor or guardian, a copy of whose record of appointment or qualification, is recorded as provided by section one of this act [§ 3571] is hereby authorized to release and fully discharge of record in any manner and by any instrument authorized by law, to the same extent as any administrator, executor or guardian appointed under the laws of this state could do, any judgment rendered by the supreme court or by any court of the county where such copy of the original record is recorded, or any mortgage or deed of trust given as a mortgage of property within such county, belonging to the estate or to the minor or other person represented by him, and may also in the same manner and to the same extent release and fully discharge any property in this state from the lien of such judgment, mortgage or deed of trust, *provided*, that the duly attested copies of the records herein provided for also show that the judgment, mortgage or deed of trust is listed in the assets of the estate in the court from which the said records come; *and, provided further*, that appended to and as a part of such release shall be the certificate of the judge or clerk of the foreign court, duly attested that said executor, administrator or guardian is, at the date of such release or instrument, still acting as such executor, administrator or guardian under authority of said court; *and provided further*, that nothing herein contained shall authorize any administrator, executor or guardian of another state or country to release or discharge any judgment, mortgage or deed of trust while any administrator executor or guardian of the estate to which such judgment, mortgage or deed of trust belongs is authorized to act by virtue of appointment and qualification under the laws of this state.

3573. Legalized. 21 G. A., ch. 103, § 3. All releases and discharges of record of any judgment mortgage or deed of trust heretofore made by ad-

ministrators, executors or guardians in the manner and to the extent authorized by this act where the copy of the original records required by this act has been or shall hereafter be recorded as required by this act are hereby declared to be legal and valid from the date of such release or discharge.

CHAPTER 3.

OF THE SETTLEMENT OF THE ESTATE.

3574. Inventory. 2370. Within fifteen days after his appointment, the executor shall make and file with the clerk an inventory of all the personal effects of the deceased of every description which have come to his knowledge, and a list of all book accounts which appear by the books or papers of the deceased to be unsettled. Such inventory shall be so made out as to show separately and distinctly, each by itself, the property inventoried as general assets of the deceased; the property inventoried and which is regarded as exempt under the next two sections; and the book accounts. [R., § 2360; C., '51, § 1328; 13 G. A., ch. 158, § 14.]

Until the debts and legacies are settled an executor is entitled to the personal property, and may sue for a recovery of debts due the estate: *Grimmell v. Warner*, 21–11.

Upon the appointment of the administrator, his title to the personal property relates back to the death of the intestate: *Haynes v. Harris*. 33–516.

Possession by devisee of personal property is *prima facie* evidence that he holds it as such unless the same person is executor and holds in that right: *White v. Secor*, 58–533.

An administrator has authority to assign notes and bills, and in the absence of any showing to the contrary it will be presumed that this power has been rightly exercised, even if the administrator improperly disposes of them. His assignee taking in good faith acquires good title: *Marshall County v. Hanna*, 57–372.

Where payment of a claim due an estate was made to the widow of decedent, who was afterwards appointed administratrix, *held*, that such payment operated as payment to the estate: *Savery v. Sypher*, 39–675.

If the order of court appointing an administrator is erroneous, and therefore voidable merely, all acts of the administrator until his appointment is set aside will be valid, and payment made to him before removal will bind the estate: *Chicago, B. & Q. R. Co. v. Gould*, 64–343.

Payment to the widow of deceased, who is not administratrix, of damages in causing the death of decedent is not a satisfaction of the claim of the estate: *Dowell v. Burlington, C. R. & N. R. Co.*, 62–629.

The administrator has no power to make a contract with a creditor of the estate by which the latter is to receive land in satisfaction of the claim. Such a contract will not bind the heirs: *Hazlett v. Burge*, 22–531.

It is doubtful at least whether an administrator without leave of court can take real property in payment of an indebtedness to the estate. Where the heir owning the estate entered into a parol agreement with the administrator whereby any interest which he was entitled to as heir or distributee of deceased was to be applied on such indebtedness, *held*, that the administrator did not thereby acquire a claim upon real property descending to the heir, such as would take priority over the levy of attachment against such heir at the suit of his creditor: *Allison v. Graham*, 67–68.

Upon a motion to set aside a compromise made by an administrator by leave of court, *held*, that the proper remedy was by a suit in equity to which the person with whom the compromise was made was a party: *Henry County v. Taylor*, 36–259.

The old common-law rule, that a debtor who has been made executor of his creditor's estate is released from his debt, when it does not appear that the assets of the estate are insufficient to pay the debts, is not in force; but where there is a person other than the executor authorized to collect the debts of the estate, a suit or judgment against the executor for a debt due by him to the estate should be against him individually and not as executor: *Kaster v. Pierson*, 27–90.

Where an administrator, after reporting that there were no assets subject to payment of the debts of the estate, sold property which was set apart to the widow as exempt, and took a note for the same, payable to him as administrator, *held*, that he was not thereby estopped as against a creditor from showing that such note was not an asset of the estate: *Laub v. Trowbridge*, 71–396.

3575. Exempt personal property. 2371. When the deceased leaves a widow, all personal property which in his hands as the head of a family

would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own right, and be exempt in her hands as in the hands of the decedent. [R., § 2361; C., '51, § 1329.]

A failure to inventory and appraise the personal property thus to be set apart to the widow, as required by statute, will not defeat her absolute ownership thereof, nor its exemption in her hands: *Adkinson v. Breeding*, 56-26.

As to who is to be deemed head of a family in such sense that upon his decease his widow may claim property as exempt, see *Linton v. Crosby*, 56-386.

It is doubtful whether the husband can by will deprive his widow of personal property which in his hands has been exempt from execution: *Linton v. Crosby*, 61-293.

It is not provided by statute that the property of the wife, exempt in her hands, shall upon her death vest in the husband. The statute (§ 3644), making provisions as to the widow of deceased husband applicable to the husband of a deceased wife, applies only to provisions relating exclusively to real estate. The personal property of the wife at her death goes into the hands of her administrator for distribution: *Wilson v. Breeding*, 50-629.

Under a former statute, which did not give the exempt property absolutely to the widow, but provided that it should remain in her possession until disposed of as provided by law, it was held that she could not sell such property and receive the proceeds for her own use: *Meyer v. Meyer*, 23-359, 377.

Also, *held*, that when such property was no longer needed by the widow it did not become liable to administration or to be taken to pay debts, but was to be distributed according to law: *Ellsworth v. Ellsworth*, 33-164; *Paup v. Sylvester*, 22-371.

The administrator cannot maintain replevin against the widow or her vendees for the recovery of chattels exempt from administration. He has no power to control her disposition of such property: *Wilmington v. Sutton*, 6-44.

The administrator has no right to take into his possession property of the widow or that to which she is entitled as exempt property of her husband's estate: *Herd v. Herd*, 71-497.

Pension money is, by § 4305, exempt to the pensioner as such, and not because he is the head of a family; therefore, his widow is not entitled to the same under the provisions of this section: *Perkins v. Hinckley*, 71-499.

3576. Life insurance. 2372; 18 G. A., ch. 5. The avails of any life insurance, or any other sum of money made payable by any mutual aid or benevolent society upon the death of a member of such society, are not subject to the debts of the deceased, except by special contract or arrangement, but shall, in other respects, be disposed of like other property left by the deceased. [R., § 2362; C., '51, § 1330.]

The administrator is charged with the duty of collecting life insurance and distributing it to the proper persons, and is liable on his bond for failure to do so: *Kelley v. Mann*, 56-625.

The proceeds of a policy of life insurance inure to the separate use of the husband or wife and children, if any, and are not to be distributed in such case among the heirs generally, as other personal property: *Rhode v. Bank*, 52-375.

The above provision contemplates a case where the policy is payable to deceased or his legal representative. If payable to another person, for the use and benefit of such person, it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

The facts in a particular case *held* not sufficient to establish an agreement that the avails of life insurance should be subject to a debt: *Herriman v. McKee*, 49-185.

Proceeds of life insurance in the hands of the beneficiary are subject to his debts: *Murray v. Wells*, 53-256.

See, also, § 1756 and notes.

3577. Appraisement. 2373. All property inventoried by the executor shall be appraised by three appraisers, who shall be appointed immediately on the filing of the inventory. [R., § 2363; C., '51, § 1231.]

3578. Notice to appraisers. 2374. The clerk shall issue to them a notification of their appointment, accompanied by a copy of the inventory as returned by the executor, and in making their appraisement they shall affix a value to each item of property, separately, as it appears in such inventory.

3579. Allowance to widow and children. 2375. The court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the time of his death. [R., § 2370; C., '51, § 1338; 9 G. A., ch. 22, § 1.]

There is no statutory provision authorizing an allowance to be made to the widow for her support for any period except for the year subsequent to the death of her husband. Under particular facts, *held*, that the supreme court would not interfere with an order refusing to make an allowance to the widow: *Caldwell v. Caldwell's Estate*, 54-456.

The probate court has no authority to make an allowance for this purpose by virtue of the terms of an antenuptial contract: *In re Estate of Collins*, 66-79.

A court in equity may have jurisdiction to carry out the terms of an antenuptial contract and make an allowance in accordance therewith for the support of the widow, but a court of probate cannot grant such relief: *Ibid.*

The allowance for temporary support where necessary is no part of the widow's dower or inheritance, but something entirely distinct, and the right thereto is not relinquished by an antenuptial release of all rights of dower and inheritance as the widow and heir of deceased: *Mahaffy v. Mahaffy*, 61-679.

This section doubtless confers upon a widow and minor children, if they do not have other means of support, a right to an allowance for their support out of the estate even though it be insolvent: *Dutch v. Marvin*, 72-663.

While the primary idea of the statute is that specific property must be set off, yet, in case it is not possible, the court may charge the executor with making money payments, and that, too, regardless of the question as to whether he has the requisite amount of money in his hands at that time, if there is property which the executor may convert into money for the purpose of making such payments: *Estate of McReynolds*, 61-585.

It is improper for the court to postpone the payment of the allowance made to the widow by ordering that an allowance made to a creditor shall first be paid. The administrator cannot by any agreement or contract with such creditor deprive the widow of her right to priority as to her allowance: *In re Estate of Dennis*, 67-110.

Under former statutory provisions, *held*, that if the estate was insolvent so that after the payment of debts there would be nothing for distribution, there was no authority for directing the executor to pay an allowance to the widow for the support of herself and minor children: *In re Application of Hieschler*, 13-597.

3580. Supplemental inventory. 2376. A supplemental inventory must be made in like manner, whenever the existence of additional property is discovered. [R., § 2365; C., '51, § 1333.]

3581. Allowance reviewed. 2377. The court may, on the petition of the widow, or other person interested, review the allowance so made to the widow or children, and increase or diminish the same, and make such order in the premises as it shall deem right and proper. [9 G. A., ch. 22, § 4.]

The allowance may, upon a proper application and showing, be reduced. It should not ordinarily be paid in advance, but a reasonable opportunity should be left to modify and reduce the allowance in case it should be found necessary to do so: *Estate of McReynolds*, 61-585.

In such matter the court must be allowed the exercise of a considerable discretion. In a particular case, *held*, that the refusal of the lower court to make any allowance would not be reversed on appeal: *Caldwell v. Caldwell's Estate*, 54-456.

A reduction of the allowance can only operate upon an unexpended balance thereof. The widow cannot be required to account for or pay back any portion already expended: *Harshman v. Slonaker*, 53-467.

3582. Property in another county. 2378. If any portion of the decedent's personal property be in another county, the same appraisers may serve, or others may be appointed. [R., § 2364; C., '51, § 1332.]

3583. Discovery of assets. 2379. The court or judge may require any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, to appear and submit to an examination under oath touching such matters; and if on such examination it appear that he has the wrongful possession of any such property, the court or judge may order the delivery of the same to the executor of the estate. [R., § 2366; C., '51, § 1334.]

The finding of the court upon such proceeding cannot be pleaded in bar of an action by the administrator to recover the property of the estate: *Ivers v. Ivers*, 61-721.

The court is not given general jurisdiction for the discovery of assets. It may not determine the question as an issue of fact upon general evidence whether the person has taken wrongful possession, but its order must be based on the examination of the defendant himself, and such order can only be made after having obtained jurisdiction of the defendant's person by his presence in court: *Rickman v. Stanton*, 32-134.

In this proceeding the parties are not to be heard as upon a trial, and other evidence than that of the party summoned is not to be introduced. The objection that the adverse party in such proceeding is an executor (see § 4889) cannot be urged against a person thus required to submit to an examination: *Smyth v. Smyth*, 24-491.

An administrator *de son tort* is liable under § 3689 at the suit of a creditor, and the remedy by this section, which is only in favor of an administrator, need not be pursued: *Madison v. Shockley*, 41-451.

Where it appears that the administrator has received money belonging to the estate, and he fails to show lawful excuse for not paying it

over upon the order of the court, he may be punished for contempt as here provided, although he shows that he has otherwise distributed the money in payment of claims and demands which he had no authority to pay, and has no money of his own with which he can repay the amount required: *Wise v. Chaney*, 67-73.

3584. Commitment. 2380. If, on being duly served with the order of the court or judge requiring him to do so, any person fail to appear in accordance with such order; or if, having appeared, he refuse to answer any question which the court or judge deem proper to be put to him in the course of such examination; or if he fail to comply with the order of the court or judge requiring him to deliver the property to the executor, he may be committed to the jail of the county until a compliance be yielded. [R., § 2367; C., '51, § 1335.]

[The words between "examination," in the fifth line, and "he may," etc., in the sixth line, are not found in the enrolled copy of the Code in the office of the secretary of state, but they are in the Code as reported by the commissioners, and are here retained as in the printed Code, having probably been inserted by the editor to supply a clerical omission.]

3585. Conveyances of real estate. 2381. Whenever it is probable that the known and acknowledged property of the deceased will not be sufficient for the payment of his debts, any person to whom the legal title of any real estate was conveyed by the decedent or any person through whom the legal title to any real estate conveyed by the decedent has subsequently passed, or any person claiming an interest in any such real estate, may be required to appear and submit to an examination as contemplated in the preceding sections, subject to the penalties therein prescribed; and the court or judge shall have full power to order the proper declaration of trust to secure the estate, to be made by any person who may appear on such examination to hold the legal title to any real estate which in the event of the insufficiency of the personal property would be assets for the payment of debts, and to enforce compliance with such order as is provided in the next preceding section.

3586. May compound. 2382. The executor, with the approbation of the court, may compound with any debtor of the estate who may be thought unable to pay his whole debt. [R., § 2368; C., '51, § 1336.]

3587. Mortgage assets. 2383. The interest of a deceased mortgagee shall be included among his personal assets, and, upon its being paid off, satisfaction shall be entered by the executor. [R., § 2369; C., '51, § 1337.]

3588. Security to creditors. 2384. When a person by his will makes such a disposition of his effects as to prejudice the rights of creditors, the will may be sustained by giving security to the satisfaction of the court for the payment of the claims of the creditors to the extent of the value of the property devised. [R., § 2371; C., '51, § 1339.]

3589. Funds collected; paid out. 2385. When no different direction is given in the will, debts due the estate, shall, as far as practicable, be collected, and the debts owing by the estate paid off therewith to the extent of the means thus obtained. [R., § 2372; C., '51, § 1340.]

SALE OF PROPERTY.

3590. Personal. 2386. The court, on the application of the executor, shall, from time to time, direct the sale of such portion of the personal effects as are of a perishable nature, or which, from any cause, would otherwise be likely to depreciate in value, and also such portions as are necessary to pay off the debts and charges upon the estate. [R., § 2373; C., '51, § 1341.

[By § 245 the clerk is authorized to make such order when no objection is filed.]

Debts should be paid out of the personal estate alone unless otherwise directed by the will, although the will leaves the personal property all to one party as a bequest: *McGuire v. Brown*, 41-650.

3591. Real estate. 2387. If the personal effects are found inadequate to satisfy such debts and charges, a sufficient portion of the real estate may be ordered to be sold for that purpose. [R., § 2374; C., '51, § 1342.]

Proceedings to set aside the widow's distributive share, and thus compel her to elect whether she will accept the distributive share or retain the homestead for life, should not be commenced until it is determined whether any portion, and if so how much, of the real property of the estate must be sold for the payment of debts: *Thomas v. Thomas*, 73–657.

It is only the interest of the estate in the property owned by decedent, and not the interest vested in the wife under § 3644, which may be subjected to the payment of debts: *Mock v. Watson*, 41–241.

The widow's rights must be set up in the proceeding: See notes to § 3593.

The fact that the personal property is insufficient to pay the debts, by reason of the misapplication thereof by the administrator, will not be a ground of objection to the application for leave to sell: *Conger v. Cook*, 56–117.

The adjudication of the court, in an order for the sale of real property by the administrator, to the effect that such sale is necessary, is to be deemed sufficient as to that fact: *Little v. Sinnett*, 7–324.

3592. Application. 2388. Application for that purpose can be made only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate. [R., § 2375; C., '51, § 1343.]

This section does not imply that the claims must have been already proven: *Little v. Sinnett*, 7–324.

The fact that the petition does not state all the claims against the estate will not render the proceedings void: *Myers v. Davis*, 47–325.

Allegations in a petition that no personal estate had come into the hands of the administrator, and that there were debts remaining unpaid, *held* sufficient to sustain the jurisdiction of the court in ordering a sale: *Stanley v. Noble*, 59–666.

In the absence of a contrary showing it will be presumed, in the case of a sale of the whole, that such sale was ordered for good reason: *Cowins v. Tool*, 36–82, 86.

Where the records show that claims were filed against the estate, proceedings for sale of property will be upheld against collateral attack, although it does not appear that such claims were ever paid: *Lees v. Wetmore*, 58–170.

Where the provisions of a will required the sale of real property upon the marriage of the widow without reference to the condition of the assets of the estate, *held*, that it was of no importance whether the executor made a proper showing of indebtedness, or whether he acted in good or bad faith in the management of the estate, as far as the validity of the sale was concerned: *Urban v. Hopkins*, 17–105.

Sale of real estate cannot be ordered upon the application of a special administrator: *Long v. Burnett*, 13–28.

Defects in the application will not defeat the jurisdiction of the court, and the validity of proceedings thereunder cannot be attacked collaterally: *Read v. Howe*, 39–553.

The application will not be sustained if not made within the time limited for the filing and allowance of claims against the estate under § 3625, unless the peculiar circumstances of the case are of such a character as to make it the duty of a court of equity to depart from this general rule, and under such circumstances the application must be made within a reasonable time: *McCrary v. Tasker*, 41–255; *Creswell v. Slack*, 68–110.

Where an application to sell real estate was made more than fifteen years after administration was granted, *held*, that this long delay required the plaintiff to establish circumstances excusing the delay: *Wilson v. Stanton*, 58–404.

In a particular case, *held*, that the circumstances were not such as to authorize an order for the sale on an application made after the time for filing claims had expired: *Hadley v. Gregory*, 57–157.

Matters excusing a delay in filing the application for leave to sell real estate until after the time for filing claims may be set up in the petition making application for leave to sell, and proved: *Conger v. Cook*, 56–117.

A judgment ordering a sale cannot be collaterally attacked, although rendered after the time for filing claims has expired: *Stanley v. Noble*, 59–666.

The petition and notice confer jurisdiction to make an order of sale, and if the court determines that they are sufficient, any error therein must be raised by appeal and not collaterally: *Read v. Howe*, 39–553; *Hilton v. Budgett*, 43–684; *Lees v. Wetmore*, 58–170; *Stanley v. Noble*, 59–666.

If the judgment of the court ordering the sale shows that there was notice, and that the sufficiency thereof was determined, the proceedings cannot be regarded as void for want of jurisdiction on account of irregularities appearing in the record which affect the sufficiency of the service: *Tharp v. Brenneman*, 41–251.

The question as to what must appear in order to give the court jurisdiction to order a sale, and as to the presumption in favor of jurisdiction, discussed at length: *Morrow v. Weed*, 4–77.

Before the power to order a sale of real estate to pay debts can arise, a petition, as the law directs, must be presented by a legal administrator: *Long v. Burnett*, 13–28.

When such petition is presented, jurisdiction over that subject is acquired, and the subsequent proceedings, although those of a court of inferior and limited jurisdiction, will be presumed as regular and conclusive as those of courts of general jurisdiction, and cannot be collaterally attacked: *Ibid.*

3593. Notice. 2389. Before any order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions, unless a different notice is prescribed by the judge. [R., § 2376; C., '51, § 1344; 13 G. A., ch. 158, § 15.]

The proceeding upon application of an administrator to sell real property is adversary and not *in rem* merely, and the absence of the notice of such application required by statute renders the proceeding absolutely void: *Good v. Norley*, 28–188; *Boyles v. Boyles*, 37–592.

Where a sale of real property of deceased was made by his heirs, and soon afterward application to sell such property was made by the administrator, of which no notice was given to the purchaser from the heirs, *held*, that such purchaser was bound to know that his vendors took as heirs, and to inquire whether there had been any administration on the property, and was bound without other notice of the proceedings: *Dolton v. Nelson*, 3 Dillon, 469.

The fact that the service of notice is defective will not render the judgment void: *Meyers v. Davis*, 47–325.

A recital in the record that notice has been served is *prima facie* evidence of that fact: *Little v. Sinnett*, 7–324.

A party served by publication only may, in the manner provided by § 4084, have an order of sale which is made in pursuance of such application and notice set aside: *Huston v. Huston*, 29–347.

In case of proceedings to sell real property upon application of an administrator, where notice is properly served upon a minor and his guardian, it is not essential to the jurisdiction of the court to order a sale that there be a formal defense interposed on behalf of the minor, at least where it appears that the order of sale was not made upon default but upon a hearing of the evidence and an investigation of the case: *Bickel v. Erskine*, 43–213.

A widow properly notified must set up her claim to dower in this proceeding or be thereafter barred from any claim on the property sold in pursuance thereof: *Olmsted v. Blair*, 45–42.

And where the widow appeared and resisted the sale, but it was ordered without making any reservation of her dower interest, *held*, that she was precluded from subjecting the land so sold to any claim for dower in a subsequent proceeding: *Garvin v. Hatcher*, 39–685.

Where the administrator, for the purpose of paying a mortgage debt, sells the property covered by the mortgage, after proper proceedings, to which the widow is made a party, the dower right of such widow is thereby extinguished as fully as if the property had been sold in pursuance of a foreclosure of the mortgage: *Mead v. Mead*, 39–28.

3594. Sale in parcels. 2390. If convenient, the real estate must be divided into parcels, and each appraised in the manner above provided for personal property, and the appraisement filed in like manner. [R., § 2377; C., '51, § 1345.]

3595. Sale of whole. 2391. When a part cannot be sold without material prejudice to the general interests of the estate, the court may order the sale of the whole, or of such parts as can be sold advantageously. [R., § 2378; C., '51, § 1346.]

In the absence of a contrary showing it will be presumed, in the case of a sale of the whole, that such sale was ordered for good reason: *Cowins v. Tool*, 36–82, 86.

This provision is not intended to apply to the wife's one-third interest in the land: *Mock v. Watson*, 41–241.

3596. Private sale. 2392. Property may be permitted to be sold at private sale, whenever the court is satisfied that the interest of the estate will be thereby promoted. [R., § 2379; C., '51, § 1347.]

3597. Public. 2393. In other cases, sales must be made at public auction, after giving the same notice as would have been necessary for the sale of such property on execution. [R., § 2380; C., '51, § 1348.]

Where, in a notice of sale dated June 4th, the time was stated as the 26th of June next, *held*, that the date referred to was in the same year and not in the next year: *Little v. Sinnett*, 7–324.

Where a town was named as the place of sale, but no particular place therein specified, *held*, that without showing that a mistake occurred, or that an unusual or improper place was adopted for the sale, the defect in the notice was insufficient to render the sale void: *Ibid.*

An administrator has no authority, in the absence of express order of the court, to accept notes and mortgage in part payment for real property sold, and should be charged with the sum for which the property was sold as money received, nor can he be credited with expenses of foreclosing a mortgage so taken: *Richards v. Adamson's Estate*, 43–248.

A purchase of land at administrator's sale by the attorney or any other agent of the administration, and for his benefit, cannot be upheld, and if the property has passed into

the possession of an innocent purchaser the administrator will be accountable for its value: *Read v. Howe*, 39-553.

A purchase at such sale by the administrator is voidable at the election of the parties interested, but valid as to others: *Harshman v. Slonaker*, 53-467; *Welch v. McGrath*, 59-519.

Under the evidence in a particular case, *held*, that a claim against the estate for the payment of which real property of decedent had been sold was not fraudulent, and that the sale should not be set aside: *Trimble v. Marshall*, 66-233.

Where an administrator obtained leave to sell an equitable interest of the estate in certain property which was incumbered, and such interest was sold, and subsequently the incumbrance was, in an action for that purpose, found to be void, *held*, that a purchaser of the equitable interest did not take the legal title free from such incumbrance, and nothing passed by the sale: *Crane v. Guthrie*, 47-542.

Where an administrator sells land which is subject to liens, the liens remain upon the land, and do not attach to the fund in the hands of the administrator: *Sullivan v. Leckie*, 60-326.

The rule *caveat emptor* applies to a judicial sale of land by order of court on an application of an administrator unless there is fraud, and the estate will not be bound by covenants of warranty inserted in the deed by the administrator: *Hale v. Marquette*, 69-376.

Where it did not appear of record that there was any publication, notice, sale, etc., as required, *held*, that a deed purporting to be made as a result of such proceeding was invalid: *Thornton v. Mulquinne*, 12-549.

Where the court has jurisdiction of the matter its action in ordering and confirming the sale cannot be impeached by showing that the requirements of the statute in regard to appraisement or sale were not complied with as to matters of form: *Cowins v. Tool*, 36-82.

Where an order of sale is made in a proper proceeding after due notice, and the deed is approved, an error in the proceedings can be corrected only upon appeal and not by collateral attack: *Hutton v. Laws*, 55-710.

3598. Appraised value. 2394. No property can be sold at private sale for less than the appraisement price, without the express approbation of the judge. [R., § 2381; C., '51, § 1349.]

3599. Credit. 2395. Property may be ordered to be sold on a partial credit of not more than twelve months. [R., § 2382; C., '51, § 1350.]

3600. Bond to prevent sale. 2396. Any person interested in the estate, may prevent a sale of the whole or any part thereof, by giving bond to the satisfaction of the court, conditioned that he will pay all demands against the estate, to the extent of the value of the property thus kept from sale, as soon as called upon by the court for that purpose. [R., § 2383; C., '51, § 1351.]

3601. Breach of bond. 2397. If the conditions of such bond are broken, the property will still be liable for the debts, unless it has passed into the hands of an innocent purchaser, and the executors may take possession thereof and sell the same under the direction of the court, or they may prosecute the bond, or both at once if the court so direct. [R., § 2384; C., '51, § 1352.]

3602. Effect of bond. 2398. If the conditions of the bond are complied with, the property passes by devise, distribution, or descent, in the same manner as though there had been no debts against the estate. [R., § 2385; C., '51, § 1353.]

3603. Approval of conveyances. 2399. Where real estate is sold, conveyances thereof, executed by the executor, pass to the purchaser all the interest of the deceased therein; but such conveyances shall not be valid until approved by the court. [R., § 2386; C., '51, § 1354; 13 G. A., ch. 158, § 16.]

3604. Record; presumption. 2400. Such approval shall be entered of record. A certificate thereof must be indorsed on the deed, with the signature of the clerk and the seal of the court affixed thereto; and the deed so indorsed shall be presumptive evidence of the validity of the sale, and of the regularity of all the proceedings connected therewith. [R., § 2387; C., '51, § 1355; 13 G. A., ch. 158, § 17.]

As to presumption of regularity, see notes to § 3597.

3605. Limitation. 2401. No action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale. [R., § 2388; C., '51, § 1356.]

This section does not apply to a case where the proceedings of the court granting leave to sell were absolutely void for want of notice or other cause: *Good v. Norley*, 28–188; *Boyles v. Boyles*, 37–592. Nor does it bar an action brought to set aside the sale on the ground of fraud within five years after the discovery of such fraud. (See § 3735): *Cowins v. Tool*, 31–513.

As to similar provision in regard to sales by guardians. See § 3456 and notes.

POSSESSION OF REAL PROPERTY.

3606. By executor. 2402. If there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate and demand and receive the rents and profits thereof, and do all other acts relating thereto which may be for the benefit of the persons entitled to such real estate. [11 G. A., ch. 139, § 3.]

[The word "devisee," in the first line, is erroneously printed "devise" in the Code.]

The administrator has no title in the real property of decedent which is subject to sale under a judgment against such administrator: *Lepage v. McNamara*, 5–124.

The administrator has nothing whatever to do with the real estate unless it be necessary to be sold for the payment of debts: *Little v. Sinnelt*, 7–324; *Gray v. Myers*, 45–158; *Hodgin v. Toler*, 70–21.

In the absence of statutory provision (which is found, however, in § 4862), the administrator cannot maintain an action of forcible entry and detainer as to real property of decedent: *Beezley v. Burgett*, 15–192.

The administrator has no right as such to receive the rents accruing after the death of decedent from his real property: *Foteaux v. Lepage*, 6–123; *Kinsell v. Billings*, 35–154.

Nor has he authority to pay out money for repairs, improvements and taxes upon such property: *Foteaux v. Lepage*, 6–123.

The administrator, as such, may, in a proper case, sue for rents, but to justify him in doing so it must be shown that there is no heir or devisee present and competent to take: *Shawhan v. Long*, 26–488.

Whether under this section an administrator might bring action for injury to real estate, *quære*. Whatever he may do is as trustee, not simply in his capacity as administrator, and he must aver the facts which authorize him to act: *Kinsell v. Billings*, 35–154.

Where by the terms of a will the executor is authorized to control and manage the real property of deceased, to rent and dispose of the same in accordance with its provisions, etc., he may maintain an action to quiet the title: *Laverty v. Sexton*, 41–435.

To give an administrator the right to bring action to remove a cloud from the title to land belonging to decedent, and subject it to the payment of his debts, he must show by a full statement of the claims against the estate and a like account of the disposition made of the personalty that the real property is necessary to the payment of the debts. If, however, it appears that there was no personal property, the showing of the existence of debts would be sufficient: *Gladson v. Whitney*, 9–267.

In such a proceeding heirs are necessary parties: *Ibid.*

Where growing crops are standing upon land set apart to the widow as dower they pass with the lands, and do not pass to the executor: *Ralston v. Ralston*, 3 G. Gr., 533.

A lease made by an executor not properly approved by the court has no validity, and cannot be enforced against him: *Capper v. Sibley*, 65–754.

3607. Proceeds. 2403. Such executor or administrator, under the order and direction of the court, may apply the profits of such real estate to the payment of taxes and of debts and claims against the estate of the deceased in case the personal assets are insufficient. [Same, § 5.]

3608. Accounts; compensation. 2404. Such executor or administrator shall account to such heirs or devisees for the rents, profits, or use of such real estate, deducting therefrom the payments made under the preceding section, together with a reasonable compensation for his own services, to be fixed by the court. [Same, § 4.]

3609. Taxes for minor heirs without guardians. 2405. When there are minor heirs for whom no guardian has been appointed, the executor or administrator shall pay out of any assets in his hands, all taxes assessed against the estate not otherwise provided for, and he shall be credited therefor as for the payment of other claims against the estate. [Same, § 6.]

3610. Provisions of will. 2406. When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered on; may exempt the executor from the

necessity of giving bond, and may prescribe the manner in which his affairs shall be conducted until his estate is finally settled, or until his minor children become of age. [R., § 2358; C., '51, § 1326.]

3611. Business continued. 2407. The court, in its discretion, may also authorize an executor or administrator to continue the prosecution of any business in which the deceased was engaged at the time of his death, in order to wind up his affairs with greater advantage; but such authority shall not exempt him from returning a full inventory and appraisement as in other cases. [R., § 2359; C., '51, § 1327.]

CLAIMS — PAYMENTS.

3612. Statement; notice; allowance. 2408. Claims against the estate shall be clearly stated, sworn to, and filed, and ten days' notice of the hearing thereof, accompanied by a copy of the claim, shall be served on one of the executors in the manner required for commencing ordinary proceedings, unless the same have been approved by the administrator, in which case they may be allowed by the clerk without said notice. [R., §§ 2391, 2393; C., '51, §§ 1359, 1361; 13 G. A., ch. 158, § 19.]

Filing of claims: The original written instrument which is a basis of the claim need not be produced until the trial. The filing of a copy is sufficient: *Braught v. Griffith*, 16–26.

The stating of a claim as provided by statute is in the nature of a petition, and a copy of a written instrument or an account upon which it is founded should be attached: *Baker v. Chittucks*, 4 G. Gr., 480.

The claim filed takes the place of a petition, and is to be regarded as a statement of the cause of action against the estate, and must contain all the averments necessary to show such cause of action: *Bremer County v. Curtis*, 54–72.

All that is required in the first instance of the claimant is to make out, verify and file his claim. The administrator may then approve or allow it, if he sees proper; otherwise it is deemed denied (§ 3614). But before the court can obtain any jurisdiction or power to decide as to the correctness of the claim notice must be served on the administrator. The allowance by the administrator, after filing and before notice, of a part of the claim, is not an adjudication as to the balance, and is not binding on claimant, and he may prosecute his demand as to the balance: *Smith v. McFadden*, 56–482.

That the claim is not properly sworn to does not render the filing thereof void: *Goodrich v. Conrad*, 24–254.

The provision in that respect is directory, and the oath may be administered after filing: *Wile v. Wright*, 32–451.

If the claim is filed in due time, though not sworn to, it will be sufficient. The omission of the oath will not render the filing void: *McCrary v. Deming*, 38–527.

If the claim is such that action thereon may be brought against the administrator in some other court, it need not be first filed, etc., in the probate court: *Linn County v. Day*, 16–158.

The jurisdiction of the probate court is not exclusive. After the claim is filed the action may be taken to the district court by consent of parties, and that court will have jurisdiction: *McCrary v. Deming*, 38–527.

So under Revision, § 2395, which prohibited the prosecution of claims for a mere money demand in the district court, except with the approbation of the county (probate) court, *held*, that such provision did not deprive the district court of jurisdiction, but was merely an inhibition upon plaintiff, which must be taken advantage of by way of defense, or it would be considered waived, and the district court would have jurisdiction by consent: *Sterritt v. Robinson*, 17–61; *Cooley v. Smith*, 17–99.

And under the same section (which is omitted in the Code) it was held that a matter of equitable nature was originally cognizable in the district court, without leave of the county court: *Waples v. Marsh*, 19–381.

Also, *held*, that such a proceeding in the district court, the approbation of the county court not being shown, was properly dismissed: *Crane v. Malony*, 39–39.

But where an action was brought in the district court against the heirs and administrator of decedent to foreclose a mortgage, and a judgment was rendered for the amount due, *held*, that this was an establishment of the claim against the administrator, and that it was not necessary that such claim be established in the probate court: *Crane v. Guthrie*, 47–542.

Where the claim against the estate grew out of a contract upon which the testator was jointly liable with another, and action was brought against the survivor and the executors of decedent jointly, in the same court in which the claim against the surety might have been filed, *held*, that the bringing of such action was a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60–367.

The administrator or executor cannot be held to take notice of the filing of a claim against the estate so as to take it into account in the distribution of the assets until he has been notified thereof in the manner required by this section: *Ashton v. Miles*, 49–564.

What claims proper: From the occupancy of premises of a married son by his mother, not a member of his family, the law will presume that the mother is to pay what

the premises are reasonably worth, unless it is expressly understood that she is to have them without charge, and reasonable compensation therefor may be recovered by the son from the mother's estate: *Harlan v. Emery*, 46–538.

Where a minor is received into the family of another, and treated as a member thereof, he cannot, in the absence of express contract, recover compensation from the estate of such person for services rendered while a member of such family: *Smith v. Johnson*, 45–308.

Where decedent had lived in the family of his son as a member thereof, *held*, that, in the absence of proof of any express agreement on his part to pay for his support, the son had not a valid claim therefor upon the estate: *Traver v. Shiner*, 65–57.

A claim for service rendered by a child of the deceased will not be supported by mere proof of rendition of services, but it must be shown that there was an expectation by both parties that compensation should be made. The presumption growing out of the family relation that services were rendered without any obligation for compensation must be overcome by affirmative evidence, and clearly established: but it is not essential to show that the rate of compensation was agreed upon: *McGarvey v. Roods*, 73–363; *Cowan v. Musgrave*, 73–384; *Magarrell v. Magarrell*, 74–378.

A claim to property of an estate arising under a contract made between heirs subsequently to the death of decedent cannot be filed as a claim against the estate: *Rogers v. Gillett*, 56–266.

Where, after a claim is filed against the estate of a decedent, the debt is paid by a surety, such payment entitles him to be subrogated to all the rights of a creditor in relation to such claim: *Braught v. Griffith*, 16–26.

A claim against an administrator for seizing and appropriating property not belonging to the estate is not such a claim as must be filed against the estate: *Adkinson v. Breeding*, 56–26.

Under the circumstances of a particular case, *held*, that the attorney acting for defendant in an action against an estate did so in behalf of other parties interested, and that an allowance to him of an attorney's fee out of the estate was improper: *Crane v. Guthrie*, 47–542.

As to claims for funeral expenses, tombstones, etc., see notes to § 3622.

Payment of liens upon property: Where a title bond was transferred by decedent before his death to his children, and the claim of the obligor of such bond for unpaid purchase money was filed against the estate, *held*, that the administrator, upon payment of such claim out of the personal assets, was not entitled to an assignment of the claim under the title bond, but that such payment was a satisfaction of the indebtedness, and that the children to whom the title bond had been assigned held the property free from such indebtedness: *Black v. Black*, 40–88.

Where the administrator had paid out funds to general creditors, and was then directed to make *pro rata* payments to a party who had also a lien upon real estate which had been subject to the claim of the general creditors, *held*, that in the absence of funds to make such payments he might enforce against such real estate the lien of the party to whom such payments were ordered to be made: *Black v. Black*, 42–694.

Where the owner of property conveyed the same by warranty deed while it was incumbered by mortgages to secure notes given by him, and such incumbrances were not excepted in the conveyance, and the mortgagees filed their claims against the estate after the owner's death, *held*, that the administrator could pay such claims out of any assets on hand, and the mortgagees could not be required to make the amount out of the mortgaged premises: *Sharpless v. Gregg*, 45–649.

Money furnished executor: If money is furnished to an executor to pay indebtedness against an estate, the estate becomes liable therefor, but it is not liable for money furnished for improvements: *Dunne v. Deery*, 40–251.

Judgments: A judgment rendered against decedent in his life-time may be enforced after his death against property upon which it became a lien: *Baldwin v. Tuttle*, 23–66.

In such case the holder may seek payment out of the personal assets by filing his claim, or he may enforce it against property upon which it is a lien without filing it, but if he pursues the latter method, he must enforce it while the lien continues or he will be entirely barred: *Davis v. Shawhan*, 34–91.

A judgment rendered against deceased in his life-time must be paid in the first instance out of the personal estate, and must therefore be filed and allowed as other claims of the fourth class, and becomes barred if not thus filed and allowed within proper time. When the personal estate is insufficient to satisfy it, action may be brought to enforce payment by sale of real estate: *Bayless v. Powers*, 62–601.

A judgment against decedent can only be enforced by proceedings against the estate. An action will not lie to revive the judgment against the heirs: *Bridgman v. Miller*, 50–392.

A judgment against a decedent may be enforced against the property on which it is a lien without being filed as a claim against the estate: *Boyd v. Collins*, 70–296.

Mortgages: Claims secured by mortgage may be filed and allowed as other claims, but a creditor does not thereby waive his right to subsequently foreclose the mortgage to enforce payment: *Moores v. Ellsworth*, 22–299.

A mortgage may be enforced against the property upon which it is a lien without being filed as a claim against the estate: *Allen v. Moer*, 16–307.

Action against heirs: For indebtedness due from decedent a claim must be filed against his estate. Action cannot be maintained thereon against the heirs direct. The heir only becomes liable in case there is not sufficient personal property to pay the claims, in which case real property of the decedent in the hands of the heirs may be subjected to its payment: *Reynolds v. May*, 4 G. Gr., 283.

An administrator who has a claim against the estate, and has had assets in his hands out of which it might have been paid, but has failed to take any steps to secure its allowance and payment until the period prescribed for

the presentation of such claims has elapsed, cannot enforce it by action against the heirs: *Janes v. Brown*, 48-568.

Whether in this state an action may be brought against the heir for the debt of the ancestor, *quœre: Ibid.*

In an action to subject the land of decedent in the hands of the heir to the payment of decedent's debts, the administrator of decedent is a necessary party, and the action cannot be prosecuted until administration is granted: *Postlewait v. Howes*, 3-365.

Action against administrator: The adjudication of a claim against the estate is to be deemed a part of the settlement of the estate, and an action cannot be brought in the district court against the administrator of the estate on an indebtednesss of decedent: *Tillman v. Bowman*, 68-450.

Payment out of personal property: Debts should be paid out of the personal estate alone unless otherwise directed by the will, although the will leaves the personal property all to one party as a bequest: *McGuire v. Brown*, 41-650.

The debts of an estate, secured and unsecured, should be paid from the proceeds of the personal property. The administrator has no right to appropriate real estate for that purpose unless absolutely necessary: *Boyd v. Collins*, 70-296.

Land conveyed by decedent to a voluntary grantee cannot be subjected to the payment of expenses of administration: *Willett v. Malli*, 65-675.

Abandonment: Where a note having been filed as a claim against an estate was afterwards withdrawn from the files for the purpose of bringing action against the surety thereon, and there was no record of any dismissal of the proceedings, *held*, that the claim was not abandoned: *Braught v. Griffith*, 16-26.

Allowance: The administrator cannot make any arrangement with the creditor by which the court will be authorized to order an allowance to such creditor to have priority over the allowance made to the widow: *In re Estate of Dennis*, 67-110.

Whether, when the administrator admits the correctness of a claim, the court may hear further proof, *quœre: Karr v. Stivers*, 34-123.

The heirs cannot, in advance of administration, bind the administrator by submitting claims against the estate to arbitration: *Stahl v. Brown*, 72-720.

Presumption: Where the probate court orders a claim to be paid which has been duly sworn to and filed, and it is so paid, this is sufficient evidence that it was admitted by the administrator with the approbation of the court: *Marlow v. Marlow*, 48-639.

Setting aside for fraud: The allowance by the administrator of a claim against the estate is not an adjudication binding upon the court when the action of such administrator is properly called in question, and it will be set aside if fraudulent: *Riordan v. White*, 42-432.

Where an administrator by fraud procures an allowance of a claim of his own, the court should, in a proper proceeding, set the allowance aside, but this should not be done upon a mere exception to his report. It would seem that an action should be brought for that purpose: *Ashton v. Miles*, 49-564.

Setting aside allowance made in vacation: An allowance of a claim by an administrator, and the proof thereof by the clerk made in vacation, may be set aside at the next term by the court: *Ordway v. Phelps*, 45-279.

Conclusive: The adjudication and order of the court allowing a claim and fixing its character is conclusive unless corrected on appeal or in some other direct proceeding: *Hart v. Jewett*, 11-276.

An allowance of a claim is an adjudication binding upon the administrator and upon creditors who may be deemed to be represented by him, but it is not conclusive against the grantee of decedent by a voluntary conveyance when it is sought to subject the land thus conveyed to the payment of such claim: *Willett v. Malli*, 65-675.

Not a judgment: The allowance of a claim by the probate court is not a judgment in such sense as to be barred in ten years, under the statute of limitations. The filing and allowance of a claim are in the nature of the filing of a petition in an action, and the action will be considered as pending until the claim is paid or otherwise disposed of: *Smith v. Shawhan*, 37-533.

The court should not render judgment upon a claim filed, but simply direct the payment by the administrator of the amount allowed: *Little v. Sinnett*, 7-324.

Where a judgment is rendered upon a claim against an estate it should be against the executor or administrator as such, and not in his individual capacity: *Voorhies v. Eubank*, 6-275.

If a judgment may be rendered against an estate it cannot be enforced by execution, but only by filing it in the probate court as a claim established against the estate: *Orcutt v. Hanson*, 71-514.

3613. Form. 2409. All claims filed against the estate shall be entitled in the name of the claimant against the executor, naming him as executor of the estate, naming it; and in all further proceedings on the claim, this title shall be preserved. [13 G. A., ch. 158, § 19.]

3614. Denial. 2410. All claims filed and not expressly admitted in writing, signed by the executor with the approbation of the court, shall be considered as denied without any pleading on behalf of the estate. [13 G. A., ch. 158, § 19.]

3615. Trial by jury. 2411. If a claim filed against the estate is not so admitted by the executor, the court may hear and allow the same, or may submit it to a jury; and, on such hearing, unless otherwise provided, all provisions

of law applicable to an ordinary proceeding shall apply. [R., §§ 2392, 2394; C., '51, §§ 1360, 1362; 13 G. A., ch. 158, § 19.]

Either party is entitled to a jury trial upon demand. If the parties waive a jury the trial may be by the court: *Ingham v. Dudley*, 60–16.

Where the administrator admits the correctness of a claim, whether the court may hear further proof discussed: *Karr v. Stivers*, 34–123.

The allowing of a claim by the court is not a judgment against which the statute of limitations will run: See note to § 3612.

While a court would be warranted in setting aside the allowance of a claim shown to be unjust or invalid, even where the administrator had negligently permitted the allowance to be made, a court ought not to disturb such allowance without a showing of the existence of a meritorious defense: *Dessaint v. Foster*, 72–639.

Where a claim has been allowed in favor of an administrator of an estate against the estate, the heirs interested may apply for and prosecute an appeal from such action in their own name, even though such appeal might have been prosecuted in the name of the administrator temporarily appointed to defend against the claim: *Burns v. Keas*, 20–16.

3616. Reference; examination of accounts. 2412. In matters of accounts of executors, the court shall have authority to appoint one or more referees, who shall have all the powers and perform all the duties of referees appointed by the court in a civil action. [13 G. A., ch. 158, § 21.]

Power is by this section conferred upon a probate court to appoint a referee in the matter of the examination of administrators' accounts: *In re Heath's Estate*, 58–36.

3617. Demands not due. 2413. Demands, though not yet due, may be presented, proved, and allowed as other claims. [R., § 2396; C., '51, § 1364.]

3618. Contingent liabilities. 2414. Contingent liabilities must also be presented and proved, or the executor shall be under no obligation to make any provision for satisfying them when they may afterwards accrue. [R., § 2397; C., '51, § 1365.]

The fact that a contingent claim is allowed does not entitle the claimant to an order of payment until the title of the claimant becomes absolute: *Blanchard v. Conger*, 61–153.

The statutory provision as to contingent claims does not apply to sureties who, having paid the principal's debt, stand in the place of creditors who have filed claims against the estate: *Braught v. Griffith*, 16–26.

3619. Proved before referees. 2415. Claims against an estate, and counter-claims thereto, may, in the discretion of the court, be proved up before one or more referees, to be agreed upon by the parties or approved by the court, and their decision being entered upon the record becomes a decision of the court. [R., § 2398; C., '51, § 1366.]

3620. Suits pending. 2416. Suits pending against the decedent at the time of his death, may be prosecuted to judgment, his executor being substituted as defendant, and such judgment shall be placed in the catalogue of established claims, but shall not be a lien. [R., § 2400; C., '51, § 1368.]

3621. Executor interested. 2417. If either of the executors is interested in favor of a claim against the estate, he shall not serve in any matter connected with that case. And if all the executors are thus interested, the court shall appoint some competent person a temporary executor in relation to such claims. [R., § 2401; C., '51, § 1369.]

3622. Expenses of funeral. 2418. As soon as the executors are possessed of sufficient means, over and above the expenses of administration, they shall pay off the charges of the last sickness and funeral of deceased. [R., § 2402; C., '51, § 1370.]

The purchase and erection of a tombstone is a proper expenditure to be made by an executor as pertaining to the funeral expenses, and such expenditure may be made without direction by the will, and notwithstanding the insolvency of the estate: *Crapo v. Armstrong*, 61–697.

The propriety of such an expenditure and the amount thereof may properly be left to the determination of the court having supervision of the settlement of the estate, and, unless the provision made shall appear to be unreasonable or excessive, such determination will be binding on the parties in interest: *Ibid.*

In case of a refusal by the executor to make application to the court for a proper and reasonable allowance for such purpose the widow

or heirs may present the matter to the court: *Ibid.*

Where the widow of deceased ordered a monument, *held*, that an order of the court disallowing a claim therefor was improper where it did not appear that the monument was too expensive, or not otherwise suitable, and the estate was solvent: *Lutz v. Gates*, 62–513.

The homestead is not liable for the payment of charges for the last sickness and funeral expenses: *Knox v. Hanlon*, 48–252.

3623. Allowance to widow. 2419. They shall, in the next place, pay any allowance which may be made by the court for the maintenance of the widow and minor children. [R., § 2403; C., '51, § 1371; 9 G. A., ch. 22, § 5.]

The administrator cannot make any arrangement with the creditor by which the court will be authorized to order an allowance to the creditor to have priority over the allowance made to the widow: *In re Estate of Dennis*, 67–110.

The allowance to the widow or minor children having been once made, whether right or wrong, the administrator is bound to pay it, and cannot be held liable for doing so where the funds remaining are not sufficient to pay the claims of a creditor: *Buttschaw v. Miller*, 72–225.

3624. Other demands; order of payment. 2420. Other demands against the estate are payable in the following order:

1. Debts entitled to preference under the laws of the United States;
2. Public rates and taxes;
3. Claims filed within six months after the first publication of the notice given by the executors of their appointment;
4. All other debts;
5. Legacies. [R., § 2404; C., '51, § 1372.]

The filing of a claim within six months entitles it to precedence in payment, although not admitted by the administrator or allowed by the court until after that time has expired: *Chandler v. Hockett's Adm'r*, 12–269; it is the filing which fixes its character as a claim of the third class and gives it precedence over claims filed after the expiration of the six months: *Noble v. Morrey*, 19–509; but the filing of the claim is notice to the administrator so as to require him to take account of it in the distribution of the assets only where he has been notified thereof in the manner contemplated in § 3612: *Ashton v. Miles*, 49–564.

Under Revision, *held*, that a claim upon which action was properly brought in the district court within six months was entitled to be treated as a claim of the third class upon the filing of the judgment in the county court, although such judgment was not filed for more than eighteen months after administration was granted: *Cooley v. Smith*, 17–99.

The fact that a contingent claim is allowed does not entitle the claimant to an order of payment until the right of the claimant becomes absolute: *Blanchard v. Conger*, 61–153.

3625. Limitation. 2421. All claims of the fourth of the above classes not filed and proved within twelve months of the giving of the notice aforesaid, are forever barred, unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the claimant to equitable relief. [R., § 2405; C., '51, § 1373.]

Limitation: This section refers to claims sought to be enforced against the personal assets of decedent, but not to a claim secured by mortgage upon which the creditor relies for satisfaction: *Allen v. Moer*, 16–307.

Further, as to filing mortgages and judgments, see notes to § 3612.

Where action on a claim is pending in the district court at the time administration is granted, a failure to file it as a claim against the estate will not cause it to be barred under this section: *O'Donnell v. Hermann*, 42–60.

Where the administrator fails to give notice of his appointment, the time for filing claims does not run, nor does the time for payment of claims become fixed: *Stewart v. Phenice*, 65–475.

The limitation begins to run from the time of giving notice by the general administrator. Notice by the special administrator is not contemplated: *Pickering v. Weiting*, 47–242.

The limitation does not apply to claims not existing at the time of decedent's death, but arising thereafter: *Savery v. Sypher*, 39–675.

Where a widow's right to a share of the real property of decedent was not established within the twelve months following the giving of notice by the administrator, *held*, that a claim by her for rents and profits on such share, filed after the expiration of that time, was not barred: *Senat v. Findley*, 51–20.

Claims of the third class may be approved after the expiration of the time fixed by the foregoing statutory provision for the filing and proving of claims of the fourth class: *Goodrich v. Conrad*, 24–254; *Smith v. McFadden*, 56–482.

Mere delay in bringing a claim of the third class on for hearing will not estop the claimant from proving it up, where it does not appear that the estate is in any manner damaged or injured by the delay, except that during the delay the co-obligors of deceased have become bankrupt: *Smith v. McFadden*, 56–482.

Claims of the fourth class are to be both filed and approved within the time limited. Mere filing is not sufficient to prevent a claim being barred: *Noble v. Morrey*, 19–509; *Willcox v. Jackson*, 51–296; *Brownell v. Williams*, 54–353.

Equitable relief against statutory bar: The mere fact of filing the claim within the twelve months provided by statute, but at such time that it cannot be reasonably expected that it can be proved within that time, will not entitle a party to equitable relief against the bar of the statute: *Willcox v. Jackson*, 51–296; *Clark v. Tallman*, 68–372.

Where it appeared that a claimant was a non-resident of the state, and had no notice of the death of intestate, and afterwards filed his claim six or eight months too late, it appearing that the debt was just and unpaid, and that the estate was still unsettled and solvent, *held*, that the circumstances were such as to entitle claimant to relief against the statutory bar: *McCormack v. Cook*, 11–267.

Where the claim was filed within such time that there was reasonable ground for believing that it would be passed upon within the time limited, *held*, that if not proved up in time, such circumstance would entitle claimant to equitable relief, if the failure did not result from any fault of his: *Wile v. Wright*, 32–451.

Where the attorney for claimant had delayed filing the claim upon the request of the administrator, who promised to secure settlement of the same without action, and it also appeared that the estate remained unsettled, and that there were sufficient assets to pay all indebtedness, *held*, that the circumstances were such as to entitle the claimant to equitable relief: *Brayley v. Ross*, 33–505.

As to whether a party whose claim is barred is entitled to equitable relief depends upon the peculiar facts of the case: *Johnston v. Johnston*, 36–608.

The controlling consideration in determining whether equitable relief should be afforded in case of failure to file a claim within the time provided is that the estate remains unsettled: *Ibid.*

Notwithstanding an estate may be closed, a creditor may establish an equitable ground to have the matter re-opened and his claim allowed. Such right to relief depends upon various circumstances, such as absence of inexcusable neglect upon plaintiff's part, solvency of the estate, etc.; but in a particular case, *held*, that a showing of equitable grounds was not sufficient: *Hazlett v. Burge*, 22–531.

Where a claim was left with attorneys more than six months before the expiration of the time for filing the same, and failure to file resulted from accident or mistake on the part of such attorneys, *held*, that there was a sufficient ground for equitable relief from the bar of the statute: *Wilcox v. Jackson*, 57–278.

Where the claim is filed in time to have it properly allowed within the year, the fact that its allowance is postponed beyond the year, by a continuance granted to defendant to enable defense to be made, will be a ground of equitable relief from the bar of the statute: *Ingham v. Dudley*, 60–16.

Where the holder of a claim, at the request of the administrator and on promise of payment, was induced to delay the filing of his claim beyond the proper time, *held*, that he would be relieved from the bar of the statute: *Burroughs v. McLain*, 37–189.

Where it appeared that a claim against the estate was placed in the hands of attorneys in due time for filing, and that they delayed filing upon the request of an attorney who had been acting for the administratrix, upon representation by him that he would see the administratrix with a view to an adjustment of the matter, and was then filed three months before the expiration of the limitation, but at such time that the term of court, in which it would come up for allowance, did not commence until a few days after the expiration of the year, *held*, that in view of the fact that the estate remained unsettled and was solvent, a sufficient excuse was shown for the slight delay, and that the court erred in rejecting the claim: *Pettus v. Farrell*, 59–296.

Under particular facts *held*, that by reason of a just expectation on the part of claimant that his claim would be paid without being filed, he was excused for failing to file the same at the first term of court, when such claim might have been filed, and as after filing the claim at the second term of court it was impracticable to have it allowed within the year he was entitled to equitable relief from the bar of the statute: *Orcut v. Hanson*, 70–604.

Where a creditor agreed to allow an account against his decedent as a payment or set-off against certain promissory notes in his hands against the owner of said account, and the latter, relying on the special agreement, did not present said account for probate as he otherwise would have done, *held*, that the facts did not constitute such peculiar circumstances as to entitle the owner of the account to equitable relief from fraud as against his failure to file the claim in time: *Preston v. Day*, 19–127.

A mere promise of an administrator to pay a claim is not sufficient to excuse the failure of the claimant to file it within the time required: *Colby v. King*, 67–458.

The fact that the county judge (then judge of the probate court) kept no books of record in his office in which to file a claim, and that a prior administrator had promised to pay the claim, and that the estate was still unsettled, *held* not sufficient to entitle the claimant to equitable relief: *Davis v. Shawhan*, 34–91.

Whether the claim was originally legal or equitable in its nature should make but little difference, if any, in determining what peculiar circumstances are sufficient to excuse the delay in filing: *Brewster v. Kendrick*, 17–479.

As to whether, when the peculiar circumstances are found sufficient to entitle a party to equitable relief, his claim should be admitted to the class to which it would equitably and properly belong, or should under all circumstances be regarded as a fourth class claim, the court was equally divided: *Ibid.*

Equitable relief will not be extended to a party who has been negligent in presenting his claim: *Ferrall v. Irvine*, 12–52; *Lacey v. Loughridge*, 51–629.

Where a claimant filed his claim, but failed

to prosecute it and have it allowed, and after eight years commenced action thereon against the administrator, who in the meantime had obtained a final discharge, *held*, that plaintiff had been negligent in prosecuting such claim, and was not entitled to equitable relief: *Phelps v. Thompson*, 48-641.

A party attempting to show equitable circumstances to excuse failure to file his claim within the time required should be held to very strict proof when he comes in after final settlement and seeks to interfere with payments already made, or subject other property to the payment of his debt. The fact of final settlement, and especially when made years after the grant of administration, is a most controlling circumstance under the statute: *Shomo v Bissell*, 20-68.

Limitation need not be pleaded: The limitation of the time for filing claims against the estate need not be pleaded to be made available. No denial of a claim is necessary, and whenever it appears to the court, by inspection of the claim or otherwise, that it has not been filed or proved as required, it is the duty of the court, independently of any pleading on the part of the executor or administrator, to reject it: *Brownell v. Williams*, 54-353.

Failure of an administrator to employ an attorney to defend against a claim on the ground that it is barred cannot constitute fraud in itself: *Trimble v. Marshall*, 66-233.

Counter-claim: A claim against the estate not filed within the time required may still be used as a counter-claim against an action for an indebtedness due to the estate: *Ware v. Howley*, 68-633.

3626. Payment of third class. 2422. After the expiration of the time for filing the claims of the third of the above classes, the executors shall proceed to pay off all claims against the estate in the order above stated, as fast as the means of so doing come into their hands. [R., § 2406; C., '51, § 1374.]

3627. Payment of fourth class. 2423. Claims of the fourth class may be paid off at any time after the expiration of six months aforesaid, without any regard to those claims not filed at the time of such payment. [R., § 2407; C., '51, § 1375.]

3628. Order of classes. 2424. No payment can be made to a claimant in any one class until those of a previous class are satisfied. [R., § 2408; C., '51, § 1376.]

3629. Claims not due. 2425. Demands not yet due shall be paid off if the holder will consent to such a rebate of interest as the court thinks reasonable. Otherwise the money to which such claimant would be entitled shall be safely invested until his debt becomes due. [R., § 2409; C., '51, § 1377.]

3630. Order of payment. 2426. Within their respective classes, debts shall be paid off in the order in which they are filed, subject to the provisions of the next section. [R., § 2410; C., '51, § 1378.]

3631. Dividend. 2427. If there are not likely to be means sufficient to pay off the whole of the debts of any one class, the court shall, from time to time, strike a dividend of the means on hand among all the creditors of that class, and the executors shall pay the several amounts accordingly. [R., § 2411; C., '51, § 1379.]

An order for payment *pro rata* is only contemplated in the event that there are not likely to be means enough to pay all the debts of any one class: *Hart v. Jewett*, 11-276.

3632. Incumbrances. 2428. The executors may, with the approbation of the court, use funds belonging to the estate to pay off incumbrances upon lands owned by the deceased, or to purchase lands claimed or contracted for by him prior to his death. [R., § 2412; C., '51, § 1380.]

See notes to § 3612.

SPECIFIC LEGACIES — PAYMENT.

3633. When paid. 2429. Specific legacies of property may, by the court, be turned over to the rightful claimant at any time upon his giving unquestionable real estate security to restore the property, or refund the amount at which it was appraised if wanted for the payment of debts. [R., § 2413; C., '51, § 1381.]

A legacy vests in the legatee at the time of the death of the testator, but it is not due or payable until such time as the executors may lawfully pay it. And where a legacy was given to a person who was indebted to the testator on notes, *held*, that the notes were not to

be deemed paid by the legacy at the time of the testator's death, but drew interest until the legacy could properly have been paid: *Bowen v. Evans*, 70–368.

The rule with reference to advancements (see notes to § 3663) is not applicable to the case of a residuary legatee: *In re Estate of Lyon*, 70–375.

3634. In money. 2430. Legacies payable in money, may be paid on like terms whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed. [R., § 2414; C., '51, § 1382.]

3635. After twelve months. 2431. After the expiration of the twelve months allowed for the filing claims as above provided, such legacies may be paid off without requiring the security provided for in the preceding two sections, if the means are still retained to pay off all the claims proved or pending as hereinbefore contemplated. [R., § 2415; C., '51, § 1383.]

3636. Order of will. 2432. If a testator has not prescribed the order in which legacies are to be paid off, and if no security is given as above provided, in order to expedite their time of payment, they may be paid off in the order in which they are given in the will, where the estate is sufficient to pay all. [R., § 2416; C., '51, § 1384.]

3637. Ratably. 2433. When not incompatible with the manifest intention of the testator, the court may direct all payments of money to legatees to be made ratably. [R., § 2417; C., '51, § 1385.]

3638. Estate insufficient. 2434. Such must be the mode pursued when there is danger that the estate will prove insufficient to pay off all the legacies, unless security be given to refund as above provided. [R., § 2418; C., '51, § 1386.]

3639. Judgment on executors' bonds. 2435. If the executors fail to make payment of any kind in accordance with the order of the court, any person aggrieved by their failure, may, on ten days' notice to the executors and their sureties, apply to the court for judgment against them on the bond of the executors. The court shall hear the application in a summary manner, and may render judgment against them on the bond for the amount of money directed to be paid and costs, and issue execution against them therefor. If any of the obligors are not served, the same proceedings in relation to them may be had with like effect as in an action by ordinary proceedings under similar circumstances. [R., §§ 2419–21; C., '51, §§ 1387–9.]

[As to publication of notice, see §§ 3684–3686.]

In such summary proceedings to compel payment by an executor in accordance with the order of the court, a petition alleging a breach of the bond is not necessary: *Hart v. Jewett*, 17–234.

It is no defense that a prior order for a *pro rata* payment of the claim has not been made, but the executor will only be liable to judgment for such *pro rata* amount as claimant is entitled to: *Ibid.*

The sureties cannot set up as a defense in such proceeding that the claim which the administrator has failed to pay was allowed by him after it was barred by statute, unless fraud or collusion of the administrator is relied on: *Weber v. Noth*, 51–375.

Where it was objected, in an action against an executor, that notice of the application for an order requiring him to pay over a distributive share was served on him in another state, of which he was a resident, *held*, that in his representative capacity he was subject to the jurisdiction of the court granting administration, and such court having expressly found that he was served with due and legal service, it would be at least a *prima facie* presumption that the court had jurisdiction: *Huey v. Huey*, 26–525.

A non-resident administrator appointed by the court is, in his representative capacity, subject to its jurisdiction, and the service of notice issued to him in a probate proceeding relative to the estate may be good, although made out of the state: *Chicago, B. & Q. R. Co. v. Gould*, 64–343.

But if it should appear that process or orders cannot be served upon him by reason of his absence from the state, or that prejudicial delay in securing his service is occasioned by such non-residence, the court may remove him or require prompt periodical appearance in the court at sufficiently brief intervals, or in other ways facilitate the service of process and orders upon him: *Ibid.*

In determining the duty of the executor as to the payment of legacies, etc., the probate court has jurisdiction to interpret the will. The jurisdiction of a court of chancery is not exclusive in that respect: *Covert v. Sebern*, 73–564.

Further, as to payment of claims, see notes to § 3612.

CHAPTER 4.

OF THE DESCENT AND DISTRIBUTION OF INTESTATE PROPERTY.

3640. Personal property. 2436. The personal property of the deceased, not necessary for the payment of debts, nor otherwise disposed of as hereinbefore provided, shall be distributed to the same persons and in the same proportions as though it were real estate. [R., § 2422; C., '51, § 1390.]

The estate of a deceased person may consist of both real and personal property, and the final distribution of the estate relates to the one as well as to the other: *Rogers v. Gillett*, 56-266.

The right to a distributive share of personal property vests in the persons entitled thereto, whether widow or next of kin, *instanter*, upon the death of the intestate, and not from the time of the actual distribution. Upon the death of the distributee before distribution is made, his share goes to his legal representative or legatee: *Moore v. Gordon*, 24-158.

Under statutes prohibiting an alien from inheriting real estate, *held*, that he might nevertheless take a distributive share in personal property: *Greenheld v. Morrison*, 21-538.

A contract between the surviving husband and the heirs of the wife's estate as to distribution of the assets thereof, construed, and *held* that any claim of the husband for deficiencies in property taken by him in lieu of his distributive share should be paid *pro rata* with the claims of the heirs: *Sloan v. Moffatt*, 41-271.

Where the administrator of an estate reported to the court that one of the children of decedent was supposed to be dead, giving reasons therefor, and subsequently asked that the money in his hands, a portion of which would have been the share of such child if alive, might be ordered to be distributed among the other heirs, and such distribution was made and the administrator discharged, *held*, that there was no adjudication thereby as to the death of such child which would preclude his creditors from garnishing the heirs to whom such distribution was made, for the share to which their debtor would have been entitled upon proof overcoming the presumption of death: *Crosley v. Calhoon*, 45-557.

The widow's distributive share of personal property under this section cannot be affected by will. (Overruling *In re Estate of Davis*, 36-24): *Ward v. Wolf*, 56-465; *Linton v. Crosby*, 61-293; *In re Estate of Lyon*, 70-375.

The fact that a widow entitled to a share of personal property, notwithstanding the will of her husband making other disposition of it, made no claim thereto until the execu or had paid out a large portion of the personal estate in legacies, *held* not to estop her from afterward insisting on her distributive share in opposition to the will: *Linton v. Crosby*, 61-293; *Linton v. Crosby*, 61-401.

In case there is no will and decedent leaves no children, the wife becomes entitled to one-half of his personal property the same as in case of real estate: *Dodds v. Dodds*, 23-306

The persons who are entitled to a distributive share of the personal property, and their proportions, are governed by the rule applicable to real estate, but the character of the title or interest is not so governed. Therefore, *held*, under a law which made the widow's dower a life estate only, that such widow would nevertheless take an absolute title to her share of the personal property: *Moore v. Gordon*, 24-158: *Hale v. Hunter*, 24-181.

The widow has only a distributive share in the personal property of which the husband dies seized. During his life-time she has no inchoate right in such property, and he may make such distribution of it in his life-time as he sees fit: *Samson v. Samson*, 67-253.

In a particular case, *held*, that the action of the court in ordering the payment to the widow of a sum to apply on the amount to which she might be afterward found entitled as her share of the personal estate was not erroneous in not ordering payment of a larger sum or allowing interest on the amount paid, the estate being still unsettled: *Linton v. Crosby*, 61-401.

The amount of advancement is not to be added to the personal estate so as to increase the avails of the personal estate to be distributed to the widow: *In re Will of Miller*, 73-113.

Further as to advancements, see § 3663 and notes.

The heirs take no title to or ownership of the personal property of the estate while it is subject to administration, but it decends to the administrator on his appointment: *Stahl v. Brown*, 72-720.

Where the period fixed for granting letters of administration has not expired, no action can be maintained by the heirs of deceased upon a promissory note, the property of decedent at the time of his death: *Haynes v. Harris*, 33-516; *Baird v. Brooks*, 65-40.

Where the statutory period for the granting of letters of administration has expired without the appointment of an administrator, and it appears that there are no debts against the estate, the title to personal property vests in the heirs jointly, and in such case an action by the heirs upon a promissory note belonging to decedent may be maintained: *Phinny v. Warren*, 52-332.

3641. Payment. 2437 The distributive shares shall be paid over as fast as the executor can properly do so. [R., § 2423; C., '51, § 1391.]

3642. In kind. 2438. The property itself shall be distributed in kind whenever that can be done satisfactorily and equitably. In other cases the

court may direct the property to be sold, and the proceeds to be distributed. [R., § 2424; C., '51, § 1392.]

3643. Partial distribution. 2439. When the circumstances of the family require it, the court, in addition to what is hereinbefore set apart for their use, may direct a partial distribution of the money or effects on hand at any time after filing the inventory and appraisement, upon the execution of security like that required of legatees in like cases. [R., § 2425; C., '51, § 1393.]

3644. Share of husband or wife; dower. 2440. One-third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him. The same share of the real estate of a deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife. The estates of dower and curtesy are hereby abolished. [R., §§ 2477, 2479; C., '51, §§ 1394, 1421; 9 G. A., ch. 151, §§ 1, 3.]

Dower abolished: While our statute expressly abolishes the estate of dower and creates another estate to take its place, yet the use of the word has not been dispensed with, and in some of its essential characteristics the interest of the wife under the statute has the same character as the estate of dower: *Mock v. Watson*, 41-241.

The widow's interest in the real property of her deceased husband, designated by the statute as a distributive share, is a materially different estate from that derived by descent: *Rausch v. Moore*, 48-611.

While the statute abolishes the estate of dower, and the interest in the lands of the deceased husband given by law to the widow is designated by other terms used in the statute, the profession continues to use the word "dower" to designate such interest, and no confusion or misunderstanding arises from such use of the word, the profession understanding its meaning in accord with the estate prescribed by the statute: *Daugherty v. Daugherty*, 69-677.

Inchoate right; what law governs: The interest of the wife in the lands of her husband, so long as it is inchoate only, may be enlarged, abridged or entirely taken away by the legislature. The extent of her interest is measured by the law in force at the time of her husband's death: *Lucas v. Sawyer*, 17-517; *Moore v. Kent*, 37-20; *Parker v. Small*, 55-732; *Foley v. Kane*, 53-64; *Cunningham v. Wilde*, 56-369.

But her interest in lands previously alienated by her husband, to which she has not relinquished her right of dower, cannot be increased by legislation subsequent to such alienation: *Moore v. Kent*, 37-20; *Davis v. O'Ferrall*, 4 G. Gr., 168; *Young v. Wolcott*, 1-171, *Craven v. Winter*, 38-471; *Pierce v. O'Brien*, 29 Fed. Rep., 402.

Under the act of 1862, which repealed the provisions of the statute by which dower was a life estate and changed it to a fee-simple, *held*, that the dower right existing in favor of the wife in property conveyed before the repeal of the prior statute was preserved: *Moore v. Kent*, 37-20.

That act did not take away the estate of dower theretofore existing, but simply enlarged it: *Ibid.*; *Kendall v. Kendall*, 42-464.

That statute did not change the common-law rule previously in force, that until dower right is assigned it is not subject to execution or attachment in an action at law. Whether this rule is changed by later statutory provisions, *quære*: *Rausch v. Moore*, 48-611.

Where property of the husband to which the wife had not relinquished the right of dower was sold at judicial sale, while the statute did not bar her dower in property sold at judicial sale, and the husband died after a change of the statute, by which the dower in such property was barred, *held*, that the widow could not claim dower in the property so sold: *Stinebaugh v. Morris*, 30-65.

When vested: Upon the death of the husband the interest of the wife becomes vested and cannot be affected by subsequent legislation: *Burke v. Barron*, 8-132.

Not subject to decedent's debts: The widow's dower right attaches upon the concurrence of seizin of the husband and coverture of the wife, and is not subject to the debts of the husband as is the interest of an heir: *Mock v. Watson*, 41-241; *Kendall v. Kendall*, 42-464.

The one-half interest which the wife may take under § 3659, in the absence of issue, includes the one-third interest here provided for, and that in excess of one-third is subject to debts of the husband: See notes to that section.

Priority of lien or mortgage for purchase money: The widow cannot claim dower in property to which her husband acquired an equitable title by a contract to convey as against the vendor's claim for the purchase money: *Barnes v. Gay*, 7-26.

The widow's dower right is subject to a mortgage for purchase money, although she did not join therein to release her dower: *Thomas v. Hanson*, 44-651.

As to other liens, see notes to § 3648.

In what property dowable: The widow has no interest in a pre-emption right: *Bowers v. Keesecker*, 14-301; *Langworthy v. Heeb*, 46-64.

Where the husband acquired title to public

lands in trust for another, *held*, that his widow was not entitled to dower therein: *Langworthy v. Heeb*, 46–64.

The widow of one holding property in trust has no right to dower therein. So *held* where a person received and held a patent from the government for land, which he had previously conveyed, and to which he thus held the legal title by arrangement merely as trustee: *McDaniel v. Large*, 55–312.

A widow is endowable of lands to which the husband has an equitable estate: *McReynolds v. Anderson*, 69–208.

Where a guardian of minor heirs without authority invested the money of his wards in real property, causing title to the same to be taken in the name of his son as trustee, *held*, that having no power to thus invest the trust funds, the ownership thereof did not vest in his wards, and that he therefore had an equitable interest in such property to which the dower right of his wife would attach: *Ibid.*

In such case, *held*, that under the particular facts the purchaser from the trustee took his title with notice of the equitable interest of the guardian, and therefore subject to the dower rights of the wife: *Ibid.*

The widow of a member of a partnership formed to deal in real property, the provision being that the property shall be bought and sold in the name of a trustee, does not have dower interest in land thus purchased and conveyed: *Mallory v. Russell*, 71–63.

Where land was conveyed to a partnership in the individual names of the partners, with the intention that it should be partnership property, *held*, that upon the death of one of the partners, it appearing that the partnership was insolvent, the widow of such partner acquired no dower interest in such property: *Paige v. Paige*, 71–318.

Where the husband had entered into a contract for the purchase of land for his own benefit and paid the purchase price, but caused the title to be conveyed to his son, *held*, that the dower interest of his wife in such land was not thereby defeated, and that it was immaterial that the husband took possession under parol contract, he having made valuable improvements on the property and continued in possession up to the time of his death: *Everitt v. Everitt*, 71–221.

In an action to correct a mistake in a deed, by which land, not intended to be conveyed thereby, is covered, it is not necessary to make the wife of the defendant a party. She has no dower right in such premises: *Stevenson v. Polk*, 71–278.

Release of dower by conveyance: A joint deed of husband and wife will operate as a release of the wife's dower interest, although it contain no express relinquishment thereof: *Edwards v. Sullivan*, 20–502; *Jones v. Des Moines*, 43–209.

Under former statutory provisions, *held*, that a conveyance not expressly releasing dower and not acknowledged by the wife, would not bar her dower right: *Westfall v. Lee*, 7–12.

The execution of a deed by one holding a power of attorney from the husband and wife, in the name of the husband alone, will not pass the wife's dower, nor will any amount of intention aid the defective execution of the power: *Wilkinson v. Getty*, 13–157.

An instrument relinquishing dower may be valid without being acknowledged or recorded: *Lake v. Gray*, 30–415.

A wife accepting money as consideration for a valid promise not to assert her dower right as against property conveyed by her husband, in the conveyance of which she does not join to relinquish her dower, is estopped thereby from afterwards setting up any dower interest in such land, and the estoppel also operates as against her heirs: *Dunlap v. Thomas*, 69–358.

It seems that the wife may, at the time of conveyance of property by the husband, make a separate contract for the sale of her inchoate right of dower therein: *Ibid.*

Purchaser without notice: It is no defense in an action for dower that defendant is a purchaser in good faith without notice: *Cruize v. Billmire*, 69–397.

Nor will the fact that the parties have lived separately and apart from each other for a long time create an estoppel as against the claim of the wife for dower: *Ibid.*

Where a purchaser of land held under patent from the school fund had no knowledge of the fact that such patent was issued in pursuance of a contract of purchase by another person than the patentee, nor that any one was entitled to a dower interest in the land, *held*, that the dower right of the wife of a person who took a contract for the purchase, and assigned the same without the wife's joining to release her dower, could not be asserted as against such innocent purchaser. While, if the purchaser had had knowledge, actual or constructive, of the interest of the first purchaser from the school fund, he might have been put on inquiry as to the dower interest of the wife of such purchaser, if any he had, it cannot be considered that he would be put on inquiry in regard to the possible dower right of some wife of whose husband he had no knowledge, actual or constructive: *Robinson v. Hague*, 63–273.

Where a man against whom a decree of divorce had previously been rendered at the suit of a woman claiming to be his wife, made an exchange of land with another who knew the fact of such divorce and believed that the party against whom it was rendered was therefore unmarried, and the transaction of exchange was effected through a son by a former marriage of the party against whom the divorce was rendered, such son and agent remaining silent as to the fact that his mother was yet living, *held*, that such son was estopped from claiming, against the party with whom the exchange of property was made, that his mother was living in another state at the time that such exchange was made, and that she survived his father and became entitled to a dower interest in such property, which descended to him as her surviving heir: *Williams v. Wells*, 62–710.

Conveyance in trust: Where a husband had conveyed property in trust for the benefit of his wife, and upon her death to her heirs, subject to a life estate in himself, *held*, that he was entitled upon her death to one-third in fee in addition to his life estate: *Conrad v. Starr*, 50–470.

Limitations: The husband's right to dower, to which he has made no relinquishment, cannot be barred as against the purchaser from

the wife by the statute of limitations during the life-time of the wife: *Hurleman v. Hazlett*, 55–256.

As to limitation of actions to recover dower, see notes to § 3648.

Relinquishment by wife to husband: Under the statutory provision (§ 3394), that neither husband nor wife has any interest in the property of the other which can be the subject of contract between them, *held*, that a release of dower by the wife in a contract with her husband with reference to a separation was not valid: *Linton v. Crosby*, 54–478.

But in the absence of such statutory provision it was held that a relinquishment of dower in an agreement to separate would be binding: *Robertson v. Robertson*, 25–350.

But aside from any agreement to separate, the contingent right of dower could not become the subject of valid grant or conveyance between husband and wife: *McKee v. Reynolds*, 26–578.

Relinquishment before marriage: Where, previously to their marriage, a husband and wife had executed a written contract, by which they waived all right in each other's real estate, *held*, that on the death of the husband the wife could not claim dower: *Jacobs v. Jacobs*, 42–600.

Conveyance in lieu of dower: The conveyance of property to a wife by her husband *held* not to have been made in lieu of dower so as to deprive her of her dower right: *Trowbridge v. Sypher*, 55–352.

Divorce bars dower: A wife who obtains a divorce from her husband thereupon loses all claim to a share in his property should she survive him: *Marvin v. Marvin*, 59–699; *Boyles v. Latham*, 61–174.

A wife cannot be allowed dower where a decree of divorce obtained before the death of the husband remains in force: *McCraney v. McCraney*, 5–232, 252.

If the sentence of divorce is void for fraud or duress it should be declared void *in toto*. But until such relief is granted, not only as to the portion determining the property rights but as to the entire decree, dower cannot be allowed: *Ibid.*

A legislative divorce as well as one granted by a court will defeat the widow's dower right: *Levins v. Sleator*, 2 G. Gr., 604.

The mere fact that one party to the marriage has remarried under such circumstances as to render him guilty of a crime unless a divorce has been had will not, as to the other party claiming dower and not shown to have been cognizant of such acts, raise a presumption of divorce: *Ellis v. Ellis*, 58–720.

In the absence of record evidence of a divorce it will not be presumed from the mere fact of long separation of the husband and wife so as to defeat the wife's right to dower: *Cruize v. Billmire*, 69–397.

In an action for dower, where the marriage of the parties is not denied, the burden of proof to establish a divorce as terminating the dower right is upon the party denying such right: *In re Estate of Edwards*, 58–431.

Adultery: The statute of Westminster 2, 13 Edward I, ch. 34, which makes an adulterous elopement a bar to dower, never having been adopted in Iowa, is not a part of the law of the state. Its provisions are inconsistent with the legislation of the state on the subject of dower, and the mode in which such right may be barred or relinquished, and also with the statutory provisions in respect to divorce on the ground of adultery: *Smith v. Woodward*, 4 Dillon, 584.

Foreclosure as a bar: If a mortgage against the husband in which the wife did not join is not foreclosed before the death of the husband, the foreclosure thereof will not bar dower unless her dower right is put in issue therein, even though the wife is made party to the foreclosure: *Mooney v. Maas*, 22–330.

But a foreclosure after the husband's death of a mortgage in which the wife has joined with the husband will bar her dower: *Ibid.*; *Mead v. Mead*, 39–28.

And a sale of the property by her husband's administrator in pursuance of proper proceedings to which she is a party, for the purpose of paying a mortgage thereon in which she joined, will equally defeat her dower right: *Mead v. Mead*, 39–28.

Sale by administrator: A widow who is notified and made a proper party to proceedings by an administrator to sell real property of her deceased husband for payment of his debts, and does not set up dower right in the land in such proceeding, cannot afterwards claim any dower interest therein: *Garvin v. Hatcher*, 39–685; *Olmsted v. Blair*, 45–42.

Judgment against husband: Where the wife's interest in property has once attached, and the question is as to whether it has been divested or otherwise affected, a party seeking affirmative relief on the theory that it has, should make her a party to the action brought to determine such question. But where a verdict or decree against the husband shows that he never had any interest in which the wife could have dower or a distributive share, the wife is bound thereby, although not made a party: *Lea v. Woods*, 67–304.

The fact that the husband has held the legal title to the property is only *prima facie* evidence that he had an interest in which his wife is dowable, and the wife may be bound by an adjudication against him to which he is not a party, determining that he never had such interest: *Ibid.*

Judicial sale: Prior to the enactment of Code of '51 there had not been, either in the state or territory of Iowa, any limitation of the common-law rule as to the wife's dower interest in the real property of her husband, and up to that time the dower right of a wife could not be extinguished by a sale under execution against the husband: *Pense v. Hixon*, 8–402.

Under the present section, *held*, that where the husband purchased property subject to a mortgage which he agreed to pay, and which the property was during his life-time sold to satisfy, his widow's dower right was barred: *Kemerer v. Bournes*, 53–172.

Under the provisions of Code of '51, authorizing a short foreclosure of mortgages by notice and sale, *held*, that such a proceeding was a judicial sale in such sense as to bar the widow's dower right: *Sturdevant v. Norris*, 30–65.

A sale of real property by an assignee under an assignment for benefit of creditors is a judicial sale within such statutory provision, and

bars any contingent right of dower in the property: *Stidger v. Evans*, 64–91.

A sale by an assignee in bankruptcy is a judicial sale in such sense as to defeat the widow's dower right under the same statutory provision: *Taylor v. Highberger*, 65–134.

As to assignment of the dower interest and actions to protect or recover the same, see notes to § 3648.

The clause declaring that provisions as to widow of deceased husband shall apply to surviving husband of deceased wife, *held* not applicable to the provisions of § 3575: See notes to that section.

A divorce procured for the fault of the wife deprives her of any interest in the property of her husband: § 3421 and note.

Where the widow's interest and the provisions of a will are inconsistent the widow may elect: § 3656 and note.

The Code commissioners say: "We have got rid of the word dower, as well as curtesy, entirely, because it has been a constant source of trouble and surprise upon those who are familiar with our statutes alone. The peculiar English doctrines of dower have been invoked again and again to confuse a right which should be as clearly defined by the statute as any other distributive share. The supreme court of Indiana has carried the tendency of our recent legislation to its logical result by holding that the wife takes like any other heir;" quoting from *Fletcher v. Holmes*, 32 Ind., 497, and *Gaylord v. Dodge*, 31 Ind., 41: *Code Com'rs' Rep.*

3645. Homestead. 2441. The distributive share of the widow shall be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement. But no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors. [R., § 2426; C., '51, § 1395.]

Where the widow takes her third in fee out of the homestead, her share still has the homestead character, and a judgment existing against her will not become a lien thereon: *Briggs v. Briggs*, 45–318; *Nye v. Walliker*, 46–306; *Knox v. Hanlon*, 48–252.

When a widow elects to take her distributive share and has it so set off as to include the homestead, she has the right to have the portion of the property not included in the homestead first exhausted in the payment of a mortgage lien upon the whole premises: *Wilson v. Hardesty*, 48–515.

The guardian of an insane wife cannot make an election for her to have her share set apart from other property than the homestead: *Ratcliff v. Davis*, 64–467.

And as bearing upon this section, see notes to § 3183.

3646. Widow of alien. 2442. The widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent. [12 G. A., ch. 56, § 2; ch. 193, § 2.]

3647. How set off. 2443. The share thus allotted to her may be set off by the mutual consent of all parties interested, when such consent can be obtained, or it may be set off by referees appointed by the court. [R., § 2427; C., '51, § 1396.]

The finding or judgment of one referee is not sufficient: *Jones v. Jones*, 47–337.

3648. Application. 2444. The application for such a measurement by referees, may be made at any time after twenty days and within ten years after the death of the husband, and must specify the particular tracts of land in which she claims her share, and ask the appointment of referees. [R., § 2428; C., '51, § 1397.]

Assignment of dower: Where the widow's interest exists in several tracts her share may be assigned in a body. She cannot be compelled to take one-third of each tract: *Montgomery v. Horn*, 46–285; *Jones v. Jones*, 47–337.

The court cannot compel the widow to accept dower in one of several tracts conveyed by her husband, in which conveyance she did not join: *O'Ferrall v. Simplot*, 4–381.

Proceedings in admeasurement of dower, and to compel the widow to elect whether she will hold the homestead or accept a distributive share, should not be brought until the estate is so far settled as to determine how much, if any, of the real property must be sold for the payment of debts: *Thomas v. Thomas*, 73–657.

Apportionment of liens: The widow's share in property other than the homestead should bear its proportion of mortgage indebtedness to which she has assented by joining in the execution of the mortgage, and she can only claim, in such case, her distributive share or the proceeds of the property after the mortgage indebtedness has been satisfied therefrom: *Trowbridge v. Sypher*, 55–352; *McGlothlen v. Hite*, 55–392; *Cottrell v. Smith*, 63–181.

Likewise the widow's dower interest, when it is not taken out of the homestead, is subject

to a *pro rata* proportion of the taxes upon the whole property: *Ibid.*

Where the portion set off to the widow for dower includes the homestead, such homestead is not to be subjected to the payment of a mortgage covering it, together with other property, though the widow joined in such mortgage, until such other property is exhausted: *Wilson v. Hardesty*, 48–515; *McGlothlen v. Hite*, 55–392; *Wells v. Wells*, 57–410.

Where mechanic's liens and taxes on decedent's real property have been paid with money provided from the personal estate, such liens and taxes should not be deducted from the widow's share of the real estate: *Conger v. Cook*, 57–49; *Linton v. Crosby*, 61–293.

The widow's share in real property is subject to a *pro rata* liability for mortgages, in which she joined, upon the whole of the property. In case of a homestead her share therein should only be subjected to a *pro rata* liability for the mortgages upon it alone: *Conger v. Cook*, 57–49.

The widow is under no obligation to pay any part of the taxes upon property in which she has a dower interest, before assignment, and therefore, in an action to recover dower from the grantee of her husband, her interest should not be held subject to the refunding of any taxes paid by such grantor, at least before demand made for assignment of dower: *Felch v. Finch*, 52–563.

Action in equity: Courts of equity will exercise a general concurrent jurisdiction with courts of law in the assignment of dower, and the widow is not limited to the method provided by statute for admeasurement: *Starry v. Starry*, 21–254; *Phares v. Walters*, 6–106.

Proceedings for admeasurement of dower under this section are not exclusive, but it may be assigned and set off in a proceeding in chancery, as, for instance, in an action for partition: *Thomas v. Thomas*, 73–657.

Limitation: The statute of limitations does not apply to an action in equity, or for the recovery of real property, to recover a dower interest. The statute does not commence to run until the heir or his assignee denies the right to dower: *Starry v. Starry*, 21–254; *Rice v. Nelson*, 27–148; *Felch v. Finch*, 52–563, *Berry v. Fuhrman*, 30–462.

The statutory limitation as to proceedings for the admeasurement of dower applies only to proceedings in the probate court and not to an action to recover dower: *Sully v. Nebergall*, 30–339.

The statute of limitations does not run against an unrelinquished right of dower before it becomes vested by the death of the husband or wife: *Hurleman v. Hazlett*, 55–256.

Unassigned dower cannot be interposed as a defense to an action by the heirs for the possession of property. Recovery of possession by the heirs, however, will not defeat the widow's claim for dower: *Cavender v. Smith*, 8–360.

Damages; rents and profits: No action for damages by a widow claiming dower can be maintained against a person in possession of property, receiving the rents and profits, when such dower has not been assigned or demand therefor made: *Huston v. Seeley*, 27–183.

The widow has no right to sue in respect to the rents before dower assigned: *Laverty v. Woodward*, 16–1.

Recovery of dower interest by heirs: If a widow, entitled to dower, fails to have her interest defined and set apart in her lifetime, her heirs may recover the same after her death: *Potter v. Worley*, 57–66.

Rights of creditor: The creditor of a widow cannot maintain an action in equity to have her share in specific land of decedent set apart to enforce his claim against such share: *Getchell v. McGuire*, 70–71.

Setting off dower; growing crops: Where property is set off to the widow as dower, growing crops thereon pass with the land set off and do not become the property of the executor: *Ralston v. Ralston*, 3 G. Gr., 533.

Assignment of inchoate right: The inchoate right of dower is not subject to grant or to assignment: *Craven v. Winter*, 38–471.

The inchoate right of dower does not pass by an assignment in bankruptcy, and a purchaser thereof from the assignee acquires no rights upon the dower interest becoming vested: *Lucas v. Bennett*, 42–703.

Right of way: The widow cannot, before her dower is assigned, maintain an action against a railway company for the value of her one-third interest in property conveyed by the husband for right of way. Whether the widow can claim any interest in the right of way so conveyed, *quære: Tuttle v. Burlington & M. R. R. Co.*, 49–134.

Action to protect inchoate right: Although during the life-time of the husband the dower right is inchoate and contingent, yet it possesses the elements of property, and may be protected from fraudulent alienation through the connivance of the husband: *Buzick v. Buzick*, 44–259.

Therefore, where the husband of plaintiff allowed a son by a former marriage to acquire a sheriff's deed upon property for much less than its value, a fraudulent intent on the part of such son being shown, *held*, that the title of the son under the sheriff's deed, so far as the property exceeded the amount paid at the sheriff's sale, should be subject to plaintiff's contingent right of dower: *Ibid.*

Where the wife voluntarily unites in the conveyance of real property, and the proceeds are invested by the husband in other property, the title of which is taken in the name of a third person, the wife has no cause of action for the protection of her dower right: *Beck v. Beck*, 64–155.

Action to recover dower right: The widow may, as against the grantee of the husband, recover her dower in land in which she has not relinquished dower, after she has made demand thereof, and may recover rents and profits for the time subsequent to making demand, and within six years prior to the bringing of suit: *O'Ferrall v. Simplot*, 4–381.

The dower right is such an interest that it may be recovered in a real action: *Rice v. Nelson*, 27–148; *Huston v. Seeley*, 27–183, 197.

Increase of value; improvements: In an action by a widow against a grantee of her husband, under a conveyance in which she did not join to release her dower, to recover her dower interest in the property so conveyed,

she can only recover her interest in the property without the improvements put thereon by the grantee; and where the grantee had increased the value of the property by securing the location of a railway depot thereon at considerable expense, *held*, that such expense was in the nature of improvements, and should be taken into the estimate in favor of the grantee to the extent to which it increased the value of the property, not exceeding the amount actually expended. (Decided under statutes prior to the Code): *Felch v. Finch*, 52-563.

There is nothing in the present statute indicating an intention to change the equitable rule announced in the case last above cited. When an alienation is made by the husband without the wife joining therein, her right is to one-third of the property as owned and possessed by the husband, and not a right to one-third, also, in the improvements put thereon by the labor and money of one in whose property she has no right: *Pierce v. O'Brien*, 29 Fed. Rep., 402.

3649. Notice. 2445. The court shall fix the time for making the appointment, and direct such notice thereof to be given to all parties interested therein as it deems proper. [R., § 2429; C., '51, § 1398.]

Where it appears that there was a notice, though it was defective or the service thereof imperfect, if the court determined in favor of its sufficiency, which fact is shown by the record, the judgment will not be held void in a collateral proceeding. An error of the court as to the sufficiency of notice can only be attacked on appeal: *Shawhan v. Loffer*, 24-217.

3650. Marking off. 2446. The referees may employ a surveyor, if necessary; and they must cause the widow's share to be marked off by metes and bounds, and make a full report of their proceeding to the court as early as practicable. [R., § 2430; C., '51, § 1399.]

3651. Report. 2447. The court may require a report by such a time as it deems reasonable; and, if the referees fail to obey this or any other order of the court, it may discharge them and appoint others in their stead, and may impose on them the payment of all costs previously made, unless they show good cause to the contrary. [R., § 2431; C., '51, § 1400.]

3652. Confirmation; new reference. 2448. The court may confirm the report of the referees, or it may set it aside and refer the matter to the same or other referees, at its discretion. [R., § 2432; C., '51, § 1401.]

Dower should be set off in specific portions of real property. It is not proper to determine simply the value of the dower interest with a view to its being paid out of the assets of the estate: *Corriel v. Bronson*, 6-471.

3653. Conclusive; writ. 2449. Such confirmation, after the lapse of thirty days, unless appealed from according to law, shall be binding and conclusive as to the admeasurement, and the widow may in such proceeding, have a writ for the possession of the land thus set apart for her. [R., § 2433; C., '51, § 1402.]

[In the printed Code the words following "may," in the third line, are "bring suit to obtain possession of the land thus set apart for her." So the section read in the Revision and in the bill reported by the Code commissioners, but it was amended and adopted by the legislature as here printed, and so reads in the original rolls in the office of the secretary of state.]

3654. Right contested. 2450. Nothing in the last section shall prevent any person interested from controverting the right of the widow to the share thus admeasured. [R., § 2434; C., '51, § 1403.]

3655. Sale; division of proceeds. 2451. If the referees report that the property, or any part thereof, cannot be readily divided as above directed, the court may order the whole to be sold and one-third of the proceeds to be paid over to the widow; but such sale shall not take place, if any one interested to prevent it will give security to the satisfaction of the court, conditioned to pay the widow the appraised value of her share with ten per cent. interest on the same, within such reasonable time as the court may fix, not exceeding one year from the date of such security. If no such arrangement is made, the widow may keep the property by giving like security to pay off the claims of all others interested upon the like terms. With any money thus paid to her the widow may procure a homestead, which shall be

exempt from liability for all debts from which the former homestead would have been exempt in her hands. And such sale shall not be ordered so long as those in interest shall express a contrary desire, and shall agree upon some mode of sharing and dividing the rents, profits, or use of such property, or shall consent that the court divide it by rents, profits, or use. [R., § 2478; C., '51, §§ 1404–6; 9 G. A., ch. 151, § 2.]

3656. Share not affected by will. 2452. The widow's share cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the circuit [district] court. [R., § 2435; C., '51, § 1407.]

Effect of will: This section applies as well to a will executed before marriage as to one executed after that time: *Ward v. Wolf*, 56–465.

That this statutory provision applies also to the provisions of a will with reference to personal property, see notes to § 3640.

The widow's consent must be made of record within the six months. She will not be bound or estopped by a writing not so made of record: *Baldozier v. Haynes*, 57–683.

The heirs have no right to rely upon such an agreement: *Ibid.*

It is not proper for the court, upon proof that the surviving husband or wife had knowledge of the will from the first, and that it was in accordance with the wish of such survivor, to enter an order, making of record the fact of consent, more than six months after the death of the party whose consent is thus established, to take under the will. Consent alone, without entry of that fact of record within six months after notice of the provisions of the will, does not defeat the party's rights: *Houston v. Lane*, 62–291.

The fact that the widow, without objection, allows the executor to pay out upon legacies such amounts as not to leave enough remaining in his hands to pay her distributive share of the personal property, will not estop her from claiming such distributive share against the provisions of the will which she has accepted: *Linton v. Crosby*, 61–401.

The statutory provision just referred to applies equally to the husband's rights under the will of the wife as to the widow's right under the will of her husband: *Shields v. Keys*, 24–298.

Under previous statutory provisions which required objection by the surviving husband or wife to prevent the dower interest being barred by other provisions made in the will, *held*, that as the will passed the title of the property devised to the devisee, subject to be divested by the objection of the husband or wife, if such party did not object, he acquired no interest to which the lien of a judgment creditor could attach, and the creditor could not in equity control the election of the surviving husband or wife with reference to abiding by or objecting to the will: *Ibid.*

Under such statutory provision, *held*, that silence and failure to perform an act of relinquishment authorized the conclusion that the survivor accepted the provisions of the will, and a subsequent will made by such survivor could not act as a relinquishment of such provisions: *Kyne v. Kyne*, 48–21.

The devise to the widow of all decedent's property will not impose upon her the necessity of filing an election to take under the will instead of taking her statutory share: *Bulfer v. Willigrod*, 71–620.

Election to accept under will: The election, when once made, fixes the widow's relation to the estate, and such relation cannot be afterwards changed: *Ashlock v. Ashlock*, 52–319.

But where the consent to the will was given in pursuance of an agreement whereby the heirs were to give her in addition certain other property, which agreement was not concurred in by all the heirs as contemplated, *held*, that she might withdraw her consent: *Richart v. Richart*, 30–465.

The acceptance of the provisions of the will does not bar a widow's right to dower where such provisions are not inconsistent with her dower right: *Potter v. Worley*, 57–66.

Where there is no express declaration in the will that a devise therein to the wife is to be in lieu of dower, the intention is to be deduced by clear and manifest implication from the will, founded upon the fact that the claim of dower would be inconsistent with the will, or so repugnant to its disposition as to disturb or defeat it: *Corriell v. Ham*, 2–552.

The widow may take dower, notwithstanding a devise to her in the will, unless there be an express provision in the will to the contrary, or the claim for dower be inconsistent with, and will defeat some of the provisions of, the will: *Daugherty v. Daugherty*, 69–677.

A devise to the wife will not be considered as in lieu of her dower unless made so by express words or necessary implication. If there is any doubt she will not be put to an election: *Clark v. Griffith*, 4–405.

Where there is no express declaration in the will, barring the widow's dower, the intention that the provisions of the will are in lieu of dower must be adduced by clear and manifest implication from the instrument itself, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to some of its dispositions as to defeat them: *Metteer v. Wiley*, 34–214.

Therefore, *held*, that the acceptance of the provisions of a will by which all testator's real and personal property, not otherwise disposed of, was given to the widow for life, to be divided among the heirs on her death, did not bar dower: *Ibid.*

Where a testator devised his entire property, real and personal, to his wife during her natural life, or so long as she should remain unmarried, and provided further that, in the event of her marrying again, her interest

should be restricted to her usual dower right, *held*, that such provision was not inconsistent with the right of the widow to assert her claim of dower in property conveyed by the husband before his death, and to which she did not relinquish her dower right: *Corriell v. Ham*, 2–552.

The election of the widow to take under a will which gives her a life estate, so long as she remains a widow, in all testator's property, with provision that at her death or marriage it is to be equally divided between his heirs, will not defeat her right of dower: *Sully v. Nebergall*, 30–339.

The acceptance by the widow of a bequest of a life estate in her husband's lands does not bar her right of dower: *McGuire v. Brown*, 41–650; *Blair v. Wilson*, 57–177; *Daugherty v. Daugherty*, 69–677.

Therefore, *held*, that a bequest to the widow of all testator's real property not otherwise disposed of, during the period of her widowhood, and in the event of her remarriage to take the course prescribed by law, did not defeat her dower right, and upon remarriage she might still claim such interest as she would have had without the will: *McGuire v. Brown*, 41–650.

A will giving the wife one-third of testator's real estate, and directing the distribution of the remainder among heirs named, is not inconsistent with the widow's right to dower: *Watrous v. Winn*, 37–72.

The bequest to the wife of one-third of testator's estate, consisting entirely of personalty, is not inconsistent with her right to a distributive share in the estate, and she is not required to elect: *In re Estate of Blaney*, 73–113.

Where a wife entered into an agreement, upon consideration to be paid, to release the dower interest in certain lands of her husband, and received a portion of such consideration before his death, and afterwards filed a claim against his estate for the balance, *held*, that she thereby elected to accept the provisions of her husband's will based upon such agreement, and could not claim dower interest in the lands released: *Stoddard v. Cutcompt*, 41–329.

Under certain facts, the provisions of a will were held to be inconsistent with widow's dower right: *Cain v. Cain*, 23–31.

A devise of property to the wife in trust for the children and not for her own benefit is not inconsistent with her right of dower: *Rittgers v. Rittgers*, 56–218.

Where the will gave to the wife certain real property to be held by her in trust for minor children, the proceeds arising therefrom to be appropriated for their care and benefit, and each of them to have an equal share on arriving at majority, other property being given to the wife, *held*, that the provision as to the disposition of the property left in trust for the children indicated the intention that dower should not be allowed out of such property, and that therefore the provisions of the will must be considered as in lieu of dower, and the wife, having accepted the provisions of the will and elected to retain them, could not claim dower: *Van Guilder v. Justice*, 56–669.

Where a will gave certain specific property to the widow and made distribution of the entire remaining property of testator, *held*, that the provision for the widow must be considered in lieu of dower: *Snyder v. Miller*, 67–261.

Under the provisions of a particular will, *held*, that a devise to the wife must be considered as in lieu of dower: *Severson v. Severson*, 68–656.

Where the widow elects to take her distributive share, including the homestead, instead of the provisions made for her in the will, the devisee of the homestead whose devise is thus defeated cannot recover its value from the estate: *Gainer v. Gates*, 73–149.

DESCENT.

3657. To decedent's children. 2453. Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seized, shall, in the absence of other arrangements by will, descend in equal shares to his children. [R., § 2436; C., '51, § 1408.]

Upon the death of the ancestor his real estate descends at once to his heirs, who may alien the same, subject to its liability for the payment of debts. The heirs are bound to pay taxes, and are entitled to possession and the rents and profits, and if the administrator receive them he is individually liable for them to the heirs or their assignees: *Laverty v. Woodward*, 16–1.

The heirs take the property as tenants in common: *Peters v. Jones*, 35–512.

The possession of the heirs follows that of the ancestor, and the former cannot maintain trespass against one who enters the land and carries away logs which he has purchased from the ancestor: *Morgan v. Corbin*, 21–117.

Where a party claims as heir, he must first establish affirmatively his relation with deceased, and second, negatively, that no other descendant exists to impede the descent to him: *Anson v. Stein*, 6–150.

During the brief period elapsing between an injury, and death resulting therefrom, an injured person may take by inheritance. If a person weaker than he has been involved in the same catastrophe and has lost his life by the same means, the law will, in the absence of proof as to such question, presume that he survived the weaker individual and during the interval was vested with a perfect right to such property, which will be disposed of accordingly. (Overruling *Sherman v. Western Stage Co.*, 24–515): *Kellow v. Central Iowa R Co.*, 68–470.

A conveyance by a deed covenanting to stand seized to uses, where the use is executed, conveys an inheritable estate: *Pierson v. Armstrong*, 1–282.

An adopted child inherits from its natural parents as well as from its parents by adoption: *Wagner v. Varner*, 50–532.

The court does not say, even by way of *dictum*, that foster-parents will inherit from adopted children, under the rule of inheritance directing the descent of adopted children to and through their natural parents: *Burger v. Frakes*, 67–460.

Where, by a special act of another state, the adoption of a child was authorized, and it was declared that such child should inherit from the adopting parents, or either of them, as if she were their legitimate child, *held*, that such adopted child did not thereby become entitled to inherit property situated in this state, left by the father of her adopting father, dying in this state after having survived such adopting parents: *Estate of Sunderland*, 60–732.

Where, under a will, realty is to take one direction and personalty another, it may be that land directed to be sold is to be regarded as personalty in the sense that the proceeds of it when sold are to take the direction of personalty, but where there is no such provision the party whose interest attaches to the land at the death of the testator, and who is not divested until he parts with it by his own act, is considered as owner of the realty: *Hadley v. Stuart*, 62–267.

Degrees of relationship are to be computed according to the rule of the civil law. (§ 49, ¶ 24): *Martindale v. Kendrick*, 4 G. Gr., 307.

3658. Share of deceased child. 2454. If any one of his children be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child had outlived his parents. [R., § 2437; C., '51, § 1409.]

The mother of a child which dies while both its parents are living, cannot, upon the death of its father, claim any share in his estate as heir of such child: *McMenomy v. McMenomy*, 22–148; *Journell v. Leighton*, 49–601. And see *Will of Overdieck*, 50–244 (construing § 3537).

So, when a devisee dies before the testator, the devise will pass to his brother, but not to his widow, under the statutory provision just referred to: *Blackman v. Wadsworth*, 65–80.

Where, at the time of decedent's death, his son was already deceased, *held*, that the widow of such son could not claim any interest in the estate by inheritance from a child of herself and such deceased son, said child having survived its father, but having died without issue before the death of its grandfather. The statute only provides for inheritance by the parents of the *estate* of a child dying without issue: *Leonard v. Lining*, 57–648.

Section applied: *McGuire v. Brown*, 41–650.

3659. Wife and parents. 2455. If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. [R., § 2495; C., '51, § 1410.]

If one-third of the real property of decedent has been set apart to his widow as dower, she is, in the absence of issue, further entitled by statute to one fourth of the remainder: *Ralston v. Ralston*, 3 G. Gr., 535.

This provision applies only in the distribution of the estate of an intestate, and not where the property is otherwise disposed of by will: *Clark v. Griffith*, 4-405; *Dobson v. Dobson*, 30–410.

The one-half given to the wife in cases here contemplated is inclusive of her one-third or dower interest: *Burns v. Keas*, 21–257; *Nicholas v. Purczell*, 21–265; *McGuire v. Brown*, 41–650.

The distributive share which may thus be held free from debts is limited to one-third. The additional interest making the one-half which the surviving husband or wife may take as heir in the absence of issue is not exempt from indebtedness of decedent: *Smith v. Zuckmeyer*, 53–14.

The excess of over one-third which the surviving husband or wife may take, in the absence of issue, is subject to other disposition of the property made by will: *Ibid.*; *Clark v. Griffith*, 4–405; *Dobson v. Dobson*, 30–410; *Linton v. Crosby*, 54–478.

3660. Surviving parent. 2456. If one of his parents be dead, the portion which would have gone to such deceased parent shall go to the surviving parent, including the portion which would have belonged to the intestate's wife, had she been living. [R., § 2496; C., '51, § 1411.]

3661. Heirs of parents. 2457. If both parents be dead, the portion which would have fallen to their share by the above rules, shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issue. [R., § 2497.]

Where an owner of property died, leaving neither issue, wife nor parents living, *held*, that his step-mother, surviving him, was entitled to one-sixth of his property: *Moore v. Weaver*, 53–11.

Where both parents die before intestate's decease the property is to descend as though both had outlived the intestate and died already in the possession and ownership of the portion falling to their respective shares:

Bassil v. Loffer, 38-451; *Neeley v. Wise*, 44-544. And see *McGuire v. Brown*, 41-650.

Where intestate dies without issue, and his parents are both dead, it is immaterial which died first, and it is immaterial whether such parents, or either of them, made any disposition of their property by will other than that which would have been made by law. The persons entitled to distributive shares in decedent's estate take from him directly, and not through the parent, the supposition that such parent died in possession of the property being merely for the purpose of determining the descent: *Lash v. Lash*, 57-88.

3662. Wife and her heirs. 2458. If heirs are not thus found, the portion uninherited shall go to the wife of the intestate, or to her heirs if dead, according to like rules; and if he has had more than one wife who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation. [R., § 2439; C., '51, § 1413.]

3663. Advancement. 2459. Property given by an intestate by way of advancement to an heir, shall be considered part of the estate so far as regards the division and distribution thereof, and shall be taken by such heir towards his share of the estate at what it would now be worth if in the condition in which it was so given to him. But, if such advancement exceeds the amount to which he would be entitled, he cannot be required to refund any portion thereof. [R., §§ 2445-6; C., '51, §§ 1419-20.]

An advancement is an irrevocable gift in anticipation of the share of the heir in the estate: *In re Estate of Lyon*, 70-375; *In re Will of Miller*, 73-118.

Such advancement creates no right of property in the estate, and cannot be regarded in making distribution under § 3640, and the share of the widow is not increased by reason of it: *In re Will of Miller*, 73-118.

The rule that advancements made to an heir are to be brought into hotchpot is not applicable to a case where there is a will under which the heir is a residuary legatee; the rule applies to intestate, or possibly to partially intestate, estates only: *In re Estate of Lyon*, 70-375.

A contract during the life of decedent, made by his prospective heirs in consideration of present advancement of property to them, by which they release all interest in his estate, should he die without making a will, and agree in no case to claim anything more from his estate, will be binding upon them in the distribution of his estate, and cannot be varied by parol evidence: *Jones v. Jones*, 46-466.

In a particular case, *held*, that the evidence established advancements to heirs such as to defeat their claim to share in the intestate's real property: *Ramsey v. Abrams*, 58-512.

Declarations made by the decedent to the effect that a conveyance to his son was not made by way of advancement is competent evidence in an action by such son against the other heirs of decedent to recover his interest in the estate: *Middleton v. Middleton*, 31-151.

LAND PATENTED TO PERSON DECEASED.

3664. Title inures. 17 G. A., ch. 33, § 1. Where patents have been made, or may be issued in pursuance of any law of the state of Iowa, to a person who had died, or who hereafter dies before the date of such patent, the title to the land designated therein shall inure to, and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life.

ESCHEAT.

3665. When no heirs. 2460. If there be property remaining uninherited, it shall escheat to the state. [R., § 2446; C., '51, § 1414.]

Where proceedings were brought by the attorney-general to recover for the state land claimed as an escheat, *held*, that the legislature had power to order the proceedings abated and to release the interest of the state in the property to the parties claiming adversely: *State ex rel. v. Tilghman*, 14-474.

3666. Duty of clerk. 2461. When the judge or clerk has reason to believe that any property within the county should, by law, escheat to the state, he must forthwith inform the auditor of state thereof, and must also appoint some suitable person administrator to take charge of the property, unless

an executor or administrator has already been appointed for that purpose in some county in the state. [R., § 2468; C., '51, § 1443.]

3667. Notice. 2462. The administrator must give such notice of the death of the deceased, and the amount and kind of property left by him within this state, as, in the opinion of the clerk or judge appointing him, will be best calculated to notify those interested or supposed to be interested in the property. [R., § 2469; C., '51, § 1444.]

3668. Sale; proceeds. 2463. If, within six months from the giving of such notice no claimant thereof appears, such property may be sold and the money appropriated by the administrator for the benefit of the school fund, under the direction of the auditor of state; and such sale shall be conducted and the proceeds thereof treated like those of other school lands. [R., § 2470; C., '51, § 1445.]

3669. Payment to person entitled. 2464. The money, or any portion thereof, shall be paid over to any one who shows himself entitled thereto within ten years after the sale of the property, or the appropriation of the money as an escheat, but not afterwards. [R., § 2471; C., '51, § 1446.]

ILLEGITIMATE CHILDREN.

3670. Inherit from mother. 2465. Illegitimate children inherit from the mother, and the mother from the children. [R., § 2441; C., '51, § 1415.]

An illegitimate child will inherit anything coming to the mother by descent, even though the mother be dead before the descent is cast: *McGuire v. Brown*, 41-650.

The law presumes the legitimacy of a child born any time during wedlock, and the issue of a voidable marriage are legitimate until the marriage is annulled by proper proceedings. They cannot be bastardized in a collateral proceeding: *Niles v. Sprague*, 13-198.

Declarations of the parent after marriage are not competent to bastardize the issue; but where the question is one of inheritance, such declarations are admissible, as showing no marriage, to rebut the presumption of legitimacy of a child begotten before and born after the alleged marriage: *Ibid.*

A man who knows a woman married by him to be with child by another man at the time of marriage is regarded as standing *in loco parentis* as to such child at its birth, and as adopting it into his family. The law in such cases raises a conclusive presumption that the husband is the father of the illegitimate child. But this rule would not prevail in cases involving questions of inheritance: *State v. Shoemaker*, 62-343.

3671. From father. 2466. They shall inherit from the father whenever the paternity is proven during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing. [R., § 2442; C., '51, § 1416.]

The recognition in writing here contemplated need not be a formal avowal executed for the purpose of making known and perpetuating the fact, but any recognition in writing, as by letter or otherwise, is sufficient: *Crane v. Crane*, 31-296.

Evidence in a particular case *held* sufficient to show that decedent was the father of illegitimate children, and that he recognized them in such a general and notorious manner as to entitle them to inherit from him: *Blair v. Howell*, 68-619.

A verdict for plaintiff in an action for seduction in which damages are sought by reason of defendant being the father of plaintiff's child, such verdict not being necessarily based upon the paternity of the child, is not sufficient evidence of paternity to entitle the child to inherit from the putative father: *Koon v Mallett*, 68-205.

For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate, and the birth of such a child and its recognition revoke a prior will in the same manner as the subsequent birth of a legitimate child: *Milburn v. Milburn*, 60-411.

A recognition made before the adoption in the Code of '51 of the statutory provision above referred to will not entitle the illegitimate child to inherit under that provision: *Hartinger v. Ferring*, 24 Fed. Rep., 15.

3672. Father from child. 2467. Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate children. [R., § 2443; C., '51, § 1417.]

3673. Rule in such cases. 2468. But in thus inheriting from an illegitimate child, the rule above established must be inverted so that the mother and

her heirs take preference of the father and his heirs, the father having the same right of inheritance in regard to an illegitimate child that the mother has in regard to one that is legitimate. [R., § 2444; C., '51, § 1418.]

This section is probably retained by mistake, as it has no meaning where it stands. It is identical with § 1418 of the Code of '51, where the words "the rule above established" refer to the rule provided by §§ 1410 and 1411, of that Code, as to inheritance by parents of a decedent leaving no issue. These two sections were repealed by 7 G. A., ch. 63, and other sections adopted which rendered this section meaningless even in its original place, much more so here. For the provisions now standing in place of §§ 1410 and 1411 of Code of '51, see §§ 3659–3661.

CHAPTER 5.

OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

3674. Time of. 2469. On the expiration of six and within seven months from the first publication of notice of his appointment, and sooner if required by the court, the executor shall render his account to the court, showing the then condition of the estate, its debts and effects, and the amount of money received, and, if any received, what disposition has been made of it by him. And, from time to time as may be convenient, and as may be required by the court, he shall render further accounts until the estate is finally settled. And such final settlement shall be made within three years, unless otherwise ordered by the court. Such accounts shall embrace all matters directed by the court and pertinent to the subject. [R., §§ 2447–8; C., '51, §§ 1422–3.]

A court of equity will not review or correct the acts of an administrator while administration is pending in a probate court. The administrator must be held accountable to the court from which his letters issued, and where his bond is, and no other: *Hutton v. Laws*, 55–710.

Where an administrator dies, a new administrator should be appointed in his place and an administrator should be appointed over his estate. The estate of the deceased administrator should be settled by his administrator, and that of the original decedent by the new administrator: *Ibid.*

Under a prior statutory provision relating to the powers of a county judge with reference to estates, *held*, that such judge had authority to receive money paid by an executor upon claims filed and allowed against the estate, and that upon such payment by the executor to the county judge, the executor was discharged from liability. Also, *held*, that no written order for payment need be made by the county judge to authorize such payment to be made to him: *Doogan v. Elliott*, 43–342.

An allegation that the executor has induced the guardian to make false charges in the guardian's account, of which the executor received the benefit, will not be sufficient ground for setting aside such executor's accounts and holding him liable for such fraudulent charges. His liability, if any, will be individual and not as executor: *Estate of Berryhill*, 61–345.

The proper time to contest the propriety of allowing items of expense by the administrator is when the report is approved, unless it is opened by proper showing within three months: *Ashton v. Miles*, 49–564.

Where an executor was ordered to pay to the widow her distributive share, and, in apparent defiance of the citations issued by the court from time to time, he failed to account, *held*, that it was proper to charge him not only with six per cent. interest on the money due at the time of the order, but with the additional sums received by him after the order: *Huey v. Huey*, 26–525.

Where an administrator failed to properly account for notes and moneys coming into his hands, *held*, that it would be presumed that while he held the notes they were drawing the highest customary interest, to wit, ten per cent., and that he should be charged with six per cent. interest, compounded annually, on moneys received: *Lommen v. Tobiason*, 52–665.

As to liability of administrator personally and on his bond, see notes to § 3563.

3675. Examination of executor. 2470. The executor may be examined under oath by the court, upon any matters relating to his accounts when the vouchers and proofs in relation thereto are not sufficiently full and satisfactory. [R., § 2449; C., '51, § 1424.]

3676. Appraised price. 2471. He must account for all the property inventoried at the price at which it was appraised, as well as for all other

property which has come into his hands belonging to the estate. [R., § 2450; C., '51, § 1425.]

3677. Presumption. 2472. The appraisement is only presumptive evidence of the value of an article, and shall be so regarded, either for or against the executor. [R., § 2451; C., '51, § 1426.]

3678. Profit and loss. 2473. He shall derive no profit from the sale of property for a higher price than the appraisement, nor is he chargeable with any loss occurring without any fault of his own. [R., § 2452; C., '51, § 1427.]

3679. Mistakes corrected. 2474. Mistakes in settlement may be corrected at any time before final settlement and discharge of the executor, and even after that time on showing such grounds for relief in equity as will justify the interference of the court. [R., § 2457; C., '51, § 1430.]

3680. Settlement contested. 2475. Any person interested in the estate may attend upon the settlement of accounts by the executor and contest the same. Accounts settled in the absence of any person adversely interested and without notice to him, may be opened within three months on his application. [R., § 2456; C., '51, § 1431.]

[As to approval by the clerk of intermediate accounts and reports, see §§ 245–247.]

Settlements made by the court with the executor must stand until impeached by evidence of fraud or mistake. Where the estate remains unsettled, and the executor has not been discharged, mistakes which have occurred may be corrected by proper action upon the final settlement: *Cowins v. Tool*, 36–82.

Until the discharge of the administrator, a party interested is not concluded by yearly settlements made in his absence and without notice, even though he has failed to appeal therefrom. In such case he may bring action upon the bond: *Clark v. Cress*, 20–50.

There is no provision for making persons interested parties to the settlement, nor for requiring notice of the proceedings to be given them. The final settlement and order of discharge may be made in their absence and without notice to them, and when so made it will doubtless have the force of a judgment in so far that it cannot be questioned in any mere collateral proceeding; but, like any other judgment or order, it may be amended or set aside entirely for any sufficient cause upon timely and appropriate proceedings: *Arnold v. Spates*, 65–570.

The provision as to the time within which the settlement may be opened is not applicable to a case where it is claimed that the administrator, by fraud or mistake, has omitted to account for a portion of the estate: *Ibid.*

In the absence of fraud, mistake or other grounds of equitable relief, a settlement made even in the absence of persons adversely interested cannot be set aside after the expiration of the three months allowed by statute: *Patterson v. Bell*, 25–149.

A party seeking to avail himself of mistake or fraud for setting aside the settlement after the expiration of the period specified by statute must allege sufficient reasons for not availing himself of those provisions for opening up the settlement; and if he seeks equitable relief on the ground of fraud, must set forth the fraudulent acts complained of, and show how he was deceived and misled thereby: *Kows v. Mowery*, 57–20.

Orders of court approving progressive reports must be regarded as correct, and it is incumbent on the heirs attacking the reports to show that they were incorrect and fraudulent, if so claimed: *In re Heath's Estate*, 58–36.

Equitable relief in case of fraud or mistake is not limited to the time within which an application may be made to have a settlement and discharge set aside: *Arnold v. Spates*, 65–570.

Settlement by an administrator with the probate court in which items of account are allowed cannot be collaterally assailed: *Harlin v. Stevenson*, 30–371.

Where a creditor has filed his claim and allowed the estate to be settled up and the administrator discharged, he cannot afterward, in an action against such administrator or heirs, subject to the payment of his claim property which he insists was fraudulently conveyed by decedent in his life-time to such heirs for the purpose of defeating it. As he might, by proper proceedings, have had such property subjected to the payment of his claim during the administration, he cannot, after the estate has been settled, open up the settlement for that purpose. The settlement and discharge of the administrator is an adjudication not only that he has accounted for all property which came into his hands, but also that the estate has been properly administered upon: *Daniels v. Smith*, 58–577.

3681. Discharge. 2476. Upon final settlement by the executor, an order shall be entered discharging him from farther duties and responsibilities. [R., § 2459; C., '51, § 1434.]

[As to deposit of funds with clerk, and final discharge, see §§ 342–344.]

The order of discharge may properly be made when the administrator is relieved from further duty touching the debts of the estate, and it has been properly found that he has ac-

counted for the assets of the estate that were at any time under his control, although the estate is not yet finally settled: *Crossan v. McCrary*, 37-684.

Where an administrator is discharged by a court of competent jurisdiction, the burden of proof is upon the party seeking to hold him liable for errors or frauds in his accounts: *Read v. Howe*, 39-553.

If an order of discharge is based upon receipts of the distributees or their assignees, given by them for amounts found due them respectively upon a final accounting, and no application is made to set aside the discharge within the time allowed, the persons receipting must be deemed to have acquiesced in the order of receipting and final discharge, and to be concluded thereby: *Diehl v. Miller*, 56-313.

3682. Judgment; execution. 2477. If judgment be rendered against an executor for costs in any suit prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appear to the court that such suit was prosecuted or defended without reasonable cause. In other cases the execution shall be awarded against him in his representative capacity only. [R., § 2458; C., '51, § 1433.]

[As to judgment and execution against the executor, see notes to § 3566.]

3683. Receipts by one executor. 2478. One of several executors may receive and receipt for money. Such receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for by himself; and this shall not charge his co-executor, except so far as it can be shown to have come into his hands. [R., § 2467; C., '51, § 1442.]

L. and S. qualified as executors and went to the bank where decedent had money deposited and gave a joint receipt for the whole amount and directed the bank to pass one-half of said sum to the credit of each, which was done. The money was never drawn from the bank and neither party had any actual possession, control or custody of the one-half thereof transferred to the other's credit. S. accounted for his half, but L. failed to do so. Later, an account was filed by them as executors, in which they charged themselves with the entire sum. As to the liability of S. for the share credited to L.'s account, the supreme court were equally divided: *Nettman v. Scramm*, 23-521.

3684. Notice affecting executor. 2479. Whenever the court shall make an order affecting an executor, and such order cannot be personally served upon him, service of such order may be made by publication of a notice, stating the substance thereof, in some weekly newspaper published in the county where such order was made, for four weeks in succession. [R., § 2474.]

[As to notice, see § 3639.]

3685. Publication. 2480. When there is no newspaper published in such county, then said notice may be published in the newspaper published nearest to the county seat of the county in which said order is made, which publication may be proved as required in like cases in the court. [R., § 2475.]

3686. Effect. 2481. Service made as above shall be as effectual as if personally served, and suits and proceedings may be prosecuted or commenced, had and maintained, in all respects as if such notice or notices, order or orders, had been personally served. [R., § 2476.]

3687. Failure to account. 2482. Any executor failing to account, upon being required to do so by the court, or as he is required to do by law, shall, for every such failure, forfeit one hundred dollars, to be recovered in a civil action on his bond for the benefit of the estate, by any one interested therein. [R., § 2453; C., '51, § 1428.]

3688. Executor of executor. 2483. An executor has no authority to act in a matter wherein his principal was merely executor or trustee. [R., § 2463; C., '51, § 1438.]

3689. Executors in their own wrong. 2484. Any person who, without being regularly appointed an executor, intermeddles with the property of a deceased person, is responsible to the regular executor when appointed, for

the value of all property taken or received by him, and for all damages caused by his acts to the estate of the deceased, but his liability extends no farther. [R., § 2464; C., '51, § 1439.]

The wife cannot, by the purchase of property with the money of her deceased husband, become entitled to such property, even to the extent to which she is entitled to share in his estate, but will hold the property in trust: *Claussen v. La Franz*, 1-226.

Although the widow or heir is entitled to a definite and determined portion of decedent's property, yet neither can take the property of decedent and invest it and appropriate the proceeds: *Schaffner v. Grutzmacher*, 6-137.

When in such case the widow assumes to administer without right, she cannot take credit for that which, under a regular administration, might have been her own. The portion which would have been hers individually, but which is so mingled with the property of the heirs that it cannot be distinguished, cannot be detained by her as against her heirs as a lien against the property purchased by the proceeds of the estate: *Ibid.*

A person who has been acting as agent of decedent during his life-time has no authority after his death to use funds remaining in his hands in payment of claims against the estate, and will be accountable for funds so used. Even if this were not so, he would not be allowed to escape liability for money used, unless it were affirmatively shown that the amounts were correct: *Crispin v. Winkleman*, 57-523.

Where the widow and heirs have appropriated personal property in the purchase and improvement of land they become liable as administrators *de son tort* in an action by a creditor to the extent of the value of the property coming into their hands, and the funds thus improperly appropriated may be pursued into the property purchased therewith, subject to the payment of the debts of the estate: *Madison v. Shockley*, 41-451.

The intermeddler is liable to an action by a creditor of the estate, as well as by the regularly appointed executor. The last clause of this section is only intended as limiting the amount of liability in such case: *Elder v. Littler*, 15-65.

A person in possession of property under color of title cannot be regarded as an executor *de son tort*, nor will the intermeddling with the lands of deceased charge a person as executor in his own wrong, because such interference is a wrong done to the heirs or devisees: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Acts of defendant in dealing with property of the estate *held* not to have resulted in damage, and therefore not such as to render defendant liable to more than nominal damages: *Portman v. Klemish*, 54-198.

An agent with whom notes are left for collection by decedent in his life-time does not become liable as executor in his own wrong for failure to turn over said notes to a foreign administrator without demand having been made for the same: *Darr v. Darr*, 59-81.

3690. Action against heirs or devisees. 2485. In an action against the heirs and devisees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion. [R., § 2465; C., '51, § 1440.]

3691. Tender. 2486. In such cases, any one may tender the amount due from him to the plaintiff, which shall have the same effect, as far as he is concerned, as though he was the sole defendant. [R., § 2466; C., '51, § 1441.]

3692. Specific performance. 2487. When a person under such obligation to convey real estate as might have been enforced against him if living, dies before making such conveyance, the court may enforce a specific performance of such contract by the executor, and require him to execute the conveyance accordingly. [R., § 2460; C., '51, § 1435.]

This provision is simply permissive. Without it, an action against the executor would have been improper; but the action may still be brought, as formerly, against the heirs alone: *Judd v. Mosely*, 30-423.

It is not necessary in a proceeding under this statutory provision that the heirs should join in the conveyance in order to pass a good title: *Fulwider v. Peterkin*, 2 G. Gr., 522.

3693. Who made parties. 2488. It is not necessary to make any other than the executor party defendant to such proceedings in the first instance; but the court, in its discretion, may direct other persons interested to be made parties, and may cause them to be notified thereof in such manner as the court may deem expedient. Heirs and devisees may, on their own motion, at any time be made defendants. [R., § 2461; C., '51, § 1436.]

3694. Considered as one person. 2489. In an action against several executors they are considered one person, and judgment may be taken and execution issued against all as such, although only part were duly served with notice. [R., § 2462; C., '51, § 1437.]

RECORDS OF CLERK.

3695. In probate matters. 2490. The clerk shall keep a record, additional to the other records required by law, showing as follows:

1. The name of every deceased person whose estate is administered, and who died seized of any real estate situate within the county, and the date of his death;

2. The names of all the heirs at law, and widow of such deceased person, and the ages and places of residence of such heirs so far as the same can be ascertained;

3. A note of every sale of real estate made under the order of the court, with a reference to the volume and page of the court record, where a complete record thereof may be found. [9 G. A., ch. 71, § 1.]

3696. List of heirs. 2491. In order to ascertain the facts required to be stated in such record, the clerk may require each executor or administrator to furnish him with a list of the names, ages, and place of residence of the heirs, which list shall be sworn to by the executor; but if such executor shall certify under oath that there are no heirs, or that, after using due diligence, he has been unable to ascertain their names, ages, or residence, the clerk shall make an entry in the record accordingly. If deemed necessary, the clerk may examine the county records to ascertain whether any deceased person died seized of any real estate, and he shall be allowed such fee therefor as may be fixed by the court. [Same, § 3.]

[The word "any" is erroneously printed in the Code before "real estate" in next to the last line of the section.]

3697. Complete record. 2492. In every case where a sale of real estate is made under the order of the court, either by an executor, administrator, or guardian, the clerk shall enter a complete record thereof in the court record, including complete records of all papers filed and all orders made, and of the deed and the approval thereof. [Same, § 2.]

3698. Bond record. 2493. He shall also keep a book known as "records of bonds," in which he shall record all bonds given by executors, administrators, and guardians. [11 G. A., ch. 120.]

COMPENSATION OF EXECUTORS.

3699. Amount of. 2494. Executors shall be allowed the following commission upon the personal estate sold or distributed by them, and for the proceeds of real estate sold for the payment of debts, which shall be received in full compensation for all their ordinary services:

For the first one thousand dollars, the rate of five per cent.;

For the overplus between one and five thousand dollars, at the rate of two and a half per cent.;

For the amount over five thousand dollars, at the rate of one per cent. [R., § 2454; C., '51, § 1429.]

3700. Same. 2495. Such farther allowances as are just and reasonable may be made by the court for actual, necessary, and extraordinary expenses or services. [R., § 2455; C., '51, § 1430.]

It will be presumed that compensation beyond that fixed by statute was for extraordinary services, in the absence of a showing to the contrary: *Patterson v. Bell*, 25-149.

REMOVAL OF EXECUTOR.

3701. For what causes. 2496. After letters testamentary, or of administration with the will annexed, or of administration, shall have been granted

to any person, he may be removed whenever the interests of the estate require it, for any of the following causes:

1. When by reason of age, continued sickness, imbecility of mind, change of residence, or any other cause, he becomes incapable of discharging his trust in such manner as the interest and proper management of the estate may require.

2. When any such executor or administrator shall fail or refuse to return inventories or accounts of sales of the estate, or to make reports of the condition of the estate, or fail or refuse to comply with any order of the court; or fail to seasonably apply to the court for authority to sell personal or real estate for the payment of debts or claims against the estate, when it shall be necessary for him so to do; or fail or refuse to discharge any of the duties prescribed for him by law, or shall be guilty of any waste or maladministration of the estate.

3. Where it shall be shown to the court by his sureties that such executor or administrator has become, or is likely to become, insolvent, in consequence of which such sureties have or will suffer loss. [R., § 2338; C., '51, § 1306; 11 G. A., ch. 139, § 7.]

A party against whom an administrator is prosecuting an action for damages due to the estate has not such interest in the estate as to be entitled to ask for the removal of the administrator. The statute contemplates that the party authorized to ask for such removal is one having a right to a benefit from the estate which will prompt him to act for the preservation of its assets and the increase of its value: *Chicago, B. & Q. R. Co. v. Gould*, 64-343.

3702. Petition. 2497. Petition for the removal of executors or administrators, or for the purpose of acquiring additional sureties, shall be filed in the court from which letters were issued by any person interested in the estate. [11 G. A., ch. 139, § 8.]

3703. Verification. 2498. Such petition must be verified by oath, and shall specify the grounds of complaint. [Same, § 9.]

3704. Citation. 2499. Upon the filing of such petition, a citation shall issue to the person complained of, requiring him to appear and answer the complaint. [Same, § 10.]

3705. How served. 2500. If the executor or administrator is not a resident of the county where such complaint is made, notice thereof shall be served upon him in such manner as the court or clerk may direct. [Same, § 11.]

3706. Property delivered. 2501. Upon the removal of any executor or administrator, he shall be required by order of the court to deliver to the person who may be entitled thereto, all the property in his hands or under his control belonging to the estate. [Same, § 13.]

3707. Penalty for failure. 2502. If any executor fail or refuse to comply with any proper order of the court, he may be committed to the jail of the county until compliance is yielded. [Same, § 14.]

3708. Acts void. 2503. Whenever the letters of any executor or administrator are revoked or superseded, all his authority shall cease, and all his acts thereafter as such shall be absolutely void. [Same, § 16.]

McCLAIN'S

ANNOTATED CODE AND STATUTES

OF THE

STATE OF IOWA,

SHOWING THE

GENERAL STATUTES IN FORCE JULY 4, 1888,

EMBRACING

THE CODE OF 1873 AS AMENDED, AND ALL PERMANENT, GENERAL AND PUBLIC ACTS OF THE GENERAL ASSEMBLY PASSED SINCE THE ADOPTION OF THAT CODE, WITH A DIGEST UNDER EACH SECTION, OF THE DECISIONS RELATING THERETO.

BY EMLIN McCLAIN, A. M., LL. B.,

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CODE OF CIVIL PRACTICE.

TITLE XVII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

PRELIMINARY PROVISIONS.

3709. Remedies classed. 2504. Remedies in civil cases in the courts of this state are divided into actions and special proceedings. [R., § 2605.]

3710. Civil action defined. 2505. A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for a recovery of penalty or forfeiture. [R., §§ 2606, 2609.]

Civil actions include everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8–40.

The term civil action includes ordinary proceedings and also proceedings in equity: *Kramer v. Rebman*, 9–114.

The granting of letters of administration by a county court *held* not to constitute another action pending so as to defeat the jurisdiction of the district court which would otherwise attach: *Waples v. Marsh*, 19–381.

Where a note provided for an attorney's fee, in case action was brought thereon, *held*, that filing the note as a claim against the estate, the claim being resisted, was sufficient bringing of action to entitle plaintiff to the attorney's fee: *Davidson v. Vorse*, 52–384.

3711. Special proceedings. 2506. Every other remedy in a civil case is a special proceeding. [R., § 2607.]

Proceedings to disbar an attorney are special proceedings: *State v. Clark*, 46–155.

As to method of trying issues in special proceedings, see note to § 3944.

3712. Form of actions. 2507. All forms of action are abolished in this state; but the proceedings in a civil action may be of two kinds, ordinary or equitable. [R., §§ 2608, 2610.]

All technical forms of action and of pleading are abolished: *Heichew v. Hamilton*, 3 G. Gr., 596.

Although forms of proceedings are abolished, yet pleas in abatement, such as to the jurisdiction, or of another action pending, are still proper and legitimate: *Rawson v. Guiberson*, 6–507.

Under the equity procedure the distinction as to the form of stating an action of trespass and one of trespass on the case is immaterial: *Brown v. Hendrickson*, 69–749.

The legislature has no power to abolish the distinction between pleadings at law and in equity. Such distinction is defined and recognized by the constitution: *Claussen v. Lafrenz*, 4 G. Gr., 224.

By the provisions of the Code it was intended to assimilate and make uniform the procedure in all law and equity cases. The changes introduced by the Code were to be applied equally to both: *Shepard v. Ford*, 10-502.

The term "civil actions" includes proceedings in equity as well as ordinary proceedings: *Kramer v. Rebman*, 9-114.

For somewhat similar provision, see § 3850.

3713. Equitable proceedings. 2508. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction; and must so proceed in all cases where jurisdiction was exclusive. [R., § 2611.]

Under this section, *held*, that reformation of an instrument to correct a mistake could not be granted in an action at law: *Adams v. Commercial Nat. Bank*, 53-491.

The provision (§ 4567) allowing a nuisance to be abated at law does not abrogate the equitable remedy before existing by way of injunction: *Bushnell v. Robeson*, 62-540.

Where plaintiff has an election to bring an action at law or in equity, and brings it in equity, it is error to transfer the cause on motion of the opposite party to the law docket: *Gribben v. Hansen*, 69-255.

Where the prayer of a petition in an action for the recovery of real property was for judgment establishing in plaintiff an estate in fee-simple in the land and giving him the immediate possession thereof, and determining and quieting the title, and for judgment of a specific sum, *held*, that as a judgment for possession, together with damages for detention, amounted, as between the parties, to all that was asked for in the prayer, it was not error to overrule a motion to transfer the cause to the equity docket: *Byers v. Rodabaugh*, 17-53.

Where an auxiliary injunction was issued to prevent garnishees from paying over money upon intervention under the statutory provisions for injunction in ordinary proceedings, and every issue made could be and was tried at law, *held*, that the auxiliary injunction did not change the action from one by ordinary to one by equitable proceedings, and the court might try the case as an action at law: *Pool v. Paul*, 23-421.

The jurisdiction of chancery has been so extended as to grant relief to prevent deprivation of rights in connection with real estate, as rights to easements, and the like, without the allegation that the threatened injury would be irreparable: *Swan v. Burlington, C. R. & N. R. Co.*, 72-650.

Partnerships and the question of their existence are matters of which chancery has jurisdiction, and if the pleadings put in issue the existence of the partnership, and the right to appropriate relief if the partnership is found to exist, it is not error to transfer the case to the equity docket: *McReynolds v. McReynolds*, 74-89.

3714. Action on note and mortgage. 2509. The action on a note, together with a mortgage or deed of trust, for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings. [R., § 4179.]

The provision that an action to foreclose a mortgage shall be by equitable proceedings is not in conflict with the constitution, art. 1, § 9, guarantying the right of trial by jury. Such right was never recognized in equity suits: *State v. Orwig*, 25-280; *Clough v. Seay*, 49-111.

Action on a mortgage and to recover judgment on the note secured thereby is not an improper union of legal and equitable proceedings: *Cooley v. Hobart*, 8-358.

As to effect of bringing separate suits on the note and mortgage, see § 4556.

3715. Mechanic's lien. 2510. The action for mechanic's lien shall be prosecuted by equitable proceedings, and therewith shall no other cause of action be joined. [R., § 4183; C., '51, § 985.]

All persons interested must be made parties to the proceedings before they can be affected by the decree: *Jones v. Hartsock*, 42-147, 153.

Held, that an action at law might, by consent of parties, be tried in connection with equitable actions to enforce mechanics' liens against the same defendant, and one judgment rendered therein adjusting all claims between them: *Hines v. Whitebreast Coal, etc., Co.*, 48-296.

Under Revision, § 4183, by which an action for a mechanic's lien was to be prosecuted as an ordinary proceeding, *held*, that subsequent incumbrancers need not be made parties, and that even though not made parties they could not bring action to redeem, and that in such cases there was no equity of redemption as in case of a mortgage: *State v. Eads*, 15-114; *Shields v. Keys*, 24-298, 308.

Even if in such action there is a misjoinder of causes of action, objection thereto is deemed waived unless made as provided elsewhere in reference to misjoinder of actions: *Flynn v. Des Moines & St. L. R. Co.*, 63-490.

3716. Divorce. 2511. An action for a divorce shall be prosecuted by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith. [R., § 4184.]

An action for divorce being equitable the right to a trial by jury does not exist, and the parties are entitled to a trial *de novo* in the supreme court: *Sherwood v. Sherwood*, 44-192.

3717. Sureties; occupying claimants. 2512. Actions by sureties and by occupying claimants, and on a lost note or bond, may be by ordinary proceedings. [R., § 4185.]

Equity cannot take cognizance of an action upon a note of which the defendant wrongfully and fraudulently procured and retains possession. Such a case does not fall within the reason of the rule allowing suit in equity upon a lost note: *Searcy v. Miller*, 57-613.

3718. Ordinary proceedings. 2513. In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. [R., § 2612.]

Action for writ of *habeas corpus* is therefore to be tried as an ordinary action at law: *Shaw v. Nachtwey*, 43-653; *Drumb v. Keen*, 47-435.

The fact that plaintiff must set out or compute various payments for the purpose of determining the amount of his cause of action will not entitle him to bring his action in equity. Such is not a case of mutual account. *Upton v. Paxton*, 72-295.

3719. Error; effect of. 2514. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket. [R., § 2613.]

An action erroneously brought at law may be changed to an action in equity without leaving the court: *Holmes v. Clark*, 10-423, 427.

Relief will not be denied because plaintiff has addressed his petition to the wrong side of the court if he is entitled to relief: *McDole v. Purdy*, 23-277.

The fact that plaintiff has improperly commenced his action by equitable proceedings, when it should have been by law, will not prevent his having an injunction under the provisions of the statute in such cases applicable to law actions: *Mills v. Hamilton*, 49-105.

Objections to the jurisdiction of the court cannot be made on the ground that the action should have been brought in equity instead of at law. If plaintiff err in the kind of proceedings adopted, the proper remedy is a motion to transfer the action to the proper docket: *Spelman v. Gill*, 74-717.

An error in commencing an action in equity instead of at law, or *vice versa*, should be corrected by motion. It is not a ground of demurrer: *Conyngham v. Smith*, 16-471; *Brown v. Mallory*, 26-469; *Wright v. McCormick*, 22-545; *Pella v. Scholte*, 21-463.

That plaintiff has a full, speedy and complete remedy at law is not proper ground for demurrer. The remedy is by motion to have the action changed into the proper proceeding: *Savery v. Browning*, 18-246; *Truer v. Lytle*, 20-301; *Gray v. Coan*, 23-314; *Gibbs v. McFadden*, 39-371; *Independent School Dist. v. Independent School Dist.*, 41-321.

The fact that an action is in equity instead of at law is not fatal. Defendant may have the action tried as an action at law, and failing to avail himself of that right he cannot complain: *Lewis v. Soule*, 52-11.

By agreement parties may have proceedings in a law action joined to and tried with those in an equitable action in which the parties are not the same, but the action still remains one at law: *Hines v. Whitebreast Coal, etc., Co.*, 48-296.

Where an answer to a petition at law set up both legal and equitable defenses, and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27-476.

See, also, notes to §§ 3722 and 3724.

3720. How corrected by plaintiff. 2515. Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards, on motion in court. [R., § 2614.]

3721. By defendant. 2516. The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this code the wrong proceedings have been adopted. [R., §§ 2615, 2616.]

The motion here contemplated cannot be made after filing an answer, nor at the time of filing an answer to an amended petition, when the fact of error in the proceedings was apparent, but not taken advantage of, at the time of filing an answer to the original petition: *Moore v. District Tp*, 28-425.

Where an amendment is made during the

trial changing the nature of the action, motion to change the cause to the proper docket should then be made, and not a motion to strike the amendment from the files on that ground: *Weaver v. Kintzley*, 58-191.

Where the plaintiff has an election to bring an action at law or in equity and brings it in equity, it is error to transfer the case on the motion of the opposite party to the law docket: *Gribben v. Hansen*, 69-255.

3722. Ordinary changed into equitable. 2517. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such as were heretofore cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings. [R., § 2617.]

The issue must be made before the transfer to the chancery docket can be ordered by the court. The discretion of the court is a legal one and is reviewable: *McHenry v. Sypher*, 12-585.

A case properly commenced by ordinary proceedings is not to be transferred to the equity docket on filing an answer setting up equitable defenses, but either party may have such equitable issues tried by equitable proceedings: *Byers v. Rodabaugh*, 17-53.

Where defendant in an action to recover real property brought his bill in equity, setting up certain equitable defenses, and asking that the action at law be enjoined until the determination of such equitable defenses, *held*, that it was not necessarily an improper exercise of discretion to postpone the legal action: *Purington v. Frank*, 2-565.

The equitable issues which either party elects to have tried by equitable proceedings may be, and under ordinary circumstances should be, first tried and settled: *Hackett v. High*, 28-539.

After the equitable issues are thus tried, any legal issues remaining are to be disposed of in the manner provided for the disposal of such issues: *Rosierz v. Van Dam*, 16-175; *Van Orman v. Spafford*, 16-186; *Kramer v. Conger*, 16-434; *Corbin v. Woodbine*, 33-297.

But it is not imperative that the equitable issue be first tried. That issue should be first tried which may result in rendering a further trial unnecessary: *Morris v. Merritt*, 52-496.

To entitle a defendant to a trial of such equitable issue by equitable proceedings such issue must be one heretofore exclusively cognizable in equity. (Decided under Revision, § 2617): *Walton v. Gray*, 29-440.

In a particular case, *held*, that the issues raised by defendant were such as to entitle him to have them tried in equity: *Marling v. Burlington, C. R. & N. R. Co.*, 67-331.

Where parties who are made defendants interpose a defense that is purely equitable the case may properly be tried as an equitable action: *Gresham v. Chantry*, 69-728.

Where plaintiff seeks to recover real property in an action at law he cannot recover upon proof of an equitable title, and if he asks any equitable relief it is not error to hold his petition insufficient on demurrer, and it would be unavailing in such case to transfer the cause to the equity docket: *Kitteringham v. Blair Town Lot, etc., Co.*, 66-280.

As to interposing equitable defenses in an action at law, see notes to § 3861.

Where an answer to a petition at law set up both legal and equitable defenses, and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27-476.

The interposition of an equitable defense in an action at law does not give rise to an equitable issue unless defendant asks relief in equity. The issue arising upon an equitable defense in such action is to be tried according to legal and not according to equitable procedure: *Carey v. Gunnison*, 65-702.

3723. Court may order change. 2518. If there be more than one party plaintiff or defendant who fail to unite on the kind of proceeding to be adopted, the court, on its own motion, may direct such proceedings to be changed to the same extent as if the parties had united in asking that the same be done.

3724. Errors waived. 2519. An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter; and all errors in the decisions of the court are waived unless excepted to at the time, except final judgments and interlocutory or final decrees entered of record. [R., § 2619.]

Under this section, *held*, that where proceedings in the circuit court which should have been brought in probate are entitled in equity or at law, a motion to change to the proper docket is the only remedy: *Ashlock v. Sherman*, 56-311; *McName v. Malvin*, 56-362; *First Nat. Bank v. Green*, 59-171; *Goodnow v. Wells*, 67-654.

Objection that the action was brought by the wrong kind of proceedings cannot be taken advantage of after judgment: *Hatch v. Judd*, 29-95.

If the proper steps to effect the change are not taken in the court below the remedy is regarded as waived: *Parshall v. Moody*, 24-314; *Green v. Marble*, 37-95; *Knott v. Tincher*, 39-628.

A party who fails at the proper time to ob-

ject to the prosecution of an action in equity which should have been at law, by moving to transfer it to the law docket, is presumed to have waived objection on that ground and to have assented to the cause proceeding as an equitable action, and in such case such relief as equity might render in a proper case might be given: *Richmond v Dubuque & S. C. R. Co*, 33-422, 504.

Where an action is improperly prosecuted by equitable proceedings, a failure to object thereto as provided in § 3721 operates as a waiver of a jury trial: *Ibid.*, 490.

Generally a judgment in an equitable proceeding may be sustained if objection to the form of proceeding has not been made in the manner prescribed by the statute, though the action should have been by ordinary proceeding; but if, upon the merits of the case, the relief granted would have been denied at law and ought not to have been given in an equitable proceeding, the judgment will not be sustained: *Ibid.*, 489.

The right to insist that equitable relief cannot be given, where the action is only for a judgment at law and is by ordinary proceeding, is not waived by failing to move for a change to the proper docket: *Newman v. Covenant Mut. Benefit Ass'n*, 72-242.

An objection to the form of the proceeding cannot be first raised on appeal: *Tugel v. Tugel*, 38-349; *Gould v. Hurto*, 61-45.

Error of the court in sustaining a motion to transfer to the equity docket will not be ground of reversal on appeal, where it does not appear that the party excepted to such action or demanded a jury trial: *State v. Craig*, 58-238.

3725. Uniformity of procedure. 2520. The provisions of this code concerning the prosecution of a civil action, apply to both kinds of proceeding, whether ordinary or equitable unless the contrary appears, and shall be followed in special proceedings not otherwise regulated so far as applicable. [R., §§ 2620, 4173; C., '51, § 2516.]

Proceedings to condemn property for a work of internal improvement should be governed, as far as practicable, by the rules governing ordinary actions: *Forney v. Ralls*, 30-559.

Thus it was held that the provisions of the Civil Code as to change of place of trial were applicable in an appeal, in a proceeding to condemn land for a right of way: *Whitney v. Atlantic Southern R. Co.*, 53-651.

This provision was applied also to proceedings to disbar an attorney: *State v. Clarke*, 46-155, 159.

3726. Actions on judgments; when brought. 2521. No action shall be brought upon any judgment, against a defendant therein, rendered in any court of record of this state within fifteen years after the rendition thereof without leave of the court for good cause shown and on notice to the adverse party, nor on a judgment of a justice of the peace of this state within eight years after the same is rendered, except in cases where the docket of the justice, or record of such judgment is, or shall be, lost or destroyed.

It is a ground of demurrer to a petition on such a judgment that the action appears to be brought within fifteen years without leave of court: *Watts v. Everett*, 47-269.

This statutory provision affects the remedy, and applies to judgments rendered before as well as after its passage: *Ibid.*

Where the record of the judgment is lost or destroyed, suit thereon, even if proper, is not the only method for supplying such record: *Gammon v. Knudson*, 46-455.

An action to foreclose a mortgage, given to secure a note which is already reduced to judgment, is not prohibited by the statutory provision above referred to: *Matthews v. Davis*, 61-225.

Prior to the enactment of this section, *held*, that an action might be maintained on a domestic judgment while in full force, and upon which an execution might issue, in the absence of any legislative restriction: *Thompson v. Lee County*, 22-206; *Simpson v. Cochran*, 23-81.

"There is no reason why a party should be harassed by suit after suit when one judgment can be made just as effective as a hundred:" *Code Com'rs' Rep.*, p. 74.

The restriction here imposed is not applicable to actions in the federal courts: *Phillips v. O'Brien County*, 2 Dill., 518.

A judgment rendered in an action on a prior judgment is a conclusive adjudication that plaintiff is owner of such judgment, and is entitled to receive the whole amount due thereon: *Virden v. Shepard*, 72-546.

3727. Judgments not annulled in equity. 2522. Judgment obtained in an action by ordinary proceedings, shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counter-claim in the action on which the judgment was recovered. [R., § 2621.]

This does not prevent the issuance of an injunction against the collection of a judgment, which is being enforced contrary to the agreement of parties: *Baker v. Redd*, 44-179.

Judgment in garnishment proceedings, although rendered for an amount in excess of garnishee's liability to judgment debtor, cannot be modified in an action in equity: *Burlington & M. R. R. Co. v. Hall*, 37-620.

Where a defendant permits judgment to go against him by default on a legal demand, he may in a subsequent action set up and rely upon equitable matters which would have constituted an available defense in the first action: and *semble*, that the same would be true where the claim available as a defense is a legal one: *Fairfield v. McNany*, 37-75.

3728. Discovery. 2523. No action to obtain a discovery shall be brought, except that where any person or corporation is liable, either jointly or severally with others by the same contract, an action may be brought against any parties who are liable, to obtain discovery of the names and residences of the others who are liable. In such action, the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract who are known to him have property sufficient to satisfy his claim. The petition shall be verified, and the cost of such action shall be paid by the plaintiff, unless the discovery be resisted. [R., § 4127.]

Equity will not take jurisdiction of a case on the ground of discovery, if it be not shown that the practice of the law courts and the rules of evidence prevailing over it are such that the party can obtain the evidence necessary to establish the amount of recovery: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 484.

The fact that plaintiff prays that defendant be required to produce the note sued on and attach a copy of it to his answer does not bring the case within equitable cognizance. Under this section an action solely for discovery cannot be brought in equity: *Searey v. Miller*, 57-613.

3729. Successive actions. 2524. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action has arisen therefrom. [R., § 4128.]

Section referred to in *Richmond v. Dubuque & S. C. R. Co.*, 33-422.

3730. Actions survive. 2525. All causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same. [R., §§ 3407, 4110; C., '51, § 2502; 9 G. A., ch. 174, § 4.]

Right of action or defense survives: Any rights of remedy or defense existing in a party pass to his representatives on his death: *Harper v. Drake*, 14-533.

An action for libel will survive: *Carson v. McFadden*, 10-91.

Although an action for slander will survive against the personal representatives of defendant, the plaintiff cannot recover, as against such representatives, exemplary or punitive damages: *Sheik v. Hobson*, 64-146.

An action for injury to the person will survive: *McKinlay v. McGregor*, 10-111.

A servant's right of action for personal injury against his master survives the death of the servant: *Mumm v. Owens*, 2 Dillon, 475.

An action for seduction brought by the female herself survives: *Shafer v. Grimes*, 23-550.

An action for divorce is abated by the death of the parties, and with it all claim for alimony: *Barney v. Barney*, 14-189; *O'Hagan v. O'Hagan's Ex'r*, 4-509.

If a counter-claim is properly maintainable in favor of two defendants, the death of one of them will work no abatement thereof: *Moorehead v. Hyde*, 38-382.

A deposition taken after plaintiff's death upon notice served before his death cannot be used in subsequent proceedings in which the personal representatives are substituted, and should be stricken from the files on motion: *Kershman v. Swhela*, 59-93.

As to survival of actions pending upon appeal, see notes to § 4441.

Assignment: All causes of action which survive under the statutory provision above referred to are assignable: *Gray v. McCallister*, 50-497.

A cause of action for a personal tort is assignable: *Ibid.*; *Weire v. Davenport*, 11-49; *Vimont v. Chicago & N. W. R. Co.*, 64-513; *Hawley v. Chicago, B. & Q. R. Co.*, 71-717.

It seems to have been otherwise held before the passage of statutory provisions relating to survival of actions: *Taylor v. Galland*, 3 G. Gr., 17.

Action upon a right of action arising from personal injury may be brought by the assignee thereof in a state where the assignment of such a cause of action is permitted by statute, although the assignment is made in a state where the common-law rule prohibiting such assignment is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

A cause of action for injuries to stock under § 1972 may be assigned, and the assignee may recover the double damages which are by that section allowed to the owner: *Everett v. Central Iowa R. Co.*, 73-442.

As to assignability, see § 3260 and notes. As to survival of actions pending, see § 3766.

3731. Civil remedy not merged in crime; damages for act producing death. 2526. The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts. [R., § 4111.]

Although the provision of Revision, § 4111, Code of 1851, § 2501, that when a wrongful act produces death the perpetrator is civilly liable for the injury, is not retained in the present Code, the affect of the present provisions is the same as though that express language had been retained: *Conners v. Burlington, C. R. & N. R. Co.*, 71-490. An action for personal injuries causing instant death survives, and may be prosecuted by the administrator: *Worden v. Humeston & S. R. Co.*, 72-201.

In determining whether the cause of action accrues to the person injured or only to his legal representatives, the test is whether he lived after the injury, and not the length of time he lived thereafter. If he lived but a short time, the cause of action accrued to him as actually as it would have done had he lived a month or a year thereafter. (Overruling *Sherman v. Western Stage Co.*, 24-515): *Kellow v. Central Iowa R. Co.*, 68-470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed. Rep., 57.

At common law no action could be maintained for an injury resulting in death, and the right of recovery for such injuries exists, if at all, only by reason of the law of the place of the injury: *Hyde v. Wabash, St. L. & P. R. Co.*, 61-441.

Therefore, *held*, that the personal representatives of the person whose death was caused by an injury in Missouri, where the statute does not authorize a recovery in such cases by the personal representatives, could not maintain an action for such injury in the courts in Iowa: *Ibid.*

A right of action for personal injury arising under the laws of this state, being assignable in this state, an action may be brought here by an assignee thereof, although the assignment is made in a state where the common-law rule prohibiting such assignment is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

Where the right of action accrues by virtue of the statute of one state the action may be maintained in another state, if not contrary to the public policy or laws of the place where suit is brought: *Morris v. Chicago, R. I. & P. R. Co.*, 65-727.

Therefore, where the death which was the subject of the action was caused in the state of Illinois by the negligence of a railway company, and the statutes of Illinois gave to the administrator of deceased the right of action for such injury, *held*, that the courts of Iowa, within which defendant was also operating its line of railroad, might obtain jurisdiction, and appoint an administrator to maintain a suit for the recovery of the damages allowed by the statutes of Illinois: *Ibid.*

A corporation is liable in a civil action for wrongful acts of its servants, done in its employment and producing death. Its liability, however, would not probably be held to exempt the immediate agent from liability: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

Where an employee of a railroad company received injuries through the wrongful act of a co-employee, resulting in death, the company was held to be the "perpetrator" within the language of Revision, § 4111, and civilly liable: *Philo v. Illinois Cent. R. Co.*, 33-47.

As to the amount of recovery in cases of death, see *Kelley v. Central R. of Iowa*, 5 McCrary, 653.

In an action by the administrator of a minor to recover damages to the estate resulting from injuries causing his death, the recovery is limited to those damages accruing after the minor would have attained his majority and up to the limit of his probable expectancy of life. The damages accruing before majority are not to the estate, but to the father or other person entitled to the minor's services: *Walters v. Chicago, R. I. & P. Co.*, 36-458; *Lawrence v. Biney*, 40-377.

3732. Proceedings; limitation of action. 2527. The actions contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as provided for service of original notices. [R., § 4111; C., '51, § 1699; 9 G. A., ch. 174, § 4.]

No notice to defendant is necessary when the cause is continued in favor of the legal representative of plaintiff, and the substitution of such representative is no cause of continuance on behalf of defendant: *Masterson v. Brown*, 51-442.

Under Code of '51, *held*, that where one of the joint makers of a note died during the pendency of a suit thereon, the action could not be continued, jointly, against the administrator of the deceased and the surviving joint obligors: *Pecker v. Cannon*, 11-20; *Marsh v. Goodrel*, 11-474.

Where action for personal injuries is brought by the administrator after the death of the injured party, for the benefit of the estate, dam-

ages for pain, and suffering cannot be recovered; but if the action is brought by the injured party before his death, and afterward his administrator is substituted as plaintiff, damages for pain and suffering may be recovered as though the action had been prosecuted to a termination by the person injured: *Muldowney v. Illinois Cent. R. Co.*, 36-462.

3733. Construction; rule of common law not applicable. 2528. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice. [R., § 2622; C., '51, § 2503.]

Similar provision in Code of '51, applied: *Strother v. Steamboat Hamburg*, 11-59; *Kramer v. Rebman*, 9-114.

A remedial statute should be so construed as to meet most effectually the beneficial end in view and prevent a failure of the remedy intended: *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398.

A remedial statute ought always to receive a liberal construction: *Steamboat Lake of the Woods v. Shaw*, 2 G. Gr., 91.

Statutes made to promote an impartial administration of justice should receive a liberal construction: *Lyne v. Hoyle*, 2 G. Gr., 135.

Exemption laws are to be maintained in spirit as well as letter, and even liberally construed in favor of those claiming their benefit: *Kaiser v. Seaton*, 62-463.

Where a statute gives a right and creates a liability not existing at common law, and at the same time provides a specific mode in which such right shall be asserted and liability ascertained, that mode and that alone must be pursued: *Cole v. Muscatine*, 14-296; *Lease v. Vance*, 28-509; *Conrad v. Starr*, 50-470.

The statute in relation to mechanics' liens being in derogation of the common law should be strictly complied with: *Greene v. Ely*, 2 G. Gr., 508; *Logan v. Attix*, 7-77.

Statutes authorizing the taking of private property for particular purposes are not to be extended by construction to apply to objects or persons not expressly within their terms: *Sandford v. Martin*, 31-67.

As applicable to a provision not found in the Code, see *Doolittle v. Greene*, 32-123; *Foster v. Elliott*, 33-216.

CHAPTER 2.

OF LIMITATION OF ACTIONS.

3734. Period of. 2529. The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared:

1. Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years;

2. Actions to enforce a mechanic's lien, within two years from the time of filing the statement in the clerk's office;

3. Those against a sheriff, or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the non-payment of money collected on execution, within three years;

4. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years;

5. Those founded on written contracts, on judgments of any courts, except those courts provided for in the next section [subdivision] and those brought for the recovery of real property, within ten years;

6. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years. [R., §§ 1865, 2740; C., '51, §§ 948, 1659; 13 G. A., ch. 140, § 2.]

I. IN GENERAL.

In equitable actions: The statute of limitations applies equally to actions at law and suits in equity: *Phares v. Walters*, 6-106; *Relf v. Eberly*, 23-467; *Williams v. Allison*, 33-278; *District T'p v. District T'p*, 62-30.

While equity will usually, in analogy to the

law, follow the statute of limitations, it will not in any case cut off rights of parties to relief within a shorter time than that prescribed by the statute, unless the other party is shown to have been prejudiced by delay in some manner which would render it inequitable to grant the relief sought: *Light v. West*, 42–138

Infringement of patent: The state statute of limitations is not applicable to actions to recover damages for infringement of a patent: *May v. Cass County*, 30 Fed. Rep., 762.

Construction: The statute of limitations should not be viewed in an unfavorable light or as a defense unjust and discreditable: *Penley v. Waterhouse*, 3–418.

Against municipal corporations: The statute does not run against the state: *Des Moines County v. Harker*, 34–84; *Kellogg v. Decatur County*, 38–524.

Though the action be brought in the name of a county, yet if it be for the benefit of the state, as for the recovery of a part of the school fund, it will not be barred by the statute: *Ibid.*

The statute will run against a city: *Pella v. Scholte*, 24–283.

Statutes of limitations will not run to defeat the exercise by a city of its governmental authority in establishing or maintaining a street, but in cases wherein arise questions involving property or contracts, which do not pertain to the exercise of its authority, the statute will run: *Waterloo v. Union Mill Co.*, 72–437.

The statute of limitations runs against an action by a county for delinquent taxes, for which the county is liable to the state: *Brown v. Painter*, 44–368.

Where actions are brought by municipal corporations to recover property or to enforce contracts made with them in their corporate or governmental capacity, the statute may be applied in the same manner as where like actions are brought by natural persons: *Burlington v. Burlington & M. R. R. Co.*, 41–134.

The general statute of limitations applies to actions in the name of the state for the use of an individual or corporation against whom the statute would run: *State v. Henderson*, 40–242.

The statute of limitation does not run against the state university: *Manatt v. Starr*, 72–677.

Pertains to the remedy: The statute of limitations in the state in which the action is brought prevails, and not that in which the contract was made: *Bruce v. Luck*, 4 G. Gr., 143.

Statutes of limitation pertain to the remedy and not to the essence of the contract, and an act extending the time for bringing suit on a cause of action is valid: *Edwards v. McCaddon*, 20–520.

And such statutes are not unconstitutional as impairing the obligation of existing contracts: *Parsons v. Carey*, 28–431; *Harrencourt v. Merritt*, 29–71; *Campbell v. Long*, 20–382.

The statute of limitations pertains to the remedy and not to the right of action or validity of the cause of action, and even though it prevent action being brought on a cause of action, such as a judgment which is still valid and enforceable in another state, it does not conflict with the provisions of the constitution of the United States, securing in each state full faith and credit to the judicial provisions of other states: *Meek v. Meek*, 45–294.

The statute of limitations does not affect the validity of a debt or obligation of a contract; it simply operates to arrest the remedy; hence an offer to pay a debt legally due applies to a debt, the remedy for which is barred by the statute of limitations: *Barke v. Earley*, 72–273.

Changes in statutes of limitation take effect on antecedent contracts: *Sleeth v. Murphy*, Mor., 321.

The Code being a re-enactment of the provisions of the Revision as to limitations of actions, the time which had run at the date when the Code was enacted is to be added to the time running under the Code in making the period of limitation. To construe the Code as extending the period of limitation, and allowing the full period in each case after its taking effect as to causes of action already existing, would affect rights already accrued, contrary to the provisions of § 54: *McDonald v. Jackson*, 55–37.

The statute of limitations applies to the remedy only, and if there is a cause of action existing, not barred when the statute takes effect, the statute applies to it, even though it is not made retrospective in its operations: *Higgins v. Mendenhall*, 42–675.

Before the bar of the statute is complete the legislature may by statute enlarge the period: *Harwood v. Quinby*, 44–385.

Repeal: Where a statute of limitations is unconditionally repealed without any saving clause, the rights of parties are to be adjudicated in the same manner as if the act had never existed, unless the period of limitation under the previous statute has already expired, in which case the repeal of the previous act will not revive the right of action: *Norris v. Slaughter*, 1 G. Gr., 338.

While the legislature has the power to enlarge the time for the statute to run, or to repeal a statute which has run for a part of the time prescribed, and give to past creditors the same length of time to prosecute their claims as future creditors, it cannot revive any right of action already barred: *Ibid.*

The repeal or amendment of the statute of limitations cannot act retrospectively so as to disturb rights acquired thereunder, and deprive parties of protection to which they were fully entitled under a prior enactment. Actions which have become barred are not revived upon the repeal of the statute of limitations: *Thompson v. Read*, 41–48.

Where a previous statute was repealed and a new one enacted without any saving clause, *held*, that in computing the statutory period on an action arising before the taking effect of the new law, the period of time which had elapsed prior to the taking effect of the new law could not be included: *Ibid.*; *Forsyth v. Ripley*, 2 G. Gr., 181; *Wile v. Matherson*, 2 G. Gr., 184.

Where the statute reduced the period of limitation as to existing causes of action, *held*, that the new period for such actions was not to exceed the whole period allowed by the

new statute, nor the period which would have been allowed under the old. (Overruling *Bennett v. Bevard*, 6-82; *Phares v. Walters*, 6-106): *Wright v. Keithler*, 7-92; *Montgomery v. Chadwick*, 7-114; *Campbell v. Long*, 20-382.

And further, as to the effect of the provisions of the Code of '51, as to causes of action not already barred, see *Kilbourne v. Lockman*, 8-380.

Effect: The fact that the period of limitation has expired as against a note will not support an averment of payment. A barred debt is not to be regarded as extinguished: *Austin v. Wilson*, 46-362.

Satisfaction of a judgment will be presumed after a lapse of twenty years, subject to explanation in regard to the non-residence of defendant. Within the twenty years, however, the jury may be authorized to presume payment from circumstances, but not from the lapse of time alone: *Hendricks v. Wallis*, 7-224.

Statutes of limitation do not affect the validity of the cause of action, and the fact that a judgment is still valid and may be enforced in the state where rendered does not prevent its being barred by the provisions of our law, notwithstanding the requirements of the constitution of the United States that full faith and credit shall be given to the judicial proceedings, etc., of another state: *Meek v. Meek*, 45-294.

In case of surety: A claim which is, by the statute of limitations, barred as against the principal debtor, is by reason thereof barred also as against the surety, whether the statutory period as to the surety has expired or not: *Auchampaugh v. Schmidt*, 72-656.

The same period of limitation applies in an action against sureties upon an official bond that would apply in an action against the principal, and it is immaterial that judgment against the principal has already been obtained: *Wadsworth v. Gerhard*, 55-367.

The fact that the principal debtor is discharged by the statute of limitations does not prevent a surety on the original indebtedness being held on a new promise or admission: *Collins v. Bane*, 34-385.

Must be pleaded: The defense of the statute of limitations is an affirmative one, and the party pleading it must show the facts constituting the bar: *Hardin v. Stevenson*, 30-371; *Tredway v. McDonald*, 51-663.

The statute cannot be relied upon at the trial unless pleaded: *Brush v. Peterson*, 54-243.

It must be specially pleaded, and will be held waived unless taken advantage of by demurrer or answer: *Robinson v. Allen*, 37-27.

The fact that a claim was barred by the statute of limitations before suit was brought thereon does not affect title acquired through such action. If parties have failed to interpose the defense of the statute at the proper time they are deemed to have waived it: *Welch v. McGrath*, 59-519.

Raised by demurrer: Where the petition shows affirmatively that its cause of action is barred by the statute of limitations it may be assailed by demurrer. (§ 3854, ¶ 6): *Shorick v. Bruce*, 21-305.

A petition in an action for slander, alleging the publication of the slander on or about a particular date, is demurrable if the date thus mentioned is such that the statute of limitation appears to have run against the action: *Jean v. Hennessy*, 69-373.

A demurrer in such case will not be defeated by the fact that the petition alleges the repetition of such slanderous words at divers times after the original publication up to the bringing of action. Such allegations of the repetition of the slander constitute only a pleading of evidence which is admissible for the purpose of showing malice: *Ibid.*

A petition cannot be assailed by demurrer on the ground that the action was barred by the statute until it shows on its face that the cause of action accrued against defendant at a time prior to the period limited by the statute: *District T'p v. Independent Dist.*, 69-88.

The objection that the action appears to be barred by the statute should be raised by demurrer, but may be taken by answer where no objection is made to its presentation in that manner: *Sac County v. Hobbs*, 72-69.

Where a special form of action is provided by statute, and it is also provided that it shall be pursued within a limited time, such limitation need not be pleaded, and the objection may be made by motion to dismiss the action if brought after the time limited: *Newcomb v. Steamboat Clermont*, 3 G. Gr., 295.

Matter removing the bar: Plaintiff may in his petition allege matters displacing the apparent bar of the statute: *Petchell v. Hopkins*, 19-531.

Thus, under a former statutory provision by which plaintiff might call defendant as a witness to prove a cause of action barred by the statute, *held*, that plaintiff must, in such a case, if his cause of action was apparently barred, state in his petition that he intended to rely upon defendant's testimony or his petition would be subject to demurrer: *Newfield v. Blawn*, 16-297.

Where the note sued on appears on its face to be barred, but plaintiff in his petition sets up facts preventing such bar from being applicable, an averment in the answer that the note shows on its face that the action is barred is no answer to the averments of the petition: *Walker v. Russell*, 73-340.

Who may take advantage of: Where land is sold at foreclosure sale for an indebtedness represented by a second note secured by mortgage, the purchaser may plead the statute of limitations in an action in which it is sought to subject the land to the payment of the first note secured by the same mortgage. The original maker of the notes and mortgage being a party to the action, but no judgment being asked against him, cannot make admissions in the pleadings such as will defeat the defense of the statute of limitations as to such purchaser: *Day v. Baldwin*, 34-380.

Where a devise is made upon condition that the devisee pay all the debts enforceable against testator's estate, the period of limitation as against such devisee who accepts under the will is not extended: *Huston v. Huston*, 37-668.

Suspension of right to sue: The time during which a party is prevented by injunction from enforcing a judgment in his favor should be excluded in calculating the period

of limitation, both as to the person enjoined and those claiming under him: *Tredway v. McDonald*, 51–663.

Where the statute has commenced to run against a cause of action it will not be suspended on account of the death of the party in whose favor the cause of action has existed and the minority of the persons to whom his rights have been passed: *Bishop v. Knowles*, 53–268.

II. WHEN COMMENCES TO RUN.

When cause of action accrues: The statute of limitations begins to run from the time the cause of action accrues. After the statute once begins to run, no subsequent disability will suspend it unless the statute itself provides therefor. Before a cause of action will accrue or the statute begin to run, there must exist a cause of action and a person authorized to prosecute it. So the statute will not run against a cause of action accruing to the estate of a decedent until there is a personal representative in whose name it may be prosecuted: *Sherman v. Western Stage Co.*, 24–515, 553.

It is not the date of a promise, but the time when the cause of action accrues thereon, which determines when the statutory period commences to run: *Walker v. Lathrop*, 6–516.

The statute of limitations commences to run when the cause of action has fully accrued: *Baker v. Johnson County*, 43–645.

Where it was agreed between the heirs of an estate that, upon the setting aside of the will, a certain amount should be allowed to two such heirs upon final distribution of the property of the estate, *held*, that the statute of limitations against the claim of the heirs for the amount thus agreed upon did not commence to run until the final distribution of the property: *Rogers v. Gillett*, 56–266.

When a person indebted to an estate made certain payments, and afterwards failed to set such payments up in defense to the action in behalf of the estate by reason of an arrangement for a compromise, and judgment was rendered against him for a larger amount than his indebtedness, and thereafter the terms of the compromise were violated by the opposite party, *held*, that the debtor's cause of action to recover payments not set up by him in the action accrued only from the time of the violation of the agreement for the compromise: *Savery v. Sypher*, 39–675.

A right of action does not accrue for a wrongful act until the party complaining has suffered injury therefrom: *Steel v. Bryant*, 49–116; *Moore v. McKinley*, 60–367.

On written contract to convey: In an action to recover the part of the purchase money paid, in case of breach of written contract to convey, the statute commences to run from the time of demand and refusal to convey, and not from date of payment of the money, such action not being for money had and received: *Deming v. Haney*, 23–77.

No time for the performance of a contract to convey being specified, it is implied that the performance shall be made within a reasonable time, and the statute of limitations will commence to run from that time: *Harbour v. Rhinehart*, 39–672.

Under continuous contract: When labor is performed during a continuous period under one contract, the statute of limitations begins to run from the completion of the work: *Shorick v. Bruce*, 21–305.

It must be presumed that it is the universal custom to render compensation for personal services at intervals, whatever may be the time of employment. But unless the custom is known to exist in case of expenses and services in support of a child or other person running through a long series of years, if the contract fixes no time for its termination, the law will presume that, unless terminated, the contract continues to run so long as the services are rendered, or in case of a child, until majority, and the amount of charges for such services and expenses will be deemed entire and not from year to year: *Carroll v. McCoy*, 40–38.

In case of partnership: The statute of limitations does not begin to run against an action for settlement of a partnership until the partnership is dissolved, or until sufficient time has elapsed after demand for accounting and settlement: *Richards v. Grinnell*, 63–44.

In case of surety: The payment of a judgment by a surety gives rise immediately to a right of action against the principal debtor for the money so paid, and the fact that such payment is made upon the mere indefinite promise by the principal to repay at some future time will not suspend the surety's right of action and the running of the statute of limitations thereon: *Wilson v. Crawford*, 47–469.

A cause of action by the surety against the principal arises when the surety pays the obligation and upon an implied promise of indemnity. Such action being on an unwritten contract must be brought within five years: *Miller v. Lesser*, 71–147.

Where the grantee of real property, as a part of the purchase money, agreed to pay off a judgment against the grantor, *held*, that the relation of principal and surety was created, and the grantor having paid the judgment, his right to recover from the grantee accrued from the date of payment, no special time for payment being fixed: *Foster v. Marsh*, 25–300.

Contract to pay after death: Where there is a contract for services to be paid for on the death of the party to whom they are rendered, the statute of limitations as against such claim commenced to run only from the death of the party: *Riddle v. Backus*, 38–81.

Indebtedness payable on demand: Upon an unwritten contract for a loan of money payable on demand, the statute commences to run from the time of the loan: *Hall v. Letts*, 21–596.

Claim against county: The statute commences to run as against an unliquidated claim against a county from the time the account accrues and not from the time the demand required by § 3815 is made: *Baker v. Johnson Co.*, 33–151.

Where a warrant is made payable out of a certain fund the right of action on the warrant does not arise until the fund out of which it is made payable comes into existence: *Wetmore v. Monona County*, 73–88.

Where preliminary steps are required: A party holding a claim or right of action can-

not be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of the action: *Prescott v. Gonser*, 34–175; *Hintrager v. Hennessy*, 46–600; *First Nat. Bank v. Greene*, 64–445; *Squier v. Parks*, 56–407: *Hintrager v. Traut*, 69–747.

The right of action will be deemed to have accrued at the time when by taking the proper steps the action might have been brought: *Hintrager v. Traut*, 69–746.

Even where a demand may be necessary before bringing action, the party having the right to demand performance at any time cannot delay such demand and thereby prevent the statute of limitations from commencing to run; and where the demand is not necessary to create a debt, but is only a preliminary step to the enforcement of a remedy for the breach of such debt, which breach is complete without the demand, the statute will commence to run from the time that demand might have been made: *Prescott v. Gonser*, 34–175.

A person cannot postpone the operation of the statute of limitations by failing to make a demand where the demand is all that is necessary to fix the liability of the other party: *Lower v. Miller*, 66–408.

When the right of action depends on a demand, such demand must be made within the statutory period of limitation after the right to make it accrues, unless there are special circumstances excusing the party from so doing; otherwise the demand will be considered as not made within a reasonable time: *Ball v. Keokuk & N. W. R Co.*, 62–751.

Therefore, *held*, that where it appeared that a railway company had a contract with a land owner by which the former was entitled to a deed for a right of way upon demand as soon as the road was located, and no demand was made until the expiration of ten years after the right to make it had accrued, the right of the company to a deed had become barred: *Ibid.*

Claim against township or school district: Where a township clerk paid an order which should have been allowed by the township trustees at the first settlement thereafter, *held*, that the statute of limitations, as against an action of *mandamus* to enforce the allowance of the claim, commenced to run from that time, and not from the time of subsequent demand: *Dewey v. Lins*, 57–235.

The statute of limitations commences to run against warrants drawn by a district township on its own treasurer, at least from the time of their presentation for payment, although such payment is refused only for the reason that there are not funds on hand at the time: *Carpenter v. District Tp*, 58–335.

Option as to payment: Where the debtor has the option to pay the debt at any time before a certain date the cause of action does not accrue until the expiration of such time: *Creighton v. Rosseau*, 1–133.

Against sheriff for right-of-way damages: A right of action against a sheriff for money paid to him in pursuance of an assessment for damages for right of way accrues at the expiration of the thirty days allowed for appeal from such assessment: *Lower v. Miller*, 66–408.

Where a right of action against a sheriff has accrued during his first term, and he is re-elected for a second term, such re-election does not stop the running of the statute as to such money. It cannot be claimed that he received at the beginning of the second term from himself an amount for which he was liable during his first term: *Ibid.*

Void county bonds: Where, by reason of an adjudication that bonds issued in payment of stock in a railroad company were void, a county became entitled to the return of such bonds, or damages on account of their having passed into the hands of innocent purchasers, *held*, that such right accrued when the bonds were declared void: *Wapello County v. Burlington & M. R. R. Co.*, 44–585.

On accommodation paper: A right of action in favor of the accommodation maker of paper against the party accommodated only arises upon failure of the latter to pay the paper at maturity or to re-imburse the maker in case he is compelled to pay it: *Jefferson County v. Burlington & M. R. R. Co.*, 66–385.

But where a county issued negotiable bonds in aid of a railroad company which had passed into the hands of innocent holders, who could recover thereon, although the bonds were in fact issued without authority, it being believed, however, at the time they were issued, by all parties, that they were valid, *held*, that the right of action of the county against the railway company to recover the amount of the liability thus improperly incurred in behalf of such company accrued at the time the bonds passed into the hands of the railway company, and the right of action was barred in five years thereafter: *Ibid.*

Against officer for taking improper bond: A cause of action against a clerk for taking a defective stay bond does not accrue until plaintiff has been damaged, that is, until a right of action has accrued on the bond: *Steel v. Bryant*, 49–116.

Therefore, an action by a clerk against his deputy, for default of the latter in approving such bond, does not accrue until the same time: *Moore v. McKinley*, 60–367.

Against trustee: The statute of limitations will run in favor of the trustee of a resulting or constructive trust from the time he disowns the trust and claims title in his own right to the trust property: *Otto v. Schlapkahl*, 57–226; *Gebhard v. Sattler*, 40–152.

The conveyance of the trust property by the trustee holding under a resulting trust by a deed in which he asserts that he is the absolute owner, followed by possession of his vendee, is sufficient to constitute a denial of the trust: *Peters v. Jones*, 35–512.

The statute of limitations will limit and control the right of action in equity in cases of implied or resulting trusts: *Harbour v. Rhinehart*, 39–672.

A contract to make a deed to a certain piece of land, provided the grantor should get a pre-emption on the same, "in the penal sum of two hundred dollars," *held* not to constitute a case of direct or express trust which in equity has been considered not to be barred by the statute of limitations. Even if in such case the purchase money has been paid, the trust is still one raised by implication and therefore within the statute: *Johnson v. Hopkins*, 19–49.

Although the statute of limitations will not run against an express trust, yet a right of action accrues whenever there is a breach of the trust, and the statute begins then to run, at least if the breach is known to the beneficiary: *Wilson v. Green*, 49–251.

In case of continuing injury: Where the injury is such that it follows as the result of natural causes in consequence of one wrongful act, the action for all the damages resulting therefrom accrues at the time of the doing of the act, and the statute of limitations then commences to run: *Powers v. Council Bluffs*, 45–652.

Where the cause of action is based on wilful trespass in construction of a ditch to interfere with plaintiff's water-power, the cause of action will be deemed to have arisen at the time such ditch was constructed: *Williams v. Mills County*, 71–367.

Where plaintiff alleged damages resulting from the diversion of a stream of water in the negligent construction of defendant's road, and that such damages occurred at a time subsequent to the construction of the road, *held*, that the statute of limitations would commence to run from the time of the damages and not from the time the road was constructed: *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56–470.

In an action for damages suffered from the maintenance of a nuisance (the erection and use of gas works), it appearing that the nuisance and injury were of a permanent character and began when the works were erected, *held*, that, as plaintiff was entitled to recover all the damages sustained in one action, the action was barred after the lapse of five years from the commencement of the nuisance: *Baldwin v. Oskaloosa Gas Light Co.*, 57–51.

The cause of action for damages from the improper construction of a ditch does not arise until the ditch first begins to affect the party's premises: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

A cause of action for damages for an overflow of water caused by an inadequate culvert in a railway embankment does not accrue when the culvert is built, but when the overflow occurs: *Sullens v. Chicago, R. I. & P. R. Co.*, 74–659.

As against a cause of action for injury to property from the construction of a ditch which is of such character as to cause permanent injury unless human agency intervene to prevent it, the statute of limitations commences to run from the beginning of the injury. In such case there cannot be successive actions, but the whole injury is to be compensated in the one action: *Powers v. Council Bluffs*, 45–652.

But this does not apply to a case where one party is under obligation to protect another from injury and fails from time to time to do so: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302.

Against action to recover taxes: As against an action by one of two claimants of land who has been defeated in an action to assert title thereto, and thereupon seeks to recover from the successful claimant the amount of taxes paid while claiming title, the statute of limitations commences to run from the time the question of title is finally adjudicated: *Goodnow v. Stryker*, 62–221; *Goodnow v. Litchfield*, 63–275; *Bradley v. Cole*, 67–650; *Goodnow v. Oakley*, 68–25.

Where a tax title was, in an action in equity brought by the holder of the legal title, declared void for the reason that the tax for which the sale was made had been in fact paid, and thereupon the holder of the legal title was required to repay to the holder of the tax title all taxes paid by the latter on the land, *held*, that such obligation to repay being a mere equity, incident to the relief granted, was not affected by the statute of limitations, and should not be limited to taxes paid within five years: *Harber v. Sexton*, 66–211.

As to limitation of actions to recover taxes paid by mistake, see notes to next section.

Ignorance of claim: When no fraud is charged, ignorance of a right will not prevent the operation of the statute of limitations against an action based thereon: *Campbell v. Long*, 20–382; *Brown v. Brown*, 44–349.

The fact that the extent of injury or damage is not fully known at the time the cause of action therefor accrues does not postpone the time of commencement of the statutory period: *Gustin v. Jefferson County*, 15–158; *Steel v. Bryant*, 49–116.

Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward, on execution, recovered the whole amount thereof, *held*, that the action to recover back the amount of the payment was barred in five years, although the judgment defendant was not aware of the failure to credit the payment until the expiration of the five years: *Shreves v. Leonard*, 56–74.

A cause of action by one county against another for support of a pauper arises when the support is furnished, and ignorance of the fact as to the proper place of settlement of the pauper will not delay the operation of the statute as against such claim: *Washington County v. Mahaska County*, 47–57.

A party who collects the amount due on a note given as collateral security becomes liable to pay over the excess beyond the amount of indebtedness at the time of the receipt of the money, and the cause of action commences to run at that time. A failure to pay in such a case cannot be deemed a fraud so as to prevent the running of the statute until the receipt of the money becomes known to the party entitled thereto: *Brunson v. Ballou*, 70–34.

All actions enumerated in the statute must be brought within the period specified, except when otherwise specially declared, and the fact that the creditor has been unable, for any reason, to discover the place of residence of his debtor, within the statutory provision, within which an action may be brought, will not defeat the bar of the statute: *Miller v. Lesser*, 71–147.

Fraudulent concealment of a cause of action by the party against whom it exists, preventing the opposite party from acquiring knowledge thereof, will prevent the statute from commencing to run until the cause of action was or might have been discovered; and this is true irrespective of the statutory provision as to the cases of fraud and mistake:

District Tp v. French, 40-601; *Findley v. Stewart*, 46-655.

Where by fraud or fraudulent concealment a debtor prevents a creditor from obtaining knowledge of the fact of indebtedness, the statute commences to run from the time of the discovery of the right of action, or when, by the use of due diligence, it might have been discovered. And this rule applies when the cause of action does not grow out of the fraud alleged, but exists independent of it, and is governed by the general provisions of the statute of limitations, and not by the provision of § 3735: *Bradford v. McCormick*, 71-129.

Where a party received money under obligation to account for it, but concealed the fact, and thereby prevented the other party from obtaining knowledge thereof, *held*, that the statute of limitations did not commence to run until the right of action might have been discovered in the exercise of due diligence: *Wilder v. Secor*, 72-161.

The liability of the surety is dependent on the liability of the principal, and, if by reason of fraudulent concealment of the cause of action, it is not barred as against the principal, neither is it barred as against his sureties: *Bradford v. McCormick*, 71-129.

III. LIMITATION IN PARTICULAR CASES.

Injuries to person: Injuries resulting in death are "injuries to the person" within the meaning of the statute, and an action by the personal representative therefor is barred in two years: *Sherman v. Western Stage Co.*, 22-556; *S. C.*, 24-515; *Nord v. Burlington & M. R. R. Co.*, 37-498.

Where the injury and the death resulting therefrom are not simultaneous, the cause of action is deemed to have accrued to the person injured and not to his personal representatives. (Overruling *Sherman v. Western Stage Co.*, 24-515): *Kellow v. Central Iowa R. Co.*, 68-470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed. Rep., 57.

An action against a carrier of passengers upon a contract of transportation for personal injuries received is barred in two years: *Nord v. Burlington & M. R. R. Co.*, 37-498.

In case of injury to the person, the statute of limitations begins to run from the time of the injury and not from the time the extent thereof is discovered by the person injured: *Gustin v. Jefferson County*, 15-158.

An action by the wife or children against a person who causes the intoxication of the husband or father by selling intoxicating liquor to him in violation of law is an action for personal injuries so as to be barred in two years: *Emmert v. Grill*, 39-690.

Statute penalty: The double damages allowed against a railroad company for killing stock (§ 1972) are not a statute penalty so as to come within this section. The action may, therefore, be brought within five years. What are statute penalties as here contemplated, discussed: *Koons v. Chicago & N. W. R. Co.*, 23-493.

The penalty provided by former statute of five times the amount of overcharge to be recovered from a railway company charging a greater amount for transportation of freight than allowed by law was a statute penalty, the action for which was barred in two years: *Herriman v. Burlington, C. R. & N. R. Co.*, 57-187.

But an action against the company to recover the amount paid in excess of the statutory rate *held* not to be an action for the penalty, and therefore not barred in two years: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732.

An action under § 2407 to recover back money paid for intoxicating liquors illegally sold is not an action for a statutory penalty: *Woodward v. Squires*, 41-677.

A bastardy proceeding is not an action for a statutory penalty within the meaning of this section: *State v. Laughlin*, 73-351.

Mechanic's lien: Although the filing of a statement for a mechanic's lien, within the thirty or ninety days provided by statute, is not essential to enable the mechanic to enforce his lien against any one except purchasers or incumbrancers in good faith, without notice, after the expiration of that time, yet the two years' limitation commences to run from the expiration of the period of thirty or ninety days, as the case may be, whether the statement for the lien is filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinkley*, 57-757.

Under the provisions of the Revision, that in case of action to enforce a mechanic's lien suit must be commenced within nine months from the time of filing the account or statement of the lien, *held*, that where the account was filed with the clerk within the ninety days allowed for filing such statement, the nine months' limitation began to run from the date of such filing, and when the account was not thus filed, the time began to run from the expiration of the ninety days within which the account should have been filed, although the failure to file the account would not defeat the lien as to parties having notice: *Gilcrest v. Gottschalk*, 39-311.

Action against public officer: An action against a treasurer, not on his bond, for moneys received and appropriated, is barred in three years: *Keokuk County v. Howard*, 41-11.

So an action against a treasurer and his sureties on his bond, for failure to account for and pay over revenues in his hands, is within this clause, and barred within three years. It does not fall within the provisions of ¶ 5: *State v. Dyer*, 17-223; *State v. Henderson*, 40-242.

The action of *mandamus* against a public officer to compel the performance of an official duty cannot be maintained until there has been a refusal to perform such duty, and the statute commences to run from the time when the plaintiff has a right to demand the performance of the act, and he cannot delay or postpone it by neglecting to make such demand: *Prescott v. Gonser*, 34-175; *Beecher v. Clay County*, 52-140.

In an action against the clerk of the court for damages resulting from his negligence in accepting an insufficient stay bond, *held*, that the cause of action did not accrue nor the statute begin to run until the stay expired: *Steel v. Bryant*, 49-116.

Under the Code of 1851, *held*, that the failure of a county judge to pay over money received by him in his official capacity was not the omission of an official duty, within the meaning of this clause, and, therefore, that the three years' limitation did not apply to an action on his bond to recover such money: *Powesheik County v. Ogden*, 7-177.

If action against the sureties of an officer on his official bond be not brought within three years after the breach thereof it is barred, although in the meantime action may have been brought and judgment recovered against the principal: *Wadsworth v. Gerhard*, 55-357.

Where a new obligation is accepted from an officer in satisfaction of his liability on his bond, the action upon such new obligation is not barred in three years: *Sac County v. Hobbs*, 72-69.

On unwritten contracts: A parol acceptance of a written proposition constitutes an oral contract: *Hulbert v. Atherton*, 59-91.

A contract by the board of supervisors with an agent for services to be performed does not become a written contract from the mere fact that the terms of such contract are embodied in the records of the board: *Baker v. Johnson County*, 33-151.

An oral acceptance of such employment by the opposite party makes the contract a parol and not a written contract: *Kinsey v. Louisa County*, 37-438.

In order to constitute a written contract sufficient to bring a case within the next paragraph and prevent the bar of five years from applying, the essential facts establishing the liability of defendant should be in writing: *Lamb v. Withrow*, 31-164.

Where it was sought to recover of defendant the amount paid by plaintiff in satisfaction of notes upon which the two appeared as joint makers, parol evidence being offered to show that plaintiff was only surety for defendant, *held*, that the action was upon an unwritten contract and could not be brought after five years: *Ibid.*

Where a surety on a judgment pays the same he may maintain an action against the principal for the amount so paid, but such action is founded upon a promise to repay, and not upon the judgment, and will therefore be barred in five years: *Johnston v. Belden*, 49-301.

An action by an accommodation indorser who has paid the judgment on a note to compel contribution by another indorser who is liable as co surety must be brought within five years after the payment is made: *Preston v. Gould*, 64-44.

Action against a party to whom a note has been indorsed as collateral security to recover the excess of the amount collected on the note beyond the amount of the indebtedness is an action upon an implied contract and must be brought within five years from the receipt of the money: *Brunson v. Ballou*, 70-34.

Under the statutory provision (§ 2407) that money paid in pursuance of the illegal sale of intoxicating liquors shall be held to have been received upon a valid promise to repay the same on demand, *held*, that an action to recover money so paid is only barred after the expiration of such time as would bar an action to recover money received under an express promise to repay, and that the clause of the statute limiting actions for statutory penalties to a shorter period is not applicable: *Woodward v. Squires*, 41-677.

Actions for the use and occupation of real estate are to be considered as brought upon an unwritten contract: *Tibbetts v. Morris*, 42-120.

The six years' limitation upon the recovery of rents and profits (see § 4491) applies to an action for the recovery of real property by one having the legal title; *in* an equitable action for conveyance and accounting, rents and profits can only be recovered for five years previous: *Muir v. Bozarth*, 44-499.

Written contracts: An action to enforce specific performance of a contract to convey real estate is governed by the provision as to actions on written contracts: *Wright v. Leclaire*, 3-221.

An action on a written contract to pay for goods to be delivered is not barred in five years, although the fact of delivery is to be established by parol evidence: *Wing v. Evans*, 73-409.

Where action was brought to foreclose a deed of trust given to secure subscriptions of money thereafter to be made, *held*, that the action was properly brought upon the written instrument, although parol evidence was necessary to show that the advances were made, and therefore that the action was not barred in five years: *White v. Savery*, 50-515.

The statutory provisions as to actions upon written contracts are applicable to suits for the foreclosure of mortgages: *Newman v. De Lorimer*, 19-244.

And also to actions to redeem: *Gower v. Winchester*, 33-303; *Green v. Turner*, 38-112; *Crawford v. Taylor*, 42-260.

An action to foreclose or redeem from a mortgage is barred at the same time as an action at law on the mortgage debt: *Smith v. Foster*, 44-442.

But a mortgage is not barred so long as the debt is unpaid and capable of being enforced: *Clinton County v. Cox*, 37-570; *Brown v. Rockhold*, 49-282.

A mortgage does not become barred so long as the debt which it was given to secure may be enforced, even though the form of the debt has been changed, as, for instance, by being merged into a judgment: *Shearer v. Mills*, 35-499.

Therefore where, by reason of the absence of defendant from the state, the action upon the indebtedness is not barred by the lapse of ten years, neither is the action to foreclose the mortgage to secure such indebtedness barred, although the action to foreclose might, by proceedings by publication, have been brought during defendant's absence: *Clinton County v. Cox*, 37-570.

Although an action to redeem from a mortgage will be cut off at the expiration of ten years from the time the right of redemption accrued, yet where it is claimed that the mortgage has been satisfied by the receipt of rents and profits by the mortgagee in possession, the action to declare the mortgage satisfied and have it canceled will not be barred until ten years after the payment was thus completed: *Green v. Turner*, 38-112.

Action for the enforcement of a vendor's lien, being treated in the same light as the foreclosure of a mortgage, must be brought within ten years from the time the cause of action accrued: *Day v. Baldwin*, 34–380.

For the recovery of real property: The statutory provisions as to limitation of an action to recover real property are applicable to a suit by a widow for dower: *Phares v. Walters*, 6–106.

But the statute does not commence to run against her until her right to dower is denied: *Starry v. Starry*, 21–254; *Rice v. Nelson*, 27–148; *Sully v. Nebergall*, 30–339; *Felch v. Finch*, 52–563.

Lapse of ten years will not bar the doweress of her dower where there has been no adverse possession: *Berry v. Furhman*, 30–462.

The statute does not run against the dower right until it has become vested by the death of husband or wife: *Hurleman v. Hazlett*, 55–256.

Under the present statutory provisions all actions for the recovery of real property, and personal actions on written contracts commenced since July 1, 1856, must be commenced within ten years after the cause of action accrued: *Johnson v. Hopkins*, 19–49.

Where an action is brought to set aside a sheriff's sale and get possession of the property conveyed thereby it is an action to recover real property within the terms of the statute: *Williams v. Allison*, 33–278.

An action against a railway company to recover damages to an abutting property owner by reason of the location of the track along the street of a city is not an action relating to an interest in real property, and must be brought within five years from the time when the right of action accrues: *Pratt v. Des Moines N. W. R. Co.*, 72–249.

The fact that an action at law to recover damages for breach of contract to convey real property has become barred will not necessarily bar an action for specific performance. Under a former statute, *held*, that the latter action was within the provision as to real property and not within that as to contracts: *Wright v. Leclaire*, 3–221.

An action in equity to compel conveyance by a purchaser who has purchased in trust for plaintiff and her husband, he being deceased, and she claiming to be sole devisee, comes within the limitation as to actions for the recovery of real property rather than the provisions as to actions for relief on the ground of fraud: *Stanley v. Morse*, 26–454.

Where the landlord is in an action determined not to be the owner of the premises, his tenant becomes liable to eviction by the real owner at any time, and the statute of limitations against such action for eviction commences to run at once and not from the end of the term: *Tibbetts v. Morris*, 42–120.

Where lots were sold in accordance with a plat on which a tract was marked as a public square, and which it was represented should remain open and without buildings, *held*, that a right of action to restrain the use or sale of such square as private property did not accrue until there was an attempt on the part of the grantor or his grantees to make some use or disposition of the premises inconsistent with such representations: *Fisher v. Beard*, 32–346; *S. C.*, 40–625.

The rule that an action by a junior mortgagee to redeem from a senior mortgage is barred in ten years is in nowise dependent upon the question of adverse possession: *Floyd County v. Cheney*, 57–160.

The mortgagor, or his grantee, or a subsequent incumbrancer, do not hold adversely to the mortgagor. Therefore, the statute of limitations will not run in favor of a subsequent grantee as against a mortgagee. (Explaining *Jamison v. Perry*, 38–14): *Hodgdon v. Heidman*, 66–645.

Whether there is adverse possession or not under a foreclosure sale does not affect the period of limitation within which an action by a subsequent incumbrancer not made party to the foreclosure of a prior incumbrance may bring his action to redeem: *Gower v. Winchester*, 33–303.

Adverse possession. The limitation commences to run from the time of ouster by one who enters with claim of adverse possession, and not from the time the adverse claimant obtains title: *Robinson v. Lake*, 14–421.

As against an action for the recovery of real property the statute begins to run at the time adverse possession is taken and held by the tenant or those under whom he claims. The possession of a tenant holding over after his term, or that of a mere trespasser, does not amount to a disseizin such that the statute will begin to run. Disseizin occurs only when possession is taken and held without assent of the owner, with intent to hold the estate therein under claim adverse to him: *Barrett v. Love*, 48–103.

Ten years' use of a highway by the public under claim of right will bar the owner of the soil: *Keyes v. Tait*, 19–123; at least in the absence of proof that the road was used by leave, favor or mistake: *Onstott v. Murray*, 22–457.

Whether the statute of limitations runs against the public because of adverse possession of a highway established in the manner prescribed by law, *quære;* but *held* that, in case of non-use of a highway for a long time and actual adverse possession thereof for ten years, the public were estopped from asserting any right thereunder: *Davies v. Huebner*, 45–574.

Mere non-user of an easement granted by deed will not bar the right. There must be some use adverse to that of the grantee to have that effect: *Barlow v. Chicago, R. I. & P. R. Co.*, 29–276.

Mere possession for the statutory period of limitation is not sufficient to enable the defendant to rely on the bar of the statute. Such possession must be adverse under color of title or claim of right: *Wright v. Keithler*, 7–92; *Jones v. Hockman*, 12–101; *Clagett v. Conlee*, 16–487; *Larum v. Wilmer*, 35–244; *Davenport v. Sebring*, 52–364; *Donahue v. Lannan*, 70–73.

A party out of possession cannot base a right of action upon adverse possession for less than the statutory period: *Hanlenbeck v. Riley*, 35–105.

Where a party states that he entered under claim of title, but also states that he took pos-

session under a conveyance which excluded the land in question by description, he will not be deemed to have color of title: *Weinig v. Holcomb*, 73–143.

The abandonment of possession by the real owner and the taking of possession by one claiming under adverse title will not give to the latter any valid claim by estoppel or otherwise until the expiration of the period of limitation: *Sanders v. Godding*, 45–463.

A party cannot claim title by prescription on the strength of adverse possession, where he does not show color of title or claim of right: *Solberg v. Decorah*, 41–501.

Possession, to be adverse, must be with intention to claim title. Facts, such as that the party has prosecuted an action against his grantor for purchase money and accepted payment thereof, and negotiated with the true owner for the purchase of the property, and that he claimed only the ownership of the improvements, should be considered as showing an abandonment of the claim of title: *Davenport v. Sebring*, 52–364.

Mere occupation of land belonging to a city, with full knowledge of the occupant that he has no color of right thereto, does not give any prescriptive right therein: *Twining v. Burlington*, 68–284.

The fact that a person filing a plat, showing the dedication of certain streets, remains in possession of the land included in such streets, does not constitute possession under a claim of right adverse to the public in such sense that the statute of limitations will run: *McDunn v. Des Moines*, 34–467.

Where land bordering on the Mississippi river was granted by the United States to the city of Dubuque, *held*, that the city took the same as a trustee and held the title for the public, subject to all the liabilities and conditions to which the property was subject in the hands of the United States, and that a person could not, by adverse and hostile possession of any part of the strip, claim title against the public under the statute of limitations: *Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158.

The statute of limitations is not available as a defense unless the defendant holds under color of title or has had actual possession for the full time limited under a claim of right. Mere possession without color of title or claim of right is not adverse, but the possessor will be deemed by the law to hold under the legal owner. No length of possession will make it adverse: *Grube v. Wells*, 34–148.

One who enters upon land without color of title, as a trespasser, does not hold adverse to or interrupt the possession of another adversely claiming the land: *Whalley v. Small*, 29–288.

A mere continuance in possession by the grantor, after conveyance by him, will not ripen into a right to rely upon the statute of limitations: *Livermore v. Maquoketa*, 35–358.

Where a party is in possession after an adjudication that he is not the owner of the premises his possession is not under claim of right or color of title: *Larum v. Wilmer*, 35–244.

Claim of right is, however, alone sufficient to entitle a party to rely upon his possession as adverse. It is not essential that he have color of title: *Hamilton v. Wright*, 30–480; *Colvin v. McCune*, 39–502.

It is not essential for one relying upon adverse possession as a bar to show legal title. A claim of right to the land is sufficient, and this claim need not be based upon the legal or a paper title, but may rest in parol. A claim based upon an equity is sufficient: *Montgomery County v. Severson*, 64–326.

It is not necessary that a title in order to constitute color of title so as to protect the person claiming thereunder shall be valid, and it is immaterial whether its want of validity results from its inherent defects or from matters transpiring subsequently to the action; or whether such want of validity is attributable to individual or judicial action: *Hamilton v. Wright*, 30–480.

The term color of title, used to designate a claim of title under which lands are held that will support a defense based upon the statute of limitations, implies that the title thus described is not valid, but is claimed to be by the party holding it; and *held*, that a party claiming under a tax deed which was void for the reason that the title of the land was in the United States government at the time of the levy of the tax on it, and therefore taxable, constituted color of title, and might be pleaded as raising the bar of the statute of limitations: *Chicago, R. I. & P. R. Co. v. Allfree*, 64–500.

A tax deed, void on its face, is sufficient to give color of title: *Colvin v. McCune*, 39–502.

A descent cast, or a devise, gives color of title, although the ancestor or devisor was a mere trespasser: *Hamilton v. Wright*, 30–480.

The possession of real property by heirs of one who held adversely under claim of right is under color of title: *Teabout v. Daniels*, 38–158.

Deeds of conveyance purporting to convey the land to the person in possession are evidence of color of title, although they are informal and indefinite in description. It is not necessary that they be sufficient to convey the title: *Sater v. Meadows*, 68–507.

But in order that an informal instrument shall constitute color of title it must appear that it was relied upon as the source of title: *Moore v. Antill*, 53–612.

A party claiming under a quitclaim deed, though he is not to be regarded as a good-faith purchaser, nevertheless has sufficient color of title to enable him to set up adverse possession: *Tremaine v. Weatherby*, 58–615.

Merely paying taxes upon wild lands and occasionally looking at them and showing them to others, *held* not such actual, visible, notorious, adverse possession as is necessary to enable a party to take advantage of the statute: *Brown v. Rose*, 48–231; *S. C.*, 55–734.

Payment of taxes is mere evidence of a claim and its extent; it is not, of itself, adverse possession: *Sioux City & I. F. Town Lot, etc., Co. v. Wilson*, 50–422.

The adverse possession need not be in defendant personally and solely, but it is sufficient if it be in him and those through whom he derives title, they claiming title: *Kilbourne v. Lockman*, 8–380.

The adverse possession must be under claim of right with intention to claim title, and not

by agreenent with the true owner: *McNamee v. Moreland*, 26-96.

Where the intention as an element of adverse possession is sought to be shown, the declarations of the occupant that he did not hold adversley are competent evidence. If the entry be permissive, it can be shown that the party did some act which would make his holding adverse: *Ibid.*

The possession, to be adverse, must be actual, continued, visible, notorious, distinct and hostile, and commenced under claim or color of title, but actual residence on the land is not necessary to constitute such possession. Any acts which are open and notorious, done under claim or color of title and continued for the necessary time, will justify the finding of adverse possession: *Robinson v. Lake*, 14-421; *Booth v. Small*, 25-177.

The acts relied on as showing actual possession must be such that on the one hand the fair inference is that they were done because the doer thereof claimed title or ownership in the premises, and on the other hand they must be such as would naturally lead any one interested in the land to understand that they were done by some one who was claiming title in the premises: *Merrill v. Tobin*, 30 Fed. Rep., 738.

The title under which the adverse possession is held need not be valid and perfect, but must be claimed in good faith; nor need the possession be shown to have been known to the adverse party or his grantor: *Close v. Samm*, 27-503.

Adverse possession must be open and notorious, and, if so, the person against whom it is maintained is presumed, as a matter of law, to know of it: *Teabout v. Daniels*, 38-158.

One may hold possession in fact of uninclosed land by the exercise of such acts of ownership over it as are necessary to the enjoyment of the ordinary use of which it is capable, and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted will amount to actual possession, and, if under color of title or claim of right, will be adverse: *Colvin v. McCune*, 39-502.

Where a person exercises such acts of ownership of real property as is necessary to enjoy the ordinary use of which it is capable in its existing condition, he is to be regarded as in possession of the same: *Teabout v. Daniels*, 38-158.

One who takes possession of timber land, and makes such use of it as it is susceptible of, cutting timber therefrom every year, is to be considered as in adverse possession: *Spitler v. Scofield*, 43-571.

Where the land in question was uninclosed and unimproved prairie land, and it was sought to show adverse possession thereof, commencing at a time when such land is not ordinarily put to any use, *held*, that it was error to instruct that such possession might be inferred from such acts of ownership, control and dominion over the property as are usually exercised by owners of land in such condition and situation: *Brown v. Rose*, 55-734.

Acts of an owner in going upon such land and hunting and digging thereon for a corner, *held* not sufficient to constitute adverse possession: *Ibid.*

A roving possession from one part of a tract of land to the other will not constitute adverse possession as to any part of the land which has not been held adversely for the statutory period: *Messer v. Reginnitter*, 32-312.

The facts relied upon to constitute adverse possession must be strictly proved. They cannot be presumed. The law presumes that the possession of land is always under a legal title, and will not permit this presumption to be overcome by another presumption. An intention to hold adversely cannot be inferred from possession alone: *Grube v. Wells*, 34-148.

Actual possession of a part of a tract is legal possession of the whole of the tract covered by the title under which the actual possession is taken, and possession of the part will impart notice of the claim to the whole tract: *Watters v. Connelly*, 59-217.

Where a party enters upon land and holds it under claim of right or color of title, having possession which is hostile and adverse to the holder of the legal title, and cultivates a portion as his own, resting his claim to the whole upon the same color of title, the law will presume him to be in possession of all the land within the boundaries as prescribed in such title; but such a rule would not apply if the adverse party had possession of the portion which claimant did not cultivate: *Chicago, R. I. & P. R. Co. v. Allfree*, 64-500.

Where one takes possession of a government subdivision of land under claim of title to the whole of it, breaks it up and puts part of it under cultivation, and no other person is in possession of any part, his possession must be held as applying to the whole tract claimed by him, especially when the actual possession extends to every government subdivision embraced in the whole tract: *Tremaine v. Weatherby*, 58-615.

Two government subdivisions in different sections, but adjoining each other, may constitute together one tract, possession of a part of which will be possession of the whole: *Kerr v. Leighton*, 2 G. Gr., 196.

Facts in a particular case *held* sufficient to show actual, open and exclusive possession by defendant, and those under whom he claimed, of open and uninclosed land: *Forey v. Bigelow*, 56-381.

The occupation of a strip of land by reason of a mistake as to the true boundary line between adjoining owners will not constitute adverse possession thereof: *Mills v. Penny*, 74-172.

In case of mistake as to the boundary line the possession of the party against whom the mistake exists will not be deemed adverse. Mere mistake does not make the possession one under claim of right: *Grube v. Wells*, 34-148.

But where parties have established a line and used it as a boundary, irrespective of the true line, the possession will be adverse, and, after the lapse of the necessary period, conclusive upon the parties and their grantees: *Hiatt v. Kirkpatrick*, 48-78.

In an action to settle a boundary line, wherein it was stipulated that the adverse parties were the owners of the respective government subdivisions, and plaintiff claimed and introduced evidence to prove adverse possession to a certain fence which was not on

the true line, *held*, that such proof of adverse possession was admissible: *Meyer v. Weigman*, 45–579.

An owner of land, who, through ignorance of the dividing line, includes a part of an adjoining tract within his inclosure, does not hold such portion by adverse possession, so as to set the statute of limitations in motion: *Skinner v. Crawford*, 54–119.

Adverse possession of a highway will not be presumed on account of a slight mistake or variance between the use and the true line: *State v. Welpton*, 34–144; *State v. Gould*, 40–372; *State v. Schilb*, 47–611.

Where defendant claimed ownership, with corresponding acts of use and occupation for ten years, up to a line fence which was erected at the mutual cost of both parties and intended to be the division line between them, it was held that a grant would be presumed under the statute of limitations in the absence of rebutting circumstances: *Burdick v. Heivly*, 23–511.

If a party owning on one side of a division line has been in peaceable possession and claimed up to the partition line and cultivated it as his, claiming adversely to all the world for more than ten years, then his title to the strip of land on his side of such division line which may not previously have belonged to him becomes complete by adverse possession: *Brown v. Bridges*, 31–138.

Where adjoining owners have, for the period of limitation, occupied to a boundary line fixed upon by agreement, and not merely under a misapprehension as to its representing the true boundary under their conveyances, they are deemed to have held to such line by adverse possession: *Foulke v. Stockdale*, 40–99.

Where parties agree as to a certain line between their property being the true division line, and occupy to such line, each is to be considered as in adverse possession of the property so occupied, whether the line is correct or not: *Tracy v. Newton*, 57–210.

Where parties by unmistakable acts adopt a corner and boundary line as true, they become binding without any express provisions, and possession under such acts is adverse: *Davis v Curtis*, 68–66.

Where a division line is agreed upon by the persons owning adjoining real estate, and possession is taken in accordance with such agreement, such possession must be considered as adverse from the time it is taken: *Heinrichs v. Terrell*, 65–25.

Adverse possession of public land cannot avail against the government: *Sater v. Meadows*, 68–507.

But if possession originates while the title is in the government its adverse character attaches and becomes operative from the time the title passes from the goverment to a private owner: *Ibid.*

Where a party was in possession of land under claim of title from the United States government at the time that an adverse title was acquired, and remained in such possession for the period of limitation, *held*, that his defense as against such adverse title was complete: *Tremaine v. Weatherby*, 58–615.

Possession of public lands under claim of title does not create any right as against the grantee of the United States, unless continued for such length of time after the government parts with the title as to entitle the defendant to avail himself of the benefits of the statute: *Iowa R. Land Co. v. Adkins*, 38–351.

While the statute of limitations does not run against the government, there is no provision in law declaring that a citizen cannot hold adversely to the government, or hold under a claim of title against it: *Chicago, R. I. & P. R. Co. v. Allfree*, 64–500.

Where a person was in possession of land under color of title while the title was still in the United States government, and remained in such possession after the title passed from the government to the plaintiff for the full period of ten years, *held*, that he might plead such possession under color of title as against the government's grantee: *Ibid.*

Adverse possession makes it immaterial whether the title conveyed by patent issued by and divesting the title of the United States was in other respects good or not: *Bicknell v. Comstock*, 113 U. S., 149.

An entry made upon land even under the title of the owner may become thereafter adverse to such title and owner: *Hamilton v. Wright*, 30–480.

The possession of a mere trespasser who enters without color of title and claim of right will become adverse from the time he places on record a deed to him purporting to convey the title to the land. The taking and the recording of such deed will operate as a notice to the owner that the person in possession is no longer a trespasser, and the statute of limitations will begin to run from that time: *Ibid.*

Where possession is originally lawful a mere forcible entry thereon, not followed by continuous possession, will not prevent the statute from continuing to run. But otherwise if entry be peaceable and continuous possession thereunder is retained: *Pella v. Scholte*, 24–283.

Where, at the time a party wall was first used for the benefit of adjoining premises, it was used by a tenant for years of such premises as a support to a building erected by him, and a stipulated sum was paid by him to the person erecting such wall as rental for the use thereof, *held*, that the statute of limitations against an action to recover one-half the expense of such wall commenced to run only from the refusal of the person owning and occupying the adjoining premises to continue to pay such rental for the use of the wall: *Crapo v. Cameron*, 61–447.

Where title is obtained by adverse possession, such title must be presumed to continue until it is divested in some manner recognized by law. It may be sold and conveyed, and the party against whom it has become perfect can do nothing to in any manner impair it. The party in whom such title has become perfect will be deemed to be in possession, and actual occupancy is not essential to its continuance: *Heinrichs v. Terrell*, 65–25.

The seizin and possession of one tenant in common are the seizin and possession of others, and the statute of limitation will not operate in favor of the former to give him title by adverse possession unless it be sole and

exclusive and with the knowledge and acquiescence of the co-tenants: *Killmer v. Wuchner*, 74–359.

Seizin and possession of one tenant in common are the seizin and possession of the other. One can never be disseized by another without an actual ouster, to constitute which physical eviction is not required, but a possession attended with such circumstances as to evince a claim of exclusive right and title and the denial of the right of the other tenants to participate in the profits. Actual ouster and adverse possession might be inferred from sole possession and an exclusive reception and enjoyment of the rents and profits with the knowledge and implied acquiescence of the other tenant in common for the period of ten years: *Burns v. Byrne*, 45–285.

One going into possession as tenant in common is not to be regarded as holding adversely to the other tenants in common until eviction: *Shell v. Walker*, 54–386.

Under the peculiar facts of a particular case, *held*, that plaintiffs had never lost their title as tenants in common in the premises in controversy, and that there had been no act of defendant amounting to an ouster of plaintiffs or assertion of his title in severalty to the whole tract: *Hume v. Long*, 53–299.

The possession of a tenant in common is not adverse to his co-tenant. It may, however, become such, and is to be regarded as such, when the tenant in common holds possession under a claim of entire ownership and the co-tenant has knowledge of it. Such knowledge on the part of the co-tenant need not necessarily be shown by direct and positive evidence. It is sufficient if it is not shown to be otherwise, and the circumstances are such that it might reasonably be presumed that the co-tenant had such knowledge: *Knowles v. Brown*, 69–11.

In a particular case, *held*, that the possession by a co-tenant was of such character and so long continued, and the circumstances otherwise were such, that notice of his occupancy must be presumed to have come to his co-tenant, and his possession would be deemed adverse: *Ibid.*

It seems that exclusive occupancy by one tenant in common for a long time will constitute ouster of a co-tenant; but under the circumstances of a particular case, *held*, that an occupancy of seventeen years would not have that effect: *Flock v. Wyatt*, 49–466.

A person entering into possession as tenant in common is presumed to continue to hold in that manner, and not adversely, until he has done some act amounting to eviction of his co-tenant: *Shell v. Walker*, 54–386.

While possession of one tenant in common, however long continued, will not amount to adverse possession as against another tenant in common, yet a conveyance by one such tenant as his own, and possession taken by his grantee under such conveyance, amounts to ouster and disseizin of his co-tenant, and the recording of the deed, accompanied by actual and notorious possession in the grantee, is notice of such adverse claim, and from that time the statute will run: *Kinney v. Slattery*, 51–353.

One going into possession under a quitclaim deed from a tenant in common does not thereby assert adverse possession as against the other tenant in common so as to set the statute of limitations in motion: *Moore v. Antill*, 53–612. And see *Hume v. Long*, 53–299.

A person who has been in possession of property under color of title for such length of time that the statute of limitations has run in his favor cannot be required to relinquish his claim thereunder and rely only upon title to one-half of the property as tenant in common cast upon him by operation of law after the commencement of his possession: *De Long v. Mulcher*, 47–445.

Where a purchaser from a tenant in common of a portion of the common premises took possession thereof and asserted such ownership as to indicate his understanding and belief that he was the owner in severalty of the land thus purchased, and retained such possession beyond the statutory period, *held*, that he should be regarded as having held adversely to the co-tenants of his grantor, who had knowledge of the facts, and as having acquired title to the property by adverse possession, although the deed under which he held did not, as a matter of law, confer upon him any right in severalty: *Laraway v. Larue*, 63–407.

The rights of one tenant in common are not waived by the fact that another is not barred of his action as against an adverse possession by reason of minority: *Peters v. Jones*, 35–512.

An adverse claim of title must exist to enable defendant in an action for the recovery of land to plead the statute of limitations. So long as the relation of mortgagor and mortgagee or of trustee and *cestui que trust* exists between the parties neither can be considered as holding a claim adverse to the other: *Jordan v. Brown*, 56–281.

The possession of mortgagor or mortgagee under the mortgage is not to be considered as adverse to the other, and this is true where the possession is under a deed absolute in terms, but which is in law a mortgage: *Crawford v. Taylor*, 42–260.

The mere possession of a mortgagee will not be held adverse to the mortgagor, even after payment of the mortgage debt, so as to give him the benefit of the statute. Something beyond mere possession after payment is necessary to make such possession adverse: *Green v. Turner*, 38–112.

Possession of the mortgagor or his grantor or an incumbrancer is not adverse to that of the mortgagee: *Hodgdon v. Heidman*, 66–645.

And the grantee of the mortgagor under a conveyance subsequent to the mortgage holds adversely to the title of a purchaser at the sale under a foreclosure to which only the mortgagor was a party: *Jamison v. Perry*, 38–14, as explained in *Hodgdon v. Heidman*, 66–645.

A mortgagor or the grantee of a mortgagor or a subsequent incumbrancer in possession of land does not hold adversely to the mortgagee: *Hodgdon v. Heidman*, 66–645.

A party having possession under a bond for a deed providing that on default the grantor might declare the bond forfeited, and the grantee, his tenant at will, was held not to be in adverse possession against the grantor until notice to quit was served, although that was

not until more than ten years after default: *Austin v. Wilson*, 46-362.

The possession of the vendee under a bond to convey is, until the contract is declared forfeited by the vendor, regarded as that of a purchaser, and therefore adverse to that of a vendor: *Montgomery County v. Severson*, 64-326.

A vendor under bond for conveyance upon payment of the purchase money is regarded as a mortgagor until the vendor, if he may do so under the contract, declares such contract forfeited. Until such forfeiture, the vendee is regarded as a purchaser and holding as such, and his possession is therefore adverse to the vendor: *Ibid.*

A purchaser, going into possession in pursuance of a void sale under a deed of trust, has color of title, and his possession is adverse to that of the original grantor: *Gebhard v. Sattler*, 40-152.

A right by prescription cannot be set up in place of one which is held by grant to defeat the terms and conditions of the grant: *Mosle v. Kuhlman*, 40-108.

On judgments of courts of record: The order of a probate court allowing a claim is not a judgment within the statutory provision as to actions upon judgments: *Smith v. Shawhan*, 37-535.

Under a former statute not expressly specifying judgments, *held*, that an action upon a foreign judgment was not barred by the provisions as to actions upon bills, notes or writings obligatory for the payment of money or delivery of property, etc.: *Latourette v. Cook*, 3 G. Gr., 593.

Under former statutory provisions specifying judgments of courts of record and also actions upon bills, notes, etc., *held*, that an action upon the judgment of a justice of the peace was within the limitation relating to judgments of a court of record: *Danemuller v. Burton*, 4 G. Gr., 445.

A revival of a judgment by *scire facias* is not a new judgment against which the statute of limitations commences to run, but the period of limitation continues to run against the original judgment: *Meek v. Meek*, 45-294.

A judgment against a decedent must be filed as a claim under § 3625 or it will be barred as there specified: *Davis v. Shawhan*, 34-91.

3735. Fraud; mistake; trespass. 2530. In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of shall have been discovered by the party aggrieved. [R., § 2741; 13 G. A., ch. 167, § 9; C., '51, § 1660.]

A cause of action on account of fraud such as was heretofore cognizable in chancery commences to run from the time of the discovery of the fraud: *Cowin v. Toole*, 31-513.

The fraud contemplated in this section is only such as was heretofore solely cognizable in chancery: *Gebhard v. Sattler*, 40-152; *Brown v. Brown*, 44-349; *Phœnix Ins. Co. v. Dankwardt*, 47-432.

Where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception here made does not apply: *Relf v. Eberly*, 23-467; *McGinnis v. Hunt*, 47-668.

An action to rescind a contract for fraud, and set aside a deed and restore the parties to their rights prior to the fraud, is an action solely cognizable in a court of chancery, and the statute begins to run with the discovery of the fraud: *Relf v. Eberly*, 23-467.

Where plaintiff dismissed an action on a bond for specific performance upon defendant's testimony that a subsequent conveyance to a third person was without notice of plaintiff's rights, and subsequently learned that such testimony was false and the pretended conveyance was fraudulent, *held*, that the statute of limitations as against an action for relief from such fraud commenced to run from the discovery thereof, although the action on the bond was barred: *Muir v. Bozarth*, 44-499.

In actions brought by an assignee in bankruptcy to recover damages for fraud, the limitation of two years imposed by the statutes of the United States upon such actions commenced to run when the fraud is discovered: *Clews v. Traer*, 57-459.

An action for money paid by mistake of one party and fraudulently received and retained by the other is not an action for relief on the ground of fraud "in a case heretofore solely cognizable in a court of chancery," and therefore is barred in five years irrespective of the time of discovery of the fraud or mistake: *Higgins v. Mendenhall*, 51-135.

The cases of mistake referred to in the statutory provision are not limited to those cognizable solely in equity, but include such as are cognizable at law as well: *Higgins v. Mendenhall*, 42-675; *McGinnis v. Hunt*, 47-668; *Higgins v. Mendenhall*, 51-135.

The fact that a party might have discovered a mistake more than five years before bringing action will not defeat the recovery if he was lulled into security, and the belief that there was no mistake by the acts of the opposite party: *Manatt v. Starr*, 72-677.

This section is applicable to an action brought to enjoin the enforcement of a judgment rendered without jurisdiction, and such action does not become barred until after five years from the discovery of the mistake in taking judgment: *Gerrish v. Seaton*, 73-15.

In an action for relief on the ground of fraud, defendant pleading the statute of limitations must show that plaintiff had knowledge of the fraud more than five years before the action was brought: *Baldwin v. Tuttle*, 23-66; *Harlin v. Stevenson*, 30-371.

But the statute commences to run not merely from the actual discovery of the fraud, but from the time when it might, by the use of diligence, have been discovered: *Humphreys v. Matoon*, 43-556.

The recording of a deed is sufficient notice of any fraud in its execution to cause the statute to begin to run against an action based upon such fraud: *Bishop v. Knowles*, 53-268.

Where a sale is made under the provisions

of a deed of trust, which is void by reason of insufficiency of notice, and that fact appears upon the face of the conveyance, the grantor in the deed of trust is chargeable with notice of the fact that the sale is void from the time such deed is recorded: *Gebhard v. Sattler*, 40–152.

Where the cause of action is based on a fraudulent execution of a deed, the grantee will be deemed to have had notice of such fraud from the time the deed is filed for record, and the statute of limitations will commence to run from that time: *Laird v. Kilbourne*, 70–83.

Evidence in a particular case *held* sufficient to show that the discovery of the mistake relied upon was made within five years: *Eggspieller v. Nockles*, 58–649.

Where the petition alleges the discovery of the fraud which is the subject of the action, within five years, it is not subject to demurrer: *Shank v. Teeple*, 33–189.

While, in an action to recover on the ground of fraud, brought more than the statutory period after the commission of the fraud, it may be necessary for plaintiff to allege due diligence in the discovery of the fraud, yet objection for failure to allege due diligence not being raised in the lower court by motion or demurrer cannot be raised for the first time in the supreme court on appeal: *Clews v. Traer*, 57–459.

The statute will run against an action to recover taxes illegally exacted from the time of their payment, and not from the time that their illegality is discovered: *Callunan v. Madison County*, 45–561; *Beecher v. Clay County*, 52–140.

A tax-payer who is entitled to recover from the county for money paid in the purchase of land on which the taxes are not delinquent, and which is sold by the treasurer by mistake, may bring his action within five years from the discovery of such mistake: *Storm Lake Bank v. Buena Vista County*, 66–128.

3736. Open account. 2531. When there is a continuous open current account, the cause of action shall be deemed to have accrued on the date of the last item therein as proved on the trial. [R., § 2743; C., '51, § 1662.]

The statute commences to run from the date of the last item, whether debit or credit: *Thorn v. Moore*, 21–285; *Mills v. Davies*, 42–91; *Keller v. Jackson*, 58–629.

The account here contemplated is one which is not interrupted nor broken, not closed by settlement or otherwise, and is a running, connected series of transactions. Where there was a hiatus of two years, followed by an item of a different character than those before, *held*, that the last item was not properly a part of the same account: *Tucker v. Quimby*, 37–17.

A claim for work performed at different periods of time, under separate and distinct contracts, is not a continuous, open, current account: *Shorick v. Bruce*, 21–305.

Where the indebtedness was accruing daily, monthly or yearly for items of board, rent, etc., *held*, that it would constitute a current account: *Moser v. Crooks*, 32–172.

And so *held* in case of a charge for keeping and providing for another continuously: *Wendeling v. Besser*, 31–248.

Though a special contract be made as to a specific piece of work, the price thereof may still be a proper item of account: *Mills v. Davies*, 42–91.

An objection that a finding in an action upon an account is not on an issue submitted, because it shows that several items were furnished under a contract between the parties, is not well founded, because a recovery could be had upon the account although the items were furnished under a contract: *Haywood v. Woods*, 28–563.

The account in a particular case held to be an open account: *Wing v. Page*, 62–87.

A charge for money due on an executed contract may form one of the items of a running account: *Buford v. Funk*, 4 G. Gr., 493.

The fact that no date, or an incorrect date, was fixed to the account, or that it was not directly charged to any one, *held* not to prevent the provisions of this section from applying: *Tubbs v. Maquoketa*, 32–564.

In a case not involving the construction of this section, *held*, that an intervening statement of a balance did not prevent subsequent items from forming a portion of the same continuous account: *Lamb v. Hanneman*, 40–41.

An interval of one year and nine months between two of the consecutive items of an account, both of which were on the credit side, *held* not sufficient to show such break in the account or cessation of dealing as to cause the statute of limitations to commence to run, it appearing that all the items had relation to the same open and continuous transaction between the parties: *Keller v. Jackson*, 58–629.

Where, after the conclusion of the debit items of an account, the payment of the same was assumed by a third person who afterwards made payments thereon, *held*, that such payments were not to be treated as items of the account, and the running of the statute was determined by the date of the last debit item: *Hammond v. Hale*, 61–38.

Under a statute requiring an action to foreclose an account for a mechanic's lien to be brought within one year from the time the payment should have been made, *held*, that no item of the account of charges for which the lien was claimed should be considered as due before the date of the last item: *Merchand v. Cook*, 4 G. Gr., 115.

The claim of a public officer for compensation is not in the nature of an open account. Each one of several terms of office is to be deemed a separate employment: *Griffin v. Clay County*, 63–413.

Where, in such a case, plaintiff had confessed that his account was made up of separate causes of action, amending his petition and setting out the same in separate counts, *held*, that he could not afterwards, for the purpose of defeating the statutory bar, claim that they were parts of an open account: *Ibid.*

Under a statute which authorized defendant to be called as a witness to prove a cause of

action which was barred by the statute, *held*, that an account apparently barred was admissible for the purpose of forming a foundation to remove the bar by calling defendant as a witness: *Thorn v. Moore*, 21-285.

3737. Commencement of action. 2532. The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action. [R., § 2744; C., '51, § 1663.]

When deemed commenced: Where the original notice was not served until a month after the petition was filed, *held*, that the court would presume the notice was delivered to the sheriff at the time of the filing of the petition with the intent that it be served immediately, and that the commencement of the action would be presumed from that time: *Snyder v. Ives*, 42-157.

The action is not commenced or pending until the delivery of the notice to the sheriff, although the petition be previously filed: *Collins v. Bane*, 34-385.

However, in an injunction proceeding, *held*, that the filing of a petition and service of the writ operated to commence the action, although no original notice was served before the period of limitation had expired: *Sweatt v. Faville*, 23-321.

Where a petition was filed, but no original notice served and no jurisdiction over defendant obtained until appearance, which was after the expiration of the period of limitation, *held*, that the suit was not sufficiently begun by the filing of the petition to prevent the cause of action being barred: *Ewell v. Chicago & N. W. R. Co.*, 29 Fed. Rep., 57.

The intent in regard to immediate service of the notice which the statute contemplates should be a continuing intent. So where a notice was placed in the sheriff's hands, who neglected to serve the same, but afterwards returned it to the attorney, who lost it and afterwards had another notice served, *held*, that the action was not begun with the delivery of the first notice to the sheriff, and that the statutory period having expired before the second notice was placed in his hands, the action was barred: *Wolfender v. Barry*, 65-653.

Where an original notice was delivered to a constable in which the return day was left blank and was afterwards filled up by him and served, *held*, that such delivery of notice did not constitute a commencement of action within the meaning of the statute: *Phinney v. Donahue*, 67-192.

This section only fixes the time of commencement of actions with reference to the statute of limitations. Other statutory provisions determine what shall be deemed commencement of the action for other purposes: *Parkyn v. Travis*, 50-436. And see notes to § 3804.

Amendments: The filing of an amended petition, if the cause of action remains the same, does not affect the question as to whether the action is brought in time: *Cobb v. Illinois Cent. R. Co.*, 38-601, 626.

Where an action was commenced in the name of two parties as executors before the period of limitation had expired, but after the expiration of such period an amended petition was filed by one only claiming as sole heir, *held*, that as the amendment was allowed without objection, defendant could not claim that the action as made by amendment was a different one from that originally commenced: *Wade v. Clark*, 52-158.

An amendment to the petition claiming additional damages, and predicated upon the same cause of action on which the original petition was founded, may be interposed after the time for bringing action on the original cause of action has expired, provided that the action on which such amendment was filed has been brought within the proper time: *Cooper v. Mills County*, 69-350.

Where the original petition, although not stating all the facts necessary in law to enable plaintiff to succeed in the action, was not attacked by demurrer or motion, *held*, that the fact that the party afterwards filed an amendment thereto after the time when, but for the commencement of the original action, the statute of limitations would have barred the action, would not deprive plaintiff of the benefit of having brought his action within the proper time: *Myers v. Kirt*, 68-124.

Where an amendment filed after the action is brought does not pertain to the cause of action so far that a new cause of action is presented, but simply alleges facts supporting plaintiff's right of recovery, the action is not barred: *Barke v. Early*, 72-273.

In a proper case plaintiff may change his claim as to the remedy and ask different relief without presenting a new cause of action: *Case v. Blood*, 71-632.

3738. Non-residence. 2533. The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described. [R., § 2745; C., '51, § 1664.]

Under this section, *held*, that residence and not citizenship was within the contemplation of the statute: *Savage v. Scott*, 45-130.

A person on his decease ceases to be a non-resident. The disability of non-residence ends with his death: *Ibid.*

The statute commences to run in favor of a defendant having a residence in this state of such character as would subject him to process of the courts of this state. Residence, and not citizenship or domicile, determines the running of the statute: *Ibid.*

Under the statute of limitations of Nebraska, *held*, that the mere temporary absence of a

debtor from the state where he has a usual place of residence, such that service of summons might be had upon him, does not suspend the statute of limitations, and it was so held where defendant, though an unmarried man, had in the state a house or rooms, which he owned or leased, furnished for his home and place of residence, and still his home and residence while temporarily absent: *Thomas v. Brewer*, 55–227.

A foreign corporation doing business within the state in such way that action might be brought against it and jurisdiction obtained in the state courts may take advantage of the statutory limitation, and is not to be deemed a non-resident: *Wall v. Chicago & N. W. R. Co.*, 69–498; *McCabe v. Illinois Cent. R. Co.*, 4 McCrary, 492; *Guinn v. Iowa Cent. R. Co.*, 4 McCrary, 576.

The fact that a non-resident land owner has had a tenant in possession of the property, against whom action might have been brought under § 4476, will not cause the statute of limitations to run in favor of such non-resident owner: *Heaton v. Fryberger*, 38–185, 196.

The expressions "out of this territory" and "the time of such person's absence," occurring in the corresponding section of the act of February 15, 1843, relating to the same subject, *held* to mean such an absence as suspended the power to commence action against such party in any of the methods provided by law: but not a mere temporary absence, during which the family of the party remained at his usual place of abode, and service of notice might have been had upon him by leaving a copy with some member of such family: *Penley v. Waterhouse*, 1–498.

The term beyond seas, used in a previous statute as indicating an exception to the running of the statute, was held to be considered as beyond the limits of the United States, and not merely as beyond the limits of the state: *Darling v. Meachum*, 2 G. Gr., 602.

If, by reason of non-residence of the debtor, an action on a note is not barred, neither is the action to foreclose a mortgage securing the same: *Clinton County v. Cox*, 37–570.

Where the only evidence of absence from the state was that defendant went east, *held*, that non-residence did not sufficiently appear in order to defeat the defense: *Tremaine v. Weatherby*, 58–615.

Where a person leaves the state in the employ of the general government, with the intention of returning when such employment shall cease, but the time of his returning is indefinite, and he retains no domicile in the state, he is to be deemed a non-resident: *Hedges v. Jones*, 63–573.

When a note shows on its face that it is barred by the statute of limitations, and defendant's answer denies the indebtedness and interposes the plea of the statute, judgment should not be rendered against defendant by default without proof of his not having been a non-resident of the state through the period of limitation: *Smith v. Gage*, 31–27.

It appearing that defendant was not a resident of the state where a judgment was recovered against him in 1850, nor subsequently when revivors thereof were had, and that he resided in this state in 1873, at the time of commencement of suit against him upon such judgment, *held*, that under the facts a presumption arose that he had resided here continuously from a period anterior to the rendering of the judgment in 1850: *Meek v. Meek*, 45–294.

When defendant pleading the statute of limitations shows when the statute commenced to run, the burden of proving an exception by reason of non-residence is upon the party relying thereon: *Evans v. Montgomery*, 50–325.

Heirs of a person dying in this state, and who have themselves been residents of the state, cannot be presumed in the absence of evidence to have afterwards been non-residents: *Laird v. Kilbourne*, 70–83.

Under previous statutes exempting the property of volunteers in the United States military service from execution or attachment, providing that the statute of limitations should not run in favor of such volunteer, *held*, that an action to enforce a mechanic's lien against the property of such volunteer did not commence to run until after his discharge from the service: *Edwards v. McCaddon*, 20–520.

Held, also, that such provision did not apply in case of action by a soldier against one not in the military service: *Hulbert v. Hopkins*, 33–122.

The statutory provisions applied in a particular case: *Gray v. Spanton*, 35–508.

3739. Bar in foreign jurisdiction. 2534. When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state. [13 G. A., ch. 167, § 10; C., '51, § 1665.]

If the cause of action did not arise in this state, the fact that defendant resided here before going to the state where the cause of action became barred, will not prevent his taking advantage of such bar in a subsequent suit here: *Lloyd v. Perry*, 32–144.

The use of the words "has previously resided" does not imply that the defendant interposing the plea of bar must at such time be a resident of this state. That plea may be interposed by either a resident or a non-resident: *Lebrecht v. Wilcoxon*, 40–93.

Aside from statute the rule is that a debt barred by the statute of the state in which it was contracted is not barred by the laws of another state in which suit may be brought. To enable a party to avail himself of the provisions of our statute to the contrary, he must show that he has, previous to his removal to this state, resided in another state by the laws of which the cause of action has been fully barred: *Sloan v. Waugh*, 18–224; *Petchell v. Hopkins*, 19–531.

A party must rely upon either the domestic

or foreign bar. He cannot weld the time which elapsed before he came to this state to that which elapsed thereafter, in order to obtain the years requisite to constitute a bar under our statute: *Sloan v. Waugh*, 18–224.

As against an indebtedness contracted while defendant was a resident of another state, the statute only commences to run when he becomes a resident of this state (unless the claim was then barred as here provided): *Petchell v. Hopkins*, 19–531.

It will not be presumed that because notes are barred by the law of the state where the defendant has previously resided a mortgage given to secure them is also barred thereby: *Gillett v. Hill*, 32–220.

Before the change of the statute in 1870, which added the last sentence to this section, *held*, that the provisions as to the bar of a foreign statute fully completed were applicable to actions arising within the state, if they were general in their nature, so that they might have been prosecuted where defendant resided: *Davis v. Harper*, 48–513.

And *held*, also, that where a cause of action arising in this state had thus become barred under the laws of a foreign state, the subsequent enactment of the statutory provision of 1870 did not remove such bar: *Thompson v. Read*, 41–48.

A cause of action for the recovery of taxes paid by a person claiming to be the owner of real estate, but against the one subsequently adjudged by the owner thereof, is a cause of action arising in this state under the statutory provision: *Bradley v. Cole*, 67–650.

3740. Minors and insane persons. 2535. The times limited for actions herein, except those brought for penalties and forfeitures, shall, in favor of minors as defined by this code, and persons insane, be extended so that they shall have one year from and after the termination of such disability within which to commence said actions. [R., § 2747; C., '51, § 1666.]

By this section action for the recovery of real property must be brought by a minor within one year after attaining majority, when the ten years' limitation expires during the year or during minority. If the limitation runs for more than a year after majority the minor's rights are the same as those of an adult: *Campbell v. Long*, 20-382.

The statute of limitations will not bar an action by a minor brought before the termination of his minority: *McGinnis v. Edgell*, 39–419.

The statute commences to run during infancy, but the action is not barred until at least one year after majority: *Mathews v. Stephens*, 39–279.

Where the minor owns as tenant in common with others, the fact that his claim or right is kept alive by this exception in his favor will not keep alive the claims of his co-tenants: *Peters v. Jones*, 35–572.

Under § 1377 extending in favor of a minor the time for redeeming from a tax sale to a year "after such liability is removed," *held*, that such disability was removed by death and the redemption must be made within the year following and not afterwards: *Gibbs v. Sawyer*, 48–443.

Under the Revision there was no such exception in favor of insane persons, nor was there at common law: *Shorick v. Bruce*, 21–305.

Where plaintiff, within one year after attaining his majority, brought action to redeem from a tax sale made during his minority, claiming title by virtue of a bond for a deed executed more than ten years previously, *held*, that the right which the grantor in the title bond would have to interpose the defense of the statute of limitations, against any claim of plaintiff thereunder, passed to defendant by the tax deed and might be interposed by him against plaintiff's action to redeem: *Byington v. Stone*, 51–317.

3741. Death; exception. 2536. If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided for, the limitation above mentioned shall not apply until one year after such death. [R., § 2748; C., '51, § 1667.]

3742. Failure of action. 2537. If after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first. [R., § 2749; C., '51, § 1668.]

This provision applies when no judgment on the merits has been rendered and another suit is brought on the same cause of action. If judgment on the merits is rendered in the first suit it will bar a new one: *McDonald v. Jackson*, 55–37.

This section will not operate to extend the period of limitation where a condition precedent to the right to bring the action has not been complied with in proper time, for instance, the presentation of the claim to a board of directors: *District T'p v. District T'p*, 62–30.

Nor will this provision apply to dismissal of an action by plaintiff unless such dismissal is compulsory. Therefore, *held*, that where plaintiff voluntarily dismissed his action for the reason that he found that he could not obtain justice in the court in which the cause was pending, a new action brought by him after the expiration of the period of limitation, but within six months after the dismissal of the preceding action, was barred: *Archer v. Chicago, B. & Q. R. Co.*, 65–611.

Under this statutory provision the fact that the first suit was discontinued (under § 3805),

for failure of plaintiff's attorney to file the petition by the time fixed in the notice, constitutes such negligence as to prevent another suit on the same cause of action being brought after the expiration of the statutory period of limitation: *Clark v. Stevens*, 55–361.

3743. Bank bills. 2538. The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall, in other respects, be applicable to all actions brought by or against all bodies corporate and politic, except when otherwise expressly declared. [R., § 2750; C., '51, § 1669.]

The state is not intended to be included among bodies corporate and politic here referred to, and the statute does not run against it: *Des Moines County v. Harker*, 34–84.

But the statute does run as against counties and cities: See notes to § 3734.

3744. Admission in writing. 2539. Causes of action founded on contract, are revived by an admission that the debt is unpaid as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby. [R., § 2751; C., '51, § 1670.]

What sufficient admission: An admission should not be excluded because made on Sunday: *Ayers v. Bane*, 39–518.

Partial payments and indorsements thereof on a promissory note are not sufficient to prevent the bar of the statute. The rule was different before the adoption of the statutory provision, but as the statute applies to the remedy, it is not unconstitutional as affecting contracts already made: *Parsons v. Carey*, 28–431; *Harrencourt v. Merritt*, 29–71; *Roberts v. Hammon*, 29–128.

An indorsement of part payment made on a note signed by the maker of the note does not constitute such admission that the debt is unpaid and a new promise to pay the same as is required to revive the debt: *Hale v. Wilson*, 70–311.

Without determining whether an indorsement of payment, signed by the party to be charged, would remove the bar of the statute, *held*, that such indorsement, signed by the treasurer of a district township, had no such effect, as he had no authority to bind such township by his contracts or admissions: *Carpenter v. District Tp*, 58–335.

A payment upon a current account before it becomes barred will prevent the statute from running as to any part of the account until five years from such payment: *Thorn v. Moore*, 21–285.

A new promise to pay a debt at a different time and in a different manner from that of the original contract is not a new agreement, but only a new promise, and cannot be enforced unless it is in writing as required by statute: *Price v. Price*, 34–404.

An agreement extending time on the original obligation without a new consideration does not suspend the right of action on such obligation, and therefore does not prevent the statute of limitations from running: *Ibid.*

Where a party is in default as to a debt or obligation, the right of action arises at the time liability accrues, and the statute of limitations begins to run from the time that defendant first becomes liable. Indulgence extended by a party to whom defendant is bound, or anything short of the extinction of the liability, or the commencement of an action, will not defeat the statute. Subsequent promises to comply with the obligation will not make a new cause of action: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Whether an admission would be good, if made to one not a party in interest or the agent of such party, *quære: Collins v. Bane*, 34–385, 389; *Palmer v. Butler*, 36–576.

But the admission need not show to whom it was made: *Mahon v. Cooley*, 36–479.

A writing admitting the debt proven to be by the party sought to be charged, but not signed by him, is not admissible, and the oral testimony of defendant that the debt in controversy is the one referred to in certain written admissions is not competent, not being an admission in writing: *Collins v. Bane*, 34–385, 390.

A renewal of notes evidencing partnership indebtedness made by the surviving member of the firm, *held* sufficient to remove the bar of the statute of limitations as to an action to enforce the payment of the indebtedness out of firm property held by the representatives of the surviving partner: *Van Staden v. Kline*, 64–180.

Where a mortgagor, in executing a second mortgage to persons as trustees under a will expressly stated that it was subject to a prior mortgage held by the same persons as trustees of the will of a different person, *held*, that the recital in the second mortgage was a sufficient admission to the mortgagees, so far as they held under the first mortgage, to take the case out of the statute of limitations, and amounted to a sufficient admission of the existence of the previous mortgage to authorize the inference of a promise to pay the same: *Palmer v. Butler*, 36–576.

A proposition to compromise is not a new promise to pay and does not revive the debt: *Morehead v. Gallinger*, 9–519; *Brenneman v. Edwards*, 55–374.

As to the sufficiency of statements in letters to constitute admissions or new promises, see *Bayliss v. Street*, 51–627; *Oakson v. Beach*, 36–171.

The first part of the statutory provision already set out relating to admissions or new promises simply declares the common-law rule. An acknowledgment of the debt is a sufficient admission, but it seems that if the

admission or acknowledgment is coupled with the expression of an unwillingness to pay and an intention not to pay, it will not revive the debt: *Penley v. Waterhouse*, 3-418.

Parol evidence may be received to show that a letter containing an admission was addressed to the plaintiff by defendant, and referred to the account in suit, but the amount of the recovery must be limited to the amount therein admitted: *Wise v. Adair*, 50-104.

In a particular case, *held*, that oral testimony was admissible to show that a letter addressed "Dear cousin" was sent to one having a beneficial interest in the note sued on, and therefore constituted an admission taking such note out of the statute of limitations: *Collins v. Bane*, 34-385.

The question whether a writing sufficiently identifies and refers to the claim in suit in order to constitute an admission taking such claim out of the statute of limitations is one of intention, and is properly left to the jury: *Ibid.*

The burden of proof is upon plaintiff to show that the acknowledgment has reference to the claim which he sets out, but the question whether it has reference to such claim or not is for the jury: *Dixon v. State*, 3-416.

After a debt has been revived by an admission, the statute commences to run anew against the original cause of action, and will run for the same length of time as against the original claim: *Bayliss v. Street*, 51-627.

Original action revived: The subsequent promise is to be considered as a waiver of the statute or the bar created by the statute: *Penley v. Waterhouse*, 3-418.

An admission or new promise may be made before the bar of the statute becomes complete as well as afterwards: *Ibid.*; *Lindsey v. Lyman*, 37-206.

A new consideration is not necessary to support it. The action should be brought on the original cause of action and not on such admission or new promise: *Frisbee v. Seaman*, 49-95.

Either an admission or new promise is sufficient. Both are not necessary: *Mahon v. Cooley*, 36-479; *Ayres v. Bane*, 29-518.

A new promise which operates to keep alive a debt will also keep alive the lien of a mortgage given to secure the same: *Clinton County v. Cox*, 37-570.

An admission of the husband, without the wife's consent, will keep alive the lien of a mortgage given on the homestead to secure the debt: *Mahon v. Cooley*, 36-479.

A renewal by acknowledgment or new promise, made prior to the sale of the premises mortgaged to secure the debt so renewed, will be binding on the vendee thereof, and he cannot set up the statute of limitations against such mortgage: *Palmer v. Butler*, 36-576.

But it is otherwise if the renewal is made subsequently to the sale: *Day v. Baldwin*, 34-380.

Where a junior mortgage was taken while a senior mortgage was in existence and not barred by the statute of limitations, and the senior mortgage afterward became barred, but was subsequently revived by a new promise of the mortgagor to pay the debt, made while the junior mortgage was in process of foreclosure, *held*, that no equities having intervened in favor of junior mortgagee, the debt secured by the senior mortgage was still a prior lien to that of the junior mortgage: *Kerndt v. Porterfield*, 56-412.

3745. Counter-claim. 2540. A counter-claim may be plead as a defense to any cause of action, notwithstanding the same is barred by the provisions of this chapter, if such counter-claim so pleaded was the property of the party pleading it at the time it became barred, and the same was not barred at the time the claim sued on originated; but no judgment thereon except for costs can be rendered in favor of the party so pleading the same. [R., § 2752.]

Any counter-claim which is authorized by § 3865 may be pleaded as a counter-claim, notwithstanding it is barred, and the statutory provision in that respect is not limited to counter-claims which were strictly so named under previous statutes: *Folsom v. Winch*, 63-477.

No recovery can be allowed on a counter-claim, which is thus interposed, although barred, for any amount over and above the amount of plaintiff's claim, such being the express statutory provision: *Ibid.*

Special statutes of limitation with reference to the time of filing claims against an estate do not apply to an offset interposed by a person who is sued by an administrator to recover a debt due from him to the estate: *Ware v. Howley*, 68-633.

A claim against one who is an heir may be properly set up against him in settling his distributive share of the estate, although such claim be barred by the statute of limitations. But the pendency of proceedings in chancery for the settlement of the estate, which are in no sense an action on the claim, will not prevent the statute from running, and, after sufficient time, would defeat an action at law on the claim: *Garrett v. Pierson*, 29-304.

Section applied: *Allen v. Maddox*, 40-124.

3746. Injunction. 2541. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action.

3747. School fund. 2542. The provisions of this chapter shall not be applicable to any action brought on any contract for any part of the school fund. [9 G. A., ch. 148, § 13.]

For similar provision, see § 3041.

CHAPTER 3.

OF PARTIES TO AN ACTION.

3748. Party in interest. 2543. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section. [R., § 2757; C., '51, § 1676.]

Real party in interest: The party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee and liable to account to another for the proceeds of the recovery; but defendant in such cases may interpose any defense which he may have against the party beneficially interested. The party beneficially interested may also sue in his own name: *Cottle v. Cole*, 20–481; *Farwell v. Tyler*, 5–535; *Pearson v. Cummings*, 28–344.

Holder of note: An indorsee may sue in his own name, although he holds the note only as security: *Sheldon v. Middleton*, 10–17.

Where a promissory note is indorsed as collateral security, the title passes to the indorsee, who may sue on it in his own name without averring or showing that the indebtedness is *bona fide*: *McCarty v. Clark*, 10–588.

A party holding a note and mortgage by written assignment may sue thereon although he holds the same only for collection: *Mann v. Cross*, 9–327.

Where it appeared that the owner of negotiable instruments had deposited them with his agent as collateral security for another party, and to be applied in payment of the debt so secured, *held*, that such other party became the owner thereof in such sense that he might have brought action on the securities in his own name as owner, and therefore that the death of the original owner did not terminate the right of such agent to possession of the notes and their proceeds: *Bennett v. Stoddard*, 58–654.

The holder of notes secured by mortgage remains the real party in interest although he has assigned the mortgage securing such notes without an assignment of the notes themselves: *Swan v. Yaple*, 35–248.

The real party in interest may sue on a negotiable note, although he is not the payee or indorsee: *McDowell v. Bartlett*, 14–157.

He may be entitled to sue under an assignment made otherwise than by indorsement: *Warnock v. Richardson*, 50–450; *Allison v. Parrett*, 16–278.

A verbal assignment will be sufficient to enable the assignee of a note to sue: *Green v. Marble*, 37–95.

The holder without indorsement of a promissory note payable to the order of payee may maintain an action thereon in his own name: *Trustees of Northwestern College v. Schwagler*, 37–577.

Where a note intended for a principal was executed to the agent of such principal, who died without having transferred it, and no administration on the estate was granted, *held*, that the principal might sue on the note in his own name: *McDowell v. Bartlett*, 14–157.

Where a note left with an agent, after maturity for collection by him, was wrongfully converted to his own use, and afterwards seized under execution and sold as his property to plaintiff, *held*, that plaintiff had not become the owner and could not sue thereon, not being the real party in interest: *McCormick v. Williams*, 54–50.

A person in possession of a note payable to bearer may maintain suit thereon in his own name: *Allensworth v. Moore*, 3 G. Gr., 273; *Riggs v. Price*, 3 G. Gr., 334.

A party who assigns notes and mortgages as securities, but afterwards pays off the indebtedness for which such assignment of the instruments is made, and regains possession of the instruments, may maintain action thereon as the real party in interest without a written re-assignment: *Norris v. Hix*, 74–524.

A party in possession of a non-negotiable note, payable to another, may bring suit thereon in his own name: *Rising v. Teabout*, 73–419.

A party suing on an instrument not negotiable by delivery, and not payable to or indorsed to him, must show by what right he claims to sue. It is not sufficient to aver simply that he is the owner: *Montague v. Reineger*, 11–503.

A party suing on a note must have the legal property or beneficial interest. A surety, prior to the payment of the note, has no right therein as against the principal: *Dennison v. Soper*, 33–183.

The assignee of a chose in action may sue thereon in his own name: *Roberts v. Corbin*, 26–315, 325.

The assignee by verbal assignment of an instrument of guaranty may sue thereon: *Green v. Marble*, 37–95.

One who has possession of a county warrant assigned to bearer may bring action thereon in his own name: *McCormick v. Grundy County*, 24–382.

The assignee of a bond by parol assignment may sue thereon: *Conyngham v. Smith*, 16–471.

Where plaintiff sued as assignee of a bond, the assignor thereof being made party defendant and admitting such assignment of record, *held*, that the obligor in the bond could not object that plaintiff was not the owner: *Burrows v. Stryker*, 47–477.

Where the lessor had subsequently to the lease sold the premises, but had not assigned the contract of lease, *held*, that he might bring action in his own name under the lease against the lessee and a party who had guaranteed the payment of the rent, and that the vendee might not maintain such action, although he might have sued lessee alone for the rent: *McLott v. Savery*, 11–323.

A promise made to a person holding a lien is transferable with the lien to an assignee, and

the surviving partner in the name of the firm: *Hosmer v. Burke*, 26-353.

Heirs: Where one became entitled to a distributive share in an estate, *held*, that at her death it vested in her administrator, and he alone could recover the same for the use of the estate, to be expended in the payment of debts thereof and to be distributed to the heirs, and that the heirs were not proper parties to maintain an action for its recovery: *Rhodes v. Stout*, 26-313.

The heirs are not the real parties in interest as to a cause of action in favor of the ancestor, although no administration on his estate has been taken out, where it does not appear that the time for the original application for administration has expired: *Haynes v. Harris*, 33-516; *Baird v. Brooks*, 65-40.

But if the period for granting administration has expired without an administrator being appointed, action on such a note may be maintained by the heirs as the real parties in interest: *Phinny v. Warren*, 52-332.

As to suits by administrators, see notes to next section.

Action by or against boat or vessel: Whilst under former statutes suits were authorized to be instituted against a boat or vessel by name, such statutes did not authorize any such boat or vessel to bring suit or sue out any writ or process in that name: *Steamboat Kentucky v. Hine*, 1 G. Gr., 379.

An action cannot be prosecuted in a name which is not that of a partnership, corporation or person. "Steamboat Pembinaw and owners," *held* not to be the name of a party in whose name action might be prosecuted: *Steamboat Pembinaw v. Wilson*, 11-479.

Misnomer of corporation: Where the corporate name was "The Trustees of Algona College," and a judgment was obtained against the corporation in the name of "Algona College," *held*, that the judgment was not void by reason of the misnomer: *Wilson v. Baker*, 52-423.

Unincorporated association: None but a natural or artificial person can become a party to a suit. Action cannot be maintained in the name of an unincorporated association, nor by a third person on a note made for the benefit of such association: *Nightingale v. Barney*, 4 G. Gr., 106.

Such an association cannot sue in that character, nor can individual members thereof prosecute a suit in behalf of other members: *Pipe v. Bateman*, 1-369.

It is not proper for a tax-payer to bring an action in the name of the school district to recover damages against the members of the board of directors individually for an improper location of a school-house: *Independent Dist. ex rel. v. Gookin*, 72-387.

Substitution of proper party: Where objection is made to the capacity of a plaintiff to bring suit, the court may allow the name of the proper party to be substituted. A plea of abatement on that ground is no longer allowed: *Roop v. Clark*, 4 G. Gr., 294.

Where an action was brought by a plaintiff who was not a proper party to bring action, and he afterwards withdrew and the proper plaintiff was substituted, *held*, that the action was not thereby dismissed: *Griffin v. Sheley*, 55-513.

Persons who are already parties to a proceeding in any capacity are bound to take notice of an order of substitution by which they are made parties in another capacity: *MacGregor v. Gardner*, 14-326.

Want of capacity; who may raise: The fact that one of several co-plaintiffs has not legal capacity to sue is not a ground of demurrer. The proper remedy in such case is by motion to strike from the petition the name of the party improperly joined: *District T'p v. District T'p*, 44-512.

Want of capacity in one of several defendants cannot be raised as a ground of objection by a co-defendant: *Ibid.*

3749. Exception. 2544. An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted. [R., § 2758; C., '51, § 1676.]

An administrator may be properly joined in a bill in equity by parties jointly interested with his intestate seeking to set aside a judgment in partition of lands: *Powell v. Spaulding*, 3 G. Gr., 443.

Where a bond in a replevin suit concerning property of an intestate was made payable to the executor in his individual capacity, *held*, that he might sue thereon either in his representative capacity or individually: *Oliver v. Townsend*, 16-430.

Where decedent gave defendant a title bond to real estate, receiving notes for the purchase money, and afterwards bequeathed and devised the notes and the title to the property with power to convey to plaintiff, who was also executrix of his will, *held*, that the latter had an election to sue on the notes and for foreclosure either individually or as executrix: *Grimmell v. Warner*, 21-11.

Trustee: The beneficiary in a trust deed may sue in his own name: *Devin v. Hendershott*, 32-192.

The penalty of a bail bond being payable into the county treasury for the benefit of the school fund renders the county such a "trustee" therefor that it may bring action for such penalty: *Shelby County v. Simmonds*, 33-345.

Where a contract is made with an agent or trustee, the real party in interest may sue in his own name without joining such agent or trustee, or the latter may sue without joining the former: *Rice v. Savery*, 22-470.

An action on an instrument made payable to trustees for the benefit of, and to secure repayment to, subscribers to a fund of the amount subscribed and paid by them may be brought by the subscribers who have not been paid, and any subscriber, if he were the only

may be enforced in an action by the assignee in his own name: *Barker v. Guilliam*, 5-510.

It would seem that the mortgagee of property might maintain an action on a policy of insurance issued to the mortgagor and assigned to the mortgagee after loss, notwithstanding a provision therein prohibiting its assignment: *Merchon v. National Ins. Co.*, 34-87.

If the claim is assigned in fact, though merely for the purpose of action, defendant cannot object that suit is brought by the assignee even if there is no consideration therefor: *Gere v. Council Bluffs Ins. Co.*, 67-272.

An assignment absolute in form vests plaintiff with the title and property in the claim, and is sufficient to enable the assignee to bring action thereon in his own name, although the assignment to him is merely in trust: *Goodnow v. Litchfield*, 63-275.

Where a policy of insurance was taken out in the name of the owner and assigned to the mortgagee as his interest might appear, *held*, that an action on such policy might be brought by the owner to recover the entire amount of the loss due thereon, there being ample power in the court to enter such judgment in the case as would fully protect the rights of all parties: *Stevens v. Citizens' Ins. Co.*, 69-658.

The assignee of a personal action for tort may maintain an action thereon. His right of action will not be defeated by reason of an agreement made at the time of the assignment to pay a portion of the amount recovered to the assignor: *Vimont v. Chicago & N. W. R. Co.*, 64-513.

The assignee of a cause of action may bring action thereon as the real party in interest, although the intention of the assignment was to prevent a removal of the cause to the federal courts: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

The fact that an action is being prosecuted by the attorney under a champertous contract, or that plaintiff is prosecuting the action under an assignment by a corporation which it has no power to make, cannot be set up to defeat the action: *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

A note payable to payee or order may be assigned without indorsement so that (under § 3751, the assignee may sue in his own name, but subject to any defense or set-off existing in behalf of the maker against the assignor, before notice of assignment: *Younker v. Martin*, 18-143; *Pearson v. Cummings*, 28-344.

A transfer by a separate instrument is an assignment and not an indorsement: *Franklin v. Twogood*, 18-515.

A valid verbal transfer of an account will enable the transferee to bring action thereon: *West v. Moody*, 33-137.

One to whom an account is assigned with an agreement on his part to pay over the proceeds realized is the real party in interest entitled to sue on the account, and such a transaction does not constitute champerty: *Knadler v. Stoop*, 36-232.

A judgment may be assigned, and action thereon should be prosecuted in the name of the assignee: *Edmonds v. Montgomery*, 1-143.

Where a party, having recovered a judgment for the possession of certain land, conveyed such land to another, *held*, that the grantee became entitled to the benefit of such judgment: *Wright v. Parks*, 10-342.

The assignee of a judgment may sue thereon in his own name: *Charles v. Haskins*, 11-329.

One to whom a judgment has been assigned without consideration for the purpose of enabling him to bring action thereon may prosecute a suit to enforce its collection as the real party in interest, being the holder of the legal title: *Searing v. Berry*, 58-20.

Holder of legal title to real property: The holder of the legal title to real property may sue for trespass, although another party is entitled to the proceeds of the recovery: *State v. Butterworth*, 2-158.

Where property is sold to one person and at his request conveyed to another for a special purpose, the one to whom it is actually sold is the proper party plaintiff to a suit to recover for fraudulent representations in the sale: *Phillips v. Bush*, 15-64.

The holder of the legal title of real property is the real party in interest in an action for the recovery thereof, although he be under obligation to account to another for the proceeds: *Boardman v. Beckwith*, 18-292.

Where the lessor of premises conveys the same, the right to collect rents afterwards accruing and payable is in the vendee, and he may recover the same in an action in his own name: *Abercrombie v. Redpath*, 1-111.

A party who has conveyed his interest in property cannot thereafter maintain an action to quiet title to the land so conveyed: *Page County v. Burlington & M. R. R. Co.*, 40-520

Where a party sued for relief in regard to property which it appeared he had before conveyed, *held*, that the burden of proof was upon him to show that as warrantor or otherwise he had such interest as to entitle him to maintain the action: *Harlow v. Gow*, 44-533.

As to transfer of interest in the subject-matter during the pending of the action, see § 3766 and notes.

One partner cannot maintain an action on an indebtedness due to the partnership: *Sypher v. Savery*, 39-258.

A surviving partner of a firm is the real party in interest as to claims existing in favor of the partnership, and he should sue as surviving partner without joining the representatives of the deceased partner: *Brown v. Allen*, 35-306.

Where, by the terms of dissolution of a partnership, the proceeds of indebtedness due the firm was to be applied to the extinguishment of indebtedness due from the firm to one partner, *held*, that action to recover such indebtedness was properly brought in the firm name, and that the partner entitled to the proceeds was not the real party in interest in such sense that the action must be brought in his name: *White v. Savery*, 50-515.

Where payment was made of a partnership note by the administrator of a deceased partner out of the assets of the estate, such note having been allowed by the court as a claim against such estate, and an action was brought by an administrator against the surviving partner for contribution, *held*, that such administrator was the proper party plaintiff, and not

unpaid subscriber, might bring such action for himself. But as to whether one such subscriber might bring the action for the amount for which he was entitled, if there were other unpaid subscribers, the court were not agreed: *Ibid.*

Where a subscription was made payable to the treasurer of an unincorporated association, *held*, that he might sue thereon in his own name: *McDonald v. Gray*, 11–508.

The trustee of an unincorporated association may sue in his own name for the benefit of the association as the trustee of an express trust: *Laughlin v. Greene*, 14–92; *Arts v. Guthrie*, 75–674.

While the beneficiary may bring action in his own name to foreclose a deed of trust, it is necessary that the trustee of the legal title be made a party: *Tucker v. Silver*, 9–261.

An assignee suing by virtue of an assignment in writing of a cause of action, by setting out the assignment by way of exhibit to his petition, sufficiently shows that he sues as trustee of an express trust, without further allegation: *Goodnow v. Litchfield*, 67–691; *Goodnow v. Oakley*, 68–25.

Action by agent: Where a contract is made in the name of a person acting as agent for another, and the promise is made to him, he is the real party having the legal interest, and may sue thereon: *Fear v. Jones*, 6–169.

An agent who is left in charge of real property has no such interest therein as to enable him to maintain in his own name an action for the possession thereof: *McHenry v. Painter*, 58–365.

An action to recover damages for mistake in transmitting a message by a broker to his principal may be brought by the principal in his own name: *Aiken v. Western Union Tel. Co.*, 69–31.

Person for whose benefit contract is made: Where one party purchased a stock of goods coupled with an agreement on the part of the seller not to engage in the same business, *held*, that the purchaser might maintain an action for the breach of such agreement, although the purchase was made for the benefit of a third party: *Moorehead v. Hyde*, 38–382.

Where plaintiff had contracted with different persons to furnish him grain, agreeing to procure for them transportation to the common destination of the grain, *held*, that he might be a proper party plaintiff in an action against a carrier for refusing to transport the grain when tendered by the respective sellers: *Cobb v. Illinois Cent. R. Co.*, 38–601.

In an action brought by a party to recover an amount deposited by him for himself and others as a wager, *held*, that the contract being void, he could not recover as the "party with whom or in whose name a contract is made," but could only recover the amount of the deposit belonging to him individually: *Toney v. Snyder*, 50–73.

Where a box belonging to two persons jointly, containing personal property of each, was taken by a common carrier for transportation under a contract with them jointly, *held*, that they might join in an action on the contract for the loss of the property as the parties with whom the contract was made: *Anderson v. Wabash, St. L. & P. R. Co.*, 65–131.

3750. Plaintiffs joined. 2545. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this code. [R., § 2759; C., '51, § 1678.]

Who may join: Sureties who pay money for their principal may sue jointly for its recovery, or severally for the amount paid by each: *Skiff v. Cross*, 21–459.

Where several independent school districts brought action against another independent district to recover taxes levied upon them, when they were a part of the same district, which taxes they claimed defendant was under obligation to pay entirely, *held*, that plaintiffs could not thus join their actions: *Independent School Dist. v. Independent School Dist.*, 50–322.

One of several joint heirs and the grantee of the interest of all the co-heirs in the property may join as plaintiffs in an action to set aside a tax deed of such property: *Watson v. Phelps*, 40–482.

Where, by the terms of a contract, two parties were bound for the entire work and labor to be performed thereunder, and were both liable for any failure therein, *held*, that the mere fact that each was to receive thereunder a separate sum of money did not necessarily render it several, so that they could not join in a suit thereon: *Fauble v. Davis*, 48–462.

Joint owners of a note should, in a suit thereon, be joined as plaintiffs, unless some of them refuse to join, in which case those refusing to join could be made defendants. The fact that the note is payable to them jointly or to bearer and is in the possession of one of them does not entitle such payee to sue as sole owner: *McNamee v. Carpenter*, 56–276.

In action to set aside a contract, brought by a third person claiming to have been defrauded by such contract, one of the parties executing the contract also claiming to be defrauded thereby may be joined as party plaintiff: *McMurray v. Van Gilder*, 56–605.

An action for breach of a joint obligation to have lands which are conveyed to different parties released from the lien of a mortgage may properly be brought in the name of the several parties jointly: *Linder v. Lake*, 6–164.

Where it was sought to restrain the collection of a tax, on the ground that there was no assessment or levy, *held*, that owners in severalty of different portions of the property affected by such tax might join as plaintiffs: *Brandirff v. Harrison County*, 50–164.

Residents and tax payers of an independent district have such direct legal interest in the question of the validity of the taxes that they are authorized to join in an action to declare them void: *Wilkinson v. Van Orman*, 70–230.

Where a city instituted proceedings to assess damages caused by change of grade of a street

and assessed the same in a particular case to two persons as joint owners of the lot, when their ownership was in fact several as to particular portions thereof, *held*, that on appeal by such owners to recover a larger amount, the city could not object to judgment being in favor of them jointly: *Thompson v. Keokuk*, 61–187.

In an action of *certiorari* to review the proceedings of a board of supervisors in authorizing the construction of a levee and the assessment of taxes upon adjacent land, different property owners, each of whom owns land subject to assessment on account of such action, may join as plaintiffs: *Richman v. Board of Supervisors*, 70–627.

In an action brought by a tax purchaser of one of three parcels of land against the original owner of all, *held*, that a cross-petition by such mortgagee and also by another junior mortgagee against the original parties and tax purchasers of other tracts and subsequent purchasers thereof for foreclosure of such mortgage was proper: *Suitz v. Black*, 45–597.

Parties separately owning property on which they reside may join in an action to enjoin the continuance of a nuisance which affects the healthfulness of the neighborhood and interferes with the enjoyment of their property: *Bushnell v. Robeson*, 62–540.

Where there is unity of interest as to the object to be attained by a bill in equity, all parties seeking redress may join in the same complaint: *Powell v. Spaulding*, 3 G. Gr., 443; *De Louis v. Meek*, 2 G. Gr., 55.

Misjoinder: Where two persons are improperly joined as plaintiffs in an action, the one may withdraw therefrom and allow the other to continue the action to recover the amount due him individually: *Stepanek v. Kuda*, 36–563.

If there is a misjoinder of parties plaintiff, it is competent for one of them to dismiss the action as to himself, and such dismissal will not affect the case as to the other party plaintiff, nor render the filing of an amended petition by the latter necessary: *Hanks v. North*, 58–396.

Two plaintiffs cannot sue in an action for slanderous words spoken of them jointly: *Hinkle v. Davenport*, 38–355.

Parties who are jointly arrested and tried for larceny cannot join as plaintiffs in an action for malicious prosecution: *Rhoads v. Booth*, 14–575.

Separate and distinct causes of action in favor of distinct parties, as, for instance, for fraudulent representations in regard to notes transferred to them in distinct transactions, cannot be joined: *Bort v. Yaw*, 46–323.

Such a defect is not waived by failure to raise the objection by demurrer or answer: *Ibid.*

A joint petition by two plaintiffs upon two distinct causes of action in favor of them may be attacked by demurrer: *Mervin v. Sherman*, 9–331.

Misjoinder of parties is not a ground for demurrer, but should be taken advantage of by motion to strike out the names of the parties improperly joined: *District T'p v. District T'p*, 44–512; *Independent School Dist. v. Independent School Dist.*, 50–322; *King v. King*, 40–120.

Misjoinder of parties plaintiff or defendant must be raised by motion. It cannot be taken advantage of on demurrer or in arrest of judgment: *Miller v. Keokuk & D. M. R. Co.*, 65–680.

Misjoinder of a party as plaintiff who cannot properly be joined as such is not ground for dismissing the action: *Arts v. Guthrie*, 75–674.

Objection to the misjoinder of defendants cannot be taken for the first time by one defendant on appeal: *Morse v. Close*, 11–93.

Defect of parties may be taken advantage of on demurrer, but not misjoinder of parties: *Beckwith v. Dargets*, 18–303.

The objection to misjoinder of parties plaintiff (as, for instance, where two persons individually injured by malicious prosecution join as plaintiffs in an action to recover damages therefore) may be taken on the trial, in arrest of judgment, or by appeal, and especially is this so where such misjoinder does not appear on the face of the petition: *Rhoads v. Booth*, 14–575.

3751. Assignment; without prejudice. 2546. In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counter-claim, defense, or cause of action whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due. [R., § 2760.]

Under this section the transferee after maturity of a negotiable note, takes subject to any counter-claim, though it be an independent cause of action, in favor of the maker and against the transferrer, existing before notice of the transfer: *Downing v. Gibson*, 53–517.

And the same rule is applied to an indorsee of negotiable paper before maturity, if the indorsement is not in good faith and for a valuable consideration: *Bone v. Tharp*, 63–223.

Held, also, that the indorsee after maturity takes subject to the defense of payment made by maker to payee before notice of the transfer: *Haywood v. Seeber*, 61–574.

Aside from statutory provision the transferee after maturity takes subject to equities attaching to the instrument itself, and such as between the parties to it would control, qualify or extinguish any rights arising between them, but he is not subject to equities between the parties to the note arising from other and independent transactions between them, and is, therefore, not subject to a set-off arising out of an independent transaction, even though existing at the time of the transfer: *Shipman v. Robbins*, 10–208; *Bates v. Kemp*, 13–223; *Ryan v. Chew*, 13–589; *Way v. Lamb*, 15–79; *Stannus v. Stannus*, 30–448.

And this rule was held applicable, notwith-

standing Revision, § 2760, which provided that an action by an assignee of a chose in action should be without prejudice to any set-off or other defense existing before notice of the assignment; it being considered that the fact that the paper was transferred after maturity, if in the usual mode of transferring negotiable paper, would not render it a mere non-negotiable chose in action: *Richards v. Daily*, 34–427.

As bearing on this section, see notes to § 3260.

In proposing the change made in this section from the corresponding section of the Revision, the commissioners say: "Parties may have claims against each other, but not connected with or growing out of the same transaction. One may assign and become insolvent; in an action by an assignee the other party cannot bring in his claims as a defense. The substitute provides a remedy, and will do much to prevent the transfer of any but negotiable paper before due. None other should be protected:" *Code Com'rs' Rep.*, p. 84.

3752. Defendants. 2547. Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided by law. [R., § 2761.]

In foreclosure: The trustee of a deed of trust of real property should be made a party in a foreclosure proceeding thereon: *Tucker v. Silver*, 9–261.

The administrator is a proper if not a necessary party in a proceeding to foreclose a mortgage executed by his decedent: *Darlington v. Effey*, 13–177.

The beneficiary in a prior deed of trust is a proper though not a necessary party in the foreclosure of a junior mortgage: *Standish v. Dow*, 21–363.

In an action to foreclose a mechanic's lien the owner of the property is a necessary party: *Keller v. Tracy*, 11–530.

Where the property was that of a Catholic church unincorporated, the legal title being in the bishop, *held*, that the bishop or the individual members of the church, or both, should have been made parties: *Ibid.*

And so in an action to foreclose a mortgage executed by defendant before his marriage on property which subsequently to such marriage became his homestead, the wife is a necessary party defendant, and her rights in the homestead cannot be otherwise cut off: *Chase v. Abbott*, 20–154.

In an action by a subcontractor to enforce a mechanic's lien for the amount of an open, unliquidated and unsettled account against the principal contractor for labor and material, the principal contractor is a necessary party defendant: *Vreeland v. Ellsworth*, 71–347.

A wife is not a necessary party in a proceeding to enjoin the sale of property under a mortgage executed by her husband with whom she joined for the purpose of releasing either her dower or homestead right: *Sloan v. Coolbaugh*, 10–31.

In an action involving priority of liens to which the owner of the property is not a party, the validity of the respective claims cannot be brought in issue: *First Nat. Bank v. Jasper County Bank*, 71–486.

Heirs: Under the facts of a particular case, *held*, that the heirs of a person through whom the title had passed were not necessary parties to the suit, it being simply a question of right as between plaintiff and defendant: *Thomas v. Kennedy*, 24–397.

In an action to set aside a fraudulent conveyance made by a decedent, his heirs are not proper parties defendant: *Harlin v. Stevenson*, 30–371.

The grantor in a conveyance which is claimed to be in fraud of creditors is not a necessary though he is a proper party defendant in an action to set it aside: *Potter v. Phillips*, 44–353.

In an action by equitable proceedings to correct a mistake in a chain of title previous grantors may be made parties defendant: *Walkup v. Zehring*, 13–306.

As to parties in action to enforce a contract to convey made by a decedent, see §§ 3692, 3693

Grantees: In an action by a grantee against his grantor to set aside a conveyance, where it appeared that the property had been reconveyed by the grantee to other parties who were not parties to the action, *held*, that in the absence of such parties the conveyance would not be set aside: *Audubon County v. American Emigrant Co.*, 40–460.

The grantee in a deed fraudulently made to defeat a creditor is a proper party defendant in an action to subject the property conveyed to the claim of a creditor, and after the issuance of the attachment it becomes a lien upon the property attached, to be enforced by creditor's bill in equity: *Taylor v. Branscombe*, 74–534.

Vendor: In an action to remove a cloud from plaintiff's title it was held that a vendor of the property who had confederated with the other defendants to perpetrate an alleged fraud was properly made a party defendant: *Beckwith v. Dargets*, 18–303.

Other cases: In a particular case, *held*, that the necessary parties to the determination of a question arising under a contract for the purchase of land were not before the court, and therefore that such question could not be determined: *Decatur County v. Bright*, 57–724.

A decree declaring an absolute conveyance to be merely a mortgage should not be rendered when parties directly interested in the instrument itself are not before the court: *Clemons v. Elder*, 9–272.

And where the widow of deceased who left one child as his heir made application for an order to have the legal title to land owned by deceased and intended for a homestead conveyed to her, it was held proper to dismiss her petition for want of necessary parties, the child not having been made a party defendant: *Palmer v. Blair*, 25–230.

In an action in the nature of a creditor's bill in equity against husband and wife, upon the death of the wife her administrator is a proper, if not a necessary, party defendant when it is sought to reach her estate: *Parshall v. Moody*, 24–314.

In an action for the cancellation of the assignment of a contract on the ground of fraud, both parties to the assignment are necessary defendants, and judgment cannot properly be rendered against the one until the other is brought in. In such case failure to raise the objection by answer will not waive it, but such objection may be insisted upon to defeat the final decree: *Miller v. Mahaffy*, 45–289.

To a bill seeking to reinstate a judgment against a party and make it a lien on land conveyed by him to another, the original defendant in the judgment is a necessary party: *Seely v. Reid*, 3 G. Gr., 374.

Judgment plaintiff is an essential party to an action to set aside a judgment for fraud: *Hulverson v. Hutchinson*, 39–316.

In an action against a judgment creditor by a surety on the judgment asking its cancellation, a third person who is charged with having received money which he should have applied in satisfaction of the judgment may be made a party defendant: *Stringfield v. Graff*, 23–438.

In such case the principal judgment debtor, not having been a direct party to the transaction claimed to have amounted to satisfaction, *held* not to be a necessary party: *Ibid.*

An attorney who, by agreement, is to receive a per cent. of the judgment is not such a party in interest that he must be made a party to the action: *McDonald v. Chicago & N. W. R. Co.*, 26–124.

Where an attorney is not charged with fraud he is not properly joined with his client as defendant for acts done by him as attorney: *Paton v. Lancaster*, 38–494.

Where the validity of the bonds of a corporation was in issue and the officers set up the rights of the stockholders, *held*, that the stockholders individually were not necessarily parties, although such bonds were issued in fraud of the stockholders, and, if valid, would exhaust the property of the corporation and render the stock valueless: *Des Moines Gas Co. v. West*, 50–16.

In actions against partners: A partnership may be sued in the partnership name or in the individual names of its members: *Markham v. Buckingham*, 21–494.

In an action to determine the interest of defendant in a partnership and subject it to the payment of a judgment, all the parties are necessary parties: *Westphal v. Henney*, 49–542.

Where one partner is sued upon a partnership debt it is not error to allow the other partner to come in and join in the defense: *Peck v. Purchen*, 52–46.

Where one of the partners dies pending suit against the firm, the surviving partner is the representative of the firm, and it is against him that suit is to be continued and not against the personal representatives of the deceased member: *Childs v. Hyde*, 10–294.

The common-law rule that in an action at law a party cannot in his individual capacity bring suit against a partnership or board of trustees of which he is a member is not applicable in a proceeding in *mandamus: Cooper v. Nelson*, 38–440.

In an equitable action it is not error to make defendants a firm, one member of which is a member of the firm who are plaintiffs: *Ford v. Independent Dist.*, 46–294.

Although defendant has been warranted under the facts in regarding two persons as partners, so that he may set up any defense in an action by one of them which he would have had if there had been a partnership in fact, yet if they are not in fact partners, he cannot, in an action by the one who is the real party in interest, insist that the supposed partner join in the action as plaintiff: *Enix v. Hays*, 48–86.

Joinder: See § 3755 and notes.

Misjoinder: Where plaintiff joins separate causes of action against different parties separate judgments cannot be rendered. The objection may be raised by demurrer if it appears on the face of the petition, otherwise by answer or motion in arrest of judgment. In such case perhaps plaintiff might dismiss as to all the parties not jointly liable. So *held* in case of a joint action against several owners of cattle for joint trespass committed by them: *Cogswell v. Murphy*, 46–44.

It being averred in the answer that defendants are improperly joined and that fact being admitted, the court should on the request of the defendant instruct that there can be no recovery, or should sustain a motion in arrest of judgment upon a verdict for plaintiff: *Mendenhall v. Wilson*, 54–589.

Non-joinder: Where it appears by the bill that a proper party is not before the court so that he may have an opportunity to be heard, the usual method is to demur or to make the objection by answer, and if this non-joinder cannot prejudice the rights of the parties to the action, the objection should be taken in this manner and cannot be urged for the first time on the hearing; but if it appears that the rights of those who are made parties may be prejudiced by such non-joinder, or that there may be a failure to mete out complete justice, the objection may be made on the hearing, or the judge may himself state the objection and refuse to proceed to make a decree. (So *held* under chancery practice): *Postlewait v. Howes*, 3–365.

The non-joinder of parties defendant in an action against persons jointly liable cannot be raised for the first time by the evidence after plaintiff has closed his case: *Hine v. Houston*, 2 G. Gr., 161.

Where a defect of parties is not apparent upon the face of the pleadings it must be pleaded by answer and the issue submitted to the jury: *Enders v. Beck*, 18–86.

As to demurrer on the ground of defect of parties, see § 3854 and notes.

3753. United interest. 2548. Persons having an united interest must be joined on the same side either as plaintiffs or defendants, except as otherwise expressly provided by law. But when some who should thus be made

plaintiffs refuse to join, they may be made defendants; the reason thereof being set forth in the petition. [R., § 2762; C., '51, § 1679.]

Joint owners of a note should join as plaintiffs, or if one refuses to join he should be made defendant: *McNamee v. Carpenter*, 56–276.

3754. One suing for all. 2549. When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [R., § 2753; C., '51, § 1680.]

This provision is not applicable where each of the parties might sue alone, and there is no necessity for joining them all in the action: *Fleming v. Mershon*, 36–413.

Therefore, *held*, that it was not proper for one or more tax-payers to bring suit in behalf of themselves and other tax-payers interested in the same question, to enjoin the collection of a tax on the ground of illegality: *Ibid.*

Where one party sues for the benefit of others, those for whose benefit the action is brought are not parties to the suit in such sense as to have the right to appeal: *Ibid.*

Where the portion of the petition by which plaintiff attempts to maintain an action for others not named as plaintiffs was stricken out, *held*, that an appeal would not lie therefrom as the parties not named could not appeal and plaintiff was not prejudiced by the action of the court: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

One or more of the members of an unincorporated society may be sued or may defend for all if they are so numerous that it would be impracticable to bring them all before the court: *Keller v. Tracy*, 11–530.

In a case wherein parties may jointly sue, one of them may under this statutory provision prosecute the action for the benefit of the others having a common interest: *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

3755. Joint and several obligations. 2550. Where two or more persons are bound by contract, or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound, shall not be a bar to proceedings against the others. [R., § 2764; C., '51, §§ 1681, 1682.]

Joinder: The maker and assignor or guarantor of an instrument not negotiable may be made joint defendants in an action thereon: *Tucker v. Shiner*, 24–334; *Huse v. Hamblin*, 29–501.

So the maker and guarantor or indorser of a negotiable instrument may be joined: *Marvin v. Adamson*, 11–371; *Mix v. Fairchild*, 12–351; *Veach v. Thompson*, 15–380; *Stout v. Noteman*, 30–414.

Action against two makers of a promissory note may be maintained, although one of them has signed it only as surety and after its maturity: *Jones v. Wilson*, 11–160.

Joint action cannot be maintained against a a county on a warrant and a guarantor who has guaranteed the payment of such warrant in a separate instrument: *Griffin v. Grundy County*, 10–226.

An action against joint and several makers could not, under the provisions of Code of '51 (different from those now found in this section), be continued after the death of one maker against an administrator and the surviving maker: *Pecker v. Cannon*, 11–20; *Marsh v. Goodrell*, 11–474.

Under the same provision, *held*, that action could not be maintained jointly against the surviving partner of a firm and the administrator of a deceased partner: *Childs v. Hyde*, 10–294.

Action may be brought against the personal representatives of one of two or more joint obligors, although the other joint obligor or obligors are still living: *Sellon v. Braden*, 13–365.

Where action upon a joint contract is brought against a survivor and the executors of a deceased party in the same court in which the claim against the decedent's estate might have been filed, the bringing of such action will be deemed a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60–367.

Action on an obligation of a firm may be brought against one partner alone: *Ryerson v. Hendrie*, 22–480.

Where a district township was divided into independent school districts, *held*, that action could not be brought on an indebtedness of the township against one of such independent districts alone: *Knoxville Nat. Bank v. Independent Dist.*, 40–612.

But that a joint action might be brought against all the independent districts composing what was formerly the district township, and a judgment against all of them might be rendered: *District T'p v. District T'p*, 52–73; *Kennedy v. Independent School Dist.*, 48–189.

Persons consequentially liable to be affected by the recovery of plaintiff against defendant should be joined as defendants that their lia-

bilities may be adjudicated in the one proceeding: *Camp v. McGillicuddy*, 10-201.

To entitle a party to be made a defendant, his claim must be made in good faith, with an apparent interest in the controversy. A mortgagor who has conveyed mortgaged property with covenants may, on his own motion, be made a party to a suit to foreclose the mortgage: *Gifford v. Workman*, 15-34.

A petition in foreclosure making third parties defendants for the purpose of cutting off their equities is not objectionable on the ground of multifariousness: *Greither v. Alexander*, 15-470.

A judgment in favor of a sole plaintiff, against two defendants jointly, may be set off against a judgment against such plaintiff in favor of one of the defendants: *Ballinger v. Tarbell*, 16-491.

Joint and several liability: Parties who are each liable to an action for separate injuries committed by the illegal sale of intoxicating liquors (§ 2418) are not so bound by statute as to be joined as defendants when they would not be otherwise jointly liable: *La France v. Krayer*, 42-143.

In an action on a joint policy of insurance made by four companies, in which each bound itself in case of a loss to pay one-fourth of the amount of insurance, the court was divided as to whether the cause of action against each was separate so that they could not properly be joined as defendants in one action: *Viele v. Germania Ins. Co.*, 26-9.

An action may be brought against any one or all of co-obligors, and the bankruptcy of one cannot in any manner affect the right of recovery against the other: *Smith v. McFadden*, 56-482.

In case of an action against two defendants jointly and severally liable, judgment may be entered against one, although the case is not disposed of as to the other: *Poole v. Hintrager*, 60-180.

An action on a promissory note against a surety may be brought where there is judgment by confession against the principal: *Citizens', etc., Bank v. Oleson*, 47-492.

As to judgment in action against joint defendants, see § 4061 and notes

3756. Other parties brought in. 2551. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in. [R., § 2765; C., '51, § 1683.]

A person cannot be divested of property in a proceeding in which he is not a party: *Moore v. Held*, 73-538.

In a proceeding to abate premises as a nuisance under the prohibitory liquor law, and for the destruction of property illegally used on the premises, all the owners of the property are necessary parties: *Shear v. Green*, 73-688.

This section is especially applicable to cases where the debtor is under an apparent liability to two different parties for the same debt, and only one of them is before the court: *Fowler v. Doyle*, 16-534.

In a proceeding to correct a misdescription of the premises, running through prior deeds, *held*, that the original grantor conveying with such mistaken description, or if dead, his heirs, were necessary parties, and should have been brought in: *Flanders v. McClanahan*, 24-486.

The mortgagee of chattels may be required to be made party to a suit by mortgagor against a third person for injury to such property: *Evans v. St. Paul Harvester Works*, 63-204.

In an action by an assignee of a cause of action for tort, the defendant cannot require that the assignor be made party: *Vimont v. Chicago & N. W. R. Co.*, 64-513.

Where the controversy may be determined by the court between the parties before it without prejudice to the rights of others, it is not necessary that such other parties be brought in: *Baldwin v. Thompson*, 15-504.

The owner of land is not entitled to be made a party in the action wherein the land is attached as the property of another: *Loving v. Edes*, 8-427.

It is not proper in a collateral proceeding to determine the question of title as between plaintiff and one not a party to the action, and when such a decree is asked the adverse claimant to the title should be made a party or the petition dismissed: *Litchfield v. Polk County*, 18-70.

A party to a contract under which a third person claims a benefit may show fraud in such contract, although the other party thereto be not a party to the suit. The determination of the question will not be binding upon such other party, and if defendant does not choose to make him a party he is not obliged to do so: *Fuller v. Lamar*, 53-477.

An order of court making a person a party defendant to an equitable proceeding, and service of notice thereunder, is as effective as an amendment to the petition bringing in such party and repeating the allegations: *McGregor v. McGregor*, 21-441.

3757. Suit on bond. 2552. When a bond or other instrument given to the state or county, or other municipal corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus secured who has sustained an injury in consequence of a breach thereof. [R., § 2787; C., '51, § 1693.]

A bond given partly for the benefit of a party not named therein might be sued on by the person in his own name: *Huntington v. Fisher*, 27–276.

Where a bond intended for the security of a county was improperly given to the county judge, *held*, that the county might sue thereon: *Collins v. Ripley*, 8–129.

Where the bond of a county treasurer was given "unto the county of Warren and state of Iowa," *held*, that it should be construed as a security to the county. Whether the state can maintain action on a county treasurer's bond, *quære: State v. Henderson*, 40–242.

A person for whose security an injunction bond was evidently intended may maintain action thereon, though it be not made payable to him: *Van Gorder v. Lundy*, 66–448.

In case of a bond given to release attached property to the sheriff instead of the plaintiff, *held* the plaintiff might sue thereon: *Moorman v. Collier*, 32–138.

In such a case, if the judgment is assigned, the assignee of the judgment may bring action on such bond: *Rowley v. Jewett*, 56–492.

Where a bond is executed to the sheriff an assignment by him is not necessary to enable a party intended to be secured thereby to bring suit thereon: *Sheppard v. Collins*, 12–570.

Where a constable wrongfully levies upon property that is exempt from execution the owner of the property may recover damages therefor in an action upon his bond: *Strunk v. Ocheltree*, 11–158.

Suit on an administrator's bond may be brought by any person entitled to money coming into the administrator's hands which he fails or refuses to pay over: *Stewart v. Phenice*, 65–475.

Where a contractor gives bonds for the performance of his contract, providing for the payment of subcontractors, a subcontractor may bring action thereon for breach of the contract: *Baker v. Bryan*, 64–561.

Where a bond was given by one who contracted for the execution of a certain portion of the work of constructing a railway for the performance of his contract, which provided for the payment of all claims against him or his subcontractor for labor performed in the prosecution of the work, *held*, that laborers employed by a subcontractor or an assignee of the claims of such laborers could bring action on such bond to recover compensation for services rendered: *Jordan v. Kavanaugh*, 63–152; *Wells v. Kavanagh*, 70–519.

In an action against a road supervisor upon his official bond, *held*, that the township clerk entitled to the money, for the misappropriation of which the action was brought, was the proper party to sue: *Wells v. Stomback*, 59–376.

A bond, though not such as is required in a particular case by statute, may still be good as a common-law bond, and the party for whose benefit it was given may sue thereon: *Sheppard v. Collins*, 12–570; *Garretson v. Reeder*, 23–21.

This section was not intended to apply exclusively, if at all, to cases of tort, but primarily and principally to matters of contract: *Tucker v. Silver*, 9–261.

3758. Partnership. 2553. Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof, and a judgment against the firm, as such, may be enforced against the partnership property or that of such members as have appeared or been served with notice. But a new action may be brought against the other members on the original cause of action. [R., § 2785; C., '51, §§ 1690, 1691.]

A partnership may be sued before a justice of the peace, and notice of service upon the resident partner will give the justice jurisdiction of the partnership so that judgment may be rendered against the firm as such, and enforced against the partnership property; but the justice will not thereby acquire jurisdiction as to an individual partner residing in another county: *Ebersole v. Ware*, 59–663.

Where judgment on a partnership debt is recovered against individual members of a firm, a sale of individual property thereunder will not be invalid, although an individual creditor might, by proceedings in equity in a proper case, compel a resort to partnership property: *Hamsmith v. Espy*, 13–439.

Whether a judgment against the firm alone, as such is a lien upon anything but firm property, *quære*, but the individual property of the members may be made liable by proper action: *Markham v. Buckingham*, 21–494.

Service on one member of a copartnership, after dissolution, *held* sufficient to warrant judgment against the firm, to be satisfied out of the partnership property: *Hale v. Van Saun*, 18–19.

A judgment against a firm does not become a lien on real property held in the name of one partner until made so by proper proceedings, although the firm may be the equitable owners: *Stadler v. Allen*, 44–198.

The surviving partner should sue as such for claims in favor of the partnership without joining the representative of the deceased partner: *Brown v. Allen*, 35–306.

Service upon one member of the firm is sufficient to give the court jurisdiction as against the partnership: *Gregory v. Harmon*, 10–445.

In such case it is not necessary that the service be made upon the member while employed in the general management of the business. Each member is an agent for all the others in the firm business, and a service upon any one is sufficient: *Walker v. Clark*, 8–474.

Under prior statutory provisions authorizing judgment against a member of the firm in an action against the firm, *held*, that service on one member would authorize a judgment against another member not served only in case the service was made during the continuance of the partnership: *Stephens v. Parkhurst*, 10–70.

Under such provisions, *held*, also, that service of notice upon an alleged partner, where there was no partnership in fact, did not give the court jurisdiction over other members of

the alleged firm not served and not appearing: *Nixon v. Downey*, 42-78.

Where an action is brought against partners individually and not against the partnership, service upon one partner does not give jurisdiction over the firm or the other partner: *Weaver v. Carpenter*, 42-343.

Under the Code of '51, the individual property of a member of a firm could not be levied upon under execution, upon a judgment against the firm, until such individual member had had an opportunity to show cause why such levy should not be made. The method of subjecting the individual property to the payment of the firm debt was by *scire facias: Davis v. Buchanan*, 12-575.

In general, as to suits by and against partners, see notes to §§ 3748, 3752 and 3755.

3759. Foreign corporations. 2554. Foreign corporations may bring suit in the courts of this state in their corporate name. [R., § 2789; C., '51, § 1695].

3760. Action for seduction. 2555. An unmarried female may prosecute as plaintiff an action for her own seduction, and recover such damages as may be found in her favor. [R., § 2790; C., '51, § 1696.]

This section does not take away from the father the right to sue for damages for the seduction of his minor daughter, which he may do under the next section: *Stevenson v. Belknap*, 6-97.

In an action by an unmarried female for her own seduction she may recover such damages as may be found in her favor, and the fact that the petition does not allege that plaintiff was damaged in any sum cannot be first raised after verdict: *Gray v. Bean*, 27-221.

To enable an unmarried female to recover for her own seduction it is not necessary that she be of previously chaste character (as is required in a criminal prosecution for seduction). Without that, she may recover for loss of health, etc., but not for loss of character: *Smith v. Milburn*, 17-30.

It is contemplated that the person seduced shall be unmarried at the time of the seduction: *Gover v. Dill*, 3-337.

Such action survives under § 3730 to the personal representatives of the female: *Shafer v. Grimes*, 23-550.

For other cases as to seduction, see notes to § 5166.

3761. Injury or death of minor child. 2556. A father, or in case of his death or imprisonment or desertion of his family, the mother may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child. [R., § 2792; C., '51, § 1697.]

The damages to be recovered in an action for the death of a minor child are those accruing before the date of the minor's attaining majority. For damages accruing subsequently the administrator must sue for the benefit of the estate: *Walters v. Chicago, R. I. & P. R. Co.*, 36-458.

In an action for seduction brought by the parent the damages are very much in the discretion of the jury. Where the act is proved, all the aggravating circumstances that follow come in by way of increasing damages. Defendant's attention to the daughter as a suitor, and the flatteries, persuasions, promises, etc., made use of by him to acccomplish his ends, may be considered in estimating the damages: *Stevenson v. Belknap*, 6-97.

The attaining the age of majority by the daughter does not take away the father's right of action: *Ibid.*

The statute, providing a remedy for the daughter, should not be construed as taking away the right of the father, or as restricting his damages to the loss of service or actual expenses incurred. The father, mother or guardian may maintain an action, though she be not living with, nor in the service of, such person, and though there be no loss of service: *Ibid.*

The father may recover exemplary damages, and the jury are to look not to the loss of service but to the damages resulting from all that the father can feel from the nature of the injury: *Ibid.*

The action by the parent must be based upon loss of service and expense incurred. Where the daughter, for whose seduction plaintiff had sued as father, was married before any expense was incurred or loss of service suffered, *held*, that plaintiff had no cause of action: *Humble v. Shoemaker*, 70-223.

Proof of mere careless indifference on the part of the parent as to the daughter's chastity will not defeat his right to recover for loss of service, but may be introduced in mitigation of damages: *Zerfing v. Mourer*, 2 G. Gr., 520.

No action can be maintained by the parent for the seduction of an adult child. And in an action by a parent the fact that the daughter is a minor must be alleged and proved: *Dodd v. Focht*, 72-579.

3762. Name unknown. 2557. When the precise name of any defendant cannot be ascertained, he may be described as accurately as practicable, and when the name is ascertained it shall be substituted in the proceedings. [R., § 2788; C., '51, § 1694.]

In a suit brought against "the heirs of Otis Reynolds," *held*, that the defendants were not described with sufficient certainty. The Code contemplates that the defendant shall be a known person, who can be described with some certainty: *Reynolds v. May*, 4 G. Gr., 283.

Where action was brought to foreclose a tax title as against a tract of land by description under a former statute allowing such procedure when the owner was unknown, *held*, that reasonable diligence to discover the owner was required by statute, and should be made to appear by stating what was done in the exercise of such diligence: *Lot Two v. Swetland*, 4 G. Gr., 465.

For similar provision as to proceedings before a justice, see § 4768.

3763. Suit on written instrument. 2558. When an action if founded on a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument. [R., § 2786; C., '51, § 1692.]

Under this section it is not necessary to allege either copartnership or corporate capacity: *Harris Mfg. Co. v. Marsh*, 49-11.

So where the action is against defendant in the name in which the contract is signed, it is not necessary to allege either copartnership or corporate capacity: *Wendall v. Osborne*, 63-99.

Where the name inserted in the instrument as that of payee is not that of a person, partnership or corporation, the suit cannot be brought in that name. So *held* where a note was made payable to "Steamboat Pembinaw and owners:" *Steamboat Pembinaw v. Wilson*, 11-479.

By signing an instrument in which the payee is specified in a particular manner the maker estops himself from setting up that the name thus used is not the proper name and description of such payee, and an action on the instrument may be brought in such name: *Davis v. David*, 1 G. Gr., 427.

Proof of defendant's signature to a note given to a partnership in its firm name is sufficient evidence to support an action thereon in the firm name: *Gordon v. Janney*, Mor., 182.

The making of a note payable to a firm or corporation is a written admission of the existence of such firm or corporation, and proof *aliunde* of the copartnership or corporation is not required in order to make out a ***prima facie*** case: *Griener v. Ulerey*, 20-266.

3764. Prisoner in penitentiary. 2559. No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or if there is none, by a person appointed by the court to defend him. [R., § 2784.]

3765. Actions by state. 2560. The state shall commence and prosecute suits according to the laws of the land as in cases between individuals, except that no security shall in such cases be required. [R., § 2793.]

3766. Transfer; abatement. 2561. No action shall abate by the transfer of any interest therein during its pendency. [R., § 2794; C., '51, § 1698.]

Where plaintiff in an action to recover property transferred his interest pending the action, *held*, that the suit might still be prosecuted in his name: *Jordan v. Ping*, 32-64.

Where a cause of action is, pending the action, assigned to a third person, such action may be continued in the name of the original party, or the court may allow the person to whom the transfer has been made to be substituted as plaintiff: *Chickasaw County v. Pitcher*, 36-593.

Such a substitution will not be made if the rights of defendant would be prejudiced thereby: *Snyder v. Phillips*, 66-481.

An alienation of interest *pendente lite*, either voluntary or involuntary, cannot constitute a bar to the prosecution of the suit, but may render it necessary for the assignee to be made a party: *Wright v. Meek*, 3 G. Gr., 472.

A conveyance pending a proceeding to assess damages for a right of way will not affect such proceedings. The purchaser may be substituted for the original owner: *Forney v. Ralls*, 30-559.

Where persons acquired property by conveyance from one who has bought at foreclosure sale, and while a proceeding is pending against him by a junior mortgagee seeking to redeem, they are not necessary parties in the further course of such proceeding and are bound by a decree therein rendered on a supplemental petition filed after such conveyance, and not asked in the original petition: *Hervey v. Savery*, 48-313.

While parties may not, by agreement, upon an assignment of the legal title of a note, provide that suit shall be prosecuted thereon in the name of the assignor, yet a party may, pending an action on a note, assign to another his interest in the recovery without rendering it necessary to change the name of the party plaintiff: *Allen v. Newberry*, 8-65; *Howey v. Willtrout*, 10-105.

But where there is a transfer of the ownership of the note during the pendency of the suit, the new owner may be substituted as plaintiff on his own motion: *Ferry v. Page*, 8-455; *Fannon v. Robinson*, 10-272.

Where, pending the action to foreclose a mortgage, the mortgagee assigns his interest therein, the decree may be rendered in the name of the assignee: *Wahl v. Phillips*, 15-478.

An action against a partnership should on the death of one partner be continued against the survivor: *Childs v. Hyde*, 10-294.

MARRIED WOMEN.

3767. May sue. 2562. A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman. [R., § 2772; 13 G. A., ch. 167, § 11.]

The claim of the wife for damages for a tort against her should be prosecuted in her own name, and not jointly with her husband. The sections allowing her to sue alone in such cases are not simply permissive but imperative: *Musselman v. Galligher*, 32-383.

Personal judgments against married women may be enforced against subsequently acquired property the same as in case of judgments against other persons: *Van Metre v. Wolf*, 27-341.

Where a contract for conveyance was made with a married woman individually, *held*, that action thereon could be brought by her alone, and that she need not join her husband therein: *Malli v. Willett*, 57-705.

3768. Defense by. 2563. If husband and wife are sued together, the wife may defend for her own right; and if either neglect to defend, the other may defend for such one also. [R., § 2774; C., '51, § 1687.]

3769. When husband or wife deserts family. 2564. When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and under like circumstances the same right shall apply to the husband upon the desertion of the wife. [R., § 2776; 13 G. A., ch. 167, § 12.]

MINORS.

3770. Action by. 2565. The action of a minor must be brought by his guardian or next friend; but the court has power to dismiss it if it is not for the benefit of the minor, or to substitute the guardian of the minor or other person as next friend. [R., § 2777; C., '51, §§ 1688-9.]

An infant may sue by his next friend, and on the trial prove his infancy as establishing his right to sue in that manner: *Byers v. Lessees of Des Moines Valley R. Co.*, 21-54.

The "next friend" in whose name a suit for a minor is commenced may be discharged and another substituted: *Thurston v. Cavenor*, 8-155.

In an action brought for a minor by his next friend such next friend is liable for costs: *Vance v. Fall*, 48-364.

An action brought in the name of the guardian of minors instead of the minors themselves, asking the quieting of title, etc., *held* not improperly brought in view of the fact that the court would have the power by the terms of the decree to sufficiently protect the interests of such minors: *Hanna v. Hawes*, 45-437.

Under a finding made by the court that the action was not being prosecuted for the benefit of the minor, and that the further prosecution was not for his best interests, *held*, that the court was authorized to dismiss the action upon a stipulation signed by the next friend who brought it: *Ball v. Miller*, 59-634.

3771. Defense by. 2566. The defense of a minor must be by his regular guardian, or by a guardian appointed to defend him where no regular guardian appears, or where the court directs a defense, by a guardian appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian. [R., § 2778; C., '51, §§ 1688-9.]

It is error to enter judgment against a guardian *ad litem*. It should be rendered against the minor party: *Tucker v. McClure*, 17-583.

In a proceeding to probate a will, the court acquires jurisdiction to appoint a guardian *ad litem* by service of notice by publication: *Farrell v. Leighton*, 49-174.

The appointment of a guardian *ad litem* may be a proper ground for continuance to enable him to prepare the case for trial: *Blythe v. Blythe*, 25-266.

At common law, infants were required to sue and defend by guardians. An infant is supposed to be incapable of guarding his own interests, and it is the duty of the court, before it divests him of his estate, to be satisfied that he has had full opportunity to have his day in court by proper and suitable guardian, and to see, notwithstanding any admission of facts by such guardian, that his rights are not sacrified: *Cavender v. Smith's Heirs*, 5-157, 192.

A guardian *ad litem* will be appointed either

on motion of plaintiff or defendant, but the court will not permit an adverse party to choose the guardian: *Ralston v. Lahee*, 8-17.

The fact that the guardian *ad litem* is interested adversely to the minor may be a ground for his removal. But unless it is shown that he took advantage of his position to injure the interests of the infant, the mere fact of his adverse interest will not be considered such conclusive evidence of fraud as to authorize the setting aside of the decree: *Ibid.*

In ants are as much bound by the conduct of those who carry on their case as adults, provided such conduct be *bona fide: Ibid.*

Failure to appoint a guardian *ad litem*, and rendition of judgment without defense by a minor, does not render a judgment void. It is erroneous, but can only be taken advantage of by direct proceedings: *Drake v. Hanshaw*, 47-291; *Myers v. Davis*, 47-325, 330: *Bickel v. Erskine*, 43-213; *Hoover v. Kinsey Plow Co.*, 55-668.

A judgment against a minor upon appearance by attorney, while irregular, is not void. Objection to the judgment cannot be raised in an action thereon in another state, but must be taken advantage of in the state where rendered and by a direct proceeding. Such an error does not go to the jurisdiction of the court: *Milne v. Van Buskirk*, 9-558.

Where a guardian *ad litem* was not appointed for a minor defendant until the trial had commenced and plaintiff had rested, when an attorney for the defendant was appointed as such guardian, *held*, that a refusal of the court to retry the case from the beginning would not be sufficient to warrant a reversal, no prejudice appearing to have resulted therefrom: *Wickersham v. Timmons*, 49-267.

A guardian *ad litem* in making defense may set up any matter which will defeat the action, although it be such matter as might have been the basis of an independent action in behalf of the minor: *Kelsey v. Kelsey*, 57-383.

A judgment in an action for partition of land belonging to minors and adults is conclusive against such minors, and a judgment for costs in the proceeding is binding upon them: *Johnson v. Carson*, 3 G. Gr., 499.

As to answer by guardian, see § 3862.

3772. Guardian ad litem. 2567. The appointment cannot be made until after service of the notice in the action as directed in this code, and may then be made by the court or judge thereof, or during vacation, by the clerk; but the court shall have the power to remove such guardian when the interests of the minor require such change. If made by the judge or clerk, it shall be done by indorsing the name of the person appointed, and the time thereof, on the petition in the action. [R., § 2779.]

Service of notice by publication upon a minor gives the court jurisdiction to appoint a guardian *ad litem*, although it has not authority to render a personal judgment: *Judd v. Mosely*, 30-423; *Hoover v. Kinsey Plow Co.*, 55-668.

Where there has not been sufficient service of notice the appointment and appearance by a guardian *ad litem* will not confer jurisdiction: *Allen v. Saylor*, 14-435.

The court has no authority to appoint a guardian *ad litem* to act for a minor until complete service upon such minor has been had: *Good v. Norley*, 28-188, 199.

3773. Application for. 2568. The appointment may be made on the application of the minor if he is of the age of fourteen years, and applies at or before the time he is required to appear and defend. If he does not so apply, or is under that age, the appointment may be made on the application of any friend of the minor or on that of the plaintiff in the action. [R., § 2780.]

INSANE.

3774. Plaintiff. 2569. The action of a person judicially found to be of unsound mind, must be brought by his guardian, and, if he have none, the court or judge thereof, or the clerk, in vacation, may appoint one for the purposes of the action. [R., § 2781.]

3775. Defense; appointment of guardian. 2570. The defense of an action against a person judicially found to be of unsound mind, or a person confined in any state lunatic asylum, who, by the certificate of the physician in charge, appears to be of unsound mind, must be by his guardian or a guardian appointed by the court to defend for him. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff, but not until service has been made as directed in this code, and no judgment can be rendered against him until defense has been made as herein provided. [R., § 2782.]

Probate jurisdiction over the persons and property of insane persons does not exclude the jurisdiction of a court of law in an action against an insane person with reference to his property: *Flock v. Wyatt*, 49-466.

3776. Pending suit. 2571. Where a party is judicially found to be of unsound mind, or is confined in any state lunatic asylum, and, by the certificate of the physician in charge, appears to be of unsound mind during the pendency of an action, the fact being stated on the record, if he is plaintiff his guardian may be joined with him in the action as such; if he is defendant, the plaintiff may on ten days' notice thereof to his guardian, have an order making the guardian a defendant also. [R., § 2783.]

INTERPLEADER.

3777. Interpleader. 2572. Upon affidavit of a defendant before answer, in any action upon contract for the recovery of personal property, that some third party without collusion with him has, or makes a claim to the subject of the action, or on proof thereof as the court may direct, the court may make an order for the safe keeping, or for the payment or deposit in court or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claims against the defendant, and in the meantime stay the proceedings. If such third party, being served with a copy of the order, fails to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the court for payment, deposit, or delivery thereof. [R., § 2767; C., '51, §§ 1685, 1686.]

3778. By sheriff. 2573. The provisions of the last section shall be applicable to an action brought against a sheriff or other officer, for the recovery of personal property taken by him under attachment or execution, or for the value of such property so taken and sold by him. And the defendant in any such action shall be entitled to the benefit of these provisions against the party in whose favor the attachment or execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action was brought, was taken under such process. [R., § 2768.]

This section gives a merely cumulative remedy to the officer. He is entitled to an indemnifying bond: *Kaster v. Pease*, 42-488.

3779. Substitution. 2574. In an action against a sheriff or other officer, for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be substituted as defendant, sureties for the costs being given. [R., § 2769.]

This section is independent of other provisions as to interpleader and the application need not be made before defendant's answer is filed. The party substituted takes up the case in the condition it is in at the time of substitution: *Bixby v. Blair*, 56-416.

In so far as it is attempted by these provisions with regard to interpleader to deprive a property owner of his right of action against a sheriff to recover property wrongfully seized by such officer under an execution against another person they are unconstitutional: *Sunberg v. Babcock*, 61-601; *Maish v. Littleton*, 62-105.

These provisions for the substitution of attachment plaintiff in an action against an officer for wrongful levy of the attachment have reference to an action for the recovery of specific personal property: *Sperry v. Ethridge*, 70-27.

3780. Landlord's attachment. 2575. An action to recover the possession of specific personal property taken under a landlord's attachment, when it is brought by the tenant or his assignee or under-tenant, may be against the party who sued out the attachment; and the property claimed by such action may, under the writ therefor, be taken from the officer who siezed it when he

has no other claim to hold it than that derived from the writ. The indorsement of a levy on the property made upon the process by the officer holding it, shall be a sufficient taking of the property to sustain action against the party who sued out the writ. [R., § 2770.]

CHAPTER 4.

OF PLACE OF BRINGING SUIT.

3781. In relation to real property. 2576. Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated:

1. For the recovery of real property, or of an estate therein, or for the determination of such right or interest;
2. For the partition of real property;
3. For injuries to real property. [R., § 2795; C., '51, § 1703.]

Under the provisions of the Code of '51, that an action relating to real property should be brought in the county where the real property was situated, *held*, that an action of trespass *quare clausum fregit* was governed thereby: *Barnes v. Davis*, 2-160.

3782. Same. 2577. Actions for injuries to real property may be brought either in the county where the property is, or where the defendant resides.

[This section and ¶ 3 of the preceding section seem inconsistent. In the original, the two sections are in different parts of the chapter, but in the re-arrangement by the editor they are brought together in the printed Code as here.]

3783. Mortgage; mechanic's lien. 2578; 20 G. A., ch. 126. An action for the foreclosure of a mortgage of real property, or for the sale of real property under an incumbrance or charge, or to enforce a mechanic's lien on real property, shall be brought in the county in which the property to be affected or some part thereof is situated.

[The amendment of this section was with the proviso that it should not affect existing contracts.]

Under the section as it stood before amendment, *held*, that an action to foreclose a mortgage and for general judgment against the mortgagor might be brought where the defendant resided: *Cole v. Conner*, 10-299; *Finnagan v. Manchester*, 12-531.

Also *held*, that where the note secured by a mortgage was made payable at a particular place, action to foreclose the mortgage might be brought in the county in which the note was made payable, although the land mortgaged was situated in another county: *Equitable L. Ins. Co. v. Gleason*, 56-47.

Also *held*, that although a mortgage might be foreclosed in any county in which the court could acquire jurisdiction to render a personal judgment on the debt, yet if the proceeding was upon publication only, and defendant did not appear, the foreclosure could not be had in a county where no portion of the property was situated: *Iowa Loan and Trust Co. v. Day*, 63-459.

An action being brought to recover upon three notes and to foreclose six mortgages upon six parcels of land in as many different counties, such mortgage being for a specific sum, a part of the note described therein, *held*, that each mortgage constituted a separate cause of action, and a motion should have been sustained to strike from the petition the portions thereof relating to mortgages upon lands not situated in the county where the action was brought: *Chadbourne v. Gilman*, 29-181.

Under the provisions of the Code of '51, *held*, that a bill in equity brought by the vendor to foreclose a title bond was a local action and properly brought in the county where the land was situated: *Johns v. Orcutt*, 9-350.

Where distinct deeds of land in different counties were given as security in connection with an instrument of defeasance, in such way as to constitute a mortgage, *held*, that a suit to foreclose as to all the lands might be brought in the county in which a portion thereof was situated: *Lomax v. Smyth*, 50-223.

It seems that where no personal judgment can be rendered in an action of foreclosure, it is an action *in rem*, and the court acquires no jurisdiction in a proceeding brought in the wrong county: *Orcutt v. Hanson*, 71-514.

An action against husband and wife for indebtedness incurred for family expenses, and in which it is sought to make such indebtedness a lien upon real property of the wife, may

be brought in the county where such real property of the wife is situated, although neither husband nor wife be a resident of that county: *Hawke v. Urban*, 18-83.

3784. Fines; against officers and on bonds. 2579. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. An action for the recovery of a fine, penalty, or forfeiture imposed by a statute, except that when the offense for which the claim is made was committed on a water-course or highway which is the boundary of two counties, the action may be brought in either of them;

2. An action against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command, or in his aid, shall do anything touching the duties of such officer or for neglect of official duty;

3. An action on the official bond of a public officer. [R., § 2796.]

An action on a bail bond given upon change of venue from one county to another, conditioned for the appearance of defendant in the county to which the change is taken, should be brought in that county and not in the county where the indictment was found. The forfeiture belongs to the county to which the change was taken: *Decatur County v. Maxwell*, 26-398.

As to place of bringing action on bail bond, see § 5997.

3785. Attachment of property. 2580. An action, when aided by attachment, may be brought in any county of the state wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of this state. If such defendant is a resident of this state, such action must be brought in the county of his residence, or that in which the contract was to be performed, except that if an action be duly brought against such defendant in any other county by virtue of any provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by an attachment. [R., § 2797; C., '51, § 1703.]

In an action by attachment the seizure of property in the county where suit is brought will be sufficient to give the court jurisdiction, but jurisdiction cannot be conferred by attaching that which is not subject to attachment and which could not be made liable under the judgment to plaintiff's demands: *Courtney v. Carr*, 6-238.

As to whether the proceedings in an action by attachment against a non-resident defendant served by publication, brought in a county where no property is found, but in which proceedings property in another county is levied on, are valid and may be removed to the proper county under § 3794 (discussing the question with reference to the provisions of Code of '51), see *Laird v. Dickerson*, 40-665.

It is the service of the attachment which gives jurisdiction where there is no personal service, and an action by attachment against a non-resident not served cannot be prosecuted in the county in which the contract on which action is based is made payable unless property of defendant can be attached in that county: *Hedrick v. Brandon*, 9-319.

A court does not acquire jurisdiction by attachment in an action against a resident of the state not served with notice: *Langworthy v. Root*, 10-260.

The provisions of this section restrict attachments against residents. An attachment issued in a case brought in a county other than thus specified is invalid and should be dismissed on motion, even if the case itself is transferred, upon the application of the defendant, to the county of his residence: *Wasson v. Millsap*, 70-348.

The word "contract" in the phrase "that (county) in which the contract is to be performed" refers to such written contract as is contemplated in the following section and not to verbal contracts: *Hatch v. Johnson*, 44-535.

3786. Place of contract. 2581. When, by its terms, a written contract is to be performed in any particular place, action for breach thereof may be brought in the county wherein such place is situated. [R., § 2798; C., '51, § 1704.]

This section is permissive, and not mandatory, and plaintiff may still sue in the county where defendant resides: *Troy, etc., Mill Co. v. Bowen* 7-465.

This section only applies to cases where personal service is had upon defendant within the state. If the proceedings are by attachment against a non-resident defendant suit can only be brought where the property is attached: *Hedrick v. Brandon*, 9-319.

Action on a written contract which is, by its terms, to be performed in a particular place cannot be brought in that place against parties who have orally undertaken to carry out the stipulations in such contract and are not residents of that county: *McDaniels v. Wheeler*,

64–678; *Wright, etc., Mfg. Co. v. Kleigel*, 70–578.

Where defendant bought of plaintiff fruit trees, agreeing to pay therefor a certain sum on their delivery at a certain place, *held*, that the contract to pay was not, by its terms, to be performed in any particular place, and suit for the price should be brought where the defendant resided. The agreement to perform in a particular place must be in terms, and not by implication merely: *Hunt v. Bratt*, 23–171.

To entitle plaintiff to prosecute an action in the county where the contract is to be performed the performance must have been required to be there made by the terms of the contract: *Ford Dodge Coal Co. v. Willis*, 71–152.

Where personal property is to be delivered by the vendor and received by the vendee at a particular place, an action for the breach of such contract may be brought in the county where, by its terms, the property was to be delivered: *Oliver v. Bass*, 30–90; *Haugen v. McCarthey*, 34–415.

Where a certificate of deposit was issued payable at a certain date on return of the certificate, *held*, that by its terms it was "to be performed" at the place where issued, so that an action on it might be brought in that county: *Sanbourn v. Smith*, 44–152.

Where a bond was given conditioned for the payment of a penalty if the principal failed to erect a school-house at a place named, according to a certain written contract, etc., *held*, that it was not "to be performed in a particular place," and an action thereon should be brought in the county where defendant resided: *Independent School Dist. v. Reichard*, 39–168.

Where plaintiff agreed to lay a railroad track for defendant in Lucas county, and defendant agreed to deliver iron and material for laying the track at the end thereof, and pay plaintiff any damage sustained by reason of delay in finishing the grade, *held*, that as to damages for delay, etc., the action could not be brought in Lucas county, as the place of performance of the contract, but *semble* that as to damages for not delivering iron, etc., at end of track, action might be brought in that county as the place where the contract was to be performed: *Manley v. Wolfe*, 24–141.

An action upon service by publication to foreclose a mortgage cannot be brought in the county in which the note is made payable, if no portion of the property is situated in that county: *Iowa Loan and Trust Co. v. Day*, 63–459.

3787. Common carriers. 2582. Actions may be brought against railway corporations, the owners of mail stages, or other line of coaches or cars, including express companies, car companies, telegraph and canal companies, and the lessees, companies, or persons operating the same, in any county through which the line or road thereof passes, or is operated. [9 G. A., ch. 169, § 8; 12 G. A., ch. 172, § 2; 14 G. A., ch. 95, § 1.]

A railway company has a residence in any county through which its road passes and in which it transacts business: *Baldwin v. Mississippi & M. R. Co.*, 5–518: *Richardson v. Burlington & M. R. R. Co.*, 8–260.

A railway company doing business in the state so that action might be commenced against it as here provided cannot claim advantages of the provisions of the statute of limitations as to non-residents: See notes to § 3738.

An action against a foreign railway corporation not operating a line of railway nor having any office in the state cannot be brought in the state on a cause of action arising out of business not transacted within the state by means of service of notice on an agent found within the state: *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed. Rep., 866.

Bringing cars within the state with a patent air brake for purposes of exhibition does not authorize service upon the foreign corporation owning such cars: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep., 434.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state: *Mooney v. Union Pacific R. Co.*, 60–346.

The provision as to telegraph companies is applicable to telephone companies, and authorizes the bringing of action against such a company before a justice of the peace in any county through which the line of the company passes or is operated: *Franklin v. Northwestern Telephone Co.*, 69–97.

3788. Construction companies. 2583. An action may be brought against any corporation, company, or person, engaged in the construction of a railway, telegraph line, or canal, on any contract relating thereto, or to any part thereof, or for damages in any manner growing out of the work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which arose the damage claimed. [14 G. A., ch. 95, § 1.]

Under this section, *held*, that where an action was brought by a subcontractor entitled to a mechanic's lien against the contractor for the construction of the railway on an agreement to pay the amount of such lien, such action was properly brought in the county through which the road was being constructed, and could not be removed, on the application of defendant, to the county of his residence: *Vaughn v. Smith*, 58–553.

The facts showing that the contract has been performed or the work done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence: *Jordan v. Kavanaugh*, 63-152.

On motion for change of venue the question as to plaintiff's right of recovery against a portion of defendants cannot be raised, as such a question must be determined upon demurrer: *Ibid.*

3789. Insurance companies. 2584. Insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred. [Same, § 3.]

Under this section an action may be brought before a justice of the peace against an insurance company in another county than that of its residence, notwithstanding the provisions of § 4756, with reference to the place of bringing action in justices' courts: *Hunt v. Farmers' Ins. Co.*, 67-742.

Suit may be brought in the county where the loss occurs: *State Ins. Co. v. Granger*, 62-272.

3790. Office or agency. 2585. When a corporation, company, or individual, has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located. [R., § 2801; C., '51, § 1705.]

These provisions are permissive and not mandatory, and the suit, if against a non-resident, may be brought in the usual manner of commencing actions against non-residents: *Dean v. White*, 5-266.

This section merely fixes the county in which suit shall be brought; it does not define the manner in which jurisdiction over the person is to be acquired: *Centennial Mut. L. Ass'n v. Walker*, 50-75.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency: *Milligan v. Davis*, 49-126.

A certain method of doing business between a firm and defendant, *held* such as to constitute the firm agents for defendant, and authorize an action against defendant growing out of the business of such agency to be brought in the county where the agency was located: *Ibid.*

An action by the agent against the principal for services as agent is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency: *Ockerson v. Burnham*, 63-570.

The section does not limit the right to commence a suit in the county where the agency is located to the time during which the agency exists: *Ibid.*

This provision is also applicable to suits against a partnership brought in a justice's court, and the partnership may be considered a resident of the county in which the business is transacted although none of its members are residents of such county: *Fitzgerald v Grimmell*, 64-261.

The office or agency referred to is one established for the purpose of carrying on the business for which the corporation is organized. A foreign corporation does not subject itself to suit here by sending here an agent to advertise, make contracts, etc.: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep., 434.

3791. Place of residence. 2586. Except where otherwise provided herein, personal actions must be brought in a county wherein some of the defendants actually reside. But if none of them have any residence within this state, they may be sued in any county wherein either of them may be found. But in all actions upon negotiable paper, except when made payable at a particular place, in which any maker of such paper, being a resident of the state, is made defendant, the place of trial shall be limited to a county wherein some one of the makers of such paper resides. [R., § 2800; C., '51, § 1701; 14 G. A., ch. 64.]

A personal action may be brought in the county where one of the defendants resides, and the fact as to whether the petition is sufficient to entitle the plaintiff to recover against such defendant cannot be determined on a motion for change of venue to the county where other defendants reside: *Armstrong v. Borland*, 35-537.

Previous to the enactment of the clause in relation to negotiable paper, it was held that when a joint action was brought against the maker and indorsers of a note it might properly be brought in the county where an indorser resided: *Stout v. Notemon*, 30-414.

And that the fact that guarantors or indorsers became parties to the note subsequent to the maker, if in good faith, would not change the rule: *Troy, etc., Mill Co. v. Bowen*, 7-465.

But *held* that a suit brought in the county of the residence of a party who was made de-

fendant merely for the purpose of compelling the other defendants to attend at great expense in a county where suit could not have been brought against them alone, might be removed to the county of residence of the proper defendants: *Ibid.*

The fact that an attachment is sought against property in another county than that of defendant's residence will not change the rule as to the place of bringing suit: *Gates v. Wagner*, 46-355.

The fact that the defendant is a resident of another state will not defeat the jurisdiction of our courts: *Swan v. Smith*, 26-87.

In a personal action the court acquires jurisdiction by getting jurisdiction of the person of defendant, no matter where the contract was made nor where it is to be performed: *Johnson v. Tostevin*, 60-46.

A person who, having relinquished his residence in one county, is in the act of removing to another with intent of residing within the latter, has not "a residence within this state," and may be sued in any county where found. The meaning of residence as here used is more precise and limited than that of domicile: *Cohen v. Daniels*, 25-88.

An action for a libel being a personal action must be brought within a county where some of the defendants reside: *Hall v. Royce*, 54-136.

Where the action seeks a remedy against an attorney for negligence it is a personal action, and if not brought in the county of his residence should be changed to such county upon proper application, although the relief asked is in connection with an application for an injunction to prevent him from enforcing judgments recovered in an action in which he appeared as attorney, and which have been assigned to him. In such case an action cannot be brought in the county in which the judgments were recovered other than that of defendant's residence: *Baker v. Ryan*, 67-708.

3792. Residents of different counties. 2587. Where an action embraced in the preceding section is against several defendants, some of whom are residents and others non-residents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such non-residents may, upon motion, have said cause dismissed with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them.

This section has no application to an action for the recovery of specific personal property brought in the county in which the property is situated: *Porter v. Dalhoff*, 59-459.

Where one of defendants is a resident of the county where the suit is brought, and the cause remains undetermined as to him, it cannot be dismissed on motion on the ground that defendant as to whom the issue is raised is a resident of another county: *McAlister v. Safley*, 65-719.

3793. Change of residence. 2588. If, after the commencement of an action in the county of the defendant's residence, he remove therefrom, the service of notice upon him in another county shall have the same effect as if it had been made in the county from which he removed.

3794. Effect; change. 2589. If a suit be brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demand a change of place of trial to the proper county. In which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county. And if the sum so awarded, and costs, are not paid to the clerk by a time to be fixed by the court, or if the papers in such case are not filed by the plaintiff in the court to which the change is ordered ten days before the first day of the next term thereof, or if ten days do not intervene between the making of said order and the first day of the next term of said court, ten days preceding the first day of the next succeeding term thereof, in either event the action shall be deemed to be discontinued. [R., § 2802; C., '51, § 1702.]

Motion to change only remedy: Where suit is brought in the wrong county, defendant's remedy is not by demurrer to the jurisdiction of the court, but by motion to change the place of trial to the proper county. If such change is not asked, suit may be prosecuted to judgment in the county where it is brought: *Lyon v. Cloud*, 7-1; *Cole v. Conner*, 10-299; *Leach v. Kohn*, 36-144.

If an action of replevin is brought in the wrong county the only remedy is by motion to change the venue to the proper county: *Goldsmith v. Willson*, 67-662.

The objection that parties are improperly joined cannot be raised on a motion by one of them for change of place of trial: *Troy, etc., Mill Co. v. Bowen*, 7-465; *Lyons v. Frazier*, 8-349.

Where the proceeding is *in rem* only, the court acquires no jurisdiction in an action

brought in the wrong county, and the provision that it may proceed with the case, unless motion to transfer it to the proper county is made, is not applicable: *Orcutt v. Hanson*, 71-514.

Time for application: Where a default had been set aside and defendant granted a certain time in which to answer, *held*, that such application, made after the expiration of the time given to answer, was too late: *First Nat. Bank v. Krance*, 50-235.

Showing for the change: On the hearing of an application of a defendant for the transfer of an action to another county upon a showing that it is his place of residence, the plaintiff should be allowed to make a counter-showing on that question: *Turner v. Maddox*, 6-489.

Where an application for a change has been made and conditionally granted, with opportunity for the opposing party to make objection or showing against such order, it is not too late for the filing of an amendment dismissing one of the causes of action so as to defeat the ground for the change of venue: *Allen v. Bidwell*, 35-218.

Waiver of objection: A party moving for a change of place of trial to the proper county, and appealing from the action of the court in overruling such application, takes the chances as to such appeal, and, if the ruling of the court below on the motion is sustained, cannot, after judgment has been rendered against him, be allowed an opportunity to defend in the action: *Breckenridge v. Brown*, 9-396.

Where a transfer is ordered, but the papers are filed in the court to which the case is transferred after the time required by statute, the other party will not be held to have waived the right to have the action discontinued by appearing in the court where the papers are filed and moving for such discontinuance: *Hall v. Royce*, 56-359.

These provisions as to changing the place of trial to the proper county have no application to actions before a justice of the peace: *Post v. Brownell*, 36-497: *Meunch v. Breitenbach*, 41-527.

Costs: Defendant is to be compensated for his actual and necessary trouble and expenses in attending in the wrong county, even where the change to the proper county is defeated by plaintiff's dismissing the suit: *Allen v. Van*, 1-568.

Dismissal: Where one of several counts in a petition is upon a cause of action properly suable in the county where the action is commenced, and the causes of action set up in the other counts are improperly brought there, defendant should move to strike the latter counts from the petition if he desires any relief, and cannot have the cause changed to another county: *Davis v. Kimball*, 74-84.

After one of two defendants who is entitled to a change of place of trial to another county appears and moves for such change and for an allowance of expenses, his right to have such allowance made cannot be defeated by dismissal of the action: *Farmers', etc., Bank v. Cohen*, 71-473.

CHAPTER 5.

OF CHANGE IN PLACE OF TRIAL.

3795. Grounds for. 2590; 17 G. A., ch. 118; 20 G. A., ch. 94. A change of the place of trial, in any civil action, may be had in any of the following cases:

1. Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury;

2. Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree;

3. Where either party files an affidavit verified by himself and three disinterested persons, not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent, or employee of such party, stating that the inhabitants of the county, or the judge, is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county, that he cannot obtain a fair trial. But when either party files an affidavit as provided by this subdivision the other party shall have a reasonable time to file counter-affidavits, and the court or judge, in the exercise of a sound discretion, must decide whether a change shall be granted, when fully advised, according to the very right and merits of the matter. The court may in its discretion cause the affiants upon either side to be brought into court for examination upon the matters contained in their said affidavits.

4. By the written agreement of the parties, and their attorneys;

5. If the issue is one triable by jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained.

Provided, however, that not more than two changes to either party of the place of trial shall be allowed for any of the causes enumerated in this section; nor shall a change of venue from the county be allowed in case of appeal from a justice of the peace; nor shall a change of the place of trial be allowed when the issue can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof, that he cannot obtain a fair trial; *and, provided*, that after any change of venue has been taken as herein provided, and a trial had and the jury been discharged or a new trial has been granted them, a subsequent change of venue may be taken for any of the causes mentioned in said section. [R., § 2803; C., '51, § 1706; 13 G. A., ch. 167, § 13.]

Grounds for change; county a party: The fact that the penalty to be recovered in an action in the name of the state on a bail bond goes into the county school fund does not make the county a party to such action so as to be a ground for changing the venue of the action: *State v. Merrihew*, 47–112; *State v. Stewart*, 74–336.

The provision that a change of place of trial shall not be granted after a continuance applies as well to a case where the county in which action is brought is a party as to any other case: *Ferguson v. Davis County*, 51–220.

Prejudice of the judge: The fact that the judge before whom the case is tried has previously been counsel for one of the parties will not render judgment by him void. Objection should be made by motion for a change of place of trial: *Jewett v. Miller*, 12–85.

Motion for change of venue on account of prejudice of the judge, if properly made in vacation, should be granted, even though the judge to whom objection is made is to go out of office before the next term of court. The change is not merely for purposes of trial; but where the objection is to the court, the statute contemplates that it may be had before the issues are made up and the case ready for trial: *Allerton v. Eldridge*, 56–709.

There is no distinction between a change on the ground of prejudice of the judge and on the ground of prejudice of the inhabitants of the county. It is not proper to designate one as a change of forum and the other as a change of place of trial: *Weare v. Williams*, 69–252.

Undue influence of opposite attorney: An affidavit of undue influence of the attorneys for the opposite party will not be sufficient to support an application for change of venue on that ground after some of the attorneys have withdrawn from the case: *Anderson v. Leverich*, 70–741.

By stipulation of parties: The statutory provision for change of place of trial on written agreement of the parties and their attorneys should be construed to authorize such change when the written agreement therefor is signed by the parties or their attorneys: *Oltrogge v. Schutte*, 51–279.

On motion of court: A court has no authority to change the venue of an action on its own motion to another court. Therefore, *held*, that a change ordered in a case in which no application was made was erroneous, although in another case between the same parties an application had been made, supported by affidavit, on the ground of prejudice of the judge: *Bennett v. Carey*, 57–221.

Affidavits: An affidavit by counsel, not containing any showing or reason why it is not made by the party, nor showing the counsel's means of knowledge, is not sufficient: *Dean v. White*, 5–266.

Where the affidavit showed that the agent making it was the only person, officer or agent of the corporation conversant with the facts, and that the matters stated therein were connected with his special business, *held*, that it was sufficiently apparent that he was the proper person to make the affidavit: *Jones v. Chicago & N. W. R. Co.*, 36–68.

Where a change of venue is desired by a corporation, the requisite affidavit must be made by its officers or agents; and *held*, that an affidavit commencing "I, A. B., vice-president of the defendant above named, being duly sworn," etc., and not otherwise showing that the affiant was vice-president, was not sufficient for the reason that the connection of the affiant with the corporation was thus shown merely by an unverified statement: *McGovern v. Keokuk Lumber Co.*, 61–265.

An affidavit of witnesses that they "verily believe" that prejudice on the part of the judge exists is sufficient: *Jones v. Chicago & N. W. R. Co.*, 36–68.

The facts showing such prejudice need not be stated: *Turner v. Hitchcock*, 20–310.

Where an application for change is made on account of prejudice of the inhabitants of the county, it should be overruled if not supported by such affidavits as required by statute: *Ferguson v. Davis County*, 51–220.

If the motion is made by more than one party it must distinctly appear from the affidavit that neither one of the three disinterested persons subscribing thereto is related nearer than the fourth degree to either of the parties making the motion: *Fairburn v. Goldsmith*, 58–339.

Where the affiants in their affidavit collectively declare that they are not related within

the specified degree to the one party making the motion, that is sufficient: *Goodnow v. Litchfield*, 63–275.

Where the affidavit for a change on the ground of undue influence of the adverse party or his attorney stated that "defendants and their attorney" had such undue influence, *held*, that it was sufficient to authorize a change: *Bixby v. Carskaddon*, 63–164.

An application for change of venue on the ground of alleged prejudice of the inhabitants of the county must be sworn to by the party asking the change if he is a natural person: *Hedge v. Gibson*, 58–656.

Where the application is not supported by affidavits of "three disinterested persons" as required it should be overruled: *Ferguson v. Davis County*, 51–220.

Discretion: Under the section before its amendment by 20 G. A., ch. 94, it was held that where a party seeking a change made such showing as required by statute, it was error to refuse his application, and the court had not in civil cases the discretion confided to it in criminal cases to determine in its discretion the propriety of granting the change: *Turner v. Hitchcock*, 20–310; *Miller v. Laraway*, 31–538; *Jones v. Chicago & N. W. R. Co.*, 36–68; *Moorman v. Moorman*, 39–460; *Cass v. State*, 2 G. Gr., 353.

Counter-affidavits: Also *held*, that counter-affidavits could not be received in a civil case as authorized in criminal cases: *Jones v. Chicago & N. W. R. Co.*, 36–68.

The amendment of the section by 20 G. A., ch. 94, authorizing counter-affidavits, is applicable on the trial of actions which were commenced before such amendment: *Eikenberry v. Edwards*, 71–82.

Examination of affiant: The court may protect itself from imposition, and, though the affidavit be in due form, may require the disinterested persons to be produced in court; and in a case where they were not found and information concerning them was refused, and other suspicious circumstances appeared, *held*, that the application for change, though sufficient in form, was properly overruled: *Davis v. Rivers*, 49–435.

Before the special provision for examination of affiants was added to the section by 20 G. A., ch. 94, it was held that the party by whom the principal affidavit was made could not be compelled to submit to an examination as to the truth of the matter stated in his affidavit: *McGovern v. Keokuk Lumber Co.*, 61–265.

Amended affidavits not presented until the case was called for trial, *held*, under the particular circumstances of the case, to have been properly refused: *Chicago & S. W. R. Co. v. Heard*, 44–358.

Affidavits part of the record: The affidavits on file become a part of the record and may be certified by the clerk on appeal in the same manner as other matters of record. It is not necessary that they be preserved by a bill of exceptions: *McGovern v. Keokuk Lumber Co.*, 61–265.

Presumption in favor of action: Unless the contrary appears from the record, the action of the court in granting a change will be presumed correct: *Ramsey v. Bush*, 27–17.

Jurisdiction: An application for a change being within the jurisdiction of the court to which it is addressed, its order thereon will not be void though erroneous: *Joerns v. La Nicca*, 75–705.

In special proceedings: The provisions of statute for change of venue in civil actions are applicable in special proceedings for the disbarment of an attorney: *State v. Clarke*, 46–155.

In right of way proceedings: A change of place of trial may be had as here provided on an appeal in proceedings to assess damages for taking property for right of way: *Whitney v. Atlantic Southern R. Co.*, 53–651.

On new trial: A change of place of trial cannot be had while the case is pending on motion for new trial, after verdict: *Perkins v. Jones*, 55–211.

The provisions as to change of place of trial are applicable to a proceeding for new trial upon petition under § 4384: *Gibbs v. Buckingham*, 48–96.

On motion to correct the record the law makes no provision for a change of place of trial, where the case has been tried and judgment rendered, and the only matter pending before the court is a motion to correct the record. In such a case a removal of the cause cannot be had: *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226.

To enforce judgment: A proceeding for execution against a partner on a judgment already rendered against the partnership can only be brought, if proper at all, in the court where the judgment was rendered, and cannot be removed on the motion of the defendant to the county of his residence: *Hollowell v. Dickerson*, 46–569.

To vacate judgment: Although proceedings to vacate and set aside a judgment for fraud must be brought in the court where the judgment was rendered, a change of venue may be taken in such proceedings as in other cases: *State v. Whitcomb*, 52–85.

Appeals from justices of the peace: A change of place of trial on appeal from a justice of the peace cannot be granted to another county or district: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723.

Although an appeal from a justice of the peace in a civil case could not be changed from the circuit to the district court, yet where such appeal was consolidated with an action originally brought in the circuit court, *held*, that the consolidated action might be changed as in any other case: *Browne v. Hickie*, 68–330.

The provision as to appeals from justices positively prohibits a change of venue from the county in a case of that kind. Where the objection is to the inhabitants of the county, or on any other ground, the provision plainly forbids the case being sent out of the county: *Boileau v. Chicago, B. & Q. R. Co.*, 69–324.

Effect of change: After granting the change the court has no further jurisdiction over the subject-matter or the parties: *Campbell v. Thompson*, 4 G. Gr., 415.

If a change is granted the cause is within the jurisdiction of the court to which the change is taken, and a motion to dismiss it for want of prosecution should be made in that court: *Farr v. Fuller*, 12–83.

The court to which the change is granted may dismiss the action where the record as filed is defective in not showing that there is any issue raised for trial: *Thompson v. Campbell*, 4 G. Gr., 322.

In garnishment cases: A garnishee is such a party as to be entitled to change of venue, and where he does not join in application for the change the cause will proceed against him in the court where commenced: *Westphal v. Clark*, 42–371.

Waiver of change: Where the party who has obtained the order for the change makes no objection at a subsequent term to the redocketing of the cause, and goes to trial, he cannot assign such proceeding as error: *Eckles v. Kinney*, 4–539.

Waiver of objection: A party who has procured the dismissal of an action in one court on the ground that it is properly pending upon change of venue in another is estopped from afterwards denying the jurisdiction of the latter court: *Perkins v. Jones*, 32–345.

Where a party has duly objected to a change of venue being granted, he does not waive such objection by appearing in the court to which the cause is changed and going to trial: *Jones v. Chicago & N. W. R. Co.*, 36–68; *McCracken v. Webb*, 36–551; *Ferguson v. Davis County*, 51–220.

The fact that a party, after properly excepting to the ruling granting a change of venue, goes to trial in the court to which the change is granted and does not raise an objection to the change by motion for new trial or in arrest of judgment, does not prevent his alleging it upon appeal: *Michaels v. Crabtree*, 59–615; *Bennett v. Carey*, 57–221.

Error in granting change: The fact that a party has had a fair trial before an unprejudiced jury does not render an improper change of venue previously made error without prejudice: *Ferguson v. Davis County*, 51–220.

An appeal will not lie from an order granting or refusing a change of venue, but upon a subsequent appeal properly taken, even from an intermediate order before final judgment, the order as to change of venue may be reviewed: *Allerton v. Eldridge*, 56–709.

By an appeal from an order granting a change of venue the supreme court acquires no jurisdiction, and will refuse to consider the case even though objection to the jurisdiction is not made by either party: *Groves v. Richmond*, 58–54.

Where the supreme court on appeal determines that a change of venue has been granted without authority, it will not review errors in the proceeding subsequent to such change, but will remand the case to the court from which it was improperly changed: *Bennett v. Carey*, 57–221; *Gilman v. Donovan*, 59–76.

3796. Application for. 2591. The application for a change of place of trial may be made either to the court or to the judge in vacation, and, if made in term time, shall not be awarded until issue be made up unless objection be to the court; nor shall such application be allowed after a continuance, except for a cause not known to the affiant before such continuance; and after one change, no party is entitled to another for any cause in existence when the first change was obtained. [R., § 2804; C., '51, § 1708.]

Time for application: A change cannot be allowed after continuance: *Dean v. White*, 5–266; *Ferguson v. Davis County*, 51–220.

To warrant a change after a continuance the affidavit for the change must state that the cause for which it was asked was not known to the applicant before such continuance: *McCracken v. Webb*, 36–551; *Finch v. Billings*, 22–228.

An application for change on the ground of prejudice of the judge, not made until after a continuance is had, is too late when it does not appear that the grounds therefor were not known prior to the continuance: *Finch v. Billings*, 22–228.

An application made on the day of trial of a cause, without previous notice and without the showing of a reason why it was not sooner made, may properly be overruled: *Demoss v. Noble*, 6–530.

It cannot be determined until the issues are made up whether "the issue can only be tried to the court," and an application for change on account of the prejudice of the people of the county cannot therefore be made even in vacation until the issues are made up: *Gibson v. Abbott*, 50–155.

Second change: After the venue has once been changed a second change cannot be granted for a cause existing when the first was granted, and this is applicable to a change asked by the party who did not ask for the first change: *Schaentgen v. Smith*, 48–359.

After one change of venue a party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained: *Michaels v. Crabtree*, 59–615.

A previous change, had by agreement of parties, does not, under the statute, prevent a subsequent change on statutory grounds, whether existing at the time of the first change or not: *Bixby v. Carskaddon*, 63–164.

The provision prohibiting a second change does not apply where a change is granted but not perfected, and the cause then proceeds in the court where it was originally brought: *Eckles v. Kinney*, 4–539.

Where a second change is asked the affidavit upon which such application is based must show that the ground relied on did not exist when the first application was granted, and it is immaterial that the first change asked was on account of the judge, and the second on account of prejudice of inhabitants of the county: *Weare v. Williams*, 69–252.

Where, after one change of venue had been granted, there was a change of judges of the court to which the case was sent, *held*, that a subsequent application for a change on the ground of prejudice of the judge might be entertained without showing that the objec-

tion did not exist when the first change was granted, and that the supreme court would take notice of such change of judges: *Upton v. Paxton*, 72–295.

3797. To what county or court. 2592. The place of trial shall be changed to some other county in the same district [or circuit], unless the objections are to the judge, or the objections made appear from the affidavits to exist as to all the other counties in the district, and shall be to the most convenient county to which no objection is made. [Whenever the change shall be granted on account of the prejudice or disability of the judge, the action shall be transferred to the district or circuit court of the same county, unless objections exist as to both the judges, in which case it shall be transferred to the most convenient county in some other district or circuit.] [R., § 2805; C., '51, § 1707; 12 G. A., ch. 86, § 7; 14 G. A., ch. 167, § 14.]

[The latter part of the section, in brackets, is superseded by the provisions of § 242, which is part of the act by which the circuit court is abolished.]

The "most convenient county" is not necessarily the one nearest in point of distance. The question as to which county is most convenient must be determined to some extent by the peculiar circumstances of each case, taking into account the distance of parties and witnesses, the convenience of attorneys, and the prospect of reaching a speedy trial, as well as the relative distance of different counties. And where nothing is shown to the contrary, it will be presumed that the county selected was, within the meaning of the law, the most convenient: *Allen v. Skiff*, 2–433.

The presumptions are that there was sufficient evidence before the court to justify it in holding that the county selected was the most convenient until the contrary appears: *Robbins v. Neal*, 10–560.

Before the circuit court was abolished it was held that, when the objection was to the judge, the change should be to the district or circuit court of the same county: *Polk County v. Hierb*, 37–361. Also that where the case was one in which the circuit court had exclusive jurisdiction, it could not be changed to the district court, but should be sent to some other circuit court: *Schuchart v. Lammey*, 62–197.

To render it error to send a case to a particular county on the ground that objection exists thereto, such objection must be specifically made and not in a general, vague manner: *Cobb v. Thompson*, 10–367.

3798. Notice in vacation. 2593. If an application for the change is made in vacation, five days' notice of the same, with a copy of the affidavit, shall be served on the adverse party or his attorney; and if the judge grant the change, he shall forthwith transmit his order to the clerk, together with all the papers used before him. [R., § 2806; C., '51, § 1709.]

A change should not be granted in vacation unless notice of the application therefor has been given the opposite party: *Preston v. Winter*, 20–264; *Loomis v. McKenzie*, 31–425.

3799. When deemed perfected. 2594. If the order for the change is granted in vacation, the same must be perfected by noon of the second day after the order is received by the clerk, and, if granted during term time, the same must be perfected by the morning of the second day thereafter or before the cause is reached for trial, if sooner reached, or such change, whether granted in term or vacation, will be deemed waived and the cause tried as though no such order had been granted. When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court, strongly enveloped and sealed, a transcript of the record and proceedings, with all the original papers, having first made out and filed in his office authenticated copies of such original papers; but, if less than all of several plaintiffs or defendants take such change, the original papers shall not be so transmitted, but a copy thereof. And as to those who take no change, the cause shall proceed as if none had been taken, except that if the place of trial is changed to a court in the same county, no transcript or copies shall be made out, but the original papers shall be transmitted. [R., §§ 2807, 2810; C., '51, § 1710.]

If costs are not paid within the time provided a subsequent payment will not effect the change: *Stryker v. Rivers*, 47–108, 110.

In case of a change granted during term, the payment of costs during the second day after the granting of the order, though not by the morning of that day, will be sufficient, provided they are paid before any action is taken by the court to vacate the order: *Bacon v. Black*, 38–162.

The provisions of this section as to the time within which the change is to be perfected do not apply to cases where the venue is changed by agreement of the parties: *Carroll County v. American Emigrant Co.*, 37-371.

A change of venue cannot be granted on application of a stranger to the action who has applied for but not yet obtained leave to intervene: *Barkdull v. Callanan*, 33-391.

A garnishee is such a party as to be entitled to change of venue, and where he does not join in an application for the change the cause will proceed against him in the court where commenced: *Westphal v. Clark*, 42-371. See, however, § 3792 and notes.

It does not follow from the mere fact that a change is granted to a portion of defendants or plaintiffs a change must also be granted to the others who do not desire it. In such case the cause must proceed as to them as if no change had been taken; but where all the defendants ask for a change, and their defense is identical, if one shows a right to the change it should be granted as to all: *Sweet v. Wright*, 62-215.

3800. Docketed. 2595. Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed without fee and proceeded in as though it had originated therein. [R., § 2808; C., '51, § 1711.]

3801. Costs of change. 2596. Unless the change be granted under subdivision two, four, or five, of section two thousand five hundred and ninety of this chapter [§ 3795], all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court, or judge, at the time of making the order, shall designate in general terms such costs, and no change shall be deemed perfected until such costs are paid. [R., § 2809; C., '51, § 1712.]

The applicant should be charged not only with the costs of the transcript but also with the costs of the term: *Allen v. Skiff*, 2-433.

The clerk's fee for entering order of change is part of the cost to be paid by the applicant: *Stryker v. Rivers*, 47-108.

Costs accrued at a former term of court are not to be taxed up to the party asking a change. It is not competent for the court to impose upon him conditions not authorized by law. Upon a proper showing he is entitled to a change as a legal right: *Bannigan v. Central Iowa R. Co.*, 58-671.

The court cannot, after the change has been allowed, order the applicant to give to the adverse party a bond to secure him in the additional costs incurred by such change: *Eckles v. Kinney*, 4-539.

The court may make the change conditional upon the payment of the costs within a specified time: *Robbins v. Neal*, 10-560.

3802. Jury fees. 2597. Where the place of trial in any civil action is changed to any county other than that in which the same was properly commenced, where the trial thereof takes place at a regular term, and occupies more than one calendar day, the judge trying said case shall certify the number of days so occupied, and the county in which the case was originally commenced shall be liable to the county where the same is tried for the sum of two dollars per day for each juryman engaged in the trial thereof. [14 G. A., ch. 9, § 1.]

3803. Special term. 2598. Where a special term of any court is held for the trial of any action contemplated in the preceding section, the court trying the same shall make out and certify the amount of county expenses incurred in the trial of each case, and the same shall be a legal and valid claim against the county in which the same was properly commenced. [Same, § 2.]

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

3804. Original notice. 2599. Actions in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney, informing the defendant of the name of the plaintiff, and that on or before a date therein named, a petition will be filed in the office of the clerk

of the court wherein suit is brought, naming it, and stating in general terms the cause or causes of action, and if the action is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, or at such other time as may be by rule of such court prescribed, default will be entered against him and judgment rendered thereon. In all cases where the time for the commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been so changed. [R., §§ 2811, 2812; C., '51, §§ 1714, 1715.]

Not process: The original notice is not a process of the court and need not be in the style of "The State of Iowa" (Const., art. 5, § 8): *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42; *Klingel v. Palmer*, 42–166.

A summons or subpœna in chancery is not sufficient to constitute an original notice under the requirements of the statute: *McKee v. Harris*, 1–364.

When action deemed commenced: Where a notice was placed in the hands of an officer for service on the day before the date on which the action was based became due, but was not actually served until the day after maturity, *held*, that the actual commencement of the action was the day of actual service, and that § 3737, declaring the action to be commenced on the date of placing the notice in the hands of the sheriff for service, has reference only to the bar of the statute of limitations: *Parkyn v. Travis*, 50–436.

So, where a penal bond provided that it should be deemed fulfilled unless action thereon was begun by a certain day, and notice of suit thereon was placed in the hands of the sheriff before that date but not served until afterward, *held*, that the action was not commenced in time: *Proska v. McCormick*, 56–318.

Misnomer: Where the petition and original notice gave defendant's christian name incorrectly, and service was made by leaving a copy at defendant's usual place of residence while she was temporarily sojourning elsewhere, and defendant was ignorant of the pendency of the action until after judgment and levy of execution, and then offered to pay the amount actually due, but plaintiff, with notice of the facts before the levy, sold defendant's property thereunder, *held*, that defendant not being personally served, and having no actual notice, was not required to take advantage of the misnomer by pleading in abatement, and that plaintiff and the officer executing the writ were liable in trespass: *Journey v. Dickerson*, 21–308.

Publication of notice in which defendant's name was stated as "P. T. B. H——," instead of "T. P. B. H——," *held* insufficient to confer jurisdiction: *Fanning v. Krapfl*, 61–417.

But where the original notice was directed to "P. T. B. H——, wife of John C. H——," *held*, that it was sufficient to give the court jurisdiction of "T. P. B. H——," it appearing that she was generally and better known in the county of her residence as the wife of John C. H—— than by her own name: *Fanning v. Krapfl*, 68–244.

Where the petition was filed by Levi Rike, and the notice stated the plaintiff's name as Levi Pike, and a judgment was rendered by default in favor of the latter, *held*, that the judgment was absolutely void: *Newman v. Bowers*, 72–465.

A party duly served with notice becomes a party to the action without appearance: *Aultman v. McLean*, 27–129.

Description of the court: A notice informing defendant that a petition would be filed in the office of the clerk of the district court of Des Moines county, *held* sufficiently descriptive of the court: *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42.

The original notice need not give the name of the state: *Lyon v. Byington*, 10–124.

Place of holding court: A notice which does not state when or where (*i. e.*, in what court) defendant is required to appear is fatally defective, and a judgment rendered thereon is void and may be collaterally attacked: *Kitsmiller v. Kitchen*, 24–163.

But it is not necessary that the name of the city or town in which the court is to be held should be stated: *Bond v. Epley*, 48–600.

Statement of cause of action: A notice simply stating the amount of plaintiff's claim without stating its nature is not sufficient: *Moody v. Taylor*, 12–71.

The notice is not to set forth the cause of action in detail, but the defendant should be informed with reasonable certainty as to the nature of plaintiff's claim, or the remedy sought, as well as of the amount of recovery asked: *Ibid.*; *Harkins v. Edwards*, 1–296.

Notice of an action to foreclose a mortgage, without claiming any special sum, *held* sufficient to warrant a personal judgment for the amount due: *York v. Boardman*, 40–57.

Where the original notice advised defendants that plaintiff claimed of them a judgment on a note and foreclosure of the mortgage given to secure payment of the same, while in the petition he claimed judgment against them for the foreclosure of the mortgage, and judgment against only one of them for the amount of the note, *held*, that there was no material variance between the notice and petition: *Hickman v. Chambers*, 10–301.

The law does not require that the original notice, in an action to foreclose a mortgage, shall describe the land covered by the mortgage: *Van Sickles v. Town*, 53–259.

A notice informing defendant that there was on file in the office of the clerk, etc., a petition of plaintiff claiming of him the sum of —— dollars, "as money due on a promissory note," *held* sufficient, though the plaintiff was not the payee of the note, but claimed it by transfer: *Elliott v. Corbin*, 4–564.

A notice stating the claim as upon a promissory note, when it was in fact upon a guaranty

of a non-negotiable instrument, *held* sufficient: *Peddicord v. Whittam*, 9–471.

A notice claiming of defendant a certain sum "as money due for your trespasses upon and injuries done certain parcels of real estate of your petitioner," *held* sufficient: *Des Moines Nav. & R. Co. v. Doran*, 4–553.

Where the petition contained two counts, one for damages under the statute for the killing of stock by a railroad, the other for damages for the same act recoverable at common law, *held*, that the original notice claiming the damages given by the statute was sufficient as to both counts, the cause of action in either case being the same: *Pearson v. Milwaukee & St. P. R. Co.*, 45–497.

In the original notice in an action for divorce it is not necessary to state that alimony is claimed. It is allowed as an incident of the main action: *McEwen v. McEwen*, 26–375; *Darrow v. Darrow*, 43–411.

A slight variance as to the amount claimed between the petition and the notice will not be a fatal defect: *Anderson v. Kerr*, 10–236.

Statement as to time for appearance: The original notice should fix, by name, the term at which defendant is required to appear. (Explaining *Lemonds v. French*, 4 G. Gr., 123, and *Butcher v. Brand*, 6–235): *Des Moines Branch, etc., Bank v. Van*, 12–523; *Van Vark v. Van Dam*, 14–232.

A notice requiring defendant to appear "on or before noon of the second day of the next regular term," etc., but not naming the term, is defective: *Decatur County v. Clements*, 18–536.

A notice requiring defendant to "appear and answer on or before noon of the 15th day," etc., it appearing that the day named was the second day of the next term, was held sufficient, although the term was not named: *Knapp v. Haight*, 23–75.

Where a notice required defendant to appear "on or before the 29th day, etc., being the second day of the next term," etc., whereas that day was in fact the fourth day of the term, *held*, that it was not error to refuse to set aside a default rendered on the 29th, there being no showing that the defendant had been misled: *Burr v. Wilcox*, 19–31.

A notice giving the date of the commencement of the term, but not otherwise naming it, *held* sufficient: *Farmers' Ins. Co. v. Highsmith*, 44–330.

Notice requiring defendant to appear on the second day of the April term, "commencing April 12th," etc., when the term really commenced April 18th, *held* insufficient: *Boals v. Shules*, 29–507.

A notice requiring an appearance at a date prior to the term is void and confers no jurisdiction: *Haws v. Clark*, 37–355.

Where the notice fixes a date for appearance of defendant which is prior to the service of the notice, and therefore impossible, the notice will not confer jurisdiction: *Genther v. Fuller*, 36–604.

A notice which does not advise defendant of time and place when and where he is required to appear, or notifies him to appear at a later date than that at which the proceedings are afterwards had, is not merely a defective notice, but is no notice, and confers no jurisdiction upon the court in such proceedings, and a judgment therein rendered is void and subject to collateral attack: *Lyon v. Vanatta*, 35–521; *Kitsmiller v. Kitchen*, 24–163.

A notice, not stating the term of court at which defendant is required to appear, does not confer jurisdiction. And in a case where it was required by statute that suit be brought within a limited time, and the notice served did not contain a statement as to the next term, *held*, that a second notice served after the expiration of the time limited, to which the defendant appeared, would not enable the court to entertain the action: *Jones, etc., Lumber Co. v. Boggs*, 63–589.

An original notice of action in a justice's court in which the return day is left blank is not such notice as is required by law: *Phinney v. Donahue*, 67–192.

Where the notice is defective in that the copy incorrectly states the date of commencement of the term at which defendant is required to appear, the original being correct in that respect, the remedy of defendant is to apply to the officer for an amended return showing the facts as to such copy, and then move to set aside the default, or, if the term has expired, petition for a new trial on the ground of having been prevented from making an appearance and interposing his defense: *Irions v. Keystone Mfg. Co.*, 61–406.

After proper service of notice is made, a subsequent change in the time of holding the term of court will not render the notice insufficient, and defendant must appear at the term as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28–274.

Defendant is not entitled to a continuance unless for cause shown, when he has appeared in response to a notice defective only in not naming the term: *Des Moines Branch, etc., Bank v. Van*, 12–523.

Plaintiff cannot have judgment for default in failing to answer before the day fixed in the notice, even though by rule of court he is required to answer on the first instead of the second day of the term: *Worster v. Oliver*, 4–345.

The court may by rule provide that defendant shall be required to appear and answer by noon of the first day instead of the second day of the term: *McGrew v. Downs*, 67–687.

Statement that judgment will be entered: A notice that, for failure of defendant to appear, judgment would be rendered against him, *held* sufficient without specifying that default would be entered for want of appearance: *Farmers' Ins. Co. v. Highsmith*, 44–330.

Where the notice fails to inform defendant that a money judgment is claimed, such judgment should not be entered against him, but if entered it will be simply erroneous and not void: *Blair v. Wolf*, 72–246.

Defective notice and the effect thereof, see notes to § 3809.

3805. Discontinuance. 2600. If the petition is not filed by the date thus fixed, and ten days before the term, the action will be deemed discontinued. [R., § 2813; C., '51, § 1716.]

If the petition is not filed by the date fixed in the notice the action will be deemed discontinued: *Hudson v. Blanpin*, 22–323. And see *Webster v. Hunter*, 50–215.

But under prior statutory provisions differing slightly from the foregoing, *held*, that a failure to file the petition by the time specified in the notice would not work a dismissal of the action if it was filed ten days before the commencement of the term: *McCaffree v. Guesford*, 1–80; *Cheever v. Lane*, 3–296; *Anderson v. Kerr*, 10–233; *Sweet v. Porter*, 12–387.

The fact that a petition is by mistake filed in the wrong court will not prevent the cause being discontinued for failure to file it within proper time: *Morgan v. Small*, 33–118.

Where a petition is marked filed by the clerk within the proper time, but he makes no memorandum of the fact upon the appearance docket, it cannot be considered filed, and the provisions of this section are applicable: *Nickson v. Blair*, 59–531.

In determining whether the petition is filed ten days before the term, Sunday is to be included in computing the days, although it is the last of the ten days: *Conklin v. Marshalltown*, 66–122.

Upon failure of plaintiff to file his petition at the time fixed in the notice, the law implies that the case is discontinued without an order of court to that effect: *Clark v. Stevens*, 55–361.

Where the petition was not filed by the date fixed in the notice, and it appeared that no prejudice resulted to defendant by that fact, *held*, that a judgment by default was not rendered void on account of such irregularity: *Brown v. Mallory*, 26–469.

A judgment recovered upon a petition filed after the time named in the notice is not void, and cannot be collaterally impeached: *Hildreth v. Harney*, 62–420

Where the date fixed for the filing of the petition was previous to that on which the notice was served, and the petition was filed at the time of such service, but not at the time fixed, *held*, that the defendant suffered no prejudice, and the action should not be deemed discontinued: *Smith v. Shaw*, 49–294.

An appearance to move for a discontinuance for failure to file petition by time fixed in notice does not waive the right to such discontinuance: *Cibula v. Pitts' Sons' Mfg. Co.*, 48–528.

If the defendant, after his motion to have the case discontinued because the petition is not filed in time is overruled, files an answer in the case, he thereby waives objection to any irregularity in the notice or the filing of the petition. Appearance to insist upon the discontinuance of the case would not give the court jurisdiction of defendant, but appearance to plead and make defense will give the court jurisdiction: *Paddleford v. Cook*, 74–433.

This section is not applicable to actions in justices' courts. Even when a petition must be filed in an action in such court it is sufficient to file it on the return day: *Duffy v. Dale*, 42–215.

SERVICE OF NOTICE.

3806. Who may serve. 2601. The notice may be served by any person not a party to the action. [R., § 2814; C., '51, § 1718.]

If the notice is served by a constable the fees allowed him in such cases by § 5081 may be taxed up as costs: *Du Boise v. Babcock*, 42–233; but where notice is served by a person not an officer his charges cannot be so taxed: *Conway v. McGregor & M. R. R. Co.*, 43–32.

3807. How long before term. 2602. The defendant shall be held to appear at the next term after service, provided:

1. He be served within the county where suit is brought, in such time as to leave at least ten days between the day of service and the first day of the next term;

2. He be served without the county, but within the judicial district, so as to leave at least fifteen such days;

3. He be served elsewhere, so as to leave twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term after service. [R., § 2815; C., '51, § 1720.]

In the computation of the periods of time here mentioned the day of service and the first day of the term are both excluded. The last day of service for a term commencing on Monday falls on Thursday. Sunday is not to be excluded in the computation: *Robinson v. Foster*, 12–186.

The fact that notice is not served such length of time before the term as to entitle the plaintiff to a trial at that time will not justify a discontinuance of the action: *Lemonds v. French*, 4 G. Gr., 123.

Even where by statute defendant cannot be required to answer until the lapse of a longer period than that required for his appearance, yet he will be in default for failure to appear at the time required: *McKinley v. Betchtel*, 12–561.

Change of time of holding court will not affect the sufficiency of the notice: See § 3804 and notes.

Personal service outside of the state upon a person not a resident or citizen of the state is only equivalent to service by publication: See § 3827 and notes.

Judgment by default rendered upon insufficient notice cannot be corrected on appeal unless motion to set aside the default has been made in the trial court: See notes to § 4307.

3808. Service. 2603. The notice shall be served as follows:

1. By reading the notice to the defendant, or offering to read it in case he neglects or refuses to hear it read, and, in either case, by delivering him personally a copy of the notice, or if he refuses to receive it, offering to deliver it;

2. If not found within the county of his residence, by leaving a copy of the notice at his usual place of residence with some member of the family over fourteen years of age;

3. By taking an acknowledgment of the service indorsed on the notice, dated and signed by the defendant. [R., § 2816; C., '51, §§ 1721, 1732.]

Of these methods of service, the first and third constitute personal service; the second, substituted service, while that by publication is constructive. If the defendant is misnamed in a notice served by personal or actual service, it seems that he can only take advantage thereof by appearing and pleading that fact in abatement; and if he fail to do so he cannot afterwards question the regularity of the judgment. But where the defendant was misnamed in a notice served by leaving a copy, etc., and had no actual notice of the action, and was not in debt to the plaintiff in the amount claimed, *held*, that he was not bound by the judgment: *Journey v. Dickerson*, 21–308.

Where service is authorized on an agent or officer of a corporation (or a member or agent of a partnership, as under Rev., § 2826) personal service is necessary, and service by leaving copy at the usual place of residence of such person will not be sufficient: *Brydolf v. Wolf*, 32–509.

A waiver of service indorsed on the notice is equivalent to an acknowledgment of service: *Johnson v. Monell*, 13–300.

In an appeal from an assessment of damages for the location of a highway, acknowledgment of service, signed by the auditor, is sufficient to constitute a valid service upon him, although he is not "defendant" in the action: *Libbey v. McIntosh*, 60–329.

Service upon attorney does not constitute service upon the client: *Death v. Bank of Pittsburg*, 1–382.

3809. Return of personal service. 2604. If served personally, the return must state the time and manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town, or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age, and was a member of the family. [R., § 2817; C., '51, § 1723.]

Method of service; return: The return should show a strict compliance with the law, as nothing will be presumed in its favor when it appears that the requirements of the statute have not been observed: *Diltz v. Chambers*, 2 G. Gr., 479.

Therefore, *held*, that a return was defective which did not state the time of service, and that the fact that part of the paper containing the return was torn off, or that the return was sworn to more than the required length of time before the return day, would not cure the defect: *Hakes v. Schupe*, 27–465.

That the return does not state the time of making service will not be a fatal defect in a collateral attack: *Wilson v. Call*, 49–463.

A return must show the manner of service — the acts done — that the court may judge of their sufficiency. A return stating that the notice was "duly served" is not sufficient: *Hodges v. Hodges*, 6–78; *Harris v. Powell*, 10–553.

A return "served on John Long on the 29th day of August, 1857," *held* insufficient: *Park v. Long*, 7–434.

A return stating "served within by reading," *held* not sufficient: *Bain v. Galyear*, 10–585; *Boker v. Chapline*, 12–204.

A return stating that service of notice was made "by reading the same in the presence and hearing of" defendant, *held* insufficient. Service should be by reading to defendant: *Hynek v. Englest*, 11–210.

But *held*, that such defect was cured by a recital in a return that defendant demanded and received a copy of the notice: *Anderson v. Kerr*, 10–233.

And a recital in the return in such a case that a true copy was left with defendant, also *held* sufficient to cure the defect: *Grosvenor v. Henry*, 27–269.

A party may waive the reading of the notice to him, and such waiver can be properly proved by recitals in the return of the officer: *Gregory v. Harmon*, 10–445.

A statement that a copy was refused by defendant sufficiently indicates that one was offered: *Farmers' Ins. Co. v. Highsmith*, 44–330.

The right of defendant to a copy may be

waived, and the return of the sheriff is sufficient evidence of that fact: *Chapman v. Allen*, Mor., 23.

If the whole return shows a substantial compliance with the statute it is sufficient, and it is not necessary to use the exact language of the statute: *Macklot v. Hart*, 12–428.

Where the place of making service was stated in the return after the signature of the officer, *held*, that it sufficiently appeared that service was made at that place: *Wilson v. Call*, 49–463.

In a particular case, *held*, that the return of service was sufficient: *Low v. Barnes*, 60–240.

A return of service of notice by reading the same "to the within-named defendant, G. B. Little, and his wife, Mrs. G. B. Little, a member of the family over fourteen years old, and delivering her a true copy of the same," *held* to be sufficient to sustain a judgment by default against Mrs. Ora M. Little as against a collateral attack, it not appearing but that Mrs. Ora M. Little and Mrs. G. B. Little were names by which defendant was known: *Peterson v. Little*, 74–223.

Service by leaving copy; return: It is essential to the sufficiency of service by leaving copy, etc., that it appear from the return that the defendant was not found: *Davis v. Burt*, 7–56; *Chittenden v. Hobbs*, 9–417; *Nosler v. Githens*, 9–295; *Grant v. Harlow*, 11–429; *Bonsall v. Isett*, 14–309; *Sidles v. Reed*, 10–589; *Eikenburg v. Barrett*, 10–593.

The return of the sheriff need not state what diligence was used to obtain service upon defendant in person. A return that he was not found is sufficient: *Neally v. Redman*, 5–387.

A return, "the defendant not being found," is a sufficient statement of that fact. It is not necessary to state that defendant could not be found: *Wilson v. Call*, 49–463.

A return that "defendant was not found" will be presumed to mean that he was not found within the county of his residence: *Macklot v. Hart*, 12–428.

It should appear from the return that the person with whom the copy was left was a member of the family of the defendant. A statement that she was the mother of defendant, *held* not sufficient: *Lyon v. Thompson*, 12–183.

A return stating that the notice was served on defendant Call by copy left, etc., "with Mrs. Call, she being a member of the family," etc., *held* sufficient: *Wilson v. Call*, 49–463.

The place where the copy is left must be returned by the sheriff as defendant's usual place of residence, and the copy must be left with some member of his family over fourteen years of age. The return must further show at whose house, and the name of the person with whom the copy is left, or a sufficient reason must be given for the omission: *Converse v. Warren*, 4–158.

Therefore, *held*, that a return of service upon F. H. W., stating, "left a copy with Mrs. G., at defendant's boarding-house, being the residence of E. E. G., the above-named Mrs. G. being over fourteen years of age, and being a member of the family of E. E. G.," was not sufficient to show service upon defendant by leaving copy: *Ibid.*

But *held*, that a return of service by leaving a copy with a certain person, a member of the family of defendant, "in his usual place of residence," stating the town and county, was sufficient: *Neally v. Redman*, 5–387; *Farris v. Ingraham*, 34–231.

A return "served by certified copy left with [defendant's] wife at his usual residence," *held* not sufficient: *Davis v. Burt*, 7–56.

A return not showing that the copy was left at the usual place of defendant's residence, nor giving the name of the person with whom it was left, *held* not sufficient: *Tavenor v. Reed*, 10–416.

A return of service by leaving copy at the residence of defendant, not stating that defendant could not be found, nor at whose house the copy was left, or that it was left at defendant's usual place of residence, or the name of the person with whom it was left, *held* fatally defective: *Clark v. Little*, 41–497.

A party may have more than one residence though but one domicile: *Love v. Cherry*, 24–204.

Return of service by leaving copy with a member of the family, *held* insufficient in a particular case: *Pilkey v. Gleason*, 1–85.

Service by leaving copy at the store of defendant with a clerk will not be sufficient unless the return shows that the store was defendant's usual place of residence: *Winchester v. Cox*, 3 G. Gr., 575; *Hendrey v. Wells*, 10–587.

Where service is authorized on an agent or officer of a corporation, or member or agent of a partnership, personal service is necessary, and a service by leaving copy at the usual place of residence of such person will not be sufficient: *Brydolf v. Wolf*, 32–509.

Misnomer in service by copy: Where defendant is misnamed in a notice served by leaving copy, and has no actual notice of the action, and is not indebted to the plaintiff, he is not bound by the judgment rendered against him: *Journey v. Dickerson*, 21–308.

Effect of defects in substituted service: Where the return of service by leaving a copy did not state the facts essential to constitute such service, *held*, that objection might be taken to the jurisdiction of the court rendering the judgment: *Clark v. Little*, 41–497.

Where the requirements of the statute as to service by copy are not observed, defendant is not in court, and any judgment against him is erroneous and will be reversed on appeal: *Harmon v. Lee*, 6–171.

Presumptions: Where the return of the sheriff showed service on "L. Burt" of a notice directed to Luther Burt, *held*, that judgment thereon for failure to appear was not erroneous, and that the court was authorized to infer that the person served was the person named in the notice: *Davis v. Burt*, 7–56.

Under the Code of '51, which did not require the return to state whether a copy of the notice had been delivered, *held*, that in the absence of any statement in the return it would be presumed that the officer had done his duty in that respect: *Watts v. White*, 12–330.

Even though the return does not show sufficient service, yet it will be presumed, in support of the ruling of the court holding the service sufficient, that due proof of service

was made in some other manner: *Lees v. Wetmore*, 58–170.

The presumption is that the officer made the service shown by his return in the manner prescribed by law: *Ketchum v. White*, 72–193.

Objection to service: An objection to the sufficiency of the service of notice can be made only by the parties as to whom the service is claimed to be defective: *Semple v. Lee*, 13–304.

Defective service: Insufficient service will not have the effect of quashing the notice and dismissing the cause: *Cheever v. Lane*, 3–296.

There is a clear distinction between a service insufficient only in the manner of making it and a case where no service at all is made or attempted to be made. In the latter case there is no question of jurisdiction to decide, and if a judgment is rendered under such circumstances against a party it will be nullity. But if there is a question of jurisdiction raised which the court must decide, if it does so erroneously against the defendant, and renders a judgment for plaintiff, such judgment will be voidable, but binding upon the parties until reversed or corrected on appeal: *Bonsall v. Isett*, 14–309.

Where it appears that there was notice and return of personal service, a defect therein which is held immaterial by the tribunal cannot be taken advantage of collaterally: *Pursley v. Hayes*, 22–11; *Ballinger v. Tarbell*, 16–491.

Though the notice be irregular and insufficient, yet if the court takes jurisdiction to render the judgment, the judgment is not void, but the error can only be taken advantage of on appeal: *Moody v. Taylor*, 12–71; *De Tar v. Boone County*, 34–488; *Woodbury v. Maguire*, 42–339.

Where there is service, though defective, the judgment can only be attacked in a direct proceeding. The presumption is in favor of the correctness of the proceedings of a court of general jurisdiction and that a public officer properly discharges his duty: *Boker v. Chapline*, 12–204.

Therefore, *held*, that the judgment of a court of general jurisdiction rendered upon service, by leaving a copy, although the return did not show that defendant was not found, could not be attacked collaterally: *Bonsall v. Isett*, 14–309; *Gregg v. Thompson*, 17–107; *Muscatine Turn Verein v. Funck*, 18–469.

The determination of the court as to the sufficiency of proof of service cannot be collaterally attacked: *Ketchum v. White*, 72–193; *Baker v. Jamison*, 73–698.

Where there is actual service and the return is defective, the judgment is not void and can only be attacked in a direct proceeding: *Moomey v. Maas*, 22–380.

Where it appears that there was notice and service, though they were defective, yet if the court determines in favor of their sufficiency, even though the determination be erroneous, the court will have jurisdiction, and its judgment cannot be held void in a collateral proceeding: *Shawhan v. Loffer*, 24–217; *Farmers' Ins. Co. v. Highsmith*, 44–330; *Shea v. Quintin*, 30–58; *Ballinger v. Tarbell*, 16–491.

Where there appears to have been service, and the court rendering the judgment determined that there was such personal service as to authorize the rendition of a judgment, the judgment is not open to collateral attack on the ground that the service was not sufficient: *Lotterett v. Cook*, 1–1.

The sufficiency of service being subject to the determination of the court, and that determination being that it is sufficient, such determination is conclusive against collateral attack: *Telford v. Barney*, 1 G. Gr., 575.

Where the court's jurisdiction depends upon the sufficiency of service of notice, and it finds and adjudges that due and lawful service has been made, this judgment cannot be attacked collaterally upon proof that service was in fact insufficient: *Lees v. Wetmore*, 58–170.

Where a decree recited a finding by the court that defendant had been served with notice, *held*, that the presumption was in favor of such finding, and the fact that the record did not otherwise show service would not overthrow the presumption. The party claiming the fact to be otherwise must allege and prove such fact: *Hale v. First Nat. Bank*, 50–612.

If there is notice, but it is illegal and technically defective, and the court holds it sufficient and enters judgment, such judgment is not void or subject to collateral attack: *Dougherty v. McManus*, 36–657.

Where the judgment of the court shows that there was notice of some kind, and that the sufficiency of the service was determined by the court in favor of its jurisdiction, the proceedings cannot be regarded as void for want of jurisdiction on account of irregularities appearing in the record which affect the service. Such judgment cannot be questioned in a collateral proceeding, but only upon appeal or otherwise as provided by law: *Woodbury v. Maguire*, 42–339.

It will be presumed in such case that due proof of all matters necessary to be shown was made to the court upon which the adjudication of the sufficiency of the service was had: *Tharp v. Brenneman*, 41–251.

Where a judgment was rendered on a return of service which did not state the date thereof, *held*, that it was not subject to collateral attack by a motion to vacate the judgment filed four years after its rendition: *Wilson v. Call*, 49–463.

If there is notice, though defective, the proceeding will not be void on account of error of the court in holding the notice sufficient: *Bunce v. Bunce*, 59–533.

When the question of jurisdiction upon service by publication is necessarily presented to a court of general jurisdiction, and is decided in favor of its jurisdiction, such judgment will be conclusive against a collateral attack: *Wright v. Marsh*, 2 G. Gr., 94.

Where a statute provided that notice in a particular proceeding should be given, such as the court might prescribe, and the court ordered due notice to all concerned to be given, and then entered on its record a recital that service of notice of the proceeding had been made, pursuant to the direction of the court, *held*, that the determination was sufficient and the judgment could not be attacked collaterally: *Stanley v. Noble*, 59–666.

Where the court necessarily determines, in

rendering judgment, that the service of notice was sufficient, the correctness of this ruling cannot be questioned in a collateral proceeding: *Fanning v. Krapfl*, 68-244.

Mere want of compliance with the requirements of statute as to form of notice and manner and time of service will not constitute a want of notice such as to render the judgment void. If there is a mere defect in the notice or service, it is subject to correction on appeal, but cannot be relied on as avoiding the judgment: *Shea v. Quintin*, 30-58.

For instance, where the notice directs defendant to appear at the next term, but does not name the term, a judgment rendered in pursuance thereof will not be void for want of jurisdiction. Such a case is one of defective notice and not want of notice: *De Tar v. Boone County*, 34-488.

Where the original notice and return of the officer were regular and sufficient, but the copy delivered was defective in erroneously stating the date of commencement of the term of court in which defendant was required to appear, *held*, that the judgment was not void and subject to collateral attack: *Irions v. Keystone Mfg. Co.*, 61-406.

Where some essential requirement of the law going to make up and constitute notice to the party is omitted, so that practically the notice required by the law has not been given, then there is such a fatal defect in the substance of the notice that no jurisdiction is conferred thereby; but if a party has been served with a notice which informs him of the remedy sought and the time and place he is required to appear, proceedings had in conformity with such notice will not be held void in a collateral proceeding, although there are defects in the notice or service: *Lyon v. Vanatta*, 35-521.

Where a defendant is personally served with notice, a judgment of the court by default will not be void for want of jurisdiction, although he was not served the requisite number of days before the return day, as required by law. Such a service will be simply defective and not void: *Darrah v. Watson*, 36-116.

Where there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court may decide, and if it does so decide erroneously, its judgment, though voidable, is binding until reversed and corrected on appeal: *Myers v. Davis*, 47-325.

Service upon an agent upon whom service against the principal is not authorized is not simply defective service, but must be regarded as no service, and judgment rendered in pursuance thereof will be void for want of jurisdiction: *State Ins. Co. v. Granger*, 62-272.

A motion to correct a judgment rendered by default upon defective service must be made in the lower court, or the error in rendering such judgment cannot be reviewed on appeal: *Pratt v. Western Stage Co.*, 27-363.

Where a judgment is rendered without notice it is void and will be set aside in chancery. This relief will not be granted if the party holding such void judgment has a valid claim whereon it was rendered to which there is no defense, but if such claim is barred by the statute of limitations the judgment may be enjoined: *Gerrish v. Seaton*, 73-15.

3810. Duty of sheriff. 2605. If the notice is placed in the hands of a sheriff, he must note thereon the date when received, and proceed to serve the same without delay in his county, and must file the same with his return thereon in the office of the clerk, or return the same by mail or otherwise to the party from whom he received it. [R., § 2819; C., '51, § 1717.]

The failure of the sheriff to indorse on the notice the time it was received by him will not vitiate the service thereof: *Cobb v. Newcomb*, 7-43.

3811. Penalty; amendment. 2606. If a notice be not duly filed or returned to the person from whom it was received by the sheriff, or if the return thereon is defective, the officer making the same may be fined by the court not exceeding ten dollars, and shall also be liable to the action of any person aggrieved thereby. But the court may permit an amendment according to the truth of the case. [R., § 2820.]

3812. Service on Sunday. 2607. Notice shall not be served on Sunday, unless the plaintiff, his agent, or attorney, make oath thereon that personal service will not be possible unless then made; and a notice indorsed with such affidavit shall be served by the sheriff, or may be served by another as on a secular day. [R., § 2821.]

3813. Notice of no personal claim. 2608. The plaintiff may set forth in the notice the general object of the action, a brief description of the property affected by it, and that no personal claim is made against any defendant, naming him, and if such defendant unreasonably defends he must pay costs. [R., § 2822; C., '51, § 1724.]

3814. Proof of service; patients in hospital for insane. 2609; 20 G. A., ch. 77. If service be made within the state, the truth of the return is proven by the signature of the sheriff, or his deputy, and the court shall take judicial notice thereof. If made without the state, or by one not such officer

within the state, the return may be proven by the affidavit of him making the same. *Provided*, that service may be made on any patient confined in the hospitals for the insane by the superintendent or assistant superintendent of such hospitals, and the certificate of such officer under the seal of such hospital shall be proof of such service. [R., § 2823; C., '51, § 1732.]

The best evidence of the service of an original notice is the officer's return thereof, and if this cannot be had by reason of the loss or destruction of the notice, the testimony of the officer who made the service is competent to prove the fact of service and return of the notice: *Bridges v. Arnold*, 37–221.

It seems that the officer's return of service should be deemed conclusive, and if any damage is suffered through his failure to make service in accordance with the statements in his return, defendant should be left to his remedy on the officer's bond: *Irions v. Keystone Mfg. Co.*, 61–406.

Service made by a constable, or by any person not a sheriff, must be proven by his affidavit: *Moss v. Blinn*, 7–261.

A sheriff has no power as such to serve notice outside of the limits of his county, and the return of service as made by him outside of the state in his official capacity, even verified by oath, will not show personal service: *Weil v. Lowenthal*, 10–575.

Affidavit of service *held* sufficient although the jurat did not state by whom it was sworn to: *Kirby v. Gates*, 71–100.

The same presumption arises in favor of a return made by a person not a party, when properly proven, as in favor of a return of a sheriff: *Macklot v. Hart*, 12–428.

3815. Service on county; presentation of claims. 2610. If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor. But no action shall be brought against any county on any unliquidated demand, until the same has been presented to such board and payment demanded. [R., § 2824; C., '51, § 1726; 9 G. A., ch. 93.]

Service: Whether service upon the chairman of the board of supervisors made outside of his county will confer jurisdiction in an action against the county, *quære: Gross v. Sioux County*, 2 Dillon, 509.

In an action not against the county, but against the members of the board of supervisors, service cannot be made upon the county auditor: *Polk v. Forest*, 71–26.

Presentation of claim: If the creditor presents his demand and it is not allowed after a reasonable time, he may bring his action. It is not necessary that the fact of the refusal to allow the claim shall appear from the records of the board. They cannot defeat the claim by a failure to take action: *White v. Polk County*, 17–413; *Ferguson v. Davis County*, 57–601.

This statutory provision will be enforced by the federal courts. So *held* in an action to recover damages against a county for the infringement of a patent: *May v. Buchanan County*, 29 Fed. Rep., 469; *May v. Cass County*, 30 Fed. Rep., 762.

This provision, as originally enacted, was limited to actions commenced after it took effect; and *held* that, in an action commenced before the act took effect, an amendment to the petition, which set out a claim for the same recovery, basing it upon an account instead of a written contract, was not a new action: *Mather v. Butler County*, 16–59.

A creditor is not obliged to appeal from the action of the board in refusing to allow his claim, but may bring action against the county: *Armstrong v. Tama County*, 34–309; *Curtis v. Cass County*, 49–421.

The common-law remedy by action against the county is not taken away by this statutory provision, but the party has his election of appealing from the disallowance of his claim or instituting his action in the proper court: *State ex rel. v. County Judge*, 5–380.

It is only unliquidated demands against the county that must be presented to the board: *Sanford v. Lee County*, 49–148.

The provision that demand must be made is not applicable where the claim has already been presented and liquidated or allowed, and a warrant, note or bond has been issued therefor: *Clapp v. Cedar County*, 5–15, 44.

This statutory provision is applicable to a claim by one county against another for relief furnished to a pauper: *Cerro Gordo County v. Wright County*, 50–439.

The statute of limitations commences to run against a claim which is thus required to be presented from the time it accrues and not from the time it is presented: *Baker v. Johnson County*, 33–151; *Kinsey v. Louisa County*, 37–438.

Proof of the fact of demand may be made by the testimony of the person making such demand: *Ferguson v. Davis County*, 57–601.

If a claim is allowed in part the acceptance of the allowance bars an action for the balance: *Brick v. Plymouth County*, 63–462; *Wapello County v. Sinnaman*, 1 G. Gr., 413.

But unless the party filing his claim has accepted a partial allowance under such circumstances that a settlement or compromise between the parties can be inferred therefrom, he is not precluded from maintaining his action for the portion disallowed: *Wilson v. Palo Alto County*, 65–18.

Where partial payment was accepted without knowledge on the part of claimant that the balance of his claim was rejected, *held*, that the claimant was not precluded from recovering the portion of the claim disallowed: *Fulton v. Monona County*, 47–622.

Presentation of a liquidated demand and acceptance of a part allowed will not estop claimant from recovering the balance: *Sanford v. Lee County*, 49–148.

ON CORPORATIONS.

3816. Railway corporations. 2611. If the action is against any corporation, or person owning or operating any railway, telegraph line, canal, stages, coaches, or cars, or any express company, service may be made upon any general agent of such corporation, or person, wherever found, or upon any station, ticket, or other agent of such corporation, or person transacting the business thereof in the county where the suit is brought; if there is no such agent in said county, then service may be had upon an agent thereof transacting said business in any other county. [C., '51, § 1727; 14 G. A., ch. 95, § 4.]

Service upon the trackmaster of a railroad, *held* not sufficient to constitute service upon the company: *Richardson v. Burlington & M. R. R. Co.*, 8-260.

A railway corporation not operating a line of railway within the state, and not having any office or agency within the state, out of the business of which the cause of action arises, is not within the jurisdiction of the state or federal courts of Iowa, and a service upon one of its agents who may be found within the state will not confer jurisdiction: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed. Rep., 866.

A foreign corporation doing business in the state in such way that it may be served with notice under statutory provisions cannot be deemed a non-resident in such sense that the statute of limitations will not run in its favor: *Wall v. Chicago & N. W. R. Co.*, 69-498.

3817. Municipal corporation. 2612. When the action is against a municipal corporation, service may be made on the mayor or clerk, and if against any other corporation, on any trustee or officer thereof, or on any agent employed in general management of its business, or on any of the last known or acting officers of said corporation, and if no person can be found on whom service can be made as provided in this and the preceding section, service may be made by publication as provided in other cases. [R., § 2824; C., '51, § 1726; 13 G. A., ch. 167, § 15.]

["On," in the third line of this section, between "corporation" and "any," is "or" in the printed Code, but the Code commissioners' report, and the evident meaning of the section, show that it should be as here given.]

Service upon the treasurer of an independent school district is a sufficient service upon the district: *Kennedy v. Independent School Dist.*, 48-189.

A notice in a garnishment proceeding directed to A. B., Mayor of Iowa City; C. D., Recorder of Iowa City, and E. F., Treasurer of Iowa City, *held* not to give the court any jurisdiction of the city, the notice not being directed to nor served upon such persons as officers: *Claflin v. Iowa City*, 12-284.

Service upon an agent of a corporation, employed in the general management of the business of a corporation, may be made in all actions without regard to the place where the action is brought. The statutory provisions with reference to service upon an agent or clerk employed in an office or agency are not applicable: *Centennial Mut. L. Ass'n v. Walker*, 50-75.

An agent having no authority to act for a corporation within the state, and whose duties outside of the state were limited to the investigation of facts and reporting them to the general manager, *held* not to be such an agent as that service upon him would constitute service upon the corporation: *Philp v. Covenant Mut. Benefit Ass'n*, 62-633.

In an action against a foreign insurance company brought in a county in which the contract of insurance was made, service of notice may be made upon any agent in the state designated by the company under the statutes of the state as an agent on whom service may be made: *Niagara Ins. Co. v. Rodecker*, 47-162.

As to appointment by foreign insurance companies of agents upon whom service may be made, see § 1739.

3818. Service on agent. 2613. When a corporation, company, or individual, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. [R., § 2827; C., '51, § 1705.]

Service cannot be made upon another agent of the same party than that who transacts the business out of which the action arises, and whose agency is of a different scope. In such cases the service must be made upon some one connected with the business out of which the

action grows, and if made upon an agent not connected with such business, it is a case not of defective service but of entire want of service: *State Ins. Co. v. Granger*, 62-272.

This section allows service upon the agent in a suit against the principal in matters connected with the agency, but the principal is not required to respond to service upon the agent of a notice of garnishment of the principal in a proceeding for the collection of a debt from the agent in no manner connected with the agency: *Upton Mfg. Co. v. Stewart*, 61-209.

Service on an agent of an insurance company whose business is to solicit and forward risks and whose residence is in the county is sufficient to constitute service upon the company. It is not necessary that he should be a general agent, have an office, or transact all business of the company in the county: *Farmers' Ins. Co. v. Highsmith*, 44-330.

Where service was made upon one who had become agent for a non-resident corporation by a written contract, by the terms of which his agency had expired, but was still acting as agent for the completion of the business, *held*, that notice of an action brought to recover upon a breach of warranty in a sale made by the corporation through such agent was properly served upon him: *Gross v. Nichols*, 72-239.

As to service on insurance companies, see § 1707.

MINORS — INSANE — PRISONERS.

3819. Service upon minor. 2614. When the defendant is a minor under the age of fourteen years the service must be made on him, and also on his father, or mother, or guardian, and if there be none of these within the state, then on the person within this state having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. When the minor is over fourteen years of age, service on him shall be sufficient. [R., § 2828; C., '51, § 1705.]

Where the service is not upon the father, mother or guardian it should appear from the return that neither father nor mother is within the state, and that there is no guardian on whom service could be made: *Allan v. Saylor*, 14-435.

The judgment of a court as to the sufficiency of such notice can only be questioned on appeal, and cannot be attacked collaterally: *Tharp v. Brenneman*, 41-251.

Although notice in an action against a minor is defective in being directed to the guardian instead of to the minor, yet if it contains the necessary statements, and is in fact served upon the minor, a judgment rendered in pursuance thereof will not be void for want of jurisdiction: *Dahms v. Alston*, 72-411.

3820. Insane. 2615. When a defendant has been judicially declared to be of unsound mind, or who is confined in any state lunatic asylum, service may be made upon him and upon his guardian, and if he have no guardian, then upon his wife or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he may be confined. [R., § 2829; C., '51, § 1729.]

3821. When confined in asylum. 2616. When it becomes necessary to serve personally with a notice or process of any kind, a person who is confined in any state lunatic asylum, the superintendent thereof shall acknowledge service of the same for such person, whenever, in the opinion of such superintendent, personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be deemed a personal one on the defendant. [13 G. A., ch. 109, § 50.]

As to proof of service on patient in hospital for insane, see § 3814.

3822. Prisoner in penitentiary. 2617. When the defendant is a prisoner in the penitentiary, a copy of the petition must be delivered to the prisoner at the time the notice is served, and a copy of the notice must be delivered to the husband or wife of the defendant, if any such there be within this state. [R., § 2830.]

SERVICE BY PUBLICATION.

3823. In what actions. 2618. Service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein;

2. In an action for the partition of real property;

3. In an action for the sale of real property under a mortgage, lien, or other incumbrance or charge;

4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where, in such cases, any or all of the defendants reside out of this state and the real property is within this state;

5. In actions brought against a non-resident of this state or a foreign corporation, having in this state property or debts owing to such defendant sought to be taken by any of the provisional remedies, or to be appropriated in any way;

6. In actions which relate to, or the subject of which is real or personal property in this state, when any defendant has, or claims, a lien or interest, actual or contingent therein, or the relief demanded consists wholly, or partly, in excluding him from any interest therein, and such defendant is a non-resident of this state, or a foreign corporation;

7. In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent;

8. Where the action is for a divorce, if the defendant is a non-resident of the state of Iowa, or his residence is unknown. [R., §§ 2831, 2832; C., '51, § 1725.]

When proper: A proceeding to foreclose a mortgage may be brought against a non-resident upon service by publication: *Robertson v. Young*, 10–291.

The provisions for service by publication in such cases are not unconstitutional: *Palmer v. McCormick*, 28 Fed. Rep., 541.

An affidavit stating that defendant has absconded so that ordinary service cannot be made upon him in the state is not sufficient to give the court jurisdiction upon service by publication: *Fuller v. Riggs*, 66–328.

Service by publication in foreclosure proceedings may be made not only in actions against non-residents, but when the affidavit shows that personal service cannot be made within the state: *Palmer v. McCormick*, 28 Fed. Rep., 541.

Statutory requirements strictly construed: Service by publication being only constructive service provided for by the legislature, and to be resorted to mainly in proceedings *ex parte*, the requirements of the statute must be strictly complied with: *Broghill v. Lash*, 3 G. Gr., 357.

Where a court acquires jurisdiction only by publication, unless publication is made as required by statute no service is obtained, and the proceedings of the court under it are void: *Hinch v. Weatherford*, 2 G. Gr., 244.

A party relying upon service by publication is held to a strict and faithful compliance with the statute: *Smith v. Smith*, 4 G. Gr., 266; *Tunis v. Withrow*, 10–305.

The statute authorizing service of notice by publication must be strictly pursued, and if the recitals in a judgment show a failure to comply with these requirements the judgment will be void: *Bardsley v. Hines*, 33–157.

Judgment by default should not be rendered against a party not personally served until the court is satisfied that every requirement of the statute with reference to the publication has been performed: *Pinkney v. Pinkney*, 4 G. Gr., 324.

The proof of service of notice required in case of publication is a condition precedent without which a court has no power to enter judgment by default; the proof required being made an element of jurisdiction, the record should show that it was made before default against the debtor: *Broghill v. Lash*, 3 G. Gr., 357; *Lot Two v. Swetland*, 4 G. Gr., 465.

Presumption: The statute permitting service by publication must be strictly complied with. Hence, in an action to set aside a judgment for want of legal notice, where it is not shown by the record, nor by evidence *aliunde*, that the defendant was a non-resident when the service upon him was attempted, the court will not presume that he was not a resident: *Hartley v. Boynton*, 5 McCrary, 453.

If the record discloses the fact that the proper steps for service by publication which are required to be made matter of record have not been made to appear to the court, the presumption which obtains in favor of the jurisdiction of the court of general jurisdiction is thereby rebutted: *Tunis v. Withrow*, 10–305.

Judgment rendered upon service by publication may be attacked collaterally by showing that the essential steps have not been taken. So held under a previous statute which required the sending of a copy of the petition by mail to the defendant, although it was decided by the decree that defendant had been served with notice as required by law: *McGahen v. Carr*, 6–331.

Under a statute providing that the court might order publication of notice in case certain facts were shown by affidavit, *held*, that the filing of such affidavit was necessary to give the court jurisdiction to order publication, and that the fact that the affidavit was

filed would not be presumed in the absence of express adjudication to that effect: *Bradley v. Jamison*, 46–68; *Bardsley v. Hines*, 33–157.

Where jurisdiction is acquired only by service by publication, presumption as to the fact of publication will not be indulged to support it: *Miller v. Corbin*, 46–150.

But a judgment upon service by publication cannot be attacked in a collateral proceeding for mere insufficiency in the notice or service, if the court has held it sufficient: *Gregg v. Thompson*, 17–107.

The determination of a court that proof of service by publication is sufficient cannot be questioned in a collateral proceeding to set aside the sheriff's deed executed to the purchaser at a sale under a judgment recovered on service by publication only: *Fanning v. Krapfl*, 68–244.

Steps necessary: Two conditions must exist to authorize service by publication against a non-resident or a foreign corporation having property or debts sought to be taken by any of the provisional remedies, in order to give the court jurisdiction to enter judgment against defendant upon such service. First, the action must relate to some of the interests enumerated in the statute; and second, defendant must be a non-resident of the state or a foreign corporation: *Sweeley v. Van Steenburg*, 69–696.

If these two conditions in fact exist at the time judgment is entered, it is valid although their existence is not shown to be of record. The statute does not require that these facts be shown, but only that publication be made in the manner and for the length of time prescribed. The fact of publication must be shown by the record or the judgment will be void. But the existence of the two conditions above mentioned need not be thus shown. It is the fact, and not proof of the fact, which confers jurisdiction in these respects: *Ibid.*

It is not necessary that an affidavit for service by publication in such cases show that defendant is a non-resident. Such non-residence is a jurisdictional fact, but it is to be ascertained and proved the same as any other necessary fact in the case: *Taylor v. Ormsby*, 66–109.

If defendant does not live within the state, plaintiff may properly make affidavit that service cannot be made within the state, notwithstanding the possibility that personal service might be made during a temporary visit: *Palmer v. McCormick*, 0 Fed. Rep., 82.

Under a statute authorizing publication of notice in certain cases, when defendant could not be found within the state, upon proper showing of the fact by affidavit, *held*, that proof of the non-residence of defendant, and return of "not found" by the sheriff, was sufficient evidence upon which to base the determination that the defendant could not be found within the state: *Byrne v. Roberts*, 31–319.

While affidavit for publication of notice as against parties out of the state under a previous statute should state facts showing that diligence had been used to ascertain the name and residence of the party, yet where everything else was regular, and the affidavit stated the use of diligence, *held*, that the failure to state the facts constituting such diligence would not deprive the court of jurisdiction so as to render its decree void: *Little v. Chambers*, 27–522.

Under the same statute, *held*, that the fact that the affidavit for publication was made by plaintiff's attorney, which did not explain affiant's means of knowledge, or why it was not made by plaintiff, was not a ground for attacking collaterally a judgment rendered on such publication: *Banta v. Wood*, 32–469.

Under previous statutory provisions that publication of notice could only be made upon an order of the court, *held*, that such order could not be made by the clerk, and that judgment upon service by publication thus ordered was void: *Miller v. Corbin*, 46–150; *Royer v. Foster*, 62–321.

Under provisions of the Code of '51, that default should not be entered against a defendant served by publication until proof was made that a copy of the petition and notice had been mailed to his address, *held*, that judgment by default upon such notice without such proof being made was void, and that the fact that the proof of mailing was made should appear of record and would not be presumed: *Broghill v. Lash*, 3 G. Gr., 357; *Taylor v. Probst*, 4 G. Gr., 534.

Under the same provisions, *held*, that a sale in an attachment proceeding in which it did not appear that the petition and notice had been thus mailed to defendant was void, and that the judgment could not be made valid by supplementing defects in the service and proofs after default was rendered: *Hodson v. Tibbetts*, 16–97.

Also *held*, that the fact of mailing the notice and petition was a jurisdictional step upon which the power of the court was made to depend and should be made to appear permanently upon the record: *McGahen v. Carr*, 6–331; *Abell v. Cross*, 17–171.

Held, also, that the order for publication in such cases should direct the mailing of a copy of the petition and notice, but that the fact that it did not so direct would not constitute an error in the subsequent proceedings if it was shown the copies were duly mailed: *Lyon v. Comstock*, 9–396.

The affidavit for publication may be sufficient though the venue be omitted, provided the state and county where it is made appear from the context: *Palmer v. McCormick*, 30 Fed. Rep., 82.

Effect of publication: Judgment in an action to quiet title rendered upon service by publication when without appearance for defendant, purporting to bar defendant from ever asserting any right or title to the land, *held* not a bar against defendant's seeking in another suit to assert title to the same land: *Pitts v. Clay*, 27 Fed. Rep., 635.

Service by publication upon a non-resident minor is to be made in the same manner as upon an adult, and when the service is so made the court will have authority to appoint a guardian *ad litem*: *Judd v. Mosely*, 30–423.

No personal judgment: Judgments *in personam* cannot be rendered where jurisdiction is acquired by publication only: *Doolittle v. Shelton*, 1 G. Gr., 272.

Where the action is improperly commenced by publication, defendant being a resident of

the state, and he enters an appearance without service of notice, the jurisdiction is not *in rem* only, but is personal to the same extent that it would have been if he had been personally served: *Equitable L. Ins. Co. v. Gleason*, 56-47.

It is error to enter a judgment *in personam* upon service by publication in a proceeding for attachment against a non-resident: *Wilkie v. Jones*, Mor., 97.

In such a case judgment should be *in rem* only, and a personal judgment would be void, even though the attached property were sold thereunder: *Smith v. Griffin*, 59-409.

That personal judgment cannot be rendered upon service by publication without appearance by defendant, see §§ 3827 and 4088 and notes.

Judgment against property: A judgment in an attachment proceeding upon service by publication binds only the property attached and cannot be enforced *in personam*, and other property than that seized under the attachment cannot be sold, nor can the attachment operate as a lien upon other property: *Banta v. Wood*, 32-469; *Mayfield v. Bennett*, 48-194.

Therefore, *held*, that where an action by attachment was brought upon a note without reference to the mortgage given to secure it, the mortgaged property not levied on under the attachment could not be sold under the execution: *Banta v. Wood*, 32-469.

Where a suit is commenced for attachment upon service by publication only, and no property is attached, the judgment is a nullity: *Judah v. Stephenson*, 10-493; *Cooper v. Smith*, 25-269.

The court acquires no jurisdiction in an attachment proceeding upon service by publication, unless the property of defendant is attached: *Wells v. Sequin*, 14-143.

Where, in an action by attachment against a non-resident, no property was levied on in the county, but a levy was made in another county to which, upon subsequent appearance of defendant in the action and motion to change the venue, the cause was transferred, *held*, that the lien of the attachment was valid from the date of the levy, and took precedence of an attachment in another action brought in the county in which the property was situated before the change of venue in the first action was had to that county: *Laird v. Dickerson*, 40-665.

Where notice of garnishment is served in an attachment proceeding commenced by publication, but no debt due the defendant is reached thereby, the court acquires no jurisdiction, and cannot, by a subsequent proceeding, subject a debt afterwards coming into existence: *Morris v. Union Pacific R. Co.*, 56-135.

The fact that a writ of attachment issues against defendant as a non-resident does not render the proceedings *in rem.* where it appears that defendant was personally served: *Darrah v. Watson*, 36-116.

In a suit against a non-resident by attachment upon service by publication, a debt due for personal services rendered by such non-resident in the state of his residence, and payable there, may be subjected, by garnishment of his creditor in this state, to the payment of a claim, although by the laws of the state of his residence the debt would be exempt from execution: *Mooney v. Union Pacific R. Co.*, 60-346.

In proceedings for divorce commenced by publication of notice the court acquires jurisdiction to allow alimony: *Harshberger v. Harshberger*, 26-503; *Twing v. O'Meara*, 59-326.

3824. How made. 2619. The publication must be made by publishing the notice required in section two thousand five hundred and ninety-nine of this chapter [§ 3804], four consecutive weeks in some newspaper printed in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall in either case be determined by the plaintiff or his attorney. [R., § 2833; 12 G. A., ch. 165; 13 G. A., ch. 142.]

Form of notice: Any notice which would give jurisdiction if personally served upon the party is good when served by publication in a proper case if the publicity of the pendency of the action which the law intends is thereby given. That is, a description in the notice of the person intended, which would be sufficient if the service was personal, is also sufficient when the service is by publication: *Fanning v. Krapfl*, 68-244.

Length of publication: Under a former statute providing that notice of a proceeding therein referred to should be published for a time not less than "once a week for four consecutive weeks," *held*, that the notice was completed at the last publication: *Banta v. Wood*, 32-469.

In what newspaper: It would seem that under the statute publication of the notice in a paper published in the county but printed in another county would not be good unless there is no paper printed in the county, and the county in which the paper is printed is the next nearest county: *Cooke v. Tallman*, 40-133.

The fact that an original notice is printed in a paper one-half of which is "patent insides" printed in Chicago does not invalidate the notice. If the local and characteristic departments of the paper are in fact printed in the county where the paper is circulated there is a substantial compliance with the statutory provisions: *Palmer v. McCormick*, 30 Fed. Rep., 82.

The plaintiff has the right to designate the newspaper in which publication of original notices, or notices of execution sales, shall be made [§ 5112]: *Herriman v. Moore*, 49-171.

The paper for publication of notice on unknown defendants is to be selected by the court: § 3830.

3825. When complete; proof. 2620. When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served within the county in which the petition is filed, on the day of the last publication. Proof thereof being made by the affidavit of the publisher, or his foreman, and filed before default is taken. [R., § 2834; C., '51, § 1732; 9 G. A., ch. 174, § 2.]

The provision that proof of publication shall be made by affidavit of the publisher or foreman is only applicable to publication of original notices in the actions specified in this chapter. In other cases proof of publication may be made by any one having knowledge of the fact. (See § 4948): *Farrell v. Leighton*, 49–174.

As to judgment upon service by publication, see notes to § 3823.

3826. Publication before filing of petition legalized. 18 G. A., ch. 124, § 1. In all cases where an action has been begun in any of the courts of record of this state, by serving the original notice by publication as by law provided, and said publication of the original notice has been begun or completed prior to the time of the filing of the petition in the cause, that in each and all said cases the court in which said cause or action is pending, shall be deemed to have acquired as full and complete jurisdiction thereof as though said petition had been on file at the time said publication of the original notice therein was begun, or at the time the affidavit provided for in section two thousand six hundred and eighteen of the code of 1873 [§ 3823], was filed, and the service of the original notice in all said causes, shall be deemed a full compliance with said section two thousand six hundred and eighteen, and sections two thousand six hundred and nineteen, two thousand six hundred and twenty and two thousand six hundred and twenty-one of the code of 1873 [§§ 3823–3827].

Prior to the passage of this legalizing act such service was upheld. (Overruling *Billings v. Kothe*, 49–34): *Foster v. Henderson*, 54–220.

3827. Actual service. 2621. Actual personal service of the notice, either within or without the state, supersedes the necessity of publication. [R., § 2835.]

Service outside the state: Personal service upon defendant outside of the state supersedes the necessity of service by publication and has the same force and effect: *Mooney v. Union Pacific R. Co.*, 60–346.

To authorize personal service without the state it is not necessary to file an affidavit that such service cannot be made within the state as is required in case of publication: *Miller v. Davison*, 31–435.

Actual personal service without the state upon a person not a resident or citizen of the state merely stands in the place of notice by publication and does not confer jurisdiction to render a personal judgment: *Weil v. Lowenthal*, 10–575; *Bates v. Chicago & N. W. R. Co.*, 19–260; *Hakes v. Shupe*, 27–465; *Darrance v. Preston*, 18–396; *Lutz v. Kelly*, 47–307.

Service by publication or personal service without the state upon a person who is not a resident or citizen of the state confers no jurisdiction upon the person. It simply authorizes the court to conclude the rights and interests of the non-resident in property over which the court, by process of attachment or otherwise, has acquired jurisdiction *in rem*, and to subject such property to sale in satisfaction of the amount found due. A personal judgment in such a case is a nullity: *Lutz v. Kelly*, 47–307.

Service within the state upon a citizen of another state will give a court jurisdiction, although he is but temporarily within the jurisdiction at the time of service: *Darrah v. Watson*, 36–116.

But if the person upon whom the service is thus made has been brought within the jurisdiction by fraud, as, for instance, by false statements as to the purpose for which his presence is desired, and concealment of the fact that it was intended to serve notice upon him when brought within such jurisdiction, the court will not entertain the jurisdiction thus sought to be acquired: *Dunlap v. Cody*, 31–260.

The rule that if a person residing in one jurisdiction be induced under false pretenses and representations to come within another for the purpose of there getting service upon him, the jurisdiction will be there held fraudulent and the judgment void, has no application in a suit against a non-resident to subject debts due to him by a corporation operating a line of railway within the state: *Mooney v. Union Pacific R. Co.*, 60–346.

The legislature cannot, by any enactment, confer upon a court of the state jurisdiction over the person of a citizen of another state: *Weil v. Lowenthal*, 10–575.

Service by publication or by personal service without the state, upon one who is not a citizen or resident, confers no jurisdiction either

as to the person or property of such non-resident, other than is acquired *in rem: Darrance v. Preston*, 18-396.

The judgment of a court of another state against a non-resident not served with notice within the jurisdiction, and making no appearance, has no binding force nor effect upon him *in personam*, and an action thereon cannot be maintained in this state: *Melhop v. Doane*, 31-397

And see § 4088 and notes.

UNKNOWN DEFENDANTS.

3828. Verified petition. 2622. In actions where it shall be necessary to make an unknown person defendant, the petition shall be sworn to, and shall state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as exactly as possible, that the name and residence of such person is unknown to plaintiff, and that he had sought diligently to learn the same, and thereon proceedings may be had against such person without naming him, as follows: [R., § 2836.]

If the provisions of this section are not complied with, the court acquires no jurisdiction of the unknown defendants: *Guise v. Early*, 72-283.

3829. Form of notice. 2623. The court shall approve a notice collected from the averments of the petition, which notice shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, also the name of the court and the term at which appearance must be made. Said notice must be entitled in the full name of the plaintiff against the unknown claimants of property, and shall be signed by the plaintiff's attorney. [R., § 2837.]

3830. Order of publication. 2624. The court, on its approval of said notice, shall indorse the same thereon, and order that the said notice be published in some newspaper of this state, designating such paper as shall be most likely to give notice to such unknown person. [R., § 2838.]

3831. Length of publication. 2625. Such notice shall be filed in the cause, and its contents, without more, shall be published in the paper designated, at least, weekly, for six successive weeks, and at the end of said time service shall be deemed complete, and such unknown person in court at the next term thereafter. [R., § 2839.]

APPEARANCE.

3832. Mode; when required. 2626; 15 G. A., ch. 10. The mode of appearance may be:

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person, or his attorney, dated the day of its delivery, and to be filed in the case;

2. By announcing to the court an appearance, which shall be entered of record;

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause; or for any purpose connected with the service or insufficiency of the notice. And an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary; but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition. [R., § 2840.]

4. No member of the general assembly shall be held to appear or answer any civil action or special proceeding, in any court of record, or inferior court, while such general assembly is in session, nor shall any person be so held to answer or appear, in any such court, on the first day of January, the fourth

day of July, the twenty-fifth day of December, or *on* any day of thanksgiving appointed by the president of the United States or by the governor of this state.

What sufficient: The memorandum in writing need not in terms state that the defendant appears. If he files a pleading in the action it will be sufficient. Such an appearance will be an appearance in court, although the court be not in session: *Conklin v. Johnson*, 34-266.

The fact that the order of the court in a case is made upon agreement of the parties is sufficient to show an appearance by defendant, whether such agreement was oral or in writing: *Auspach v. Ferguson*, 71-144.

The written memorandum or appearance in a particular case, *held* sufficient: *Shaw v. National State Bank*, 49-179.

Appearance to object to the service of notice is a general appearance to the action: *McFarland v. Lowry*, 40-467.

An appearance to object to the original notice because not properly stamped, and to cross-examine plaintiff's witnesses, *held* an appearance to the action: *Wilsey v. Maynard*, 21-107.

Appearance to object to the sufficiency of service upon a director of a corporation defendant is sufficient to give the court jurisdiction: *Robertson v. Eldora R., etc., Co.*, 27-245.

The rule that a special appearance to object to the notice confers jurisdiction is applicable in proceedings before a justice: *Church v. Crossman*, 49-444.

If defendant makes appearance for any purpose the notice has then served its purpose and a second one will not be required. Being in court with timely notice he is held to answer unless he can show that by reason of defect in the notice, such as failure to specify the term at which he is required to appear, he has not been able to prepare his defense: *Des Moines Branch, etc., Bank v. Van*, 12-523.

Prior to the provision found in § 3832, that a special appearance to object to the service of notice should constitute an appearance, *held*, that a special appearance to object to defect in the notice would not confer jurisdiction: *Hodges v. Brett*, 4 G. Gr., 345; *Milbourn v. Fouts*, 4 G. Gr., 346; *Weil v. Lowenthal*, 10-575; *Converse v. Warren*, 4-158.

Under such statute, *held*, also, that defendant might appear so far as to object to the jurisdiction of the court over the person or subject-matter, but if he appeared by motion or otherwise, seeking to call into action any power of the court except such as pertains to its jurisdiction, it was an appearance: *Ulmer v. Hiatt*, 4 G. Gr., 439; *Stockdale v. Buckingham*, 11-45.

Therefore, *held*, that an application for a continuance amounted to an appearance: *Ibid.*; *Converse v. Warren*, 4-158.

Held, also, that an appearance by motion to suppress a deposition or quash an attachment constituted such appearance as to give the court jurisdiction: *Clark v. Blackwell*, 4 G. Gr., 441.

An appearance by motion to change the venue confers jurisdiction: *Post v. Brownell*, 36-497.

So *held*, also, as to a motion to dissolve an attachment: *Chittenden v. Hobbs*, 9-417; *Wood v. Young*, 38-102.

An appearance to a writ of attachment constitutes a general appearance in the action: *Winchester v. Cox*, 3 G. Gr., 575.

Appearance to set aside the sale of attached property does not constitute an appearance to the action: *Osborn v. Cloud*, 21-238.

The filing of a demurrer by a non-resident defendant constitutes general appearance, giving the court jurisdiction: *Johnson v. Tostevin*, 60-46.

Appearance to cross-examine plaintiff's witnesses, even though a general appearance is disclaimed, is sufficient to give jurisdiction: *Ruhn v. Greer*, 37-627.

As to appearance after default to cross-examine witnesses, see § 4080.

Where intervenors, residents of another county, voluntarily appeared in an action and filed their petition and an amended petition, *held*, that they were estopped from saying that the court did not have jurisdiction, and that they had no cause of action which by proper amendment could be joined with the pending action: *Jack v. Des Moines & Ft. D. R. Co.*, 49-627.

Appearance not conferring jurisdiction: A want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction: *Spurrier v. Wirtner*, 48-486.

An appearance does not waive the right to have an action discontinued if the petition is not filed by the time fixed in the notice as provided in § 3805: *Cibula v. Pitts' Sons' Mfg. Co.*, 48-528.

An appearance after default, to have the default set aside as being rendered on insufficient notice, is not such an appearance as will cure the defect in entering default without proper notice, such a case being different from an appearance before the default to object to the insufficiency of the notice: *Boals v. Shules*, 29-507.

An appearance by motion to set aside a sheriff's sale is not an appearance to the original action: *Osborn v. Cloud*, 21-238.

An appearance of a party to testify as a witness is not an appearance to the action: *Nixon v. Downey*, 42-78.

Where an action is by statute required to be brought within a specified time, the appearance by defendant to such action brought after the time specified, and the filing of pleading by him setting out such facts, will not constitute a waiver of the objection: *Jones, etc., Lumber Co. v. Boggs*, 63-589.

The filing of a pleading to the jurisdiction of the court by defendant will not confer jurisdiction upon the court: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed. Rep., 866.

Where a motion is made to set aside a sheriff's sale in a court other than that in which the action is pending, the act of defendant in appearing and moving to strike the motion from the files will not confer jurisdiction upon the court: *White v. Hampton*, 14-66.

Where a judgment was rendered upon serv-

ice by publication, and subsequently defendant therein filed a petition to set it aside, and afterwards filed a motion in that case for change of venue, *held*, that this did not make the judgment effective as a judgment *in personam*: *Mayfield v. Bennett*, 48–194.

Waives defects: By appearing and submitting to the jurisdiction of the court, defendant waives all defects in the process and service thereof: *Bell v. Pierson*, Mor., 21; *Hall v. Biever*, Mor., 113; *Hedinger v. Silsbee*, 2 G. Gr., 363; *Houston v. Walcott*, 1–86; *Van Vark v. Van Dam*, 14–232; *Childs v. Limback*, 30–398.

Where the court has jurisdiction of the subject-matter, mere irregularity in the process or its service will be cured by voluntary appearance; so *held* in case of an appeal from a justice of the peace: *Wilgus v. Gettings*, 19–82.

Appearing and submitting to the jurisdiction is a waiver of all objection to any preceding irregularity: *Cane v. Watson*, Mor., 52.

A subsequent appearance of defendant will validate the previous service of a writ of injunction made without the court having obtained jurisdiction of defendant: *District T'p v. District T'p*, 54–115.

By attorney without authority: Where it is shown that appearance by attorney is made without authority, the case stands as if there had been no appearance, and if default has been entered it is the same as a default without service: *Rice v. Griffith*, 9–539; *Macomber v. Peck*, 39–351.

Such a judgment is a nullity, and not merely voidable, and even though the record recites that jurisdiction has been acquired, a sale thereunder will pass no title to an innocent purchaser: *Harshey v. Blackmarr*, 20–161.

The defendant in an action upon a foreign judgment may deny the authority of the attorney who appeared for him in the action: *Baltzell v. Nosler*, 1–588.

In an action to set aside a judgment defendant may show that an agent or attorney who entered appearance for him, or accepted service, had no authority to do so, for the purpose of showing that the judgment was without jurisdiction: *Newcomb v. Dewey*, 27–381.

The presumption is that an attorney who appears for a party is authorized to do so: *Potter v. Parsons*, 14–286; *Harshey v. Blackmarr*, 20–161.

But if the attorney is in fact not authorized, the party may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21–329.

The fact of an appearance by attorney being established, it is for the party insisting that the appearance was unauthorized and the judgment void to show that fact: *Bond v. Epley*, 48–600.

Where a foreign judgment is resisted on the ground that the court rendering it had no authority, the fact that the attorneys who appeared for defendant were not authorized to do so is immaterial, if it is shown that defendant was duly served with notice, and would have been precluded without an appearance: *Woodward v. Willard*, 33–542.

A party who adopts the acts of an attorney appearing for him, although such appearance is without authority, by paying him for such services, thereby ratifies his acts and is bound by the judgment rendered: *Ryan v. Doyle*, 31–53.

Where an appearance by attorney is authorized, the court acquires jurisdiction of defendant by reason of such appearance, and any irregularity in the original notice, or want of authority in the attorney to accept service of such notice, is immaterial: *Fanning v. Minnesota R. Co.*, 37–379.

Evidence in a particular case of the authority of an attorney to appear for a party, *held* sufficient to overcome the denial of such authority on the part of the party: *Ellis v. White*, 61–644.

Further as to appearance by attorney, see notes to § 292.

Time to plead: It is not error to enter up a judgment by default on the day of the filing of such appearance without giving time to plead when no time is asked: *Shaw v. National State Bank*, 49–179.

Defendant is not entitled to a continuance except for cause upon appearing to a defective notice: *Des Moines Branch, etc., Bank v. Van*, 12–523.

Where by statute defendant was given in equity a longer time in which to answer than that allowed in law cases, *held*, that he would nevertheless be in default in failing to enter an appearance on the return day, although not required to answer on that day: *McKinley v. Betchtel*, 12–561.

WHEN ALL DEFENDANTS ARE NOT SERVED.

3833. Mode of procedure. 2627. When the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly, or jointly and severally, or severally liable only, he may, without prejudice to his rights in that or any other action against those not served, proceed against those served in the same manner as if they were the only defendants; if he recover against those jointly liable only, he may take judgment against all thus liable, which may be enforced against the joint property and separate property of those served, but not against the separate property of those not served, until they have had opportunity to show cause why judgment should not be enforced against their separate property; or,

2. The plaintiff may continue till the next term, and proceed to bring in the other defendants; but at such second term the suit shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such a delay. [R., § 2811.]

REAL ESTATE; LIS PENDENS.

3834. Notice to third parties. 2628. When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed. [R., § 2812.]

Effect of the notice: The record in a suit to restrain the enforcement of a mortgage is receivable in evidence as against a purchaser at a foreclosure sale under such mortgage, to affect him with notice of the claims of the plaintiff in such suit. *Sowden v. Craig*, 26–156.

An action to foreclose a mortgage is notice to the world of the rights of the mortgagee in the mortgaged premises: *Knowles v. Rablin*, 20–101.

The purchaser at a foreclosure sale is affected with notice of another foreclosure proceeding then pending as to the same property: *Cooley v. Brayton*, 16–10.

The purchaser at a tax sale of land on which a university fund mortgage is being foreclosed is bound by the decree therein: *Crum v. Cotting*, 22–411.

A purchaser *pendente lite* takes subject to an action pending against his grantor, affecting the title, and the fact that the suit is subsequently dismissed without prejudice and a new suit commenced will not relieve him of notice: *Ferrier v. Buzick*, 6–258.

A purchaser after judgment is rendered and satisfied, and before appeal, is not affected by subsequent proceedings in the case: *Davis v. Bonar*, 15–171.

But where a purchaser took before judgment and without paying consideration, *held*, that he was affected with the result of the proceeding: *Smith v. Kerns*, 24–589.

While the provisions of the statute rendering a petition affecting real estate notice of the action so as to charge third persons applies only where there is, at the commencement of the suit, a personal, vested interest, claim or lien in or upon the actual subject-matter of the action, *held*, that an action for the illegal sale of intoxicating liquors, wherein it was also sought to charge the property on which the sale was made, was such as to affect a subsequent purchaser of the property with notice of the claim: *O'Brien v. Putney*, 55–292.

The fact that the grantor fraudulently conceals from the grantee the pendency of the action will not affect the force of the judgment as between the opposite party and the grantee: *Blanchard v. Ware*, 37–305.

After action is brought to set aside a deed for fraud, a purchaser at execution sale from the defendant in such action, of the property conveyed thereby, is charged with notice of the action: *Rider v. Kelso*, 53–367.

It is the filing of the petition which, under the statute, imparts notice. The indexing in the appearance docket is no part of the filing, and failure to index reversely in name of defendant will not invalidate the notice. Nor is the service of original notice an essential of the filing or necessary to constitute notice: *Harerly v. Alcott*, 57–171.

It is the filing of the petition and not the service of the notice which creates notice to third parties: *Shropshire v. Lyle*, 31 Fed. Rep., 694.

In what cases applicable: The doctrine of *lis pendens* is not solely confined to actions in equity; it is also a rule in actions at law: *O'Brien v. Putney*, 55–292.

The doctrine of *lis pendens* has no application to personal property: *Miles v. Left*, 60–168.

One who takes negotiable bonds with full knowledge of the pendency of a suit to avoid the bonds and coupons is not entitled to the protection of an innocent and *bona fide* purchaser: *Durant v. Iowa County*, Woolworth, 69.

A pending action will not constitute notice as to matters not set up in such action until after the acquisition of rights by a party who is protected without such notice: *Wheeler & Wilson Mfg. Co. v. Hasbrouck*, 68–554.

Parties: It may be questioned whether, in the absence of notice to the party or his attorney, it is necessary, in order to create a *lis pendens*, to make any other persons parties than those whose interest in the subject is shown in some manner by the records, or by possession of the subject-matter of the controversy. But where the plaintiff or his attorney has notice that an interest is claimed by some person, it is the better practice, if not a bounden duty, to make such person a party to the action, in the absence of notice to such person of plaintiff's equity: *Mitchell v. Peters*, 18–119.

A purchaser bound by judgment: A purchaser *pendente lite* is bound by the judgment which is finally rendered in the case although not made a party thereto: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

The assignee of a mortgage is not affected by notice of rights involved in an action against the mortgagor's grantor not brought when the conveyance to the mortgagor was made: *Farmers' Nat. Bank v. Fletcher*, 44–252.

Fictitious mortgagor: The fact that the mortgagor was a fictitious person would not,

in such case, affect the right of an assignee if he had no knowledge thereof: *Ibid.*

Foreclosure of mechanic's lien: Persons purchasing after the commencement of an action to foreclose a mechanic's lien, *held* affected by notice thereof, and estopped thereby from afterwards setting up as a defense to the claim any matter which should have been interposed in such action: *Tredway v. McDonald*, 51-663.

Purchaser entitled to benefits: Where one purchases land *pendente lite*, and the action is determined in favor of the grantor, such purchaser may claim the benefits of the adjudication: *Woodin v. Clemons*, 32-280.

Purchaser from one not a party: A purchaser of real property during a litigation affecting the same, but taking title from one who is not a party to such litigation but holds adversely to such party, is not affected with notice of the rights involved: *Semple v. McCrary*, 46-37.

A purchaser of real property is not charged with notice of a suit with respect thereto to which neither he nor his grantor is a party: *Parsons v. Hoyt*, 24-154.

Knowledge of a suit against a husband by his creditors is not sufficient notice to put a purchaser of land from the wife on inquiry as to such suit: *Bailey v. McGregor*, 46-667.

A purchaser from the wife is not affected by the fact that suit has been brought against her husband affecting the land, he having no notice that such suit has relation to the land in question: *Bailey v. McGregor*, 46-667.

A judgment against one who does not hold the legal title does not prevent the holder of the legal title from passing a good title to a *bona fide* purchaser: *Joseph v. McGill*, 52-127.

Delivery of deed; estoppel: It seems that one who is a defendant in an action to determine the title to real estate is concluded from claiming the same by virtue of the delivery, by another defendant, of a deed executed by the plaintiff and held in escrow, when such delivery is made while the suit is pending, shortly before decree is entered adjudging plaintiff to be the owner of the land: *McGregor v. McGregor*, 21-441.

Actual notice: A *lis pendens* only operates as constructive notice to all persons of the title or claim of the parties to the subject of the litigation. If actual notice is otherwise given to one, it is immaterial whether or not, as to him, there is a *lis pendens*: *Mitchell v. Peters*, 18-119.

3835. Property in another county. 2629. When any part of real property, the subject of an action, is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with constructive notice of the pendency of the action, file with the clerk of the district court of such county, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, and from the time of such filing only shall the pendency of the action be constructive notice to subsequent vendees or incumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if a party to the action, and the clerk of such county must, immediately on receipt of such notice, index and record the same in the incumbrance book. And within two months after the determination of such action, there shall be filed with such clerk a certified copy of the final order, judgment, or decree, who shall enter and index the same in the manner as though rendered in that county, or such notice of pendency shall cease to be constructive notice. [R., § 2843; 13 G. A., ch. 167, § 16.]

CHAPTER 7.

OF JOINDER OF ACTIONS.

3836. When permitted. 2630. Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof. [R., § 2844; C., '51, § 1751.]

Two causes of action which may be prosecuted by the same proceeding may properly be joined: *Reed v. Howe*, 28-250.

A cause of action on tort and one on contract may be joined: *Turner v. First Nat. Bank*, 26-562; *Jack v. Des Moines & Ft. D. R. Co.*, 49-627.

A cause of action upon a note may be joined

with one upon an account: *Thorpe v. Dickey*, 51-676.

But such causes of action cannot be joined where the parties to the note are not all parties to the account, even though the note has been indorsed as collateral security for the account: *Ibid.*

In an action in tort several distinct trespasses may be joined in the same action: *Wilson v. Johnson*, 1 G. Gr., 147.

Indebtedness due upon an executed contract may be included as an item of account, and form a part of the action on said account which includes other items: *Buford v. Funk*, 4 G. Gr., 493.

A tender of separate lots of goods at different times for transportation, on behalf of the same party, does not necessarily show different causes of action for each amount tendered: *Cobb v. Illinois Cent. R. Co.*, 38-601.

Under statutory provisions for the foreclosure of tax deeds, *held*, that one action of foreclosure might properly be brought on twenty-two different tax deeds when the title was to the same property, the land owned by the same party, the deeds all made the same day, to the same purchaser, and the right of action had accrued on all of them: *Byington v. Woods*, 13-17.

Where the petition shows a number of causes of action, even though they may be different and various, it cannot for that reason be attacked by demurrer: *McFaul v. Ramsey*, 20 How., 523.

Equity abhorring a multiplicity of suits will never send a suitor from its bar to bring another action, when relief can be granted fully and completely and without injustice to others in an action wherein it has acquired jurisdiction of the parties and of the subject-matter in controversy: *Stapleton v. King*, 40-278.

In an action for breach of contract plaintiff may also have judgment for the foreclosure of a mortgage given as security upon such contract: *Ibid.*

A cause of action by the wife for injuries suffered by reason of acts of defendant, causing her husband's death, cannot be joined with an action commenced by the husband for such injuries in which the wife, after his death, is substituted as administratrix: *Frink v. Taylor's Adm'x*, 4 G. Gr., 196.

In an action to foreclose a mortgage as against the maker of a note and mortgage, it is not proper to join the action against the indorser of the note on his indorsement: *Breckinridge v. Brown*, 9-396.

A separate cause of action against one defendant, and a cause of action against the same defendant and another defendant, cannot be joined in the same action: *Addicken v. Schrubbe*, 45-315.

An action at law against one party cannot be joined with an action in equity against such party and another: *Stevens v. Chance*, 47-602.

A joint action for slander cannot be maintained by two plaintiffs. If the same slanderous words are at the same time spoken respecting several persons they furnish each a ground for a separate action, but such persons have no community of action and cannot sue together: *Hinkle v. Davenport*, 38-355.

Where the petition against two defendants avers a joint tort by each, it cannot be assailed for misjoinder, but no judgment should be rendered thereon unless the proof warrants a joint judgment. Otherwise no judgment should be rendered at all: *Barnes v. Ennenga*, 53-497.

Where, by dismissing a cause of action embraced in one count as against a portion of the defendants, a joinder of actions in the two counts is rendered improper, plaintiff may be allowed to file a new petition setting up the cause of action in one of such counts, and defendants may be required to appear thereto without new service: *Dorothy v. Hicks*, 63-240.

Where, by amendment to a petition, a cause of action is set up which cannot be properly joined with the action in the original petition, if plaintiff does not elect which one of such causes of action he will prosecute, the amendment may be stricken from the files on motion: *Sweetzer v. Harwick*, 67-488.

As to joint action against a saloon-keeper and the owner of premises used for such purpose, see §§ 2418, 2419, and notes.

3837. Plaintiff may strike out. 2631. The plaintiff may strike from his petition any cause of action or any part thereof, at any time before the final submission of the case to the jury or to the court, when the trial is by the court. [R., § 2845.]

Section applied: *Allen v. Bidwell*, 35-218.

Where by dismissal of a cause of action embraced in one count as against a portion of the defendants, a joinder of actions in the two counts is rendered improper, the plaintiff may be allowed to file a new petition stating the cause of action in one of such counts, and the defendants may be required to appear thereto without new service: *Dorothy v. Hicks*, 63-240.

3838. So may court. 2632. The court, at any time before the defense, shall, on motion of the defendant, strike out of the petition any cause or causes of action improperly joined with others. [R., § 2846.]

Where the misjoinder is of causes of action against different parties this section and the following one are not applicable: *Cogswell v. Murphy*, 46 44.

That causes of action against several defendants are improperly joined does not entitle one of the defendants to have the action dismissed as to him. At most he is only entitled to have the other causes of action stricken from the petition against him: *Wilson v. Baker*, 52-423.

3839. Misjoinder waived. 2633. All objections to the misjoinder of causes of actions shall be deemed to be waived, unless made as provided in the last section. [R., § 2847.]

A misjoinder not taken advantage of by motion before answer cannot be made the ground of a motion in arrest: *Grant v. McCarthy*, 38-468.

Failure to file a motion to strike out an action improperly joined waives the objection: *Flynn v. Des Moines & St. L. R. Co.*, 63-490.

If different causes of action which might properly be joined in one action in separate counts are improperly joined in one count, the pleading can only be assailed by motion, and such objection cannot be raised upon the introduction of evidence: *Cobb v. Illinois Cent. R. Co.*, 38-601.

3840. Separate petitions. 2634. When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and action shall be docketed for each of said petitions, and the same shall be proceeded in without further service, and the court shall determine, by order, the time of pleading therein. [R., § 2848.]

CHAPTER 8.

OF PLEADING.

3841. Time to demur or answer. 2635. The defendant shall, in an action commenced in a court of record, demur, answer, or do both as to the original petition before noon of the second day of the term. [R., § 2849; C., '51, § 1737.]

It is not a sufficient cause for striking an answer from the files that it was filed after the second day of the term, which is the day required by law for the filing of such pleadings: *Keeney v. Lyon*, 10-546.

The filing of a counter-claim in proper time is equivalent to the filing of an answer: *Town v. Bringolf*, 47-133.

In the absence of a rule of court defendant is not required to appear and answer or demur before noon of the second day, and if the attention of the supreme court is not called to any rule of the lower court authorizing default for failure to appear on the first day it will be presumed that the action of the lower court in setting aside a default for failure to appear the first day was proper: *Huebner v. Farmers' Ins. Co.*, 71-30.

3842. Subsequent pleadings. 2636. Each party shall demur, answer, or reply to all subsequent pleading, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed. But all pleadings must be filed by the time the cause is reached for trial. [R., §§ 2850, 2851, 2858.]

These provisions as to filing pleadings before the case is reached for trial are applicable to an appeal from a justice court: *McDowell v. Booth*, 72-141.

An answer filed, without leave of court, after the full submission of the cause, and presenting new issues, may be stricken from the files: *Sullivan Savings Institution v. Copeland*, 71-67.

Defendant has until noon of the next day after the filing of an amended petition in which to file an answer thereto: *Brandt v. Wilson*, 58-485.

The plaintiff may file a reply later than the time here fixed, upon such reasonable terms as the court may impose: *Williams v. Niagara F. Ins. Co.*, 50-561.

As to default for failure to file pleadings, see § 4076 and notes.

3843. First day of term. 2637. The day on which the judge actually opens court shall be, for the purpose of timing the pleading, considered the first day of the term. [R., § 2857.]

3844. Extension of time. 2638. The court may extend the time of filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day possible. [R., § 2859.]

The extension by the court of the time for filing an answer does not deprive defendant of his right to demur, nor does it extend the time for filing such demurrer. A demurrer filed at the time fixed by the court for filing an answer should be stricken from the files: *District T'p v. White*, 42–608.

Where time is given to answer, and at the expiration of that time and before default a demurrer is filed, the action of the court in refusing to strike such demurrer from the files on motion will not be reversed where the abstract does not show all the facts and circumstances surrounding the transaction, and that there was prejudicial error in the ruling: *Gray v. Myers*, 45–158.

Refusal by the court on motion to strike a demurrer from the files because filed after the time provided amounts in effect to an extension of the time: *Rumsey v. Robinson*, 58–225.

Where plaintiff was allowed a certain time to file an amended petition, after a demurrer to the original petition had been sustained, but did not file such amendment until after the expiration of the time fixed, and defendant thereupon moved to strike it from the files, and plaintiff asked for time to make resistance to the motion by filing an affidavit of excuse, which he did not file within the time fixed by the court nor until after the argument of defendant on the motion to strike was closed, *held*, that it was not error to strike the amended petition from the files, as asked: *Hayward v. Goldsbury*, 63–436.

Where defendant was given until a certain time to answer, and before that time change of venue was taken to another county, *held*, that he was not in default for want of answer until the first day of the next term in the county to which the cause was taken: *Wormley v. District T'p*, 45–666.

Where a motion is made to strike a pleading from the files because not filed in the time required by rule of court, and no excuse is offered for the failure to comply with the rule, the striking of the pleading from the files will not be error: *Bolander v. Atwell*, 14–35.

3845. Motions assailing pleading; but one motion or demurrer. 2639. All motions assailing a pleading shall be in writing, and filed before an answer or reply has been filed to the pleading assailed, except as provided in section two thousand six hundred and fifty of this chapter [§ 3856], and shall specify the causes on which they are founded, and none other shall be argued or considered. But one motion and one demurrer assailing such pleading shall be filed, unless such pleading be amended after the filing of a motion or demurrer thereto. [R., §§ 2864, 2865, 2866.]

A motion should state the causes on which it is based: *Hall v. Crouse*, 14–487.

A motion urging as an objection to a pleading that it is not sworn to is not sufficient to cover the objection that the affidavit is by a party who does not show himself competent to make it: *Wood v. Bailey*, 12–46.

Where a motion is founded upon matter outside of the record it should be verified: *Shellenberger v. Ward*, 8–425.

A motion simply directing the attention of the court to the case as it is presented in the pleadings and record, in order that the party may have the relief to which he thus appears entitled, need not be in writing: *Palmer v. Jones*, 49–405.

The filing of a demurrer waives any error in overruling a motion to strike or to require a more specific statement: *Stineman v. Heath*, 36–7[illegible].

A motion after a motion or a demurrer after a demurrer to the same pleading is not allowable: *Riddle v. Backus*, 36–430.

Where a demurrer had been filed by an attorney without the knowledge or consent of the party, and such demurrer was by permission of the court withdrawn, *held*, that the same attorney, after receiving proper authority, might interpose a new demurrer: *Winterstein v. Walker*, 10–198.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek County v. Cass County*, 63–244.

A motion which has once been passed upon should not be reheard at the instance of the unsuccessful party until the ruling thereon has been set aside on his motion, with notice to the opposite party: *Townsend v. Wisner*, 62–672.

A party cannot, by asking to refile a pleading which has previously been stricken from the files, raise the same question which was determined by striking it from the files, for the purpose of excepting to the ruling of the court thereon: *Barkdull v. Callanan*, 33–391.

A motion should state the causes on which it is based: *Hall v. Crouse*, 14–487.

Where no ruling appears to be made upon a motion the presumption is, unless it otherwise appears, that it was waived: *Cook v. Smith*, 50–700.

3846. Demurrer or motion suspends other pleadings. 2640. A demurrer or motion assailing any pleading or count thereof, suspends the necessity of filing any other pleading to such pleading or count until the same has been determined, and the next pleading shall be filed by noon of the day succeeding such determination. [R., § 2867.]

[In the printed Code the words "the morning" are erroneously inserted instead of the word "noon" in the fourth line of the section.]

The substitution of the word "noon" for the word "morning," in this section, as here made, *held* correct: *Brandt v. Wilson*, 58–485.

3847. When argued. 2641. All motions and demurrers shall be argued and submitted when filed, unless the adverse party is absent or desires time, in which case it shall be extended until the morning of the succeeding day unless the cause is sooner reached for trial. [R., § 2869.]

3848. Not withdrawn. 2642. A motion or demurrer once filed, shall not be withdrawn without the consent of the adverse party entered thereon, or of the court. [R., § 2870.]

3849. Appearance docket. 2643. The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court. [R., § 2871; 9 G. A., ch. 75, § 1.]

3850. Forms of action abolished. 2644. All technical forms of action and pleading, all common counts, general issues, and all fictions are abolished, and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this code. [R., § 2872; C., '51, § 1733.]

Our system of pleading ignores all fictions and technical forms, actions and pleadings. All that is required is a statement of the facts constituting the cause of action: *Holloway v. Griffith*, 32-409, 413.

For somewhat similar provision, see § 3712.

3851. Pleadings defined. 2645. Pleadings are the written statements by the parties of their respective claims and defenses, and are:

1. The petition of the plaintiff;
2. The demurrer or answer of the defendant;
3. The demurrer or reply of the plaintiff;
4. The demurrer of the defendant. [R., §§ 2873-4.]

PETITION.

3852. What to contain. 2646. The petition must contain:

1. The name of the court and county in which the action is brought;
2. The names of the parties to the action, plaintiffs and defendants, followed by the word "petition" if the proceedings are ordinary, and by the words "petition in equity," if the proceedings are equitable;
3. A statement of the facts constituting the plaintiff's cause of action;
4. A demand of the relief to which the plaintiff considers himself entitled, and if such demand be for money, the amount thereof must be stated;
5. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts looking to a money remedy;
6. In a petition by equitable proceedings, each division shall also be separated into paragraphs, numbered as such for more convenient reference, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement. [R., § 2875; C., '51, § 1736.]

I. THE COMMENCEMENT.

The caption determines what court the petition is in: *Morgan v. Small*, 33-118.

An error in the petition in stating the name of the county in which the action is brought is matter of form which will not be a ground for disturbing the judgment: *Holmes v. Wright*, Mor., 100.

Title: Where the petition was addressed to "The judge of the district court," but did not contain in the heading the names of the parties nor the word petition, *held*, that it was merely defective in form, and the court did not err in refusing, on account of such defect, to dismiss the action on defendant's motion: *Smith v. Watson*, 28-218.

Where, in the title, the defendants were named and described as late partners of the firm named, and in the petition it was alleged that defendant executed a promissory note, a copy of which was set out in the firm name, *held*, that it was sufficiently charged that defendants were members of said firm: *McCloskey v. Strickland*, 7-259.

A paper denominated "synopsis of petition" and entitled with the names of parties and filed by the clerk, and entered upon the ap-

pearance docket of the district court, but not containing the name of the court or county, and which the clerk was not directed to file in any particular court, *held* not sufficient to invoke jurisdiction of the court in which it was filed, and therefore properly stricken from the files on motion: *Garretson v. Hays*, 70–19.

A petition entitled in the circuit court does not, by being filed in the district court, give the latter any jurisdiction. The fact that an indorsement on the back of the wrapper shows that the filing in the circuit court has been canceled and that it is refiled in the district court will not affect the case, the words and figures on the wrapper being no part of the petition: *Jordan v. Brown*, 71–421.

II. STATEMENT OF CAUSE OF ACTION.

Ultimate facts: Our system of pleading is a fact system, one which requires the parties to state truly and frankly the facts upon which they rely for their action or defense. It does not allow, on the one hand, the statement of legal conclusions, nor on the other the statement of evidence of facts: *Lumbert v. Palmer*, 29–104; *Pfiffner v. Krapfel*, 28–27.

Presumptions of law need not be averred nor proven: *Furgison v. State*, 4 G. Gr., 302.

Consideration being presumed in case of written instruments (§ 3290) need not be averred nor proved in the first instance: *State v. Wright*, 37–522.

In pleading a tax sale, where the execution and delivery of the deed by the proper officer is alleged, and a copy thereof is attached to the petition, it is not necessary to aver facts of which the law makes the deed presumptive evidence: *Byington v. Robertson*, 17–562.

Matters of which judicial notice is taken need not be stated in the pleading: *Clough v. Goggins*, 40–325.

It is not necessary to set forth or cite a public statute upon which the right claimed in the pleading is based: *Chicago, B. & Q. R. Co. v. Porter*, 72–426.

In pleadings under the code the statement of facts should be as much a logical statement of the cause of action as was ever required by the strict rules of the common law: *McConnoughey v. Weider*, 2–408.

Nothing is more clearly condemned by the provisions of the Code, nor with greater justice, than the pleading of statements of evidence instead of propositions which contain the ultimate results of evidence: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

A pleading in equity presenting an account of payments and credits and referring to the evidence upon which plaintiff's claim is based, found in letters and explanations thereof, intended to assist in the proper understanding of the facts, *held* not necessarily improper: *Ingle v. Jones*, 43–286.

Not conclusions of law: A pleading must state the facts from which the conclusion can be drawn that the party is entitled to the relief asked or to maintain the defense interposed. If conclusions only are stated a motion for more specific statement may be sustained, and the pleader may be required to set out the facts on which he relies without setting out the evidence to sustain them: *Lane v. Burlington & S. W. R. Co.*, 52–18.

A paragraph of a pleading should contain something more than a mere conclusion of law based upon statements of facts contained in some other paragraph. If it does not, it may be stricken out on motion: *Cooper v. French*, 52–531.

The allegation of conversion of property is a legal conclusion. The pleading should show what was done constituting a conversion. *Burt v. Decker*, 64–106.

A general averment of priority of one mortgage over another is not the pleading of any fact, but the mere assertion of a legal conclusion, and under such allegation actual notice, not otherwise specially pleaded, cannot be proved: *Koon v. Tramel*, 71–132.

Under our system of pleading the facts upon which a right of action is based are required to be stated: and it is not permissible for the party to plead mere conclusions: *Sac County v. Hobbs*, 72–69.

A pleading stating that a city had fixed and established the grade of a street, *held* to sufficiently state an ultimate fact by stating the method in which the grade was established: *Luse v. Des Moines*, 22–590.

An averment in an answer attacking the validity of a tax sale, that the day on which the sale was made "was a day not authorized by law therefor," *held* to be a proper averment of fact: *Plympton v. Sapp*, 55–195.

In an action for seduction the fact of seduction is the ultimate fact to be established, and it is not necessary to aver the means made use of to deceive and mislead: *Brown v. Kingsley*, 38–220.

Certain allegations of an answer *held* properly stricken out on motion as being merely legal conclusions and matters of argument: *Boggs v. Chicago, B. & Q. R. Co.*, 54–435.

The objection that an allegation of a pleading is a conclusion of law instead of a statement of fact should be raised by motion for more specific statement or otherwise, and not by demurrer: *Kendig v. Marble*, 55–386.

It is not allowable to plead mere abstract conclusions of law having no element of fact, but if they contain also the elements of a fact, construing the language in its ordinary meaning, then force and effect must be given them as allegations of fact: *Grinde v. Milwaukee & St. P. R. Co.*, 42–376.

Information not sufficient: Where the averment of a fact is essential to entitle plaintiff to recover, it is not sufficient to aver information of such fact: *Winneshiek County v. Allamakee County*, 62–558.

Contract: The averment that defendant signed and delivered to plaintiff an agreement in writing is sufficient as an averment that defendant entered into such contract: *Waukon & M. R. Co. v. Dwyer*, 49–121.

In an action upon a policy of insurance, *held*, that the averment in the petition of the issuance of the policy, coupled with the averment that the amount stated in the policy with interest is due to plaintiff, sufficiently stated the cause of action supporting the judgment upon proper evidence, no objection having been made to the form of the pleading: *Revere F. Ins. Co. v. Chamberlin*, 56–508.

Negativing defenses: The plaintiff need not in his petition negative matter which it would be proper for defendant to set up by

way of defense to the action: *Dunlavey v. Watson*, 38-398.

Allegations as to diligence and negligence: Where the petition in an action for damages against a railway company alleged the running of an engine in such a grossly negligent manner that the same ran over the animal for the killing of which damages were sought, *held*, that the defendant was not entitled on motion to a more specific statement: *Grinde v. Milwaukee & St. P. R. Co.*, 42-376.

Under an allegation that the injury complained of was caused by the employees of defendant in charge of a train, recovery cannot be had by proving that it was caused by employees elsewhere: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

In an action for negligence the evidence must show that the injury for which damages are claimed was caused in the manner alleged in the petition. It is not sufficient to show that the injury occurred in any other manner because of defendant's negligence: *Mannel v. Chicago, R. I. & P. R. Co.*, 56-655; *Carter v. Kansas City, St. J. & C. B. R. Co.*, 65-287.

A party averring in his pleading a fact as constituting negligence, whereon he bases his right to recover, cannot depart from the issue made by this averment and show other facts in order to establish other negligence; and this will be true whether it is necessary or not to allege negligence: *Miller v. Chicago & N. W. R. Co.*, 66-364.

A general averment of diligence is not an averment of an ultimate fact, but a conclusion of law: *Leas v. White*, 15-187.

Fraud: In order to admit evidence of fraud under our system of pleading there should be at least a general statement of the facts constituting fraud: *Hale v. Walker*, 31-344.

A mere charge of fraud in the pleading is not sufficient without statements of specific words or acts constituting fraud. Such an allegation is the mere averment of a legal conclusion. The facts upon which the fraud is based must be averred: *Ockendon v. Barnes*, 43-615; *Mason v. Searles*, 56-532.

A party asking relief on the ground of fraud must set forth the fraudulent acts complained of, and show how he was defrauded or misled thereby: *Kows v. Kouse*, 57-20.

While fraud is a good defense to a contract, it is not sufficient to plead it in general terms. The specific statements and acts relied upon as constituting fraud must be set out. If these do not show fraud, the pleading is insufficient and may be successfully assailed by demurrer: *Mills v. Collins*, 67-164.

Whoever sets up fraud must do more than allege fraud in general and abstract terms. He must set out the specific facts in which the fraud consists: *Kerr v. Sieman*, 72-241.

In pleading fraud and collusion it is not necessary for the pleader alleging such fraud or collusion to set forth all the minute facts tending to establish or confirm the allegation, but there must at least be a general statement of the facts: *Singleton v. Scott*, 11-589.

In charging fraud it is not necessary or proper for the pleader to set out all the facts establishing it. The ultimate fact and not the evidence should be pleaded: *Coulin v. Toole*, 31-513.

A petition in an action against the indorser of a negotiable instrument, stating that defendant falsely and fraudulently represented to plaintiff, with a view to induce him to purchase the note and take the assignment thereof without recourse, that it was all right, etc., whereas the contrary was true, sets out a sufficient cause of action: *Watson v. Chesire*, 18-202.

A petition alleging facts constituting fraud, without alleging that such facts are fraudulent or designating them as a fraud, is sufficient to charge fraud: *Lafever v. Stone*, 55-49.

A petition stating that a sale of real estate by an administrator to pay debts was a private sale, and void, because effected through fraud and collusion between the administrator and purchasers, is sufficient, if proved, to avoid the sale if the property is still in the hands of the first purchaser: *Van Horn v. Ford*, 16-578.

Allegations of indebtedness: An answer denying that plaintiff is the real party in interest, or that defendant is indebted to him as charged, without stating the facts upon which such allegations are based, is insufficient: *Cottle v. Cole*, 20-481.

Where plaintiff alleges an indebtedness which was to be repaid in a certain manner, and it appears that something has been received by him, he must, to entitle him to recover, state how much has been received: *Gammel v. Young*, 3-297.

In an action upon a judgment it is not necessary to allege that the judgment is still in full force and virtue and not satisfied. It is sufficient if it is alleged in the usual form that the sum claimed is still due: *Blake v. Burley*, 9-592.

Averment of non-payment of a judgment in replevin *held* a sufficient allegation to show a breach of the replevin bond: *Cameron v. Boyle*, 2 G. Gr., 154.

Ownership or title: Where a party sues on a promissory note made payable to him in his name, the averment that the demand sued on is his property is not necessary. He is presumed to be the owner until the contrary is shown: *Blake v. Burley*, 9-592.

Where a note is payable to bearer, the allegation in the petition that it is the property of plaintiff is sufficient without alleging the method in which it became his property: *Dabney v. Reed*, 12-315.

A statement in a petition averring ownership is sufficient without stating the facts showing plaintiff's title: *Sturman v. Stone*, 31-115.

An averment that a party holds title to real property is not an averment of fact, but of a conclusion of law: *Jordan v. Walker*, 56-686.

In an action to cancel a deed it is sufficient if the petition shows a right to the relief asked without stating the prior history of the title: *Wilson v. Miller*, 16-111.

Where a plaintiff in an action of replevin seeks to recover on the ground of ownership of the property, he cannot sustain the action by evidence that he holds a lien thereon under which he is entitled to possession: *Knowlton v. Lendrum*, 54-756.

Act of agent: An allegation as to the doing of an act by the party may be established by proof that the act was done by his agent: *Poole v. Huntrager*, 60-180.

A petition alleging that defendant, through

an agent named, employed plaintiff, *held* to be a sufficient averment of an employment of plaintiff through an authorized agent: *Call v. Hamilton County*, 62–448.

Proof of partnership: Where defendant was sued as a partner, *held*, that evidence that he held himself out to the public as a partner was admissible in evidence without such fact being pleaded: *Hancock v. Hintrager*, 60–374.

Want of jurisdiction: Where in a pleading it is averred as an essential fact that the court rendering a certain judgment, referred to therein, had no jurisdiction so to do, the opposite party is entitled, on a motion for more specific statement, to have the facts set out on which the alleged want of jurisdiction is based: *Crewdson v. Middleton*, 57–335.

Excessive judgment: In an action to set aside a judgment claimed to be excessive the fact should be alleged from which it may appear by computation that the amount of the judgment is in excess of the amount due: *Byers v. Odell*, 56–618.

Waiver: It is proper to declare on a contract and set up a waiver of the conditions thereof: *Flynn v. Des Moines & St. L. R. Co.*, 63–490.

Under our Code system of pleading a plaintiff cannot, in an action against an indorser of a note or bill under an averment of demand, protest and due notice, recover upon proof of facts amounting to a waiver of them. Waiver cannot be proved under an allegation of notice: *Lumbert v. Palmer*, 29–104.

But where it was averred that defendant waived want of demand and notice in such case, *held*, that this might be relied on in addition to the averment that demand was made and notice given: *Peck v. Schick*, 50–281.

Under allegations of due diligence in notifying the indorser of a negotiable note in order to hold him liable, proof that such diligence would have been unavailing is not admissible, although under the statutes of the state in which the transaction took place the latter fact would have been sufficient to render the indorser liable if it had been properly pleaded: *Woolsey v. Williams*, 34–413.

Where a pleading avers payment it will not be supported by proof of a waiver of payment, although waiver, if it is properly pleaded, would sustain the cause of action, and it is immaterial that the pleading would have been sufficient without such averment: *Bernhard v. Washington L. Ins. Co.*, 40–442.

Where there is a condition precedent to plaintiff's right of action, he should aver and prove the performance of such condition or its waiver, and upon averment of performance evidence of waiver is not admissible: *Edgerly v. Farmers' Ins. Co.*, 43–587.

Waiver cannot be proven under plea of performance, nor is it competent under plea of performance to show that the contract was altered by the act of the parties. A party cannot sue upon one contract and recover upon another: *Fauble v. Smith*, 48–462.

Where defendant in his answer set up certain printed instructions under which he claimed to have acted as agent of plaintiff, *held*, that he could not, under such pleadings, prove conversations or directions waiving or changing such instructions: *Howe Machine Co. v. Woolly*, 50–549.

Waiver of condition in a policy of insurance requiring preliminary proofs of loss cannot be shown without being alleged: *Smith v. State Ins. Co.*, 64–716. Evidence of such waiver is not admissible under an allegation that the proofs were furnished: *Welsh v. Des Moines Ins. Co.*, 71–337.

When the waiver of a condition is relied upon it must be pleaded: *Eiseman v. Hawkeye Ins. Co.*, 74–11.

Implied contract; tort; conversion: Proof of a tortious taking of property, where the property has not been sold by the wrongdoer, will not support the averment of a contract to pay therefor: *Moses v. Arnold*, 43–187.

Where the facts stated show a cause of action for the recovery of purchase money paid in pursuance of a contract which the vendee has made, on the ground of false representations by the vendor, plaintiff may recover on proving the essential fact as to the false representation, although he has also alleged that the misrepresentation was wrongfully and wickedly made; the unnecessary allegation as to intent will not change the cause of action from one of contract to one of tort: *Maichen v. Clay*, 62–452.

Consideration: Where a mere simple contract is the foundation of an action plaintiff must allege a consideration: *Decker v. Birhap*, Mor., 62.

Where the consideration for an agreement is the compromise of a suit such fact must be alleged by the party seeking to establish the agreement, and such an issue must be made in the pleadings before the fact can be proven in his behalf: *Richardson v. Barrick*, 16–407.

The objection that no consideration is shown upon the face of an instrument pleaded, or that none is averred in plaintiff's petition, cannot be taken by demurrer. Want of consideration, or failure in whole or in part of the consideration of a written contract, must be averred and shown by way of defense, consideration in a written instrument being presumed (§ 3290): *Linder v. Lake*, 6–164; *Towsley v. Olds*, 6–526; *Goodpaster v. Porter*, 11–161; *Henderson v. Booth*, 11–312; *State v. Wright*, 37–522.

Breach of contract; demand: Where the contract is an agreement to deliver a specified article of personal property, or make payment in that manner, demand must be made and alleged as having been made before action was brought: *Decker v. Birhap*, Mor., 62.

Breach of covenants of warranty: In an action upon breach of covenant of seizin it is sufficient to negative the words of the covenant, and it is not necessary to show wherein the grantor was not lawfully seized: *Socum v. Hann*, 36–138.

In pleading breach of covenant as a defense in an action for purchase money, it is sufficient to negative the words of the covenant and allege that the grantor had no title or seizin. It is not necessary to aver ouster or eviction: *Camp v. Douglas*, 10–586.

In setting out breach of covenant it is not sufficient to allege merely a failure of title. The denial of title should relate to the time of

the conveyance. Nor is it the proper practice to set out the deed in full as a part of the pleading. The covenants claimed to have been broken, alone should be set out: *McCampbell v. Vastine*, 10–538.

Breach of warranty in sales: In an action for breach of warranty in the sale of a horse. *held*, that the allegation that the animal was unfit for one purpose for which he was warranted was sufficiently specific without an allegation of the cause of such unfitness: *Schurtz v. Kleinmeyer*, 36–392.

Where a contract of a sale of a machine contained a stipulation that in case it did not comply with the terms of the warranty the purchaser should notify the seller of that fact, and the latter might have an opportunity to make it comply or substitute another machine, *held*, that plaintiff could not recover for breach of warranty without also alleging notice to the seller and the giving of an opportunity to remedy the defects: *Davis v. Robinson*, 67–355.

Breach of bond: See § 3935 and notes.

Allegations and proof: The proof must sustain the material allegations of the petition. Under an allegation in an action of replevin that plaintiff is the absolute and unqualified owner of the property he cannot recover upon proof of an interest as mortgagee: *Kern v. Wilson*, 73–490.

Under allegations of an oral contract plaintiff cannot recover on proof of a written contract, even though such proof be oral, establishing the contents of a written contract which has been lost or destroyed: *Petersen v. Ochs*, 40–530.

When a written warranty is relied upon evidence of a parol warranty is not admissible: *Barrett v. Wheeler*, 66–560.

Under a petition upon a written contract plaintiff cannot recover upon proof of an estoppel: *Phillips v. Van Schaik*, 37–229.

Under allegations of an indebtedness for work performed plaintiff cannot recover on a contract guarantying payment for such work by another: *Packard v. Snell*, 35–80.

When plaintiff declares upon a special contract he must prove the contract as laid, and any material variance even as to the amount due on the contract will be fatal. It would be otherwise if the action were for work and labor, in which case the amount claimed would be immaterial: *Beebe v. Brown*, 4 G. Gr., 406.

In a particular case, *held*, that there was a variance between the contract given in evidence and the contract set out in the pleadings: *York v. Wallace*, 48–305.

A party suing on a contract for services performed thereunder is limited in his recovery to the amount stipulated in such contract, and cannot recover an additional amount for breach of the contract by the other party: *Bush v. Chapman*, 2 G. Gr., 549.

Under the allegations in a particular case, *held*, that plaintiff did not claim under a special contract, and might recover the reasonable value of services rendered: *Forey v. Western Stage Co.*, 19–535.

A plaintiff who declares specially upon a contract and also upon the common count for goods sold and delivered may recover upon the common count on the *quantum meruit*: *Formholz v. Taylor*, 13–500.

Although at common law an express promise might be alleged although an implied contract was relied upon, under code pleading proof of an implied promise is not proper under the allegations of an express promise: *Proctor v. Reif*, 52–592; *Lines v. Lines*, 54–600.

The allegation of an express contract to take a note in payment of a debt will be sustained by proof of a state of facts from which an agreement to that effect would be implied: *Hunt v. Higman*, 70–406.

Although it is well settled that when plaintiff alleges a special contract he cannot prove and recover upon another contract or on a count for *quantum meruit*, yet when plaintiff set out one contract which was denied by defendant, who in his answer set up another contract, under which he claimed plaintiff's services were rendered, and the case was fully tried upon these issues, *held*, that plaintiff was properly allowed to recover the amount to which he was entitled under the contract set up in defendant's answer: *Cook v. Smith*, 54–636.

When the plaintiff seeks to recover against defendant individually upon a several promise a joint note containing a joint promise only is not admissible in evidence: *Roop v. Seaton*, 4 G. Gr., 252.

Where, in an action on a note, a deposition was taken in which the note referred to was set out by copy different from the note set out in the petition, *held*, that although such a variance might have been ground for objecting to the evidence, yet the identity of the note referred to in the deposition and the one set out in the pleading might have been established by other evidence, and in the absence of a showing that all the evidence in the court below was before the supreme court on appeal, it would be presumed that such other evidence was introduced: *Lauman v. Nichols*, 15–161.

Where the petition in an action for breach of warranty averred that paramount title had been subsequently purchased by plaintiff from a corporation named, but offered in evidence in support of that allegation a deed from another corporation, *held*, that this was a material variance, and the deed should have been rejected: *Burns v. Iowa Homestead Co.*, 48–279.

Plaintiffs, in an action of forcible entry and detainer, claimed to recover on the ground that defendant was tenant at will by holding over after the termination of the lease. *Held*, that they were confined to these facts and could not recover upon proof of fraudulent combination to obtain the lease without amendment of the pleadings. As to whether such amendment could be made, *quære: Goldsmith v. Boersch*, 28–351.

Where a party induced by fraud to make an exchange of one horse for another which was diseased brought replevin to recover the animal which he had given in exchange, alleging absolute ownership and right to possession, and that defendant falsely pretended to have entered into a contract of exchange, etc., and that plaintiff had tendered back the horse received and demanded the return of the

other, and thereupon defendant alleged ownership by a valid contract of exchange, *held*, that plaintiff might show fraud in the contract of exchange, rendering it void, at least in a proceeding before a justice of the peace, where not quite the same strictness of pleading is required as in courts of record: *Nolan v. Jones*, 53-387.

In a particular case, *held*, that an admission tending to show a guaranty or warranty was not admissible in an action for false representations: *Clark v. Ralls*, 58-201.

Where plaintiff sought to recover the value of property alleged to have been fraudulently converted by defendant, and defendant alleged title under a bill of sale, no allegation of fraud in such transaction being made by plaintiff, *held*, that plaintiff could not introduce evidence to prove fraud and thus defeat plaintiff's title: *Kervick v. Mitchell*, 68-273.

A petition claiming that defendant cut and carried away timber from the land of plaintiff, *held* not necessarily in form an action of trespass, and that under such petition plaintiff could show a promise to pay for such timber though he was not in possession at the time of the injury and had not the complete title until afterward: *Kline v. Mann*, 29-112.

Specific negligence must be proved as set out: *Armstrong v. Ackley*, 71-76.

Where the petition in an action before a justice of the peace claimed $100 "for damages and trespasses," etc., and that defendant "broke and entered said premises by force . . . and did cut down and carry away one hundred trees of the value of $100," *held* that, upon a trial of such action on appeal, plaintiff could recover for the consequent injury to the realty, as also for the breaking: *Dugan v. Hunt*, 29-447.

The fact that the cause of action stated in the petition is that of trespass, while the evidence shows what was formerly known as trespass on the case, will not constitute a material variance: *Brown v. Hendrickson*, 69-749.

As to variance, see § 3892 and notes.

As to effect of failure to prove allegations, see § 3936 and notes.

Allegations of damage: In an action for damages to furniture, *held*, that evidence of damage to other articles, such as provisions, etc., could not be introduced: *Whitmore v. Bowman*, 4 G. Gr., 148.

Under a petition claiming damages for selling plaintiff a horse having the glanders, *held*, that plaintiff could not recover for damages resulting from unlawful sale of such diseased horse by defendant to another by which plaintiff was injured: *Proctor v. Reif*, 52-592.

Damages occasioned by physical and mental suffering may be alleged in a general way, and plaintiff cannot be required to make an itemized statement thereof: *Gilbert v. Hoffman*, 66-205.

It is not necessary to allege in a pleading the qualities or uses of the thing which add to its value, when recovery is sought for its destruction or injury: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

The averment in an action for personal injuries that plaintiff was seriously injured and suffered great pain and mental anguish, and was put at great expense because of the negligence of defendant causing the injury, *held* not sufficient to entitle plaintiff to recover for loss of time: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588.

Where plaintiff sues for compensation under a contract which he has but partially performed, while he is subject to have set off against him the damages which the opposite party has sustained by reason of his failure to completely perform, yet it is for such opposite party to aver and prove such damages, and not for the party suing upon the contract to negative their existence: *Wolf v. Gerr*, 43-339.

Where the petition in an action upon a replevin bond claimed a certain amount due as damages, and stated fully and explicitly the nature of the injury, *held*, that the petition was sufficient to entitle plaintiff to recover the damages suffered: *Keyes v. McNulty*, 14-484.

Plaintiff can recover no more than claimed in his petition: *Cameron v. Boyle*, 2 G. Gr., 154; *Stiles v. Brown*, 3 G. Gr., 589.

Relief which is not claimed in the petition cannot properly be afforded: *Gwynn v. Turner*, 18-1.

It is against the spirit and intent of our Code to allow, as fruits of litigation, that which was not, by fair and obvious import of the pleadings, put in issue and litigated between them: *Pfiffner v. Krapfel*, 28-27.

No judgment or other relief should be granted where none is asked: *McConnell v. Denham*, 72-494.

Proof as to the amount of damage should be confined to the damages alleged in the petition: *Gamble v. Mullin*, 74-99.

The jury cannot award a greater sum as damages than is claimed in the pleading: *Charles City Plow, etc., Co. v. Jones*, 71-234.

A claim in a petition for expenses incurred for medical attendance covers expenditures for medicine used by the physician in giving such medical attendance: *Knapp v. Sioux City & P. R. Co.*, 71-41.

Where a petition to recover damages caused by the destruction of grain gave the number of bushels of grain destroyed and demanded judgment for a specified sum, *held*, that judgment could not be reversed for failure to allege the value of the grain in absence of a motion for a more specific statement: *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 72-535.

III. PRAYER.

Essential: It is error to render judgment against a defendant against whom no prayer for relief is made: *Mobley v. Dubuque Gas, etc., Co.*, 11-71.

Where the petition set out facts which *prima facie* entitled plaintiff to be regarded as assignee of a dower interest, but did not specifically seek to have such dower assigned, and defendant by answer and cross-petition set up title under a deed of trust and asked that his title be quieted, *held*, that a decree for defendant should be modified so as not to bar plaintiff from asserting his rights as assignee of the dower interest: *Huston v. Seeley*, 27-183.

Where the petition sets out a cause of ac-

tion with the proper averments showing damages, the fact that it contains no prayer for damages cannot be taken advantage of after verdict: *Humphreys v. Daggs*, 1 G. Gr., 435.

Prayer for general relief: Where there is a prayer for general relief the plaintiff may have such relief against the parties to the action as he shows himself entitled to, where such relief is consistent with the case made by the petition: *Laverty v. Sexton*, 41-435.

Under a general prayer for relief in an equitable action plaintiff is entitled to any relief in equity to which he is entitled under the facts pleaded: *Hoskins v. Rowe*, 61-180.

Under a prayer for general relief, any relief may be granted which is consistent with the allegations of the pleading and sustained by the proof; and it is error to fail to grant relief to which the party shows himself entitled, though it be not specially asked: *Pond v. Waterloo Agl. Works*, 50-596.

Under a general prayer for relief there may be a decree for the foreclosure of a mortgage if the facts stated justify such relief, although the foreclosure is not specifically asked: *Herring v. Neely*, 43-157; *Hait v. Ensign*, 61-724.

Under a prayer for general relief complainant may be entitled to any relief consistent with the case made in his petition, but not to a decree covering matters not referred to nor included therein and as to which defendant has not properly had his day in court: *Wilson v. Horr*, 15-489.

A court of equity cannot, under a general prayer for relief, make a decree or grant relief which has no proper basis in the facts set up in the petition: *Casady v. Woodbury County*, 13-113.

Relief cannot be granted by a decree which is not specially prayed for and is not within the contemplation of a general prayer for relief: *Johnson v. Mantz*, 69-710.

Exemplary damages in an action for civil damages for sale of intoxicating liquors to husband being specially authorized by statute need not be asked in the prayer: *Gustafson v. Wind*, 62-281.

Interest: Where the petition prays judgment for a certain sum "with interest and costs," recovery may be had for interest on the sum so claimed from the commencement of the action, but not for interest accrued prior to that time: *Haven v. Baldwin*, 5-503; *Butcher v. Brand*, 6-235; *Barton v. Smith*, 7-85; *Heffernan v. Burt*, 7-520; *Lyon v. Byington*, 10-124; *Anderson v. Kerr*, 10-233; *Anderson v. Kerr*, 10-236; *Galley v. Tama County*, 40-49.

Interest accruing after the commencement of the action may be included in the judgment, although the amount for which judgment is asked in the petition is not large enough to include such interest: *Dawson v. Graham*, 48-378.

Where a petition set forth a promissory note drawing interest and alleged "that said amount specified in said note is wholly due and unpaid," and asked for "judgment for the amount due by the said note," *held* not erroneous to include in the judgment the interest due on the note up to the rendition of the judgment: *Smith v. Watson*, 28-218.

IV. COUNTS AND PARAGRAPHS.

Counts: Different causes of action should not be mingled in one count: *Sands v. Wood*, 1-263.

Two or more notes may constitute but one cause of action, and may be embraced in a single count with the petition: *Stadler v. Parmlee*, 10-23; *Merritt v. Nihart*, 11-57; *Ragan v. Day*, 46-239.

Under the present Code parties are allowed to plead the same cause of action in different counts, as they might do at common law, where it appears that the counts relate to the same cause of action: *Pearson v. Milwaukee & St. P. R. Co.*, 45-497; *Peck v. Schick*, 50-281; *Van Brunt v. Mather*, 48-503.

The statement in the petition that the counts relate to the same cause of action is unnecessary, but will not vitiate the pleading: *Pearson v. Milwaukee & St. P. R. Co.*, 45-497.

It is allowable, under the Code, to join two counts which seek to recover on different and inconsistent states of fact: *Jack v. Des Moines & Ft. D. R. Co.*, 49-627.

It is proper to plead the same indebtedness in different forms and in different ways; and two claims, one upon an account and the other upon a bill of exchange, the indebtedness sought to be recovered being the same, may be joined in the same petition: *Kimball v. Bryan*, 56-632.

Although one count fails to state sufficient facts to entitle the plaintiff to relief demanded therein, yet if such facts are stated in other parts of the petition, and objection to the count is not taken by way of motion or demurrer, it cannot be raised afterward by an instruction: *Cruver v. Chicago, M. & St. P. R. Co.*, 62-460.

Under a former statutory provision prohibiting the statement of one cause of action in different counts, *held*, that where the petition showed that the cause of action was for one wrong which in one count was styled malicious prosecution and in the other false imprisonment, *held*, that the costs were properly taxed against the plaintiff: *Watson v. Bell*, 37-640.

The petition in an action for personal injury should not, ordinarily, be divided into counts: *Hammer v. Chicago, R. I. & P. R. Co.*, 61-56.

Where separate causes of action are set out in one count of the petition, the court may properly sustain a motion to divide and enforce such order by striking out a substituted petition filed without compliance with such order: *O'Conner v. Chicago, R. I. & P. R. Co.*, 75-617.

Paragraphs: One of the paragraphs into which a petition setting forth an equitable cause of action is divided is not alone subject to demurrer. If, when taken with the other paragraphs, a cause of action is stated, that will be sufficient: *Benedict v. Hunt*, 32-27; *Delaware County Bank v Duncombe*, 48-488.

Whatever is numbered as a distinct paragraph should contain something more than a mere conclusion of law, based upon statements of facts in other paragraphs, otherwise it may be stricken out on motion: *Cooper v. French*, 52-531.

3853. Amended before answer. 2647. The plaintiff may amend his petition without leave at any time before the answer is filed, without prejudice to the proceedings already had; but a notice of such amendment shall be served on the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as he had to the original petition. [R., § 2975.]

Leave of court is not necessary to entitle plaintiff to file such amendment as here contemplated, and an appearance of defendant to move to strike such amendment from the files or to demur or answer thereto obviates the necessity of notice of the amendment: *Kimball v. Bryan*, 56-632.

DEMURRER.

3854. Causes of. 2648. The defendant may demur to the petition only where it appears on its face, either:

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

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

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

4. That there is a defect of parties, plaintiffs or defendants; or,

5. That the facts stated in the petition do not entitle the plaintiff to the relief demanded;

6. That the petition on the face thereof shows that the claim is barred by the statute of limitations; or fails to show it to be in writing where it should be so evidenced or, if founded on an account, or writing as evidence of indebtedness, and neither of such writings, account, or copy thereof is incorporated into or attached to such pleading, or a sufficient reason stated for not doing so. [R., §§ 2876, 2918, 2920, 2961, 2963, 2964.]

Grounds: The provisions of the statute limit the causes of demurrers and no other can be urged. The fact that the pleading is argumentative, not being one of the causes set out, cannot be taken advantage of in that manner: *Davis v. Bonar*, 15-171.

Want of jurisdiction: Unless it appears on the face of the petition that the court has no jurisdiction, an objection on that ground cannot be raised by a demurrer, and can only be taken advantage of by answer: *Childs v. Limback*, 30-398.

Demurrer to the jurisdiction of the court is not the proper method of raising the objection that the action is brought in the wrong county. Such objection is to be raised by motion to change the place of trial to the proper county: *Cole v. Conner*, 10-299.

An objection based on the want of jurisdiction may be raised at any time, and is not waived even by consent: *Orcutt v. Hanson*, 71-514.

Another action pending: A demurrer on this ground can only be sustained when the fact appears on the face of the petition: *Mosher v. Independent School Dist.*, 42-632, 635.

That pendency of another action may be pleaded in abatement, see notes to § 3939.

The defect of parties which is a ground of demurrer is a non-joinder of parties who should have been joined, either as plaintiffs or defendants. A misjoinder or uniting of parties who should not be joined is not a ground of demurrer: *Turner v. First Nat. Bank*, 26-562; *Mornan v. Carroll*, 35-22; *King v. King*, 40-120; *Dubuque County v. Reynolds*, 41-454; *District Tp v. District Tp*, 44-512, 517; *Bort v. Yaw*, 46-323; *Independent School Dist. v. Independent School Dist.*, 50-322.

The fact that a party to the proceeding who was properly made a party has not been served with notice cannot be taken advantage of by demurrer on behalf of another party who is served: *Forbes v. Delashmutt*, 68-164.

If causes of action against different parties are joined the defendant may demur: *Cogswell v. Murphy*, 46-44.

If the defect of parties appears on the face of the petition it will be held waived, unless taken advantage of by demurrer: *McCormick v. Blossom*, 40-256; *Lillie v. Case*, 54-177.

If defect of parties be fatal to the character of the petition and the relief asked, the objection may be insisted on at the hearing, and if the court proceeds to a decree notwithstanding such objection, it may be reversed for error on this account: *Swan v. Clark*, 36-560.

The objection that a necessary party defendant has not been served with notice need not, and perhaps should not, be raised by answer of the other defendant, but may be insisted upon to defeat a final decree: *Miller v. Mahaffy*, 45-289.

Not raised on appeal: An objection on the ground of defect of parties cannot be made for the first time in the supreme court. If not taken advantage of by demurrer or perhaps by plea, it must be regarded as waived: *Bouton v. Orr*, 51-473.

An objection to the non-joinder of parties, when first made in the appellate court, if well

taken, will operate to remand the cause for further proceedings in the court below: *Parshall v. Moody*, 24-314.

Where it appears in the supreme court that parties who are necessary to a full determination of the controversy are not in court, the cause will be remanded for the purpose of allowing such parties to be brought in: *Crosby v. Davis*, 9-98.

As to misjoinder of parties, see notes to §§ 3750 and 3753.

That the facts do not entitle the party to the relief demanded: Under the Revision a petition was not vulnerable to demurrer simply because it asked relief to which its averments did not entitle the pleader: *Byers v. Rodabaugh*, 17-53; *Orman v. Orman*, 26-361; *Harwood v. Case*, 37-692.

But the phrase "relief demanded" used in the Code is broader than the corresponding term used in the Revision: *Watts v. Everett*, 47-269.

Therefore, *held*, that a demurrer would lie in an action on a judgment brought within fifteen years from its rendition without leave of court, as required by § 3726, being alleged: *Ibid.*

A petition setting out a cause of action upon a note alleged to have been executed upon a date which fell upon Sunday is subject to a demurrer, and the court will take judicial notice of the fact that a given day of the month falls upon Sunday: *Clough v. Goggins*, 40-325.

Where the petition sets out a contract under which it is incumbent upon plaintiff to do something before it becomes incumbent or proper for defendant to perform on his part, and the plaintiff fails to allege performance, the objection to the defect in plaintiff's petition can be raised by demurrer: *White v. Day*, 56-248.

The fact that the averments of the petition do not entitle plaintiff to the relief demanded should be raised by demurrer, and not through motion to strike them from the petition; but if the motion is made and passed upon without objection on that ground, the form of raising the question will not constitute reversible error: *Rhoadabeck v. Blair Town Lot, etc., Co.*, 62-368.

Statute of limitations: Where a pleading shows affirmatively that its cause of action is barred by statute of limitations, the proper mode of assailing it is by demurrer: *Miller v. Dawson*, 26-186; *Springer v. Clay County*, 35-241.

To enable a party by demurrer to insist on the bar of the statute of limitations, the pleading must show affirmatively that the cause of action is barred by the laws of this state or of some other state where defendant has resided: *Moulton v. Walsh*, 30-361; *Shearer v. Mills*, 35-499.

Where it appears that before the period of limitation expired defendant became a nonresident of the state, and it does not affirmatively appear that the action has become barred by the laws of the state where he has subsequently resided, a demurrer will not lie: *Brown v. Rockhold*, 49-282.

Under a previous statutory provision which did not expressly authorize a demurrer on this ground, although it appeared on the face of the petition that the cause of action was barred by the statute of limitations, *held*, that the objection could not be taken by demurrer, but must be set up by way of answer or plea, for the reason that the statute recognized exceptions which might take the action out of the operation of the statute, and the statute ought to be pleaded so that the other party might have an opportunity to take advantage of such exceptions: *Wapello County v. Bigham*, 10-39.

This was also the rule at common law, but it was otherwise in equity: *Phares v. Walters*, 6-106.

Where it appears on the face of a petition on a policy of insurance that the action is brought after the expiration of the time limited in the policy for bringing such action, the objection may be raised by demurrer: *Moore v. State Ins. Co.*, 72-414; and see *Carter v. Humboldt F. Ins. Co.*, 12-287.

Statute of frauds: The objection that the contract sued upon is not in writing cannot be urged as a ground of demurrer unless the contract appears to be one which must be in writing to be enforced: *Coe v. Carrell*, 6-350.

That a contract relied on appears to have been in parol when under the statute of frauds it should have been in writing is made a ground of demurrer. If plaintiff relies for proof of his claim upon the testimony of defendant he must make that averment in his petition in order that it be not subject to demurrer: *Babcock v. Meek*, 45-137.

And it was similarly held as to the statute of limitations under previous provisions authorizing the plaintiff to recover notwithstanding the bar of the statute, where he could establish his claim by defendant's testimony: *Newfield v. Blawn*, 16-297.

Failure to set out account or copy thereof: In a petition claiming an amount due for services performed for defendant at his verbal request and not under written contract during a certain period and at a certain place, *held*, that it did not necessarily appear that the cause of action embraced separate items of account so that a demurrer on the ground that the account or a copy thereof was not set out should have been sustained: *O'Brien v. Chicago, M. & St. P. R. Co.*, 64-411.

This provision as to setting out a copy of the account sued on is to be observed no matter how simple may be the account: *Winters v. Page County*, 70-300.

In an action for balance due on settlement of account, a copy of the account need not be set out: *Buehler v. Reed*, 11-182.

As to bill of particulars, see § 3919.

Failure to set out copy of written instrument sued on: Where plaintiff claims under an assignment without stating whether it is in writing or not, but without setting out any writing, he may be compelled, on motion for more specific statement, to show how he became owner of the claim, but the objection cannot be reached by demurrer for failure to set out a copy of such instrument, it not appearing that it was in writing: *Thompson v. Cook*, 21-472.

The objection that a bill of particulars, or a written instrument, is not set out or attached, must be taken by demurrer; it cannot be interposed as a ground for the exclusion of evi-

dence: *Farwell v. Tyler*, 5-535; *Peterson v. Allen*, 12-366; *Smith v. McLean*, 24-322.

Objection that written notice of loss of stock, in case of injury to such stock on a railway where the company has a right to fence and has not done so, as provided in § 1972, is not attached to the petition, should be taken advantage of on demurrer, and not by objection to the introduction of such notice in evidence: *McKinley v. Chicago, R. I. & P. R. Co.*, 47-76, 78.

It is necessary in an action to recover upon a subscription of stock to a corporation to set out a copy of the subscription paper: *Hudson v. Plank Road Co.*, 4 G. Gr., 152.

Where a pleading is founded upon breach of covenants in a deed, a copy of the deed should be incorporated into or attached to such pleading: *Nosler v. Hunt*, 18-212.

Where a negotiable instrument is sued on in the name of the indorsee, a copy of the indorsement should be set out together with a copy of the instrument: *Mainer v. Reynolds*, 4 G. Gr., 187.

In an action upon the guaranty of a written instrument it is not necessary to set out a copy of the guaranty. The action is founded on the instrument itself: *Knight v. Fox*, Mor., 305.

In an action on a note and mortgage by an assignee the instrument of assignment may properly be attached to the petition: *Franklin v. Twogood*, 18-515.

The fact that a petition avers that the mortgage therein referred to was duly assigned to plaintiff does not necessarily imply that it was transferred by writing, and such petition will not, therefore, be subject to demurrer on the ground that such written instrument is not set out: *Barthol v. Blakin*, 34-452.

Where an action was brought upon a large number of bank-bills of different denominations, *held*, that it was sufficient to attach one of each denomination as an exhibit: *Tarbell v. Stevens*, 7-163.

The failure to set out in a cross-petition a written instrument relied on therein which is already set out in the original petition is not a ground of demurrer: *Coe v. Lindley*, 32-437.

If the action is based upon a contract written in a foreign language it is sufficient to attach a translation to the petition; a copy in the foreign language need not be set out: *Christenson v. Gorsch*, 5-374; *Bower v. Deideker*, 38-418, 421.

It is only necessary to attach a copy of the written instrument when the action is founded on such instrument: *Barney v. Buena Vista County*, 33-261.

It is not the evidence in the case that plaintiff is to attach to his petition, but a copy of the instrument or account on which he brings his suit: *Latterett v. Cook*, 1-1.

Plaintiff is not required to attach to his petition copies of instruments which he intends to introduce in evidence unless they are the instruments upon which the action is founded: *McLott v. Savery*, 11-323.

Plaintiff cannot be required to set up a written instrument which is not the basis of his cause of action, but is merely a link in the chain of evidence necessary to establish it: *Harwood v. Case*, 37-692.

Where a record is not the foundation of an action it need not be set out: *Ruddick v. Marshall*, 23-243.

Where a petition in equity sought to have set aside a judgment by confession, *held*, that it was not necessary to attach a copy of the statement on which such judgment was rendered: *Vannice v. Green*, 14-262.

In an action for damages for right of way, *held*, that the deed for such right of way might be introduced as evidence without having set it out in the answer: *Taylor v. Cedar Rapids & St. P. R. Co.*, 25-371.

The duplicate receipt of the receiver of the United States land office, relied on to establish plaintiff's title in an action of trespass, need not be set out by copy: *Dorcey v. Patterson*, 7-420.

In an action of right it is not necessary to attach copies of title papers: *Boardman v. Beckwith*, 18-292.

Where, in an action against a county treasurer for wrongfully seizing and selling plaintiff's property, defendant justified under a tax list and warrant, setting out the warrant, *held*, that the answer was not demurrable for not setting out a copy of the tax list: *Games v. Robb*, 8-193.

In an action to set aside a sheriff's sale, *held*, that it was not necessary to attach a copy of the execution and sheriff's deed as instruments sued on: *Walkup v. Zehring*, 13-306.

Where a party suing upon rescission of a contract for the conveyance of land offered to return certificates of stock received by him in payment for such land, *held*, that he need not set out a copy of such certificates: *Carey v. Cincinnati & C. R. Co.*, 5-357.

Where a note is written upon the back of a paper containing a contract, it is not necessary, in making an exhibit of a copy of the note in the pleading, to set out a copy of such contract: *Dunning v. Rumbaugh*, 36-566.

For objection appearing on the face of the petition: A demurrer can be interposed only for matters appearing on the face of the petition: *Polk County v. Hierb*, 37-361.

An exhibit cannot be attached to a demurrer in order to take advantage of grounds therefor which would not otherwise appear: *Ruddick v. Marshall*, 23-243.

Neither the interrogatories attached to a pleading nor the answers thereto can, on demurrer, aid a defective pleading: *Lane v. Krekle*, 22-399.

In ruling upon a demurrer the court cannot go outside of the pleading to discover facts upon which the pleading may be sustained: *Miller v. Miller*, 63-387.

What objections raised by demurrer and what by motion: Under previous practice, *held*, that a variance between the declaration and the writ could not be raised by demurrer: *Culver v. Whipple*, 2 G. Gr., 365.

If an averment of the petition is claimed to be insufficient in law, the proper way to raise the objection is by demurrer and not by motion: *Childs v. Griswold*, 15-438.

An objection which is a ground of demurrer cannot properly be raised by motion to dismiss the action: *State ex rel. v. De Kruif*, 72-488. Nor by motion to strike: *Irwin v. Yeagar*, 74-178.

A demurrer and not a motion to strike from the files is the proper mode of determining the sufficiency of the pleading: *Clark v. Cress*, 20–50; *Martin v. Dobbins*, 32–5. 4; *Merchants' Nat. Bank v. Montgomery*, 32–602.

An objection that a counter-claim set up in the answer cannot be properly interposed on account of its not being in behalf of the proper parties should be raised by demurrer and not by motion to strike from the files: *Bird v. McCoy*, 22–594.

Objection to the sufficiency of a petition cannot properly be raised by motion to strike out all the averments thereof. Such objection should be raised by demurrer: *Rhoadabeck v. Blair Town Lot, etc., Co.*, 62–368.

However, if such a motion is made and passed upon in such a case without objection on that ground, the form of raising the question will not constitute reversible error: *Ibid.*

The fact that plaintiff's action should have been brought in law instead of in equity, or *vice versa*, or that plaintiff in an action in equity has a full, speedy and complete remedy at law, are not proper grounds for demurrer. The remedy in such cases is by motion to have the action changed to the proper docket: See § 3719 and notes.

An alternative allegation in the petition, of a material fact, is not a ground of demurrer: The remedy for such defect is by motion: *Turner v. First Nat. Bank*, 26–562.

Failure of the petition to set out the damages sustained by plaintiff is not a ground of demurrer, but can only be reached by motion for more specific statement: *McCormick v. Basal*, 46–235.

Where one count of the pleading is held insufficient on demurrer, and an amendment is filed, the same in substance as the original, the other party is not required to again demur, but the amended pleading should be stricken from the files on motion: *Waukon v. Strouse*, 74–547.

Where a mortgage provided that upon thirty days' default in payment of interest the whole amount of the principal should become due at the option of the holder, and at the end of such thirty days' default action was brought, it being alleged in the petition that plaintiff had elected that the whole sum become due, *held*, that a demurrer would not lie upon the ground that notice of the election had not been given, but such objection could only be raised by motion for more specific statement or answer: *Parkyn v. Travis*, 50–436.

Where a petition in an action to recover damages for changing the grade of the street alleged that the grade was established by ordinance, but neither described the grade nor set out the ordinance, *held*, that while it might be subject to be made more specific on motion it was not vulnerable to demurrer: *Noyes v. Mason City*, 53–418.

Defensive matter: The petition in equity in an action to defeat certain tax deeds stated that the plaintiff was the owner of the property at the time of the several sales and continued to be such owner; that she had redeemed from the sales and paid all taxes due, and that notwithstanding these facts defendant had in some manner obtained tax deeds; *held*, that if defendant claimed title under a sale made at a different time from any mentioned in the petition, such fact could only be made available by affirmative pleading on his part and that a demurrer would not lie: *Gray v. Coan*, 23–344.

Where the allegation of the petition, that the indebtedness to secure which a vendor's lien was sought to be enforced was incurred in the purchase of the homestead, was not distinctly negatived by the answer, so that the court could not determine therefrom whether the homestead right existed and was effectual or not, *held*, that it was not error to sustain a demurrer to that part of the answer setting up a homestead exemption: *Pratt v. Delavan*, 17–307.

Where the defense set up in the answer is held insufficient on demurrer, it will not be presumed that the issue raised by such defense was before the court upon final hearing in such manner as to render the ruling upon the demurrer error without prejudice: *Schroeder v. Chicago, R. I. & P. R. Co.*, 41–344.

Several causes of demurrer: Where a demurrer assigns several causes, and is sustained as to one and overruled as to others, such ruling will not be reversed on appeal if any of the causes assigned are good, although as to the particular ground on which it was sustained the ruling be found erroneous: *Jeure v. Perkins*, 29–262.

To entire pleading; when one count or division is sufficient: A demurrer can only properly be interposed to controvert the legal sufficiency of the matter stated in the entire count or petition, and not to assail a portion of a count, or improper, foreign, redundant or irrelevant matter therein. If the count contains sufficient statements to constitute a cause of action or defense it is not vulnerable to demurrer: *Hayden v. Anderson*, 17–158.

A paragraph of a pleading cannot be assailed on demurrer, the demurrer being proper only when it attacks the whole pleading or count: *Delaware County Bank v. Duncombe*, 48–488.

A demurrer to the entire petition should not be sustained because a portion of it demands relief upon facts improperly pleaded: *District T'p v. District T'p*, 44–512.

Where an answer sets up but one defense it is not proper to interpose a demurrer to a portion thereof: *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 67–324.

Where but a portion of the pleading or count is defective, a motion to strike out the objectionable matter is the proper remedy: *Shulte v. Hennessy*, 40–352.

Where distinct defenses are improperly joined in one division of an answer, the demurrer may be directed against one of them alone: *Wright v. Connor*, 34–240.

A general demurrer to a pleading containing more than one count should be overruled if either count or any cause of action set out therein is sufficient: *Chambers v. Lathrop*, Mor., 102; *Jarvis v. Worick*, 10–29; *Coon v. Jones*, 10–131; *Darr v. Lilley*, 11–4; *Edmonds v. Cochran*, 12–488; *Zapple v. Rush*, 23–99; *Singer v. Cavers*, 26–178.

Judgment against plaintiff on demurrer to one count of the petition should not be entered while an issue upon a plea to another count

remains undetermined: *Roberts v. Albright*, 2 G. Gr., 120.

A demurrer to the whole of an answer, some parts of which are good, should be overruled: *Bonney v. Bonney*, 29-448.

A demurrer to the whole answer should not be sustained where the answer contains a general denial: *Sample v. Griffith*, 5-376.

It is error to sustain a demurrer to the whole of an answer when a material issue is presented therein by an averment that defendant has not knowledge or information sufficient to form a belief as to an allegation of the petition: *McPhail v. Hyatt*, 29-137.

Where an entire answer is attacked by a demurrer, the demurrer should be overruled if the answer contains a defense to the action, although some one or more divisions therein are vulnerable to demurrer: *Holbert v. St. Louis, K. C. & N. R. Co.*, 38-315; *Johnson v. Tantlinger*, 31-500.

What admitted by demurrer: A demurrer only admits such facts to be true as are well pleaded: *Harkins v. Edwards*, 1-426; *Hartford Bank v. Green*, 11-476; *Scofield v. McDowell*, 47-129; *Bailey v. Landingham*, 52-415.

A demurrer admits facts well pleaded in the pleading attacked, but not conclusions of law stated therein: *Games v. Kobb*, 8-193; *Lyon v. O'Kell*, 14-233; *Smith v. Henry County*, 15-385; *Freeman v. Hart*, 61-525.

One of the offices of the demurrer is to inquire whether the matter is well pleaded or can be pleaded, and it therefore raises the question whether the opposite pleader may, under the rules of evidence, prove the facts which he has pleaded: *Harkins v. Edwards*, 1-426.

Where a demurrer is interposed to the petition on an account, on the ground that no copy thereof is set out or attached, and is overruled, the defendant should not be held as admitting the averments of the petition, and, on failure to answer, plaintiff's claim should be established by evidence as on default: *Buehler v. Reed*, 11-182.

An averment as to the non-existence of evidence of a fact or of a conclusion of law is not admitted by demurrer: *Iowa K. Land Co. v. Sac County*, 39-124, 122.

A fact which is judicially known to the court is to be regarded as a matter of law, and cannot be pleaded. A contradiction or denial of such fact cannot, therefore, be well pleaded, and is not admitted by demurring to the pleading containing such contradiction or denial: *Cooke v. Tallman*, 40-133.

A demurrer does not confess an allegation which it appears from the face of the pleading that the pleader is estopped to make. Thus a party having, in an answer, admitted the execution of a tax deed and also alleged its invalidity for want of advertisement of the sale, *held*, that as the deed was conclusive as to the regularity of the sale in this respect, the allegation of invalidity for want of advertisement was not admitted by demurrer to the answer: *Scofield v. McDowell*, 47-129.

In an action to compel the collection of a tax voted in aid of a railroad upon certain conditions, *held*, that an averment that due proof had been made as to compliance with the conditions was an averment of fact, and was confessed by the demurrer to the petition: *Burlington, C. R. & M. R. Co. v. Stewart*, 39-267.

Where a petition, based upon certain certificates, alleged that they were in due form of law, but the certificates were also set out, *held*, that a demurrer on the ground that they did not contain conditions required by law did not admit the averment that they were in due form: *Minnesota & I. S. R. Co. v. Hiams*, 53-501.

In passing upon a demurrer the court will not look to prior or subsequent pleadings for facts admitted nor consider facts not pleaded or admitted. The facts alleged by the pleading alone are to be deemed admitted for the purpose of its consideration: *Johns v. Bailey*, 45-241.

Amendment: A demurrer may be amended: *Morrison v Miller*, 46-84; *Poweshiek County v. Cass County*, 63-244.

Demurrer relating back: The common-law rule that the demurrer relates back to the first defective pleading is not applicable under the Code, and if the objection to the first defective pleading is not raised by the opposite party, it is no ground for holding such pleading bad when a demurrer is afterward interposed to the pleading of the opposite party: *Gano v. Gilruth*, 4 G. Gr., 453.

But under the common-law practice where defendant filed a defective pleading, and plaintiff a replication to which defendant demurred, *held*, that although the replication was defective, the court would go back to the first error committed and render judgment in favor of plaintiff on the ground that the demurrer would relate back to the first mistake in pleading: *Wile v. Matherson*, 2 G. Gr. 184.

Withdrawal of pleading in order to demur: It is a matter within the sound discretion of the court to allow the withdrawal of a pleading and the filing of a demurrer to the previous pleading instead, and such discretion is not reviewable unless shown to have been abused: *Dubuque County v. Reynolds*, 41-454; *Byington v. Stone*, 51-317.

Second demurrer: A second demurrer to the same pleading is not allowable: See § 3845.

A demurrer is waived by interposing a second demurrer whilst the first is undisposed of: *District T'p v. District T'p*, 44-512.

Or by filing an answer: *Fisher v. Scholte*, 30-221.

Or by going to trial on an issue of fact: *Porter v. Lane*, Mor., 197; *Daugherty v. Bridgman*, Mor., 295.

Change of ruling on demurrer: Where a pleading was held bad on demurrer, and an amendment was filed setting up substantially the same allegation, and a motion was made to strike such amendment from the files, *held*, that the court in passing upon such motion might change its ruling as to the demurrer, and refuse to strike the amendment from the files: *Jenkins v. Shields*, 36-526.

The court is not concluded in the subsequent stages of the case by rulings made upon a demurrer, but may and should change such rulings if satisfied of its error. If thereby a party

is taken by surprise, some order should be made which will fully protect his rights: *Norton v. Knapp*, 64–112.

As to the effect of a ruling on demurrer, see notes to § 3859; and as to waiver of objection to ruling by amending or pleading over, see notes to § 3860.

3855. How specific. 2649. A demurrer must specify and number the grounds of objection to the pleading, or it will be disregarded; and it shall not be sufficient to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of said section may be stated in the terms thereof. [R., § 2877; C., '51, § 1754.]

How specific: The general demurrer is abolished: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

A demurrer not distinctly stating the grounds on which it is based should not be regarded: *Jones v. Brunskill*, 18–129.

In demurrers and motions the true ground of objection should be distinctly stated in order that the party shall be advised what specific defect is aimed at: *Danforth v. Carter*, 1–546.

A party will not be allowed to state one ground of demurrer, and argue and obtain judgment upon another: *Middleton Savings Bank v. Dubuque*, 15–394.

And an objection not pointed out cannot be raised thereunder: *Allen v. Cerro Gordo County*, 34–54.

Under a demurrer on the ground that the facts stated in the answer do not constitute a defense, the objection that the facts stated are not well pleaded cannot be raised: *Traders' Bank v. Alsop*, 64–97.

It is no part of the office of a demurrer to contain an argument or anything other than just such matter as shall call the attention of the opposite party clearly to the specific points made by it. A pleader is not required to give the reason which has led his mind to the conclusion that the pleading attacked is objectionable in the matters pointed out: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

In law actions: A demurrer must specifically point out the ground upon which it is founded: *Babbitt v. Walters*, 3 G. Gr., 564; *Traders' Bank v. Alsop*, 64–97.

As an action of *mandamus* is an action at law, a demurrer to the petition must specify the grounds of objection: *District Tp v. Independent Dist.*, 72–687.

A demurrer in an action at law that the matters stated in the petition are not sufficient to constitute a cause of action or to entitle plaintiff to recover is not sufficiently specific and should be disregarded: *Crouch v. Crouch*, 9–269; *Singer v. Cavers*, 26–178; *McLaughlin v. Bascomb*, 36–593; *Davidson v. Biggs*, 61–309.

Demurrers in particular cases *held* too general or indefinite: *McKellar v. Stout*, 13–487; *McGregor & S. C. R. Co. v. Birdsall*, 30–255; *Childs v. Limback*, 30–398.

A demurrer to a petition based upon certificates of clerks of election as to the voting of a railroad aid tax, on the ground that they contained no conditions upon which said tax was claimed to have been voted, the statute requiring such conditions to be incorporated into such certificates, *held* sufficiently specific: *Minnesota & I. S. R. Co. v. Hiams*, 53–501.

Where by stipulation of the parties a demurrer had been recognized as raising an issue in the case, *held*, that the objection to such demurrer, that it was not in proper form, could not be taken advantage of: *Updegraft v. Edwards*, 45–513.

Statement of grounds of demurrer in a particular case, *held* sufficient: *Davenport v. Whisler*, 46–287.

In equity: In determining a demurrer to a petition in equity setting up the objection that the petition does not show that the plaintiff is entitled to any equitable relief, the question is not whether plaintiff is entitled to all the relief asked for in the prayer of the petition, but whether he is entitled to any relief in equity, conceding the facts set forth in the petition to be true: *Peters v. Phillips*, 63–550.

While a general demurrer may be interposed to a petition in equity, yet if the party undertakes to specify grounds of demurrer he will be confined to those designated and cannot raise others which might have been taken advantage of under a general demurrer: *Allen v. Cerro Gordo County*, 34–54; *Bisson v. Curry*, 35–72.

A demurrer in an equitable action may be both general and special, and if the general ground is substantially stated and well taken, it is sufficient although the special ground alleged be not sufficient: *Cowen v. Boone*, 48–350.

A general demurrer to a bill that it is without equity reaches matters of substance only and not defects which are merely formal: *Hoskins v. Hattenback*, 14–314.

Under a general demurrer in an equitable action, the right of plaintiff to maintain the action as a proper party may be raised: *Hanna v. Hawes*, 45–437.

If any of the cases mentioned as ground of demurrer except the general ground specified in ¶ 5 of the preceding section are intended to be relied on, they should be specified in an equitable action with the same certainty and precision as in a law action or they will be disregarded: *Ibid.*

Where a proceeding has, without objection, been treated as in equity, and a general demurrer to the petition has been sustained, such ruling will not be reversed in the supreme court on the ground that the action was not properly in equity, and the demurrer should have been specified: *Hintrager v. Sumbargo*, 54–604.

3856. Waiver of; answer; arrest of judgment. 2650. When any of the matters enumerated as grounds of demurrer do not appear on the face

of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment, before judgment is entered. [R., § 2878.]

Objections not properly raised by motion, demurrer or otherwise must be deemed waived: *Murphy v. Creighton*, 45–179, 183; *Hanks v. North*, 58–396; *Wendall v. Osborne*, 63–99.

An objection to the pleadings not taken before trial nor by motion in arrest of judgment is deemed waived: *Great Western Printing Co. v. Tucker*, 73–755.

Ground of demurrer waived: Defendant by taking issue upon the allegations of the petition thereby admits that they constitute a cause of action, and cannot therefore insist that plaintiff shall prove facts outside of the record in order to make out his cause of action: *Frentress v. Mobley*, 10–450.

A judgment based upon an answer setting up the statute of limitations will not be set aside as erroneous on the ground that the question might and should have been raised by demurrer: that objection to the answer must be raised at the proper time: *Brenneman v. Edwards*, 55–374.

A demurrer to an amended petition presenting all the grounds of objection in a previous demurrer to the original petition, *held* to be a waiver of the original demurrer: *District T'p v. District T'p*, 44–512.

Objections raised by demurrer not showing want of jurisdiction are waived by joining issue and going to trial upon the merits: *Stiles v. Brown*, 3 G. Gr., 589.

An objection which might have been raised by demurrer cannot be first urged by a motion for judgment where the evidence shows the existence of a fact not pleaded which would cure the objection: *Olson v. Neal*, 63–214.

The method of taking advantage of a question which goes to the cause of action as set out in the petition is by demurrer, motion in arrest, and perhaps also upon error duly assigned, but the advantage of such objection cannot be taken by motion for new trial: *Veach v. Thompson*, 15–380; *Egleston v. Brassfield*, 38–698.

The objection that the petition fails to allege that the damage claimed was the result of the injury imputed to defendant cannot be raised where it is not made until after the trial: *Gray v. Bean*, 27–221.

If defendant both demur and answer to the same cause of action, his answer will be held as waiving his demurrer: *Fisher v. Scholte*, 30–221.

Defect of parties: Non-joinder of necessary parties should be raised by demurrer and cannot be first interposed by answer where the defect appears on the face of the petition: *Roop v. Seaton*, 4 G. Gr.. 252; *McCormick v. Blossom*, 40–256; *Ryan v. Mullinix*, 45–631.

Defect of parties not appearing on the face of the petition and not raised by answer must be deemed waived; but in case of a defect of parties in a proceeding in equity where such defect was vital to the character of the petition and relief asked, *held*, that it might be first insisted on at the final hearing: *Swan v. Clark*, 36–560.

The fact that a necessary party is not served need not be set up in the answer, and is not waived by failure so to do: *Miller v. Mahaffy*, 45–289.

Defect of parties not taken advantage of by demurrer, answer or motion in arrest of judgment will be deemed waived: *Melick v. First Nat. Bank*, 52–94.

Misjoinder of parties is not a ground of demurrer. If not raised by motion it is waived, and cannot be afterwards raised, even in arrest of judgment: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Where misjoinder of parties does not appear on the face of the petition it is waived if not taken by answer: *McKeever v. Jenks*, 59–300.

Where plaintiff seeks to recover for a joint tort of defendants, who, by the evidence, appear not to be jointly liable. the objection may be taken by motion in arrest: *Cogswell v. Murphy*, 46–44.

So where two plaintiffs sued jointly for a cause existing in their favor severally, if at all, *held*, that a motion to dismiss was properly sustained: *Bort v. Yaw*, 46–323.

Failure to rely upon defense in answer: Where a defense such as that of the statute of limitations is not set up in the answer, it cannot afterward be relied upon: *Robinson v. Allen*, 37–27.

Where a petition in equity to rescind a contract to convey real property does not show that any consideration has been paid, nor contain any offer to repay the consideration, defendant, if he desire to rely upon the failure of plaintiff to offer to pay the consideration received, must state the fact that the consideration was paid by way of defense in his answer, and the failure to do so will be regarded as waiving such defense: *Seymour v. Shea*, 62–708.

Ground of motion or demurrer waived if not raised: Objection to a petition for want of definiteness and exactness in statement of the cause of action is waived by failure to raise such objection upon motion or demurrer: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

An objection which might have been raised by demurrer to the petition cannot be made the ground of motion to dismiss the action, but can only be raised by motion in arrest of judgment: *Draper v. Ellis*, 12–316.

Where the petition has not been assailed by motion or demurrer, defendant cannot object to the introduction of evidence thereunder merely on the ground that it is too general in its terms to admit of evidence being introduced: *Ruby v. Shee*, 51–422.

The fact that an allegation in a pleading is informal, if not taken advantage of by motion or demurrer, cannot be made the ground of objecting to the introduction of evidence thereunder: *Oliver v. Depew*, 14–490.

As a court may in the exercise of its discre-

tion permit the withdrawal of an answer and filing of demurrer, it is not error to pass upon the questions raised by the demurrer after an answer has been filed: *Wilson v. McIntyre*, 73-713.

Instructions: That objections cannot be first raised by instructions, see notes to § 3996.

Motion in arrest is the proper method of raising an objection to a petition which is defective in substance, and not as matter of form only: *Edgerly v. Farmers' Ins. Co.*, 43-587; *Hahn v. Wickham*, 55-545.

Where the petition states facts sufficient to entitle plaintiff to some relief the question whether it is sufficiently specific must be raised by motion for more specific statement, otherwise it is waived, and cannot be raised by motion in arrest: *District T'p v. Board of Directors*, 52-287.

If the motion in arrest is not made in the trial court it cannot be taken advantage of on appeal: *Smith v. Warren County*, 49-336; *Melick v. First Nat. Bank*, 52-94.

A motion in arrest of judgment is provided where the facts stated in the petition do not entitle the plaintiff to any relief. If there is a lack of evidence to sustain a verdict defendant's remedy is to move for a new trial: *Kirk v. Litterst*, 71-71.

As to amending to cure defect raised by motion in arrest, see notes to § 4049.

Objections not to be first raised on appeal: An objection which might have been raised in the lower court by demurrer or motion in arrest of judgment cannot first be raised on appeal: *Garland v. Wholebau*, 20-271; *Savings Bank v. Horn*, 41-55; *Church v. Higham*, 44-482.

And see notes to § 4397.

Objections not deemed waived: Where the facts stated in the petition do not entitle plaintiff to any relief, although no demurrer on that ground is interposed, the court may instruct the jury to find for defendant: *Seaton v. Hinneman*, 50-395; *Smith v. Burlington, C. R. & N. R. Co.*, 59-73.

Where, after a verdict for defendant, plaintiff moved to set aside the verdict and for a new trial on the ground of error in the admission of evidence, and the court overruled such motion, *held*, that as plaintiff's petition was not sufficient to show a cause of action the decision of the court below would not be reversed, although the defects in the petition had not been raised by demurrer: *Wetmore v. Mellinger*, 64-741.

If upon a trial evidence is offered in support of what the party deems an immaterial averment such evidence may be objected to by the opposite party, and if the court deems the averment irrelevant the evidence will be excluded: *Specht v. Spangenberg*, 70-488.

Waiver of objection on the ground that an issue is not involved in the case under the pleadings will not arise from the fact that evidence is allowed to be introduced without objection, which might bear upon such issue if it were involved in the case, but which is applicable to issues arising under the pleadings as they stand: *Eikenberry v. Edwards*, 67-14.

Defects cured by verdict: A defect in a petition that might have been assailed by motion or demurrer is cured by the verdict: *Crossen v. White*, 19-109.

Where a defect in a petition which might be raised by demurrer is not thus attacked, and defendant succeeds on the trial, he cannot, upon appeal by plaintiff, insist that on account of such defect plaintiff was not entitled to recover: *Kendig v. Overhulser*, 58-195.

A defect, whether of substance or form, which would have been fatal on demurrer, will not be fatal after verdict if the issue joined is such as necessarily required proof of the facts defectively stated or omitted in the pleading, and without which it is not presumed either that the judge would have directed the jury to give, or the jury would have given, a verdict: *Cotes v. Davenport*, 9-227.

Going to trial waives objections not raised: Where the evidence is sufficient to support the judgment, it will not be reversed by reason of a mere irregularity in the pleadings as to the manner in which the issues are made, which was not raised in the proper manner: *Union Nat. Bank v. Barber*, 56-559.

Where allegations of a petition are not denied, and the parties proceed to trial on the theory that such allegations are admitted, the opposite party is estopped from afterwards objecting thereto: *First Nat. Bank v. Warrington*, 40-528.

Motions, demurrers or pleas undisposed of: By consenting to go to trial on an issue of fact, defendant waives any demurrer remaining undisposed of: *Porter v. Lane*, Mor., 197; *Daugherty v. Bridgman*, Mor., 295.

So *held*, also, as to a plea on file not disposed of: *Starr v. Wilson*, Mor., 438; *Cook v. Steuben County Bank*, 1 G. Gr., 447.

Where it appears that a motion filed was never called to the attention of the court nor any ruling made upon it, it will be presumed that it was waived: *Guest v. Byington*, 14-30.

3857. Demur to part; answer to part. 2651. The defendant may demur to one or more of the several causes of action alleged in the petition, and answer as to the residue. [R., § 2879; C., '51, § 1738.]

That an answer waives a demurrer, see notes to preceding section.

3858. Joinder in. 2652. The opposite party shall be deemed to join in a demurrer, whenever he shall not amend the pleading to which it is addressed. [R., § 2900.]

3859. Answer after. 2653. Upon a demurrer being overruled, the party demurring may answer or reply. [R., § 2976; C., '51, § 1755.]

The party demurring has a right, after the overruling of his demurrer, to plead over: *Hillis v. Ryan*, 4 G. Gr., 78.

The overruling of a demurrer to the answer does not, when issue is joined, conclude plaintiff from showing the true rights of the respective parties: *Standish v. Dow*, 21-363.

If the party to whose pleading a demurrer is sustained does not ask leave to amend, but excepts to the ruling, judgment may be entered as for want of a pleading: *Bridge v. Livingston*, 11-57.

If defendant stands upon his demurrer the court may properly render judgment as upon a finding of the facts alleged in the petition: *Brown v. Mallory*, 26-469.

But judgment should not be rendered against a defendant standing on his demurrer to plaintiff's petition, without plaintiff proving up his claim as required in other default cases: *Musser v. Hobart*, 14-248; *Buehler v. Reed*, 11-182.

Where it appears from the record that judgment against the party is entered upon the overruling of his demurrer for failure to plead further, it will not be considered a judgment on the merits, even though it recites that it was rendered upon the hearing of evidence and an inspection of the pleading: *Conner v. Long*, 63-295.

A judgment upon demurrer is a bar to any other action upon the facts, the sufficiency of which was put in issue by such demurrer: *Felt v. Turnure*, 48-397.

Where a party excepts to an order overruling his demurrer and judgment is entered against him, and on appeal the action of the court is affirmed, the judgment is final and he cannot have the cause remanded in order that he may plead: *Grimes v. Hamilton County*, 37-290.

Where plaintiff's demurrer to a portion of defendant's answer, which would, if sufficient, constitute a complete defense, is overruled and plaintiff elects to stand on such demurrer, he may appeal from the ruling thereon, and is not required to proceed to trial on the other defenses set up in the answer: *Wallace v. Council Bluffs Ins. Co.*, 66-139.

Where a party stands on his demurrer, and appeals from the judgment overruling it, judgment should be rendered against him, and on affirmance of the judgment on appeal he cannot be permitted to withdraw his demurrer and proceed to trial on the merits: *Dunlap v. Cody*, 31-260.

3860. Failure to amend. 2654. Upon a decision of a demurrer, if the unsuccessful party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, as the case may be. [R., § 3086; C., '51, § 1771.]

The filing of a demurrer waives any error in overruling a motion to strike or to require a more specific statement: *Stineman v. Beath*, 36-73; *Baldwin v. Dougherty*, 39-50.

Amending: By amending his pleading after a demurrer thereto has been sustained, a party waives any objection which he may have to the ruling on the demurrer: *Taylor v. Galland*, 3 G. Gr., 17; *Ford v. Jefferson County*, 4 G. Gr., 273; *Duncan v. Hobart*, 8-337; *Rees v. Leech*, 10-439; *Franklin v. Twogood*, 18-515; *Smith v. Cedar Falls & M. R. Co.*, 30-244; *Melhop v. Doane*, 31-397; *Philips v. Hosford*, 35-593; *Muscatine v. Keokuk N. L. Packet Co.*, 47-350; *Lane v. Burlington & S. W. R. Co.*, 52-18; *Bixby v. Blair*, 56-416.

The rule that the filing of an amended pleading waives any error in sustaining a demurrer to such pleading is only applicable where the party, by pleading over, supplies omissions or cures defects in his pleading pointed out by the demurrer. Therefore, the filing of an amendment to an answer setting up a new defense does not waive error in sustaining a demurrer to the defense set up in the original answer: *Ingham v. Dudley*, 60-16.

Where one division of an answer sets out a counter-claim, and a demurrer to that division as well as another portion of the answer is sustained, an amendment as to the other portion will not waive error in the ruling as to the counter-claim: *Folsom v. Winch*, 63-477.

Any error in sustaining a motion striking out a portion of the pleading is waived by filing an amendment to such pleading: *Marker v. Dunn*, 68-720.

By answering, defendant waives any objection he may have to the overruling of his motion attacking the petition: *Rea v. Flathers*, 31-545; *Benedict v. Hunt*, 32-27; *Coakley v. McCarty*, 34-105; *Clary v. Iowa Midland R. Co.*, 37-344; *Shugart v. Pattee*, 37-422; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

By pleading over, that is, filing an answer or reply, a party waives any objection which he might have to the overruling of his demurrer to the pleading filed by the adverse party: *Moore v. Ross*, Mor., 401; *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398; *Baldwin v. Winn*, 3 G. Gr., 180: *Ford v. Jefferson County*, 4 G. Gr., 273; *Harmon v. Chandler*, 3-150; *Mitchell v. Wiscotta Land Co.*, 3-209; *Ayres v. Campbell*, 3-582; *Abbott v. Striblen*, 6-191; *Paukett v. Livermore*, 5-277; *Cameron v. Armstrong*, 8-212; *Wilcox v. McCune*, 21-294; *Walker v. Kynett*, 32-524; *Coakley v. McCarty*, 34-105; *Conner v. District T'p*, 35-375; *State v. Tieman*, 39-474; *Jones v. Marcy*, 49-188; *Westphal v. Henney*, 49-542; *Smith v. Warren County*, 49-336; *Gray v. Lake*, 55-156; *Smith v. Powell*, 55-215; *Tootle v. Phœnix Ins. Co.*, 62-362.

The overruling of a demurrer to a petition is waived by answering over, and the question cannot again be raised unless renewed by a motion in arrest: *Mahaska County v. Ingalls*, 14-170.

However all substantial objections can be reached by instructions asked or by rulings on the evidence or by motion in arrest of judgment: *Williams v. Soutter*, 7-435.

If the court could not under any circumstances have jurisdiction over the subject-matter of the action, its error in overruling a demurrer would not be waived by pleading over. But where, the general jurisdiction of the court not being questioned, it is claimed that a certain fact is pleaded or exists which

if true would oust it of jurisdiction, any error of the court in deciding such claim must be preserved and shown of record like any other error: *Roland v. Brock*, 29-284.

Although the demurrer raises a question not raised by the answer, yet the filing of the answer will waive any objection to the ruling on the demurrer: *Westphal v. Henney*, 49-542.

The fact that the defendant, after excepting to the overruling of his demurrer, files an answer which is withdrawn before the case comes on for trial, does not constitute a waiver of error in the overruling of his demurrer. The withdrawal of the answer restores the parties to the position they were in before the answer was filed: *Jordan v. Kavanaugh*, 63-152.

A demurrer to the answer having been sustained and the defendant having elected to stand thereon and prepare his bill of exceptions, the plaintiff asked to withdraw his demurrer, but the defendant objected and was sustained; *held*, that the defendant waived his exception to the error in sustaining the demurrer and was estopped from availing himself of it: *Anson v. Dwight*, 18-241.

Where defendant, upon the overruling of his demurrer, took time to answer, but no answer was filed, and judgment went against him by default, *held*, that he did not waive objection to the ruling on demurrer: *Watts v. Everett*, 47-269.

A plaintiff who files a replication to an amended answer thereby waives any objection he might have made to the right of defendant to file such amended answer: *Phœnix Ins. Co. v. Dankwardt*, 47-432.

The filing of an answer to an amended petition which has been improperly filed, and proceeding to trial on an issue thus raised, will waive any error in the filing of the amended petition: *Pumphery v. Walker*, 71-383.

Where, after the sustaining of defendant's demurrer, he waives the advantage thereof and answers, the plaintiff cannot afterwards on appeal complain of the ruling on the demurrer: *Eubank v. Whittaker*, 11-197.

Going to trial: Objections raised by demurrer not showing want of jurisdiction are waived by joining issue and going to trial on the merits: *Stiles v. Brown*, 3 G. Gr., 589.

Where one of several pleas was demurred to and the demurrer sustained without exception of defendant, who went to trial on the other issues, and judgment was rendered against him, *held*, that he could not complain of the action of the court in sustaining the demurrer to the plea: *Eastman v. English*, 14-95.

By going to trial and resting his defense upon remaining pleas, *held*, that defendant waived any objection in sustaining a demurrer to other pleas filed by him: *Swafford v. Whipple*, 3 G. Gr., 261.

Where a party relied upon and went to trial upon a plea, *held*, that it would be presumed that a previous plea was waived, or that objection to the ruling of the court in rejecting such plea was abandoned: *Cook v. Steuben County Bank*, 1 G. Gr., 447.

Where a party did not stand upon his plea which was overruled, but went to trial upon the general issue, *held*, that he thereby waived any error in the overruling of the plea: *Hotchkiss v. Thompson*, Mor., 156.

Error in overruling a demurrer to an answer is waived by consenting to go to trial on the issues: *Finley v. Brown*, 22-538; *Warren v. Scott*, 32-22.

Motion for new trial which is granted waives objection to the overruling of a motion to direct the jury to find a verdict for defendant: *Laverenz v. Chicago, R. I. & P. R. Co.*, 53-321.

Standing upon the plea or demurrer: If a party desires to have the decision upon a demurrer against him reviewed on appeal he must suffer judgment to be rendered against him on the demurrer: *Plummer v. Roads*, 4-587.

Upon the overruling of a party's demurrer he may either stand thereon and have a review of the ruling of the court on the appeal, or he may plead over, thereby waiving his right to appeal, or in case no further pleading on his part is necessary to raise issue, he may waive the issue on the demurrer by proceeding to the trial of the cause. By insisting on judgment for want of a pleading or refusal to proceed with the trial, the adverse party may require the unsuccessful party to either stand upon his demurrer or waive it, and if the latter elects to stand upon his demurrer, judgment may be rendered against him, which may be final in case the decision of the court is affirmed on appeal. But if no such judgment is entered, the affirmance upon appeal will not debar the unsuccessful party from pleading over or proceeding with the trial, as the case may be: *Tyler v. Langworthy*, 37-555.

In cases where no reply to an answer is necessary, the party demurring thereto, whose demurrer has been overruled, if he elects to stand thereon, must so state, and have the fact shown of record. A mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21-294.

When a demurrer is overruled the party demurring has his election to stand on it or plead over; he may move the court to plead over and proceed to trial on the merits. But if he fails to do this the court is justified in presuming that he stands upon his demurrer, and may render judgment against him for failure to plead in proper time: *Cameron v. Boyle*, 2 G. Gr., 154.

Failure of the unsuccessful party to amend or plead over, after the ruling upon a demurrer, subjects him to the consequences of an adverse verdict if plaintiff, or a default if defendant: *Grimes v. Hamilton County*, 37-290; *Bridge v. Livingston*, 11-57.

ANSWER.

3861. What to contain. 2655. The answer shall contain:

1. The name of the court, of the county, and of the plaintiffs and defend-

ants, but when there are several plaintiffs and defendants, it shall only be necessary to give the first name of each class, with the words, and others;

2. A general denial of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief;

3. A specific denial of each allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief;

4. A statement of any new matter constituting a defense;

5. A statement of any new matter constituting a counter-claim;

6. The defendant may set forth in his answer as many causes of defense, counter-claim, whether legal or equitable, as he may have. [R., § 2880.]

I. DENIAL.

What sufficient: A denial of each and every allegation in the adverse pleading in any wise material not already admitted or denied is a proper form of denial: *Ingle v. Jones*, 43–286.

An answer consisting of a direct traverse of the statements of the petition, although amounting to a negative pregnant, cannot be regarded as a mere nullity: *Doolittle v. Greene*, 32–123.

Where plaintiff, in a petition in equity, alleged the purchase by defendant of certain property with the means of plaintiff, and sought to hold defendant as trustee of such property, and defendant, after denying the allegations of plaintiff's petition, proceeded to state what was done with the money alleged to have been invested in such property, *held*, that such allegations of defendant were not by way of counter-claim but by way of denial, and were not irrelevant: *Childs v. Griswold*, 15–438.

As legal conclusion: An answer which makes a denial as a conclusion or inference from facts stated is not to be considered as a general denial of plaintiff's petition: *Wright v. Schmidt*, 47–233.

Where plaintiff averred a written assignment to him of the cause of action, *held*, that a denial of the assignment was not sufficient and that defendant should have denied the execution thereof: *Cottle v. Cole*, 20–481.

An answer which simply denies a fact of which the record set out in the petition is conclusive evidence, or which denies the conclusion drawn from the facts alleged in the petition, is insufficient and subject to demurrer: *State v. Bryant*, 55–451.

What denial puts in issue: A general denial in an answer to a petition which alleges performance of a contract does not put in issue the fact of the existence of the contract, nor constitute a denial of a recital in the petition that a deposit of money has been made as a condition precedent: *Halferty v. Wilmering*, 112 U. S., 713.

An answer by a corporation defendant in an action on a note and mortgage, denying that the note sued on is its note and that it was ever made and executed by defendant, *held* to put directly in issue the allegations of the petition that the note and mortgage were executed by defendant through its duly authorized board of trustees, and to authorize defendant to show that persons signing the note and mortgage were not trustees of defendant and had no authority to execute such instruments, and therefore that the answer was not sham and irrelevant: *Babbage v. Second Baptist Church*, 54–172.

Denial of intent: Where the petition in an action for slander alleges the effect of words spoken and the intent of the speaker to have been to charge plaintiff with a crime, a denial that defendant intended to or did charge plaintiff with the commission of a crime by the language used raises a material issue: *Wilkin v. Tharp*, 55–609.

Denial of information or belief: A denial of any knowledge or information sufficient to form a belief as to the truth of allegations contained in the petition is in effect a denial of the matter thus pleaded and puts the same in issue: *Carr v. Bosworth*, 68–669.

An answer simply denying any knowledge or information with respect to a note upon which action is brought cannot be held frivolous. An answer will not be so held unless its insufficiency is so clear that it is apparent on a mere inspection: *McFarland v. Lester*, 23–260.

An allegation that defendant has no knowledge or information as to a certain fact alleged in the petition, and, therefore, upon such knowledge alleges, upon information and belief, that the fact is not true, is a sufficient denial to put the allegation of the petition in issue: *Leyner v. Fuller*, 67–188.

Averment of want of knowledge or information sufficient to form a belief as to any particular fact presents precisely the same issue as a general denial, and is not sufficient where a specific allegation is necessary to put the matter in issue: *Craig v. Hasselman*, 74–538.

Where plaintiff sought to recover damages for the death of a cow, alleged to have been caused by the negligence of defendant's servant, and defendant stated in his answer that of the alleged negligence of said servant and death of said cow defendant had no knowledge or information to form a belief that said cow died in consequence of such negligence, and therefore denied the same, *held*, that such denial did not put in issue the acts of negligence, but only that the cow died in consequence thereof: *Beyre v. Adams*, 73–382.

A statement that defendant has no information sufficient to form a belief, etc., is not sufficient to raise an issue. The denial should be of any knowledge or information: *Manny v. French*, 23–250; *Claflin v. Reese*, 54–544.

An allegation that the party has no knowledge sufficient to form a belief is not sufficient

to raise an issue: *Cutler v. McCormick*, 48–406, 415.

Denial and admission: A general denial in an answer will apply only to facts not admitted in the pleading: *Moore v. Isbel*, 40–383.

Denial in sense not intended: Where an averment taken in the sense in which it is intended by the pleader is not denied no issue is raised thereon: *Fellows v. Webb*, 43–133.

Denial not subject to demurrer: Denials, whether general or special, are not subject to demurrer. If informal, redundant or otherwise objectionable, the denial should be reformed on motion: *Oleson v. Hendrickson*, 12–222.

A denial is not subject to demurrer even though it be of a fact shown by a record which is set out in the petition: *State ex rel. v. Davenport*, 12–335.

So far as an answer amounts to a denial of the petition it cannot be assailed by demurrer: *Stuart v. Aumiller*, 37–102.

Where the answer interposes a general denial putting in issue some fact which is essential to plaintiff's right of recovery, a demurrer to the entire answer will not be sustained: *Hine v. Keokuk & D. M. R. Co.*, 42–636.

A demurrer to such an answer will not be sustained unless it contains averments which show affirmatively that there is no defense: *Stratton v. Drenan*, 58–571.

Not to be deemed frivolous: The fact that an answer is but a general denial will not warrant its being stricken from the files. Such an answer is not manifestly frivolous, nor is it scandalous or irrelevant: *Keeney v. Lyon*, 10–546.

What admissible under general denial: Where the evidence tends to disprove material matter alleged by plaintiff and denied by defendant, it is admissible without any special defense being pleaded: *Johnson v. Pennell*, 67–669.

In an action for personal injuries in which plaintiff alleges and seeks to prove freedom from contributory negligence defendant may, under general denial, introduce evidence of intoxication for the purpose of showing negligence on the part of plaintiff which contributed to the injury: *Fernbach v. Waterloo*, 76–598.

Where a title is attacked on the ground of fraud a general denial of the pleading is sufficient to authorize any proof showing that the title is not fraudulent: *Ray v. Teabout*, 65–157.

And as to what may be shown under denial, see § 3910.

General issue: Under a general denial defendant may not introduce evidence of all the facts which might have been proved under the general issue at common law, but is confined to contesting the facts alleged in the petition; but he may introduce as evidence whatever goes to controvert or disprove the facts alleged in the petition which are denied in the answer: *Oleson v. Hendrickson*, 12–222.

Under our system of pleading there is no general issue, and a defendant should plead any defense he intends to interpose: *Hagan v. Burch*, 8–309.

The Code in providing for a general denial does not authorize anything corresponding to the general issue at common law, which is unknown under our system of pleading. Under the general denial any affirmative defense can be proved, but no evidence is competent which does not tend to negative some fact which plaintiff is bound to prove in order to entitle him to recover: *Scott v. Morse*, 54–732.

Trespass: In an action of trespass defendant may under the general denial introduce evidence to show that he took and held possession of the property under an agreement with and by consent of plaintiff: *Wallace v. Robb*, 37–192.

Under an answer by simple denial in an action for trespass, the defendant cannot excuse the trespass by proving the right of possession or title in a third person: *Patterson v. Clark*, 20–429.

Negligence: Where plaintiff seeks to recover for negligence of defendant, and the answer contains a denial of the allegations of the petition, defendant may prove acts tending to show the exercise of care. Such proof negatives negligence and is not in support of an affirmative defense: *Kendig v. Overhulser*, 58–195.

Payment: Evidence of payment may be introduced in an action upon a contract under a general denial of indebtedness: *Sinnamon v. Melbourn*, 4 G. Gr., 309.

A plea of payment is not an affirmative defense: *Stacy v. Stichton*, 9–399; *Powesheik County v. Mickel*, 10–76.

Where plaintiff in his petition claimed an amount due, and defendant set up a contract with plaintiff and alleged full payment thereunder, *held*, that the averments of defendant were not by way of confession and avoidance, but in full denial, and that the burden of proving the sum due was upon plaintiff: *Garretson v. Bitzer*, 57–469.

Denial of ownership of note: Where a plaintiff claims to be the owner of a promissory note and seeks to recover its value from defendant as wrongfully in possession thereof, defendant may merely deny plaintiff's allegations and need not allege or prove ownership in himself. In order to recover, plaintiff must prove defendant's possession unlawful: *Gaskell v. Patton*, 58–163.

Denial of indebtedness: An answer merely denying that plaintiff is entitled to recover the amount claimed, but not putting in issue plaintiff's cause of action, does not raise any issue triable by jury, but the court may proceed to render judgment as upon default: *Mann v. Howe*, 9–546; *Sheldon v. Middleton*, 10–17.

Denial of an indebtedness to plaintiff in any sum whatever raises no issue: *McIntosh v. Lee*, 57–356.

A denial that "there is due on said note the sum of, etc., as claimed by plaintiff," *held* not sufficient as an answer, and assailable by demurrer: *Stucksleger v. Smith*, 27–286.

A denial in the answer that defendant is indebted in the amount claimed in the petition does not present an issue of fact and does not amount to a general denial: *Callanan v. Williams*, 71–363.

A general denial of indebtedness as claimed in the petition is not sufficient to put in issue the execution of a note sued on, nor plaintiff's

property therein, and such facts will be deemed admitted: *Morton v. Coffin*, 29–235.

Where defendant denied owing the amount claimed in the petition, but proceeded to state matters which he claimed showed the absence of such indebtedness, and the matters so stated were held insufficient, on demurrer, to constitute a defense, *held*, that no issue was left on the denial: *Bridge v. Livingston*, 11–57.

A denial that defendant owes the sum claimed in the pleading or any other sum is a sufficient denial to put in issue the indebtedness: *Godfrey v. Cruise*, 1–92.

What put in issue by: Where an answer averred that there was no valid ordinance under which a certain license was issued, *held*, that in the absence of a motion for more specific statement, it sufficiently put in issue the validity of a pretended ordinance under which such license was issued: *Horner v. Rowley*, 51–620.

The denial that the contract relied upon in the petition as made for defendant by an agent as defendant's agreement raises the question of the authority of the agent to enter into such contract for defendant. It is not necessary to specially plead that the agent had exceeded his authority in making the contract: *Gilbert v. Baxter*, 71–327.

II. NEW MATTER; CONFESSION AND AVOIDANCE.

What may be pleaded as a special defense: Defendant may plead as a defense any fact which will defeat plaintiff's claim for relief: *Kelsey v. Kelsey*. 57–383.

It is the policy of the law to settle all controversies and litigations without any unnecessary multiplication of suits, and if in one action all the rights of the parties may be determined, it will be done without requiring other suits to be instituted: *Ibid.*

An allegation that a written contract under which plaintiff seeks to recover has been altered since its execution is an allegation of new matter, which does not cast upon plaintiff the obligation of explaining such alteration until evidence in support of such allegation is introduced by defendant: *Wing v. Stewart*, 68–13.

Defense must be pleaded: In an action to enforce a contract for taking and leaving cars on a side-track, it was alleged as a part of the defense that plaintiffs had been negligent in handling cars left for them on said side-track. Such defense not being pleaded by way of counter-claim or as a defense in bar to plaintiffs' action, *held* properly stricken from the files on motion: *Amsden v. Dubuque & S. C. R. Co.*, 13–132.

Facts constituting but a mere argumentative denial, which so far as material are admissible under the general denial, may be stricken out on motion: *De Forest v. Butler*, 62–78.

A party may not plead one defense and prove another: *Ruby v. Schee*, 51–422.

Must be responsive to petition: The defendant cannot set up a supposed or presumed ground of claim for plaintiff, and then plead to it himself, and thus put the plaintiff to the necessity of pleading to it also: *Kilbourne v. Lockman*, 8–380.

Defense imposing liability on defendant: A defendant cannot interpose a defense, the result of which will be to cause a damage which he will be under obligation to pay. The obligation to pay the damage to result would prevent the interposition of the defense, a circuity of actions being disfavored: *First Nat. Bank v. Schlichting*, 40–51.

Affirmative denial: Where defendant, denying the allegations of the petition setting up plaintiff's claim of right to property and possession, affirmed that he (defendant) was entitled to such property and possession, *held*, that the latter allegations did not constitute new matter: *Hunt v. Bennett*, 4 G. Gr., 512.

Failure to prove affirmative denial: If the material allegations of the petition are neither proved nor admitted, the plaintiff cannot recover because of the failure of defendant to prove the allegations of his answer: *Iowa County v. Huston*, 39–323.

Want of authority to sue: Where defendant by his answer avers that plaintiff has no authority to sue, plaintiff should join issue with defendant upon such answer and prove his authority. Such an answer cannot be attacked by demurrer: *Merritt v. Daniels*, 10–196.

Special defenses: As to what defenses must be specially pleaded, see § 3925 and notes.

Confession and avoidance: A party pleading new matter in avoidance must first confess either expressly or by implication that which he proposes to avoid: *Martin v. Swearengen*, 17–346: *Anson v. Dwight*, 18–241; *Morgan v. Hawkeye Ins. Co.*, 37–359.

The answer should specifically deny, or, admitting, should set forth that which would justify and avoid every material allegation in the petition: *Hutchinson v. Sangster*, 4 G. Gr., 340.

A party desiring to plead in avoidance must confess the fact sought to be avoided: *Howes v. Carver*, 7–491.

General denial and confession and avoidance may be pleaded in separate divisions of the same answer: See notes to § 3916.

If new matter is pleaded in avoidance there should be in the same count a confession that but for such new matter the action could be maintained; and in a particular case, *held*, that the different counts of the answer setting up new matter in avoidance did by implication admit a cause of action: *Morgan v. Hawkeye Ins. Co.*, 37–359.

In a particular case, *held*, that the answer contained sufficient confession to warrant proof of matter in avoidance: *Abbott v. Sartori*, 57–656.

Mitigation: As to pleading matter in mitigation, see § 3888 and notes.

Abatement: See notes to § 3939.

III. EQUITABLE DEFENSES.

In an action on a judgment defendant may set up as an equitable defense any matter which he might have made the ground of an equitable suit directly assailing the judgment: *Rogers v. Gwinn*, 21–58.

Affirmative defenses, equitable in their nature, are to be viewed in the same manner as

to substance as though the same facts had been made the basis of a petition in chancery: *Penny v. Cook*, 19-538.

The right of a defendant to avail himself of an equitable defense is not limited to any particular kind of action, but is general: *Thompson v. Hurley*, 19-331.

An equitable defense being interposed, it may be sustained by such proof as is properly admissible on the trial of such an issue. The proper practice is to try the equitable issues first, afterward the other issues, if any remain: *Byers v. Rodabaugh*, 17-53.

Where the answer to a petition at law set up both legal and equitable defenses, and the cause was tried by a referee without any separation of the issues, *held*, that although one of the parties served separate notice of appeal as from two cases, it would be treated on appeal as one case, and tried as an equitable action: *Van Orman v. Merrill*, 27-476.

Where defendant seeks to show that by reason of mutual, material mistake, a contract never received the assent of the parties thereto, the issue thereby raised is one of law and not equitable: *Carey v. Gunnison*, 65-702.

Further as to equitable issues, see notes to § 3722.

The defense that certain conditions on which a contract to convey land was made have not been performed is not an equitable defense, but is simply a legal defense to the title under the contract: *In re Smith*, 56-270.

Where the plaintiff brought action for the possession of specific personal property, alleging his ownership thereof, and on the trial introduced a bill of sale as evidence of such ownership, *held*, that it was competent for defendant to introduce parol evidence to show that such bill of sale was in fact a mortgage, after having pleaded such fact: *McAnnulty v. Seick*, 59-586.

Equitable title: Under prior statutes not allowing equitable defenses in actions at law, it was held that an equitable title was no defense against a legal one in such an action: *Page v. Cole*, 6-153; *Harmon v. Steinman*, 9-113; *Parley v. Goocher*, 11-570; *Abbott v. Chase*, 13-453; *Cole v. Gill*, 14-527.

But under the statutory provision allowing equitable defenses in actions at law, an equitable title may be set up as a defense to an action to recover real property by a party having the legal title: *Rosierz v. Van Dam*, 16-175; *Van Orman v. Spafford*, 16-186; *Kramer v. Conger*, 16-434; *Shawhan v. Long*, 26-488.

An equity will not support an action at law to recover possession of land against the holder of the legal title: *Pendergast v. Burlington & M. R. R. Co.*, 53-326.

Where no equitable defense is pleaded the legal title must prevail: *Goepinger v. Ringland*, 62-76.

IV. SUFFICIENCY OF ANSWER.

Mere conclusions: It is not proper to state in an answer mere conclusions, whether drawn from facts not stated or from allegations of fact found in the opposite pleading, which might have been attacked by demurrer: *Sac County v. Hobbs*, 72-69.

Objection previously raised: An objection which has been made to the petition by demurrer and overruled cannot again be pleaded and relied upon by way of answer: *Kissinger v. Council Bluffs*, 73-171.

Allegation of payment: An allegation of full payment of the amount due plaintiff, without stating the amount paid, is not sufficiently specific: *Feller v. Winchester*, 3 G. Gr., 244.

An allegation that a party gave or delivered over to the county all the taxes levied, etc., *held* a sufficient allegation of payment of such taxes: *Goodnow v. Oakley*, 68-25.

Under an allegation that plaintiff paid money for defendant which he agreed to pay, evidence is admissible to show arbitration establishing such indebtedness: *Beidler v. Shallenberger*, 42-203.

Purchaser for value: An allegation by a party relying upon the fact of his being an innocent purchaser, as a defense, that he paid full value, will be sufficient in the absence of a motion for a more specific statement: *Haven v. Kramer*, 41-382.

Fraud: A general allegation of fraud by way of defense to a note is sufficient: *Hildreth v. Tomlinson*, 2 G. Gr., 360; *Strawser v. Johnson*, 2 G. Gr., 373.

In a particular case, *held*, that a plea of fraud, though not artistically drawn, was sufficient, no objection thereto being raised until on appeal: *Clark v. Taylor*, 68-519.

Joint answer: One defendant is not bound by the answer of a co-defendant: *Mobley v. Dubuque Gas, etc., Co.*, 11-71.

The failure of one of several partners sued upon a partnership claim to set up a defense will not deprive another of the right to do so: *Brayley v. Goff*, 40-76.

A defense which is good as to one defendant and not as to another will be held bad when pleaded by the defendants jointly: *Morton v. Morton*, 10-58.

Where two persons are sued as partners and service is had on only one of them, he cannot by joint answer bind the other alleged partner, if no partnership actually exists: *Nixon v. Downey*, 42-78.

A counter-claim is an answer: *Town v. Bringolf*, 47-133.

No notice need be served on plaintiff of the filing of an answer asking affirmative relief: *Treiber v. Schafer*, 18-29.

3862. Of guardian. 2656. The guardian of a minor, or person of unsound mind, or attorney for a person in prison, must deny in the answer all the material allegations of the petition prejudicial to such defendant. [R., § 2893.]

Section applied: *Bickel v. Erskine*, 43-213.

As to defense by guardian, see § 3771 and notes.

3863. Divisions. 2657. Each affirmative defense shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelli-

gibly refer to that part of the petition to which it is intended to apply. [R., § 2882.]

Several distinct defenses should not be pleaded in the same division of the answer: *Donahue v. Prosser*, 10-276.

Contradictory defenses should not be pleaded in the same division: *Morgan v. Hawkeye Ins. Co.*, 37-359.

Each affirmative defense must be stated in a distinct division of the answer, and must be sufficient in itself: *Davis v. Robinson*, 67-355.

Each division must in itself be sufficient for the purposes for which it is pleaded; otherwise it would be subject to demurrer: *National Bank v. Green*, 33-140.

Where an answer is divided into paragraphs which do not state separate defenses, but which, taken together, state one defense, a paragraph of such answer is not subject to demurrer: *Benedict v. Hunt*, 32-27.

3864. No prayer. 2658. In the defense part of an answer or reply, it shall not be necessary to make any prayer of judgment. [R., § 2883.]

COUNTER-CLAIM.

3865. How stated; what may constitute. 2659. Each counter-claim must be stated in a distinct count or division, and must be:

1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or,

2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action; or,

3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced or which was then held, either matured or not, if matured when so plead. [R., §§ 2884, 2886, 2889, 2891; C., '51, § 1740.]

How set up: The provisions of this section as to stating each counter-claim in a distinct count, etc., refer to pleadings in an action at law. The following section requires a counter-claim in equity to be divided into paragraphs: *Pond v. Waterloo Agl. Works*, 50-596.

A counter-claim is not a defense. It does not deny the cause of action or plaintiff's right to recover thereon. A defense denies the right to recover, and shows either that plaintiff never had a right of action or that it is discharged: *Haywood v. Seeber*, 61-574.

A counter-claim is an answer, so that a defendant who has interposed such counter-claim cannot be adjudged in default for want of answer: *Town v. Bringolf*, 47-133.

A set-off (now included among counter-claims) is not an answer to plaintiff's claim, and should be set forth after and totally distinct from the defense itself: *Freeman v. Fleming*, 5-460.

Where the case goes to the jury upon a counter-claim, setting up a cause of action which cannot properly be recovered on in that way, the court cannot on motion disregard such allowance, and treat the case as if such counter-claim had not been pleaded: *Mitchell v. Joyce*, 76-449.

Must be specially pleaded: If a counter-claim is relied upon it must be pleaded: *Lord v. Ellis*, 9-301.

Affirmative relief cannot be granted to the defendant in an equity case without being asked by cross-bill or otherwise: *Holladay v. Johnson*, 12-563.

In case of partnership: An account against a firm of which plaintiff is a member may be pleaded as a set-off (or counter-claim) by defendant in an action to foreclose a mortgage brought by plaintiff in his individual right: *Allen v. Maddox*, 40-124.

Where a petition stated a cause of action against a partnership, and its answer set up a counter-claim in behalf of the partnership and certain individuals, and also contained allegations indicating that the individuals were members of the partnership and that the counter-claim related to the same transaction as that referred to in the petition, *held*, that such counter-claim was properly interposed: *Bird v. McCoy*, 22-549.

By surety: Where an action is brought against a principal and surety, the surety may, by consent of the principal, interpose any counter-claim which would be available in favor of the principal as against such indebtedness, notwithstanding the provisions of the third subdivision of the Code, heretofore set out: *Reeves v. Chambers*, 67-81.

By one joint defendant: Where a husband and wife were sued jointly, *held*, that the husband could not set up, by way of counter-claim, a cause of action in his favor alone for malicious prosecution: *Musselman v. Galligher*, 32-383.

Malicious prosecution: A counter-claim for damages for malicious prosecution of an action cannot be interposed in the action. The right of action in behalf of defendant for malicious prosecution does not arise until the original action is ended: *Brooks v. Westover*, 65-369.

In case of attachment: A claim for damages on an attachment bond may be interposed

as a counter-claim in the action itself: See § 4242 and notes.

Where defendant in an attachment suit had previously made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim under subdivision 3 of this section: *Rumsey v. Robinson*, 58–225.

In an action by a receiver of a corporation to recover indebtedness accruing before his appointment, an account against such corporation accruing also before the taking possession by the receiver may be set off: *Cook v. Cole*, 55–70.

In action by assignee, where the claimant of property in possession of assignee, claiming a lien thereon for compensation to his assignor for services rendered in connection with such property, for the purpose of getting possession of the property gave to assignor a bond for the payment of any compensation which might be found due the latter, and an action on such bond was brought by the assignee, *held*, that the defendant in such action might set off a claim against the assignor for indebtedness due at the time of the assignment: *Van Sandt v. Dows*, 63–594.

Further as to how far an assignee is subject to counter-claims against the assignor, see § 3751 and notes.

In an action to collect a special tax against a property owner for improvements on abutting streets, the property owner cannot set up by way of counter-claim a claim of damages against the city for injuries to his property by reason of the negligent manner of making such improvements: *Burlington v. Palmer*, 67–681.

In such case, even though the claim of the city to recover the special tax is defeated, the counter-claim against the city for damages cannot be maintained: *Ibid.*

In a suit by an administrator to collect a claim due decedent in his life-time, the defendant may set up as a counter-claim a demand existing in his own favor against decedent, but if the counter-claim exceeds the original claim, the balance can only be enforced as other claims against the estate: *Lucore v. Kramer*, 22–387; *Van Sandt v. Dows*, 63–594.

But in such case defendant could not set off a claim against the estate acquired by him subsequently to the death of the intestate: *Cook v. Lovell*, 11–81.

The whole theory of the counter-claim is based upon the right of deduction. If that does not exist, the claim should be made the subject of an independent action, where judgment for the whole amount due can properly be rendered: *Eldredge v. Bell*, 64–125.

An executor cannot, in an action against him individually, interpose as a counter-claim a debt due to his testator's estate: *Gourley v. Walker*, 69–80.

And see § 3566 and notes.

Where counter-claim is barred: The provisions of § 3745, allowing a counter-claim to be pleaded, even when barred as an independent cause of action, are applicable to counter-claims under the first or third subdivision of this section, as well as those under the second: *Folsom v. Winch*, 63–477.

Failure to interpose: The fact that a counter-claim which might have been interposed against a cause of action was not thus interposed will not prevent its afterwards being set up in an action on the judgment: *Ibid.*

Dismissal of action does not dismiss a counter-claim already interposed: See notes to § 4053.

What constitutes counter-claim: An answer stating matters simply intended to defeat plaintiff's claim, where no affirmative defense is sought, is not a counter-claim: *Stuart v. Hines*, 33–60.

Where, in an action upon a promissory note given for the purchase price of certain sheep, defendant alleged that a certain sum was to be deducted from the amount of the note in accordance with stipulations in a contract of purchase, *held*, that such averments set up a defense and not a counter-claim, although at the close of the answer defendant claimed judgment for the sum specified: *Burroughs v. McLain*, 37–189.

Matters stated by defendant by way of evidence having no other effect than to put in issue plaintiff's right to recover under his petition, and which might have been proven under a general denial in the answer, do not constitute a counter-claim: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 66–751.

In an action to foreclose a mortgage in which a party is made defendant who, it is alleged, claims a lien upon the premises, the answer of such party stating the nature of his lien does not constitute a counter-claim, and such answer does not therefore require a reply: *Vaughn v. Eckler*, 69–332.

Where an answer in an action to foreclose a mortgage amounted in itself only to a plea of payment, although defendant prayed therein for a cancellation and satisfaction of the mortgage, *held*, that after dismissal of action by plaintiff, defendant was not entitled to any relief as upon a counter-claim, although in case of trial upon the petition and answer he might, upon recovery of judgment in his favor, have been entitled to a decree of cancellation and satisfaction, as prayed: *Union Nat. Bank v. Carr*, 49–359.

A pleading in a particular case *held* to be a counter-claim against an intervenor, and not a reply to an answer in the case, and therefore not subject to the rule that a reply must not be inconsistent with the petition: *Jack v. Des Moines & Ft. D. R. Co.*, 49–627.

Set-off: Previous to the present statutory provision which treats set-off as a kind of counter-claim, *held*, that the set-off must be predicated upon an independent demand which defendant had against plaintiff, and was different from a mere right to reduction of plaintiff's demand or a claim to defeat it on account of some matter connected therewith: *Crookshank v. Mallory*, 2 G. Gr., 257.

The principles upon which set-off in equity was based and the rules by which it was governed were entirely different from those which governed in common law. In a legal set-off a mutual dependence or mutual credit in an equitable sense was not required, and it was

sufficient that there be a debt on each side: *Zugg v. Turner*, 8-223.

A claim sounding in tort as well as one arising on contract may be used as a set-off: *Campbell v. Fox*, 11-318.

Defendant in an action on a note duly assigned cannot litigate a set-off against an assignor not a party to the record under an averment that he was the real party in interest: *Lewis v. Denton*, 13-441.

To entitle a party to use a set-off it must have existed in his own favor and not in favor of a third person: *Reed v. Darlington*, 19-349.

As explaining the difference between set-off and counter-claim, as defined by previous statutes, see *Allen v. Maddox*, 40-124.

Counter-claim proper: It is not required that the facts constituting a counter-claim under the second division of this section should exist at the commencement of the action: *Wilson v. Wilson*, 40-230.

A set-off or counter-claim of damages for fraud and deceit may be interposed by defendant in an action to foreclose a mortgage: *Moberly v. Alexander*, 19-162.

In an action to recover upon a promissory note, a counter-claim in the nature of an action for the possession of the note, for the purpose of cancellation, is proper: *Sigler v. Hidy*, 56-504.

In an action in equity by an insurance company for the cancellation of a policy, *held*, that a cause of action in behalf of defendant for a loss under the policy was sufficiently "connected with the subject of the action" to be set up as a counter-claim: *Revere Fire Ins. Co. v. Chamberlin*, 56-508.

Where plaintiff is liable jointly with others to defend on contract, such liability may be set up as a counter-claim (§ 3755): *Redman v. Malvin*, 23-296.

It is not proper to set up by way of counter-claim an independent claim, or new matter constituting a cause of action against plaintiff in favor of one of several defendants: *Jenkins v. Barrows*, 73-438.

Cross-bill: No notice need be served on defendant of the filing of an answer in the nature of a cross-bill asking affirmative relief: *Trieber v. Shafer*, 18-29.

While it is true, as a general rule, that defendant is not entitled to any affirmative relief except upon averments of a cross bill or cross-petition, yet where plaintiff files his petition for an account, and a balance is ultimately found in favor of defendant, the latter is entitled to a decree for such balance: *McGregor v. McGregor*, 21-441.

If affirmative relief has been granted to defendant, as prayed in his answer, without a cross-bill or cross-petition, and no objection to the form of the pleading is taken in the trial court, such objection will not be considered on appeal. (Overruling *MacGregor v. MacGregor*, 9-65): *Kellogg v. Aherin*, 48-299.

The judgment on a cross-petition by defendant against plaintiff cannot be reviewed on an appeal from the judgment in the original action, unless the party against which the judgment on such cross-petition is rendered takes an appeal: *Mahaffy v. Mahaffy*, 63-55.

As to cross-bill for divorce, see § 3416.

3866. Equitable matter. 2660. An equitable division must also be separated into paragraphs, and numbered as required in regard to an equitable cause of action in the petition. [R., § 2885.]

3867. Co-maker or surety. 2661. A co-maker, or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counter-claim, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal, but the plaintiff may meet such counter-claim in the same way as if made by the co-maker or principal himself. [R., § 2887.]

The surety may, by consent of his principal, interpose a counter-claim which would be available in an action against the principal, although it is not within the province of subdivision 3 of § 3865: *Reeves v. Chambers*, 67-81.

3868. New party. 2662. When a new party is necessary to a final decision upon a counter-claim the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action. [R., §§ 2888, 2890.]

3869. Cross-petition, when filed. 2663. When a defendant has a cause of action affecting the subject-matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition against the co-defendant or other person. The defendants thereto may be notified as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross-petition shall not delay the trial of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-petition. [R., § 2892.]

Cross-petitions or cross-actions: Defendants to cross-petitions or cross-actions brought against them by their co-defendants must be served with notice of the claim made against them: *Thode v. Spofford*, 65–294.

A decree on a cross-bill of one defendant against another should not be rendered until the latter has been made an adversary party, by motion or otherwise, to plaintiff in the cross-bill: *Miller v. McGalligan*, 1 G. Gr., 527.

Where plaintiffs brought action to set aside a guardian's deed to property held by defendant, and defendant, by cross-petition against certain mortgagees of the property from plaintiff, sought to have such mortgages set aside, *held*, that the mortgagees were properly brought in by cross-petition and their rights determined: *Bunce v. Bunce*, 59–533.

The dismissal of the original petition after the filing of a cross-petition will not operate as a dismissal of such cross-petition: *Spearing v. Chambers*, 25–99.

Cross-petition of one defendant against another, *held* proper in a particular case: *Rose v. Schaffner*, 50–483.

In an action to foreclose, brought against several defendants, *held*, that a cross-bill by one such defendant for the recovery of money paid by mistake to a co-defendant upon which plaintiff had a claim was proper: *Ibid.*

3870. Demurrer to answer. 2664. When the facts stated in the answer, or any count or division thereof, are not sufficient to constitute a defense or counter-claim, the adverse party may demur, and shall be held to the same certainty in the statement of the grounds therefor as obtains in a demurrer to the petition. [R., § 2894.]

Demurrer to answer: Where the matter pleaded does not amount to a denial or to confession and avoidance, the defect may be reached by demurrer: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

Want of verity in the allegations of an answer cannot be made available by demurrer. When the answer contains a specific denial of every averment in the petition, it is error to sustain a demurrer as to these denials: *McGregor v. McGregor*, 21–441.

When an answer alleging former adjudication was demurred to on the ground that the prior suit was not for the same matters, *held*, that properly such facts were to be relied upon as evidence and not as causes of demurrer: *Keokuk County v. Alexander*, 21–377.

A demurrer to an answer on the ground that it does not state facts constituting a defense, where the matters pleaded are neither by way of denial nor by way of new matter, is sufficiently specific: *Davenport Gas, etc., Co. v. Davenport*, 15–6.

In cases where no reply to an answer is necessary, the party demurring thereto, whose demurrer has been overruled, if he elects to stand thereon, must so state, and have the fact shown of record. A mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21–294.

Where two defenses are improperly joined in one count of the answer the plaintiff may demur to one of them only, and the defendant will not be allowed to object thereto on the ground that the demurrer does not go to the whole count: *Wright v. Connor*, 34–240.

An objection that a counter-claim set up in the answer cannot be properly interposed on account of its not being in behalf of the proper parties should be raised by demurrer and not by motion to strike from the files: *Bird v. McCoy*, 22–549.

Demurrer to the whole answer should not be sustained where the answer contains a general denial: *Sample v. Griffith*, 5–376.

As to demurrers generally, see §§ 3854, 3855 and notes.

REPLY.

3871. When necessary. 2665. There shall be no reply except:

1. Where a counter-claim is alleged; or,

2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by reason of the existence of some fact which avoids the matter alleged in the answer. [R., § 2895; C., '51, § 1741.]

When required: Allegations of an answer not relating to a counter-claim are deemed controverted without a reply, and no reply is necessary: *Davis v. Payne*, 45–194; *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 65–563; *Mills County Nat. Bank v. Perry*, 72–15.

No reply is required to an answer which in substance pleads payment only: *Kirk v. Woodbury County*, 55–190.

Where the allegations of defendant's answer do nothing more than put in issue the right of plaintiff to recover under his petition, and do not set up any matter which might not have been proved under a mere denial, they need not be denied in the reply: *Walker v. Sioux City & I. F. Town Lot, etc., Co.*, 66–751.

Where the answer does not set up an affirmative defense but simply puts in issue one of the material allegations of the petition, a reply is not necessary: *Bayliss v. Murray*, 69–290.

However, although a reply is not called for, yet where it raises no new issue, and every fact alleged in it could be shown under the issues raised on the petition and answer, it will not constitute reversible error to refuse to strike it from the files: *Ibid.*

A reply is not necessary, under our system of pleading, to let in proof of a former adjudi-

cation of matters set up in the answer, not in the nature of a counter-claim: *Carleton v. Byington*, 24–172.

Where facts, which might be set out by way of reply, appear affirmatively in the answer, no reply is necessary: *Scott v. Luther*, 44–570.

Where defendant in an action on a written contract of subscription set up want of consideration, *held*, that plaintiff might prove facts showing the incurring of expenses on the faith of such subscription, without having pleaded it in reply, such matter being in denial and not in confession and avoidance of the matter averred in the answer: *University of Des Moines v. Livingston*, 57–307.

Plaintiff cannot be required to file a pleading confessing and avoiding, or denying, the allegations in the answer or cross-petition: *Cassidy v. Caton*, 47–22.

If the reply contains a denial of affirmative matter not constituting a counter-claim, coupled with matter in confession and avoidance the denial will be disregarded and the reply will be considered an admission of the allegations of the answer: *Meadows v. Hawkeye Ins. Co.*, 62–387.

The pleading of a waiver or estoppel is not necessarily inconsistent with the denial of facts pleaded in the answer as a defense, and pleading such waiver or estoppel will not be a waiver of the denial: *Tobin v. Western Mut. Aid Soc'y*, 72–261.

While there can be no plea in avoidance without confessing the matter sought to be avoided, yet this confession need not be in terms, but may be by implication. It is sufficient if it give color to the alleged right of the adverse party: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75–694.

Where, in reply to an answer setting up a previous adjudication, plaintiff, without admitting or denying such previous adjudication, alleged that it was procured by fraud, *held*, that such reply did not constitute a confession of the matter alleged in the answer: *Platner v. Platner*, 66–378.

If plaintiff expects to introduce evidence of matter to avoid the facts pleaded in the answer, as that an assignment set up in the answer is a forgery, he should plead that fact by way of reply: *Hay v. Frazier*, 49–454.

But the only penalty which attaches for failure to set up matter in avoidance by way of reply, when relied on, is that evidence of such matter cannot be introduced if the defendant objects in proper time. Failure to reply does not admit the allegations of the answer: *Ibid.*

Where a defendant pleads a defense which avoids the cause of action, plaintiff cannot introduce evidence to show the waiver of such defense without having set up such waiver in the reply: *Zinck v. Phœnix Ins. Co.*, 60–266.

Where plaintiff has a defense to affirmative matter set up by defendant in his answer, such defense should be pleaded in his reply: *Kervick v. Mitchell*, 68–273.

Under the provisions of the Revision no reply to affirmative matter in an answer not setting up a counter-claim was necessary; and where defendant set up a release or other affirmative matter, plaintiff might meet the issue raised by proving fraud, etc., without having set up such matter, either in his petition or in a reply: *Noble v. Steamboat Northern Illinois*, 23–109; *Barger v. Farris*, 34–228; *Corbin v. Beebee*, 36–336. And as other cases under the Revision, see *Stuart v. Hines*, 33–60, 101; *Gwyer v. Figgins*, 37–517. It was to obviate this construction that the second paragraph of the section as it stands in the Code was added: *Code Com'rs' Rep.*, p. 95.

Matters which should have been alleged in the petition: A repetition in the reply of allegations of matter pleaded in the petition may be stricken out on motion. So, also, may prayers for relief which substantially appear in the petition, or a prayer asking dismissal of a cross-bill which is answered in the reply: *Hall v. Harris*, 61–500.

The office of the reply is to make an issue on the allegations of the counter-claim of defendant or to plead matter in defense or avoidance of the matters pleaded by way of defense in the answer. A plaintiff is not permitted to plead in his reply matters which are material only to the cause of action alleged in his petition. Much less will he be permitted to recover on a distinct cause of action pleaded only in his reply: *Marder v. Wright*, 70–42.

It is not proper to set out in the reply allegations which are intended as amendatory to the petition. But an objection to such pleading cannot first be taken on appeal: *Willson v Harris*, 68–443.

Claims for damages should be made in the petition and amendment thereof, and are not sufficient if first made in the reply: *Jones v. Marshall*, 56–739.

Where one who is defendant in a mortgage foreclosure as having an equity in the premises seeks to establish by a cross-bill the fact that his lien is a prior one, plaintiff may allege for the first time in his reply that his mortgage was recorded prior to defendant's: *Clarke v. Bancroft*, 13–320.

3872. Statements of. 2666. When a reply must be filed, it shall consist of:

1. A general or specific denial of each allegation or counter-claim controverted, or any knowledge or information thereof sufficient to form a belief; or,

2. Any new matter not inconsistent with the petition constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same. [R., § 2896.]

[The word "petition," in the first line of the second subdivision, is erroneously printed "position" in the Code.]

Where plaintiff dismissed his cause of action, but defendants proceeded upon a counter-claim, *held*, that the pleading by plaintiff in the nature of an answer or counter-claim to defendants' claim could not be stricken from the files because inconsistent with the petition: *Gardner v. Halstead*, 71-259.

Where, in an action on a note, defendant denied that he signed the note and claimed it to be a forgery, *held*, that plaintiff might in his reply set up an estoppel without abandoning the allegation of his petition that the note was signed by defendant: *Eikenberry v. Edwards*, 71-82.

Defendant may set up matters in avoidance, thereby colorably confessing the allegations of the answer, but not expressly admitting them, without waiving the general denial implied by law of the allegations of the answer. He has the right in this way to set up inconsistent defenses: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75-694.

3873. Defenses to counter-claim. 2667. Any number of defenses, negative or affirmative, are pleadable to a counter-claim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered as required in case of such matter in the answer. [R., §§ 2897-8.]

3874. Demurrer. 2668. When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statements of grounds thereof as obtain in demurrer to the petition. [R., § 2899.]

VERIFICATION.

3875. When necessary. 2669. Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also; and in all cases of verification of a pleading, the affidavit shall be to the effect that the affiant believes the statements thereof to be true. [R., § 2904.]

Failure to verify: The court cannot disregard a pleading which is not verified when it should be: *Lee v. Keister*, 11-480.

An unverified petition, even in a case where verification is made necessary, is not a nullity, and advantage of the defect can only be taken by motion to strike (§ 3883): *Rush v. Rush*, 46-648.

Objection that the pleading is not properly verified cannot be raised by way of attack upon the judgment in the proceeding: *Wright v. Marsh*, 2 G. Gr., 94.

Filing a demurrer to a petition waives any error in the ruling of the court on motion to strike out for want of verification: *Stineman v. Beath*, 36-73.

Failure to verify answer: When an answer is filed which is not verified when it should be, the court should not render judgment by default against defendant for want of an answer, without the proper steps being taken to strike the answer from the files: *Wolff v. Hagensick*, 10-590.

When, after the filing of the petition and answer, both unverified, plaintiff verified his petition by leave of court, *held*, that the court should not have rendered judgment by default against defendant for want of an answer: *Mallory v. Sailing*, 48-699.

The object of the provisions requiring an answer to a sworn petition to be verified is not merely to enable a party to obtain testimony by having his pleadings responded to under oath, but to secure the truthful statement of the defense, and when the petition is verified the plaintiff has a right to insist upon a sworn answer. If such verified pleading is not filed the other party may insist upon and claim a default: *Wilson v. Preston*, 15-246.

Where the parties go to trial upon the issue raised by an unverified answer in a case when the answer ought to be verified, the plaintiff is not entitled to have the averments of his petition deemed true for want of answer: *Taylor v. Runyan*, 9-522.

The statute does not provide, as a consequence of failure to answer under oath, nor does it intend, that the pleading sworn to is to be taken as true: *Ibid.*

The fact that the petition which is verified includes an application for an attachment which is specially required by statute to be verified does not relieve defendant from verifying his answer: *Harper v. Drake*, 15-157.

As to verified answer in equity, see § 3885 and notes.

Amendment: Where a petition for attachment is not sufficiently verified as to the existence of grounds for attachment the defect may be cured by amendment: *Lowenstein v. Monroe*, 52-231.

The court may permit an amendment to a pleading to be made without being verified unless a new and distinct cause of action is introduced (§ 3886): *Tegler v. Shipman*, 33-194.

An amendment containing substantial additional matter must be verified in the same manner as the original: *Walker v. Ayres*, 1-449.

What sufficient verification: Where the jurat specifies that the party "makes oath that the matters and things stated in the petition are true," this is sufficient as a verification, although affiant does not sign the affidavit

or pleading. (Decided under Code of '51): *Bates v. Robinson*, 8-318.

Under the provisions of statute that answers to interrogatories shall be verified by the affidavit of the party answering, *held*, that an affidavit was necessary, and that a simple verification "subscribed and sworn to before me this," etc., with the signature and seal of the notary public, was not sufficient: *Averill v. Boyles*, 52-672.

An affidavit as to the truth of the pleading, "to the best of affiant's knowledge and belief," is not sufficient: *Stadler v. Parmlee*, 10-23.

A verification to the effect that the facts set forth in the pleading are true is sufficient. The word "facts" thus used covers the allegations in the petition the same as though affiant had stated that the matters and things therein set forth were true: *Sherrill v. Fay*, 14-292; *Wheelock v. Winslow*, 15-464.

An affidavit referring to "the foregoing petition," without giving the title of the action, *held* sufficient: *Levy v. Wilson*, 43-605.

Jurat: It is not necessary, under the present Code, that the certificate to the affidavit show the name of the affiant: *Stone v. Miller*, 60-243.

The jurat need not expressly state that the affidavit was subscribed and sworn to by the person whose name is signed thereto. That fact will be inferred from the expression "subscribed in my presence and sworn to before me:" *Stoddard v. Sloan*, 65-680.

While it should appear that the notary in signing the jurat acts in his official capacity, it is not necessary that he append to his designation as notary public the name of the county in and for which he acts. The court will take judicial notice of the county for which he is commissioned as notary, and if it appears that that county is the one in which the act is performed as shown by the evidence it will be sufficient: *Ibid.*

Where an affidavit was headed "State of Iowa, Delaware County," and the officer's signature, with the addition "Notary Public," was authenticated with a seal, *held*, that it was sufficient: *Stone v. Miller*, 60-243.

Where the jurat was signed with the name of a person with the word "clerk" added, and the seal of the court was attached thereto, *held*, that it sufficiently appeared that the person before whom the affidavit was made was clerk of such court, and that the venue was thus sufficiently shown: *Levy v. Wilson*, 43-605.

3876. Corporation. 2670. Where a corporation is a party, the affidavit may be made by any officer thereof. [R., § 2905.]

3877. United interest. 2671. When there are several parties united in interest, the affidavit may be made by any one of them. [R., § 2906.]

3878. By agent or attorney. 2672. If the pleading be founded on a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney, the affidavit may be made by such agent or attorney, so far as relates to the statement of the cause of action thereon; but when relief is asked other than a money judgment or decree of foreclosure, the affidavit must contain averments showing competency as herein provided. [R., § 2907; 13 G. A., ch. 167, § 18.]

3879. By person knowing facts. 2673. If the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same. [R., §§ 2908-9.]

By whom verified: Where the name of the person verifying the petition is the same as that of plaintiff, it will be presumed that such person is the plaintiff. Therefore, where a petition in an action brought by a partnership was verified by a person who did not state that he was a member of the firm, but the account attached to the petition was verified and showed that a person of the same name was a member of such firm, *held*, that it sufficiently appeared that the verification of the petition was by a member of the firm: *Lessem v. Wilson*, 43-488.

Where a sworn answer was called for in an equitable proceeding as to transactions between plaintiff and defendant, *held*, that an answer verified by the wife of defendant acting as his agent, and showing herself familiar in general with the business to which the controversy related, but not as to the particular transactions referred to, was not sufficient: *Leach v. Keach*, 7-232.

An affidavit of verification by the attorney of a party, showing his knowledge of the facts stated in the pleading and the source of it, is sufficient: *Brady v. Otis*, 40-97.

Where the affidavit does not state that a person making it has knowledge as to the truth of its allegations, nor state facts from which such knowledge can be inferred, the verification is not sufficient: *Clute v. Hazleton*, 51-355.

Where a person other than the party verifies a pleading, it is not sufficient if he states in his affidavit that he knows the facts stated to be true as he verily believes. Why he thus knows is not required to be stated: *Yoe v. Nichols*, 51-330.

But if the affiant states the facts by reason of which he claims to have personal knowledge, and such facts do not render him competent to speak as from personal knowledge, the verification will not be sufficient: *Searle v. Richardson*, 67-170.

Where the affidavit shows that affiant was possessed of the requisite knowledge of the

facts to make a verification, that is sufficient although it be not certain to a certain intent in every particular: *First Nat. Bank v. Mason*, 57-105.

Verification by the agent of the plaintiff, both as to the cause of action and the grounds for attachment, *held* sufficient in a particular case: *Rausch v. Moore*, 48-611.

3880. Counter-claim. 2674. Where the petition is not verified, and the answer contains a counter-claim, the same may be verified apart from the defense part of the answer, and the foregoing provisions are applicable to the counter-claim as if the same were a separate pleading.

When an answer is required to be verified, a counter-claim may be set up which is not verified: *Innes v. Krysher*, 9-295.

3881. Guardian; executor; prisoner. 2675. Verification shall not be required to any pleading of a guardian, executor, or prisoner in the penitentiary, nor to any pleading controverting the answer of a garnishee, nor to one grounded on an injury to the person or the character. [R., §§ 2910, 2912.]

3882. When cannot be required. 2676. When it can be seen from the pleading to be answered, that an admission of the truth of its allegations might subject the party to a criminal prosecution, no verification shall be required. [R., § 2911.]

3883. Effect if not verified. 2677. If a pleading be not duly verified, it may be struck out on motion; but such defect will be deemed waived if the other party respond thereto, or proceed to trial without such motion. [R., § 2916.]

[The word "duly" in the first line is erroneously omitted in the printed Code.]

An unverified petition, even in a case where verification is made necessary, is not a nullity, and advantage of the defect can only be taken by motion to strike: *Rush v. Rush*, 46-648.

Filing a demurrer to a petition waives any error in the ruling of the court on motion to strike out for want of verification: *Stineman v. Beath*, 36-73.

And see notes to § 3875.

3884. When applicable to amount claimed. 2678. The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. [R., § 2914.]

3885. Proof. 2679. The verification shall not make other or greater proof necessary on the side of the adverse party. [R., § 2915.]

The provisions as to verification apply equally to pleadings in ordinary and in equitable proceedings. (Overruling previous cases): *Shepard v. Ford*, 10-502.

The rule as to the amount of testimony necessary to overcome a sworn answer in a chancery proceeding is abrogated: *Wilson v. Holcomb*, 13-110; *Mitchell v. Moore*, 24-394; *Smith v. Phelps*, 32-537.

3886. Amendments not verified. 2680. Courts may permit the amendments authorized by this chapter to be made without being verified, unless a new and distinct cause of action or counter-claim is thereby introduced. [R., § 2981.]

Section applied: *Tegler v. Shipman*, 33-194, 197.

SLANDER — LIBEL.

3887. Statements of petition. 2681. In an action for slander or libel, it shall not be necessary to state any extrinsic facts for the purpose of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, or that the matter was used in a defamatory sense; but it shall be sufficient to state the defamatory sense in which such matter was used, and that the same was spoken or published concerning the plaintiff. [R., § 2928.]

Allegation of defamatory sense: It is sufficient to set out the words themselves and state the defamatory sense: *Kinyon v. Palmer*, 18-377; *Swearingen v. Stanley*, 23-115; *Clarke v. Jones*, 49-474.

Words are to be taken in their plain and

natural import and in the sense in which they would be understood by those to whom they were addressed: *Truman v. Taylor*, 4-424; *Wilson v. Beighler*, 4-427.

And explanatory circumstances known to both parties will be considered as part of the words: *De Moss v. Haycock*, 15-149.

Cause of action: There can be but one cause of action for a slanderous conversation, although the items of slander are numerous: *Cracraft v. Cochran*, 16-301.

Plaintiff need only set out in his petition or prove so much of the conversation as constitutes a cause of action, but either he or defendant may prove all of the conversation occurring at the same time for the purpose of showing the *quo animo: Ibid.*

Special damages: Where the words spoken are actionable *per se*, special damages need not be alleged or proven: *Parker v. Lewis*, 2 G. Gr., 311.

In such case general damages may be proved, but plaintiff cannot prove or recover for special injuries not alleged: *Hicks v. Walker*, 2 G. Gr., 440.

Where the words charged are actionable *per se*, the fact that averments are made of damage to plaintiff as a citizen, farmer and church member will not justify the requirement of a more specific statement as to the particular damage in the case: *Swearingen v. Stanley*, 23-115.

Evidence: It is not necessary for plaintiff to prove the precise words as laid in the petition, but it is sufficient to prove them substantially as set out: *McClintock v. Crick*, 4-453; *Desmond v. Brown*, 29-53; *Bower v. Deideker*, 38-418.

Proof of words spoken in a foreign language: While at common law the authorities are uniform that to allege a publication of ignominious words, and prove a publication of words in another tongue, is a variance and cause for nonsuit, yet, under our system of pleading, it seems that it would be sufficient to set out a translation of the words spoken in the foreign language, averring that they were spoken in that language, and that the words charged are a correct translation of them. In such case the proof of the speaking of the words in a foreign language would not constitute a variance: *Bower v. Deideker*, 38-418.

The meaning of the words used may be inferred from their plain import, and evidence of the sense in which they were understood is not necessary, although testimony of those who heard the words as to their understanding would be proper if their meaning was not clear: *Hess v. Fockler*, 25-9.

Repetition: It is competent in actions for slander to prove a repetition of the slanderous charges for the purpose of showing malice, without any allegation in the petition of such repetition, and the portion of the petition making such allegation may be stricken out on motion: *Halley v. Gregg*, 74-564.

MATTER IN MITIGATION; MALICE.

3888. How pleaded. 2682. In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth in a distinct division of his answer, any facts of which evidence is legally admissible to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances whether he prove the defense or justification or not, and no mitigating circumstances shall be proved unless plead, except such as are shown by, or grown out of, the testimony introduced by the adverse party; and in actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury on the whole case find that such defense was made with malicious intent. [R., § 2929.]

[The word "prove," in the sixth line, is erroneously printed "provoke" in the Code.]

Mitigation or partial defense: All mitigating circumstances, certainly all contemporaneous with the act, which might at common law have been given in evidence under the general issue, may still be given under an answer in denial. But all which tend to show the truth of the charge must be pleaded. It is the safest rule to state every fact relied on in mitigation: *Beardsley v. Bridgman*, 17-290.

In an action for slander defendant offered to amend his answer by alleging that there was such a report in circulation at and before the time the words were alleged to have been spoken by defendant. *Held*, that such offer was properly refused, it not being alleged that the words were repeated without actual malice: *Ibid.*

Facts relied upon as mitigating circumstances must be pleaded as such, and not by way of defense or justification: *Ronan v. Williams*, 41-680.

Facts which might be considered by way of mitigation of damages cannot be considered if pleaded as a complete defense when they do not constitute a defense: *Ibid.*

A partial defense, or matter in mitigation, must be pleaded and proved as such, and not as a complete defense. Where the matter set up is neither by way of denial nor of confession and avoidance, a demurrer will lie: *Davenport Gas, etc., Co. v. Davenport*, 15-6; *Peck v. Parchen*, 52-46.

While, in one sense, facts pleaded in mitigation do not constitute a defense, yet, as such facts, if relied on, must be pleaded to entitle defendant to introduce evidence of them, a plea of such facts must be regarded as tendering an issue: *Mielenz v. Quasdorf*, 68-726.

Whether facts can be pleaded in mitigation for the purpose of showing that defendant had reasonable ground to believe that the facts written and spoken were true, *quære: Ibid.*

Matter in defense cannot be pleaded hypothetically, nor can a party plead to the whole cause of action, and also aver matter which shows only a partial defense: *Martin v. Swearengen*, 17–346.

Defendant may allege mitigating circumstances without confessing the speaking of the words, and it is not necessary to deny malice, or aver belief in the truth of the words spoken: *Desmond v. Brown*, 33–13.

Where mitigating circumstances are pleaded it is incumbent upon the party pleading to prove them, which must be done in his own behalf and not by cross-examination of witnesses who are not examined in chief as to the mitigating matter: *Hanners v. McClelland*, 74–318.

Prior to the enactment of this section, *held*, that proof that the words were spoken in the heat of passion or under excitement produced by immediate provocation might be shown without being specially pleaded: *McClintock v. Crick*, 4–453.

But this statutory provision does not make any change in the law as to matters of substance. The same matters only can now be pleaded in mitigation which are recognized to be such by law, independent of the Code: *Marker v. Dunn*, 68–720.

In an action for libel in charging plaintiff with being a defaulter to the government, *held*, that the action of the government subsequent to the publication of the libel, in relieving plaintiff from the consequences of default, could not be shown in evidence: *Roberts v. Miller*, 2 G. Gr., 122.

Evidence that plaintiff has made statements tending to show the truth of the words charged as slanderous is admissible: *Bower v. Deideker*, 38–418.

Under an allegation by defendant in a suit for slander for charging plaintiff with unchastity that plaintiff was reported to be unchaste at the time the words were spoken, but not alleging the truth of the charge, defendant cannot prove specific acts of unchastity: *Hanners v. McClelland*, 74–318.

Plaintiff's character: The bad character of plaintiff may be shown in mitigation of damages: *Armstrong v. Pierson*, 8–29; *Fletcher v. Burroughs*, 10–557.

Plaintiff's bad character is no bar to his right to recover; it only goes in mitigation of damages. Defendant may still be held to recompense the injured party to the extent of the trouble or expense in recovering, or disproving the unjust accusation: *Armstrong v. Pierson*, 8–29.

But defendant cannot plead either in defense or mitigation that the plaintiff has been guilty of a specific crime in no way connected with the alleged defamatory words, or the occasion on which they were used: *Fisher v. Tice*, 20–479.

Nor can defendant prove specific offenses or particular acts of dishonesty not connected with the transaction under investigation nor set up in the pleadings, nor that the plaintiff was in the habit of committing such offenses: *Fountain v. West*, 23–9.

Provocation: That slanderous words were spoken through heat of pass on, under provocation, may be shown in mitigation, but not in complete defense: *McClintock v. Crick*, 4–453.

Insanity or monomania on the subject-matter of the charge may be pleaded in defense to an action for libel: *Fisher v. Tice*, 20–479.

Intoxication: It is no defense to an action for slander that defendant was intoxicated at the time of the speaking of the slanderous words: *Reed v. Harper*, 25–87.

Justification: Where defendant, in an action for slander in speaking words imputing a crime, attempts to justify by proof of the truth of the charge, he is not required to prove the commission of the crime beyond a reasonable doubt, as would be necessary in a criminal prosecution for such crime. (Overruling *Bradley v. Kennedy*, 2 G. Gr., 231; *Forshee v. Abrams*, 2–571; *Fountain v. West*, 23–9; *Ellis v. Lindley*, 38–461; *Georgia v. Kepford*, 45–48; *Mott v. Dawson*, 46–533): *Riley v. Norton*, 65–306. And see notes to § 5813.

Matter in justification is not admissible unless justification is pleaded: *Forshee v. Abrams*, 2–571.

Where defendant pleads the truth of the words spoken by way of justification, the motive of plaintiff in prosecuting the action cannot be inquired into: *Bradley v. Kennedy*, 2 G. Gr., 231.

It is no justification that defendant believed the words to be true. To justify, he must prove they were in fact true. But the belief may be given in evidence in mitigation: *Fountain v. West*, 23–9.

INTERVENTION.

3889. By person having an interest. 2683. Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause and before the trial commences. [R., § 2930.]

By tax payer: A tax payer, as such, has not such an interest in the matter in litigation as to entitle him to intervene in a suit against his county to enforce the payment of a claim, at least in the absence of a showing that the board of supervisors, acting in bad faith, are failing properly to defend against such claim: *Cornell College v. Iowa County*, 32–520.

But where the board aid, collude and conspire with the opposite party to procure judgments against the county, a tax payer may intervene: *Greeley v. Lyon County*, 40–72; *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Where the board of supervisors refuse to set up a defense in an action against the county, a tax payer may do so by intervention: *Richards v. Supervisors*, 69–612.

By county: Where tax payers brought action against a purchaser of the poor farm from the county, for the purpose of having the sale set aside on the ground of inadequacy of price, etc., *held*, that the county might intervene in the action and join with defendants in resisting the granting of the relief: *McConnell v. Hutchinson*, 71–512.

By other parties: In a proceeding to enjoin the collection of a tax in aid of a railway, the railway company may intervene, although it be not yet entitled to the tax: *Brown v. Bryan*, 31–536.

A party claiming to be the equitable owner of a promissory note may intervene and have his rights established in a suit brought by the possessor and holder of the legal title against the owner: *Taylor v. Adair*, 22–279.

The purchaser at a foreclosure sale is subrogated to the rights of the mortgagee, and may intervene in the foreclosure suit which is still pending as to other defendants: *Dyer v. Harris*, 22–268.

A party *held* entitled to intervene under the facts of a particular case: *Young v. Tucker*, 39–596.

While a party interested in the subject-matter involved may unite with the defendant in resisting the claim of the plaintiff, he cannot ask to be substituted as the defendant to the action in place of the original defendant: *Britton v. Des Moines, O. & S. R. Co.*, 59–540.

By assignee: An assignee of a debtor under general assignment made after a levy of attachment may intervene in an attachment proceeding for the purpose of interposing against plaintiff a claim for damages growing out of a wrongful suing out of an attachment: *Dunham v. Greenbaum*, 56–303.

Notice: Where, in a proceeding to foreclose a mortgage executed to a trustee to secure bonds, the holder of a portion of the bonds intervened and an issue was raised between such bondholder and the trustee, on the trial of which evidence was introduced, it appearing that the petition of intervention was filed before default of the defendant corporation, *held*, that the objection that notice of the petition of intervention had not been served upon defendant could not be raised for the first time in the supreme court: *Sanxey v. Iowa City Glass Co.*, 63–707.

How effected: A party cannot by one petition intervene in several distinct and unconsolidated actions, nor can an agent make his principal a party to the intervention by filing the petition in his (the agent's) name: *Rosenbaum v. Adams*, 61–382.

This section empowers a person to become a party by intervention to an action or controversy between others only during the pendency of the action: *Edwards v. Cosgro*, 71–296.

Judgment conclusive against intervenor: A judgment in an action where a third party has intervened as defendant is conclusive both upon the original defendant and the intervenor: *Witter v Fisher*, 27–9.

As between different intervenors, the court may determine their respective rights as to liens. One who is adjudged not to have a lien cannot object as to the disposition made of other claims: *Phillips v. Both*, 58–499.

The intervenor cannot object to the amount of judgment rendered against defendant in the main action: *Ibid.*

Dismissal: The intervenor may dismiss his intervention at any time before final submission without any express order to that effect, and it will be without prejudice to his rights in another action: *Dalhoff v. Coffman*, 37–283.

Supplemental petition: Where the court had jurisdiction of the subject-matter and the parties, *held*, that it might render judgment in favor of an intervenor on an amended petition, setting up an award had upon an agreement of arbitration made subsequently to the filing of the original petition of intervention: *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 51–300.

3890. Decision; no delay; costs. 2684. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention. [R., § 2931.]

An intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony: *Van Gordon v. Ormsby*, 55–657.

The court may refuse to permit an intervention where the petition is presented too late, or where it is attempted to raise issues which would necessarily involve delay: *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75–722.

Where a verdict has been rendered, or the parties have agreed upon the judgment to be entered, it is too late to intervene: *Henry v. Cass County Mill, etc., Co.*, 42–33; *First Nat. Bank v. Gill*, 50–425.

3891. How effected. 2685. The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings provided for in this chapter. But if such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto. [R., § 2932.]

AMENDMENTS.

3892. Variance. 2686. No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually mislead [misled] the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just. [R., § 2972; C., '51, § 1758.]

What variance deemed material: No variance is material unless the adverse party has been misled to his prejudice: *Bower v. Deidecker*, 38–418.

A slight variance between the allegations of the petition and the proof, which cannot have misled the opposite party, is not to be deemed material: *White v. Spangler*, 68–222.

Variance in a particular case between the allegations and the proof, *held* not to be material: *Rayburn v. Central Iowa R. Co.*, 74–637.

Conformity of proof to pleadings: The rule requiring conformity of allegation and proof is not materially changed by the Code, although non-conformity may be now corrected by amendment: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

A party cannot, having sued under a provision of statute authorizing him to recover treble damages, upon an appeal from the judgment awarding such relief, support his right to actual damages on an entirely different right of recovery: *Bond v. Wabash, St. L. & P. R. Co.*, 67–713.

What sufficient on appeal: The objection that the evidence does not correspond with the allegations, if not raised in the court below, cannot be first urged upon appeal: *Iselin v. Griffith*, 62–668; *Mathes v. Cover*, 43–512; *Wilcox v. Jackson*, 57–278.

If a right to recovery is established to the amount claimed such recovery will not be interfered with on appeal on the ground that the facts upon which the amount of recovery depended differed in some respects from the facts pleaded: *Jenkins v. Barrows*, 73–438.

Malice: Under a petition alleging wilful and malicious acts of defendant as a ground of recovery, plaintiff may recover on proof of careless and negligent acts, without proof of malice, if an averment of such acts would have authorized recovery: *McCord v. High*, 24–336.

Payment: Where defendant set up an account against plaintiff by way of payment, *held*, that he could not introduce evidence of payment of money not embraced in such account, under his answer: *Hoddy v. Osborn*, 9–517.

Matters of account: A book of account showing dealings between defendant and one of the plaintiffs cannot be used as evidence in an action brought by two persons holding and owning the book jointly with another without proof that it was actually the account book of the two jointly: *Hansen v. Kirtley*, 11–565.

Where plaintiff claimed in his petition a certain sum which was not stated to be a balance due upon account, but the account was set up in items of debit and credit, leaving a balance to the amount claimed, *held*, the allegations of the petition were sustained by proof of a balance due upon the account: *Keys v. Francis*, 28–321.

Ownership of third person: Where, in an action against sureties on a sheriff's bond for negligence of the sheriff in not making a levy, it was averred that the execution defendant had property subject to execution, and that the sheriff was guilty of negligence in omitting to levy thereon, the defendant denying such averment alleged particularly the ownership respectively of the different articles of property in the execution defendant's possession, *held*, that such particular averments in the answer were necessary, and it was not error in the court to instruct the jury that such ownership should be proved as averred: *Crosby v. Hungerford*, 59–712.

Written instrument: The slightest variance in any portion of the written instrument is fatal unless it should conclusively appear that the mistake could not operate prejudicially to the party taking advantage of it: *Hight v. White*, Mor., 45.

Judgment: So *held* where the judgment sued on was described as being for $834.41 damages and costs, whereas the judgment introduced in evidence was for that amount besides costs: *Ibid.*

Where a portion of the record is set out in an action on a judgment, and on the trial other portions of the record of the proceedings in which the judgment was rendered are offered in evidence, such evidence will not constitute a variance: *Latterett v. Cook*, 1–1.

Variance as to interest: The fact that an instrument as set out in the pleadings contains no reference to interest, while the instrument introduced in evidence provides for interest at a certain rate, will not constitute a material variance: *Wilson v. King*, Mor., 106.

Breach of warranty as defense to note: In an action on a note given for fruit trees, the defense set up in the answer was that the trees were to be delivered to defendant in good condition, and that when delivered they had been frozen and damaged while in plaintiff's possession and owing to his negligence, and were worthless, and that the trees were frozen by the fault of plaintiff; *held*, that evidence of improper packing and boxing of the trees by plaintiff was admissible under the issues: *Phœnix v. Lamb*, 29–352.

Copy of written instrument: When there is a variance between the allegations

and the proof as to the character of a written instrument, and a correct copy thereof is attached to the pleading, such variance will be immaterial: *Walker v. Ayres*, Mor., 200; *Carothers v. Green*, Mor., 429.

Date: When it is impossible to determine from the instrument what the date is as shown by the writing, the question of date should be left to the jury in determining whether the evidence supports the allegations of the pleading: *Jefferson County v. Savory*, 2 G. Gr., 238.

Under a petition alleging the execution of a contract on the day it bears date, it is not competent to prove that it was executed on a different date: *McIntosh v. Lee*, 57–356.

Variance between the allegations and the proof as to the date of a note sued on and the indorsements on the back thereof, *held* not material and therefore not fatal: *Bremer County Bank v. Eastman*, 34–392.

Time and place, when material, see §§ 3908, 3909 and notes.

Sufficiency of proof: See § 3936 and notes.

3893. Not material. 2687. When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. [R., § 2973; C., '51, § 1757.]

3894. Failure of proof. 2688. When, however, the allegation of the claim or defense to which the proof is directed is unproved in its general meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. [R., § 2974.]

In a particular case, *held*, that the allegations of the pleading were not "unproved in its general meaning" within the provisions of this section, and that the variance between the pleading and the proof was not material: *Miller v. Kendig*, 55–174.

3895. Amendments allowed. 2689. The court may, on motion of either party at any time, in furtherance of justice, and on such terms as may be proper, permit such party to amend any pleadings or proceedings by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved. [R., § 2977; C., '51, § 1759.]

[The word "pleadings," in the next to the last line, is erroneously printed "pleading" in the Code.]

I. RIGHT TO AMEND.

In equity: These provisions apply in equity as well as at law: *Brink v. Morton*, 2–411.

In supreme court: This section is of a general character and applies to all courts, and is peculiarly applicable to proceedings in the supreme court. Under it the supreme court may on motion grant leave to file an amended assignment of errors: *Stanley v. Barringer*, 74–34.

The rule is to allow: So far as substantial rights are not prejudiced the court should allow amendments on proper terms rather than dismiss the action and compel the party to commence anew: *Harkins v. Edwards*, 1–296; *Seevers v. Hamilton*, 11–66.

The rule is to allow amendments; to refuse them, the exception: *Pride v. Wormwood*, 27–257; *Hinkle v. Davenport*, 38–355.

Amendments within the limits of the statute should always be allowed when substantial justice will thereby be promoted: *Dixon v. Dixon*, 19–512; *Tegler v. Shipman* 33–194; *Miller v. Perry*, 38–301.

The allowance of an amendment is within the sound judicial discretion of the court, and if it does not introduce a new cause of action and is in furtherance of justice for the purpose of remedying an error, leave should be granted: *O'Connell v. Cotter*, 44–48.

Refusal to allow defendant to amend his answer where there has been a mistrial, and application for leave is made, will be error: *Logan v. Tibbott*, 4 G. Gr., 389.

The statute and the practice under it are very liberal in allowing amendments, especially where the object is to make the pleadings conform to the evidence: *Blandon v. Glover*, 67–615.

The right to amend cannot depend upon the character of the evidence introduced under such amendment: *Mitchell v. Joyce*, 69–121.

Applications to amend should always be allowed when the tendency is to advance justice: *Wilson v. Johnson*, 1 G. Gr., 147.

Where the facts set up in an amendment were material, and such that they could not be proven without being pleaded, *held*, that it was error to strike the amendment from the files on motion: *Fairburn v. Goldsmith*, 58–339.

Discretionary: The right to amend is not an absolute and unconditional right, but is to be allowed in the sound discretion of the court in furtherance of justice: *Brockman v. Berryhill*, 16–183; *Hays v. Turner*, 23–214; *State ex rel. v. Mayor of Keokuk*, 18–388; *Phillips v. Van Shaick*, 37–229.

Review of discretion on appeal: Before the discretion exercised in granting leave to amend can be held erroneous, satisfactory evidence must be furnished of abuse thereof: *Phœnix Ins. Co. v. Dankwardt*, 47–432.

The allowance or rejection of amendments is a matter of sound judicial discretion, and the ruling thereon will only be interfered with by an appellate tribunal where substantial prejudice has resulted to the party complaining: *Fulmer v. Fulmer*, 22 230.

The supreme court will not interfere with the discretion of the trial court allowing amendments within the time fixed by statute: *Marling v. Burlington, C. R. & N. R. Co.*, 67-331.

Error without prejudice: In particular cases, *held* that refusal to allow an amendment was error without prejudice: *Allison v. Barrett*, 16-278; *State ex rel. v. Mayor of Keokuk*, 18-388; *Simmons v. Rust*, 39-241; *Whalley v. Small*, 29-288.

Leave to amend: Amendments can only be made by leave of court, except in accordance with § 3853, authorizing an amendment of the petition before the filing of an answer: *Allen v. Bidwell*, 35-86. And see note to that section.

Although a party has no right to file an amendment without leave, yet the court should not strike such amendment from the files on motion if it is one which should have been allowed if leave had been asked: *Miller v. Perry*, 38-301.

Where the transcript of the record on appeal showed that an amendment to the pleading in the court below setting out an instrument in writing was made by interlineation, *held*, that it would be presumed that it was made when objection to the introduction of the statement as evidence was interposed, and that the amendment was thus made by leave of court: *Giddings v. Giddings*, 57-297.

Waiver of objection: The fact that the opposite party answers an amended petition filed without leave constitutes a waiver of objection to such filing: *Keokuk County v. Howard*, 43-351.

Where a party makes no objection to the filing of an amendment, but takes issue, and goes to trial upon the merits, he thereby waives any error in allowing the amendment: *Foley v. McKeegan*, 4-1.

Failure to except to an order of court granting leave to amend waives objection to the filing of the amendment, and a motion cannot afterwards be sustained to strike such amendments from the files: *Scott v. Chickasaw County*, 53-47.

Where a demurrer to the petition was sustained on account of failure to set out a written notice, required by statute, and the plaintiff, without leave of court, attached to his petition a copy of such notice, and defendant, in answer, set up a want of such notice, *held* that, the issue being raised by the answer, the notice was receivable in evidence: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

The terms upon which an amendment may be made rest within the discretion of the court, and its action with respect thereto will not be reviewed unless abuse of discretion is shown: *Harrison v. Colton*, 31-164.

It is not usually proper to tax all the costs accrued to defendant as a condition of granting leave to amend his answer: *Poole v. Hintrager*, 60-180.

Re-swearing of jury: It is not error to refuse to re-swear the jury after the filing of an amendment changing the issue: *Arnold v. Arnold*, 20-273.

Where an amended petition was filed submitting a cause of action in favor of one plaintiff in place of a similar cause of action in favor of joint plaintiffs, *held*, that it was not necessary to have the jury re-sworn: *Hinkle v. Davenport*, 38-355.

Surprise; continuance: Neither party should be allowed to be prejudiced or taken by surprise: *Harkins v. Edwards*, 1-296.

The filing of an amendment which takes the opposite party by surprise, so that he cannot go to trial, may be a good ground for continuance, but the amendment cannot for that reason be stricken from the files: *Snediker v. Poorbaugh*, 29-488.

As to when an amendment will be ground for continuance, see § 3897 and notes.

Where the amendment, so far as allegations thereof are not in the original pleading, is immaterial, filing thereof will constitute no ground for continuance: *Nelson v. Hagen*, 72-705.

In trial of an appeal from a justice of the peace: In an action pending on appeal from a justice of the peace, new or amended pleadings cannot be filed as matter of right, but may be allowed upon proper terms and a showing of cause for failure to plead below: *Dunton v. Thorington*, 15-217; *Stanton v. Warrick*, 21-76; *May v. Wilson*, 21-79; *Warren v. Scott*, 32-22; *Ping v. Cockyne*, 37-211; *Adae v. Zangs*, 41-536; *Clow v. Murphy*, 52-695.

Held not error to allow an amendment correcting a mistake in the name of the plaintiff in such a case after the case was called for trial: *Adae v. Zangs*, 41-536.

An additional pleading by way of amendment to defendant's answer setting up a new defense may be allowed on such appeal: *Nettman v. Schramm*, 23-521; *Warren v. Scott*, 32-22.

But amended pleadings cannot be filed in such cases as a matter of right. Leave to file, even upon cause shown, is a matter of discretion: *Packard v. Snell*, 35-80; *Griswold v. Bowman*, 40-367

II. WITHIN WHAT TIME.

After demurrer: It is error to sustain a demurrer to a pleading which has been corrected by an amendment filed after the filing of the demurrer: *Bell v. Byerson*, 11-233.

Where a demurrer was filed before the filing of the amendment to the pleading attacked, and was decided after the filing of such amendment, it not appearing that the court considered such amendment upon passing upon the demurrer, *held*, that as the ruling upon the demurrer would have been erroneous if the amendment had been considered, it would be presumed that it was not so considered: *Johnson v. Tostevin*, 60-46.

During the trial: Amendments may be allowed in a proper case after the jury are sworn. (Overruling *Cole v. Swan*, 4 G. Gr., 32): *Williams v. Miller*, 10-344.

They may be allowed during the progress of the trial on proper terms: *Arnold v. Arnold*, 20-273.

An amendment to correct a clerical error may properly be allowed during the trial, if without prejudice: *Avery v. Wilson*, 26–573.

The allowing of an amendment to the petition after plaintiff's opening argument to the jury was finished, *held* not such an abuse of discretion as to be reversible on appeal: *Harrison v. Colton*, 31–16.

Leave granted to amend an answer after the testimony was closed, upon condition that the party pay all costs up to that time, *held* not improper in the absence of any showing of abuse of discretion: *Hall v. Doran*, 6–433.

It is not error to allow an amendment after the evidence is received, for the purpose of adapting the pleadings to the case made by the evidence: *Ellis v. Lindley*, 37–334.

An amendment may be allowed after commencement of argument to the jury, where the claim is not changed by the amendment: *Hammond v. Sioux City & P. R. Co.*, 49–450.

It is not error to allow an amendment after the conclusion of the testimony, and for the purpose of conforming the pleadings to the proof, even when such amendment changes the issue. If, after the amendment, the opposing party can make it appear that he is surprised, or is not prepared to meet the issue raised by the amendment, a continuance will be allowed at the cost of the other party. If such continuance is not applied for, the objection is waived: *Thomas v. Brooklyn*, 58–438.

Where, after the evidence had been partly introduced, defendant filed an amended answer, setting up a new defense, and plaintiff did not ask a continuance but proceeded with the trial, *held*, that he could not complain, after verdict, of the filing of the amendment: *Sheldon v. Booth*, 50–209.

After defendant has introduced his evidence and rested, he should be granted leave to file an amended and substituted answer for the purpose of conforming his answers to the evidence: *Blandon v. Glover*, 67–615.

In an action to set aside a deed as procured by fraud and undue influence, *held*, that it was not improper to allow plaintiff, after the conclusion of the evidence and during the argument by counsel, to file an amendment setting up the fact that plaintiff was of weak understanding and in financial distress, it being considered that such amendment did not materially change the issue nor set up a new cause of action or ground of relief. The question whether the amendment shall be allowed is addressed largely to the discretion of the lower court: *Clough v. Adams*, 71–17.

In an action to quiet title in which plaintiff avers ownership of the property, it is not error to allow him, after conclusion of the evidence, to amend so as to ask general relief and for possession of the property: *Wyland v. Mendel*, 78–739.

Where an amendment was allowed while the second argument was being made, *held*, that the discretionary power of the trial court in such matters would not be interfered with on appeal unless it satisfactorily appeared that the order was not in furtherance of justice: *Smith v. Howard*, 28–51.

It is error to refuse leave to plaintiff, after the close of the arguments, to file an amendment to his petition for the purpose of conforming the allegations to the proofs: *Tiffany v. Henderson*, 57–490

Where leave to amend was granted after the conclusion of the argument to the jury, and the amendment was filed after the return of verdict, it being slight and only for the purpose of conforming the petition to the proof, *held*, that it was properly allowed: *Correll v. Glasscock*, 26–83.

So *held*, also, where the allowance of the amendment was made after the decision of the court was announced, but before decree was formally entered: *Spink v. McCall*, 52–432.

So, also, where an amendment was allowed after the issue on a plea in abatement had been tried and determined: *Hunt v. Collins*, 4–56.

Held proper to allow an amendment, after verdict, to a petition so as to correct a mistake therein and make it apply to the land described in the evidence: *Ball v. Keokuk & N. W. R. Co.*, 71–306.

Amendments after verdict and before judgment are usually allowed for the purpose of conforming pleadings to the evidence, and even after judgment the petition may be so amended as to ask in the prayer other relief which has been granted in the judgment: *O'Connell v. Cotter*, 44–48.

To allow an amendment on a second trial withdrawing a denial previously made by the pleading, and thus securing for the party so amending the opening and closing, *held* not erroneous: *Bates v. Bates*, 27–110.

An amendment may be made to the petition, without terms, no prejudice resulting to the defendant thereby, pending a motion in arrest of judgment for variance: *Thomson v. Wilson*, 26–120.

Amendments filed too late: After a referee's report has been filed, a party ought not to be allowed to file an amended petition tendering a new issue, and have the case resubmitted to the referee, without showing proper excuse for the delay: *Newell v. Mahaska County Savings Bank*, 51–178.

Where leave to amend was asked just as the jury was called, for the purpose of interposing a cross-action, and was refused, *held*, that such ruling was not erroneous: *Brockman v. Berryhill*, 16–183.

Where an amendment to an answer was offered after defendant had made his argument and submitted his cause to the jury, and it did not appear but that it might have been filed sooner, *held* not error to strike it from the files: *Bays v. Herring*, 51–286.

It is not error to refuse leave to file an amendment to the original petition at the close of the trial, in which for the first time appears any cause of action against defendant: *Nelson v. Hays*, 75–671

It will not be considered error to refuse to allow an amendment after the cause has been submitted to the jury, where no facts indicating an abuse of discretion of the court are shown: *Hatfield v. Gano*, 15–177.

Where an amended answer was not filed until the day before the cause was called for trial, although it had been pending with opportunity to file it for several years, *held*, that it was not an abuse of discretion in the court

to strike from the files on motion: *McClintock v. Crick*, 4-453.

In a particular case *held* that an application to amend the petition, made at a late day, during a second trial, and such as would entitle defendant to a continuance, was properly rejected: *Phillips v. Van Schaick*, 37-229.

An amendment offered after the submission of the cause to the court, and which was not merely to make the pleading correspond to the proof, but set up a material allegation upon which defendant would have had the right to take issue, *held* too late and properly refused: *Harrington v. Christie*, 47-319.

The filing of an amendment after verdict will not enable the supreme court to consider an issue in the case which was not raised by the pleadings as they stood during the trial, and which was not considered during that time as involved in the case: *Eikenberry v. Edwards*, 67-14.

Where a party failed to file his amendment within the time granted by the court to do so, but afterwards filed it, and the opposite party moved to strike it from the files, and the party filing it asked time to make resistance to the motion by affidavit, which affidavit was not filed within the time set therefor, nor until after the argument of the motion, *held*, that the motion to strike the amendment from the files was properly sustained: *Hayward v. Goldsbury*, 63-436.

Where, in a replevin suit, plaintiff was granted leave to file a substituted pleading by a certain date and did not file it until five months afterward, and after a motion for judgment had been filed by the other party, *held*, that in view of the nature of the case the substituted petition was properly stricken from the files: *Becker v. Becker*, 50-139.

It is not error to refuse leave, after a decree is entered and before it is approved, to file an amendment to the pleadings which will present a new issue and require a re-opening of the cause: *Deere v. Nelson*, 73-186.

The right to amend exists only during the proceedings in the case, and cannot be exercised after the cause is decided and the right of the parties settled, and judgment finally entered. It may be that after judgment an amendment may be permitted to conform the pleading to the proceedings, but not one setting up new claims or new issues: *Bicklin v. Kendall*, 72-490.

It is not error to refuse the defendant leave to set up by way of amendment to his answer, after introduction of evidence, that the contract sued on by plaintiff is void because of being entered into on Sunday. Such defense being purely technical is not in furtherance of justice, it appearing by the testimony of defendant that the indebtedness actually existed. It might be otherwise with reference to the statute of limitations: *Chlem v. Kubat*, 72-291.

After appeal: It is too late to amend after a cause is pending in the appellate tribunal: *Johnson v. Chaplin*, 28-570.

After cause remanded for new trial: A party may be allowed to amend after the case has been appealed to the supreme court, and been sent back for a new trial: *Bebb v. Preston*, 3-325; *Scott v. Chickasaw County*, 53-47; *Gray v. Regan*, 37-688.

Where a demurrer is overruled in the court below, and the ruling is reversed on appeal, final judgment cannot be rendered in the supreme court; but the party whose pleading is thus assailed has a right to amend in the court below: *Ware v. Thompson*, 29-65.

After trial of an equity cause *de novo* on appeal and the filing of a *procedendo* in the court below, it is error to allow the filing of an amended pleading setting up matter which might have been set up before the trial: *Reed v. Howe*, 44-300; *Sexton v. Henderson*, 47-131.

After appeal in an equity case and trial *de novo* and remand of cause to the lower court for further action, the unsuccessful party is entitled, upon such showing of newly-discovered evidence as would entitle him to a new trial after a decree, or material facts transpiring subsequent to the decree, to have a hearing thereof and introduce amended and additional pleadings rendered necessary by such new evidence or new facts: *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Shorthill v. Ferguson*, 47-284.

Where an amendment is thus allowed, raising a new issue, the subsequent trial should be on such new issue. The other issues must be regarded as settled by the previous adjudication: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

Where the party entitled to a final decree cannot have the same in the supreme court by reason of a mistake in his pleading, as to which he and his attorney are not chargeable with negligence, the court may remand the case, although it is triable *de novo* in the supreme court, for the purpose of enabling the party to amend his petition and secure the relief to which he is entitled: *White v. Farlie*, 67-628.

Where, after a decree adjudging to a party the ownership of specific property had been affirmed in the supreme court and the case remanded, such party asked leave to amend his pleadings so as to allege that the property had been converted by the other party, and asking for the return of the property, or judgment therefor, it was held error to refuse leave to so amend: *Jones v. Clark*, 31-497.

III. WHAT AMENDMENTS ALLOWABLE.

Changing from law to equity: It is not improper to allow an amendment which changes the cause of action from one in equity to one at law: *Emmet County v. Griffin*, 73-163.

Changing name of plaintiff: Where suit was brought by an individual partner when it should have been by the firm, *held* proper to allow an amendment making the other partner a joint plaintiff: *Hodges v. Kimball*, 49-577.

And in such case, where a new action would have been barred, *held* error to refuse such amendment: *Dixon v. Dixon*, 19-512.

Where an action was brought in the name of a firm as plaintiff, and it was sought to defeat the right of recovery on the ground that the evidence showed the name of plaintiff was incorrect by reason of the word "limited" in such name being omitted, *held*, that it was not error to allow plaintiff to amend his petition by adding such word in the title of the case: *Paine v. Waterloo Gas Co.*, 69-211.

Where an order is made substituting one party for another as plaintiff in the petition, and the defendant has answered, it is too late to object to the insufficiency of the petition in that respect. In such a case there is no necessity for a new petition by the substituted plaintiff or the formal acceptance of the petition by him: *Ream v. Jack*, 44-325.

Where suit was brought in the name of a township, *held*, that, although the township had no capacity to sue, the name of the township officer entitled to the possession of the money sued for might, on motion, be substituted as plaintiff and the action proceed: *Wells v. Stomback*, 59-376.

A petition may be amended by striking out the name of a party improperly joined as plaintiff: *Butcher v. Carleton*, 11-47; *Hinkle v. Davenport*, 38-355.

It is proper to allow an amendment to the petition substituting for the name of plaintiff before her marriage her name after marriage: *Glick v. Hartman*, 10-410.

Name of defendant: It is not improper to allow an amendment substituting the true name of the party defendant when ascertained: *Arbuckle v. Bowman*, 6-70.

Joining another defendant: In an action against one party defendant, an amendment showing a cause of action against the same defendant and another, *held* allowable: *Harkins v. Edwards*, 1-296.

What may be amended: A demurrer may be amended as other pleadings: *Morrison v. Miller*, 46-84.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek County v. Cass County*, 63-244.

The statement of a relator in his application for a writ of *mandamus* may be amended: *State ex rel. v. Bailey*, 7-390.

The return of an alternative writ of *mandamus* may be amended: *State ex rel. v. Mayor of Keokuk*, 18-388.

A motion for a new trial made within three days after the rendition of the verdict, as required by statute, may be amended by matter germane thereto at any time during the term: *Sowden v. Craig*, 20-477.

Where the verification of the pleading is defective, the court may allow a new verification to be made by way of amendment: *Hughes v. Feeter*, 18-142.

The plaintiff may, after the filing of an unverified answer to his petition, amend by adding a verification to his petition, whereupon it will be necessary for defendant to file a verified answer: *Wilson v. Preston*, 15-246.

As to amending petition for injunction, see notes to § 4622.

As to the right to amend in attachment proceedings, see § 4246.

Answer to amended petition: When an amendment to the petition is made and allowed, pending or after the argument of the cause below, defendant is entitled to file an answer to the amendment: *Fulmer v. Fulmer*, 22-230.

Demurring to amended petition: Where an amended petition is filed, materially changing the cause of action, a demurrer thereto may be interposed without withdrawing the answer already on file to the original petition: *Keller v. Bare*, 62-468.

Amendments relating back: Where the amendment set up a distinct cause of action, which when pleaded was barred by the statute of limitations, *held*, that it would not be considered as relating back to the date of the original petition, so as to avoid the bar of the statute: *Van de Haar v. Van Domselaer*, 56-671.

What matter may be set up by amendment: It may be proper under certain circumstances to allow defendant, after the introduction of evidence has commenced, to amend his answer so as to set up the bar of the statute of limitations: *Phœnix Ins. Co. v. Dankwardt*, 47-432.

It is not error to allow an amendment to a petition so as to increase the amount claimed: *McDonald v. Chicago & N. W. R. Co.*, 26-124, 138.

An amendment may properly be made to the petition adding another count seeking to recover the same indebtedness but in another form. The original notice of the claim for the indebtedness will be deemed to cover the indebtedness in whatever form it may be set up in the amendment: *Kimball v. Bryan*, 56-632.

An amended petition should refer to matters existing previously to the commencement of the action. Those matters arising subsequently thereto should be set up in a supplemental petition (§ 3938): *Seevers v. Hamilton*, 11-66.

It is not proper to allow an amendment to the petition on a promissory note for the purpose of setting up a cause of action on a mechanic's lien, as these two actions cannot be joined: *Sweetzer v. Harwick*, 67-488.

Where an amendment in the nature of a cross-bill was offered by defendant setting up want of authority for appearance for him, and attacking the decree upon such ground, it appearing that defendant had been duly and legally served with notice of the pendency of the action, *held*, that it was not error to reject the amendment: *Aultman v. McLean*, 27-129.

That a cause of action barred by the statute of limitation cannot be set up by amendment, see notes to § 3737.

Second amendment: Where a party has once amended and asks to do so again, he must, by tendering his amended pleading, show that the change he offers to make is a substantial one: *Harvey v. Spaulding*, 7-423.

Amendment must be substantial: If it appears that the court has held the pleading bad for a certain cause, and the amendment does not cover it, such amendment may be rejected; but if it covers the objection, any defect in it must be reached by motion or demurrer as in case of the original pleading: *Hamill v. Phenicie*, 9-525.

The court, in the exercise of its discretion, must see that the amendment is substantial, and not a mere repetition of the former pleading: *Harvey v. Spaulding*, 7-423.

If it is a mere repetition of the former pleading the amendment may be rejected or

stricken from the files upon motion: *Mayer v. Woodbury*, 14-57; *Robinson v. Erickson*, 25-85; *Phenix Ins. Co. v. Findley*, 59-591.

It is not allowable, after the pleading has been held bad upon demurrer, to file another which does not differ in substance but only in phraseology, and such amendment may be stricken out on motion: *Epley v. Ely*, 68-70.

Construction: As to how amendments are to be construed with reference to the original pleading, see § 3898 and notes.

3896. Errors disregarded. 2690. The court must, in every stage of an action, disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. [R., § 2978.]

A defect in the pleadings will not be regarded where no prejudice could have been wrought thereby: *Coates v. Davenport*, 9-227; *Doniphan v. Street*, 17-317.

Section applied: *Smith v. Milburn*, 17-30; *Kibby v. Harsh*, 61-196.

An error will not be regarded on appeal unless the ruling is upon a material point: See § 4043.

3897. Continuance. 2691. When either party shall amend any pleading or proceeding, the case shall not be continued in consequence thereof, unless the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment. But if the court is thus satisfied, a continuance may be granted to some day in the same term, or the next term of said court. [R., § 2979; C., '51, § 1756.]

A continuance should not be granted on account of the filing of an amendment by the opposite party unless some showing of cause therefor is made: *State v. Tieman*, 39-474.

An amendment of the petition in an action for personal injuries, by which the amount of damage claimed was increased and the description of the injury slightly changed, *held* not sufficient to entitle defendant to a continuance: *Garlick v. Pella*, 53-646.

Where a person has not asked a continuance upon the filling of an amendment by the opposite party he cannot afterwards complain that no time was given after filing of the amendment before the final decree: *Wyland v. Mendel*, 78-739.

3898. How amendment made. 2692. All matters of supplement or amendment, whether of addition or subtraction, shall not be made by erasure or interlineation of the original, or by addition thereto, but upon a separate paper which shall be filed and constitute, with the original, but one pleading. But if it be stated in such paper that it is a substitute for the former pleading intended to be amended, in that case, it shall be deemed such substitute, but the pleading superseded by the substitute shall not be withdrawn from the files. [R., § 2983.]

To be construed with original: The original pleading and the amendment are to be construed together: *Burrows v. Frank*, 67-502.

They are to be construed so as to be consistent if possible, rather than inconsistent and conflicting: *Pharo v. Johnson*, 15-560.

Not deemed a substitute: An amended pleading which is not expressly made a substitute for a preceding one will be construed with the original as in addition thereto: *Kostendader v. Pierce*, 37-645; *State v. Finn*, 45-148.

A pleading which is filed as an amendment to a former pleading will not be treated as a substitute, but both will constitute one pleading and be construed together: *Cooley v. Brown*, 35-475.

Where the amendment did not withdraw a part of the original petition relating to a tender, *held*, that it was to be construed in connection therewith: *Rump v. Schwartz*, 56-611.

The prayer for relief in the original petition is applicable to an amendment. The amendment and the original constitute but one plea: *Montgomery v. Shockey*, 37-107.

An answer filed after the amendment is to be regarded as referring to the allegations of the petition as it stands after amendment. The original and amendment together constitute the pleading: *Flint v. Gauer*, 66-696.

An amended petition, substantially the same as the original, requires no further answer than the one filed to the original petition: *Brown v. Ellis*, 26-85.

Not a new action: Where an amended petition did not set up any different claim from that first presented, *held*, that the claim therein set forth was not to be regarded as an action brought after the passage of an act which was enacted subsequently to the original petition and prior to the amendment: *Mather v. Butler County*, 16-59.

When to be deemed a substitute: So far as an amended answer covers the same ground as the original, it is to be deemed as a substitute for it, even though embracing additional matters: *White v. Hampton*, 9-181.

An answer headed "amended answer," setting up substantially the same matters as the pleading to which it was an amendment, *held* to be a substitute and not an amendment to such pleading: *Bates v. Kemp*, 12-99.

Where an amended answer and not an amendment to the answer is filed, it is to be deemed a substitute for the original, and the issues are to be ascertained from such amended answer alone: *Lauman v. Des Moines County*, 29-310.

Original pleading deemed admission: The pleading to which a substitute is filed still remains as a solemn admission of the facts therein stated by the party pleading them: *Mulligan v. Illinois Cent. R. Co.*, 36-181, 189.

INTERROGATORIES.

3899. Annexed to pleading. 2693. Either party may annex to his petition, answer, or reply, written interrogatories to any one or more of the adverse parties concerning any of the material matters in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering. [R., § 2985.]

A method of procuring the testimony of the opposite party is thus provided in addition to other ordinary methods, and an interrogatory tending to elicit evidence pertinent and material to the issue ought not to be stricken out on motion: *Greene v. Woods*, 34-573.

Where the interrogatories ask for matters which are immaterial, the refusal of the court to require them to be answered will not constitute error: *Mason v. Green*, 32-596.

It is not error to refuse to make an order requiring answers to interrogatories attached to a pleading when such interrogatories are frivolous and unimportant. Even if one of them is proper but not particularized, it is not error to refuse an order requiring them all to be answered: *Hogaboom v. Price*, 53-703.

Neither the interrogatories nor the answers thereto will, on demurrer, aid a defective pleading: *Lane v. Krekle*, 22-399.

3900. Answers. 2694. The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition. [R., § 2986.]

Section applied: *Gwyer v. Figgins*, 37-517.

3901. Time of responding. 2695. The interrogatories shall be answered at the same time the pleading to which they are annexed is answered or replied to, unless they are excepted to by the adverse party; in which event the court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered, and within what time such answer shall be made. [R., § 2987.]

Where the interrogatories are attached to an answer which requires no reply, the court should be asked to fix a time within which they should be answered, before moving to dismiss the action for want of such answer: *Hogaboom v. Price*, 53-703; *Garvin v. Cannon*, 53-716.

3902. Not to cause delay. 2696. The trial of an action by ordinary proceedings, shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in the court at the trial, so that he may be orally examined; nor in case of absence, unless an affidavit be filed showing the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause. [R., § 2988.]

Where interrogatories were filed by the defendant just before going to trial, although the petition had been on file for several months, *held*, that they were, on motion, properly stricken from the files: *Jones v. Berryhill*, 25-289.

Where there was no affidavit made and the cause was reached for trial, *held*, that the counts containing the interrogatories were properly stricken out: *Courtright v. Deeds*, 37-503, 516.

3903. Particularity required. 2697. The party, in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge, and what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge. [R., § 2989.]

3904. How verified. 2698. The answer to the interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made of his own personal knowledge are true, and those made from the information of others he believes to be true. [R., § 2990.]

Where there was no verification to the answers to the interrogatories except the usual certificate of the notary, "subscribed and sworn to before me," *held*, that the answer was not sufficiently verified: *Averill v. Boyles*, 52-672.

3905. Failure to answer. 2699. Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answer thereto, if truly made from such knowledge, will sustain the claim of defense, or any part thereof, and the opposite party shall fail to answer therein within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly. [R., § 2991.]

This section establishes a rule of evidence, and the interrogatories unanswered and the affidavit constitute proof of the claim or defense, and on trial judgment should be given accordingly; but they do not entitle the party to judgment without trial, and, after the filing of the affidavit, the opposite party may dismiss: *Perry v. Heighton*, 26-451.

Although the failure to reply to interrogatories thus propounded entitles the opposite party to judgment, he cannot avail himself of such failure by first making his objection on appeal: *Sully v. Wilson*, 44-394.

Where the interrogatories were not answered, although the affidavit as above referred to was filed, but the party did not ask for judgment accordingly, *held*, that failure of the court to thus order a judgment in his favor could not be taken advantage of on appeal: *Garvin v. Cannon*, 53-716.

To entitle a party to have his claim or defense taken as true on account of failure of the opposite party to answer interrogatories attached to his pleading, the affidavit of the party that he believes that the facts inquired about are within the knowledge of the opposite party, and that the answers of such party will sustain his claim or defense, should, if the facts are claimed as applicable to a part of the claim or defense, state what particular portion would be sustained by such answers: *Hogaboom v. Price*, 53-703.

3906. Answer compelled. 2700. The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time allowed therefor, dismiss the petition, or quash the answer of the party so failing. [R., § 2992.]

GENERAL PRINCIPLES OF PLEADING.

3907. Denial as to time, sum, quantity, or place. 2701. In all cases in which a denial is made by answer or reply, concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity, or place, and if not, what time, sum, quantity, or place, he admits. [R., § 2901.]

3908. Time, when material; how stated. 2702. When time is material, the day, month, and year, or when there is a continued act, its duration must be alleged. When time is not material, it need not be stated, and if stated, need not be proved. [R., § 2955.]

In an action for trespass the time when the trespass was committed is not ordinarily material and need not be proven as alleged, plaintiff being at liberty to prove the trespass at any time before the commencement of the action, either before or after the day laid in the declaration: *Terpenning v. Gallup*, 8-74.

Where an answer in an action to foreclose a tax deed alleged redemption on a certain date, and plaintiff denied the making of redemption on that or any other date, *held*, that it was not a variance to introduce a certificate of redemption bearing a different date from that stated in the answer: *Byington v. Bradley*, 11-78.

3909. Allegation as to place. 2703. It shall be necessary to allege a place, only when it forms a part of the substance of the issue. [R., § 2957.]

In an action to recover damages for the illegal sale of liquor to plaintiff's husband, the description of the property occupied by defendant in making such sale is not material unless it is sought to charge the owner of such property with the lien of the judgment recovered: *Gustafson v. Wind*, 62-281.

3910. Evidence under denial. 2704. Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove. [R., § 2944.]

See notes to § 3861.

3911. Counts and divisions numbered. 2705. The counts of the petition must be consecutively numbered as such, and so must the divisions of the answer as such, and of the reply as such. [R., § 2902.]

3912. Correction of defect. 2706. If any pleading do not conform to the foregoing requirements as to form, divisions, or numbering, or the distinct or separate statements of its cause of action or defense, the court may, on its own motion, or that of the adverse party, order the same to be corrected on such terms as it may impose. [R., § 2903.]

3913. Sham defenses. 2707. Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may, in its discretion, impose. [R., § 2861.]

3914. Statute; how plead. 2708. In pleading a statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. [R., § 2926.]

A foreign statute must be pleaded, and it is not sufficient merely to refer to it by its title or date of approval, nor by stating what, in the judgment of the pleader, are its general requirements: *Carey v. Cincinnati & C. R. Co.*, 5-357.

3915. Rules of court. 2709. Every court of this state shall take judicial notice of the rules of any other court thereof, if published as directed by law. [R., § 2927.]

3916. Inconsistent defenses. 2710. Inconsistent defenses may be stated in the same answer or reply, and when a verification is required, it must be to the effect that the party believes one or the other to be true, but cannot determine which. [R., § 2937.]

Inconsistent defenses may be stated in the same answer: *Morgan v. Hawkeye Ins. Co.*, 37-359.

The rule of the common law as modified by the statute of 5th Anne was that matter in confession and avoidance might be pleaded with the general denial and did not take away the necessity of plaintiff first making out his case: *Grash v. Sater*, 6-301.

A plea in confession and avoidance does not destroy the force and effect of a general denial; the burden of proof still being upon plaintiff: *Quigley v. Merritt*, 11-147.

An admission in the nature of a confession and avoidance does not admit matters formally denied in other counts of the answer: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

Pleading the statute of limitations as to an adverse title does not constitute an admission of want of title in the party so pleading: *Tabler v. Callanan*, 49-362.

Notwithstanding the statutory provision allowing inconsistent defenses, a denial and a confession and avoidance of the affirmative allegations of an answer not constituting a counter-claim cannot be set up in the reply. Such a denial not being proper in a reply will be disregarded, and the allegation of the answer will be deemed admitted by the reply in confession and avoidance: *Meadows v. Hawkeye Ins. Co.*, 62-387.

Allegations in the reply by way of avoidance must in effect confess that but for the matter pleaded in avoidance the defense to which it applies would entitle the party pleading the same to succeed. But this confession need not be made in terms; it may be made by implication. It is sufficient if it give color to the alleged right of the adverse party. Plaintiff may thus seek to avoid the allegations of defendant's answer without waiving the denial thereof implied by law. He has the right to thus rely upon inconsistent defenses to the allegations of the answer: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75-694.

A defendant cannot, while denying a fact essential to plaintiff's recovery, base a claim for affirmative relief on the same fact: *Baird v. Morford*, 29-531.

Although a party may plead inconsistent defenses, he cannot claim property under two inconsistent rights at the same time: *Crawford v. Nolan*, 70-97.

An admission in one defense made necessary by the nature of that defense is not to be construed as affecting a different defense inconsistent with such admission: *Barr v. Hack*, 46-308; *Heinrichs v. Terrell*, 65-25.

Defendant should have the full benefit of each defense pleaded. Therefore, in an action of slander, where defendant pleaded general denial and justification, *held*, that the admission in the plea of justification could not avail plaintiff upon trial of the issue raised by the general denial: *Barr v. Hack*, 46-308; *Herzman v. Oberfelder*, 54-83.

3917. Pleading; exceptions. 2711. Whenever a party claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading. [R., § 2940.]

Where a statute gives a new right or privilege under certain circumstances, conditions or qualifications, the party claiming such right in his petition or setting it up in his defense must bring himself within the requirements of the statute: *Helfenstein v. Cave*, 6-374.

An exemption or exception must be pleaded: *First Nat. Bank v. Baker*, 57-197.

3918. What deemed admitted. 2712. Every material allegation in a pleading not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true. But the allegations of the answer, not relating to a counter-claim, and of the reply, are to be deemed controverted. But an allegation of value, or amount of damage, shall not be deemed true by a failure to controvert it. A party desiring to admit any allegations which by this section would be deemed controverted, may, at any time, file a written admission thereof. [R., § 2917; C., '51, § 1742.]

Material allegations in the petition not denied in the answer are to be taken as true: *Bolander v. Atwell*, 14-35; *Singer Mfg. Co. v. Billings*, 39-347.

Allegations contained in an amendment not contradicted by any subsequent pleading are to be deemed true: *Clough v. Adams*, 71-17.

Facts well pleaded: It is only facts which are well pleaded that are admitted by failure to deny them. Legal conclusions stated in the pleading are not thus admitted: *Alston v. Wilson*, 44-130.

Denial of a conclusion from the facts stated in the petition will not amount to a denial of the facts themselves: *Bensley v. McMillan*, 49-517.

Even where the pleading is to be taken as true it is only to the extent of admitting facts and not the correctness of conclusions drawn from them by the pleader as to matter of law: *Twogood v. Coopers*, 9-415.

Allegations which are inconsistent with the facts pleaded are not deemed admitted by failure to deny: *Scofield v. McDowell*, 47-129.

Partial denial: Where the facts stated in the petition tended to show that defendant was liable either as common carrier or as warehouseman, *held*, that the fact that defendant's answer denied liability as warehouseman did not tend to show his liability as common carrier: *Porter v. Chicago & N. W. R. Co.*, 20-73.

Where the answer put in issue only the third count of the petition, which was for the attorney fee provided for in the note sued on in the first and second counts, *held*, that judgment was properly rendered on the first and second counts as being a part of the claim not controverted: *Musser v. Crum*, 48-52.

Under the pleadings of a particular case, *held*, that the answer put in issue only certain items of the account, and that as to the balance plaintiff should have judgment: *Rodefer v. Myers*, 56-227.

Default not necessary: Where the defendant answered, but did not controvert the substantial portion of the petition, *held*, that plaintiff was entitled to a judgment when the cause came on for trial, and that there was no need of a formal default being entered as for want of an answer, and that defendant would not, in such case, be entitled to a jury: *Mann v. Howe*, 9-546.

Evidence not required: Where the material facts upon which plaintiff's right to recover depends are admitted or uncontroverted, it is not necessary for him to introduce any evidence whatever: *Bloomer v. Glendy*, 70-757.

Denial coupled with confession and avoidance: An admission in an answer in the nature of confession and avoidance does not operate to admit matters formally denied in the other counts of the answer: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

Pleading the statute of limitations as to an adverse title does not constitute an admission of want of title in the party so pleading: *Tabler v. Callanan*, 49-362.

Denial presumed: After a trial on the merits where justice appears to have been done, and it does not appear to have been claimed during the trial that an allegation of a pleading was not put in issue, no advantage can be taken of the want of denial thereof: *Clay v. Alcock*, 23-591.

After trial upon the merits without objection to the pleadings, the judgment will not be reversed because a replication had not been filed when it was required to prevent the allegations of the answer being deemed admitted. It will be considered that the failure to file such replication was waived: *Sullivan v. Finn*, 4 G. Gr., 544; *Arbuckle v. Bowman*, 6-70.

Where a plaintiff proceeds with the trial, treating his pleading as denied, even though not formally denied, he cannot object after verdict that his pleading should have been taken as true: *Hendrie v. Rippey*, 9-351.

Where in an equity case it did not appear that any answer to a cross-petition had been filed in the court below, but the parties there and the court had proceeded as though such answer had been filed, and the allegations in the cross-petition were in issue, *held*, that it would be presumed that an answer to the cross-petition had been filed at the proper time: *Hervey v. Savery*, 48-313.

Allegations of answer: The allegations of an answer not relating to a counter-claim are deemed controverted without reply: *Davis v. Payne*, 45-194.

An allegation that a written contract under which plaintiff seeks to recover has been altered since its execution is an allegation of new

matter which does not cast upon plaintiff the obligation of explaining such alteration until evidence in support of such allegation is introduced by defendant: *Wing v. Stewart*, 68–13.

The allegations of an answer, not constituting a counter-claim, are deemed denied by operation of law, and plaintiff cannot be compelled to file a pleading admitting or confessing and avoiding the same. If defendant introduces no evidence supporting his allegations they are to be deemed unproved: *Cassidy v. Caton*, 47–22.

Where plaintiff replied to an affirmative defense in the answer by way of confession and avoidance, *held*, that the affirmative defense must be considered as admitted by the pleadings: *Clapp v. Cunningham*, 50–307.

No reply is necessary in order to controvert affirmative matter in the answer not amounting to a counter-claim, and if a reply is filed containing both a denial of such matter and also a confession and avoidance thereof, the denial will be disregarded and the affirmative matter in the answer will be deemed admitted: *Meadows v. Hawkeye Ins. Co.*, 62–387.

But plaintiff may set up in his reply matter in avoidance, impliedly confessing the truth of the allegations of the answer, without waiving the denial implied by law. He has a right to thus rely upon inconsistent defenses in his reply: *Day v. Mill-Owners' Mut. F. Ins. Co.*, 75–694.

Under the Revision it was not necessary that a reply be filed in order to enable plaintiff to prove matter in confession and avoidance of affirmative defenses in the answer, but if he filed, as he was authorized to do, a formal admission of affirmative matter set up in the answer, he could not prove matter in avoidance without having given notice of his intention to do so in the admission: *Viele v. Germania Ins. Co.*, 26–9, 42.

Under the provisions of the Code of '51 affirmative allegations of an answer not denied in the reply were deemed admitted: *Arbuckle v. Bowman*, 6–70; *Alexander v. Doran*, 13–283.

Further as to when reply is necessary, see § 3871 and notes.

Allegations of value or amount of damages are not deemed true by reason of failure to deny them: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38–377, 382; *Yoe v. Nichols*, 51–330.

An admission of the facts alleged in the petition will not constitute an admission of the indebtedness to the amount claimed or to any amount: *Hallowell v. Fawcett*, 30–491.

Allegations of value of services rendered by the plaintiff for which recovery is sought in the petition are not admitted by failure to controvert them: *Haldane v. Arcadia*, 70–462.

A party failing to deny an allegation of value is not estopped from offering evidence as to such value, nor is a party precluded from proving the true value where, by mistake, he has alleged it incorrectly: *Reilly v. Ringland*, 39–106.

Where plaintiff claimed a *quantum meruit* for services, and defendant admitted the services but pleaded a special contract and payment thereunder, *held*, that the finding that there was no special contract did not authorize judgment for plaintiff for the amount claimed: *Templin v. Henkle*, 50–95.

Where a reply controverting a counter-claim was stricken from the files, *held*, that it was error to render judgment for defendant for costs without evidence showing that the counter-claim equaled or exceeded the plaintiff's demand: *Yoe v. Nichols*, 51–330.

A denial of an indebtedness to the plaintiff in any sum whatever raises no issue: *McIntosh v. Lee*, 57–356.

3919. Bill of particulars. 2713. If a pleading is founded on an account, a bill of particulars thereof must be incorporated into or attached to such pleading, verified as the pleading, and deemed a portion thereof, subject to be made more specific on motion, and shall define and limit the proof, but may be amended as other pleadings. The items of such bill of particulars shall be consecutively numbered. [R., § 2918.]

The provisions of this section are applicable in cases before justices of the peace: *McKenney v. Hopkins*, 20–495.

Failure to attach a copy of an account on which a pleading is founded is ground for a demurrer: See § 3854.

In an action founded upon tort plaintiff cannot be required to attach a bill of particulars of the items included in his claim for damages, although his petition may, in a proper case, be required to be made more specific in this respect (under § 3927): *McDonald v. Barnhill*, 58–669.

3920. Account deemed true, when. 16 G. A., ch. 36, § 1. In all actions for money due upon an open account when the defendant has been personally served with the original notice therein and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant makes default or fails to controvert or deny the same or any of the items thereof, by pleading duly verified, the account, or so much thereof as is not so controverted or denied, shall be taken as true and admitted.

To make this provision applicable the action must be for items of account properly provable by books of original entries: *Lyman v. Bechtel*, 55–437.

A claim for attorney's fees and various items of money advanced by an attorney is properly a matter of account, and if the petition to which a bill of particulars is attached is duly verified judgment may be rendered on default without further evidence: *Eaton v. Peavy*, 75-740.

3921. Judgment, how pleaded. 2714. In pleading a judgment, or the determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. [R., § 2921.]

3922. Conditions precedent. 2715. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part. [R., § 2922.]

3923. Action in representative capacity. 2716. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation a plaintiff may aver such capacity or relation in the same general way. [R., § 2923.]

Where plaintiff or defendant is a corporation or partnership, the averment of corporate or partnership capacity should be made, and a failure to do so will be ground of demurrer: *Sweet v. Ervin*, 54-101.

An action in a name which is not that of a person, partnership or corporation cannot be maintained: *Steamboat Pembinaw v. Wilson*, 11-479.

Where the action is not against a natural person the petition should in some manner show that as an artificial person the defendant named can sue and be sued. Therefore, *held*, that in an action of trespass against a railroad company, the corporate capacity of defendant not having been alleged, the petition was subject to demurrer: *Byington v. Mississippi & M. R. Co.*, 11-502.

Where a city has been incorporated by special charter its corporate existence need not be averred, but judicial notice may be taken thereof. But when incorporated under general incorporation acts its corporate existence must be averred, and, when properly put in issue, proved: *Hard v. Decorah*, 43-313.

Where a school district sues it need not set out the manner in which it was formed. The presumption is that it was constituted properly: *Ft. Dodge School Dist. v. District T'p*, 15-434.

After the question of organization and capacity of a corporation plaintiff to sue has been submitted to the court in a collateral proceeding by agreement, and a finding had thereon, without objection, it is too late to question the right of the defendant to raise the question in such proceeding: *Ft. Dodge School Dist. v. District T'p*, 17-85.

The fact that defendant is described in the petition as a city, and its style is averred to be "the city of," etc., is a sufficient averment of the fact that it is a municipal corporation: *Stier v. Oskaloosa*, 41-353.

3924. Facts must be stated. 2717. If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated. [R., § 2925.]

Where a general allegation of corporate capacity is made, a bare denial thereof will not put in issue such capacity, and it will be deemed admitted: *Stier v. Oskaloosa*, 41-353.

But *held* that an answer denying "that defendant is or ever was a corporation duly organized . . . under the laws of . . . or under the laws of any other state or government," sufficiently put in issue the fact of corporate existence: *Folsom v. Star Union Line*, 54-490.

A mere denial that plaintiff suing in the capacity of a receiver had duly qualified, *held* not sufficient to put his official capacity in issue, but that the facts relied upon should have been stated: *Goodhue v. Daniels*, 54-19.

A general denial does not put in issue the fact of administratorship, where it is generally averred: *Mayes v. Turley*, 60-407.

A general denial does not put in issue the existence of a corporation and its capacity to sue: *Blackshire v. Iowa Homestead Co.*, 39-624; nor the validity of the appointment of a guardian: *Gates v. Carpenter*, 43-152; nor the power of a bank to purchase a note: *Commercial Bank v. King*, 47-64.

Where plaintiff alleged a consolidation on the part of a corporation defendant, *held*, that such allegation was not in the statutory provision above referred to, and was put in issue by a general denial: *Koons v. Chicago & N. W. R. Co.*, 23-493.

The objection that the petition does not describe the defendant as a corporation cannot be raised for the first time by motion in arrest of judgment: *Andre v. Chicago & N. W. R. Co.*, 30-107.

Where an action is brought by or against a corporation or partnership in the name in which it is designated in a written instrument

on which the action is based, no allegation of corporate or partnership capacity need be made: See § 3763 and notes.

Where plaintiff, in an action to enjoin the maintenance of a nuisance for the sale of intoxicating liquor, avers that he is a citizen of the county for the purpose of showing himself entitled to bring such action, that fact is not put in issue by a general denial, but only by specially pleading the facts showing such allegation not to be true: *Littleton v. Harris*, 73–167; *Shear v. Green*, 73–688.

In such a case defendant does not raise an issue as to plaintiff's citizenship in the county by averment of want of knowledge or information sufficient to form a belief with reference thereto: *Craig v. Hasselman*, 74–538.

3925. Matters specially pleaded. 2718. Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person as an escrow, or showing matter of justification, excuse, discharge, or release, and any defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded. [R., § 2942.]

Matter in avoidance, such as that defendant is not liable by reason of judgment having been rendered against him for an indebtedness in a garnishment proceeding, must be specially pleaded and cannot be shown under a general denial: *Walters v. Washington Ins. Co.*, 1–404.

Want of consideration: Where plaintiff sues upon a written contract it is incumbent upon defendant to aver want of consideration if he relies thereon: *University of Des Moines v. Livingston*, 57–307.

If defendant relies as a defense to an action for services performed upon an agreement that they should be rendered without compensation, he should specially plead that fact, and evidence thereof will be irrelevant under a general denial: *Scott v. Morse*, 54–732.

Where the answer denied that there was any consideration for a note sued on, without stating the facts upon which this allegation was based, *held*, by part of the court, that it was not demurrable, but could be attacked, if at all, only by motion to make more specific. But the other members of the court held that as it was stated that the note was a gift and the petition showed that expenses had been incurred by reason thereof, the facts stated constituted no defense, and the answer might be assailed by demurrer: *Simpson Centenary College v. Bryan*, 50–293.

That consideration is presumed in case of a written contract, see § 3290 and notes.

Exception: Where an exception exists which constitutes a defense, such exception should be pleaded by defendant, and any matter available as against such exception should be pleaded by way of reply: *McCormick v. Holbrook*, 22–487.

In case of trespass: If the defense is that the property did not belong to plaintiff, but belonged to defendant, the answer must set up this fact before defendant can be allowed to prove it on the trial: *Dyson v. Ream*, 9–51.

Defendant cannot excuse a trespass by proving that the right of possession or title is in some third person, without pleading such fact as a general defense: *Patterson v. Clark*, 20–429.

Matter in estoppel must be specially pleaded: *Ransom v. Stanberry*, 22–334; *Phillips v. Van Schaick*, 37–229; *Folsom v. Star Union Line*, 54–490.

The facts constituting an estoppel must be pleaded, and when this has been done a demurrer to the pleading will raise the sufficiency of the facts to constitute such estoppel: *Crawford v. Nolan*, 70–97.

The statute of limitations must be specially pleaded: See notes to § 3734.

Other defenses: The defense that a contract is void because entered into on Sunday must be specially pleaded: *Riech v. Bolch*, 68–526.

Any defense, such as that the instrument sued on is not stamped as required by the United States revenue laws, must be specially pleaded: *Glidden v. Higbee*, 31–379.

Fraud relied upon as a defense must be specially pleaded: *Root v. Schaffner*, 39–375.

An allegation in an answer to a petition on a note of a fact showing that plaintiff is not a *bona fide* holder thereof, and that it was obtained through fraud and without consideration, constitutes a sufficient traverse of the petition, and, if notice of fraud or of want of consideration is established, it will defeat recovery, although plaintiff prove that he became a holder of the note for value before maturity: *Moore v. Moore*, 39–461.

Where the discharge of a contract is relied upon as a defense, such discharge must be specially pleaded. Therefore, *held*, that in an action on a note for default in payment of interest an admission of the execution of the note coupled with a denial of all other allegations of the petition would not raise an issue as to whether there was such default, the fact of the payment of interest not being alleged by defendant: *Junge v. Bowman*, 72–648.

As to what may be proved under general denial, without any special defense being pleaded, see notes to § 3861.

3926. Irrelevant and redundant matter. 2719. The court may, on motion of any person aggrieved thereby, cause irrelevant or redundant matter to be stricken from any pleadings, at the cost of any party whose pleading contains them. [R., § 2946; C., '51, § 1753.]

What deemed irrelevant or redundant: It is often difficult to say just when the rule excluding redundant or irrelevant matter is infringed upon, but in a case arising

upon the equity side of the court the violation of the rule must be clear in order to justify the court in striking matter from the pleading which is explanatory of the nature of the defense interposed therein: *Childs v. Griswold*, 15-438.

Matter not pertinent to the cause of action upon which the petition is based, but which may be regarded as introductory or an inducement to the facts relied upon by the plaintiff, need not be stricken out upon motion: *Bellows v. District T'p*, 70-320.

Irrelevant or immaterial matter is anything stated in the pleading which, if established on the trial, would not entitle the party to or aid him in obtaining the relief demanded or sustaining the defense pleaded: *Johns v. Pattee*, 55-665.

A paragraph in an answer, setting up matter which does not constitute a defense, may be stricken out on motion: *Evans v. Robbins*, 29-472.

Certain matter in a pleading as to which no evidence could properly be admitted, even if issue had been taken thereon, *held* properly stricken out on motion: *Davis v. Chicago & N. W. R. Co.*, 46-389.

Averments in an answer and amendment thereto as to title of defendant to personal property sought to be recovered by plaintiff, *held* immaterial, as plaintiff could only recover by showing title in himself: *Whitaker v. Sigler*, 44-419.

An allegation in a petition of a fact, the existence of which cannot, as it appears from the allegations of the petition, be actually known, will be immaterial: *Carl v. Granger Coal Co.*, 69-519.

When to be stricken out; discretion: A mere averment of law, if so voluminous as to incumber the record, may be stricken out on motion, but to refuse to do so is not error: *Abbott v. Striblen*, 6-191.

Refusal to strike from the pleading redundant matter being within the discretion of the court is not reversible upon appeal: *Buel v. Lake*, 8-551.

It is not error to overrule a motion to strike out redundant matter, where it does not appear that the opposite party is aggrieved thereby: *Cate v. Gilman*, 41-530.

Statements of facts which could be proved under denials already made in the answer and which are inconsistent with the allegations of the petition should not be stricken from the answer on motion: *Ibid.*

Any party required to answer a pleading containing irrelevant matter is aggrieved thereby and may have it stricken out on motion: *Johns v. Pattee*, 55-665.

While it is the duty of the court to expunge redundant or irrelevant matter upon motion, such motion should not be entertained when facts and not the evidence of facts are stated in such a manner as not to prejudice the opposite party: *Childs v. Griswold*, 15-438.

Motion to strike: A party may properly move to strike irrelevant matter from the pleading in order to ascertain beforehand whether or not the court deems it irrelevant and whether the court will permit evidence to be introduced in support thereof, but he does not, by proceeding to trial after his motion to strike has been overruled, waive any objection to the relevancy of such allegation: *Specht v. Spangenberg*, 70-488.

Where the whole statement of a cause of action is irrelevant or redundant matter a demurrer would be proper, but if the petition is good in part and only objectionable in containing whole statements of irrelevant or redundant matter which cannot be made the subject of a material issue, such matter should be purged by motion: *Bolinger v. Henderson*, 23-165; *Douglass v. Bishop*, 27-214.

Error without prejudice: Where, on motion, certain portions of the answer were stricken out, but the issue sought to be raised by such portions was sufficiently raised by the portions not stricken out, *held*, that the granting of the motion, if error, was without prejudice: *Cooper v. McKee*, 49-286.

Where the party complaining of the overruling of a motion to strike out a portion of the pleading would not have been benefited by the granting of his motion, the error, if any, will be deemed to be error without prejudice: *Holt v. Brown*, 63-319.

Need not be proven: Where the fact pleaded is immaterial it need not be proven: *Billingham v. Bryan*, 10-317.

Surplusage: Where one is sued *in autre droit*, and it appears from the allegations of the petition that defendant is liable in his own right, the words added to defendant's name to indicate the right in which he is sued will be treated as surplusage or *descriptio personæ*: *Laverty v. Woodward*, 16-1.

An irrelevant averment in a pleading, not stricken out, becomes mere surplusage, and must be treated as such in the trial of the case: *Specht v. Spangenberg*, 70-488.

3927. More specific. 2720. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. No pleading which recites or refers to a contract shall be deemed sufficiently specific unless it states whether it is in writing or not. Such motion shall point out wherein the pleading is not sufficiently specific or it shall be disregarded, and if the reason for such demand exists outside of the pleadings, the motion must state the same and be supported by affidavit. [R., § 2948.]

What required: A demand made should be distinctly stated, and, if it is a money demand, it should be shown with accuracy: *Gammel v. Young*, 3-297.

Uncertainty cured by proofs: Allegations in a pleading which are indefinite and uncertain may have the certainty required for a proper judgment or decree afforded by proofs: *Harrison v. Kramer*, 3-543, 557; *Russell v. Nelson*, 32-315.

Where the allegations in a petition are general and indefinite, but defendant, without

moving for a more specific statement, puts in issue the general averments of the petition, plaintiff may introduce evidence tending to establish the cause of action thus generally averred in his petition: *Gunsel v. McDonnell*, 67-521.

Motion for more specific statement: There is no prejudice in refusing to sustain a motion for more specific statement when the allegation which is sought to be made more specific is surplusage: *Schoonover v. Hinckley*, 46-207.

A motion for more specific statement will lie for indefiniteness in the statement of facts, etc., but not for indefiniteness in the prayer for judgment: *Sieberling Co. v. Dujardin*, 38-403.

Where a matter of fact is alleged in the alternative, the remedy for the defect is by motion and not by demurrer: *Turner v. First Nat. Bank*, 26-562.

Where plaintiff sought foreclosure of certain tax deeds, and alleged payment of taxes subsequently, for which he asked a lien, *held*, that a motion for a more specific statement, and not a demurrer, was the proper method to raise the objection that it did not appear what the subsequent taxes paid were: *Byington v. Woods*, 13-17.

Failure of plaintiff to state the specific items constituting his cause of action cannot be raised by way of objection to the evidence. It must be interposed by motion for more specific statement: *Bartle v. Des Moines*, 38-414.

Any error in overruling the motion of the defendant to have the petition made more specific is waived by answering: *Coakley v. McCarty*, 34-105; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

Whether agreement is written or oral: A motion for more specific statement should be sustained as to an alleged agreement whereby defendant claims to have advanced money in behalf of plaintiff, in order that it may appear whether such agreement was written or oral, and defendant may also be required to set out a bill of particulars of the amounts and dates at which such moneys were advanced: *Schoonover v. Hinckley*, 46-207.

The objection that the petition does not show whether the contract sued on is in writing or not cannot be raised by demurrer, but only by motion for more specific statement: *Barthol v. Blakin*, 34-452.

Where, in an action to recover on a policy of insurance, plaintiff alleged the waiver of the provisions of the policy requiring the filing of proofs of loss, *held*, that a motion by defendant to require plaintiff to state whether such waiver was oral or in writing, and what officer or agent undertook to make such waiver, should have been sustained: *Webster v. Continental Ins. Co.*, 67-393.

Failure to set out a copy of a written instrument or give reason for not doing so is a ground of demurrer: See § 3854 and notes.

3928. Title of cause. 2721. The title of a cause shall not be changed in any of its stages of transit from one court to another. [R., § 2949.]

3929. Judicial notice. 2722. Matters of which judicial notice is taken need not be stated in a pleading. [R., § 2950.]

3930. Pleading conveyance. 2723. When a party claims by conveyance, he may state it according to its legal effect or name. [R., § 2952.]

3931. Pleading estate. 2724. It shall not be necessary to allege the commencement of either a particular or a superior estate, unless it be essential to the merits of the case. [R., § 2954.]

3932. Injuries to goods. 2725. In actions for injuries to goods and chattels, their kind or species shall be alleged. [R., § 2956.]

3933. Injuries to real property. 2726. In actions for injuries to real property, the petition shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the numbers by which the property is designated in the national survey, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation certain enough to identify it. [R., § 2958.]

3934. Malice. 2727. When the party intends to prove malice to effect damages, he must aver the same. [R., § 2959.]

This section is applicable where plaintiff seeks to recover exemplary damages on the ground that the acts of defendant were malicious: *Jones v. Marshall*, 56-739.

An averment of malice by plaintiff when required should be made in the petition or an amendment thereto. It is not sufficient to make it in the reply: *Ibid.*

Exemplary damages cannot be recovered unless malice is averred: *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25.

3935. Bond; breaches of. 2728. In an action on a bond with conditions, the party suing thereon shall notice the conditions and allege the facts constituting the breaches relied on. [R., § 2960; C., '51, § 1818.]

Attaching a copy of the bond to the pleading as an exhibit is not a compliance with this section: *Ryder v. Thomas*, 32–56.

It is not always sufficient to state the condition correctly and aver a breach thereof in the words of the instrument itself. The petition should set out the facts fully enough to enable the court, upon the admission of the facts set forth, to grant the relief sought: *Leas v. White*, 15–187.

In an action on a delivery bond, *held*, that it was not necessary to make an assignment of a breach thereof, there being in such case but one breach and the measure of damage being fixed by statute: *Gordon v. Atkinson*, Mor., 195.

In an action on an attachment bond the bond should be set out, the conditions noticed, and the facts establishing the breach, as, for instance, that the attachment was wrongfully sued out, alleged: *Bunt v. Rheum*, 52–619.

In an action upon a bond plaintiff cannot recover any more than a nominal sum until some damage resulting from the breach thereof has been averred and proven, even although the breach is alleged and shown: *Linder v. Lake*, 6–164.

In an action upon a bond it must be alleged that the damages which have become payable thereunder have not been paid: *Ryder v. Thomas*, 32–56; *Horner v. Harrison*, 37–378; *Hencke v. Johnson*, 62–555.

At common law it was sufficient to assign a breach in the words of the contract either negatively or affirmatively, or in words co-extensive with the import and effect of the contract, and as defendant must know in what respects he has or has not performed his contract, any great particularity ought not to be required. Accordingly, in an action upon a penal bond providing for the payment of a penalty for the illegal sale of intoxicating liquors, *held*, that it was sufficient to allege a sale for purposes other than those permitted, and it was not necessary to state for what purpose such sale was made, nor when, where, and to whom: *Jones County v. Sales*, 25–25.

In an action upon a bail bond or recognizance, the petition need not aver the particular fact that the officer had power to take it: *Furgison v. State*, 4 G. Gr., 302; *State v. Hufford*, 23–579.

As to pleading breach of contract in general, see notes to § 3852.

3936. Amount of proof. 2729. A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense. [R., § 2966.]

Where the petition alleges two states of facts upon either of which defendant would be liable, and some of its averments while material to one are redundant to the other, failure to prove the latter, where a right of recovery is established without such facts, will not defeat the recovery: *Way v. Chicago, R. I. & P. R. Co.*, 73–463.

Where the proof of an occurrence is made by statute presumptive evidence of liability, it is not necessary to prove negligence of the defendant in connection therewith, even though alleged in plaintiff's petition: *Engle v. Chicago, M. & St. P. R. Co.*, 77–661.

The fact that plaintiff is allowed to recover without proving the entire facts alleged by him will not constitute error where his petition alleges the grounds necessary to entitle him to recover, and sufficient is proved to make out a cause of action: *Little v. McGuire*, 38–560.

It is necessary to prove only the substance of the issue. Thus where, in an action for malicious prosecution in charging plaintiff with being the father of a bastard child, it was alleged that defendant was the father of such child, *held*, that this averment formed no part of the real issue and need not be proven: *Green v. Cochran*, 42–544.

Where the question of a trust is raised by the pleadings, the court may grant relief, although the trust as found does not correspond in its entire scope and purpose with that alleged: *Jordan v. Brown*, 56–281.

Where the statute authorized a party having a hedge on the partition line between his own and another's land to select his own half thereof and require payment for the other half by the adjoining owner, and plaintiff in his petition claimed to recover one-half of the hedge, alleging its value to be a certain amount, and evidence showed that he had selected one-half and the fence-viewers had found the value of the other half, *held*, that there was no variance: *McKeever v. Jenks*, 59–300.

Further as to variance, see § 3892 and notes.

Section applied: *Arnold v. Arnold*, 20–273; *Sweezey v. Collins*, 36–589; *Snyder v. Reno*, 38–329; *Knott v. Tincher*, 39–628; *Edwards v. Cottrell*, 43–194; *Moseley v. Shattuck*, 43–540, 543; *Kearney v. Fitzgerald*, 43–580.

3937. Genuineness of signature. 2730. When a written instrument is referred to in the pleading, and the same, or a copy thereof, is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be, shall, in a pleading or writing filed within the time allowed for pleading, deny the genuineness of such signature under oath. If such instrument be not negotiable, and purport to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, state under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such sig-

nature. The person whose signature purports to be signed to such instrument, shall, on demand, be entitled to an inspection thereof. [R., § 2967; 9 G. A., ch. 28; 13 G. A., ch. 167, § 19.]

Signature deemed genuine unless denied: Where the assignment of a judgment is set out, the signature to such assignment will be deemed true until denied under oath: *Edmonds v. Montgomery*, 1–143; so *held*, also, *in an action against the guarantor of a promissory note*: *Partridge v. Patterson*, 6–514.

This statutory provision is applicable in case of city warrants: *Clark v. Des Moines*, 19–199, 227. Also in case of county warrants: *Clark v. Polk County*, 19–248.

Signatures to a deed, not being denied under oath, must be taken as genuine: *Blackshire v. Iowa Homestead Co.*, 39–624.

In an action upon a bond of a district township, the answer not being under oath, *held*, that, the signature being shown to be genuine, there was no error in admitting the bond in evidence: *Curry v. District T'p*, 62–102.

Effect of denial: Where the genuineness of the signature is denied under oath, the party seeking to introduce the instrument in evidence cannot do so until he has established *prima facie* the genuineness of the signature; and in case the signature is that of an agent purporting to act for the principal, whose name is signed to the instrument, the authority of the agent to bind the principal must be shown: *Miller v. House*, 67–737.

Where denial under oath not required: The statutory provision does not apply to an administrator suing on the note of his decedent, and a denial by him of the execution puts in issue the genuineness of the signature: *Ashworth v. Grubbs*, 47–353.

By whom denial made: The denial under oath contemplated in the statute must be by the party whose signature it purports to be: *Walker v. Sleight*, 30–310.

A denial by the maker of the genuineness of the signature of an indorser is not sufficient to throw the burden of proving the genuineness of such signature upon the party claiming thereunder: *Robinson v. Lair*, 31–9.

Under a prior statute it was held that the denial under oath was required to be made by defendant, although the instrument purported to be signed by an agent or another person for him: *Thompson v. Abbott*, 11–193.

What sufficient denial of signature: The denial that a note sued on was for a valuable consideration assigned and indorsed to plaintiff by defendant or by any other person with his knowledge or assent, at the time set forth in the plaintiff's petition, although under oath, does not amount to a denial of defendant's signature: *Carle v. Cornell*, 11–374.

Denial of execution: Under this section a denial of the execution of the instrument will not be sufficient to put in issue the genuineness of the signature: *Loomis v. Metcalf*, 30–382.

Nor will a denial of knowledge or information as to the signing of the instrument put the signature in issue: *Hall v. Ætna Mfg. Co.*, 30–215.

Nor will denial that defendant ever signed or executed an instrument of such tenor and effect raise such an issue: *Douglass v. Matheny*, 35–112.

An answer admitting the making of a note at the time specified in the petition, similar in tenor to the copy declared on, but stating that whether the one sued on was the identical note, and the defendant's signature thereto genuine, were matters with which he was not acquainted, and therefore requiring plaintiff to prove the same, *held* not to be such a denial as to raise an issue with reference to the execution of the note: *Sheldon v. Middleton*, 10–17.

It is not necessary that the answer shall be sworn to in order to raise an issue on the execution of a note. This section gives to defendant the privilege of denying the genuineness of the signature under oath and thus changing the burden of proof to plaintiff, who must then prove its genuineness: *Lyon v. Bunn*, 6–48; *Seachrist v. Griffeth*, 6–390; *Terhune v. Henry*, 13–99.

A denial, though not sworn to, puts in issue the execution so far as to prevent its being taken as admitted: *Fannon v. Robinson*, 10–272.

Under a denial of the execution defendant may introduce evidence that the instrument, by reason of alterations or otherwise, is not such as he signed, without having denied the genuineness of the signature under oath: *Lake v. Cruikshank*, 31–395.

Burden of proof: Where a written instrument was relied upon by a party in his pleading, but was not so set out by copy that the opposite party was required to deny the genuineness of the signature under oath, *held*, that such instrument should not have been admitted in evidence over an objection thereto, until evidence tending to prove its genuine character had been introduced: *Hay v. Frazier*, 49–454.

The object of this section is to change the burden of proof in respect to the execution of the instrument, and cast it upon defendant, but defendant is not estopped from controverting the execution of the instrument, or his signature thereto, by proof, where he has denied the execution in his answer: *Sankey v. Trump*, 35–267.

Defendant may, by answer not under oath, deny the genuineness of his signature, and support such allegation by proper evidence, the burden of proof being upon him: *Brayley v. Hodges*, 52–623.

Whilst a denial of the execution of a note will not cast upon plaintiff the burden of proving the signature, yet it will permit defendant to prove that the signature is not his: *Sully v. Goldsmith*, 49–690.

When a signature is denied under oath, while the defendant must introduce some evidence to support his defense and overthrow the *prima facie* case made by the writing, yet, when he has done so, the *onus probandi* as to the genuineness of the signature rests upon plaintiff: *Farmers', etc., Bank v. Young*, 36–14.

Signature admitted: When a written contract is set out in the pleadings and recognized by the parties on both sides it is not necessary for them to prove the signature: *Brewer's Estate v. Crow*, 4 G. Gr., 520.

Where the execution of a contract set out in the pleadings is not denied under oath and there is no evidence tending to show that it has not been duly executed, its execution should be regarded as admitted: *Templin v. Rothweiler*, 56–259.

3938. Supplemental pleading defined. 2731. Either party may be allowed, on motion, to make a supplemental petition, answer, or reply, alleging facts material to the case, which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings. [R., § 2968; C., '51, § 1749.]

An amended petition should refer to matters existing previously to the commencement of the action. Those matters arising subsequently thereto should be set up in a supplemental petition: *Seevers v. Hamilton*, 11–66.

Evidence cannot be given of matters arising after the commencement of the action, whether occurring before or after the filing of the pleading, unless foundation has been laid by a proper supplemental pleading: *Allen v. Newberry*, 8–65.

Where defendant alleged, by way of defense, that the claim sued on was only to become mature on a contingency which had not happened, *held*, that plaintiff might, in a supplemental petition, set up the happening of such a contingency after suit was brought: *Davenport v. Mitchell*, 15–194.

Where the petition improperly sets up a cause of action not yet accrued, but such cause of action does afterwards accrue, it may then be set up in a supplemental petition: *Sigler v. Gondon*, 68–441.

An answer setting up matters in bar occurring since the last adjournment of the court can only be interposed by leave of court, and in the absence of such leave should be disregarded: *Williams v. Miller*, 10–344.

Where the relief asked in the original petition, being the right to redeem a portion of premises sold at foreclosure sale, was granted, but before the expiration of the time for such redemption as thus allowed a party asked in a supplemental petition that the decree be modified so as to allow the redemption of an additional portion of the property, and it appeared that the full relief was not asked at first through mistake or oversight and without negligence, *held*, that the relief sought in the supplemental petition should be granted: *Hervey v. Savery*, 48–313.

When in an action to foreclose a mortgage securing several notes recovery is sought for all the notes that will mature before final decree, there is no necessity for amendment or supplemental pleading setting up the maturity of notes maturing after the commencement of the suit and asking relief as to them: *Whiting v. Eichelberger*, 16–422.

3939. Matter in abatement. 2732. Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in bar, and no one of such causes shall be deemed to overrule the other; nor shall a party after trial, on matter of abatement, be allowed in the same action to answer or reply matter in bar. [R., § 2969.]

Under the provisions of the Code of '51, *held*, that a plea to the jurisdiction, or that there was another action pending, was as proper and legitimate as before the adoption of that Code: *Rawson v. Guiberson*, 6–507.

Pendency of another action: The fact that there is another action pending between the same parties for the same cause of action may be pleaded in abatement to another action in which the same parties are the real parties in interest, although there may be other parties thereto who are merely nominal: *Jennings v. Warnock*, 37–278.

Where two actions are brought for the same cause of action, but one of them is dismissed before that fact is pleaded in abatement in the other, or indeed if the one be dismissed before the court has in the other determined the sufficiency of the plea in abatement, the plea should be overruled. (Overruling *Rawson v. Guiberson*, 6–507): *Rush v. Frost*, 49–183.

To constitute the defense of a previous action pending it must appear that the former action is still actually pending: *Hawley v. Chicago, B. & Q. R. Co.*, 71–717.

A previous action pending is not a defense if the former action is dismissed before the question as to its pendency comes before the court for determination: *Ball v. Keokuk & N. W. R. Co.*, 71–306.

The pendency of another action in the name of another plaintiff suing on the same cause of action is not ground of abatement: *Guest v. Byington*, 14–30.

An action pending in the federal court brought by creditors to set aside a general assignment will not necessarily prevent an action by the same creditors in a state court to have the assignee enjoined from paying dividends under such assignment: *Wurtz v. Hart*, 13–515.

That a person seeking relief might obtain it by cross-bill in another pending action cannot be made an objection in an original action: *Osborn v. Cloud*, 23–104.

Where plaintiff in one action asked damages for the use of property by a railway company, and the company in another action sought to compel the party who was plaintiff in the first to convey a right of way in accordance with an alleged agreement, *held*, that although the fact as to the alleged agreement was in issue in both actions, the pendency of the first could not be pleaded in abatement as to the second: *Chicago & S. W. R. Co. v. Heard*, 44–358.

The fact that the party had one action pending against the sheriff to enjoin an execution sale, *held* not to be matter which should be urged in abatement of an action against the

purchaser of the property at execution sale: *Jones v. Brandt*, 59–332.

That the pendency of another action for the same cause of action is a ground of demurrer, see § 3854.

Jurisdiction: The proper mode of raising the objection of want of jurisdiction where it is not apparent upon the face of the petition is by pleading the facts in abatement: *Meunch v. Breitenbach*, 41–527.

Award: The fact that a cause of action has been settled by an award on file is matter to be pleaded in abatement, and cannot be raised by motion to dismiss the action: *Hynes v. Sabula, A. & D. R. Co.*, 38–258.

Garnishment: That defendant has been garnished for a debt due the assignor of plaintiff before assignment, if no judgment has yet been rendered in the garnishment proceedings, is pleadable in abatement and not in bar: *Clise v. Freeborne*, 27–280.

Effect of abatement: The sustaining of a demurrer to an answer setting up matter in abatement is not a trial in such sense as to prevent a setting up of matter in bar by way of answer: *Winet v. Berryhill*, 55–411.

The mere filing of an answer setting up a plea in abatement by reason of defect of parties will not warrant a dismissal of the action: *McCormick v. Blossom*, 40–256.

Must be pleaded: Proof of matter tending to abate the action, if objected to, should not be received if such matter has not been pleaded; and *held*, that although a champertous contract as to the maintenance of plaintiff's suit appeared from the evidence, yet, as no such fact was pleaded, it was not a ground for abating the action: *Allison v. Chicago & N. W. R. Co.*, 42–274.

Judgment: As to form of judgment on matter in abatement, see § 4058.

3940. Subsequent defenses. 2733. Any defense arising after the commencement of any action, shall be stated according to the fact, without any formal commencement or conclusion, and any answer which does not state whether the defense therein set up arose before or after action, shall be deemed to be of matter arising before action. [R., § 2970.]

See notes to preceding section.

3941. Consolidation of actions. 2734. Whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause be shown the same shall be consolidated. [R., § 2980.]

The power of the court to consolidate actions has long been exercised in the absence of any express statutory direction, and the relief which by this section is given to defendant with reference to actions pending in the same court which might have been joined may also in a proper case be given to plaintiff: *Viele v. Germania Ins. Co.*, 26–9, 46.

Failure to give notice of the consolidation of actions will not render the judgment invalid as to so much thereof as might properly have been rendered in an action to which defendant was properly a party, without consolidation being made: *Willard v. Calhoun*, 70–650.

Where actions are by consent of parties consolidated, the two separate actions may be deemed discontinued, and a new and distinct action created, in which is included all of the questions presented by the pleadings in both of the former actions, and the power and jurisdiction of the court with reference to this new action is the same as though it had been brought in the manner in which actions are ordinarily instituted: *Browne v. Hickie*, 68–330.

Where three separate actions were brought against the same defendant joined with different co-defendants in each action, *held*, that plaintiff might, after dismissing the action as to such co-defendants, have all the actions consolidated: *Harwick v. Weddington*, 73–300.

3942. Lost pleading. 2735. If an original pleading be lost or withheld by any one, the court may order a copy thereof to be substituted. [R., § 2982; C., '51, § 1760.]

3943. Records not to be altered. 2736. No record shall be amended or impaired by the clerk or other officer of the court, or by any person without the order of such court, or of some court of competent authority. [R., § 2984.]

[The word "without," in the second line, is erroneously printed "with" in the Code.]

CHAPTER 9.

OF TRIAL AND JUDGMENT.

3944. Issues; law and fact. 2737. Issues arise in the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law;
2. Of fact. [R., § 2993.]

Issues arising in special proceedings must be tried either as an ordinary or equitable proceeding, and the mode of trial will be determined by assigning the proceeding to whichever class it appropriately belongs to: *Sisters of Visitation v. Glass*, 45–154.

3945. Of fact. 2738. An issue of fact arises:

1. Upon a material allegation of fact in the petition denied by the answer;
2. Upon a material allegation of new matter presented in the answer and denied by the reply;
3. Upon allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading. Any other issue is one of law. [R., §§ 2994, 2995.]

[The second subdivision of this section is not consistent with §§ 3871 and 3918, relating to reply.]

ISSUES — HOW TRIED.

3946. Trial defined. 2739. Issues of law must be first tried. A trial is a judicial examination of the issues in an action whether they be issues of law or of fact. [R., §§ 2996–7; C., '51, § 1770.]

3947. Issues; how tried. 2740. Issues of fact, in an action in an ordinary proceeding, must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made. [R., § 2998; C., '51, § 1772.]

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

The amount of damages is to be assessed by the jury, and it is improper to order an assessment by the clerk: *Wiley v. Arnold*, 1 G. Gr., 365.

An action for divorce being an action in equity, the parties have no right to a jury trial: *Sherwood v. Sherwood*, 44–192.

An issue of fact in an equitable proceeding is to be tried by the court and cannot be submitted to a jury, even as formerly provided under Revision, § 2999, for the purpose of informing the conscience of the court. The reference contemplated in this section is not one to a jury, but such an one as is provided for in § 4022 *et seq.* (overruling, in this respect, *Sherwood v. Sherwood*, 44–192, and *Howe Machine Co. v. Wooley*, 50–549): *Hobart v. Hovart*, 51–512.

A party may rely as a defense to a contract upon matter such as fraud in its execution, showing that no such contract was entered into by the parties, although he might in equity make such fact the ground for a cancellation of the contract. The interposition of such a defense does not raise an equitable issue: *Carey v. Gunnison*, 65–702.

Where the same action involves issues cognizable in equity, and also law issues, either party is entitled to a jury trial as to the latter, and those issues are to be tried first the determination of which will be most likely to dispose of the case: *Morris v. Merritt*, 52–496.

It is not error in the court to overrule motion of a party to submit to a jury certain issues in an equitable action: *Shontz v. Evans*, 40–139.

The right to trial by jury is not inalienable, but may be waived or forfeited: *Wilkins v. Treynor*, 14–391.

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

The verdict in a trial by a jury defective as to the number will be void unless the defect is waived. The mere act of the party in accepting the jury will be deemed merely a waiver of further objection to individual jurors and not a waiver of the objection to number, where it appears that the party had no knowledge of the deficiency in that respect: *Cowles v. Buckman*, 6–161.

The provision requiring a party to pay a jury fee, or increasing the jury fee, is not un-

constitutional: *Adae v. Zangs*, 41-536, 542; *Little v. McGuire*, 43-447; *Steele v. Central R. of Iowa*, 43-109; *State v. Verwayne*, 44-621.

In equitable actions triable to the court, a reference may be made, even without consent. The parties are not entitled, as of right, to a trial by jury: *State v. Orwig*, 25-280.

And as to right of trial by jury, generally, see Const., art. 1, § 9, and notes.

A party in default is not entitled to a jury to assess amount of recovery: See § 4079 and notes.

Waiver of jury trial, § 4021.

Trial to the court without a jury, see § 4070 and notes.

3948. Method of trial in ordinary actions; appeal. 2741; 18 G. A., ch. 83. All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as now provided by law; and upon appeal no evidence shall go to the supreme court except such as may be necessary to explain any exception taken in the cause; and such court shall hear and try the case only on the legal errors so presented. [R., § 2999.]

To warrant the supreme court in reviewing errors of law in the admission or exclusion of evidence, the record need not contain all the evidence in the case, but need only show the purport of the evidence passed upon: *Smith v. Johnson*, 45-308.

Evidence offered, but rejected, need not be taken to the supreme court on appeal where the error assigned is the dismissing of the case upon the evidence: *State ex rel. v. Chamberlin*, 74-266.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises. The issues in the case in determining the applicability of instructions and the competency and relevancy of the evidence are to be determined from the pleadings: *Kelleher v. Keokuk*, 60-473.

In order to determine whether prejudice resulted to appellant by reason of the exclusion of evidence, not only the questions, but the answers, or the facts that they would tend to establish, should appear in the record. Unless prejudice be thus shown, the judgment cannot be disturbed on account of exclusion of evidence: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549. And see notes, III, b, to § 4124.

Questions not raised below will not be considered on appeal: See notes, III, a, to § 4124.

Special proceedings (such as probate of wills, etc.) are triable in the supreme court upon legal errors duly assigned, and not *de novo*: *Ross v. McQuiston*, 45-145; *Sisters of Visitation v. Glass*, 45-154; *Brett v. Myers*, 65-274.

The mode of trial in special proceedings will be determined by assigning the proceeding to that class, legal or equitable, to which it properly belongs: *Davis v. Clinton*, 55-549.

If a special proceeding is triable as an ordinary action, there is the same right to trial by jury, change of venue, etc., as in ordinary proceedings: *Whitney v. Atlantic Southern R. Co.*, 53-651.

The rule is to try all causes on oral evidence, and, in the supreme court, on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired, the proper steps to secure it must be taken: *Finch v. Hollinger*, 47-173, 175.

Under Revision, § 2999, *held*, that in equity actions tried by the second method (as provided in that section) the supreme court could only consider questions of law properly assigned, as in actions by ordinary proceedings: *Snowden v. Snowden*, 23-457.

A trial of a case to a referee does not constitute a trial in open court, nor will a subsequent hearing of the case on exceptions to the report of the referee constitute such trial: *Hobart v. Hobart*, 45-501.

3949. In equitable actions. 2742; 17 G. A., ch. 145; 19 G. A., ch. 35, § 1. But in equitable actions, wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew.

[By 19 G. A., ch. 35, § 2, the provisions of this section as amended are applicable to cases pending but not submitted to the supreme court; and it was provided that a certificate previously made within the six months allowed for appeal should be deemed to have been made within proper time.]

Cases tried as equitable: Where a proceeding has been treated without objection in the lower court as equitable, it is to be so treated in the supreme court: *Hintrager v.*

Sumbargo, 54–604; *Balch v. Ashton*, 54–123; *Manchester v. Houg*, 66–649; *Fritzler v. Robinson*, 70–500.

Where an equitable action and a counterclaim therein were both tried in the court below as in equity, *held*, that on appeal all the issues would be triable *de novo*, although the counter-claim was legal in its nature: *Taylor v. Kier*, 54–645.

Where the issues are equitable it will be presumed that the case was tried as an equitable action, unless the record shows the contrary: *Baldwin v. Davis*, 63–231.

The supreme court regards cases tried in the lower court under the rules governing equitable actions as belonging to that class, whether any question of strictly equitable jurisdiction arises or not; but the fact that the case was tried before a court without a jury does not show that it was tried as an equitable action: *McCormick v. Lundburg*, 38 N. W. Rep., 409.

Mistake in form of proceeding: Where a case is tried without objection or exception in the court below as a case in chancery, and appealed to the supreme court in form to be tried *de novo*, it will be so tried, whether properly triable as an equitable action or not: *Clute v. Frasier*, 58–268.

A party cannot, on appeal, complain that relief is granted in an action at law which could only be given in equity, where the action, although brought by ordinary proceedings, is tried below and upon appeal as an equitable action: *Graham v. Rooney*, 42–567.

Trial de novo is the proper method in equity: Equity cases tried by the method provided by statute must on appeal be heard *de novo*. The appellant cannot have the case tried in any other manner. It is the mode of trial and not the character of the case and the relief sought which determine the method of trial on appeal: *Blough v. Van Hoorebeke*, 48–40.

Where a case was on appeal properly triable *de novo*, *held*, that the court would not refuse to try it in that manner because the attorney, by reason of a mistaken belief as to the proper method of trial in such an appeal, had not embodied all the evidence in the abstract, or introduced evidence in the court below which he wished to have considered on such appeal: *Sherwood v. Sherwood*, 44–192.

An equity case will be tried *de novo* on appeal, notwithstanding the special finding of the jury on the trial below: *Chambers v. Ingham*, 25–222.

Where an equitable action is triable *de novo* on appeal, the fact that the referee reports the facts and conclusions of law separately will not give to his findings the effect of a special verdict, and the supreme court may still try the case upon the facts: *Cooper v. Skeel*, 14–578.

The constitution guaranties the right of trial *de novo* on appeal in an equitable action, and a former statutory provision for a review of divorce and foreclosure cases only upon errors assigned was held unconstitutional: *Sherwood v. Sherwood*, 44–192; *Howe Machine Co. v. Woolly*, 50–549.

Where appellant insists upon a trial *de novo*, and appellee objects, there can be no ground of complaint of either party where the court tries the cause anew and affirms the judgment: *McClain v. McClain*, 57–167.

It is competent for the parties, with the consent and approval of the court, to waive provisions as to the manner of trial: *Baker v. Jamison*, 73–698.

Trial of equity case on errors assigned: Where it did not appear that the steps required by statute, in order to obtain a trial *de novo* on appeal, had been taken, *held*, that the case could not be tried in that manner, but only as a law action upon errors assigned: *Lynch v. Lynch*, 28–326; *Mallory v. Luscombe*, 31–269; *Twogood v. Reily*, 48–546; *Howe Machine Co. v. Woolly*, 50–549.

Where the necessary steps to secure a trial *de novo* have not been taken, errors of law properly assigned may be considered: *Jordan v. Wimer*, 45–65; *Lutz v. Kelley*, 47–307; *Kershman v. Swehla*, 62–654.

In such a case it will be necessary that the same steps shall have been taken to preserve and present the errors relied upon as must be taken in an action at law to secure a hearing upon the errors: *Buckwalter v. Craig*, 24–215; *Krapfel v. Pfiffner*, 24–176; *Schmeltz v. Schmeltz*, 52–512.

Parties have the right to prepare and have an equity case tried on appeal upon errors assigned, and may stipulate or agree upon evidence introduced and considered in the court below for that purpose: *Hutchinson v. Wells*, 67–430.

On appeal in an equitable case from a ruling upon a motion or demurrer exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon errors: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632.

That exception to a decree is not necessary to support an appeal, see notes to § 4038.

Where in an action in equity judgment is rendered on the allegations in the pleading and an appeal is taken therefrom, no assignment of errors is necessary and the trial in the supreme court will be *de novo*: *Heidlebaugh v. Wagner*, 72–601.

Law case not triable de novo: Even though an action by ordinary proceedings is tried on written evidence, and on appeal to the supreme court all the evidence is taken up, the case will not be tried *de novo*, but only upon errors: *Dove v. Independent School Dist.*, 41–689.

Regulations as to method: Although the legislature cannot take away the right of trial *de novo* on appeal in equity cases, yet the manner of its exercise may be regulated: *Richards v. Hintrager*, 45–253.

The right to a trial *de novo* in equity cases on appeal is granted by the constitution only where the mode and manner prescribed by statute have been followed in the court below and the necessary steps taken to obtain such a form of trial on appeal: *Sisters of Visitation v. Glass*, 45–154.

Where a divorce case was not tried in open court, as required by statute, but was sent to a referee, who reported the evidence with his findings to the court, and all the evidence was taken to the supreme court on appeal, *held*, that as the trial in the court below was not in the manner prescribed by law, the supreme

court could not try the case *de novo: Hobart v. Hobart*, 45–501.

The legislature is not prohibited from providing for the trial of chancery causes in the supreme court upon questions of law certified by the court below. The provision prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, except upon questions of law duly certified, is not unconstitutional as prohibiting a trial *de novo: Andrews v. Burdick*, 62–714.

The rule is to try all cases on oral evidence in the lower court, and in the supreme court on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired the proper steps to secure it must be taken: *Finch v. Hollinger*, 47–173.

Change in statute applicable to actions pending: A change in the statute as to the method of trying equitable actions is applicable to a case commenced before the passage of the act which comes on for trial after the act has taken effect: *Bailey v. Malvin*, 53–371.

A change in provisions as to the certificate of the judge, required to show that the evidence was all reduced to writing, *held* applicable to actions pending but not tried: *Cornell v. Cornell*, 54–366.

Where an equitable action was sent back on appeal for a new trial with permission to the parties to replead, and a trial was had after a change in the statute as to such method of trial, *held*, that the method of securing trial *de novo* on appeal was to be determined by the statute in force at the time of the second trial: *Cross v. Burlington & S. W. R. Co.*, 58–62.

Written evidence: Where an order has been made for trial in an equitable action upon written evidence oral evidence is not admissible: *Sexton v. Henderson*, 47–131; *Harlan v. Porter*, 50–446.

Taking down in writing: The taking of the testimony in short-hand, no transcript thereof being filed, is not a taking down "in writing:" *Godfrey v. McKean*, 54–127.

If the court orders the evidence taken down in short-hand, and the evidence is so taken and properly certified at the time, and it is afterwards transcribed, this is a sufficient taking down in writing. It is not necessary that the translation or transcript be made at the time of the trial: *Ross v. Loomis*, 64–432; *Howe v. Jones*, 66–156.

A case cannot be tried *de novo* on appeal unless the evidence be certified by the judge. It is not sufficient that the evidence be taken in short-hand and the notes preserved: *Carskaddon v. Bartlett*, 63–180.

But if the evidence is taken down in short-hand by order of the court, and the notes are afterwards transcribed by the reporter and certified by him and filed, such transcript will be deemed written evidence; but this transcript must be filed within the six months allowed for making the judge's certificate. If the judge's certificate has been made in proper form in connection with the original notes as filed, it may be regarded as so connected with the transcript when made as to constitute, with the reporter's certificate, a sufficient certificate of the evidence; but the certificate is not to be deemed complete until the transcript is made and certified by the reporter. This rule would, perhaps, have no application in a case tried by ordinary proceedings: *Merrill v. Bowe*, 69–653.

Where the short-hand reporter's notes are filed, but are not extended or certified to by the reporter until after the expiration of six months from the trial, the case cannot be tried anew upon appeal, although the judge within the six months attaches his signature to the notes, to the effect that they contain all the evidence offered or introduced: *Wise v. Usry*, 72–74.

The translation of the short-hand notes is required to be filed within six months from the rendition of the decree: *Arts v. Culbertson*, 73–13.

The burden is upon appellant to show that the transcript of the short-hand notes was properly certified within six months after the entry of judgment: *Moody v. Edwards*, 72–456.

Short-hand notes of the evidence taken on the trial and certified by the judge at its close, when followed by the filing of the transcript of the same, is a sufficient taking down of the evidence in writing: *Goetz v. Stutsman*, 73–693.

Where the short-hand notes of the evidence are certified to by the judge as containing all the evidence introduced and offered, together with all the objections and exceptions of the parties, and ordered filed and made a part of the record, and are so filed, and afterwards the translation of the notes by the short-hand reporter and his certificate thereto that such translation is full, true and complete, is filed within proper time, the evidence is sufficiently preserved to entitle the parties to trial anew on appeal: *Adams County v. Graves*, 36 N. W. Rep., 889.

It is no objection to the trial of a case *de novo* that the evidence was not taken down and certified by the official reporter where it is tried upon written evidence: *Gately v. Kniss*, 64–537.

Depositions: The granting of an order that an equity case be tried upon depositions rests in the exercise of the sound discretion of the court, and it will be presumed on appeal that such discretion has been properly exercised. The fact that the party making application has failed to avail himself of the opportunity to take depositions given by an order at a former term may be sufficient ground for refusing the subsequent application for such order: *Mills County Nat. Bank v. Perry*, 72–15.

Trial term: When an order is made to take the evidence in the form of depositions the cause is necessarily continued, and the appearance term is not the trial term, even in actions for foreclosure, divorce, etc.; but if the evidence is ordered to be taken down in writing there need be no continuance unless for cause, and the appearance term is the trial term for those classes of equitable actions: *Holbrook v. Fahey*, 51–406.

Where one party demands a trial the court should not continue the cause for the purpose of taking depositions without making an order for trial of the cause upon depositions: *Ellwood v. Price*, 73–84.

Question as to admissibility of evidence: On the trial of an equitable action

de novo on appeal, questions as to competency of testimony, admissibility of depositions, etc., come up as original questions upon the objections made in the court below, and upon their decision the testimony is considered or rejected, as the case may be. If found competent and admissible the testimony is considered, although it was excluded in the court below, but the decision is not thereby reversed, unless the consideration of such testimony makes a different conclusion necessary: *Blough v. Van Hoorebeke*, 48–40.

Error in the admission of evidence in an equity case triable *de novo* on appeal does not constitute a ground of reversal: *Hasner v. Patterson*, 70–681.

Immaterial evidence will be disregarded, whether objected to on the trial below or not: *Cook v. Smith*, 50–700.

Upon trial of an equitable action *de novo*, the supreme court passes upon the sufficiency of the evidence properly admitted, and need not consider the objections to the admissibility of evidence made in the court below: *Hanks v. Van Garder*, 59–179.

The fact that evidence has been erroneously admitted in the lower court in such a case will not render a reversal necessary, but such evidence will be disregarded, and the final determination of the case will be made upon evidence properly received: *Van Bogart v. Van Bogart*, 46–359; *Putney v. O'Brien*, 53–117.

If, however, testimony which is properly admissible, but is rejected by the lower court, is not a part of the record, the determination that there was error in the action of the lower court in excluding it would render it necessary to reverse the judgment and remand the cause. The proper practice in such cases is to permit all testimony to which objections are sustained to be made part of the record, so that if held admissible by the supreme court it may be considered upon the trial in that court: *Blough v. Van Hoorebeke*, 48–40.

As the provisions of this section can be complied with and the full benefit of a trial *de novo* be secured only by causing all the evidence offered to be written down, if questions asked are not permitted to be answered, and thus made part of the record, the defeated party must be allowed to have a review of such questions upon error. Otherwise he would be denied the benefit of an appeal: *Clinton Lumber Co. v. Mitchell*, 61–132.

Where in the trial of an equitable action a deposition was erroneously stricken from the files, *held*, that the supreme court would not try the case *de novo*, considering such deposition, but would remand the case for a new trial, in order that the opposing party might have an opportunity to introduce further evidence on his part: *Sweet v. Brown*, 61–669.

The supreme court will reverse a decree of the lower court where it is apparent upon the record that there is not sufficient evidence to sustain it; but if the record entry recites that there was other evidence, which would be sufficient, and which may have been lost, the case will be remanded for a retrial: *Webster County v. Taylor*, 19–117.

It being the practice in the trial of equity cases in the trial courts to admit evidence offered, without ruling as to its admissibility, a party who, by cross-examining a witness, calls out the same evidence which he has objected to in chief, will not be deemed to have waived his objection: *Donnell v. Braden*, 70–551.

What questions considered: Where a case is tried *de novo*, all questions may be presented in the supreme court which legitimately arise on the record, whether they were urged or relied on in argument in the lower court or not: *Seymour v. Shea*, 62–708.

Alleged errors in interlocutory proceedings will not be considered, but the supreme court will try the case on its merits: *Hackworth v. Zollars*, 30–433; *State v. Orwig*, 27–528.

What must appear of record to warrant trial de novo: An equity cause cannot be tried *de novo* in the supreme court unless the testimony is all embodied in the record: *Krapfel v. Pfiffner*, 24–176; *Maxwell v. Lundy*, 19–576.

Where it does not appear from recitals in the decree or from a certificate of the judge or clerk that the evidence is all before the supreme court, the case will not be tried *de novo*: *Van Orman v. Spafford*, 16–186; *Anderson v. Easton*, 16–56; *Kellogg v. Kelsey*, 16–388; *Winslow v. Turner*, 20–294; *Pickett v. Hawes*, 20–335; *Wetherell v. Goodrich*, 22–583.

If the evidence is not all in the record the same presumption obtains as to the correctness of the judgment of the court below as in an ordinary action: *State v. Orwig*, 27–528; *Garner v. Pomroy*, 11–149.

Where the record did not show the evidence upon which findings of fact by a referee were based, *held*, that the supreme court could not try the case *de novo*: *Lillie v. Skinner*, 46–329.

The testimony and not simply the facts found by the court should be set out in the record: *Robb v. Dougherty*, 14–379.

Where the record contained a stipulation as to certain facts, but no statement that the cause was tried upon such stipulation, *held*, that the cause could not be tried *de novo*: *Davenport v. Ells*, 22–296.

Where the bill of exceptions referred to exhibits which did not appear of record, so that it was apparent that the evidence was not all before the court on appeal, *held*, that the decree below would not be disturbed: *Cook v. Woodbury County*, 13–21.

The court cannot try a case *de novo* where it has before it the oral evidence taken down in writing, but not the documentary evidence: *Howe v. Jones*, 66–156.

Where the record showed that certain facts were proved without setting forth the evidence by which such proof was made, *held*, that the supreme court would not refuse to try the case *de novo* because of the omission of such evidence when no objection appeared to have been made to its sufficiency at the trial, but that if it affirmatively appeared that the record did not contain all the facts proved or all the evidence submitted to the lower court, its action would not be reviewed: *Pickett v. Hawes*, 20–335.

If it should appear from an inspection of the record that some item of the evidence irrelevant to some issue in the case, or entirely immaterial, was omitted from it, the court would

not on account of such omission refuse to try the case anew. But to warrant the court, however, in so trying the cause, the irrelevancy or immateriality of the omitted testimony must be clearly made to appear from the evidence: *Palo Alto County v. Harrison*, 68–81.

Appellee cannot object to a trial *de novo* on the ground that the record does not contain evidence admitted against his objection but not contained in the abstract; it must be presumed that as to him the admission would strengthen rather than weaken appellant's cause: *Clinton Lumber Co. v. Mitchell*, 61–132.

What the abstract must show: To entitle the party appealing to a trial *de novo* in an equitable action, it should appear from the statements of his abstract, which will be deemed true if not controverted, that the evidence is all before the court: *Britton v. Central R. Co.*, 39–390.

The court cannot consider a case triable *de novo* where the abstract does not purport to contain all the evidence: *Britt v. Case*, 58–757.

It must appear from the abstract not only that all the evidence was made of record on the trial below, but that all the evidence is substantially embodied in the abstract: *Greer v. Dickey*, 53–755.

The abstract must purport to contain all the evidence: *Goodykoonts v. Ringland*, 52–732.

When a trial anew is desired it is essential that the evidence introduced in the district court should be set out in the abstract, and upon proper application made to the court it must be assumed that such evidence in all cases can be procured or supplied: *Shear v. Brinkman*, 72–698.

If the action is triable on appeal *de novo*, and the abstract does not purport to be an abstract of all the evidence, the court will not try the case, but will simply affirm the decree: *Overholt v. Esmay*, 54–748; *Wilson v. Blair*, 55–745.

Or the appeal may in such case be dismissed on motion: *Green v. Ronen*, 59–83.

The abstract must contain the statement that it embraces all the evidence offered or introduced on the trial below: *Polk County v. Nelson*, 75–648.

Where the case was equitable in nature, and the abstract purported to contain all the evidence, and recited that such evidence was by order of the court taken down in writing and filed with the clerk, and made part of the record, *held*, that there appeared a sufficient compliance with the statute to entitle appellant to trial *de novo* on appeal: *Stoddard v. Hardwick*, 46–160.

Method of making evidence appear of record: There are but three modes by which the supreme court can know that all the evidence introduced below is in the record: 1st. By bill of exceptions stating that fact. 2d. By certificate of the judge as contemplated in this section; and, 3d, by certificate of the judge, agreement of parties, or certificate of the clerk, as provided in § 4414: *Flesher v. Groves*, 48–700.

Judge's certificate; time for making: The certificate of the evidence by the judge must be made during the time allowed for appeal (six months): *Mitchell v. Laub*, 59–36; *Page County v. American Emigrant Co.*, 61–246; *Marshalltown v. Forney*, 61–578; *Preston v. Hale*, 65–409; *Hartnett v. Sioux City*, 66–253; *Wisconsin, I. & N. R. Co. v. Braham*, 71–484.

Where it does not appear at what time the certificate of the evidence is made by the judge the cause cannot be heard *de novo*. It should be made to appear affirmatively that the certificate was signed within the time fixed by statute, and it cannot be presumed that it was so signed: *Russell v. Johnston*, 67–279; *Mitchell v. Laub*, 59–36.

Objection to the giving of a certificate after the time for appeal has expired is not waived by a stipulation, entered into by the parties before the expiration of the time for perfecting appeal, that the case shall be heard at a particular term of the supreme court: *Hartnett v. Sioux City*, 66–253.

Evidence certified at such time as is provided for under the section as amended, although before the passage of such amendment, may be considered in an appeal submitted after the taking effect of the act: *Starr v. Case*, 59–491.

The judge may certify to the record within the proper time, even though it be after the appeal is taken: *Goff v. Hawkeye Pump, etc., Co.*, 62–691.

Where the certificate of the clerk as to the evidence is sufficient to enable the court to try the case *de novo* (under § 4414), the provisions as to the time the judge's certificate shall be made are not applicable: *Cross v. Burlington & S. W. R. Co.*, 58–62.

After the time has expired within which a certificate of the evidence is required to be made, the judge has no power or jurisdiction to amend or alter it, and it may be shown in the supreme court by evidence outside of the record, as, for instance, by a certificate or affidavit of the judge, that interlineations appearing in the judge's certificate were made by him after the time for making the certificate had expired: *Lewis v. Markle*, 71–652.

Whether the court has power after six months have expired to correct clerical errors in the certificate, *quære: Runge v. Hahn*, 75–733.

Sufficiency of judge's certificate: A certificate not attached to any evidence, but merely showing the names of the witnesses, and the side upon which they were introduced respectively, without referring to any testimony as taken in writing, *held* insufficient: *Alexander v. McGrew*, 57–287.

In a particular case, *held*, that the certificate, although not attached to the evidence, identified the different instruments of evidence with as much certainty as was possible under the circumstances, and was sufficient in that respect: *Palo Alto County v. Harrison*, 68–81.

Where, upon a trial of an issue as to one defendant, he introduced the same evidence that was introduced on the hearing of the case as to another defendant, *held*, that it was sufficient that the certificate of the judge appeared as to the evidence introduced on the first issue, and it need not be certified again as evidence introduced on the second trial: *Ætna L. Ins. Co. v. Bishop*, 69–645.

The certificate of the judge, when it properly identifies the evidence, has the effect to make it part of the record. It is not essential that it contains an express declaration or order to that effect, but it must sufficiently identify the different items of evidence, and cannot in this respect be supplemented by the certificate of the clerk. And *held*, that a recital in the certificate that the cause was submitted upon packages of depositions filed upon a certain date did not sufficiently identify the evidence: *Runge v. Hahn*, 75–733.

Certificate by the judge trying the case: Where the trial is had before the judge of another district holding court by exchange, the judge trying the case can give the certificate within the time provided by statute, although he has left the district where the trial was held: *Howe v. Jones*, 66–156.

What certificate must show: To secure a trial *de novo* in the supreme court in an equitable action it is necessary that the certificate of the judge show that all the evidence *offered* upon the trial is before the court. The certificate that the evidence preserved is all the evidence which was *introduced* is not sufficient: *Taylor v. Kier*, 54–645; *Groneweg v. Barnum*, 70–763; *Polk v. Sturgeon*, 71–395.

So *held* as to a certificate showing that the record contained all the evidence *used* on the trial: *Hart v. Jackson*, 57–75.

So *held*, also, as to a certificate that the record contained all the evidence "adduced," it further appearing from the record itself that in several instances evidence was offered and excluded which was not made part of the record: *Tuttle v. Story County*, 56–316.

A certificate that the transcript contains all the evidence, together with the objections of the parties, etc., is not sufficient to enable the supreme court to try the case anew: *Lewis v. Markle*, 71–652.

A certificate that the evidence certified was all that was "offered, adduced and introduced," *held* sufficient: *Marshalltown v. Forney*, 61–578.

So *held*, also, as to a certificate that the evidence certified "is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial:" *Wood v. Wood*, 61–256.

A certificate that the evidence certified was "all the evidence submitted in said cause," *held* sufficient: *Miller v. Wolf*, 63–233.

Certificate of referee: Where a judgment is rendered upon a referee's report it is not sufficient that the evidence is certified by the referee, but it must be certified by the judge: *Porter v. Everett*, 66–278.

Agreement of parties: If by the agreement of the parties the facts are reduced to a statement in writing, such statement takes the place of depositions or of oral testimony reduced to writing and becomes the evidence in the case, and upon such evidence the case may be tried *de novo* on appeal: *Williams v. Wells*, 62–740.

The certificate of the clerk that the transcript contains all the evidence on file does not sufficiently show that the evidence thus certified was all that was used in the court below: *Grant v. Grant*, 46–478; *Davenport v. Ellis*, 20–296.

Where it appears that the evidence on the trial of an equitable action consists wholly of depositions and papers on file, the certificate of the clerk to such evidence is sufficient to authorize the supreme court to entertain the appeal. The rule requiring the certificate of the judge to be made during the term has no application to such certificate of the clerk: *Cross v. Burlington & S. W. R. Co.*, 58–62.

3950. Finding of facts. 2743. In all trials of fact by the court, other than those contemplated in the preceding section, the court shall, if either party request it, give its decision in writing, stating, separately, the facts found and the legal conclusion founded thereon; and the whole decision shall be a part of the record, and the finding shall have the effect of a special verdict. [R., § 3088; C., '51, § 1793.]

The finding: The court is to find the facts, and not the evidence of the facts: *Myers v. Smith*, 15–181. And such facts should be stated with the same certainty and definiteness that would be required in a pleading: *Van Riper v. Baker*, 44–450.

Where the findings of fact are so indefinite that judgment cannot properly be rendered thereon, the judgment will be set aside: *Kelly v. Burns*, 36–507.

Request: The court may upon its own motion make such a finding of facts: *Jennings v. Jennings*, 56–288.

If a finding is made by the court it may be presumed on appeal that it was done in pursuance of a request of one of the parties, in the absence of anything to the contrary in the record: *McCue v. Wapello County*, 56–698; *Corner v. Gaston*, 10–512.

A finding of facts cannot be required where there is no competent evidence before the court upon which such a finding could be made: *Golden v. Newbrand*, 52–59.

Where a party asked findings of fact and the court directed him to present the points on which he wished findings to be made, and he did so without objection, *held*, that he had no ground of complaint on appeal: *Olson v. Martin*, 38–346.

Also *held*, in such case, that the party could not complain because the findings were not in the form required by law or did not present conclusions of law: *Ibid.*

Where a decision in writing is not requested the final judgment is the only finding necessary to be made by the court: *Gallinger v. Vale*, 6–387.

The neglect of the court to find upon any particular fact involved upon which no finding is asked will not be error, even though the court does find specially upon some other facts in controversy: *Ruble v. Atkins*, 39–694.

Effect: The special finding of facts by the court, like the special verdict of the jury, when entered of record becomes part of the judgment entry, and takes the place of a bill

of exceptions for all questions of law legitimately deducible from the same: *Corner v. Gaston*, 10–512.

Method of trial to the court, see § 4070 and notes.

Presumption in favor of on appeal: The finding of facts by the lower court in a trial before it has the same presumption in its favor in the supreme court upon appeal as are entertained in favor of the verdict of a jury: *State v. Haskell*, 20–276: *Mallory v. Luscombe*, 31–269; *Hambell v. O'Neal*, 39–562; *Clark v. Reynolds*, 46–674: *Dove v. Independent School Dist.*, 41–689

In all actions or special proceedings not triable *de novo* on appeal, the finding of the lower court upon questions of fact stands as the verdict of a jury, and will not be disturbed on appeal unless clearly unsupported by the evidence. *Hamilton v. Iowa City Nat. Bank*, 40–307; *Sisters of Visitation v. Glass*, 45–154; *Knox v. Hanlon*, 48–252; *Smith v. Walker*, 49–289; *In re Will of Donnelly*, 68–126; *Goldsmith v. Wilson*, 68–685; *Brainard v. Van Kuran*, 22–261.

The findings of fact by the court must be clearly and manifestly unsustained by the evidence to justify the appellate court in granting a new trial on this ground: *Berryhill v. Jones*, 35–335: *Fouts v. Pierce*, 64–71.

To authorize a reversal in such case there must be such want of testimony in support of the findings of the lower court as to raise the presumption that the finding is not the unprejudiced and honest exercise of the discretion of the court: *Vogel v. Wadsworth*, 48–28; *Root v. Gay*, 64–399; *Woodman v. Dutton*, 57–442; *Ross v. McQuiston*, 45–145; *Gibson v. Fisher*, 68–29.

Conflicting evidence: A finding of facts by the lower court will not be disturbed on account of insufficiency of the evidence to support it, where the evidence is conflicting: *Harris v. Heackman*, 62–411; *In re Railsback's Heirs*, 54–459; *Hallam v. Haywood*, 21–398; *McIntosh v. Livingston*, 41–219; *Watkins v. Swiggett*, 41–684; *Perry v. Cottingham*, 63–41.

Unless it appears that a finding of facts by the court below is so manifestly against the evidence as to demand a reversal, the supreme court will not interfere with such finding, although if trying the case for itself it might have reached a different conclusion: *Williams v. Brown*, 45–102; *Starker v. Luse*, 33–595.

It is only when the finding of facts by the lower court is clearly and manifestly in conflict with the evidence that the appellate court is warranted in interfering therewith: *Ruble v. Atkins*, 39–694; *Pearson v. Minturn*, 18–36; *Goldsmith v. Boersch*, 28–351.

The supreme court will not, in a law case, reverse the judgment of the court below based upon a finding of facts, if there is any evidence upon which such finding can be sustained: *Leighton v. Orr*, 44–679.

It is only where the finding evinces passion or prejudice, and cannot be supported under any reasonable view which may be taken of the evidence, that it should be set aside on appeal: *Van Steenburg v. Milford Water Power Improvement Co.*, 64–711.

The question before the court on appeal, where there has been a finding of facts in a law action, is not whether the finding is sustained by the evidence, but whether there was evidence tending to support such finding: *Altman v. Farrington*, 45–620.

When the evidence submitted to the court below leaves a question of fact in doubt the supreme court will not reverse the finding: *Weller v. Hawes*, 19–443.

When the finding of the court below is not sustained by the testimony a new trial will be awarded: *Keokuk County v. Alexander*, 21–377.

Where no finding of facts is made the supreme court can on appeal determine whether the testimony is sufficient to support a conclusion of fact which would in law authorize the judgment rendered: *Vogel v. Wadsworth*, 48–28.

Finding not conclusive if judgment thereon reversed: Where final judgment is rendered in favor of a defendant he cannot appeal from a finding of facts which is against him. But if defendant has properly objected to the correctness of such finding, it is not proper, in case of a reversal on plaintiff's appeal, to render judgment against defendant thereon without opportunity for a new trial: *Boyce v. Wabash R. Co.*, 63–70.

Conclusion of law: A finding by the lower court, which is merely a conclusion of law from the facts, there being no dispute or controversy as to the facts themselves, is reviewable on appeal, and is not conclusive in the same sense that a finding of fact is: *Northwestern Coal Co. v. Bowman*, 69–150.

As to what is necessary to secure a review in the supreme court of a case tried by the court, see § 4399.

3951. Trial term. 2744. Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made. [R., § 3007; C., '51, § 1762; 13 G. A., ch. 167, § 20.]

3952. In equitable actions. 2745. The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' liens. [R., § 2856; 13 G. A., ch. 167, § 17.]

Where the court, in an action triable by equitable proceedings, orders the evidence taken down in the form of depositions, the appearance term cannot be the trial term; but if no such order is made and the court directs the evidence to be taken down in writing at the trial, then the appearance term is the trial term in such equitable actions as are specified by this section, to wit, divorce, foreclosure of mortgage or other lien, and enforcement of mechanic's lien: *Holbrook v. Fahey*, 51–406.

If at the first term the court orders the testi-

mony in an equitable action, such as that for foreclosure of a mortgage, to be taken by deposition, and either party elects to take his testimony in that form, the trial of the case must of necessity be continued to give an opportunity for the taking of depositions. The court exercises its discretion as to whether it will order the testimony taken in this form; and if it refuses to do so, and the party requesting such action does not elect to have his testimony taken in that manner, he cannot complain of the refusal to grant a continuance to the next term: *Lombard v. Thorp*, 70-220.

As to the provisions in relation to the trial term in actions of divorce, foreclosure, etc., see *Sherwood v. Sherwood*, 44-192; *Palmer v. Call*, 4 Dillon, 566.

As to the effect upon this, and the preceding section, of the substitute for § 2742, see notes to that section.

The fact that the first term is not the trial term for a cause does not make it improper to render judgment at that term by default in the absence of any motion or claim by defendant for a continuance: *Duncan v. Hobart*, 8-337; *Holt v. Smith*, 9-373.

3953. Separate trials. 2746. The court may, in its discretion, allow separate trials between the plaintiff and any defendant, or of any cause of action united with others, or of any issue in an action; and such separate trials may be had at the same or different terms of the court, as circumstances may require. [R., §§ 3024-5; C., '51, § 1768.]

The granting of separate trials is discretionary with the court: *Kilbourne v. Jennings*, 40-473.

And where a husband and wife brought joint action for slander, *held*, that it was not error to allow the plaintiffs to sever their causes of action: *Blades v. Walker*, 36-266.

Where a plaintiff seeking to recover a sum of money based his right in the first count of his petition upon the ground of his minority at the time of making the contract, and in the second count upon the ground of fraudulent representations, *held*, that it was not error in the court to refuse to grant separate trials upon the two counts: *Childs v. Dobbins*, 61-109.

Where a motion for separate trials is overruled by the court below in the exercise of its discretion, the supreme court should require a very strong showing before holding such discretion to have been improperly exercised: *Forshee v. Abrams*, 2-571.

Where separate trials are granted, a trial as to one defendant is not an adjudication as to the other: *Eikenberry v. Edwards*, 71-82.

3954. Calendar. 2747. The clerk shall keep a calendar distinguishing, first, criminal causes, and next, civil causes, and arranging each in the order of their commencement, and shall, under the direction of the court or judge, apportion the same to as many days as is believed necessary, and, at the request of any party to a cause, or his attorney, shall issue subpœnas accordingly. The clerk shall furnish the court and the bar with a sufficient number of printed copies of the calendar. [R., § 3005; C., '51, §§ 1761-2.]

A bar-docket printed in pursuance of the provisions of this section is no part of the official records of the court: *Gifford v. Cole*, 57-272.

The court may, after an assignment of causes has been made, make a re-apportionment, and if the party is not taken by surprise, or thus prevented from obtaining his testimony, he will have no ground of objection: *Elliott v. Cadwallader*, 14-67.

CONTINUANCES.

3955. Application for. 2748. When time is asked for making application for continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor; for which cost, judgment may at once be entered by the clerk unless the contrary be agreed between the parties. [R., § 3008; C., '51, § 1764.]

3956. Cause for. 2749. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained. [R., § 3009; C., '51, § 1765.]

In criminal cases: The provisions of these sections are applicable in criminal cases: See § 5804.

Party not at fault: A continuance should not be granted for a cause growing out of the fault of a party: *Connor v. Griffin*, 27-248.

A continuance on the ground of the absence of a witness should not be granted to defendant in default, who offers no defense, nor when the residence of the witness is not given, and diligence in ascertaining it is not shown: *James v. Arbuckle*, 8-272.

Diligence required: Application for continuance, based upon absence of papers which have been taken from the court by the attorney of the party asking the continuance, may properly be refused: *Wright v. Clark*, 2 G. Gr., 86.

The party seeking a continuance on the ground of the absence of a witness must show that he has availed himself of the means given by the statute to procure the attendance of such witness, or to obtain his deposition: *State v. Cross*, 12-66.

The fact that a witness examined before the grand jury, and whose name is indorsed upon the indictment, is subpœnaed by the prosecution but does not appear, cannot be made the basis of a motion by defendant for continuance, after the jury is sworn, upon the ground that he is a material witness for defendant. If his attendance on behalf of defendant is desired he should be subpœnaed by defendant and steps taken to ascertain whether he will be present: *State v. Hayden*, 45-11.

Where defendant was a resident of California, and his attorney had been for more than two months in communication with him, but it did not appear that he had taken any steps to secure the testimony of his client, *held*, that there was not sufficient showing of diligence to entitle defendant to a continuance for the purpose of having his testimony taken: *Argall v. Pugh*, 56-308.

Absence of a witness *held* not sufficient ground for a continuance where the deposition of the witness could have been taken: *Bell v. Chicago, B. & Q. R. Co.*, 61-321.

A party must show, not only that he made proper efforts to obtain the desired evidence after he knew that it might be obtained, but also that he used due diligence in discovering it: *State v. Bell*, 49-440.

An affidavit in a particular case *held* insufficient, in that it did not show that the witness' absence was unknown until so near the term that his deposition could not be taken: *Widner v. Hunt*, 4-355.

A party is held to greater diligence in procuring the deposition of a non-resident than that of a resident witness: *Peck v. Parchen*, 52-46.

Where a commission issued in December to take the deposition of a witness, and was not returned before trial in the following June, *held*, that sufficient diligence was not shown: *Cole v. Strafford*, 12-345.

It is not required of a party, in the exercise of proper diligence, that he have witnessess in attendance from a distance to meet a claim not yet made in the pleadings, although he may have noticed that such claim will be made: *Sapp v. Aiken*, 68-699.

The supreme court would be slow to disturb an order of continuance made upon application of the prosecution after the failure of the jury to agree in a criminal prosecution submitted to them, where the ground for asking such continuance is that witnesses for the prosecution have been allowed to depart from the court before the conclusion of the trial and cannot be secured before the next term: *State v. Miller*, 65-60.

A party is not entitled to a continuance for the purpose of taking testimony where the action has been so long pending and the necessity of the testimony has been apparent for such length of time that it is negligence on his part not to have procured his testimony sooner: *Greither v. Alexander*, 15-470.

A party cannot have a continuance on account of the absence of a witness where it does not appear that proper steps were taken to secure his attendance or that the party had any reason to believe that the witness would remain within the reach of a subpœna during the term: *Fiske v. Berryhill*, 10-203.

As to whether sufficient diligence was used under particular circumstances, see *Fiske v. Berryhill*, 10-203; *State v. Scott*, 44-93; *State v. Spurbeck*, 44-667; *State v. Dakin*, 52-395; *Brandt v. McDowell*, 52-230; *Kimball v. Bryan*, 56-632; *State v. Stone*, 65-366.

Discretion: The application for a continuance is addressed peculiarly to the sound legal discretion of the judge, and his ruling thereon will not be interfered with on appeal, unless the supreme court is clearly satisfied that this discretion has been abused and injustice thereby done: *Widner v. Hunt*, 4-355; *Childs v. Heaton*, 11-271; *State v. Rorabacher*, 19-154; *Boone v. Mitchell*, 33-45; *Finch v. Billings*, 22-228; *Harrison v. Charlton*, 37-134; *Peck v. Parchen*, 52-46; *State v. Wells*, 61-629; *State v. Reid*, 20-413.

The discretion which is conferred upon the court is, however, not arbitrary, but is to be governed and controlled by legal rules: *Purington v. Frank*, 2-565.

Where a party clearly brings himself within the law in an application for continuance, and no special circumstances are shown defeating his right, it is the duty of the court to grant the motion, and a refusal to do so will constitute reversible error: *Welsh v. Savery*, 4-241; *State v. Barrett*, 8-536.

While much is left to the discretion of the court in passing upon such an application, its ruling should not be arbitrary nor in violation of the rights of either party: *State v. Painter*, 40-298.

The judge, being acquainted with all the facts in connection with the case, can determine whether the party has, with due diligence and in good faith, made efforts to prepare for trial: *State v. Stegner*, 72-13.

Grounds; absence of evidence: In a criminal case the state as well as defendant is entitled to reasonable opportunity to procure its witnesses and be prepared for trial, and where a proper application for a continuance is made by the state with sufficient showing of diligence it should be granted: *State v. Painter*, 40-298.

In a particular case, *held*, that a continuance should have been granted on application of defendants to allow them to procure testimony as to their general character: *State v. Nash*, 7-347, 373.

Where, in a prosecution for murder, defendant asked a continuance on account of the absence of a witness by whom he expected to prove that he (witness) did the killing, *held*, that the improbability that the witness would thus subject himself to a criminal prosecution was not sufficient ground for refusing a continuance: *State v. Farr*, 33-553.

A continuance could not be granted on account of the absence of a witness whose testi-

mony would relate only to a portion of the claim which is dismissed: *Herd v. Herd*, 71–497.

Absence of counsel: A continuance may be granted in a particular case on account of absence of counsel, but if such application is refused, the supreme court would require very strong circumstances, manifesting a clear abuse of discretion, before it would interfere: *Brady v. Malone*, 4–146.

While the absence of a party's attorney on account of sickness might be a ground for continuing a cause to a later day in the same term, under the circumstances of a particular case, *held*, that it was not sufficient to require a continuance over the term: *State v. Ostrander*, 18–435, 448.

Sickness of the defendant's counsel in a criminal case will not, *per se*, be sufficient ground for continuance if, in the exercise of reasonable diligence, defendant could have been ready for trial. Under the circumstances of a particular case, *held*, that it was not error to refuse a continuance on that ground: *State v. Rainsbarger*, 74–196.

Held not error to refuse to grant a continuance to defendant on account of sickness of his attorney in view of the fact that the indictment had been pending for fifteen months, and a continuance on the same ground had been granted at the previous term: *State v. Stegner*, 72–13.

Where it was shown that the attorney for one of the parties at the time of the motion for continuance was very sick and unable to do business, and the nature of the case was such that no other attorney could prepare for its trial at that time, *held*, that it was error to refuse a continuance, although it appeared that afterwards, and prior to the time of the trial, such attorney had so far recovered as to be at the court-house, though not in a condition to try the case: *Rice v. Melendy*, 36–166.

Absence of the party: To warrant the granting of a continuance on account of the absence of the party himself, the court should require much stricter showing of diligence or cause for such absence than in case of a witness not a party: *Gates v. Hamilton*, 12–50.

Where an affidavit for continuance showed the absence of a party to the suit, but did not show that his presence was necessary except as a witness, and did not state what was expected to be proved by his testimony nor the particular facts to which he would testify, *held*, that a continuance was properly refused: *Jackson v. Boyles*, 64–428.

The showing in a particular case *held* not sufficient to entitle defendant to a continuance on account of his own absence: *Brandt v. McDowell*, 52–230.

The appointment of a guardian ad litem may be a proper ground for continuance to enable him to prepare the case for trial: *Blythe v. Blythe*, 25–266.

The substitution of an administrator as a party is not a ground for continuance: *Masterson v. Brown*, 51–442.

Amendment of pleadings as a ground for continuance, see notes to § 3895.

Prejudice must appear: Under equity practice, *held*, that where defendant had called for a replication under oath, and the same was duly given, he was not entitled to a continuance in order to procure attendance of plaintiff as a witness to testify concerning the same matter already embraced in his sworn replication: *Stevens v. Campbell*, 6–538.

Where a criminal case was continued to a special term in the absence of the prisoner on account of the previous connection of the judge with the case, *held*, that no prejudice resulted to the accused in view of the fact that the continuance would have resulted from operation of law in any event: *State v. Linhart*, 23–314.

A party complaining of the refusal of the court to grant a continuance upon an amendment being filed by the opposite party must show that he suffered prejudice, such as that he had not information of all the evidence required to make his defense, or that his witnesses were not all present, or the like: *York v. Clemens*, 41–95.

Where a defendant asked for a two days' continuance for the purpose of procuring testimony, which was overruled, and the cause was proceeded with, but defendant was not called upon to introduce evidence until the third day after, *held*, that he was not prejudiced by refusal to grant his application: *Winklemans v. Des Moines Northwestern R. Co.*, 62–11.

Where a case has been continued upon the application of a party at previous terms, reasonable prejudice should be shown before another continuance is granted: *Rosecranes v. Iowa & M. Telephone Co.*, 65–444.

Facts in a particular case *held* not to show sufficient prejudice to entitle a party to continuance on account of the absence of testimony: *Owens v. Hart*, 66–565.

3957. Showing. 2750. Motions for continuance on account of the absence of evidence, must be founded on the affidavit of the party, his agent, or attorney, and must state:

1. The name and residence of such witness, or, if that be not known, a sufficient reason why not known, and also, in either case, facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

2. Efforts, constituting due diligence, which have been used to obtain such witness, or his testimony;

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved. [R., §§ 3010–11; C., '51, § 1766.]

Affidavits: It is not competent for the attorney to swear to an affidavit as to facts for a continuance which are solely within the knowledge of his client: *Widner v. Hunt*, 4–355.

Counter-affidavits: See notes to § 3961.

Ability to procure witness at next term: The provision that the affidavit shall show reasonable ground of belief as to the attendance of witnesses at the next term, etc., contemplates more than a mere statement of a belief that the testimony can be procured: *State v. Rorabacher*, 19–154.

Showing of diligence: It is not sufficient to state that due diligence has been used; the facts constituting such diligence must be shown: *Thurston v. Cavenor*, 8–155.

The facts constituting due diligence must be shown, and from such facts the court will determine whether the necessary diligence has been exercised: *Brady v. Malone*, 4–146.

Affidavits for the purpose of showing due diligence should be strictly construed and most strongly against the applicant for the continuance: *Ibid.*

The showing in particular cases for a continuance on account of the absence of material witnesses *held* sufficient: *State v. Dakin*, 52–395; *State v. Nash*, 7–347, 373.

In particular cases *held* that the showing of diligence was not sufficient to require the court to grant the continuance: *Thurston v. Cavenor*, 8–155; *Walker v. Scofield*, 39–666; *Adams v. Peck*, 4–551; *Brotherton v. Brotherton*, 41–112; *State v. Spurbeck*, 44–667; *Randall v. Fockler*, 52–618; *Finch v. Billings*, 22–228.

Statement as to what absent witness will prove: Where the application for continuance is made on account of the absence of witnesses the affidavit ought to give the names of the witnesses, their residence and the particular facts which the party expects to prove, or give some excuse for not doing so, not only in order that it may appear that substantial justice requires the continuance, but because the opposite party has a right to know the facts expected to be proved in order that he may admit them and thus prevent a continuance if he so desires, as provided in the next section: *State ex rel. v. Tilghman*, 6-496; *Olds v. Glaze*, 7–86.

The affidavit as to what affiant believes witness will prove must state facts, as distinguished from legal conclusions: *State v. Felter*, 25–67.

A statement that the party expects to prove by the witness "all the material allegations contained in his answer" is not sufficient: *Olds v. Glaze*, 7–86.

The affidavit must show that the witness would, if present, testify to facts material and relevant to the issue: *State v. Bennett*, 52–724; *State v. Williams*, 8–533; *State v. Falconer*, 70–416.

Where the ground for continuance was the absence of defendants to the suit, who it was claimed were the only witnesses by whom the defense could be proven, *held*, that the application was not sufficient without setting out the facts to which such witnesses would testify: *Jackson v. Boyles*, 64–428.

Where the showing as to what it was expected to prove by a witness whose absence was made the basis of an application for continuance did not indicate that the matters to which he would testify would show a legal defense, *held*, that the continuance was properly refused: *State v. Clark*, 69–196.

No other witnesses: The affidavit must show that there are no other witnesses by whom the facts stated can be fully proved: *Thompson v. Abbott*, 11–193.

But where a party stated in his affidavit that he knew of no person by whom the same facts could be "as fully proved as by said" witness, *held*, that the affidavit was sufficient: *Welsh v. Savery*, 4–241.

A continuance should not be granted upon an affidavit that the party knows of no witness in the state by whom he can prove the desired fact, where he fails to state that there is a person anywhere by whom such fact can be proven: *Thompson v. Lord*, 14–591.

3958. Admission by opposite party. 2751. If the application is insufficient, it shall be overruled; if held sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated. [R., §§ 3012–13; C., '51, § 1767.]

Where the opposite party admits that the witness, if present, would testify to the facts stated, the affidavit may be read to the jury as the basis of such admission: *Strong v. Hart*, 7–484.

But it can be read only in so far as it states facts which the witness, if present, would be allowed to testify to: *State v. Sater*, 8–420.

The admission does not preclude legal objections which might be made to the testimony if the witness were present: *State v. Geddis*, 42–264.

The statements of the affidavit, if admitted and read, are to be taken as the testimony of the witness in court, and cannot be impeached by proof of different statements made out of court, unless a proper foundation therefor has been laid, even though such outside statements were under oath: *State v. Shannehan*, 22–435.

The affidavit and admission are not admissible as evidence at a subsequent term: *State v. Felter*, 32–49.

As to whether the provisions denying a continuance on the ground of absence of witnesses in case of admission as to what the witness is expected to prove is in violation of defendant's constitutional right to compulsory process for the attendance of his witnesses, *quære: Trulock v. State*, 1–515.

Although where the facts stated by the affidavit as those which it is expected to show by an absent witness are not material a change should not be granted, yet the ruling of the

court in granting a change will not, in case the opposite party elects to allow the affidavit to be read in evidence, preclude the court from changing its former ruling and refusing to allow the affidavit to be read in evidence on the ground that the facts to be proven by the absent witness are immaterial: *Whitney v. Brownewell*, 71–251.

3959. Filing motion. 2752. The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered, and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, the motion shall be made and determined as soon as the court opens after the next ordinary adjournment. [R., § 3014.]

The motion should be filed as soon after the second day of the term as it becomes certain that it will have to be filed: *Bays v. Herring*, 51–286.

If the affidavit is not made on the second day, a sufficient excuse therefor should be therein stated: *Randall v. Fockler*, 52–618.

If filed after the second day, and no reason for the delay is shown, the motion should be overruled: *Lucas v. Casady*, 12–567; *Chicago & S. W. R. Co. v. Heard*, 44–358; *Bell v. Chicago, B. & Q. R. Co.*, 64–321; *State v. Benge*, 61–658.

Under the facts in a particular case, *held*, that it did not sufficiently appear that the application was made as soon as it became certain that it would need to be made as required by statute: *Bays v. Herring*, 51–286.

Where the application was made on the day the cause was regularly reached for trial, *held*, that in the absence of any showing to the contrary, it would be presumed that it was overruled for the reason that it was not made within the time required: *Woolheather v. Risley*, 38–486.

3960. Amendment. 2753. The application shall be amended but once, unless by permission, to supply a clerical error. [R., § 3015.]

Before the enactment of this provision, *held*, that the practice of suffering affidavits or continuance to be amended, or new ones to be filed, was one which might be productive of much evil, and which should be permitted with great caution, if at all: *Widner v. Hunt*, 4–355.

3961. Written objections to. 2754. To such motion, both as original and as amended, the adverse party may, at once, or within such reasonable time as the court shall allow, file written objections stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desire it. [R., § 3016.]

Counter-affidavits: In case of a motion for continuance on account of the absence of evidence, counter-affidavits are not receivable: *State v. Bowers*, 17–46; *State v. Dakin*, 52–395; *State v. Wells*, 61–629.

But where the motion was overruled because insufficient in itself, *held*, that the action of the court could not be reversed on appeal although counter-affidavits had been received and considered: *Williams v. Niagara F. Ins. Co.*, 50–561.

Where a continuance is asked on account of excitement and prejudice against defendant in a criminal case, the application may be resisted by counter-affidavits as to the matters relied upon: *State v. Wells*, 61–629.

The statement of facts which are expected to be proven by an absent witness cannot be contradicted by counter-affidavits, but as to facts showing diligence and the like counter-affidavits are receivable: *State v. Rainsbarger*, 74–196.

3962. Part of record. 2755. Such motion and objections shall be a part of the record, and error in refusing a continuance or in compelling an election may be reviewed. [R., § 3017.]

As to review, on appeal, of a ruling on a motion for continuance, see § 4393 and notes.

3963. Notice book. 2756. No copy need be served of a motion for continuance or of objections thereto, but a notice of such motion shall be entered on the notice book. [R., § 3018.]

3964. Costs. 2757. Every continuance granted upon the application of either party, shall be at the costs of such party, unless otherwise ordered by the court. [R., § 3019.]

Where a continuance was granted to defendant for the reason that plaintiff had asked and obtained leave to introduce evidence material to the case, after both parties had rested and after defendant's witness had left the court, *held*, that the cost of the trial being rendered useless by the continuance, and the continuance being rendered necessary by the plaintiff's witness being absent, the costs were properly taxed to plaintiff: *Voorhees v. Chicago, R. I. & P. R. Co.*, 71–735.

After a party has accepted an unnecessary order for a continuance, accompanied by an order for the payment of costs, he should not be heard to complain of the latter order: *Robinson v. Chicago, R. I. & P. R. Co.*, 73–506.

3965. Parties may agree. 2758. The court shall grant continuance whenever the parties agree thereto, and provide as to costs as may be stipulated. [R., § 3020.]

3966. Case remains on docket. 2759. A case continued remains for all purposes except a trial on the facts. [R., § 3022.]

3967. One of several defendants. 2760. Where the defenses are distinct, any one of several defendants may continue as to himself. [R., § 3023.]

Where the action was against two defendants as a firm and not against them as individuals, *held*, that a continuance against one would operate as a continuance against both: *Butler v. McCall*, 15–430.

SELECTION OF JURY.

3968. How done. 2761. When a jury trial is demanded, the clerk shall select twelve jurors by lot from the regular panel. [R., § 3026; C., '51, § 1773.]

Where the jury consisted of but eleven jurors, it appearing that the parties had no knowledge of that fact until after verdict, *held*, that the defect was fatal and could not be considered as waived: *Cowles v. Buckman*, 6–161.

As to trial by jury, see § 3947 and Const., art. 1, § 9.

3969. Challenge. 2762. A challenge is an objection made to the trial jurors and is of two kinds:

1. To the panel;
2. To an individual juror. [R., § 3027; C., '51, § 2972.]

3970. Joint challenges. 2763. Where there are several parties plaintiffs or defendants, and no separate trial is allowed, they are not allowed to sever their challenges, but must join in them. [R., § 3028.]

3971. To the panel. 2764. A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury. [R., § 3029; C., '51, § 2974.]

A challenge to the panel should be sustained where the requisite number of trial jurors has not been summoned: *Baker v. Steamboat Milwaukee*, 14–214.

3972. When made. 2765. A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge. [R., § 3030; C., '51, § 2975.]

3973. How tried. 2766. A challenge to the panel may be taken by either party and upon the trial thereof, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. [R., § 3031; C., '51, § 2976.]

3974. Allowance. 2767. If the facts of the challenge be allowed by the court, the jury must be discharged and its members disqualified from sitting as jurors so far as the trial in question is concerned; if it be disallowed, the court shall direct the jury to be impaneled. [R., § 3032; C., '51, 2977.]

The fact that vacancies in the panel from which the jury is drawn have been filled with talesmen in an illegal manner is not a ground for challenge to the panel. The objection should be raised by challenge to such talesmen when called: *Buford v. McGetchie*, 60–298.

3975. To jurors. 2768. A challenge to an individual juror is either peremptory or for cause. [R., § 3033; C., '51, § 2978.]

3976. When made. 2769. It must be taken when the juror appears and before he is sworn, but the court may, for good cause, permit it to be taken at any time before the jury is completed. [R., § 3034; C., '51, § 2979.]

3977. Peremptory. 2770. A peremptory challenge is an objection to a juror for which no reasons need be given, but upon which the court shall exclude him. [R., § 3035.]

3978. Number of; how made. 2771. Each party shall have the right to challenge peremptorily, five jurors and no more; and the parties shall challenge alternately, commencing with the plaintiff, and the challenges for cause being first exhausted or waived, the parties shall then, in turn, in the same order, exercise the right of peremptory challenge. [R., § 3036; C., '51, § 1774; 9 G. A., ch. 174, § 3.]

An error in overruling a challenge to a juror for cause is waived if the party making such challenge afterward waives a peremptory challenge to the jury containing such juror: *Barnes v. Newton*, 16–665; *State v. George*, 63–682. And see note to § 3465.

A waiver of peremptory challenge by a party only counts as one of the number to which he is entitled, and, after a challenge by the other party, he may use any remaining right of challenge, even as to a juror in the box when the waiver was made: *Fountain v. West*, 23–9.

Where a jury was selected and accepted by the parties and then dismissed upon the adjournment of court until the next day without being sworn, *held*, that at the opening of the next session and before the actual swearing of the jury a party might interpose a peremptory challenge not exercised by him in the impaneling of the jury: *Spencer v. De France*, 3 G. Gr., 216.

By waiving peremptory challenges and accepting the jury the defendant waives any error in overruling previous challenges for cause: *State v. Winter*, 72–627.

3979. Causes of; vacancy filled. 2772. After each challenge, the vacancy shall be filled before further challenges are made, and any new juror thus introduced may be challenged. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction for felony;

2. A want of any of the qualifications prescribed by statute to render a person a competent juror;

3. Inability to understand the English language, unsoundness of mind, or such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror;

4. Consanguinity or affinity within the ninth degree to the adverse party;

5. Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or being a member of the family, or in the employment of the adverse party;

6. Being a party adverse to the challenging party in a civil action, or having complained against, or been accused by him in a criminal prosecution;

7. Having already sat upon the trial of the same issues;

8. Having served as a grand or trial juror in a criminal case based on the same transaction;

9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict;

10. Being interested in a like question with the issue to be tried. [R., §§ 2271, 3037–40; C., '51, § 1775.]

Discretion: Questions as to the qualification of jurors are submitted to the sound discretion of the court, and its action will not be reviewed unless an abuse thereof is shown: *Anson v. Dwight*, 18–241; *May v. Elam*, 27–365.

Causes of challenge: Where it was shown that a juror had a bet of twenty-five cents outstanding which would be affected by the result of the trial, and this fact was not disclosed when he was interrogated as to his qualifications, *held*, that he was incompetent, and that a new trial should have been granted: *Seaton v. Swem*, 58–41.

In an action against a city for damages a citizen and tax payer of the city is not a competent juror: *Davenport Gas, etc., Co. v. Davenport*, 13–229; *Dively v. Cedar Falls*, 21–565; *Cramer v. Burlington*, 42–315; *McGinty v. Keokuk*, 66–725.

A tax payer of a city is subject to challenge as a juror by plaintiff in an action against the

city for damages, although he is a non-resident of the city: *Kendall v. Albia*, 73–241.

The right to challenge is a right allowed parties to protect themselves in their interests, but it is not a ground of challenge by one party that the juror has an interest adverse to that of the other. Therefore *held*, that on appeal in a proceeding to assess damages for change of the grade of a street the city could not challenge a juror on the ground that he was a tax payer: *Conklin v. Keokuk*, 73–343.

In an action against a city for damages the defendant cannot object to a resident of the city acting as juror on the ground that he is not a tax payer: *Hollenbeck v. Marshalltown*, 62–21.

Jurors who have rendered a verdict of guilty in a criminal prosecution are not competent to sit in a civil action for trespass against the same defendant, arising out of the same transaction, even though they state upon their *voir dire* that they have not formed or expressed any opinion in the case: *Spear v. Spencer*, 1 G. Gr., 534.

Where it appeared, in an action to collect a subscription to a railway company, that a juror was united with others along the road in resisting suits brought to recover upon contracts given for the same purpose as the contract in suit, *held*, that he was properly excluded from the jury for cause: *Courtwright v. Strickler*, 37–382.

Where a juror was a partner of one of the parties, *held*, that he was properly excused upon challenge for cause: *Stumm v. Hummel*, 39–478.

Cases of express and implied bias, as those terms were used in a previous statute, discussed: *May v. Elam*, 27–365.

Cause stated: A challenge for cause not further specifying the objection made to the juror should be overruled: *Bonney v. Cocke*, 61–303.

Error in excluding juror: When a challenge to a juror is sustained, even though erroneously, and an unobjectionable jury is procured, the supreme court must be well satisfied that the challenge was sustained without any cause in order to justify a reversal on that ground: *Wisehart v. Dietz*, 67–121.

Where a juror was discharged on a showing that one of the parties was the father of the juror's wife, it not appearing what other showing there was as to bias, *held*, that the judgment would not be reversed on that ground: *Ibid.*

Objection waived: A motion for a new trial on the ground that one of the jurors had already sat on the trial of the same issues should not be sustained in the absence of a showing that the party complaining was ignorant of that fact: *Hurlert v. Weines*, 27–134.

Where the party does not examine the jurors under oath or otherwise as to their qualification and competency, he cannot make an objection to a juror which would have thus been disclosed a ground for a new trial: *Stewart v. Ewbank*, 3–191.

3980. Challenge; how tried. 2773. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon; and other evidence may also be heard. [R., § 3042; C., '51, § 2988.]

3981. Same. 2774. In all challenges, the court shall determine the law and the fact, and must either allow or disallow the challenge. [R., § 3043; C., '51, § 2990.]

See notes to § 3979.

3982. Talesmen. 2775. When the requisite number of jurors cannot otherwise be obtained, the sheriff shall select talesmen to supply the deficiency from the body of the county. [R., § 3044; C., '51, § 1777.]

Where the panel of jurors regularly summoned is exhausted by challenges it may be filled by calling persons present in court, and it is not error to refuse to order it filled from the jury lists and delay the trial for that purpose: *State v. Harris*, 64–287; *Brentner v. Chicago, M. & St. P. R. Co.*, 68–530.

The fact that a jury is filled up by talesmen is no ground of objection unless abuse of discretion on the part of the court is shown: *Emerick v. Sloan*, 18–139.

It is not a ground for challenge to the panel from which the jury is drawn that vacancies in the panel have been filled with talesmen in an illegal manner. The objection should be raised by challenge to such talesmen when called: *Buford v. McGeichie*, 60–298.

3983. Persons who keep the seventh day. 2776. A person whose religious faith and practice are to keep the seventh day of the week as a day set apart by divine command, and dedicated to rest and religious uses, cannot be compelled to attend as a juror on that day, and shall, in other respects, be protected in the enjoyment of his opinions to the same extent as those who keep the first day of the week. [R., § 4112; C., '51, § 2504.]

3984. Exemption. 2777. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted. [R., § 3041; C., '51, § 2987.]

The section applied: *State v. Adams*, 20–486.

As to what persons are exempted, see § 306. Section 5791 is identical with this section.

3985. Majority verdict; struck jury. 2778. The parties may at any time, either before the jury is sworn, or after, agree to take the verdict of the majority, which agreement being stated to the court and stated on the record to have been made, shall bind the parties, and, in such case, a verdict signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall, in every particular, be as binding as if made by a full jury; or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first, and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the cause. [R., § 3045; C., '51, § 1776.]

ORDER OF TRIAL.

3986. After jury is sworn. 2779. When the jury has been sworn, the court shall proceed in the following order:

1. The party on whom rests the burden of proof, may briefly state his claim and the evidence by which he expects to sustain it;

2. The other party may then briefly state his defense, and the evidence by which he expects to sustain it;

3. The party on whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party must then produce his evidence;

4. The parties then will be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence in their original case;

5. But one counsel on each side shall examine the same witness, and upon interlocutory questions, the party moving the court or objecting to testimony shall be heard first; the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to respondent's argument. Debate on the questions shall then be closed, unless the court request further argument. [R., § 3046.]

Impaneling jury: When the jury have been sworn, as usual, to try the issues between the parties, the subsequent allowance of an amendment presenting a new issue will not, it seems, make it necessary to reswear the jury: *Arnold v. Arnold*, 20-273.

Burden of proof; opening and closing: The question as to who has the burden of proof is properly a matter of practice, and the ruling of the court thereon will not be reviewed unless there is evidence of an abuse of discretion: *Viele v. Germania Ins. Co.*, 26-9.

The true test, to determine upon whom is the burden of proof, is to consider which party would be entitled to the verdict if no evidence were offered on either side. The burden is upon the party against whom, in such case, the verdict ought to be: *Ibid.; Vieths v. Hagge*, 8-163, 192.

The party having the affirmative of the issue does not always have the burden of proof: *Silliman v. King*, 36-207.

Where, under the issues, plaintiff is not required to introduce any evidence and is entitled to judgment for all he claims if defendant fails to establish matters pleaded by him, the burden of proof and the right to open and close the case are upon defendant: *Bixby v. Carskaddon*, 70-726.

Where, upon the material issues in a case, the burden was upon defendant, *held* not error to give him the opening and closing, although the allegations of the petition were not, in terms, admitted by the answer: *Delaware County Bank v. Duncombe*, 48-488.

Action of the court in determining who is entitled to the opening and closing is not subject to review on appeal: *Goodpaster v. Voris*, 8-334.

While the right of review of the decision of the court as to who has the affirmative is not absolutely denied, there must be a clear case of prejudice arising from error in the decision of the court upon that point to justify a reversal on such ground: *Fountain v. West*, 23-9; *Preston v. Walker*, 26-205; *Woodward v. Laverty*, 14-381; *Smith v. Cooper*, 9-376; *Ashworth v. Grubbs*, 47-353; *Dent v. Smith*, 53-262; *Van Horn v. Smith*, 59-142.

In an attachment suit, where a counter-claim on the bond is interposed, if plaintiff introduces no evidence to show defendant's liability on the cause of action, defendant has the opening and closing with reference to the liability on the bond: *Whitney v. Brownewell*, 71-251.

The burden of proving freedom from contributory negligence is upon the party alleging negligence, although the fact of contributory negligence may be alleged in the answer: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315; *Gamble v. Mullin*, 74-99.

Where a party has insisted on the right to open and close, against the objection of the other party, and has been allowed by the court to do so, he cannot complain of an instruction that the burden of proof is upon him: *Lister v. Clark*, 48-168.

As to opening and closing the argument, see next section.

Order of evidence: The order in which the proof of facts shall be received is in the sound discretion of the court: *Cannon v. Iowa City*, 34–203; *Woolheather v. Risley*, 38–486; *Carman v. Roennan*, 45–135; *Duffees v. Judd*, 48–256; *State v. Fry*, 67–475.

And in the absence of any proof of prejudice to the appellant or of abuse of discretion by the court, the supreme court will not feel justified in interfering, on appeal, with the exercise of such discretion: *Pearson v. South*, 61–232.

A decision of the court in such matter will not be overruled on appeal unless manifest abuse of such discretion is shown: *Samuels v. Griffith*, 13–103; *Donaldson v. Mississippi & M. R. Co.*, 18–280.

The supreme court will not be justified in interfering with the exercise of this discretion by the lower court, unless in a clear case of its abuse, even where it is exercised in excluding evidence which is not strictly rebutting in its character, after the original case for that party has been closed: *Boals v. Shields*, 35–231.

It is within the discretion of the court to permit a witness at any time during the trial to correct the evidence previously given. If the opposite party is taken by surprise, and he is unable to controvert the new evidence because of the absence of witnesses, he should at least apply for a continuance: *Miller v. Hartford F. Ins. Co.*, 70–704.

Out of regular order: In the exercise of its discretion, and in accordance with common practice, the court may admit testimony the relevancy or competency of which is not at the time apparent, on the promise of the party offering it, and with the understanding that he will introduce other testimony by which its competency or relevancy shall become apparent, and that otherwise it shall be ruled out; but the court may, in its discretion, require the evidence to be introduced in its proper order: *Rutledge v. Evans*, 11–287; *Cramer v. Burlington*, 42–315.

Where the pleadings of defendant alleged that he had fully complied with the conditions of a title bond, which he offered in evidence, *held*, that an objection to the introduction of such bond offered in evidence because defendant had showed no title or interest therein was properly overruled, defendant being permitted first to introduce the bond and then to show his title and interest in it: *Van Orman v. Spafford*, 16–186.

The record in another case may be introduced in evidence to prove a prior adjudication without previous proof that the former action was between the same parties or involved the same rights. Those facts might be established by evidence afterwards: *Searle v. Richardson*, 67–170.

It is not error to admit secondary evidence of an instrument claimed to be lost before there is evidence authorizing the introduction of such secondary evidence, if afterwards facts are shown in the testimony of either party rendering the introduction of such secondary evidence proper: *Cook Mfg. Co. v. Randall*, 62–244.

Where it is sought to prove by parol evidence a sale which is taken out of the statute of frauds by part performance, evidence of the sale may be first introduced, to be followed by proof of part performance: *Campbell v. Ormsby*, 65–518.

Additional evidence in chief after party has rested: The entire subject of the examination of witnesses and the order of production of testimony rests very largely in the discretion of the judge trying the cause, and it is within his discretion, in the furtherance of justice, to admit new testimony on the part of the affirmative after the testimony on the part of the negative has been closed: *Hubbell v. Ream*, 31–289.

Unless an abuse of discretion is shown the action of the court in allowing the plaintiff on rebuttal to introduce evidence which is not strictly rebutting furnishes no ground of reversal: *Hess v. Wilcox*, 58–380.

So where defendant, under the allegations of his answer, introduced testimony upon a point as to which the burden of proof was properly upon plaintiff under the pleading, *held*, that it was not error in the court to then allow plaintiff to introduce adverse evidence, although it was not in rebuttal: *Crane v. Ellis*, 31–510.

Although the matter of the order of introducing evidence is largely in the discretion of the court, yet where evidence was allowed out of its proper order and the court refused to allow additional evidence in rebuttal, *held*, that there was such error as to require reversal: *McDonald v. Moore*, 65–171.

Testimony offered merely for the purpose of corroborating a witness may properly be excluded until the testimony of the witness has been impeached: *State v. Rorabacher*, 19–154.

Additional evidence after evidence is closed: The admission of testimony after both sides have rested their case is so much a question of discretion that it will not be interfered with on appeal without a showing of abuse of discretion or prejudice to appellant: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28–12.

The court may in its discretion allow the introduction of additional evidence after the evidence has been closed and the arguments of counsel have been made: *Darlan v. Rosencrans*, 56–122.

It is the common practice in trial courts to permit parties to introduce material evidence at any time before the verdict, which has been omitted by mistake or inadvertence: *Meadows v. Hawkeye Ins. Co.*, 67–57.

Evidence may be received out of its regular order for other reasons than "to correct an evident oversight or mistake," as provided in § 4006: *Huey v. Huey*, 26–525.

Where plaintiff had omitted to prove title necessary to make out his case, *held* not error to allow him to introduce proof thereof after the evidence had been closed: *McNichols v. Wilson*, 42–385.

Where an issue is finally submitted to the court and determined, it is too late afterwards to introduce additional evidence bearing thereon: *Byington v. Moore*, 62–470.

Evidence to rebut counter-claim: After defendant has introduced proof to establish a set-off, plaintiff should be allowed to introduce evidence to show that defendant's claim has been paid. He is not called upon to introduce such evidence until after defendant has intro-

duced the evidence on his part *Luke v. Bruner*, 15 3

Preliminary statement: The introduction of evidence is not to be precluded by the statement of the case to the jury by the attorney in opening Admissions thus made are not binding on the party *Frederick v Gaston*, 1 G Gr , 101

Introduction of written evidence: Where a case was being tried on the written report of evidence offered on a former trial, *held*, that a party might on his own motion withdraw or withhold a portion of the evidence offered by himself on such trial *Henderson v Chicago, R I & P R Co*, 48 216

Introduction of record: It is not necessary to constitute a full introduction of the record in evidence that it be actually handed to the jury *Iowan v Davis*, 5-406

Where a written instrument is offered in evidence and no objection is made thereto, it is to be regarded as introduced *Stephens v Pence* 56 257

Where a party makes an oral statement that he offered to read a book in evidence, but did not find it in the case nor produce it on the trial *held* that it could not be considered a part of the evidence received, and that the right to a trial *de novo* on appeal could not be defeated by the fact that the record did not contain such copy *Palo Alto County v Thompson* 68 81

Inspection of instrument: When a note is introduced in evidence the opposite party has a right to inspect the same, but if, taking advantage of such temporary possession, he fails to return it or puts it out of his power to return it a copy may be introduced and used *Selman v Cobb* 59

Number of witnesses: The trial court is authorized to exercise a discretion as to the number of witnesses that shall be introduced to a particular point or to establish any particular fact *Kesee v Chicago & N W R Co.*, 30-78 *Bays v Herring*, 51-286, *Bays v. Hunt*, 60-251

Where the court, in advance, informed the respective parties that the number of witnesses as to a particular point (the value of property in an appeal from an assessment for damages for right of way) would be limited to five on each side, *held*, that such action was not erroneous *Lucrett v Union Pacific R Co*, 59-243

In the absence of manifest abuse of such discretion the appellate court will not interfere with the action of the lower court with reference thereto *Kesee v Chicago & N W R Co*, 30 78

Excluding jury: While it sometimes desirable that remarks made by the judge and arguments by the counsel upon questions involved in the case be not made in the presence of the jury, yet it is not always practicable or desirable to have such questions argued and determined in their absence The proper practice in each case is to be determined by the trial court in the exercise of sound legal discretion *Hall v Carter*, 14 364

Submission: So long as the case is open for evidence by agreement of counsel or order of court it is open for all proper applications and orders, and cannot be considered as submitted without having been called in court for that purpose, or peremptorily ordered by the judge *Cate v. Gilman*, 54-510

3987. Argument. 2780. The parties may then either submit or argue the case to the jury. In the argument the party having the burden of the issue, shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause, and if in the close he should refer to any new matter or point, or fact not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case [R., § 3025.]

Where a defendant admits the allegations of plaintiff's petition he is entitled to open and close the argument *Hartwell v Faucett*, 30-491.

The order of argument is so much a matter of discretion that the appellate court will not review on appeal a ruling, with reference thereto *Woodward v Lantz*, 14 381

Refusal of the trial court to allow a previous opinion of the supreme court in the same case to be read as an argument for the purpose of comment will not be ground for reversal in the absence of a showing that such opinion was applicable to the case and that the discretion of the court was wrongfully exercised *Shephard v Lewis* 30-41

It is error to allow counsel in argument to read to the jury a part of his argument evidence introduced on a former trial of the same cause, but not introduced in the pending trial *Martin v Orndoff* 2-304

A motion for continuance being part of the record is a proper matter of comment by counsel without being formally offered in evidence. *Cross v. Garrett*, 35-480.

It is not improper for counsel in argument to read to the jury by question and answer a portion of the testimony of a witness, and he cannot be required as a condition of doing so to read the entire testimony of such witness. *Goodson v Des Moines*, 66-265

It is not improper to allow an attorney in his argument to the jury to exhibit a drawing which he claims gives the result of the evidence submitted to the jury *Stafford v Oskaloosa* 64 20

Great latitude is allowed to counsel in appealing to the sympathy of the jury *Dowdell v Wilcox*, 64-721

The absence of the judge during the argument of the case to the jury will not constitute error sufficient to authorize reversal of a judgment, unless prejudice resulting from his absence, or some ground from which such error can be presumed, is shown *Baxter v Ray*, 62-306 *Hall v Wolff*, 61-569.

Unless an abuse of discretion by the court below is shown the case will not be reversed upon appeal for alleged error in the argument of counsel: *Hull v Alexander*, 26-569.

As to the right of adverse counsel to reply to any reference made by counsel in closing to new matter, see *Cross v. Garrett*, 35-480.

That misconduct of counsel in argument may be ground for new trial, see § 4044 and notes.

3988. Waiver of opening. 2781. If the party holding the affirmative waive the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument. [R., § 3048.]

3989. Number of attorneys allowed; court to arrange order. 2782. Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant, he may appear by two, and where there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order. [R., § 3049.]

3990. Argument restricted. 2783. The court may restrict the time of any attorney in any argument to itself, but shall not do so in any case before a jury. [R., § 3050.]

Before the adoption of this provision it was held that the time allowed to an attorney for addressing the jury might be limited by the court in its discretion, and that such action would not be interfered with on appeal unless it should appear that the party was greatly prejudiced by the exercise of such discretion: *Fletcher v. Burroughs*, 10-557.

INSTRUCTIONS.

3991. To be in writing. 2784. When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court shall be in writing. [R., § 3051.]

3992. Modifications. 2785. If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded. [R., § 3053.]

3993. Giving and refusing. 2786. The court must read over all the instructions which it intends to give, and none other, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury all those which are refused, and must write the words "given" or "refused," as the case may be, on the margin of each instruction. [R., § 3054.]

3994. Exceptions; record. 2787. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record. [R., § 3055.]

3995. Charge of the court. 2788. After argument the court may, also, of its own motion, charge the jury. Such charge shall be written in consecutively numbered paragraphs; and no oral explanation thereof shall be allowed. The provisions of this section shall also apply to the instructions asked by the parties. [R., §§ 3057, 3058, 3060.]

3996. Exceptions after verdict. 2789. Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instruction objected to and the ground of the objection. [R., § 3059.]

I. FORM OF AND METHOD OF GIVING.

In writing: Under the provision (§ 3991) requiring instructions to be in writing it is error to orally explain an instruction given, or to charge the jury verbally: *Head v. Langworthy*, 15-235.

Where the jury sent questions to the judge, in response to which he told them orally that their questions had nothing to do with the

case, and that it was their duty to determine the case under the evidence and instructions given, *held*, that such action was not erroneous, it not being an instruction to the jury, but a refusal to instruct: *Sullivan v. Collins*, 18-228.

It is not error in the court, after reading to the jury instructions asked by one of the parties, to state orally that such instructions are given at the request of such party: *Scott v. Chicago, M. & St. P. R. Co.*, 68-360.

A direction to the jury to find a verdict for one party, when such direction is proper, need not be in writing: *Milne v. Walker*, 59-186.

Instructions asked, written in pencil, cannot be refused as not being in writing, as required by the statute: *Harvey v. Tama County*, 53-228.

The rule requiring instructions to be in writing is sufficiently complied with by presenting them in print: *State v. Fooks*, 65-196.

Where instructions were given orally and afterwards reduced to writing, with the acquiescence of defendant, *held*, that it was not ground for reversal on defendant's appeal: *State v. Sipult*, 17-575.

If a party sits by with the knowledge that the statute requiring instructions to be in writing is not being complied with, and without excepting to the oral charge, he cannot afterwards be allowed to complain: *Head v. Langworthy*, 15-235.

Modification of instructions asked may be made by cutting off a part of the sheet on which the instruction is written, notwithstanding the particular provisions of § 3992 as to the method of making modifications: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

Giving instructions to jury without reading: A party who, without objection, permits instructions to be handed to the jury as given, without being read, cannot after verdict object to the action of the court in so doing: *Langworthy v. Meyers*, 4-18; *Talty v. Lusk*, 4-469.

When to be asked: Instructions which are submitted during the opening and only argument made at the trial cannot be refused as being presented too late: *McCaleb v. Smith*, 22-242.

Marking as "given" or as "refused:" Where several instructions were asked, written on sheets of paper fastened at the top, and on the margin of the first sheet the court wrote, "instructions one to seven, all refused," *held*, that this was a substantial compliance with the statute (§ 3993) requiring the court to write "given" or "refused" in the margin of each instruction, and was a refusal such that exception might be taken thereto: *Harvey v. Tama County*, 53-228.

Unless it is stated on the margin or elsewhere that an instruction complained of was "given," it will not be regarded as properly before the court on appeal. The recital in the clerk's transcript that an instruction was given is not sufficient: *Cadwallader v. Blair*, 18-420.

As to making instructions part of the record, and preserving exceptions thereto, see *infra*, V.

Additional instructions: If further instructions are to be given to the jury after they have retired they must be given in open court, that an opportunity may be offered to know what they are, and except to them if desired, and to ask others if deemed necessary: *O'Conner v. Guthrie*, 11-80.

Additional instructions should not be given without notice to counsel of the parties: *Davis v. Fish*, 1 G. Gr., 406.

Special interrogatories: It is proper and not uncommon, in the submission of special interrogatories, to instruct the jury as to the mode and manner of answering each one, according as they find the facts to exist: *State v. Geddis*,, 42-264.

II. DUTY TO INSTRUCT; REFUSAL; MODIFICATION.

A justice of the peace has no authority to give instructions to a jury in his court: *St. Joseph Mfg. Co. v Harrington*, 53-380.

Duty to instruct: It is the duty of the judge to see that every case is so presented to the jury that they have clear and intelligent notions of what they are to decide, and necessary instructions should therefore be given, although not requested by counsel; and a failure to give such instructions may be ground for new trial when the verdict does not effectuate justice between the parties: *Owen v. Owen*, 22-270.

If the instructions asked by counsel are defective and insufficient, and the case is complicated, or the law applicable to it not supposed to be within the knowledge of jurymen, and, particularly, if the charge is of a high criminal offense, it is the duty of the court to point out to the jury controverted questions of fact, and state the law applicable to them, and a failure to do so will be error: *State v. Brainard*, 25-572.

Where, in a criminal prosecution, the court gave full instructions as to the theory of the case relied on by the prosecution, but omitted to give instructions upon an essential part of the case upon the theory upon which defendant relied, *held*, that the judgment should be reversed: *State v. O'Hagan*, 38-504.

Where instructions, although correct as far as they go, do not announce such rule as is necessary for the guidance of the jury, the giving of them will amount to error: *Durant v. Fish*, 40-559.

The fact that an instruction directs the attention of the jury to certain things proper to be considered, as well as to the facts and circumstances surrounding the case, will not constitute error merely because it omits to direct their attention to other facts which might be proper for them to consider: *Allender v. Chicago, R. I. & P. R. Co.*, 43-276.

The reasons for the rules of law contained in instructions to the jury need not be stated: *State v. Turner*, 19-144; *State v. Rorabacher*, 19-154.

Instructions should be asked: It is not incumbent on the court, on its own motion, to instruct as to a matter upon which an instruction is not requested by the party desiring it: *Smith v. Chicago, M. & St. P. R. Co.*, 60-512.

Where it does not appear but that substantial justice has been effected, and further instructions have not been asked, the case

should not be reversed for failure of the court to more fully instruct the jury: *Hubbell v. Ream*, 31–289.

If instructions given do not embrace the law applicable to the case it is the duty of the party desiring a fuller or broader instruction to ask it, and if he fails to do so he cannot object to an instruction which is given and is correct as far as it goes: *Gwinn v. Crawford*, 42–63.

Mere failure to instruct may be reversible error if it appears that defendant has not had a fair trial. But where instructions are correct as far as they go, defendant cannot be heard to complain of failure to instruct as to matters as to which no instructions have been asked: *State v. Helvin*, 65–289.

Failure to state the law upon a particular point will not avail defendant if he has not asked instructions on such point: *State v. Tweedy*, 11–350; *State ex rel. v. O'Day*, 69–368.

A party cannot object on the ground of failure of the court to fully instruct the jury unless he has asked proper instructions on the point on which he claims the charge to be defective: *Ault v. Sloan*, 4–508.

Failure of the court to instruct as to other points upon which no instructions were asked will not be error where the instructions given are correct as far as they go: *Mackie v. Central R. of Iowa*, 54–540; *Hall v. Stewart*, 58–681.

Where an instruction is correct as far as it goes, it will not generally be considered erroneous for not stating additional rules applicable to the same point, unless the opposite party asks an instruction for the purpose of supplementing it: *Gwynn v. Duffield*, 66–708.

Objection that instructions are not more specific cannot be urged by a party who failed to ask more specific instructions: *Dixon v. Stewart*, 33–125; *Harrison v. Iowa Midland R. Co.*, 36–323; *Koehler v. Wilson*, 40–183.

If a party desires to have a question specifically presented to the attention of the jury he should ask an instruction upon it: *State v. Hazen*, 39–648; *McCausland v. Cresap*, 3 G. Gr., 161.

Where an instruction contains affirmative error, appellant will not be debarred from complaining thereof because he fails to ask an instruction which would have contravened the one given and expressed the correct rule: *State v. Pennell*, 56–29.

Failure to give an instruction which is absolutely essential to enable the jury to correctly apply the rule laid down in the instruction given will constitute error even though no such instruction is asked: *Seekel v. Norman*, 71–264.

Refusal of irrelevant instructions: It is not error to refuse instructions which are irrelevant to the issue: *Ford v. Jefferson County*, 4 G. Gr., 273.

Instructions may be refused which, while correct, are not essential to enable the jury to understand the questions involved: *Hale v. Philbrick*, 47–217.

Refusal to modify: Although the court may in its discretion modify instructions asked and give them as modified, yet it is not under obligation to so correct or limit them. It may refuse them entirely and leave the party proposing them to assume the hazard of their entire correctness: *Tifield v. Adams*, 3–487; *Keenan v. Missouri State Mut. Ins. Co.*, 12–126.

It is not error to refuse an instruction which could not be properly given without modification: *Grimes v. Martin*, 10–347; *Morrison v. Myers*, 11–538.

Refusal as to facts in detail: The court may properly refuse instructions which merely call the attention of the jury to particular facts and circumstances testified to by the witnesses in the case which are proper for their consideration. It might be impractical to instruct as to all the facts in detail: *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50–656; *State v. Miller*, 65–60.

The jury having been instructed that plaintiff could not recover unless they found the existence of the contract relied on by him, *held*, that it was unnecessary to further instruct that plaintiff could recover upon proof of other matters: *Poole v. Hintrager*, 60–180.

Refusal of proper instructions error: The court shall give instructions asked if they are correct and there is any basis for them in the testimony: *State v. Gibbons*, 10–117.

Where letters were put in evidence to prove an admission and also to be used by way of comparison to prove the genuineness of a signature, *held*, that it was error to refuse to instruct the jury that they might make such comparison: *Saunders v. Howard*, 51–517.

The refusal of the court to give instructions correct in law and supported by the evidence and not covered by instructions given constitutes reversible error: *Prichard v. Hopkins*, 52–120; *Spaulding v. Adams*, 63–437.

It is not sufficient that the jury might have considered evidence referred to without an instruction. If it is proper for the jury to consider matters referred to in the instruction it is proper for the court to so instruct them: *Spaulding v. Adams*, 63–437.

An instruction simply calling the attention of the jury to certain matters which the evidence tends to establish, informing them that they should consider such circumstances, should be given if requested and correct in law: *Ibid.*

Instructions cannot be refused on the ground of being unnecessarily lengthy and numerous: *McCaleb v. Smith*, 22–242.

The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibility of any particular witness, *held* not error where a general instruction on that question was given. *State v. Curran*, 51–112.

Also *held* not error to refuse an instruction cautioning the jury not to put a strained construction upon the testimony of the prosecuting witness: *Ibid.*

Refusal of instructions otherwise given: It is not error to refuse instructions asked where the subject is properly covered by instructions given by the court: *Rusch v. Davenport*, 6–443; *State v. Castello*, 62–404; *Seekel v. Norman*, 71–264.

The court is not bound to repeat the instructions previously given: *Trustees of Iowa College v. Hill*, 12–462.

It will not constitute error to refuse instructions when others given by the court cover

precisely and fully the same ground: *Harper v. Madren*, 21-407.

It is not error to refuse instructions which are correct if others to the same effect have been given: *Clinton Nat. Bank v. Torry*, 30-85; *Todd v. Branner*, 30-439; *Hopper v. Moore*, 42-563.

It is not error to refuse instructions which, though correct, are substantially covered by instructions given by the court: *Price v. Alexander*, 2 G. Gr., 427, *Raver v. Webster*, 3-502; *Rusch v. Davenport*, 6-443; *Mills v. Mabon*, 9-484; *Payne v. Billingham*, 10-360; *State v. Hockenberry*, 11-269: *Rindskoff v. Barrett*, 14-101; *Russ v. Steamboat War Eagle*, 14-363; *State v. Roubacher*, 19-154; *State v. Sellugel*, 19-169; *Harper v. Madren*, 21-407; *Robinson v. Illinois Cent. R. Co.*, 30-101; *Wilhelm v. Fimple*, 31-131; *Maxwell v. Gibbs*, 32-32: *State v. Murphy*, 33-270, *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656; *Thomas v. Brooklyn*, 58-438. *Thompson v. Keokuk*, 61-187; *Volaw v. Diehl*, 62-676; *Gee v. Moss*, 68-318.

When the law of the case has once been stated to the jury all further instructions should be refused: *Wilson Sewing Machine Co. v. Bull*, 52-554.

It is not error to refuse an instruction substantially given in another form which is as beneficial to the party as if given in the form asked by his counsel: *State v. Stanley*, 33-526.

Where by agreement of the parties instructions given by the court were to be decisive of the case, *held*, that the refusal to give every instruction asked by one of the parties could not be construed as error: *Parsons v. Hedges*, 15-119.

It is not error to refuse one instruction and give another in its place which differs from the former merely in words and not in essential meaning: *Gaspin v. Wilson*, 40-90.

It is not error to refuse instructions embodying propositions which are all forcibly and favorably presented in instructions given: *State v. Donneker*, 40-340.

It is not error to refuse an instruction which presents a doctrine that has been fairly stated in another instruction: *Allen v. Burlington, C. R. & N. R. Co.*, 57-623.

Where the instructions given fairly submit the points of the controversy to the jury, the refusal to give others substantially covered by those given will not constitute error: *Van Winter v. Henry County*, 61-684.

Where one instruction states to the jury the rule as to an element of the case it is not necessary to repeat the same rule in connection with other instructions: *State v. Heatherton*, 60-175.

Particular instructions: Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for error or mistake, and it is error to refuse an instruction correct in law and applicable to the evidence which instructs as to a particular state of facts, although the general proposition is covered by other instructions: *Muldowney v. Illinois Cent. R. Co.*, 32-176; *Perry v. Dubuque Southwestern R. Co.*, 36-102; *Manuel v. Chicago, R. I. & P. R. Co.*, 56-655; *Parkhill v. Brighton*, 61-103.

It is error to refuse an instruction directly applicable to facts of which there is evidence before the jury, although the principles of law to which such facts relate are properly stated in the instructions given: *Muldowney v. Illinois Cent. R. Co.*, 39-615.

It is error to refuse correct instructions which are relevant, even though the same instructions are given in a different form: *Webster v. Raver*, 4 G. Gr., 426.

Modifications of instructions asked should not be by interlineation or erasure: *Phillips v. Starr*, 26-349.

In giving instructions the court is not limited to the language adopted by the party requesting them, but may modify them to meet its views; but if, as so modified, they do not express the law they are subject to objection: *State v. Gibbons*, 10-117; *Abbott v. Striblen*, 6-191.

It will not constitute error to add to an instruction a modification which does not change its meaning: *Moore v. Chicago, B. & Q. R. Co.*, 65-505.

Held not error to modify an instruction so as to make it as broad as the issues between the parties: *Large v. Moore*, 17-258.

Modifications will not be erroneous which are merely words of explanation expressing that which must have been understood had they not been added: *Paukett v. Livermore*, 5-277.

Where an instruction asked by a party is modified by the court with matter not pertinent thereto, or erroneous if pertinent, it will constitute error: *State v. Green*, 20-424.

A modification of an instruction by cutting out a portion of it, *held* not to constitute error where the change was a proper one: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

III. SUBJECT-MATTER OF INSTRUCTIONS.

a. *In General; Misleading and Erroneous; Effect of Error.*

The charge in general: It is better as a general rule for the judge to put aside the instructions asked and cover the whole ground in a methodical charge of his own: *State v. Collins*, 20-85.

Where numerous and conflicting instructions are asked by the opposite parties they should be subjected to the mental alembic of the judge and materially reduced and purified and moulded to the facts of the case: *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539.

It is not good practice for the court to charge the jury in chief and then give all the instructions asked by either party. A clear and distinct enunciation of the law should be given: *Wilson Sewing Machine Co. v. Bull*, 52-554.

Ordinarily where the whole law of the case is given to the jury, although at the instance of the different parties, the supreme court will not interfere, but the instructions must be consistent as a whole, and not misleading: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

Instructions to the jury which partake of the nature of an argument are to be discouraged, and courts should labor to give such only as present the issues in a clear, simple, plain and unincumbered manner: *State v. Turner*, 19-144.

While it is not good practice to ask instructions which are simply intended to constitute a reply to the argument of counsel on the other side, and such instructions can usually be properly refused, yet where the argument of counsel contained statements not warranted by the evidence, *held*, that it was error to refuse an instruction which was intended to correct any misapprehension growing out of such improper argument: *State v. McCartney*, 65–522.

Foreign terms: The use of the word *onus* in an instruction *held* not objectionable; for, though a Latin word, it is incorporated into our language: *In re Will of Convey*, 52–197.

Should be clear and consistent: Instructions should be brief and perspicuous; and where they are confused or in conflict, to the probable prejudice of the complaining party, a new trial should be granted: *Eyser v. Weissgerber*, 2-463; *Hoben v. Burlington & M. R. R. Co.*, 20–562.

The whole charge, as given, should be consistent, and so framed as not only to state the law correctly, but in such manner as not to confuse the jury: *Hoben v. Burlington & M. R. R. Co.*, 20–562.

Abstract propositions: Instructions should clearly present the rules applicable to the peculiar facts of the case rather than general and abstract propositions of law, the bearing and force of which will not be fully understood and correctly applied by the jury: *State v. Glynden*, 51–163.

The giving or refusal of an instruction upon a mere abstract proposition of law, not referring in any way to the evidence, is not sufficient to warrant a reversal, unless it may be fairly inferred that the jury was thereby misled to the prejudice of the party complaining: *McGregor v. Arnill*, 2–30.

While the giving of instructions containing abstract propositions of law not applicable to the evidence will not in itself constitute prejudicial error, yet, if the jury are thereby left without any other guide in applying the evidence to the case, that fact may in itself constitute error warranting a reversal: *State v. Thompson*, 45–414.

It may also be error to give instructions embodying abstract propositions of law which are correct in themselves, but are not applicable to the evidence, where such instructions have a tendency to make an erroneous impression upon the jury and mislead them: *Moffitt v. Cressler*, 8–122; *Van Tuyl v. Quinton*, 45–459; *Williamson v. Reddish*, 45–550.

Contradictory: It is error sufficient to warrant a reversal that instructions lay down two contradictory rules for the guidance of the jury, if it appears that they may have adopted the erroneous instead of the correct one: *State v. Hartzell*, 58–520.

Conflict in the instructions is a ground for reversal on appeal: *Moore v. Des Moines & Ft. D. R. Co.*, 69–491.

Where an erroneous instruction is given the fact that the jury are elsewhere correctly instructed will not cure the error. In such case the instructions would be conflicting and inconsistent: *State v. Keasling*, 74–528.

Misleading: An instruction embracing a legal principle may be misleading as applied to the particular facts of the case, and therefore erroneous: *State v. Benham*, 23–154.

An instruction embracing a correct legal principle, but couched in such language as to be likely to mislead the jury, may properly be refused: *Perry v. Dubuque Southwestern R. Co.*, 36–102.

Where the instructions are such that the jury have been probably misled and confused by the language used, a new trial should be granted, even though the law may have been correctly stated in some of the instructions: *Preston v. Dubuque & P. R. Co.*, 11–15.

In a particular case, *held*, that an instruction referring to a matter which, owing to the circumstances of the case, was not proper for the jury to consider, was misleading and therefore erroneous: *Dolan v. Jean*, 35–413.

Where an instruction is misleading by reason of being susceptible of an erroneous construction, although technically correct, it may be a ground for reversal: *McCracken v. Webb*, 36–551.

An instruction which is inapplicable to the testimony, and has a tendency to mislead the jury, will constitute error: *Aultman v. Lee*, 43–404.

Giving an instruction so framed that it might have misled the jury as to the amount of proof necessary on the part of defendant, *held* sufficient error to warrant a reversal: *Williamson v. Reddish*, 45–550.

An instruction collecting together various things which, if true, would exonerate defendant from liability, *held* to be misleading in that it tended to lead the jury to believe that all such circumstances must concur to exonerate defendant, whereas a portion of them only were sufficient, as a matter of law, for that purpose: *Van Tuyl v. Quinton*, 45–459.

An instruction directing the jury that if they find a certain fact to be true to return a verdict for plaintiff, when the right of recovery depends upon other facts in connection with the fact thus mentioned, is misleading: *McKern v. Albia*, 69–447.

An instruction directing the jury as to the effect of a particular fact, which fact is in itself not essential as to the rights of either party, is misleading: *Campbell v. Wheeler*, 69–588.

An instruction to the effect that a bill of sale was invalid unless possession of the property passed thereunder, *held* misleading, as no explanation was made as to the effect of notice to other persons of the transaction: *Tiffany v. Anderson*, 55–405.

Where an instruction was such that it authorized the jury, if they found a certain fact, to consider it only in mitigation and allow some damage, when the fact itself was such as to entirely preclude plaintiff's recovery, *held* error sufficient to require a reversal: *Guptill v. Verbach*, 58–98.

A particular instruction excluding from the jury any statements of counsel as to the issues on a former trial, *held* not erroneous as tending to exclude the pleadings on the former trial: *Wormley v. Hamburg*, 46–144.

An instruction to the jury that if they believed plaintiff had testified falsely to any material fact they would be authorized to reject all his testimony unless corroborated by other

credible evidence, *held* not misleading: *Brown v. Chicago, R. I. & P. R. Co.*, 51-235.

A mere mistake of the court in directing the jury that, if their verdict was for plaintiff, the form should be "that the jury find for the defendants," etc., *held* not such error as likely to mislead the jury: *Eldredge v. Bell*, 64-125.

The fact that the court in stating the issues to the jury confounds the action of trespass with trespass on the case is not such an error as can be made a ground for reversal: *Brown v. Hendrickson*, 69-749.

Error without prejudice in giving instructions: A case will not be reversed for the giving of an erroneous instruction which could not have worked any prejudice to the complaining party: *Fyser v. Weissgerber*, 2-463; *McGregor v. Armill*, 2-30; *McKay v. Leonard*, 17-569; *Clagett v. Conlee*, 16-487; *Ocheltree v. Carl*, 23-394; *Hunt v. Chicago & N. W. R. Co.*, 26-363; *Horr v. Reed*, 20-591; *Thompson v. Blanchard*, 2-44; *First Nat. Bank v. Breese*, 39-640; *Blackburn v. Powers*, 40-681; *State v. Hart*, 67-142; *Kendig v. Overhulser*, 58-195; *Parkhurst v. Masteller*, 57-474; *Walthem v. Artz*, 70-609.

The giving of an irrelevant instruction will be considered error without prejudice where it could not have been detrimental to the party complaining: *Sullivan v. Finn*, 4 G. Gr., 544.

Where the result could not have been different if erroneous instructions which were given by the court had not been given, the giving of such instructions will be deemed error without prejudice: *Farwell v. Salpaugh*, 32-582.

The failure to give a correct instruction will not be reversible error, if, even had the instruction been given, the result must have been the same, and any other verdict would properly have been set aside: *Cedar Falls & M. R. Co. v. Rich*, 33-113; *Olson v. Neal*, 63-214.

The refusal to give a correct instruction as to a matter properly before the jury will be error without prejudice if the jury specially find that the facts on which the instruction was founded did not exist: *Martin v. Algona*, 40-390; *Clinton Nat. Bank v. Graves*, 48-228.

Where it is clear from the verdict that the jury have not been misled by an erroneous instruction, the giving thereof will not be ground for reversal: *Gwinn v. Crawford*, 42-63; *Peake v. Conlan*, 43-297.

An instruction which might be erroneous as a general proposition, but is not misleading under the evidence, will not be ground for a reversal: *Ross v. Davenport*, 66-548.

Error in giving an instruction will be error without prejudice where the verdict of the jury is in favor of the person complaining: *Dunham v. Dennis*, 9-543.

Where an erroneous instruction as to a particular matter is given, but from the verdict it is apparent that the jury have adopted a view of the case which renders such matter immaterial, the error will be considered as without prejudice: *Hall v. Stewart*, 58-681; *Hall v. Ballou*, 58-585.

Error in the giving of an instruction will be without prejudice where it appears that the jury have made such a finding upon the facts that such instruction can have had no influence upon the result: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 61-175; *Lathrop v. Central Iowa R. Co.*, 69-105.

Where an instruction in stating the liability of defendant fails to notice a limitation on that liability, but the evidence clearly shows the non-existence of such limitation, the error in failing to state the limitation will be deemed to be without prejudice: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Where instructions were given as to the right of plaintiff to recover exemplary damages, which were claimed to be erroneous, *held*, that as, under the circumstances, plaintiff was not entitled to actual damages, the instruction was, if erroneous, error without prejudice: *Myers v. Wright*, 44-38.

Where the verdict necessarily implies the finding of every fact as established which under the law is required to establish right to recovery, there is no ground to set aside the verdict, even though under the instructions plaintiff was required to prove in addition, as a condition of his right to recover, another fact which was not essential: *Tuck v. Singer M'f'g Co.*, 67-576.

Error in general instructions to the jury as to matters of law will be deemed error without prejudice where the verdict of the jury is special, having no connection or relation whatever with any principle of law: *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119.

Where the jury has, by special findings, determined every fact necessary to authorize judgment, error in giving or refusing instructions as to the legal conclusions to be drawn from such facts will constitute error without prejudice: *Boals v. George*, 30-601.

It is not error to refuse instructions asked which are substantially given in the charge of the court: *Wilhelm v. Fimple*, 31-131.

A party cannot claim that he has been prejudiced by the failure to instruct at his request as to what his rights would have been under a condition of things which the verdict shows conclusively did not exist: *Ibid.*

Judgment will not be reversed because of an erroneous instruction given by the court below when the controlling question in the case was fairly left to the jury, and correctly decided by them: *Bondurant v. Crawford*, 22-40.

If a party complains of erroneous instructions he must not only show the error, but that it resulted to his prejudice, and for that purpose it must appear that judgment was rendered against him: *Shannon v. Scott*, 40-629.

Error of which party cannot complain: A party cannot complain of the giving of instructions which are of the same purport, though not identical with those asked by himself: *Smith v. Sioux City & P. R. Co.*, 38-173.

Where an instruction given is erroneous on a particular point, but as to that point the instructions asked by the party complaining contain the same error, the party cannot take advantage of such error in the instruction given: *Weller v. Hawes*, 49-45; *Campbell v. Ormsby*, 65-518.

Where instructions follow the theory of the case as set forth in the petition, plaintiff can-

not complain of error in the instructions as to the basis of recovery: *Briscoe v. Reynolds*, 51-673.

An error in presenting issues to the jury by which defendant is allowed the benefit of a defence which he is not entitled to will not be a ground of reversal in favor of such party: *Chlein v. Kabat*, 72-291.

General directions to jury: A statement by the judge to the jury, that, a case having been twice tried, it was important that they should agree if they could satisfy their minds as to the right of the case, *held* not improper: *Niles v. Sprague*, 13-198.

It is not error to caution the jury, after they have been out for some time without agreement, that each juror should lay aside pride of opinion and examine their differences in a spirit of fairness and candor, and state to them that a new trial would involve large expense: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36-372.

The court may properly instruct upon a point not suggested by counsel for either party, and intimate to counsel his intention of instructing on such point, and his desire to have the point discussed, even though thereby he discloses to the counsel of one party an error which such counsel might have overlooked, and which would have been fatal to his case: *Hinkle v. Davenport*, 38-355.

b. *Stating the Issues.*

By the court: It is the province of the court, and not that of the jury, to determine the nature of the action, or what issues are made by the pleadings: *McKinney v. Hartman*, 4-154; *Beebe v. Stutsman*, 5-271; *Potter v. Wooster*, 10-334; *Reid v. Mason*, 14-541; *Pharo v. Johnson*, 15-560; *Hempstead v. Des Moines*, 52-303.

Duty to state the issues: In a proper and necessary case the court is to inform the jury specifically as to the issues involved and not leave it to them to determine such issues; but when the necessity for such a case does not exist, no such direction can be asked as a matter of right: *Fannon v. Robinson*, 10-272.

It is the province and duty of the court to determine what are the issues in the pleadings, and this cannot be left to the jury: *West v. Moody*, 33-137.

It is the duty of the court to instruct as to the issues, and state directly and plainly the claims made by the parties: *Little v. McGuire*, 43-447.

The court should make a full statement of the issues to the jury: *Hollis v. State Ins. Co.*, 65-454.

Failure of the court to state fully to the jury the material issues made by the pleadings will constitute error: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399.

The fact that an issue is ignored in the instructions given to the jury will constitute reversible error: *Hill v. Aultmann*, 68-630; *Kennedy v. Rosier*, 71-671.

It is error to omit reference to a material issue in the case, as, for instance, the issue of contributory negligence: *Gamble v. Mullin*, 74-99.

In a particular case, *held*, that there was no prejudicial error in referring in an instruction to the matter charged in the petition, without specifying also an amendment to the petition: *Fuhs v. Osweiler*, 59-431.

Instructions in a particular case, *held* sufficiently to present to the jury the issues before them, although the fact that defendant denied the averment of plaintiff's petition was not stated in express terms: *Gunsel v. McDonnell*, 67-521.

It is not necessary to present to the jury questions which have been disposed of by rulings made during the progress of the trial: *Wells v. Kavanaugh*, 74-372.

Error in stating: As to the correctness of statement of the issues in particular cases, see *Stafford v. Oskaloosa*, 57-748: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

Matters not in issue: It is not error in the court to fail to state to the jury the effect of impeaching evidence as to the credibility of a witness where no instruction on that question is asked. The impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and the failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues in the case: *State v. Kirkpatrick*, 63-554.

Matters of dispute arising upon the law or the evidence are not issues which the court ought specifically to present to the jury: *State v. Nadal*, 69-478.

Failure to give an instruction with reference to immaterial questions on matters which, though pleaded by way of defense, do not constitute a defense in law, will not be deemed prejudicial to the party seeking to raise the immaterial question or plead the incompetent matter: *Tuck v. Singer Mfg. Co.*, 67-576.

It is error to submit to the jury an issue not in the case; *Storrs v. Emerson*, 72-390; *Benton v. Chicago, R. I. & P. R. Co.*, 55-496.

Issues not supported by evidence: Failure to state to the jury an issue raised by the pleadings will not constitute error where there was no evidence for the party introduced upon such issue: *Van Vechten v. Smith*, 59-173.

It is not necessary for the court to state to the jury an issue involving matters as to which there is no conflict in the evidence: *Kimball v. Monarch Ins. Co.*, 70-513.

Not sufficiently specific: If the issues are stated in the instructions, a failure to state them more specifically will not be reversible error where more specific instructions are not asked by the opposite party: *Dixon v. Stewart*, 33-125.

Issues withdrawn: Where the court declines to submit an issue to the jury upon which evidence has been introduced, the evidence bearing on that issue should be taken from the jury, and it is error in such case to instruct them that the facts concerning that matter may properly be considered in determining the issues that are submitted: *Hammer v. Chicago, R. I. & P. R. Co.*, 70-623.

Reference to pleadings: It is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are: *Fitzgerald v. McCarty*, 55-702; *Porter v. Knight*, 63-365; *Bryan v. Chicago, R. I. & P. R. Co.*,

63-464; *Hollis v. State Ins. Co.*, 65-454; *Lindsay v. Des Moines*, 68-368. But such reference will not constitute error if the issues are clearly stated without regard to such reference: *Dorr v. Simerson*, 73-89.

The statement of the issues should be in writing, and it is error to make such statement by reading from the pleadings portions which are not incorporated in the instructions: *Hall v. Carter*, 74-364; *State v. Birmingham*, 74-497.

It is not error to refer the jury to the pleadings to ascertain the narrative of the facts therein contained: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

It is not improper to refer the jury to the petition and the amendment thereto for a fuller statement of the several items of the plaintiff's claim for damages: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

It is not error to state the issues in the form presented by the parties: *Fleming v. Shenandoah*, 71-456.

It is a sufficient statement of the issues if the court sets out the pleadings and adopts them as a part of the instructions where the pleadings contain a plain statement of the matter in controversy: *Crawford v. Nolan*, 72-673.

It is not required that the issues should all be stated in a single paragraph of the charge. It is sufficient if they are fully stated to the jury in some part of the charge in such a manner as to be understood: *Timins v. Chicago, R. I. & P. R. Co.*, 72-94.

IV. PERTINENCY TO ISSUES AND EVIDENCE.

a. *In General.*

Must be pertinent to issues in pleadings: It is error to submit to the jury a question not presented by the pleadings: *Stein v. Seaton*, 51-18; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

An instruction to the jury as to liability for a cause of injury not alleged in the petition is ground for a reversal: *Cressy v. Postville*, 59-62.

Instructions should not be given upon a matter which is not in issue: *Troughear v. Lower Vein Coal Co.*, 62-576; *Fisk v. Chicago, M. & St. P. R. Co.*, 74-424.

It is error to give an instruction containing a correct legal proposition which is not applicable to any issue involved in the case: *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Roberts v. Richardson*, 39-290; *Sioux City & P. R. Co. v. Walker*, 49-273; *Wood v. Chicago, M. & St. P. R. Co.*, 68-491.

Where evidence is admitted without objection upon an issue not raised by the pleadings, the court may properly instruct the jury as to the effect of such evidence. The objection that no such issue is raised in the pleadings comes too late: *Collins v. Collins*, 46-60.

The objection that instructions given pertain to an issue not in the case cannot be considered if the party objecting has asked instructions upon that issue: *Hahn v. Miller*, 60-96.

Refusal of instructions not pertinent: An instruction not pertinent to the pleadings or evidence should be refused although containing correct propositions of law: *Cutter v. Fanning*, 2-580; *Gover v. Dill*, 3-337; *Conger v. Dean*, 3-463; *Oliver v. Depew*, 14-490; *Packer v. Cockayne*, 3 G. Gr., 111; *State v. Gibbons*, 10-117.

Instructions not supported by evidence: It is error to give an instruction on a state of facts not proven, even though the instruction is correct as an abstract proposition of law, if the giving of such instructions may tend to mislead the jury: *Moffitt v. Cressler*, 8-122; *Farr v. Fuller*, 8-347.

Where an instruction is based upon a theory wholly unsupported by the evidence and calculated to mislead the jury, the giving thereof will constitute error: *Mundhenk v. Central Iowa R. Co.*, 57-718; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539.

An instruction which though correct is not adapted to the facts of the case upon any hypothesis which the evidence tends to establish should not be given, especially when the jury is properly instructed otherwise: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

Refusal of an instruction as to a state of facts finding no support in the evidence will not constitute error, though the instruction be abstractly correct: *Messer v. Regnuitter*, 32-313; *Cross v. Garrett*, 35-480.

An instruction should be refused where there is no evidence to which it is applicable: *State v. Correttle*, 12-358; *Cobb v. Illinois Cent. R. Co.*, 38-601; *Davis v. Robinson*, 71-618.

A court cannot be required to give an instruction containing an abstract proposition which is correct in itself, but which is not legitimately connected with the evidence in the case: *Tryon v. Oxley*, 3 G. Gr., 289; *Hall v. Hunter*, 4 G. Gr., 539; *Trustees of Iowa College v. Hill*, 12-462; *Conners v. Burlington, C. R. & N. R. Co.*, 74-283

An instruction correct in law, but based upon a state of facts as to which there is no evidence, should not be given: *McCramer v. Thompson*, 21-244; *First Nat. Bank v. Hurford*, 29-579; *Byington v. McCadden*, 34-216; *Case v. Illinois Cent. R. Co.*, 38-581; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539; *Leffingwell v. Gilchrist*, 40-416; *Howell v. Price*, 40-548; *State v. Fraunburg*, 40-555; *O'Laughlin v. Dubuque*, 42-539; *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620; *State v. Osborne*, 45-425; *Clark v. Ralls*, 58-201; *Hess v. Wilcox*, 58-380; *Hall v. Wolff*, 61-559; *Snyder v. Kurtz*, 61-593; *Johnson v. Miller*, 63-529; *State v. Archer*, 69-420; *Stein v. Council Bluffs*, 72-180.

It is error to submit a material question of fact to the jury upon which there is no evidence, even though the rule of law as to such question of fact be properly stated: *Bank of Monroe v. Anderson Bros. Mining & R. Co.*, 65-692; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150; *White v. Spangler*, 68-222; *State v. Myer*, 69-148; *Johnson v. Miller*, 69-562; *Griffith v. Burlington, C. R. & N. R. Co.*, 72-645.

Error in giving an instruction which states a correct proposition of law, but is not founded upon anything appearing in the evidence, will not be considered to be without prejudice, where all of the instructions given are of that

character, and fail to show their applicability to the case or the evidence before the jury: *State v. Thompson*, 45-414.

An instruction cannot be held erroneously refused when there is nothing in the record to indicate what testimony was before the jury, as the refusal may have been justified on the ground of inapplicability: *Little v. Martin*, 28-558.

It is error to direct the attention of the jury to matters as to which there is no evidence before them: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

The jury cannot be required to pass upon the effect of a fact as to which there is no evidence: *Stier v. Oskaloosa*, 41-353.

It is error to give an instruction based upon facts as to which there is no evidence, assuming to the jury thereby that there is such evidence, the sufficiency of which is left for them to pass upon: *Moorehead v. Hyde*, 38-382.

An instruction assuming that the jury may find a fact as to which there is no evidence whatever is erroneous: *Hand v. Langland*, 67-185.

An instruction directing the jury that they may allow damages as to which there is no evidence is erroneous: *Reed v. Chicago, R. I. & P. R. Co.*, 57-23.

Where there is no evidence whatever tending to show the amount of a particular item of damage, it is error to authorize the jury to allow damages for such item. So *held* as to expenses incurred for medical treatment in case of personal injury: *Stafford v. Oskaloosa*, 57-748.

Held, that it was error to instruct the jury that they might allow for loss of time and expenses of medicine and nursing in an action for personal injuries, where there was no allegation in the pleadings as to loss of time and no evidence of expense: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588. But *held*, that it was not error to give such an instruction where the petition asked a recovery for such expenses, and the evidence showed them to have been incurred: *Knapp v. Sioux City & P. R. Co.*, 71-41.

It is improper to leave to the jury the determination of damages, based upon the employment of counsel, where there is no evidence as to the amount of counsel fees: *Parkhurst v. Masteller*, 57-474.

Where there is some evidence upon the point, an instruction which is applicable to that point and correct in law should be given without regard to the weight of such evidence: *De Camp v. Mississippi & M. R. Co.*, 12-348.

The statement of an abstract proposition not inherently erroneous and not purporting to relate to the evidence will not require a reversal merely on the ground that there is no evidence to which it is applicable: *Kearney v. Fitzgerald*, 43-580.

An instruction embodying a correct presentation of the law, which may have been given to meet positions taken in argument, will not be ground for reversal, although not applicable to the evidence, if not of such nature as to mislead the jury: *Hall v. Stewart*, 58-681.

Where there is evidence introduced relating to a particular matter, the court will be justified in instructing the jury in regard to the law pertaining to such matter, even though the evidence is not such that the party introducing it could properly claim anything therefrom, if there appears to be any danger that the jury may be misled by such evidence: *Walker v. Camp*, 69-741.

A party who has asked instructions upon a particular point cannot afterwards complain of instructions given by the court upon that point, on the ground that there is no evidence whatever to support the instructions: *Spears v. Mt. Ayr*, 66-721.

b. *As to Questions of Fact.*

Matters of law and not of fact: The instructions must state rules of law only, leaving to the jury the decision of the facts and the application of the rules of law given them by the court: *Muldowney v. Illinois Cent. R. Co.*, 32-176.

The court cannot instruct the jury upon questions of fact: *Frederick v. Gaston*, 1 G. Gr., 401.

The sufficiency or insufficiency of testimony to establish a given fact or determine an issue cannot be passed upon by the court, but must be left to the jury: *Franks v. State*, 1 G. Gr., 541.

The court cannot instruct the jury upon the sufficiency of the evidence to entitle a party to recover. If there is evidence tending to entitle him to a verdict it is the exclusive province of the jury to pass upon its sufficiency: *Robinson v. Illinois Cent. R. Co.*, 30-401.

It is not error to submit to the jury a question relating to a matter as to which the evidence on one side is not contradicted by any direct evidence on the other, if there are circumstances to be considered by the jury in determining whether the fact is established by the evidence or not: *Saar v. Fuller*, 71-425.

It is error to give an instruction which, though stating a correct proposition of law, assumes facts to be true which are in issue: *Luman v. Kerr's Adm'r*, 4 G. Gr., 159.

It is error to charge the jury as to the weight and sufficiency of the testimony: *Houston v. State*, 4 G. Gr., 437.

The court may explain to the jury the legal effect of facts, but the facts themselves must be determined exclusively by the jury: *Ibid.*

An instruction which assumes as true the very fact in controversy, and bases thereon the relative duties and liabilities of the parties, should be refused: *Russ v. Steamboat War Eagle*, 14-363.

It is error to assume a fact as proven which is properly for the determination of the jury: *State v. Jones*, 33-9.

An instruction based upon an assumption of fact is erroneous: *Walters v. Chicago, R. I. & P. R. Co.*, 41-71.

The court would not be justified in giving an instruction which assumes facts as true which are for the jury to determine: *Ruter v. Foy*, 46-132.

An instruction should not assume facts as not proven of which there is some evidence: *Napper v. Young*, 12-450.

It is error to assume as true in an instruction a fact which is in issue and upon which

the evidence is conflicting: *Case v. Burrows*, 52-146; *Bryan v. Brazil*, 52-350; *Bowersock v. Winers*, 60-84.

It is error to give an instruction based upon an assumption as to a fact which is in issue and upon which there is a conflict in the evidence, and such an instruction will be considered prejudicial: *Roach v. Purcell*, 61-98.

A fact should not be assumed to be true of which there is no proof: *Howes v. Carver*, 3-257.

However slight the effect of testimony, and however little the consideration to which it is entitled from a jury, still its weight is to be determined by them, and should not be determined beforehand by the court in an instruction: *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

It is not the province of the court to direct the jury to consider what is or is not probable as between conflicting theories in the case. It is the duty of the jury to determine, as best they can, which is supported by a preponderance of the evidence and not which is probably true: *Butler v. Chicago & N. W. R. Co.*, 71-206.

Remarks made in the presence of the jury, based upon an assumption of the facts upon which it is the province of the jury to pass, and which would be erroneous if contained in an instruction, will entitle defendant to a new trial: *State v. Stowell*, 60-535.

An instruction that if the jury find the testimony of plaintiff to be the only positive evidence in support of material allegations, and that it is contradicted in all material points by an unimpeachable witness, they must find for defendant, *held* error, as taking from the jury the province of weighing the entire evidence: *Delvee v. Boardman*, 20-446.

The practice of emphasizing evidence by instructions is not as a rule to be commended, but the court should exercise wise discretion in the matter: *West v. Chicago & N. W. R. Co.* 77-654.

The law does not require the court in its instructions to the jury to call special attention to the facts testified to by the several witnesses: *State v. Laughlin*, 73-351.

As to whether instructions in particular cases were erroneous as containing an assumption of fact, see *Perigo v. Chicago, R. I. & P. R. Co.*, 55-326; *Richardson v. Hoyt*, 60-68; *State v. Tarr*, 28-397.

The assumption in an instruction that a certain fact is conceded will not be presumed to be erroneous, it not appearing by the record but that such concession or admission was made in some proper manner: *Walsh v. Ætna L. Ins. Co.*, 30-133.

Where there is no controversy as to the facts, especially where the evidence is documentary, the court may direct the jury as to the application of such evidence to the law that must govern the case: *Thorp v. Craig*, 10-461; *Wood v. Porter*, 56-161; *Hughes v. Monty*, 24-499; *State v. Meshek*, 61-316; *Russ v. Steamboat War Eagle*, 14-363.

It is always proper for the court to instruct the jury as to every fact about which there is no controversy: *State v. Archer*, 73-320.

Stating to the jury the law as applicable to a particular state of facts will not necessarily be erroneous as an assumption that such facts are proven: *State v. Ziebart*, 40-169.

Instructions with reference to certain facts which the evidence tends to prove, stating what the legal effect of such facts will be if found by the jury, may be proper: *Pritchett v. Overman*, 3 G. Gr., 531.

The grouping together in one instruction of legitimate facts which the evidence tends to prove, and charging that such facts constitute circumstantial evidence, is not necessarily erroneous: *State v. Carnahan*, 17-256.

It is proper for the court to announce to the jury rules sanctioned by reason and experience to enable them rightly to weigh the evidence submitted in the case. Thus the jury may be told that a writing is entitled to more weight than statements founded merely on memory; and that expert testimony is of the lowest order and most unsatisfactory character: *Whitaker v. Parker*, 42-585.

It is not improper for the court to advise the jury as to the character of the evidence introduced on the trial and the relative weight of different kinds of evidence: *Buford v. McGetchie*, 60-298.

Held prejudicial error to erroneously state the testimony of a party in such a way as to make such testimony appear to be in conflict with admissions shown to have been made by him: *State v. Richards*, 72-17.

c. *As to Effect of Written Instruments, Records, etc.*

The construction of a written instrument is for the court: *Lucas v. Synder*, 2 G. Gr., 499; *Durham v. Daniels*, 2 G. Gr., 518; *Hendrick v. Kellogg*, 3 G. Gr., 215.

The court may charge the jury as to whether or not a writing introduced in evidence is a contract: *Eyser v. Weissgerber*, 2-463.

The question whether certain letters introduced in evidence constituted a contract is to be determined by the court: *Lea v. Henry*, 56-662.

Effect of written instrument: The legal effect of an instrument is to be determined by the court and not by the jury, and if such instrument is conclusive evidence of a fact, it is error to leave that fact to the jury for determination: *Chandler v. Keiler*, 44-371.

It is the duty of the court to construe a contract, and it is error to leave its construction to the jury: *Kilbourne v. Jennings*, 40-473; *Vaughn v. Smith*, 58-553.

Where the evidence is undisputed it is for the court to determine whether a written instrument has been duly executed or not so as to effect the purposes for which it was intended: *Snyder v. Kurtz*, 61-593.

When a contract is in writing the court should interpret it and not submit to the jury the question of its meaning as dependent upon parol evidence which is not admissible for the purpose of varying it: *Daly v. W. W. Kimball Co.*, 67-132.

Where a question arises as to the construction of a written contract it is for the court and not for the jury to construe it: but where the question in controversy is as to whether the contract has been lawfully performed, and that question depends upon extrinsic evidence,

the weight and effect of the evidence is for the jury: *Fairbanks v. Jacobs*, 69–265.

Where the court is unable to determine the date of an instrument owing to the manner in which the figures are written, it may submit the question to the jury: *Partridge v. Patterson*, 6–514.

Where letters are plain in their language and require no interpretation, it is not necessary for the court to put a construction upon them. But they may be left to the jury as other evidence: *Avery v. Chapman*, 62–144.

Where the objects of an association were to be determined from the constitution and by-laws *held*, that it was for the court to construe such instruments, and the question as to the purposes of the association should not have been submitted to the jury: *Johnson v. Miller*, 63–529.

Ordinances: The construction of an ordinance of a city should be made by the court and not left to the jury: *Ingram v. Chicago, D. & M. R. Co.*, 38–669.

Record of road: It is the province of the court to determine the sufficiency of the records to sustain a road, and an instruction may properly be given that the records and papers offered in evidence are sufficient proof of the establishment of a public highway: *State v. Prine*, 25–231.

Title to real estate: The court may instruct the jury as to who holds title to real estate as shown by deeds introduced, or when the question of title is one of law upon the testimony: *State v. Delong*, 12–453.

Issues in former judgment: It is the province of the court and not the jury to determine what issues were involved in a case which is pleaded as a former adjudication: *Neumeister v. Dubuque*, 47–465. Or where it is claimed that the issues in another case were identical with those in the pending action: *Hempstead v. Des Moines*, 52–303.

d. *Construction; Conflicting Instructions.*

All the instructions given should be read and construed together for the purpose of determining the correctness of any part of the charge: *Burrows v. Lehndorff*, 8–86, 104; *Brown v. Bridges*, 31–138; *State v. Maloy*, 44–104; *Locke v. Sioux City & P. R. Co.*, 46–109, 114; *State v. Stanley*, 48–221; *Albertson v. Keokuk & D. M. R. Co.*, 48–292; *State v. Golden*, 49–48; *Beazan v. Mason City*, 58–233; *Gronau v. Kukkuck*, 59–18; *Carter v. Monticello*, 68–178.

Circumstances of the case: Instructions must always be considered with reference to the circumstances of the case in which they are given: *State v. Johnson*, 8–525.

Not erroneous as qualified: Even though the instruction be abstractly erroneous or capable of misconception, yet if, when taken with the other instructions and in the connection in which it was given, it could not have been misunderstood, the giving of it will not constitute ground for reversal: *Ferguson v. Beadle*, 30–477.

Even though one clause of an instruction be apparently erroneous, yet if it is so clearly qualified by what follows that from the entire instruction the jury cannot have failed to receive a correct impression, the instruction will not be erroneous: *Dixon v. Stewart*, 33–125.

If, as a whole, the instructions contains a correct exposition of the law, the supreme court will not ordinarily interfere, even though, if separately considered, they might be objectionable. Where, however, they are so framed as to present a conflict or tend to mislead the jury, that fact will constitute error: *Brown v. Bridges*, 31–138.

Although an instruction, if standing alone, might be susceptible of an interpretation which would make it erroneous, yet if, when construed with other instructions, it cannot be reasonably understood in such erroneous sense, the giving of it will not be ground for reversal: *Parker v. Dubuque Southwestern R. Co.*, 34–399.

The charge of the court must be taken together, and if, when so considered, it fairly presents the law, and is not liable to misapprehension nor calculated to mislead, the judgment should not be reversed simply because some one of the instructions may lay down the law without sufficient qualification: *Rice v. Des Moines*, 40–638.

If, as a whole, the instructions contain a correct exposition of the law the case will not be reversed, although, separately considered, they may be objectionable: *Green v. Cochran*, 43–544.

It is not proper to select out single sentences or phrases from the instructions as a subject for criticism as distinct from the entire instructions: *State v. Pierce*, 65–85.

Instructions must be regarded as a whole, and a defect in one may be cured by other portions of the charge: *Hamilton v. State Bank*, 22–306.

Though one of the instructions is too broad in its statements, if it is properly limited by a subsequent one the charge will not be considered erroneous: *Ruble v. McDonald*, 18–493.

An instruction cannot be complained of for not containing limitations or qualifications given in another instruction: *Stier v. Oskaloosa*, 41–353.

Where an instruction presents a correct proposition of law, but one which needs to be explained, modified and corrected by some other proposition, it cannot ordinarily be presumed that the jury is misled if the other proposition is expressed in a different instruction: *Lombard v. Chicago, R. I. & P. R. Co.*, 47–494.

The omission in one instruction of a proper qualification which is given in another may be sufficient to prevent the instructions from being erroneous: *Allen v. Burlington, C. R. & N. R. Co.*, 57–623.

It is not usual, and in ordinary cases not possible, to state in a single instruction all the propositions to which the attention of the jury should be directed, and if the instructions taken together present a correct statement of the law applicable to the case there will be no ground of reversal: *Funston v. Chicago, R. I. & P. R. Co.*, 61–452.

All the essential ideas necessary to the expression of a single rule should be expressed in a single instruction: *Wordon v. Humeston & S. R. Co.*, 72–201.

Conflicting instructions: It is error to give instructions which are conflicting: *Hart v. Chicago, R. I. & P. R. Co.*, 56–166; *Brown v. Bridges*, 31–138.

Where instructions are inharmonious and misleading, and directly in conflict, the judgment will be reversed on appeal: *Vanslyck v. Mills*, 34–375.

Where instructions are contradictory it cannot be said that the error of one is cured by the giving of the other. It cannot be determined in such case which one of the instructions the jury followed, and it cannot be said that no prejudice resulted from the error: *Conway v. Illinois Cent. R. Co.*, 50–465.

Where the instructions are contradictory and it is impossible to tell which the jury followed, such conflict will constitute error and warrant a reversal: *Hawes v. Burlington, C. R. & N. R Co.*, 64–315.

Common understanding: Where an instruction, taken in connection with others given, states the law in such a manner as to enable a person of common understanding to know what is intended, it is sufficient: *Smothers v. Hanks*, 34–286.

A verbal inaccuracy in an instruction will not be ground for reversal if it is not such as to tend to mislead or confuse the jury, and the meaning is plain to the common understanding: *Harger v. Spofford*, 46–11.

It is not necessary, in an instruction, for the court to define words that may be understood by men of ordinary intelligence: *Rogers v. Millard*, 44–466.

Sense intended: Where a word is used in an instruction which might be taken in different senses, and the jury follows the instruction in the sense in which it was intended, a judgment on the verdict will not be reversed because the jury might have followed it in the sense in which it was not intended: *Parkhurst v. Masteller*, 57–474.

Ordinary meaning: It is not proper to seek after some far-fetched and unusual signification of the language of an instruction and base a reversal thereon. The language should be given its usual and ordinary meaning: *State v. Huxford*, 47–16.

The language of an instruction should receive a reasonable construction in view of all the circumstances, and not a strange or forced one: *Davenport v. Cummings*, 15–219.

e. *Duty of Jury to Follow.*

Law of the case: The instructions of the court to the jury constitute the law of the case, and must be followed by the jury whether right or wrong: *Taylor v. Cook*, 14–501; *Baird v. Chicago, R. I. & P. R. Co.*, 55–121; *Stewart v. Smith*, 60–275; *Roberts v. Leon Loan, etc., Co.*, 63–76; *Crane v. Chicago & N. W. R. Co.*, 74–330.

The instructions constitute the law of the case for the jury, and a verdict contrary to the instructions will be set aside or the judgment reversed without regard to whether the instructions are correct or not: *Caffrey v. Groome*, 10–548; *Savery v. Busick*, 11–487; *Jewett v. Smart*, 11–505; *Farley v. Budd*, 14–289; *Porter v. Thomson*, 22–391; *Beal v. Stone*, 22–447; *Morss v. Johnson*, 38–430; *Cobb v. Illinois Cent. R. Co.*, 38–601; *Sullivan v. Otis*, 39–328; *Howell v. Snyder*, 39–610; *Peterson v. Ochs*, 40–530; *Baird v. Chicago, R. I. & P. R. Co.*, 55–121; *Furman v. Chicago, R. I & P. R. Co.*, 57–42; *Musser v. Maynard*, 59–11; *Griffith v. Parton*, 59–31; *Graham v. McGeoch*, 61–51; *Browne v. Hickie*, 68–330; *Way v Chicago, R. I. & P. R. Co.*, 73–463.

The instructions to the jury must be regarded as the law of the case, and if the verdict of the jury is without support in the evidence under the instructions a new trial should be granted: *Dutton v. Wabash, St. L. & P. R. Co.*, 66–352; *Griffith v. Burlington, C. R. & N. R. Co.*, 72–645.

A refusal of the lower court to grant a new trial on that ground will require a reversal: *Nichols v. Chicago, R. I. & P. R. Co.*, 69–154.

Where an instruction states that to entitle a party to recover the jury must find a certain fact, and there is no evidence establishing such fact, the case will be reversed although the instruction itself is erroneous, and the fact referred to is not essential to support the verdict: *Bowman v. Brown*, 52–437.

It is the duty of the jury to regard the law as laid down by the court, even if it is incorrect; and where a verdict has been returned which is contrary to the instructions given, and a new trial has been granted upon that ground, the supreme court will affirm the order without reviewing the instructions: *Boyer v. Riley*, 41–13.

It cannot be presumed in favor of the verdict on appeal that it was rendered upon a theory of the case correct in law, but in conflict with the instructions given: *Mast v. Pearce*, 58–579.

While an instruction given is binding on the jury without regard to its correctness, yet it is not binding upon the court, and the court may, in ruling upon a motion for judgment upon a special finding or upon the pleadings, disregard instructions which would have been binding upon the jury, and which it considers erroneous: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359; *Haldane v. Arcadia*, 70–462.

Where a general verdict is set aside because in conflict with an instruction given, it does not follow that the court should render judgment on a special verdict in accordance with the law in such instruction. If the instruction is incorrect the court may refuse to render judgment in accordance therewith, and award a new trial: *Evans v. St. Paul Harvester Works*, 63–204.

Where the court instructed the jury that they could not award plaintiff more than nominal damages, and the jury returned a verdict for a larger amount, *held*, that the court might reduce the verdict to nominal damages, but that it could not, after having done so, set it aside and grant a new trial on the ground merely that the jury had disregarded the instructions: *Morlan v. Russell*, 71–214.

f. *What Objections May be Raised or Errors Cured by Instructions.*

Defects in pleading: The question as to the sufficiency of a pleading cannot be raised by an instruction: *Nollen v. Wisner*, 11–190;

McIntire v. McIntire, 48–511; *Bushnell v. Robeson*, 62–540.

An objection to defendant's cross-demand, which should have been raised by demurrer, comes too late when made for the first time, after a trial on the merits, by an instruction, and is deemed waived: *Young v. Broadbent*, 23–539.

That a contract is void because made on Sunday must be specially interposed as a defense. It cannot be raised by instructions to the jury on the evidence if not pleaded: *Riech v. Bolch*, 68–526.

The objection that the facts stated in the petition will not entitle the plaintiff to any relief whatever is waived by going to trial on the merits and cannot be first raised in an instruction: *Cruver v. Chicago, M. & St. P. R. Co.*, 62–460.

Objections to evidence cannot be first taken by an instruction to the jury. Such evidence should be disregarded: *State v. Pratt*, 20–267.

It is error to exclude from the jury, by an instruction, evidence which has been admitted without objection: *Becker v. Becker*, 45–239.

An objection to evidence, made at the time the evidence is introduced, cannot be raised by objecting to the giving of instructions based on such evidence: *Le Grand Quarry Co. v. Reichard*, 40–161.

Where a defense in a criminal prosecution for obstructing a highway rested upon the insufficiency of the record of the establishment of the highway, *held*, that such objection could be raised by instructions although it might have been interposed to the admission of the record in evidence: *State v. Anderson*, 39-274.

Withdrawing improper evidence from jury: If the court, by an instruction excludes from the consideration of the jury evidence which has been improperly received, such exclusion of the evidence will be considered as preventing any prejudice which would otherwise result from the admission thereof. It is not to be presumed that the minds of the jurors would become poisoned or prejudiced by the introduction of evidence which the court afterward directs them not to take into consideration: *State v. Postlewait*, 14–446.

Where improper evidence was admitted against objection, but was afterwards by the court expressly withdrawn from the consideration of the jury, *held*, that there was not sufficient error to require a reversal of the case: *State v. Spurbeck*, 44–667.

Where the court in its charge to the jury plainly directs them to disregard evidence improperly admitted, error in admitting the evidence is thereby cured: *Cook v. Robinson*, 42–474.

Error in admitting evidence as to a matter not in issue by the pleadings is cured by an instruction plainly taking such evidence from the jury: *Bardwell v. Clare*, 47–297.

The prompt exclusion of evidence erroneously admitted will correct the error: *State v. Davis*, 56–202; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

By an instruction withdrawing from the jury the consideration of evidence which has been improperly admitted, the error in such admission may be cured: *Davis v. Danforth*, 65–601.

Error in refusing, on motion, to strike out improper evidence cannot be cured by an instruction to the jury which correctly states the law of the case: *Wicks v. De Witt*, 54–130.

Instructions of the court to the jury to disregard matters which it has improperly allowed to be read to the jury, *held* not sufficient in a particular case to cure the error: *Martin v. Orndorff*, 22–504.

Where evidence which is incompetent in any event is introduced, even without objection, it may properly be excluded on motion or the jury instructed to disregard it entirely; but where secondary evidence which may be made competent is introduced without objection, it ought not to be withdrawn by an instruction: *Davis v. Strohm*, 17–421.

V. EXCEPTIONS; REVIEW ON APPEAL.

How made of record: By this section instructions and the action of the court thereon in giving or refusing them constitute a part of the record, and need not be set out in the bill of exceptions in order to bring them before the supreme court: *Roberts v. Leon Loan, etc., Co.*, 63–76.

The instructions when filed become a part of the record and may be certified by the clerk: *Parker v. Middleton*, 65–200.

Where the giving and refusal of instructions and exception to such rulings are noted on the margins of the instructions, the supreme court can review such rulings, although they are not preserved by a bill of exceptions: *Wells v. Burlington, C. R. & N. R. Co.*, 56–520.

While it is not essential that instructions should be preserved by a bill of exceptions when they have been filed and made part of the record, yet it is essential that they be certified by the clerk of the trial court to the supreme court; and if they cannot be made a part of such transcript, error in the giving of them cannot be considered: *Bonney v. Cocke*, 61–303.

Exceptions necessary: The action of the trial court in giving instructions cannot be reviewed on appeal unless exceptions thereto have been duly taken in the trial court: *Kelleher v. Keokuk*, 60–473; *Todd v. Brauner*, 30–439; *Norton v. Swearengen*, 19–566; *Cadwallader v. Blair*, 18–420; *State v. Moran*, 7–236; *Kirk v. Litterst*, 71–71; *Lewis v. Lewis*, 75–669.

So *held*, also, as to refusal to give instructions: *Morse v. Close*, 11–93.

The record must show that exception to the giving of instructions was duly taken: *May v. Wilson*, 21–79; *Wilcox v. McCune*, 21–294.

Noting exceptions: Where the fact of giving or refusing to give instructions and exceptions thereto is entered in the margin in the handwriting of the judge, and the giving of such instructions is afterwards made a ground for sustaining a motion for new trial, it will be presumed that such entry was made at the time the instructions were passed upon: *Kellow v. Central Iowa R. Co.*, 68–470.

If the ruling of the court upon an instruction with a proper exception thereto is noted on the margin of the instruction it is suffi-

cient, and a formal bill of exceptions is not necessary, although proper: *Cadwallader v. Blair*, 18-420; *Phillips v. Starr*, 26-349.

Objections to an instruction cannot be raised for the first time in the supreme court: *Norris v. Kipp* 74-444

Time for excepting: Under this section exceptions to the giving or refusal of instructions may be taken within three days after verdict, but it is not sufficient to take them after that time, even in a bill of exceptions allowed and signed: *Bailey v. Anderson*, 61-749.

The ruling of the court in giving or refusing instructions cannot be reviewed when such ruling was not excepted to at the time or within three days after verdict: *Maxon v. Chicago, M. & St. P. R. Co.*, 67-226; *Robinson v. Linn County*, 71-224.

Exceptions taken in a motion for new trial filed within the three days after verdict allowed by statute, the grounds of objection being set out, are sufficient: *Deere v. Needles*, 65-101; *Parker v. Middleton*, 65-200.

But if the motion is not filed within the three days the exceptions cannot be regarded: *Gardner v. Jaques*. 42-577; *Kirk v. Woodbury County*, 55-190; *Ewaldt v. Farlow*, 62-212.

If objections to instructions are not taken at the time, but are taken in a motion for a new trial, the ground of objection must be stated: *Parsons v. Parsons*, 66-754.

Exceptions to instructions preserved during the course of the trial may be considered on appeal, although the motion for a new trial, in which they are also incorporated, is stricken from the file because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

A claim that it is the practice in a trial court to regard all instructions as excepted to will be of no avail in the supreme court if the fact of the existence of such practice does not appear in the record: *Steyer v. Curran*, 48-580.

Statement of grounds: The grounds of exception to the giving or refusal of instructions need not be stated if exceptions are taken at the time of giving or refusal: *Van Pelt v. Davenport*, 42-308, 314; *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25; *Williams v. Barrett*, 52-627; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126; *Boyce v. Wabash R. Co.*, 63-70.

If exceptions are not taken when the instructions are given such exceptions must specify the ground of objection: *Hale v. Gibbs*, 43-380, 384.

In such case the ground of objection that "they are not applicable" is not sufficiently specific where it is urged that the instructions are essentially erroneous: *Miller v. Gardner*, 49-234.

An objection that an instruction is contradictory, erroneous and misleading, without more, is too general: *Patterson v. Chicago, M. & St. P. R. Co.*, 70-593.

So where the exception was first taken in the motion for a new trial, no ground being alleged, *held*, that error in the instructions could not be considered on appeal: *Stevens v. Taylor*, 58-664.

An exception stating that "the court misdirected the jury in a matter of law," *held* too general where the exception was not taken at the time the instruction was given: *Benson v. Lundy*, 52-265.

Where grounds are stated no others can be considered on appeal: *Price v. Burlington, C. R. & M. R. Co.*, 42-16; *Davenport v. Cummings*, 15-219; *Patterson v. Chicago, M. & St. P. R. Co.*, 70-593.

What sufficiently specific as to the instructions objected to; exception en masse: A general exception *en masse* to all the instructions given is sufficient if no portion of the charge is correct: *Eddy v. Howard*, 23-175.

But if any portion of the instructions given is correct such an exception *en masse* will not be regarded. (The rule being different under the present statutory provision from that announced in *Eyser v. Weissgerber*, 2-463, decided under a former statute.) *Davenport Gas, etc., Co. v. Davenport*, 13-229; *Loomis v. Simpson*, 13-532; *Jack v. Naber*, 15-450; *Armstrong v. Pierson*, 15-476; *Cousins v. Westcott*, 15-253; *Lyons v. Thompson*, 16-62; *Shephard v. Brenton*, 20-41; *Spray v. Scott*, 20-473; *Verhoff v. Van Houwenlengen*, 21-429; *Carpenter v. Parker*, 23-450; *Redman v. Malvin*, 23-296; *McCaleb v. Smith*, 24-591; *Mershon v. National Ins. Co.*, 34-87; *Cook v. Sioux City & P. R. Co.*, 37-426; *Bartle v. Des Moines*, 38-414; *Moore v. Gilbert*, 46-508; *Ruter v. Foy*, 46-132; *Pitman v. Molsberry*, 49-339.

And it was held that an instruction to the charge in the words "to the giving of each of which instructions the defendant excepted" was not sufficient: *Davenport Gas, etc., Co. v. Davenport*, 13-229.

Where but one instruction was given, only a portion of which was considered objectionable, *held*, that an exception to the entire instruction was not sufficiently specific: *Brown v. Scott County*, 36-140.

Designation by number sufficient: An exception to instructions which specifies them by number is sufficiently definite as to the part objected to: *Miller v. Gardner*, 49-234.

An exception to all the instructions between certain numbers, "and to each of them," is sufficiently specific: *Mann v. Sioux City & P. R. Co*, 46-637.

An exception to the refusal to give instructions, as follows, "to which said refusal as to each of said instructions separately the defendant at the time excepted," *held* sufficient, even if exception to refusal to give was required to be specific, which it is not: *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126

An exception to the giving of each and every instruction given, taken at the time the instructions are given, is sufficient. A change in the statute since the decision in *Davenport Gas, etc., Co. v. Davenport*, 13-229, renders the rule of that case to the contrary no longer applicable: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315; *Eikenberry v. Edwards*, 67-14.

Single proposition: If there is but a single proposition stated in the charge an exception thereto is sufficiently specific: *Boyce v. Wabash R. Co.*, 63-70.

A general exception to the refusal to give several instructions is sufficient: *Daven-*

port Gas, etc., Co. v. Davenport, 13-229; *Harvey v. Tama County*, 53-228; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126, 143.

Particular exception construed: Where the judge refused certain instructions which he had before announced that he would give, to which exception was taken, and gave in their place another instruction in which a specific question was submitted to the jury, *held*, that an exception to this instruction sufficiently called in question the correctness of the action of the court, not only as to the time and manner of giving the instruction, but also as to the matter thereof: *Eddy v. Howard*, 23-175.

What necessary to enable court to review instructions: So much of the evidence should be set out in the record as relates to the instructions that their applicability may appear, but it is not absolutely essential that all the evidence should be set out. Instructions which are erroneous and misleading in any possible view will be reviewed, although the record does not present all the evidence: *Stevenson v. Greenlee*, 15-96; *Murphy v. Johnson*, 45-57.

Evidence to support instructions: As an instruction may not state all of an abstract proposition of law, and yet be correct as applicable to the facts of the case, the supreme court cannot pass upon the correctness of instructions without some statement of the facts which the evidence tended to establish being before it: *Mudge v. Agnew*, 56-297.

The supreme court cannot pass upon the correctness of the action of the lower court in giving or refusing instructions unless the evidence upon which such instructions are based appears of record and is appropriately brought before such court: *Potter v. Wooster*, 10-334; *Wilcox v. McCune*, 21-294.

Where instructions are founded on evidence they will not be reviewed unless all the evidence is before the court: *Reid v. Mason*, 14-541.

As instructions, abstractly correct, may be properly refused if not applicable under the evidence, a party complaining of the refusal to give an instruction must bring before the court on appeal the evidence showing such applicability: *Cutter v. Fanning*, 2-580; *Gover v. Dill*, 3-337; *Hinan v. Hale*, 7-153; *Frost v. Inman*, 10 287; *Wisner v. Brady*, 11-248; *Paden v. Griffith*, 12-272; *Wilcox v. McCune*, 21-294; *Chase v. Scott*, 33-309.

The refusal of instructions which might have been proper under a certain state of the proof will nevertheless not be held erroneous on appeal when the evidence is not all before the court: *Shephard v. Brenton*, 20-41.

The court cannot, upon appeal, pass upon the pertinency of instructions given, unless all the evidence is before it: *Nollen v. Wisner*, 11-190; *Preston v. Walker*, 26-205.

The presumption is that instructions were correctly given, and that there was evidence introduced on the trial to authorize them, unless the absence of such evidence is made to appear: *Bridgman v. Steamboat Emily*, 18-509; *State v. Rice*, 56-431; *Roby v. Appanoose County*, 63-113.

The court cannot say that an erroneous instruction was without prejudice, unless such fact affirmatively appears: *Carlin v. Chicago, R. I. & P. R. Co.*, 31-379; *Potter v. Chicago, R. I. & P. R. Co.*, 46-399; *Roby v. Appanoose County*, 63-113.

In order to secure the review of instructions properly excepted to, it is only necessary that the record present so much of the evidence as will show that facts to which instructions are applicable were before the court. And what is usually necessary is a statement in the bill of exceptions that there was evidence tending to prove such facts: *Kelleher v. Keokuk*, 60-473.

When all the instructions must appear: The supreme court cannot reverse a criminal case for failure of the court to properly instruct the jury, when it has not before it all the instructions and evidence: *State v. Hamilton*, 32-572.

To warrant a reversal on account of refusal of the lower court to give instructions asked, it must appear that those given are all before the appellate court: *State v. Johnson*, 19-230; *Bower v. Stewart*, 30-579; *Chase v. Scott*, 33-309; *State v. Nichols*, 38-110; *Moody v. St. Paul & S. C. R. Co.*, 41-284; *State v. Stanley*, 48-221; *State v. Williamson*, 68-351; *Huff v. Aultman*, 69-71.

If an instruction given is so far erroneous that any modification thereof properly presenting the law would have been in conflict with it, the error will be ground for reversal although all the instructions are not before the court; but it will be otherwise if there might have been, in another instruction, modifications or limitations such as, with the instruction complained of, would have correctly presented the law: *Bland v. Hixenbaugh*, 39-532.

Verdict against instructions: The granting of a new trial on the ground that the verdict is against the instructions will not be reviewed unless the instructions appear in the record: *Caffrey v. Groome*, 10-548; *Briggs v. Hartman*, 10-63; *Beal v. Stone*, 22-447; *Howell v. Snyder*, 39-610.

Presumptions: In passing upon the correctness of the action of the trial court in refusing instructions as not applicable to the facts of the case, the presumption will be in favor of the correctness of the ruling of the court in the absence of evidence showing it to be erroneous: *Stier v. Oskaloosa*, 41-353.

A case will not be reversed for refusal to give instructions asked where it does not appear what instructions were actually given: *Moody v. St. Paul & S. C. R. Co.*, 41-284.

Where it appears that instructions were given which were not before the court, which might have modified or changed those given which are insisted upon as being erroneous, the court cannot presume that there were not other instructions correcting any error in the one relied upon as being erroneous: *State v. Stanley*, 48-221.

Where instructions are objected to as not applicable to the evidence, and the evidence is not all before the court, on appeal, it will be presumed that there was evidence to which the instructions were applicable, rather than the contrary: *Blackburn v. Powers*, 40-681; *Gantz v. Clark*, 31-254.

Where instructions would be correct under

a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions: *Rice v. Des Moines*, 40-638; *State v. Hemrick*, 62-414; *Wallace v. Robb*, 37-192; *Warbasse v. Card*, 74-306.

RULES REGARDING JURIES.

3997. View of premises. 2790. Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial. [R., § 3061; C., '51, § 1779.]

The purpose of viewing the premises is to enable the jury to better understand the testimony of witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. Therefore, *held*, that it was error to instruct them to "determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial, *including your personal examination*, whether," etc.: *Close v. Samm*, 27-503. And see *Harrison v. Iowa Midland R. Co.*, 36-323.

Where the value of property is in issue and the jury have inspected the premises, it is not error to instruct them that in determining the market value of the property they are to weigh the evidence in the light of what they have seen: *Thompson v. Keokuk*, 61-187.

There is no impropriety in allowing the jury to go to view personal property, the identity of which is a question in controversy, where it is impracticable to have the property brought before them: *Nutter v. Ricketts*, 6-92

The exercise of the authority to direct the jury to view the premises rests in the judgment and discretion of the court, and the refusal to exercise it will not constitute reversible error where it is not made to appear that the decision was not correct or that the discretion of the court in the matter was abused: *King v. Iowa Midland R. Co.*, 34-458; *Clayton v. Chicago, I. & D. R. Co.*, 67-238.

For similar provisions in criminal cases, see § 5817.

3998. Deliberation; kept together. 2791. When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer, until they agree upon a verdict, or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. [R., § 3062; C., '51, § 1781.]

Conversation by the officer with the jury except as herein permitted constitutes a sufficient ground for setting aside the verdict: *Cole v. Swan*, 4 G. Gr., 32.

It is misconduct on the part of the jury, sufficient to warrant a new trial, to have the reporter come into the jury room and read from his notes portions of the testimony as requested by them: *Fleming v. Shenandoah*, 67-505. And see notes to § 4044.

As to the separation of the jury where a sealed verdict is returned, see § 4012 and notes.

3999. Separation; advice. 2792. If the jury are permitted to separate during the trial, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person on any subject of the trial, and that during the trial it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them. [R., § 3063; C., '51, § 1780.]

4000. Discharge of juror. 2793. If, after the impaneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, he may be discharged. In such case the trial shall proceed with the remaining jurors, provided the number has not been reduced below ten, or the court may, in its discretion, order the jury to be discharged. [R., § 3064; C., '51, § 1782.]

The legislature has no authority, in providing for a jury trial under the constitution, to authorize such trial by a less number than twelve jurors. Therefore this section is un-

constitutional: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67-296; *Kelsh v. Dyersville*, 68-137.

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

Where the jury was discharged on account of one juror being necessarily excused, and the new jury as impaneled consisting of the same jurors except the substitution of a talesman for the juror excused, *held*, that no error appeared, the case not having proceeded with the first jury further than a statement of the case by counsel: *State v. Laughlin*, 73-351.

4001. Discharge of jury. 2794. The jury may be discharged by the court on account of any accident or calamity requiring their discharge, or by the consent of both parties, or, when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [R., § 3665.]

Where a jury was impaneled and sworn to try a cause, and the court thereupon adjourned until the following day, when, by reason of the filing of an amended pleading, the case was postponed for a day and another cause tried in which some of the same jurors served, *held*, that upon the subsequent trial of the first cause the first jury should have been dismissed and a new jury formed: *Lyons v. Hamilton*, 69-47.

Where a jury is dismissed and an order of continuance is made, not a mere adjournment of the court, but a continuance of the cause to another day in the term, the jury should be regarded as discharged: *Ibid.*

4002. Cause retried, when. 2795. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct. [R., § 3066.]

4003. Adjournment. 2796. The court may also, at any time after having entered upon the trial of any cause, where it may deem it right for the purposes of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just. [R., § 3067.]

4004. What jury may take with them. 2797. Upon retiring for deliberation, the jury may take with them all books of accounts, and all papers which have been received as evidence in the cause, except depositions, which shall not be so taken, unless all the testimony is in writing, and none of the same has been ordered to be struck out. [R., § 3068; C., '51, § 1783.]

The jury has nothing to do with papers not introduced as evidence, such, for instance, as a motion for a continuance: *McClintock v. Crick*, 4-453.

The jury may take with them the instructions of the court: *Head v. Langworthy*, 15-235.

They may take with them, also, papers admitted in evidence: *Peterson v. Haugen*, 34-395.

A party cannot be heard to complain that the jury took a deposition with them to their room unless he objected at the proper time and it appears that prejudice resulted: *Shields v. Guffey*, 9-322; *Davenport v. Cummings*, 15-219.

Where the jury took with them a deposition attached to the pleadings, with the presumed consent of appellant, and no prejudice was shown, *held*, that there was not sufficient error to warrant a reversal: *State v. Delong*, 12-453.

Where a deposition which was material to the issue, but which had not been offered in evidence, was taken by the jury to their room without the knowledge or consent of the party, *held*, that it was error in the court below to refuse a new trial: *Coffin v. Gephart*, 18-256.

So *held*, also, where the jury took with them and considered a deposition not in evidence, and favorable to the successful party: *Stewart v. Burlington & M. R. R. Co.*, 11-62.

But such misconduct would not vitiate the verdict if the deposition was favorable to the party complaining, or could not have prejudiced him: *Ibid.*; *Abel v. Kennedy*, 3 G. Gr., 47.

The statute does not prohibit the jury from taking with them any evidence except depositions which is in proper form to be considered by them; and *held*, that it was not erroneous to allow them to take with them a photographic view which had been introduced in evidence: *Barker v. Perry*, 67-146.

The right of a party who has introduced books of account to have them taken by the jury to the jury room may be waived by his action: *Davenport v. Cummings*, 15-219.

The fact that the jury improperly takes with them an account book which has been introduced in evidence will not vitiate their verdict if it does not appear that the party objected thereto, or had no opportunity to object, or that his rights were prejudiced: *Turner v. Kelley*, 10-573.

It is not error to allow the jury to take the pleadings with them to the jury room: *McGinty v. Keokuk*, 66-725; *Dorr v. Simerson*, 73-89.

The jury cannot be permitted by adding evidence to make the case other or different than that which was taken with them to their room: *Kruidenier v. Shields*, 70–428; *Griffin v. Harriman*, 74–436.

The jury must try the case in the light of the evidence and not upon their private knowledge or prejudice: *Pumphrey v. Walker*, 71–383.

The evidence of an intelligent witness must be accepted, unless he is contradicted or impeached by other evidence in the case, or his statements are improper in view of other testimony or impossible in the nature of things: *Ibid.*

Judgment for a greater sum than that shown to be due by the evidence will be reversed: *Callender v. Drabelle*, 73–317.

4005. Court open for verdict. 2798. When the jury is absent, the court may adjourn from time to time in respect to other business, but it is to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. [R., § 3069; C., '51, § 1784.]

4006. Further testimony to correct mistake. 2799. At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege. [R., § 3070; C., '51, § 1778.]

It is in the discretion of the court to allow a party to introduce testimony as to a certain point claimed to have been omitted by oversight, although the case had been partially argued to the jury: *McManus v. Finan*, 4–283.

So *held*, also, where a party was allowed to introduce evidence after the conclusion of the argument of one of the counsel for the opposite party: *McCormick v. Holbrook*, 22–487.

But *held*, in a particular case, that the refusal of the court to allow defendant to introduce additional evidence after the opening argument in the case had been made was not sufficient ground for reversal, it not appearing that the court's discretion had been abused: *Kemerer v. Bournes*, 53–172.

This provision is applicable to a case where a witness is by accidental delay prevented from reaching the place of trial in time for the introduction of his testimony at the proper time: *Smith v. State Ins. Co.*, 58–487.

Even if the power of the court under this provision is discretionary, the abuse of such discretion in refusing to admit testimony in a proper case will be ground for reversal: *Ibid.*

In a case tried in equity upon depositions, *held*, that the party should be allowed, after the announcement of the decision of the court and before entry of judgment, to introduce oral evidence to correct a misstatement in the witness' deposition: *Eggspieller v. Nockles*, 58–649.

It is not an abuse of discretion to refuse to re-open a case after it has been submitted to give a party opportunity to introduce newly-discovered evidence which might, in the exercise of a reasonable degree of diligence, have been discovered before the trial: *Baker v. Jamison*, 73–698.

Under particular circumstances, *held*, that it was improper to refuse a party leave to recall a witness after his case was closed for the purpose of establishing material facts: *Cowan v. Musgrave*, 73–384.

The privilege of recalling a witness to reexamine him upon the same subject-matter, for the purpose of explaining an apparent contradiction, is a matter within the discretion of the court: *State v. Rorabacher*, 19–154.

Although this provision relates only to civil cases, yet in criminal cases also, under some circumstances and for some purposes, a witness may be recalled after the evidence is closed, and in the absence of a showing to the contrary it will be presumed that he was properly recalled: *State v. Shean*, 32–88.

In general, as to order of introducing evidence, etc., see notes to § 3986.

4007. Request for additional information. 2800. After the jury has retired for deliberation, if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the information required shall be given in the presence of, or after notice to, the parties or their counsel. [R., § 3071.]

Additional instructions should always be given in open court. It is error to send them to the jury in their room: *O'Connor v. Guthrie*, 11–80.

Additional instructions should not be given without notice to counsel of the parties: *Davis v. Fish*, 1 G. Gr., 406.

It is not error to instruct a jury which has, after some time, failed to come to an agreement, that it is the duty of each juror to lay aside all pride of opinion and carefully review the ground of his opinion; that a new trial would involve a large expense, etc., and direct them to return to their room and examine their differences in a spirit of fairness and candor: *Frandsen v. Chicago, R. I. & P. R. Co.*, 36–373.

Where the jury, after retiring, returned into court and requested permission to examine a witness as to testimony given by him, *held*, that it was not error to allow such examination and refuse permission to counsel to make further examination of the witness: *Herring v. State*, 1–205.

4008. How given. 2801. Such information shall be in writing, and shall be held approved unless it be excepted to in the same way as the charge, and no discussion thereon shall be allowed to either party. [R., § 3072.]

4009. Food and lodging. 2802. If, while the jury are kept together, either during progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable food and *lodging*, they must be provided by the sheriff, at the expense of the county. [R., § 3076.]

VERDICT.

4010. How signed and rendered. 2803. The verdict must be written and signed by a foreman chosen by the jury itself, and when agreed, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. [R., § 3073; C., '51, § 1789.]

I. SUFFICIENCY IN GENERAL.

Form: Where the intention of the jury is sufficiently indicated by the language of the verdict, it may be carried out although informal, and where the verdict was for the plaintiff for the amount of a note and interest, *held*, that it was not error to direct the clerk to compute the amount and enter up judgment therefor: *Stevens v. Campbell*, 6-538.

Where the foreman filled up and signed the blank form of verdict given to the jury by the court in its instructions, and returned the same as the verdict of the jury, and the jurors were thereafter polled, *held*, that there was no ground of objection on appeal: *McGinty v. Keokuk*. 66-725.

The provision as to signing is directory merely, and if it is in fact returned by the jury, a failure to sign it will not be fatal: *Morrison v. Overton*, 20-465.

Where a verdict, taken in connection with the charge of the court as to form, etc., thereof, leaves no doubt as to what the court and jury mutually understood and intended, it is sufficient: *State ex rel. v. Funck*, 17-365; *Harrell v. Stringfield*, Mor., 18.

The form of a verdict is sufficient if it expresses the intention of the jury. In arriving at this intention, it is always proper to look at the nature of the case, the issue made, and especially the whole language used by the jury: *Cassel v. Western Stage Co.*, 12-47.

A verdict which unmistakably expresses the intention of the jury is sufficient: *Armstrong v. Pierson*, 15-476.

A judgment will not be disturbed on account of any defect in the verdict, provided the intention of the jury is unequivocal and evident: *Cane v. Watson*, Mor., 52.

A verdict, however informal, is good if the court can understand it; and where, in an action in which exemplary damages were claimed, the jury rendered a general verdict for $100 actual damages, and a special verdict for $200 exemplary damages, *held*, that a judgment for $300 was not erroneous: *Ward v. Thompson*, 48-588.

Where the verdict in an action on a note was for "the amount of the note and interest," and the only question at issue was as to the right to recover at all, *held*, that the court might order the clerk to compute the amount and enter judgment accordingly: *McGregor v. Armill*, 2-30.

Where a counter-claim is interposed and the jury find for the plaintiff in a certain amount, it will be understood that the counter-claim has been passed upon by the jury: *Stepanek v. Kula*, 36-563.

Where, in an action against four defendants, all of whom set up counter-claims, a verdict in favor of plaintiff against two of the defendants was returned, *held*, that such verdict was also conclusive as to the counter-claims of the two defendants against whom no damages were allowed: *Ibid.*

In an action of right in which damages were claimed for the unlawful detention, *held*, that a verdict for plaintiff in a certain sum was sufficient to support judgment for plaintiff for possession of the property: *Daniels v. Chicago & N. W. R. Co.*, 35-129.

A verdict in an action of replevin finding the party "entitled to the following articles described in her petition, viz. (naming the articles)," *held* to be insufficient for uncertainty in not describing the articles to which the party was found entitled: *Richardson v. McCormick*, 47-80.

Correction by the court: The verdict of the jury may be put in form by the court, if it can be definitely ascertained from the data given by them for whom and in what amount they intended to render a verdict: *Stevens v. Campbell*, 6-538; *Cassel v. Western Stage Co.*, 12-47; *Armstrong v. Pierson*, 15-476.

When the amount cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount: *Fromme v. Jones*, 13-474; *Moore v. Devol*, 14-112.

Where the jury return a verdict for a larger amount than authorized by the instructions of the court, the court may, by its own order, reduce the amount of the award, but having

done so it cannot afterward set aside the verdict as being in violation of the instruction and grant a new trial: *Morlan v. Russell*, 71-214.

A verdict may be amended in matter of form at any time before the judgment is rendered: *Cane v. Watson*, Mor., 52.

The court may change the language of the verdict of the jury and make it correspond to the usual forms, whenever such change cannot, by possibility, alter its meaning; and such change may be made after the separation of the jury: *Gordon v. Higley*, Mor., 13.

Although a court may put the finding of the jury in proper legal form, it cannot change it for the purpose of curing a substantial defect therein: *Wise v. Hine*, 1 G. Gr., 62.

To justify a court in modifying or reforming a verdict, it must have unmistakable data upon which to base its action, and when the verdict is for a specified amount, "with interest," it cannot be altered so as to draw interest from a date prior to the verdict: *Edwards v. McCaddon*, 20-520.

Modification of the verdict, by which plaintiff is allowed to recover less than the amount found in the verdict, cannot be complained of by the opposite party: *Blakley v. Bird*, 12-601.

Correction of verdict and entry of judgment in a different amount by the court, *held* erroneous under particular circumstances: *Flanagan v. McWilliams*, 52-148.

Returning to jury for correction: The party against whom a verdict is rendered cannot complain of the action of the court in permitting the jury to reduce the amount thereof, when the record contains no evidence nor exceptions to rulings to show that he could have escaped a judgment for the first amount: *Hamilton v. Barton*, 20-505.

Where the controversy was as to the *right* to recover at all, and not as to the *amount*, and the jury rendered a sealed verdict "for the plaintiffs," *held* not error to call the jury into the box and direct them to find the amount due plaintiffs: *Lee v. Bradway*, 25-216.

Where the verdict returned by the jury is informal or ambiguous, it is the duty of the court to have it corrected in form or have the ambiguity explained by the jury at any time before their discharge: *Orton v. State*, 4 G. Gr., 140.

Where a verdict is rendered which does not express the intention of the jury, through a failure to include in the computation interest which the jury intended to allow, the remedy of the party prejudiced is by motion to reform the verdict or have it set aside. He cannot, upon failure to take advantage of his rights in this respect, have relief in equity: *McFaul v. Woodbury County*, 57-99.

Granting it to be technical error to send a jury back to return a different verdict in the absence of the attorney for defendant, the verdict must stand in the absence of a showing of prejudice: *Rowell v. Williams*, 29-210.

As to correction of sealed verdict, see notes to § 4012.

In gross upon two counts: Where a verdict is rendered for a gross sum upon two counts, and it does not appear what amount was allowed under each count, the error as to one count will operate upon appeal to cause the reversal of the entire judgment: *Sioux City & P. R. Co. v. Walker*, 49-273.

A general verdict in a case where the petition sets up distinct causes of action will not be set aside as against the evidence if it can be sustained on any one of the causes of action: *Burtis v. Chambers*, 51-645.

In such case the verdict will be presumed to have been based upon the count which is sustained by the evidence: *Bays v. Herring*, 51-286.

Setting aside verdict: Although the statute provides for setting aside a verdict on the application of the party aggrieved, this does not preclude the court from taking such action on its own motion where an error is apparent: *Allen v. Wheeler*, 54-628.

Further as to setting aside verdicts, see § 4044.

II. DIRECTING VERDICT; TAKING CASE FROM JURY.

When case may be taken from jury: Where there is no evidence on behalf of a party having the burden of proof as to the issue, or where essential or integral elements of his cause of action or defense are wholly without proof, the court may properly refuse to let the case go to the jury, or it may direct the jury as to the verdict to be returned: *Allen v. Pegram*, 16-163; *Powers v. Council Bluffs*, 45-652; *Murphy v. Chicago, R. I. & P. R. Co.*, 45-661; *Allen v. Wheeler*, 54-628.

This is true where there is no controversy as to the facts, and especially where the evidence thereof is documentary: *Thorp v. Craig*, 10-461.

Where facts are established without conflict, which as a matter of law will defeat the right to recover, the court should, upon motion, take the case from the jury: *Conners v. Burlington, C. R. & N. R. Co.*, 74-383

Where there is an utter want of evidence to sustain a defense it is proper for the court to direct the jury to render a verdict accordingly: *Atkinson v. Blair*, 38-156.

In an action for personal injuries, *held*, that there was no evidence showing negligence on the part of defendant causing the injury, and that the court properly directed the verdict for defendant: *Skellenger v. Chicago & N. W. R. Co.*, 61-714.

Where, in an action for personal injuries, it appears without controversy that plaintiff was not in the exercise of ordinary care at the time of receiving the injury, the court may properly direct a verdict to be rendered for defendant: *Starry v. Dubuque & S. W. R. Co.*, 51-419; *Griffin v. Chicago, R. I. & P. R. Co.*, 68-638.

So where in such an action there was nothing to show absence of contributory negligence on plaintiff's part, *held*, that it was proper to direct a verdict for defendant: *Murphy v. Chicago, R. I. & P. R. Co.*, 45-661.

Where there is no testimony sustaining the charge in a criminal case, or where it is so slight that a verdict of guilty would be instantly set aside, the court may direct an acquittal, but not where there is a conflict in the testimony: *State v. Smith*, 28-565.

Where it would be the duty of the court to set aside a verdict for plaintiff, if rendered, it may properly, on motion, at the conclusion of the evidence, direct a verdict for defendant: *Starry v. Dubuque & S. W. R. Co.*, 51-419; *Bothwell v. Chicago, M. & St. P. R. Co.*, 59-192.

In a particular case, *held*, that the evidence should have directed the jury to find a verdict for plaintiff and assess his damages at a certain sum: *Fairburn v. Goldsmith*, 58-339.

Evidence in a particular case *held* to be such as to warrant the withdrawal of the case from the jury: *Bemis v. Woodworth*, 49-340.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. Burlington, C. R. & N. R. Co.*, 59-73.

When there is nothing for the jury to do but determine the amount of a note, the court may direct their verdict: *Potter v. Wooster*, 10-334.

Where, on an issue of fact raised by petition and answer in denial, all evidence was ruled out, *held* error to direct a verdict for plaintiff, as plaintiff was bound to prove the substance of his complaint, and whether he had done so was a question for the jury: *Oleson v. Hendrickson*, 12-222.

It is not proper to direct a verdict against a party for failure to allege and prove an essential element of his cause of action or defense (as, for instance, for failure to aver performance of conditions of a contract on which he relies). Such failure is a ground for motion in arrest of judgment, and the party should be allowed the opportunity to cure it as provided in § 4049: *Wrought Iron Bridge Co. v. Greene*, 53-562.

Must be entire absence of evidence: The court is justified in taking a case from the jury only when there is an entire absence of evidence tending to establish the claim or defense which is set up in the pleading: *Sperry v. Etheridge*, 63-543; *Citizens' Bank v. Rhutasel*, 67-316.

The trial court is warranted in taking the case from the jury only in case there is an entire want of evidence tending to prove some of the facts essential to plaintiff's right of recovery, and when, without conflict, the evidence establishes some right which defeats his right of recovery: *Lane v. Central Iowa R. Co.*, 69-443.

Conflicting evidence: Where there is a conflict in the evidence the court should not direct the verdict of the jury: *Woods v. Mains*, 1 G. Gr., 275.

If there is evidence tending in any degree to establish a cause of action or defense, it is error to take the case from the jury: *Crawford v. Burton*, 6-476; *Hall v. Ætna Mfg. Co.*, 30-215; *Green v. Milwaukee & St. P. R. Co.*, 38-100.

It is only where the facts are settled and there exists no controversy or conflict of evidence respecting them that a motion to take the case from the jury or an instruction directing their verdict is proper: *Greenleaf v. Illinois Cent. R. Co.*, 33-608.

The court should not take the case from the jury or pronounce an opinion upon the sufficiency or weight of the evidence where there is evidence in any degree tending to establish a cause of action or defense, except in cases where the proof is documentary: *Muldowney v. Illinois Cent. R. Co.*, 32-176.

Where there is evidence tending in any degree to establish a cause of action or defense, however slight it may be, the question of fact involved should be left to the jury, even though the court should feel in duty bound to set aside a verdict for one of the parties if it should be found in his favor: *Way v. Illinois Cent. R. Co.*, 35-585.

After party has rested: A motion to direct a verdict for defendant on plaintiff's evidence cannot be entertained until plaintiff has rested his case: *Miller v. House*, 63-82.

Need not be in writing: An instruction of the court to the jury directing a verdict for a party on the evidence is not such an instruction as is required to be in writing: *Stone v. Chicago & N. W. R. Co.*, 47-82; *Milne v. Walker*, 59-186.

A motion to direct the jury to return a verdict for a party upon the evidence need not be in writing, nor need it state the facts and conclusions which are admitted thereby: *Foley v. Chicago, R. I. & P. R. Co.*, 64-644.

Where defendant elected to stand upon his motion to have the court direct a verdict of the jury in his favor, *held*, that he thereby waived errors which had previously occurred, and that he could not complain of the action of the court in directing the verdict for the plaintiff, unless such direction was against the evidence: *Battis v. McCord*, 70-46.

What deemed admitted: Where the court is asked by defendant to instruct the jury to find in his favor, the plaintiff is entitled to have everything regarded as established which the testimony tends to prove: *Stone v. Chicago & N. W. R. Co.*, 47-82, 84.

Where the court dismisses an action or counter-claim, after the evidence has been introduced, the party prejudiced by such ruling is entitled to have everything on which his right to recover depends, which the evidence tended to prove, regarded as established: *Welch v. Jenks*, 58-694.

There is no rule requiring the court or jury to specifically find the facts before a verdict may be directed, nor will all the facts be considered as admitted or established which the jury might have inferred from the evidence. The court is authorized to determine what conclusions of fact may be lawfully inferred from the facts proved, and may direct accordingly: *Griffin v. Chicago, R. I. & P. R. Co.*, 68-638.

Where the defendant moves the court to direct the jury to find a verdict for him on plaintiff's evidence, plaintiff is not entitled to have an admission of record by defendant of all the facts that the evidence tends to prove: *Youll v. Sioux City & P. R. Co.*, 66-346.

Although it is true that by a motion to direct a verdict a party admits every fact which the evidence introduced by the opposite party tends to prove, yet the admission is not such that if the motion for a verdict is overruled and on appeal the supreme court holds that it should have been sustained, the supreme court may thereupon render judgment as upon a finding of facts: *Meadows v. Hawkeye Ins. Co.*, 67-57.

By a motion to instruct the jury to return a

verdict a party does not waive his right to afterwards submit evidence in case the motion is overruled: *Case Threshing Machine Co. v. Merrill*, 68–540.

Demurrer to evidence: It may be doubted whether under the reform system of procedure a demurrer to evidence was intended to be allowed in any case, but, if permissible, the demurrant should bring himself within the established rules of common law, one of which is that a part of the evidence cannot be arrested from the jury by demurrer unless it embraces all the evidence offered by the same party: *Hardin v. Snyder*, 15–460.

It is the peculiar province of the jury to ascertain the truth of the facts and the credibility of witnesses, and a party ought not to be allowed by a demurrer to evidence to refer the question to another tribunal. Therefore such a demurrer admits on the record not only the truth of all the facts proven by the evidence, but every conclusion which the evidence offered conduced to prove: *Ibid.*

However loose and undetermined the evidence may be, if it conduces to prove any relevant fact it should be left to the determination of the jury: *Franks v. State*, 1 G. Gr., 541.

In determining a demurrer to the evidence, all the facts which the evidence tends to prove are to be regarded as admitted, and the court must pass upon the legal effect of such facts as proved, admitted or inferred, and not upon the sufficiency of the evidence submitted to prove them: *Ibid.*

On taking the case from the jury it must be conceded that those facts were fully established which the testimony tended to establish: *Miles v. Townsend*, 3 G. Gr., 546.

A demurrer to evidence not only admits the truth of the facts found, but every fact and conclusion in favor of the other party which the evidence conduces to prove, or which the jury might have inferred therefrom in his favor: *Jones v. Ireland*, 4–63.

Before a party can demur to evidence the facts must be first ascertained and found and admitted on the record. The demurrer admits the facts found and every fact and conclusion which the evidence conduces to prove or which the jury might have inferred from it. Without these admissions plaintiff is not bound to join in the demurrer, or if he should the court could pronounce no judgment thereon: *Coates v. Galena & C. U. R. Co.*, 18–177.

Upon a demurrer to evidence the testimony is to be taken most strongly against the party demurring: *Stanchfield v. Palmer*, 4 G. Gr., 23.

A demurrer to evidence is only allowable in the discretion of the court: *Jones v. Ireland*, 4–63.

Nonsuit: If the testimony offered does not support the action or is so insufficient as to justify an arrest of judgment, the court may nonsuit the plaintiff, but great care and caution should be exercised to guard against any interference with the province of the jury. It should not be done if there is any room for doubt as to the sufficiency of the evidence: *Mason v. Lewis*, 1 G. Gr., 494; *Eddy v. Wilson*, 1 G. Gr., 259.

On a motion to nonsuit the plaintiff on the evidence, the court should not take the case from the jury if the evidence tends, although remotely, to show facts which, if established, would support the action. Such a motion is like a demurrer to evidence, and admits all the facts to be proved on which the evidence bears: *Wiley v. Shoemak*, 2 G. Gr., 205.

Under the practice in this state it is not proper to nonsuit the plaintiff on the evidence, even when the evidence is so insufficient that a verdict for plaintiff would be set aside, provided there is any evidence tending to support plaintiff's claim: *Way v. Illinois Cent. R. Co.*, 35–585.

Where there is any proper evidence before the jury it is error to nonsuit the plaintiff on the motion of defendant: *Hall v. Ætna Mfg. Co.*, 30–215.

Refusal to enter a nonsuit on defendant's motion will not be ground for reversal on appeal where defendant has afterward introduced his evidence and there has been a trial on the merits: *Ayres v. Hartford F. Ins. Co.*, 17–176.

4011. Polled. 2804. When the verdict is announced, either party may require the jury to be polled, which shall be done by the court, or clerk, asking each juror if it is his verdict. If any one answer in the negative, the jury must be sent out for further deliberation. [R., § 3074.]

4012. Sealed verdict. 2805. When, by consent of the parties and the court, the jury have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, nor shall such jury be polled or permitted to disagree thereto, unless such a course has been agreed upon between the parties in open court and entered on the record. [R., § 3075; C., '51, § 1785.]

If the jury agree upon their verdict and seal it at an unusual hour, it need not be at once filed with the clerk: *Bass v. Hanson*, 9–563.

Where a jury sealed up their verdict and left it with the bailiff to be handed to the clerk, and then separated without the parties having consented to a verdict being rendered in that manner, *held*, that the separation did not necessarily render the verdict void: *Cook v. Walters*, 4–72; *Heiser v. Van Dyke*, 27–359.

Where a verdict though sealed is merely informal, the jury may be afterwards directed to put it in form: *Bass v. Hanson*, 9–563; *Tifield v. Adams*, 3–487.

A jury may, after returning a sealed verdict, be permitted to correct an error in the amount which was caused by a single omission: *Hamilton v. Barton*, 20–505.

A sealed verdict, being opened, read as follows: "We, the jury, find for the plaintiffs." The jury, being recalled by the court and in-

structed to put their verdict in form, did so by adding, "for the sum of," etc., that being the sum due, if anything, on the note sued on. *Held*, that the action of the court was only requiring the jury to do a ministerial act which the clerk might have done, and if error, was without prejudice: *Higley v. Newell*, 28-516.

In all cases of the rendition of a sealed verdict the court should be careful to have the jury present at the opening of the verdict, if it is at all practicable, in order to recommit it to them if it is so informal that it cannot be rectified by the court: *Tifield v. Adams*, 3-487.

It is not proper to recommit a sealed verdict to the jury except for the purpose of correcting formal errors. They should not be allowed afterwards to return another verdict contrary to the former: *Miller v. Mabon*, 6-456.

The jury may be allowed to reconsider a sealed verdict for the purpose of correcting an error occurring through inadvertence: *Hamilton v. Barton*, 20-505.

In case of a sealed verdict the jury should not be polled, but if they are, the dissent of a juror to the verdict will not affect its validity: *Bingham v. Foster*, 37-339.

It is not improper to allow the jury to separate under the agreement of counsel upon the return of their sealed verdict, although having failed to answer special interrogatories submitted, it not appearing that the party requested that such jury should be sent out again to consider further of such special findings: *Rogers v. Hanson*, 35-283.

Where the case is such that the court is authorized to direct a verdict for plaintiff, it is at most only error without prejudice to direct the jury, after having returned a special verdict and separated, to render a general verdict for the defendant: *Allen v. Wheeler*, 54-628.

As to what is "open court," see *Hobart v. Hobart*, 45-501.

4013. General or special. 2806. The verdict of a jury is either general or special. A general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all, or upon any of the issues. [R., § 3077.]

4014. Special defined. 2807. A special verdict is one in which the jury finds facts only. It must present the ultimate facts as established by the evidence, and not the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law. [R., § 3078.]

[The words "and not the evidence," in the third line, are erroneously omitted in the printed Code.]

In an action involving an issue as to the execution of an instrument, it being claimed by defendant that only a part of it had been read over to him, *held*, that a finding by the jury that defendant *signed* the instrument was not the finding of an ultimate fact, but only an item of evidence to prove such fact: *Hardin v. Branner*, 25-364.

4015. General and special; interrogatories. 2808. In all actions, the jury, in their discretion, may render a general or special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before the argument to the jury is commenced. [R., § 3079; C., '51, §§ 1786-7.]

Special findings; general verdict: Either party has a right to a general verdict if he demands it and the jury renders it, and the court has no authority, against the objection of a party, to direct the jury to return only a special verdict: *Schultz v. Cremer*, 59-182: *Morgan v. Thompson*, 60-280.

The jury may return special findings on their own motion without instructions: *Hall v. Carter*, 74-364.

The statutory provisions for the submission of interrogatories to the jury and requiring special findings thereon are not applicable in criminal cases: *State v. Ridley*, 48-370; *State v. Fooks*, 65-196.

The fact that special interrogatories are improperly submitted to the jury will not constitute prejudicial error sufficient to reverse the judgment where such judgment has been rendered on a general verdict which is not shown to be erroneous: *Petrie v. Boyle*, 56-163.

Where certain facts amounting to a settlement were alleged as a defense, and the jury in a special verdict found that there was such settlement, *held*, that it was not error to have refused instructions asked by plaintiff as to what constituted a settlement: *Wales v. Independent School Dist.*, 49-200.

A special finding by one jury is not binding upon the court on a second trial: *Hollenbeck v. Marshalltown*, 62-21.

If a special verdict be sufficiently definite to enable the court to pronounce judgment thereon, it is not necessary that there be a general verdict for either party. And where a special verdict affords the court all the data necessary, judgment may be entered though there is no assessment by the jury: *Helphrey v. Chicago & R. I. R. Co.*, 29-480.

Where one of the findings of fact having a material bearing upon the issues in the case is without support in the evidence, the verdict

should be set aside and a new trial granted: *Heath v. Whitebreast Coal, etc., Co.*, 65–737.

Where a party asks to have a general verdict set aside and for a new trial on account of certain special findings of fact inconsistent with the general verdict, and the entire verdict is set aside, he cannot be bound by special findings as to which no objection was made: *Ruble v. Atkins*, 39–694.

As to judgment upon special verdict, see § 4065.

As to special verdict in criminal cases, see § 5848.

Submission to opposite attorney: The requirement to submit all questions to the attorney of the adverse party is limited to such questions as are requested by the parties, and is not applicable to those submitted by the court on its own motion: *Clark v. Ralls*, 71–189.

Time for presenting: Where a party presented his interrogatories just before the final argument to the jury was commenced, *held* not error to refuse them as not being presented in time: *Hopper v. Moore*, 42–563.

It is not error to refuse to submit to the jury interrogatories not submitted to opposing attorneys until after the argument has commenced. It is not sufficient that they are submitted to the court before that time: *Crosby v. Hungerford*, 59–712.

Whether the interrogatories submitted to the jury by the court on its own motion are required to be submitted to the attorneys of the parties before the argument is commenced, *quære: Petrie v. Boyle*, 56–163.

A party cannot, after a general verdict, have the case resubmitted to the jury in order to have them make special findings: *Rogers v. Hanson*, 35–283.

Form of interrogatories: The questions so submitted should be such that they can be answered by yes or no, or in some brief and pertinent way: *Marshall v. Blackshire*, 44–475.

It is not error to refuse to submit to the jury particular questions not ultimate in their nature, or which could not well be considered or answered without danger of confusion and misapprehension: *Phœnix v. Lamb*, 29–352.

The court cannot be required to propound to the jury interrogatories which call for a finding of facts not necessarily determinative of the case. A party is not entitled to a special finding upon every circumstance which might have some bearing upon the case: *Hawley v. Chicago, B. & Q. R. Co.*, 71–717.

The jury should not be required to find specially on a question, an answer to which would involve, not the statement of a single fact, but a conclusion drawn from many facts: *Home Ins. Co. v. Northwestern Packet Co.*, 32–223, 246.

The questions of fact presented to the jury for special findings must be founded upon the material facts in the pleadings in such form as to elicit conclusions of fact as established by the testimony, and not what the evidence was, nor conclusions of law: *Hatfield v. Lockwood*, 18–296.

It is not error to refuse to instruct the jury to make a special finding upon a fact which is immaterial: *Bonham v. Iowa Cent. Ins. Co.*, 25–328.

The statute contemplates that specific questions of fact shall be submitted to the jury, and not such questions as whether a person was guilty of negligence as to a certain matter, and if so, in what manner, etc.: *Lewis v. Chicago, M. & St. P. R. Co.*, 57–127.

Immaterial or not pertinent: The court cannot be required to ask special findings as to immaterial facts: *Lawson v. Chicago, R. I. & P. R. Co.*, 57–672; *Liston v. Central Iowa R. Co.*, 70–714.

Interrogatories which demand special findings not pertinent to the issues may properly be withheld from the jury: *Bellows v. District T'p*, 70–320.

Not relevant to the evidence: It is not error to refuse to submit to the jury questions which it is not practicable for them to answer under the evidence in the case: *Winkleman v. Des Moines Northwestern R. Co.*, 62–11.

Modification: A court is not required to submit improper questions to the jury because requested so to do by a party, nor to give such as are proper in substance in the precise form in which they are presented: *Mickey v. Burlington Ins. Co.*, 35–174.

Modifications by the court of interrogatories submitted, *held* proper as more fully adapting them to the issues and evidence in the case: *Dunning v. Van Buren*, 46–492.

Improper interrogatories: Interrogatories asked in particular cases, *held* properly refused: *Cummins v. Des Moines & St. L. R. Co.*, 63–397; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

The fact that the answer to a special interrogatory is not inconsistent with the general verdict, and nothing is claimed for it, does not prove that its submission to the jury was not erroneous; it may nevertheless have misled the jury as to the effect to be given to the facts therein referred to: *Ferguson v. Central Iowa R. Co.*, 58–293.

Refusal to submit: Where the fact which a party asks to have submitted to the jury is important as bearing upon the issue involved in the case it will be error to refuse to submit it: *Day v. Mt. Pleasant*, 70–193.

Argument upon: *Held* not error to permit an attorney submitting special interrogatories to read such interrogatories to the jury and instruct them how they ought to be answered in the light of the evidence: *Timins v. Chicago, R. I. & P. R. Co.*, 72–94.

Answers: If the evidence is insufficient to enable the jury to answer an interrogatory in the affirmative, a negative answer should be given and not an evasive and uncertain one: *Fisk v. Chicago, M. & St. P. R. Co.*, 74–424.

Failure to answer interrogatories: Where the jury, in their answer to interrogatories for findings of fact as to matters which are pertinent and material to the finding of a general verdict, reply "we do not know," a motion for a new trial on that ground should be sustained: *Darling v. West*, 51–259.

Where the answer of the jury to an interrogatory is that they do not know, and such answer is plainly contrary to the undisputed evidence in the case, the court will be justified in granting a new trial on such ground: *Lytton v. Chicago, R. I. & P. R. Co.*, 69–338.

Where the jury in answer to special interrogatories used the words "think" and "have reason to believe," *held*, that such answer presented in positive language the conclusion reached by the jury: *Martin v. Central Iowa R. Co.*, 59-411.

Held not prejudicial error to dismiss the jury without requiring answer to an interrogatory propounded, where such answer, if given, could not have controlled the general verdict: *Dreher v. Iowa Southwestern R. Co.*, 59-599.

The failure of a jury to answer a specific interrogatory, upon a point upon which there was no conflicting evidence, *held* not to justify a new trial, especially if the general verdict was warranted: *Dively v. Cedar Falls*, 27-227.

The action of the court below, in refusing to return a jury to their room because they fail to find definitely as to certain specific interrogatories, will not be interfered with on appeal, except abuse is clearly shown; especially when the materiality of the answer sought is not apparent, or the general verdict is inconsistent with but one answer to such questions: *Greenleaf v. Illinois Cent. R. Co.*, 29-14.

Where a jury, in connection with answers to certain interrogatories, addressed a communication to the court stating that they were of such a nature that the evidence would hardly warrant definite answers to the same either in the affirmative or negative, *held*, that a general verdict in accordance with the answers to the special interrogatories should not be set aside: *Bayliss v. Davis*, 47-340.

4016. Special controls general. 2809. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. [R., § 3080.]

Where the special verdict is inconsistent with the general verdict the latter should be set aside and judgment entered on the former: *McGregor & S. C. R. Co. v. Foley*, 38-588.

To entitle to a judgment upon a special verdict against a general verdict in favor of the other party the special findings must be inconsistent with the general verdict, and sufficient of themselves, when taken together with the facts admitted by the pleadings, to establish or defeat (as the case may be) the right to recover: *Hardin v. Branner*, 25-364; *Conners v. Burlington, C. R. & N. R. Co.*, 71-490.

It is only when the general and special verdicts are so inconsistent that both cannot stand that the latter will be allowed to defeat the former; and where there is evidence to sustain the general verdict it will stand, although the special verdict does not seem to sustain it: *Phœnix v. Lamb*, 29-352.

To justify a judgment upon special findings against a general verdict the findings must be inconsistent with the general verdict: *Bills v. Ottumwa*, 35-107.

Where the special findings, while inconsistent with the general verdict, are not sufficient in themselves to authorize a judgment for the opposite party, the court may be justified in setting aside the general verdict and granting a new trial: *Hammer v. Chicago, R. I. & P. R. Co.*, 61-56; *Davenport Savings, etc., Ass'n v. North Am. F. Ins. Co.*, 16-74.

Where the jury found special facts which under the instructions of the court showed contributory negligence on the part of plaintiff, *held*, that the general verdict was inconsistent with such special finding and must be set aside, irrespective of whether the instructions of the court were correct or not: *Baird v. Chicago, R. I. & P. R. Co.*, 55-121.

Where the jury, in an action for negligence of a railway company causing an injury, found generally for the plaintiff, but in answer to special interrogatories as to which of the employees of the company was negligent responded that it was the brakeman or the fireman, *held*, that their general verdict should be set aside: *Ford v. Central Iowa R. Co.*, 69-627.

Where, to entitle a party to recover, two facts must be found by the jury, and they return a general verdict in his favor, it will be presumed that they found both facts in his favor, and a special finding as to one of them only will not amount to a finding that the other does not exist: *Nockles v. Eggspieler*, 53-730.

Where, under the special findings, plaintiff had no cause of action, and they were inconsistent and irreconcilable with the verdict, *held*, that the latter should have been set aside and a judgment rendered on the former: *Cooper v. McKee*, 53-239.

The court cannot go outside of the special and general verdicts of the jury regularly rendered for the purpose of penetrating the counsels of the jury room; and where it appeared, by reason of certain words written after one of the instructions of the court, that the jury misunderstood such instruction as being a special interrogatory asking for a finding of fact, *held*, that the words thus written and relied upon as impeaching the verdict must be disregarded: *Cooper v. Mills County*, 69-350.

Action of a court in refusing to set aside a general verdict, and render a judgment upon the special findings, will be waived, if the party afterwards moves to set aside the general verdict for a new trial and such motion is granted: *Williams v. Frick*, 71-362.

Where a general verdict in behalf of defendant is rendered in an action in which a counter-claim is pleaded, it will not be error for the court to refuse to set it aside on the ground that the claim set up cannot be properly introduced by way of counter-claim, but only as an independent cause of action: *Mitchell v. Joyce*, 76-449.

As to judgment on special verdict, see § 4065 and notes.

4017. Assessment of recovery. 2810. When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of such recovery. [R., § 3081; C., '51, § 1788.]

4018. Joint or several verdicts. 2811. Where there are several plaintiffs or defendants, whether the pleadings are joint or several, the verdicts shall be moulded according to the facts and to suit the exigencies of the case. [R., § 3083.]

4019. Form. 2812. The verdict shall be sufficient in form if it expresses the intention of the jury. [R., § 3084; C., '51, § 1790.]

[As to sufficiency in form, see notes to § 4010.]

4020. Entered of record. 2813. The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary. [R., § 3085; C., '51, § 1789.]

4021. Waiver of jury trial. 2814. Trial by jury may be waived by the several parties to an issue of fact in the following cases:

1. By suffering default or by failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes. [R., § 3087.]

The right to trial by jury is not inalienable, but may be waived or forfeited: *Wilkins v. Treynor*, 14-391.

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

Where it does not appear on appeal that a jury was not waived, the supreme court will not reverse a case on the ground that the court below refused to submit the cause to a jury: *Hawkins v. Rice*, 40-435.

The right to jury trial is waived by failing to demand it when the cause comes up for trial, and the fact that at a previous term such right was demanded and refused, the cause being then continued, does not render a new demand for jury trial necessary, when the cause again comes on for trial: *Davidson v. Wright*, 46-383.

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

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

Waiver of jury trial relates to all issues in the case as they exist or may arise upon further pleadings as authorized by law: *Henny Buggy Co. v. Patt*, 73-485.

REFERENCE.

4022. By consent. 2815. All or any of the issues in an action, whether of fact or of law, or both, may be referred upon the consent of the parties, either written or oral, in court entered upon the record. [R., § 3089; C., '51, §§ 1650, 1794.]

There cannot be a reference in an action for divorce, even by consent of parties: *Hobart v. Hobart*, 45-501.

Where the parties have agreed to a reference, neither can afterward demand a trial by jury: *Hewitt v. Egbert*, 34-485.

Where a party is present when an order for reference is made, and nothing appears of record to the contrary, his consent to such order will be presumed: *Vandall v. Vandall*, 13-247.

4023. Without consent. 2816. When the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or,
2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or,
3. When a question of fact shall arise in any action by equitable proceed-

ings, in which case the court, in the order of reference, shall prescribe the manner in which the testimony shall be taken on the trial. [R., § 3090.]

Reference without consent: The cases which may be referred without consent of parties are only those which were formerly cognizable in equity, and it is only in such cases that a reference can be made without consent of the parties. Otherwise the right of trial by jury would be infringed: *McMartin v. Bingham*, 27-234.

Where accounts were to be examined and a series of calculations made, *held*, that the remedy by means of a reference would be more complete and adequate, and that, therefore, equity would have jurisdiction and a compulsory reference might be ordered: *Blair Town Lot, etc., Co. v. Walker*, 50-376.

The provision for compulsory reference in cases of account is not unconstitutional, since such cases come within the jurisdiction of courts of equity: *Burt v. Harrah*, 65-643.

A mortgage foreclosure, although it was triable under the Revision as an action at law, was held to be nevertheless of equity cognizance so that it might be referred without consent of the parties: *State v. Orwig*, 25-280.

In law actions: A compulsory reference cannot be made in an action at law. Therefore where plaintiff's cause of action was to recover for money which defendant had received and converted to his own use, *held*, that a compulsory reference was erroneous: *District T'p v. Bulles*, 69-525.

A probate court has power in proceedings as to accounts of executors to appoint a referee (§ 3616): *In re Heath's Estate*, 58-36.

Discretion of court: An order appointing a referee in an equity case is so essentially a matter of practice, so preliminary in its nature, and so much in the discretion of the court, that it cannot be successfully assigned as error without a showing of prejudice: *Hatch v. Judd*, 23-499.

4024. Majority may decide. 2817. Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision by the majority shall be regarded as their decision. [R., § 3091; C., '51, § 1652.]

4025. Vacancies. 2818. When appointed by the court, the judge thereof may fill vacancies in vacation. [R., § 3092; C., '51, § 1653.]

4026. Powers. 2819. The referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty. [R., § 3093; C., '51, § 1769.]

Although the report of a referee is like the verdict of a jury or a finding by the court, yet under the language of § 4051, ¶ 1, a party may dismiss his action after a submission to the referee, although he could not after a like submission to the court or a jury: *Belzor v. Logan*, 32-322.

The referee is not the court: *Hobart v. Hobart*, 45-501.

4027. Trial. 2820. The trial by referee shall be conducted in the same manner as a trial by the court. He shall have the same power to summon and enforce by attachment the attendance of witnesses, to punish them as for a contempt for non-attendance or refusal to be sworn or to testify, and to administer all necessary oaths in the trial of the case. to take testimony by commission, allow amendments to pleadings, grant continuances, preserve order, and punish all violations thereof. [R., § 3094.]

4028. Report; judgment. 2821. The report of the referee on the whole issue, must state the facts found and the conclusions of law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; the report may be excepted to and reviewed in like manner. [R., § 3095.]

Reporting conclusions: Where a cause was referred to a commissioner in equity "to examine and report his conclusions under the rules of practice of this court," *held*, that a report in the form of a statement by the commissioner of the import of the testimony as he understood it sufficiently followed the order of the court: *Byington v. Hampton*, 13-23.

The fact that a referee who is only authorized by the submission to find the facts reports also his conclusions of law, which are adopted by the court, constitutes error without prejudice: *Shindler v. Luke*, 43-89.

Report of balance: In the absence of instructions by the court the referee is not bound to find as to the items of a mutual account, but may simply report the final sum due from one party to the other: *Hewitt v. Egbert*, 34-485.

Facts not ultimate: Failure of the referee to make findings as to certain facts will not be ground for reversal where the facts as to which findings were requested were immaterial or were not ultimate facts: *Keokuk County v. Howard*, 42-29.

Uncertainty: Where the report of a referee is so uncertain and defective that it is impossible to ascertain therefrom the facts governing a material issue in the cause, it should be set aside on motion: *Doyle v. Reilly*, 18–108.

Official capacity presumed: In order to support a referee's report the presumption will be entertained, in an action upon the official bond, that the official capacity of the referee was fully established: *Keokuk County v. Howard*, 42–29.

Correctness presumed: It must be presumed, in the absence of any showing whatever, that the matters stated in the report of the referee are correct: *Shindler v. Luke*, 43–89.

It is to be presumed that the referee in his findings has determined the question of interest upon the evidence before him, and the court should not, in rendering judgment upon such finding, provide for the recovery of interest upon the amount found due: *Keokuk County v. Howard*, 43–354.

Where upon the evidence it is impossible to determine whether a referee's report is correct or not, it should be allowed to stand: *In re Heath's Estate*, 58–36.

Effect of report: Where the reference is made by order of court the pleadings constitute the submission, and an agreement between the parties that the award shall be made a rule of court is unnecessary. When the award is returned to the court a judgment may be rendered upon the same, or the court may set it aside in whole or in part, or make a new reference: *Schohmer v. Lynch*, 11–461.

Certification of the evidence: The referee should certify all the evidence. If he fail to do so the report may be set aside and recommitted with an order to report with all the evidence duly certified. If the evidence was not taken in writing, and such time has elapsed that the referee cannot make the required certificate, it seems he should, on due notice, recall witnesses. The report of the evidence certified by the referee should have all the elements of certainty of a bill of exceptions: *Smith v. Harlan*, 49–101.

The court should require the referee to preserve and report the evidence with his findings of fact and conclusions of law unless there is some good reason for not doing so: *Goodale v. Case*, 71–431.

Unauthorized findings: Findings of a referee which he has not been authorized nor required to make should be set aside upon exception being made to the report: *Sage v. Nichols*, 51–44.

Reference back to make specific: The court may refer the case back to the referee to have the findings of fact made more specific, but the additional findings should be confined to matters specified in the order recommitting the case: *Ibid.*

Amended pleadings: A party should not be allowed to file an amended pleading and tender a new issue after a referee's report has been filed, and thereupon have a resubmission to the referee, without at least offering some excuse for not filing the amendment before the making of the referee's report: *Newell v. Mahaska County Savings Bank*, 51–178.

Review by the court; preservation of the evidence; exceptions: The court appointing a referee is not authorized to review the evidence taken before him, or his rulings, unless such evidence and rulings are preserved by bill of exceptions: *Inman v. Jamison*, 18–22.

And if the finding is claimed to be against the evidence, all the evidence should be preserved and certified by the court: *Oliver v. Townsend*, 16–430.

Findings of law; exceptions: But a party may have a review of the findings of law and fact made by the referee, irrespective of whether any exceptions thereto were taken before the referee. The power of the court in acting on the report of a referee is not merely appellate: *Edwards v. Cottrell*, 43–194; *Hodgin v. Toler*, 70–21.

Exceptions before the referee need only be taken to make that of record which would not otherwise appear. Error in his conclusion of law may be taken advantage of by motion to set aside the report, or by exceptions filed upon the coming in of the report: *Washington County v. Jones*, 45–260.

Exceptions before court and before referee: The provisions of this section as to exceptions to the report do not refer to exceptions taken before the referee under § 4030: *Michael v. Longman*, 42–484.

And where no such exceptions were taken either to the report or to the judgment thereon, a review cannot be had in the supreme court, even though the report was filed or the judgment rendered in vacation: *Roberts v. Cass*, 27–225.

Where the report of the referee is to be reviewed, exceptions should be taken to it as the foundation of the review; an exception to the final judgment will not enable the supreme court on an appeal to inquire into the correctness of the report: *Bauder v. Hinckley*, 60–185.

The party desiring to except to the finding, when the evidence is not all certified, should have the whole report recommitted. It is not proper to allow the referee to make such certificate after his report is filed and judgment is rendered thereon, nor is it sufficient that he certify to the best of his recollection after his report is filed: *Smith v. Harlan*, 49–101.

Where a referee's report is filed in vacation without agreement, it cannot be regarded as coming in until presented to the court and acted upon. Therefore where it is agreed that any exceptions to the master's report should be filed within a limited time after the coming in thereof, such exceptions may be filed within that time after the first day of the next term: *Michael v. Longman*, 42–484.

Too general: An exception that a finding is contrary to law is too general and uncertain: *Sage v. Nichols*, 51–44.

Irregularities in proceeding; setting report aside: Exceptions to the master's report relating to irregularities in his proceeding should be overruled. Such errors or defects are to be reached by motion to set aside the report or refer it back for correction: *White v. Hampton*, 10–338.

The report of the referee is not to be set aside on the mere affidavit of the party as to a matter of opinion inconsistent with the find-

ing of the referee: *Dunn v. Starkweather*, 6-466.

On appeal: The finding of the referee is regarded the same as the verdict of a jury, and will not be disturbed unless clearly and manifestly against the weight of the evidence: *Johnston v. Johnston*, 19-74.

In ordinary actions a finding of facts by a referee has the effect of a special verdict of a jury and can only be disregarded when palpably against the weight of the evidence; but in equitable actions, triable as such, it is the duty of the court to adjudicate the case upon the evidence, and not alone upon the finding of facts: *Wilgus v. Gettings*, 21-177.

The report of the referee is to be regarded as the verdict of a jury, and a judgment thereon should not be reversed unless there is such an absence of evidence in its support as to authorize the conclusion that it was not the result of the exercise of honest, intelligent and unprejudiced judgment: *Taylor v. French Lumbering Co.*, 47-662; *Moore v. Brown*, 49-130. And see *Childs v. Shower*, 18-261; *Johnston v. Johnston*, 19-74; *Whicher v. Steamboat Ewing*, 21-240; *Lyon v. Harris*, 73-292.

The report will not be set aside on appeal where there is a conflict in the testimony: *Carson v. Cross*, 14-463; *Brainard v. Simmons*, 67-646.

The judgment upon the report cannot be reviewed by the supreme court unless all the evidence is contained in the record: *Haywood v. Woods*, 28-563.

A certificate of the referee that the record contains the substance of all the material evidence will not warrant such review: *Sears v. Sellew*, 28-501.

The report is not to be overthrown if there is any evidence in its support: *Corley v. Osborne*, 50-526.

Where the evidence upon which the referee makes his report is not before the court, his findings of fact must be accepted as correct: *Peck v. Schick*, 50-281.

The finding of fact by the referee being regarded as a verdict of the jury, the action of the lower court in setting it aside will not be interfered with on appeal if there is anything in the record to support such action: *Lyons v. Harris*, 73-292.

4029. Finding of facts. 2822. When the reference is to report the facts, the report shall have the effect of a special verdict. [R., § 3096.]

See notes to preceding section.

4030. Bill of exceptions. 2823. The referee shall sign any true bill of exceptions taken to any ruling by him made in the case whereto any party demands a bill of exceptions; and the party shall have the same rights to obtain such bill as exist in the court, and such bill shall be returned with the report. [R., § 3097.]

See notes to § 4028.

4031. Selection of referees. 2824. In all cases of reference, the parties, except when a minor may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be persons free from exception, or the court may allow each party to select one, and itself to select a third. [R., § 3098; C., '51, §§ 1651, 1795.]

4032. Appointed in vacation. 2825. A judge of the court, when a case is pending, may, in vacation, upon the written consent of the parties, make an order of reference. In such case the order of reference shall be written in the written agreement to refer, and shall be filed with the clerk of the court with the other papers in the case. [R., § 3099.]

4033. Sworn. 2826. The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report therein according to the best of his understanding. The affidavit shall be returned with the report. [R., § 3100.]

If the affidavit here required is shown to have been made, but lost, its absence will not warrant the setting aside of a referee's report: *Sears v. Sellew*, 28-501.

A failure to return the affidavit with the report is not a fatal objection to the report. The fact that the referee was duly sworn may be otherwise shown: *Shindler v. Luke*, 43-89.

Where the record showed that the referee was only properly sworn three days before filing his report, but it appeared by affidavit on the hearing of a motion to set aside the report that he had been properly sworn before he commenced the trial of the case and the affidavit had been lost, *held*, there was no error in refusing to set aside the report: *Harper v. Kissick*, 52-733.

Where an exception is filed to the report of the referee on the ground that he has not been sworn, and evidence is introduced, not objected to, to the effect that he was duly sworn, the exception should be overruled: *Quick v. Cox*, 38-568.

4034. Procedure. 2827. The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing, and when he shall make his report; but in the absence of such direction, he shall do so on the morning of the tenth day after the day on which was made the order of reference, and shall file his report as soon as done; of the time thus fixed or determined the parties shall take notice, and non-attendance of either party within an hour of such time shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee. [R., § 3102.]

Where the referees are directed to proceed, and it is left to them to fix the time of hearing both by agreement of parties and order of court, they will not be compelled to set the hearing of the cause on the tenth day after the issuing of the order: *Corbitt v. Nealy*, 29-445.

The report of the referee ought not to be received after the term at which he is required to report by the order appointing him. After that time he ceases to have authority as a referee: *Goodale v. Case*, 71-434.

That plaintiff's attorney on account of some conversation and negotiation between him and the defendant failed to appear at a trial before a referee, *held* no excuse, the circumstances not being such as to warrant the attorney in being misled: *Washington County v. Jones*, 45-260.

4035. Acceptance by referee. 2828. The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may, on the motion of either party, make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on his motion, on good cause shown, enlarge the time for making his report. [R., § 3103.]

4036. Process; administering oaths. 2829. Any one of such referees may issue and sign subpœnas and other process, and administer oath necessary for the discharge of their duties and the full exercise of all their powers. [R., § 3104; C., '51, § 1654.]

4037. Proceed as court. 2830. The form of procedure which in the court itself regulates service, pleading, proof, trial, and the preparation, progression, and method of each of these, shall obtain before the referee; and in every incident of the proceeding before him, the rights and responsibilities of parties, and of their attorneys, and of the referee, shall be the same as if the referee was the court engaged in the same matter. [R., § 3105.]

Immaterial matters; costs: Where a referee upon request of a party investigated matters not in issue under the pleadings, and the finding thereon was adverse to such party, *held*, that the costs thereof were properly taxed to him, although he recovered judgment in the case: *Keokuk County v. Howard*, 42-29.

Section applied: *Keokuk County v. Howard*, 43-354.

EXCEPTIONS.

4038. What and when taken. 2831; 18 G. A., ch. 209. An exception is an objection taken to a decision of the court or party acting as the court on matter of law. The party objecting to the decision must do so at the time the same is made (but if decision is on motion, demurrer or judgment, exception may be taken within three days) and embody his objection in a bill of exceptions to be filed during the term or within such time thereafter as the court may fix. But in no event shall the time extend more than thirty days beyond the expiration of the term, except by consent of parties, or by order of the judge. But in an equitable action, tried as such, no bill of exceptions shall be required. [R., § 3106; C., '51, § 1805.]

Exceptions necessary: The supreme court will not review, on appeal, a ruling of the lower court to which exception is not duly taken: *Chapman v. Lobey*, 21-300; *Holton v. Butler*, 22-557; *Appanoose County v. Walker*, 23-26; *Redding v. Page*, 52-406.

The fact that exception was properly taken must affirmatively appear: *Beason v. Jonason*, 14–399.

This rule is not affected by the statutory provision (§ 4398) dispensing with the necessity of a motion for new trial: *Eason v. Gester*, 31–475.

The supreme court will not review a case on appeal where the record presents no finding of facts by the court below, or motion for a new trial or other exception taken to its ruling: *Marshall v. Richards*, 19–571.

Where no exceptions were taken save to the ruling on a motion for new trial, and the record contained nothing to show the truth of the grounds assigned for new trial, the judgment was affirmed: *Kline v. Moore*, 20–599.

Where no exceptions are taken on the trial of an equity case, and the proper steps are not taken to have the case tried anew in the supreme court, there is nothing which the court can consider on appeal: *Richards v. Hintrager*, 45–253.

No objection to a judgment not excepted to in the court below can be considered upon appeal: *Redding v. Page*, 52–406; *Soup v. Smith*, 26–472.

Appeal cannot be taken from the ruling upon a demurrer unless such ruling is duly excepted to: *Cain v. Story*, 15–378.

An exception to the overruling of a demurrer is all that is necessary to preserve the party's right of appeal from such ruling. It is not necessary for him to except again when the final judgment is entered: *Jordan v. Kavanaugh*, 63–152.

Where a motion for continuance was made by defendant, but overruled, and judgment entered against him by default, and no exception was made to the ruling on the motion, nor was any motion made to set aside the default, *held*, that there was nothing which could be reviewed on appeal: *Carter v. Griffin*, 54–62.

The action of the court in ordering a change of place of trial should be excepted to or it cannot be made a ground for objection on appeal; if not known to the appellant in time for taking proper exceptions, he should move to set aside the order on that ground, and except to the action of the court if adverse to him: *Scott v. Neises*, 61–62.

Objections to a referee's report cannot be urged on appeal unless exceptions to the report have been filed in the trial court: *Blake v. Dorgan*, 1 G. Gr., 547.

Not necessary in equity: An exception to a final decree in an equitable action is not necessary where the party is entitled to a trial *de novo* on appeal: *Dicken v. Morgan*, 59–157; *Gately v. Kniss*, 64–537.

Where a party in an equitable suit stands upon the ruling upon a motion or demurrer, and desires to appeal therefrom, he should except thereto as in a law action: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632: *Phipps v. Penn*, 23–30; *Hodgin v. Toler*, 70–21.

By whom taken: An exception by the party who is the real party in interest in the appeal, although not technically the party appealing, will be sufficient to save the question for review: *Fries v. Porch*, 49–351.

Waiver of exception: An exception properly taken, but afterwards expressly waived upon appeal, cannot be taken advantage of by the opposite party: *Fortney v. Jacoby*, 51–95.

Waiver of necessity for exception: Where upon the transfer of a cause by agreement from one court to another for trial, it was stipulated that the judgment to be rendered should be entered in the court from which the transfer was taken, as of the previous term, and that either party should have the right to appeal, *held*, that such stipulation amounted to a waiver of the necessity of excepting to the judgment: *Wolf v. Smith*, 36–454.

Successful party need not except: The successful party cannot, in any way, be prejudiced by the failure to except to any action of the court adverse to him: *Baird v. Chicago, R. I. & P. R. Co.*, 61–359.

Therefore where, on appeal, a judgment was reversed because the verdict was contrary to an instruction given, and the cause was remanded for a new trial, and the unsuccessful party then moved for judgment on special findings, on the theory that under the doctrine of the instruction he was entitled to judgment on such findings, *held*, that the successful party might controvert the correctness of such instruction although he had not excepted thereto, and that the instruction was not binding on the court: *Ibid.*

Time for taking: An exception to a decision or ruling must be taken at the time the decision or ruling is made. The only departure from this rule is that authorized by statute in regard to instructions (§ 3996): *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 50–455; *Nagel v. Guittar*, 62–510; *Boardman v. Beckwith*, 18–292. [But by express provision now incorporated into this section, exception to decision on motion or demurrer, or to a judgment, may be taken within three days.]

Objection to the introduction of evidence must be made at the time it is offered: *State v. Benge*, 61–658.

Time for filing: It is not error to refuse to stop a trial for the purpose of allowing a party to prepare a bill of exceptions, when time is granted within which to prepare the same: *Anson v. Dwight*, 18–241; *Hanan v. Hale*, 7–153.

Where, pending the argument of a motion for a new trial by the party applying therefor, the court adjourned without giving an opportunity to file a bill of exceptions, *held*, that the action of the court could not be reviewed on affidavits: *Campbell v. Ayres*, 4–358.

Where a motion in arrest and for a new trial has been continued to a succeeding term, it is sufficient to embody the exceptions into one bill and have it signed by the judge, unless dissent of the opposite party is shown: *Courtney v. Carr*, 11–295.

In the absence of an express agreement or consent the judge has no power to sign a bill of exceptions after the final adjournment of the term: *Claggett v. Gray*, 1–19; *State v. Orwig*, 34–112; *Hahn v. Miller*, 60–96; *Gates v. Brooks*, 59–510; *Gibbs v. Buckingham*, 48–96.

The subsequent verbal alteration of an order or judgment made on approving it at a subse-

quent term will not entitle the party to a bill of exceptions at that term, including objections raised at the trial: *State v. Orwig*, 34–112.

An exception can be preserved only by having it embodied in the bill of exceptions, or by having it noted in the record of the decision to which it relates (§ 4040), and a party who would save his exception by the first method must have his bill of exceptions signed and filed within the time prescribed therefor; and where, upon a demurrer being overruled, followed by an order dismissing the action, the unsuccessful party filed a motion for rehearing, which was, on the same day, submitted and taken under advisement, but not overruled until the following term, *held*, that the bill of exceptions signed at following term was insufficient: *State ex rel. v. Leach*, 71–54.

A bill of exceptions may, by agreement of parties, be settled and signed after the conclusion of the term: *Harrison v. Charlton*, 42–573; *Dedrick v. Hopson*, 62–562.

An agreement between two attorneys for an extension of time to file a bill of exceptions, duly filed, is binding upon the parties without any approval by the court: *State ex rel. v. Chamberlin*, 74–266.

If time for filing the bill of exceptions is extended by consent, it must be filed within the time so given, and will not be considered if filed afterwards: *Lynch v. Kennedy*, 42–220; *Lloyd v. Beadle*, 43–659; *St. John v. Wallace*, 25–21; *Frost v. Senior*, 44–706; *Parmenter v. Elliott*, 45–317; *Deland v. Weddington*, 54–698; *Hahn v. Miller*, 60–96; *Mineral Ridge Coal Co. v. Smith*, 68–561.

A bill of exceptions signed after the expiration of the term or after the time allowed for that purpose, if the time has been extended, will be stricken out on motion in the supreme court: *Lynch v. Kennedy*, 42–220; *Gibbs v. Buckingham*, 48–96; *Templin v. Exchange Bank*, 69–149; *McCarthy v. Watrous*, 69–260.

If not filed within the time prescribed in the order of court extending the time, the bill will be disregarded or stricken from the record: *McFarland v. Folsom*, 61–117.

Where thirty days was agreed upon to settle a bill of exceptions, and no showing was made of a proper effort to settle the same within the time fixed, *held*, that without such showing a party could not have the benefit of exceptions signed by the judge after that time, and that he was in no better position when it was thus signed by by-standers: *St. John v. Wallace*, 25–21.

Where the time was extended to a day beyond the term, by consent, for signing and filing a bill of exceptions, and the bill was signed by that date, but not filed, *held*, that it was not valid, and the judge could not, by order made in vacation at the time of signing, direct that it be made a part of the record: *Cobb v. Chase*, 54–196.

Where it appears that within the time allowed for settling and filing a bill of exceptions said bill was signed, but it does not appear, except by statement in the abstract, not based upon matter of record, that such bill was filed with the clerk, the supreme court cannot consider it: *Anderson v. Leaverich*, 70–741.

Presumption: Where it appears that the bill of exceptions was signed within proper time, and it is made part of the transcript, it will be presumed, in the absence of all showing to the contrary, that it was filed within the proper time: *Wilson v. First Presb. Church*, 60–112.

Where the bill of exceptions is silent as to when it was settled, it will be presumed that it was taken in trial term regularly, or settled by agreement without reference to the time of filing; and if consent to an extension of time beyond the term is shown, it will be presumed that the bill was reduced to form and made part of the record within the time contemplated by law. But if it appears to have been taken in vacation, and assent is not shown, the bill will be stricken from the record upon objection properly made: *Claggett v. Gray*, 1–19.

4039. Form; grounds. 2832. No stated form of exception is required. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be also stated, and no other shall be regarded. [R., § 3107.]

What sufficient: An exception to the overruling of a motion for a new trial is a sufficient exception to the judgment: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59–416.

Where a motion asking for judgment on the findings of a special verdict was overruled, and proper exception taken, *held*, that it was not necessary to except to the judgment afterwards rendered: *Aldrich v. Price*, 57–151.

Where the judgment is founded upon a conclusion of law which is duly excepted to, it seems that such exception will be sufficient to entitle the party to have the correctness of such conclusion determined upon appeal, although no exception to the final judgment appears: *Barnhart v. Farr*, 55–366.

To admission or rejection of evidence: When exception is taken to the admission or exclusion of evidence the ground of objection must be stated, otherwise the ruling cannot be reviewed on appeal: *Peck v. McKean*, 45–18; *Davidson v. Smith*, 20–466; *Thompson v. Blanchard*, 2–44.

Objections to evidence not raised in the court below cannot be first taken on appeal: *Johnson v. Miller*, 69–562.

If incompetent evidence is not objected to by the prisoner at the time it is produced its admission cannot afterward be made ground for reversal: *State v. McLaughlin*, 44–82.

In the absence of objection at the time and a showing of prejudice the fact that one who read testimony reduced to writing to the jury in a criminal action was not sworn to do so correctly cannot be urged as an objection on appeal: *State v. Polson*, 29–133.

An objection to the competency of a witness not made in the lower court cannot be first urged on appeal: *Schmidt v. Littig*, 69–277.

Evidence which is competent as determining the rights of the parties, and which might have been made admissible by the amendment of the pleadings on the trial, if not objected to then cannot afterwards be objected to in the supreme court on appeal as not admissible under the issues raised by the pleadings: *Council Bluffs Lodge v. Billups*, 67-674.

A party cannot, on appeal, object to evidence on a different ground from that interposed in the court below: *Luke v. Bruner*, 15-3; *Iowa Homestead Co. v. Duncombe*, 51-525.

The record must show that the introduction of evidence was objected to upon the same ground urged against it upon appeal: *Childs v. McChesney*, 20-431.

A party having alleged one objection to evidence on which it is improperly excluded, cannot, on appeal, allege other objections thereto in support of the action of the court below: *Lines v. Lines*, 54-600.

For instance, under the objection that evidence is incompetent, irrelevant and immaterial under the pleadings, he cannot urge that it was improperly admitted in rebuttal: *Davidson v. Dwyer*, 62-332.

When the admission in evidence by the defendant of a deed void upon its face is objected to on other grounds, which are overruled, the plaintiff may upon appeal offer such objection to its validity, when the record shows that the court found for the defendant solely upon the evidence of the deed, and that plaintiff excepted to this finding and made it a ground of a motion for a new trial: *Ferguson v. Heath*, 21-438.

Grounds must be stated: The ground of objection to evidence should be distinctly stated: *State v. Wilson*, 8-407.

It is not necessary to show by bill of exceptions the reason or ground of an objection to the action of the court below where the entire basis of the action of the court necessarily appears from the record; in such case any objection which may be raised to the action of the court can be urged under an exception taken to such action: *McGovern v. Keokuk Lumber Co.*, 61-265.

Error in admitting testimony cannot be complained of if introduced without objection: *State v. Smith*, 46-670; *State v. Hamilton*, 32-572.

The degree of particularity required in pointing out objections to testimony when offered must depend very much on the kind of testimony and the circumstances and attitude of the case: *Rindskoff v. Malone*, 9-540.

Where testimony was received "subject to all legal objections," and no objection was made at the trial nor in the motion for a new trial, *held*, that the objection that papers were thus introduced without proper authentication, or that records were used without accounting for the absence of the originals, were not objections which could be first made on appeal: *Guest v. Byington*, 14-30.

Objection to evidence as "incompetent, irrelevant and immaterial" does not raise the question of the competency of the witness to testify as to a question of value: *White v. Smith*, 54-233.

Nor does such objection raise the question as to whether the evidence offered is the best evidence: *Iowa Homestead Co. v. Duncombe*, 51-525; but *contra*, see *Hunt v. Higman*, 70-406.

The objection "incompetent, irrelevant and immaterial" to offered testimony, without more, goes to the testimony, and not to the competency of the witness: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

An objection to evidence "as incompetent under the law" raises the objection that the examination of the witness in the manner proposed is not authorized by law as well as that the evidence sought to be introduced is inadmissible. Therefore, *held*, that such an objection was sufficient to raise the point that a witness could not be cross-examined as to his belief as to a future state of existence for the purpose of discrediting his testimony, although other evidence of the fact would be admissible: *Dedric v. Hopson*, 62-562.

A party's right to the relief asked in his pleading, or objections to defects in his pleading, cannot be raised by objections to evidence: *Jones v. Marcy*, 49-188.

A general objection to the introduction of evidence, specifying no ground upon which it is raised, cannot be taken advantage of on appeal: *Gelpecke v. Lovell*, 18-17; *Carleton v. Byington*, 18-482; *Davidson v. Smith*, 20-466; *O'Hagan v. Clinesmith*, 24-249; *Chase v. Walters*, 28-460; *Keough v. Scott County*, 28-337; *Williams v. Meeker*, 29-292; *Snyder v. Nelson*, 31-238; *Lake v. Miller*, 31-596; *State v. Benge*, 61-658.

Where the party appealing has made a general objection to the admission of evidence, the ground of which does not appear of record, and it is *overruled*, such ruling cannot be reviewed upon appeal, for the reason that, in presenting such objection, he might have relied upon an insufficient ground, and should not be allowed, upon appeal, to rely upon another and sufficient ground. But where the successful party makes a general objection which is *sustained*, if the appellant can show that there could be no legal or possible ground upon which such ruling can be sustained, he will be entitled to a reversal: *Clark v. Connor*, 28-311; *Engleken v. Webber*, 47-558.

When the bill of exceptions does not disclose the ground of objection to a question, but the objection is sustained, the court will, on appeal, if the question is vulnerable to any objection, presume that such was the one made and rightfully sustained: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

What sufficiently specific: An exception on the ground of incompetency is sufficiently specific: *Greenleaf v. Dubuque & S. C. R. Co.*, 30-301.

Where testimony was introduced to impeach a witness by showing bad moral character, *held*, that an objection to such testimony as incompetent and improper was not sufficiently specific to raise the objection that the testimony related to a specific vice and not to the general moral character: *Kilburn v. Mullen*, 22-498.

Motion for new trial is not necessary to enable the court to pass upon a ruling as to the admission or exclusion of evidence, where such ruling is duly excepted to, and virtually disposes of the whole case: *McCoy v. Junien*, 15-371.

4040. Exception noted. 2833. When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts. [R., § 3108.]

An oral exception entered of record at the end of the decision excepted to is sufficiently taken: *Cramer v. White*, 29-336.

An exception thus entered need not be embodied in a bill of exceptions: *Laub v. Paine*, 46-550; *Winet v. Berryhill*, 55-411.

An exception to the conclusion of law in the judgment, *held* sufficient to raise a question whether the conclusion reached from the facts found was correct: *Henkle v. Keota*, 68-334.

A bill of exceptions makes that a part of the record which was not so before. If the error appears without it there is no necessity for it: *Eyser v. Weissgerber*, 2-463.

It is not necessary to preserve by a bill of exceptions the decision on a demurrer, or the judgment of the court: *State v. Strong*, 6-72.

A written agreement of facts signed by the parties and filed becomes a part of the record without being embodied in a bill of exceptions: *Black v. Howell*, 56-630.

Exceptions entered by a judge upon his calendar and not otherwise preserved are not sufficiently made of record: *Lewis v. May*, 22-599.

Errors with reference to the introduction or rejection of evidence cannot be considered where there is no bill of exceptions showing that the rulings complained of were made: *Acton v. Coffman*, 74-17.

Misconduct on the part of an attorney in arguing to the jury must be shown by a bill of exceptions and not by affidavit: *Rayburn v. Central Iowa R. Co.*, 74-637; *Hall v. Carter*, 74-364; *Fowler v. Strawberry Hill*, 74-644.

As to the proper method of taking exceptions to instructions, etc., see § 3996 and notes.

4041. Writings identified; skeleton bill. 2834. An exception, when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same by any unmistakable reference thereto; and the clerk, in making a transcript of the bill of exceptions, shall write therein at length all of such writing included therein by reference. [R., § 3109.]

Written instruments: To make writings, etc., a part of the record they should be incorporated into the bill of exceptions or plainly identified thereby. They cannot be made a part of the record by the mere certificate of the clerk (under § 4414): *Garber v. Morrison*, 5-476; *Reed v. Hubbard*, 1 G. Gr., 153; *Jordan v. Quick*, 11-9; *State ex rel. v. Jones*, 11-11; *Harmon v. Chandler*, 3-150.

A paper which is not of itself a part of the record cannot be made a part of the record by being certified to by the clerk and inserted in his transcript. It must be preserved by a bill of exceptions. An entry by the judge in his private calendar, or even by the clerk in his record, that a ruling was made and that an exception was taken to the ruling, is not such an exception as is contemplated by law: *State ex rel. v. Jones*, 11-11.

Papers not identified by a bill of exceptions are not properly a part of the record although embraced in the transcript: *Green v. McFaddin*, 5-549.

In all cases where a written instrument is referred to as connected with the action of the court to which exception is taken, it should be contained in the bill of exceptions: *Reed v. Hubbard*, 1 G. Gr., 153.

Identification of instruments or evidence: It is the safer practice, when exceptions are taken in relation to any instrument in writing, to copy the same into the bill of exceptions, but if this is not done it should be so particularly described and referred to in the bill as to enable the clerk to copy the same without mistake into the record and to enable the supreme court to refer to it with positive certainty: *Humphry v. Burge*, 1 G. Gr., 223.

A paper sought to be incorporated into a bill of exceptions by description must be designated and identified with clearness and certainty: *Sands v. Wood*, 1-263; *Bryan v. State*, 4-349.

The reference in a bill of exceptions to papers on file, not otherwise identifying them, is not sufficient to make them a part of the bill of exceptions: *Freher v. Geeseka*, 5-472.

The statement in a bill of exceptions that the plaintiff offered in evidence "the transcript sued on" is not sufficiently definite to identify the instrument offered in evidence, although it was in fact the instrument attached to the petition: *Smith v. Taylor*, 11-214.

The fact that the bill of exceptions refers to depositions marked as exhibits cannot be sufficient to identify and make part of the record depositions which are not identified by the certificate of the clerk or the judge, or by any exhibit marks, as depositions read upon the trial: *Pierce v. Locke*, 11-454.

Where the bill of exceptions stated that the party filed a certain motion with affidavits attached, etc., *held*, that the mention in the affidavits was not sufficient to make them a part of the record: *Moffit v. Rogers*, 15-453.

Writings referred to in the bill of exceptions should be copied at length in their proper place in the transcript: *Ibid.*

Although, if attached and clearly identified, the writings referred to may be embodied in the transcript without being copied out in the bill of exceptions, the sufficient and better plan is to follow the course laid out and insert them in the bill: *Lyons v. Thompson*, 16-62.

If the evidence or other papers attached to the bill of exceptions are not sufficiently iden-

tified therein they will be disregarded: *Van Orman v. Spafford*, 16–186.

When the testimony is not in the body of the bill of exceptions, and there are discrepancies in the paging or references made, the supreme court will disregard it: *Burlington Gas Light Co. v. Green*, 21–335.

Skeleton bills: A bill of exceptions which does not contain the evidence, but directs the clerk to "insert all the evidence, rulings, objections and exceptions," does not sufficiently identify such evidence, and it may, upon motion, be stricken from the files: *Hill v. Holloway*, 52–678.

A skeleton bill of exceptions which does not identify the evidence which is to be inserted, but merely directs the clerk to insert all the evidence, or "plaintiff's evidence" and "defendant's evidence," is not sufficient. The clerk has no power to determine what is to be inserted under such a direction. The bill must so identify the evidence that a mistake of the clerk as to what is to be inserted in the transcript may be readily corrected: *Tootle v. Phœnix Ins. Co.*, 62–362; *Wilson v. Tenant*, 61–194; *Wooster v. Chicago, M. & St. P. R. Co.*, 74–593.

A bill of exceptions directing the clerk to copy as a part thereof the evidence and the instructions given and refused, leaving the clerk to determine what he shall copy, and giving no means of identification whereby he may be directed what papers he shall copy, and whereby errors, if any should be made, could be corrected, is not sufficient to make the evidence thus referred to a part of the record. The bill should identify the different papers intended to be made a part of the record: *Wells v. Burlington, C. R. & N. R. Co.*, 56–520.

A bill of exceptions in which the clerk is merely directed to insert the evidence, without such evidence being otherwise identified, is not sufficient: *Lockard v. Chicago, St. P., M. & O. R. Co.*, 66–250; *Williams v. Williams*, 69–715; *Parks v. Council Bluffs Ins. Co.*, 70–655.

Where the bill of exceptions directed the clerk to insert the evidence taken by the shorthand reporter and filed in the case, marked "C," and certified by the court, but no transcript of such short-hand report was ever filed, *held*, that the evidence was not sufficiently made of record: *Warbasse v. Card*, 71–[illegible].

A bill of exceptions, though a skeleton bill in form, is sufficient if it only refers to the short-hand report of the evidence, and directs the evidence thus referred to to be inserted: *Glenn v. Gleason*, 61–28.

A skeleton bill of exceptions which sufficiently identifies the evidence which is to be inserted therein, as, for instance, by a proper reference to the notes or transcript of the evidence as taken down by the short-hand reporter and filed with the clerk, will make such evidence a part of the record: *McCarthy v. Watrous*, 69–260.

Where the bill of exceptions directed the clerk to insert the transcript of the evidence produced and offered by plaintiff, contained in the reporter's notes, filed in the office of the clerk of the court, *held*, that such identification was sufficient, although the transcript was not on file when the bill of exceptions was signed, it being filed, however, when the bill was filed: *Gardner v. Burlington, C. R. & N. R. Co.*, 68–588.

A bill of exceptions referred to the evidence in the following manner: "The following rulings were had and reduced to writing by said reporter, being all the testimony in said trial. Here insert evidence in full." *Held* to sufficiently identify the evidence: *Wilson v. First Presb. Church*, 60–112.

Where the bill of exceptions directed the clerk to insert the instructions given by the court on its own motion, and such instructions were incorporated by the clerk in the transcript, *held*, that it would not be presumed that instructions were given by the court other than on its own motion, and therefore that it would be considered that all the instructions given were before the court, and that the identification of the instructions in the skeleton bill of exceptions was sufficient: *King v. Barber*, 61–674.

The evidence may be sufficiently incorporated into the bill of exceptions by reference to the stenographer's report of the evidence, whether such report is certified by the reporter or not. A transcript or extension in long-hand of the reporter's notes is not necessary to complete the bill of exceptions, and is not necessary unless a transcript is required: *Hampton v. Moorehead*, 62–91.

Where the original notes of the reporter are filed, and the reporter has therein marked and identified, in writing, the papers offered in evidence, and the clerk is directed to insert in the bill of exceptions all exhibits referred to and identified by said reporter, the written evidence offered is sufficiently identified to become a part of the record: *Manson v. Ware*, 63–345.

4042. Signing. 2835. When the decision is not entered on the record, or when the grounds of objection do not sufficiently appear in the record, the party excepting must reduce his exception to writing and present it to the judge for his signature. If he deems it true he shall sign it. If the judge refuses to sign it, the party may procure the signature of two by-standers attesting that the exception is true and that the judge has refused to sign the same, and the bill of exceptions shall then be filed with the clerk and shall become a part of the record. But the truth of such exception may be controverted and maintained by affidavits, not exceeding five on each side, which shall become part of the record. All affidavits impugning the exception must be filed within three days from the time of filing the bill of exceptions, and

all affidavits sustaining the same within two days thereafter. [R., § 3110; C., '51, §§ 1806–7.]

What deemed of record: Under the provisions of § 4414 a motion properly filed becomes part of the record: *Lemonds v. French*, 4 G. Gr., 123; *Mays v. Deaver*, 1–216; *Ellsworth v. Moore*, 5–486.

The fact that a matter is recited in a motion which is made a part of the record does not make the matter itself of record unless expressly made so: *Herring v. State*, 1–205: *Pharo v. Johnson*, 15–560.

The answer of a garnishee does not become a part of the record unless embodied in a bill of exceptions: *Brainard v. Simmons*, 58–464.

Affidavits introduced on the hearing of an application for a temporary injunction in resistance thereof are no part of the record unless preserved by bill of exceptions or otherwise: *Hart v. Foley*, 67–407.

It is not necessary that affidavits which have been presented on a motion for change of venue be preserved and made matter of record by a bill of exceptions. When filed they become part of the record and may be certified by the clerk on appeal in the same manner as other matters of record: *McGovern v. Keokuk Lumber Co.*, 61–265; *Winet v. Berryhill*, 55–411.

An affidavit for publication, when filed, becomes part of the record: *Bradley v. Jamison*, 46–68, 73.

Where exceptions are duly made of record, and the question presented arises from the pleadings, and nothing else, the pleadings being of record, no bill of exceptions is necessary: *Gardner v. Halstead*, 71–259.

Evidence taken in short-hand: It is the better practice to preserve evidence which is taken down in short-hand by a bill of exceptions. Whether it may be done by filing the original notes and making certified transcripts therefrom, *quære*. At any rate the record must be made up in the court below: *State v. Hessian*, 58–68.

A report of the evidence by the short-hand reporter which is not filed in the cause, nor any transcript thereof, does not become a part of the record: *Ferris v. Anderson*, 72–420.

The provisions of § 5029, as amended, with reference to the taking down of evidence by a stenographer, do not dispense with formal bill of exceptions, and such bill filed within the proper time, and referring to the original notes or transcript, is necessary in order to make the evidence a part of the record on appeal: *McCarthy v. Watrous*, 69–260.

The only way oral evidence introduced on the trial of the cause can be preserved and identified for the purposes of an appeal is by bill of exceptions signed by the trial judge. A paper purporting to contain a portion of the evidence introduced on the trial, and certified to by the official reporter, but not embodied in the bill of exceptions, cannot be recognized as a part of the transcript: *State v. Hemrick*, 62–414.

The stenographer's notes, when filed with the clerk as a part of the record of the case, may be amended or corrected by the court when it is ascertained in a proper proceeding that they do not fully or correctly embody the action or proceeding of which they were intended to be the record: *Mahaffy v. Mahaffy*, 63–55.

The filing of the stenographer's original notes and the subsequent incorporation of them into the bill of exceptions, and the insertion of a duly certified copy thereof in longhand in the transcript, is sufficient to make the evidence of record: *McAnnulty v. Sick*, 59–586.

To render a short-hand report of the evidence a part of the record it must be filed with the clerk, together with the reporter's transcript thereof. It cannot be made of record by being merely referred to in the bill of exceptions without being filed: *Lowe v. Lowe*, 40–220.

Where the exception refers to the evidence taken in the case by the official reporter, and certified to by the judge, "and marked Exhibit A." the fact that neither the original nor the translation of such notes is marked "Exhibit A" will not prevent its being considered a part of the record, it being otherwise sufficiently identified: *Miller v. Chicago, M. & St. P. R. Co.*, 70–302.

In order to make a transcript of the reporter's notes a part of the record they should be certified by him to be a correct transcript. A certificate of the judge to such notes is not sufficient: *Richards v. Lounesbury*, 65–587.

Certificate of judge: A certificate of the judge showing the several rulings made during the trial as to the admission or exclusion of evidence, and that the same were duly excepted to, is sufficient as a bill of exceptions: *State v. Fay*, 43–651; *Hay v. Frazier*, 49–454.

While a certificate of the judge to the evidence, that it is all the evidence offered and received on the trial of the case, is a sufficient compliance with the statute respecting bills of exception, yet this certificate must be filed within the time prescribed, and if not so filed will be disregarded and stricken from the record: *Gibbs v. Buckingham*, 48–96; *State v. Newcomb*, 56–335; *McCarthy v. Watrous*, 69–260.

The translation of the short-hand notes of evidence duly certified by the judge may be regarded as having the effect of a bill of exceptions, but it must be certified and filed within the time prescribed for filing a bill of exceptions: *Wadsworth v. First Nat. Bank*, 73–425.

The short-hand report of the evidence, objections, rulings and exceptions, certified to by the judge and made a part of the record by him, and filed within proper time, is sufficient as a bill of exceptions: *Hurlburt v. Fyock*, 73–477.

Upon judge's own motion: A judge may, on his own motion and without the request of either party, make and file a bill of exceptions, but the party should have notice of it. Such notice, however, will be presumed in the absence of a contrary showing: *Shepherd v. Brenton*, 15–84.

Bill cannot be contradicted: A bill of exceptions, when signed and filed, becomes a part of the record, and the judge cannot change or modify it by a contradictory state-

ment or certificate. Where a party has excepted to rulings upon the evidence when made and has not waived his objection, and his bill of exceptions is filed within the time allowed by law or agreed upon between the parties, it is competent for him to embody in it all grounds of objection upon which he desires a review of the cause, and to waive such others as he sees fit: *Dedric v. Hopson*, 62–562.

The record entry of a verdict by the clerk is higher evidence thereof than the bill of exceptions embodying such verdict. It is not strictly the office of the bill of exceptions to show the amount of the verdict: *Cook v. United States*, 1 G. Gr., 56.

Where there are affidavits and counter-affidavits as to the action of the court, the recitals of the bill of exceptions will be relied upon as stating the facts: *Shepherd v. Brenton*, 15–84.

Not certified: A paper purporting to be a bill of exceptions and not certified as a part of the record cannot be considered: *Conrad v. Baldwin*, 3–207.

Impeachment: A witness' testimony, as embodied in a bill of exceptions, cannot be introduced on a subsequent trial to impeach him: *Boyd v. First Nat. Bank*, 25–255.

What sufficient signing: A bill of exceptions, signed with the last name of the judge, the final designation "judge" being added, if properly certified by the clerk, will be presumed to have been signed by the judge and filed in the case in which the certificate is given: *Mays v. Deaver*, 1–216.

It is contemplated that a bill of exceptions shall be signed by the trial judge except in cases where signature by by-standers is authorized: *Independent School Dist. v. Farmer*, 74–744.

Refusal of judge to sign: It is not proper, by proceedings in *mandamus*, to control the discretion of the trial judge in regard to proceedings which are to be shown by bill of exceptions. If the parties have agreed to extend the time for filing a bill until it is too late to have a bill signed by by-standers, they must rely upon the discretion of the judge: *Jamison v. Reid*, 2 G. Gr., 394.

Signing by by-standers: The only remedy, when the court refuses to sign a bill of exceptions or signs an incorrect one, is by the signature by by-standers to a correct bill. A bill cannot be impugned by affidavits: *Woodworth v. Byerly*, 43–106.

Where a bill of exceptions is signed by by-standers, it should be drawn up and signed at the time of the trial: *Clark v. Parvin*, Mor., 371.

Where time beyond the term has been given for filing the bill that method does not obtain: *St. John v. Wallace*, 25–21.

The attorneys of a party are not proper persons, as by-standers, to sign a bill of exceptions of such party: *Ibid.*; *Simon v. Weigel*, 10–505.

It is not necessary that the judge certify to his refusal to sign the bill of exceptions. That fact may be proved by the evidence of the by-standers, as here provided: *Craig v. Andrews*, 7–17.

A bill of exceptions signed by by-standers is not sufficient if it merely states what they understand the action of the court to be: *Clark v. Parvin*, Mor., 371.

To authorize a bill of exceptions signed by by-standers it must appear that the judge refused to sign it: *Edgar v. Caldwell*, Mor., 434.

Where a judge refuses to sign a correct bill of exceptions the only remedy is by obtaining the signatures of by-standers. Whether this method can be pursued where the time to file a bill of exceptions is extended beyond the term, *quære*. But if the party accepts the incorrect bill and prosecutes his appeal therefrom, and judgment is rendered against him, he cannot upon such facts obtain relief from such judgment in an action in equity: *Bellows v. Tod*, 52–359.

As to signing bills of exception by referee, see § 4030.

4043. Must be on material point. 2836. No exception shall be regarded in the supreme court unless the ruling has been on a material point and the effect thereof prejudicial to the rights of the party excepting. [R., § 3111.]

Ruling not reviewed unless prejudicial: An exception will not be regarded in the supreme court unless the ruling has been on a material point, and prejudicial to the rights of the party excepting: *Bremer County Bank v. Eastman*, 34–392.

A judgment will not be reversed for an error committed by the trial court, unless appellant has been prejudiced thereby: *Tuck v. Singer Mfg. Co.*, 67–576; *Whitney v. Brownell*, 71–251.

A judgment will not be reversed in consequence of errors which do not operate injuriously upon the party seeking reversal: *Grange v. Buzick*, 3 G. Gr., 570.

A case will not be reversed on account of error in the action of the court below which has worked no prejudice to the appellant: *Union Ag'l, etc., Ass'n v. Neill*, 31–95; *Wile v. Wright*, 32–451; *Hamilton v. Floyd*, 20–598; *Crawford v. Paine*, 19–172; *Bell v. Byerson*, 11–233; *Smith v. Eaton*, 50–488.

One of two co-parties cannot object on appeal that a judgment against them jointly is erroneous because a judgment against his co-party was not proper, such co-party not having appealed: *Hoadley v. Hammond*, 63–599.

A party cannot, on appeal, complain of rulings which are in his favor, or a judgment so far as it is in his favor: *Boyce v. Wabash R. Co.*, 63–70; *Hintrager v. Hennessy*, 46–600; *Day v. Mill Owners' Mut. F. Ins. Co.*, 70–710.

A party having objected to evidence, which was thereupon admitted only for a particular purpose, cannot afterwards complain on appeal that such evidence should have been admitted for other purposes: *Henderson v. Chicago, R. I. & P. R. Co.*, 48–216.

Refusal to strike out immaterial matter in a pleading, upon motion, cannot be reviewed upon appeal: *Abbott v. Striblen*, 6–191.

Refusal to allow an amended answer to be filed will be deemed error without prejudice, where it appears that all the facts alleged in

the amended answer might have been proven under the original answer: *Hough v. Housel*, 20–19.

Allowance of an amendment which works no prejudice to the party appealing cannot be made a ground for reversal: *Tabor v. Foy*, 56–539.

Where an objection to a juror based upon his having a previously formed opinion with reference to the facts relating to a certain issue in the case was overruled, *held*, that such ruling would be error without prejudice where it appeared that the facts as to that issue in the case were not in controversy: *Albia v. O'Harra*, 64–297.

The exclusion of evidence by the consent of a party cannot be made ground for reversal: *Wilson v. McAdams*, 10–590.

Waiver of error: Where improper evidence is permitted to remain in a criminal case, without objection, the error in its admission is waived: *State v. Stickley*, 41–232.

The action of the court in requiring additional security on a replevin bond, *held* not to be ground for reversal, as such order could not affect the validity of the judgment when rendered on the merits, and the error, if any, was waived by the compliance therewith: *Pritchard v. Hopkins*, 52–120.

Where defendant was by the court ordered to answer, and thereafter obtained an extension of time within which to answer, and, upon his failure to comply, default was entered against him, *held*, that any error in the first order requiring defendant to answer was error without prejudice: *Rock v. Wallace*, 15–379.

Errors subsequently cured: Where an action of the court is at the time erroneous (as, for instance, in admitting a written instrument without proper proof of the signature), yet if subsequent evidence is such as to render the action of the court proper thereunder, there is no ground for reversal: *Davenport v. Cummings*, 15–219.

Judgment in favor of the party beneficially interested will not be reversed on account of error of the referee in finding in favor of a party not entitled: *Williams v. Brown*, 28–247.

Error in striking defendant's answer from the files, on motion, is cured by subsequently allowing defendant to prove the defense alleged when the evidence fails to establish the same: *McNamara v. Estes*, 22–246.

Errors which have ceased to be prejudicial: A judgment will not be reversed which, however erroneous when made, has, by reason of a change in circumstances, ceased to be prejudicial to the co nplaining party: *State ex rel. v. Waterloo Savings Bank*, 39–706.

The supreme court will not reverse a case in behalf of a party where the right which he seeks to protect, if it ever existed, has expired: *Cutcomp v. Utt*, 60–156.

The improper substitution of a new appeal bond on an appeal from a justice of the peace, *held* to be error without prejudice where judgment on such appeal was for the party appealing and giving the bond: *Hammitt v. Coffin*, 3 G. Gr., 205.

Where persons bound over to await the action of the grand jury bring a proceeding, by *habeas corpus*, to test the correctness of the action of the magistrate, and being remanded to custody thereupon appeal from such order, a subsequent indictment by the grand jury for the same offense will render the decision in the *habeas corpus* proceeding immaterial and the appeal will be dismissed: *Witmore v. Burgan*, 70–161.

Rulings upon demurrer, when deemed without prejudice: The fact that a demurrer based on an insufficient ground is erroneously sustained will not be ground for reversal, where there could have been no recovery upon the count of the petition to which the demurrer was directed: *Childs v. Dobbins*, 61–109.

Where the lower court, in ruling on the demurrer to a petition, erroneously sustains it as to some portions thereof, but the action is determined in favor of plaintiff, and he is given the relief demanded, the ruling on the demurrer will be considered as error without prejudice: *Scott v. Union County*, 63–583.

The fact that the court erroneously sustains a demurrer to a count of the answer is error without prejudice, where the issue raised by such count is elsewhere presented and passed upon by the jury: *McKeever v. Jenks*, 59–300.

Where a demurrer to a petition was overruled and plaintiff thereupon filed an amended petition setting out the cause of action fully, *held*, that any error of the court in overruling the demurrer was without prejudice to the defendant: *Gillis v. Matthews*, 4 G. Gr., 254.

Where a demurrer to a portion of an answer was overruled, but under the instructions the issue thereby presented was, by implication, excluded from the jury and not considered by them, *held*, that the error, if any, in the ruling on the demurrer was without prejudice: *Flanagan v. McWilliams*, 52–148.

Where a demurrer is erroneously sustained upon one ground, and overruled upon another as to which it should have been sustained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have taken in the lower court if the demurrer had been sustained on a proper ground: *District T'p v. Independent Dist.*, 63–188.

Error without prejudice in rulings upon evidence: Where, from the instructions or from other parts of the record, it is made to appear that error in the admission of testimony has worked no prejudice to the party objecting, the cause should not be reversed on that ground: *Woodward v. Horst*, 10–120.

A cause will not be reversed for the admission of evidence which cannot have been prejudicial to the party complaining, even though such evidence was inadmissible: *Quinton v. Van Tuyl*, 30–554; *Cooper v. Mills County*, 69–350; *Walsh v. Ætna L. Ins. Co.*, 30–133.

Where, under the issues and the evidence, plaintiff could not recover, even had defendant introduced no evidence whatever, any error in the admission or exclusion of evidence cannot be complained of by plaintiff: *George v. Eason*, 69–461.

Where it appears that answers to questions which were properly objected to were favor-

able rather than adverse to the party objecting, the overruling of the objection will be considered as error without prejudice: *Andrews v. Woodcock*, 14-397; *Drath v. Deitz*, 15-436.

A judgment will not be reversed for improper rejection of testimony when the court is satisfied that justice has been done, and that there is no reason to believe that a different result would be reached upon a new trial: *Pelamourges v. Clark*, 9-1.

Where the jury have returned their verdict against a party seeking to recover, any error in the admission of evidence having a tendency merely to limit the extent of his recovery will be error without prejudice: *Chambers v. Grout*, 63-342.

The admission of unimportant and irrelevant evidence, if without prejudice, will not operate to reverse a case on appeal, though such admission may have been error: *McKenzie v. Kitler*, 27-254; *Curl v. Chicago, R. I. & P. R. Co.*, 63-417.

Where immaterial evidence was admitted, in the main without objection, *held*, that the judgment would not be reversed because an inconsiderable portion thereof was admitted over the party's objection: *Weitz v. Ewen*, 50-34.

Error in admitting or rejecting evidence is cured by a subsequent admission, by the party objecting, of the fact which the evidence tended to prove: *Murray v. Wells*, 57-26; *Liston v. Central Iowa R. Co.*, 70-714.

The supreme court will not reverse a case for the rejection of testimony which could not have changed the verdict: *Robinson v. Keith*, 25-321; *State v. Hallett*, 63-259.

The execution of a deposition will not be made a ground for reversal where it appears that it does not tend to prove or disprove any fact in issue between the parties: *Kelly v. Ford*, 4-140.

Error in admitting or refusing to exclude evidence will not be sufficient ground for reversal where the result must have been the same if the evidence had been excluded: *Brayley v. Ross*, 33-505; *Courtwright v. Strickler*, 37-382; *Jaques v. Sax*, 39-367; *Langford v. Ottumwa Water Power Co.*, 59-283; *Amsden v. Dubuque & S. C. R. Co.*, 13-132; *Holt v. Brown*, 63-319; *Belair v. Chicago & N. W. R. Co.*, 43-662; *Hubbard v. Mason City*, 60-400.

A cause will not be reversed for the admission of evidence which does not cast any greater burden upon the opposite party than he would have had without the admission of such evidence: *Barker v. Kuhn*, 38-392.

Admission of improper evidence as to a matter which is self-evident or of common observation known to all men, and in accord with such common observation, cannot be considered prejudicial: *State v. Smith*, 46-670; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

The exclusion of evidence will constitute error without prejudice where the witness is afterwards allowed to testify fully as to the matters called for by the question objected to: *Keough v. Scott County*, 28-337; *State v. Geddis*, 42-264; *Allison v. Chicago & N. W. R. Co.*, 42-274; *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Reed v. Chicago, R. I. & P. R. Co.*, 57-23; *Abell v. Cross*, 17-171; *State v. Nelson*, 58-208.

Error in allowing the introduction of a portion only of a deposition, *held* to be error without prejudice in view of the fact that the entire deposition was afterwards introduced: *Bixby v. Carskaddon*, 63-164.

The overruling of a motion to suppress a deposition is error without prejudice, where the witness testifies in person on the trial, and such testimony is more favorable to the party complaining than that in the deposition: *Curry v. Allen*, 60-387.

Judgment will not be reversed for erroneous admission of evidence to establish a fact which is sufficiently established by other and competent evidence: *Ellwood v. Wilson*, 21-523; *McCrary v. Deming*, 38-527; *Le Grand Quarry Co. v. Reichard*, 40-161; *Wallace v. Wallace*, 62-651; *State v. Shelton*, 64-333; *Jackson v. Boyles*, 64-428; *Stone v. Ballingall*, 41-291; *Siltz v. Hawkeye Ins. Co.*, 71-710; *Morgan v. Wilfley*, 71-212. But see *Oppenheimer v. Barr*, 71-525.

A judgment will not be reversed for error in admitting testimony to prove title when the title is subsequently established by competent evidence: *Des Moines v. Casady*, 21-570.

Error in rejecting evidence will be deemed to have been without prejudice where the facts to be proven by such evidence are otherwise fully established: *Lowe v. Lowe*, 40-220; *State v. Woodson*, 41-425; *Hoadley v. Hammond*, 63-599; *State v. Pratt*, 40-631; *Parcell v. McReynolds*, 71-623.

Held, that defendant was not prejudiced by the rejection of testimony which had been once introduced and was again offered to the jury: *Smith v. Howard*, 28-51.

Where the jury has failed to allow exemplary damages, any error in the admission of evidence as to malice will be error without prejudice: *Brown v. Hendrickson*, 69-749.

The admission of evidence upon a prosecution for murder, tending to show malice and deliberation, *held* error without prejudice in view of the fact that defendant was convicted only of manslaughter: *State v. Middleham*, 62-150.

Where a witness, in a prosecution for assault with intent to commit murder, gave evidence tending to show malice, and a cross-question to such witness by defendant's counsel was overruled, *held*, that as defendant was convicted only of assault and battery, the error, if any, was without prejudice: *State v. Graham*, 51-72.

A cause will not be reversed on appeal upon the ground that the evidence is not admitted in the proper order, or for the reason that a fact which should be proved in the first instance by one party is established by the testimony of the other: *Cook Mfg. Co. v. Randall*, 62-244.

If, in answer to an improper question, matter is elicited not responsive thereto, the error of the court in overruling an objection to the question will not justify a reversal on the ground of prejudice from the part of the answer not responsive to the question. In such case the court should be asked to strike out the irresponsive matter: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

A verdict will not be set aside because in conflict with evidence which is irrelevant and immaterial, even though admitted without objection: *Scott v. Morse*, 54-732.

A cause will not be reversed on the ground that an objection to an improper question has been overruled, if the question itself was not followed by an improper answer: *State v. Groome*, 10-308.

As to what must appear in the record in order that error in rulings upon evidence may be considered, see notes to § 4414.

Error in admitting evidence cured by taking it from jury, see notes to § 3996.

Error without prejudice as to instructions, see notes to § 3996.

That error is prejudicial must affirmatively appear: A party appealing from a ruling of the lower court must not only show affirmative error, but also error prejudicial to his substantive rights: *Fulmer v. Fulmer*, 22-230; *Blackburn v. Powers*, 40-681; *Brewington v. Patton*, 1-121.

Where the evidence in an action triable *de novo* was not properly certified, and was on motion stricken from the abstract, *held*, that the court would not consider an alleged error of the court below in dismissing plaintiff's petition, for the reason that even if there was error in the ruling it could not be determined, in the absence of the evidence, whether plaintiff was entitled to recover: *Hoy v. Cowgill*, 52-711.

Where it is claimed that the jurors have taken improper considerations into account in determining their verdict, prejudice must be shown, or sufficient ground must appear for presuming prejudice, to warrant a reversal on account of refusal of the lower court to grant a new trial on that ground: *State v. Woodson*, 41-425.

Error appearing, presumed prejudicial: Error in the admission of evidence will not be deemed to have been without prejudice if such evidence is material. The admission of incompetent evidence has been held to be error without prejudice in cases where it appears that the judgment or verdict could not have been different had the evidence been excluded; but no such ruling has been made where the evidence held to be unlawful constituted the whole of the proof of the party offering it, or added to the weight of the testimony in his behalf: *Smith v. Johnson*, 45-308.

When there has been error a presumption of prejudice arises, and if the record fails to satisfy the supreme court that no prejudice has been caused, then such error cannot be disregarded: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399; *Strobel v. Moser*, 70-126; *Reynolds v. Keokuk*, 72-371; *McCormick Harvesting Machine Co. v. Jacobson*, 73-546.

Where a conflict in the instructions arises from giving an erroneous instruction inconsistent with others given, although it is not shown that such instruction was considered and had an effect upon their decision, it will be presumed that it was considered, and the verdict will be set aside: *Carlin v. Chicago, R. I. & P. R. Co.*, 31-370.

Where evidence is admitted over the objection of a party it will be presumed that the court considered it, and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

An erroneous instruction will not be deemed to be without prejudice unless the fact appears affirmatively: *Roby v. Appanoose County*, 63-113.

If the instruction is erroneous or misleading it will be presumed that there was evidence to which it was applicable, and that it therefore constituted prejudicial error: *Harrison v. Charlton*, 37-134; *Warbasse v. Card*, 74-306.

If error in admitting evidence appears it must be affirmatively shown to be without prejudice to warrant its being disregarded: *George v. Keokuk & D. M. R. Co.*, 53-503.

Prejudice will be presumed from an erroneous ruling upon a motion for change of place of trial: *Ferguson v. Davis County*, 51-220.

While a presumption of prejudice will arise from a legal error, yet such presumption may be overcome; and where it is made to appear affirmatively that no prejudice did or could have resulted from the error, the case should not be reversed therefor: *Dunne v. Deery*, 40-251.

NEW TRIALS.

4044. Grounds for. 2837. A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof after verdict by a jury, report of a referee, or a decision by the court. The former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted on the application of the party aggrieved for the following causes affecting materially the substantial rights of such party:

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

2. Misconduct of the jury or prevailing party;

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

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

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property;

6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;

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

8. Error of law occurring at the trial, excepted to by the party making the application. [R., § 3112.]

As to granting new trial on appeal, see notes to § 4424.

As to new trial in criminal cases, see §§ 5872–5875.

As to new trial on petition, see §§ 4383–4391.

I. IN GENERAL.

Presumption in favor of court's action: There are many things attendant upon the trial in a *nisi prius* court which never can be presented to an appellate court. The former has much better facilities for determining whether justice has been done, or whether there has been accident or surprise to the prejudice of the unsuccessful party, and its ruling is always regarded by the supreme court as having a presumption in its favor: *Conklin v. Dubuque*, 54–571; *Hill v. Denslinger*, 61–240; *Johnson v. Chicago, R. I. & P. R. Co.*, 58–348.

Discretion: A motion for a new trial is addressed to the sound discretion of the court, and such discretion will not be interfered with, unless it is manifest that it has been improperly exercised: *Freeman v. Rich*, 1–504; *Ruble v. McDonald*, 7–90; *Pickering v. Kirkpatrick*, 32–163; *New York Piano Forte Co. v. Mueller*, 58–552; *Donahue v. Lannan*, 70–73.

But this discretion is a legal one, and must be exercised according to the rules of law: *Stewart v. Burlington & M. R. R. Co.*, 11–62; *Stockwell v. Chicago, C. & D. R. Co.*, 43–470.

And see notes to § 4424, with reference to a review on appeal of the action of the court below in granting or refusing a new trial.

Substantial justice: A new trial should not be granted where justice has been done and the merits correctly decided: *Woodward v. Horst*, 10–120.

If there are strong probable grounds to believe that all the merits of the case have not been fully tried and that justice has not been done, the court will be justified in granting a new trial: *Deere v. McConnells*, 15–269.

Bill of exceptions: A rule of court to the effect that no motion for new trial should be heard until a bill of exceptions was presented ready for signature, etc., *held* inconsistent with the statutory provisions for new trial. The trial court is presumed and bound to know what occurred during the trial without a bill of exceptions: *Emery v. Emery*, 54–106.

Waiver: A motion for new trial is waived by motion for judgment upon special findings in opposition to the general verdict. Such temporary waiver of a motion for new trial has the effect of a withdrawal of it: *Nixon v. Downey*, 49–166.

Negligence: Both in equity and in law, the negligence of a party or his agent or attorney, which alone produces an adverse result, will estop him from claiming relief as to such result: *White v. Poorman*, 24–108.

Where it does not appear that the knowledge of an irregularity for which a new trial is asked was acquired by the party in time to do anything to avoid the prejudice resulting from the misconduct of the jury, *held*, that his right to a new trial was not defeated: *Oleson v. Meader*, 40–662.

Where a party does not examine the jurors under oath or otherwise as to their qualifications and competency, he cannot make an objection to a juror, which would thus have been disclosed, the ground for a new trial: *Stewart v. Ewbank*, 3–191; *McKinney v. Simpson*, 51–662; *State ex rel. v. Funck*, 17–365; *Faville v. Shehan*, 68–241.

As to the diligence in discovery of evidence, see *infra*, II, f.

Concurring verdicts: The court should require a much stronger case to be made in the application for a new trial, where two verdicts have been rendered in favor of the same party; yet such second verdict by no means concludes the court from again granting a new trial, and especially when the second application is based on another ground: *Jourdan v. Reed*, 1–135. And see notes to § 4424.

If the jury have disregarded the law or have rendered two concurring verdicts that show a want of fair and proper exercise of judgment on the testimony submitted, and are against the evidence, a third trial ought to be granted: *Carlin v. Chicago, R. I. & P. R. Co.*, 37–316.

To one of two parties: Where a judgment is rendered against two defendants, the granting of a new trial as to one does not affect the judgment as to the other: *Gordon v. Pitt*, 3–385.

In an action against joint wrong-doers the court may set aside the verdict and award a new trial as to a portion of the defendants, and render a judgment upon the verdict as to the others: *Terpenning v. Gallup*, 8–74.

As to part of the case: While, as a general rule, if granted at all, a new trial is awarded for the entire case, yet, where it can be done without danger of confusion or prejudice, it may be granted as to one count and refused as to another: *Woodward v. Horst*, 10–120.

It seems that the court may in a proper case grant a new trial as to a part of the case and allow the judgment to stand as to the other portion, but this will not generally be done; and if it appears on appeal that the judgment is erroneous as to a portion thereof the whole judgment will be reversed: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

II. GROUNDS.

a. *Misconduct of Jury.*

What sufficient: To vitiate the verdict of a jury for misconduct, it must be such as to satisfy the court that a fair and impartial trial has not been had, and that the verdict is con-

trary to the law and the evidence: *Langworthy v. Myers*, 4-18; *State v. Accola*, 11-243.

Quotient verdict: Where the jury determined their verdict by adding together twelve different amounts marked down by them respectively, and dividing the same by twelve, having agreed beforehand to be bound by the result as their verdict, such verdict should be set aside: *Manix v. Malony*, 7-81; *Schanler v. Porter*, 7-482; *Denton v. Lewis*, 15-301; *Hendrickson v. Kingsbury*, 21-379.

In such case it is error to allow plaintiff to remit all above the lowest amount set down by any member of the jury, and render judgment in the plaintiff's favor for that amount; *Darland v. Wade*, 48-547.

But where the verdict is on this account irregular as to only a part of the amount found, the valid portion will be allowed to stand: *Fuller v. Chicago & N. W. R. Co.*, 31-211.

Where, however, by this method a sum is found, without an agreement in advance to be bound by it, and afterwards, upon discussion, it is agreed to and adopted, the verdict will be valid: *Burton v. Holmes*, 16-252; *Hamilton v. Des Moines Valley R. Co.*, 36-31; *Deppe v. Chicago, R. I. & P. R. Co.*, 38-592; *Sullens v. Chicago, R. I. & P. R. Co.*, 74-659.

Verdict determined by lot: Where the jury, some or all of the members having first agreed to be bound by the result, determine their verdict by lot or ballot, such verdict will be set aside and a new trial granted: *Merseve v. Shine*, 37-253; *Ruble v. McDonald*, 7-90.

While they may, after having so formed an illegal verdict, repudiate it and find a valid one as the result of due deliberation, yet the evidence of such action must be clear and satisfactory; and where a subsequent vote is but a ratification of the verdict by lot, it will not be sufficient: *Thompson v. Perkins*, 26-486.

The drinking of intoxicating liquor by a juror during the discharge of his duty as such is sufficient ground for setting aside the verdict and ordering a new trial: *State v. Baldy*, 17-39; *Berry v. Berry*, 31-415.

The fact that one of the jurors became intoxicated on the evening of the day on which the trial commenced and before the conclusion thereof, *held* sufficient ground to warrant a new trial: *Fairchild v. Snyder*, 43-23.

The drinking of intoxicating liquors by a juror after the submission of the case to the jury will be sufficient to warrant the granting of a new trial, whether he drinks so much as to come under the influence thereof or not: *Ryan v. Harrow*, 27-494.

Taking intoxicating liquor as medicine before the final submission of the case is not ground for new trial: *State v. Morphy*, 33-270; *O'Neill v. Keokuk & D. M. R. Co.*, 45-546.

Indulgence in intoxicating liquors during the adjournment of a court and before the final submission of the cause to the jury will not be a ground for setting aside the verdict and granting a new trial in the absence of a showing of prejudice resulting therefrom: *State v. Bruce*, 48-530; *Van Buskirk v. Daugherty*, 44-42; *State v. Livingston*, 64-560.

The drinking of intoxicating liquors at the instance and solicitation of one of the parties cannot be made a ground for new trial on the motion of such party: *Webster County v. Hutchinson*, 60-721.

The affidavit of a party to the fact of a juror's intoxication should be admitted, if at all, only in cases where no other proof is practicable and failure of justice might result from its rejection: *State v. McLaughlin*, 44-82.

Bet: The fact that a juror had an outstanding bet, which would be directly affected by the result of the trial, which fact was not disclosed by him when questioned as to his competency and was not known to the adverse party, *held* sufficient ground for a new trial, although the bet was trifling in amount: *Seaton v. Swem*, 58-41.

Social intercourse between juror and attorney: Acts of social intimacy between a juror and an attorney in the case during the progress of the trial *held* sufficient misconduct to require the granting of a new trial: *Stafford v. Oskaloosa*, 57-748. But in a particular case, *held*, that the facts were such as not to require the granting of a new trial on that ground: *Koester v. Ottumwa*, 34-41.

Communication with juror: Conversation held with the jury by the officer in charge except for the purpose of ascertaining whether they have agreed on a verdict is sufficient ground for setting the verdict aside: *Cole v. Swan*, 4 G. Gr., 32. But statements by bailiff to jury in a particular case *held* not such as to require a new trial: *State v. Cowan*, 74-53.

Conversation of a juror with counsel of one of the parties, had after the conclusion of the argument in the case, *held* sufficient misconduct to warrant the granting of a new trial: *Oleson v. Meader*, 40-662.

The fact that after the verdict had been agreed to and signed, but before it was returned and the jury had separated, one of the jurors disclosed to the attorney for one of the parties the result, *held* not such misconduct as to require the granting of a new trial: *Hyde v. Lookabill*, 66-453.

Where during the adjournment of the court a party not knowing that the person addressed was a juror asked him what he thought of the case, etc., but, upon being informed that the person addressed was a juror, said no more, *held*, that no misconduct was shown: *Wise v. Bosley*, 32-34.

Statements of fellow jurors in regard to the credibility of a witness, made after they have agreed upon their verdict, are not grounds for setting the verdict aside: *Ibid.*

The fact that during an intermission of the court pending the trial, a person not connected with the case spoke to the juror in relation to the merits thereof, without any reply by the juror being shown, *held* not sufficient to require a reversal: *McCash v. Burlington*, 72-26.

Misconduct of a juror in asking an immaterial question of a witness while viewing the premises, and also of another juror in conversing with disinterested persons regarding the case, *held* error without prejudice: *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

Under the showing in particular cases, *held*,

that it did not appear that a juror was in fault in reference to overhearing a conversation in regard to the case between outsiders, and that there was not such prejudice shown as to warrant the granting of a new trial on that account: *Ridenour v. Clarinda*, 65-465; *Thrift v. Redman*, 13-35.

Where it appeared that a paper was thrown by a member of the jury which was picked up by the attorney of the successful party, but it did not appear that it was for him, and it was by him at once shown to the judge, *held*, that misconduct sufficient to require the setting aside of the verdict did not appear: *Allison v. Chicago & N. W. R. Co.*, 42-274.

Separation of the jury without some showing of prejudice will not be sufficient to warrant the setting aside of the verdict: *Ibid.*

A new trial should not be granted for the separation of the jury for a short time and for a necessary purpose, after submission and before a verdict is agreed upon, when it appears that they have communicated with no one and no prejudice has resulted: *Boggs v. Chicago & N. W. R. Co*, 29-577.

Statements by a juror to his fellow jurors, made after their retirement, and relating to matters outside of the case for their consideration in making up their verdict, may be a ground for new trial, if prejudice is shown to have resulted: *Hall v. Robison*, 25-91.

Statements by a juror to his fellows as to personal knowledge with reference to a matter in issue may be shown as ground for new trial: *Griffin v. Harriman*, 74-436

Improper discussion: The fact that the character and standing of one of the parties was canvassed and discussed by the jury while considering the case, *held* not sufficient to show misconduct of the jury: *Fulliam v. Muscatine*, 70-436.

Disqualification of juror: Affidavits that a juror has stated that he is a non-resident will not be sufficient to require the setting aside of the verdict: *Parkinson v. Parker*, 48-667.

A motion for a new trial on the ground that one of the jurors has already sat on the trial of the same issues should not be sustained in the absence of a showing that the party complaining was ignorant of that fact: *Hurtert v. Weines*. 27-134.

Leaving jury room: Held not to be sufficiently prejudicial error to warrant reversal that one of the jurors, after the case was submitted to the jury, was permitted to withdraw from the jury room and attend the trial of another case in the same court in which he was a party: *State v. Fertig*, 70-272.

Mistake of jurors: It is not a sufficient reason for setting aside the verdict of a jury and ordering a new trial that a portion or all the jurors supposed that their verdict, if for defendant, would not be a bar to a subsequent suit by plaintiff for the same cause of action: *Minter v. Hite*, 4-583.

Taking improper papers: Where counsel prepared a statement in writing of the damages, and after using the same in his argument to the jury handed it to them with the papers in the case, as his estimate of the proper claims, without any intention to conceal the fact, *held*, that in the absence of a showing of bad faith, or prejudice to the other party, or objection to such action, the case would not be reversed for such irregularity: *Greff v. Blake*, 16-222.

The fact that a deposition is improperly taken by the jury will not be ground for a new trial, where it is shown that no prejudice resulted to the complaining party by reason of the irregularity: *Morris v. Howe*, 36-490.

Where the jury sent for the petition in the case, to which was attached a copy of the note sued on, and, assuming that such exhibit was the original and not a copy, proceeded to compare the signature thereof with the signature of the same person to another paper claimed to have been signed by him, *held*, that such facts might be shown as ground for a new trial: *Kruidenier v. Shields*, 70-428.

Where, without fault attributable to either party, a paper, which was not in evidence and which was capable of influencing the jury, was in their hands and read by them, *held*, that their verdict would be set aside, although the trial court may have decided that the verdict was not subject to be set aside as not being supported by the evidence before the jury: *McLeod v. Humeston & S. R. Co.*, 71-138.

Further as to what papers the jury may take with them on retiring, see notes to § 4004.

Reading parts of evidence: It is misconduct on the part of the jury sufficient to warrant a new trial to have the reporter come into the jury room and read from his notes portions of the testimony as requested by them: *Fleming v. Shenandoah*, 67-505.

How misconduct shown: In order to take advantage of misconduct on the part of a juror, the party complaining must set out the misconduct complained of in order that the opposite party may be prepared to meet the complaint with counter-affidavits: *Beal v. Stone*, 22-447.

An affidavit of the party as to misconduct of the jury based upon information and belief is not sufficient: *State v. Tucker*, 68-50.

An affidavit of a person who states that he heard a juryman talking about the evidence that had been produced in the case, but not giving the name of the juryman nor the statements made by him, is not sufficient to require the verdict to be set aside for misconduct: *Brant v. Lyons*, 60-172.

Discretion: The question whether the verdict ought to be set aside on account of alleged misconduct is left very largely to the sound discretion of the trial court, and, in the absence of a showing of an abuse of discretion, its action will not be reversed upon appeal: *Perry v. Cottingham*, 63-41.

b. *Misconduct of Opposite Party or Attorney.*

False testimony: That the successful party has introduced false testimony constitutes misconduct which, upon motion, requires the granting of a new trial: *First Nat. Bank v. Wabash, St. L. & P. R. Co.*, 61-700.

Without prejudice: Misconduct in a particular case *held* to be without prejudice: *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

Where the opposite party rode in the same conveyance with the jury and counsel on both

sides in going to view the premises, no objection thereto being at the time made, *held*, that there was not such misconduct as to require a new trial: *Hahn v. Miller*, 60-96.

Improper statements or argument to jury: Improper statements made in argument to the jury by the attorney of the successful party may be such misconduct as to justify the court in setting aside the verdict: *Wickersham v. Timmons*, 49-267.

But misconduct in the attorney of the prevailing party in the argument to the jury, in referring to matters not pertaining to the case, *held* not sufficient ground for a new trial when it did not appear that prejudice had resulted to the other party therefrom: *Hammond v. Sioux City & P. R. Co.*, 49-450.

It is not improper for counsel in argument to the jury to read and comment upon a motion and affidavit filed by the opposite party at a previous term to obtain a continuance: *Hanners v. McClelland*, 74-318.

The conduct of the opposite counsel and party in appealing to the sympathies of the jury, in a particular case, *held* not sufficient to require a new trial: *Dowdell v. Wilcox*, 64-721.

Counsel must be permitted some latitude and discretion in addressing the jury, and absolute correctness of statement as to matters of law is not required: *Scott v. Chicago, M. & St. P. R. Co.*, 68-360.

Misconduct of opposing counsel in an argument to the jury cannot be made ground for new trial unless objected to at the time; at least, the action of the lower court in overruling an application for a new trial on that ground will not be reversed on appeal: *Ross v. Davenport*, 66-548.

Where the improper action of counsel in addressing the jury was not objected to until after the verdict, *held*, that the action of the lower court in overruling the application for a new trial on that ground would not be interfered with on appeal, it not appearing that the complaining party was prejudiced by what occurred: *Sunberg v. Babcock*, 66-515.

The act of counsel in seeking to introduce in evidence an offer to permit judgment to be taken will constitute misconduct, but if objection thereto is not taken at the time by moving to discharge the jury and have another trial, it cannot be urged as a ground for new trial after verdict: *Riech v. Bolch*, 68-526.

In such case a direction to the jury to disregard such statement will not cure the misconduct: *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345.

Where objection was made to remarks of counsel in addressing the jury, and the judge stated orally that he would instruct the jury not to consider any remarks of that kind, but failed to do so, *held*, that what was said to the jury sufficiently corrected any improper effect to result from such remarks: *Lindsey v. Des Moines*, 74-111.

Where statements were made by an attorney in his concluding argument not warranted from anything in the evidence and relating to the animus actuating the other party, etc., *held*, that it was misconduct for which a new trial should have been granted; and that where such statements were made while the judge was not present, but was hearing another case, the fact that objection was not made to the court by the opposite party at the time of the misconduct did not defeat his right to call it in question: *Hall v. Wolff*, 61-559.

Action of counsel in making statements to the jury as to the existence of facts of which there is not only no evidence, but no claim that they are proven, for the purpose of inducing the jury to make deductions prejudicial to the other party, might, it seems, be ground for a new trial although no objection thereto was made at the time *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

Remarks of the counsel of the plaintiff to the jury, in an action for personal injury, insinuating the possibility of, although not expressly charging, improper action on the part of defendant in seeking to bring disrepute upon the plaintiff so as to damage his testimony in the case, *held* to be such as, under the circumstances, to require the granting of a new trial: *Henry v. Sioux City & P. R. Co.*, 70-233.

While a delicate sense of propriety ought probably to deter counsel from stating to the jury the result of a former trial, it is not necessarily such misconduct as to demand anything more from the court than an admonition to the jury that the knowledge of the amount of the former verdict should have no influence upon them: *Ball v. Keokuk & N. W. R. Co.*, 74-132.

When a reversal is asked on the ground of the misconduct of an attorney the record should show such misconduct without question: *Everett v. Central Iowa R. Co.*, 73-442.

The action of the trial court in overruling the motion to set aside the verdict on the ground of the misconduct of attorneys will be presumed to be correct: *Seekel v. Norman*, 71-264.

Where misconduct of attorney in argument is relied on for reversal on appeal it should be shown by bill of exceptions, and not by affidavits filed in the trial court: *Rayburn v. Central Iowa R. Co.*, 74-637; *Hall v. Carter*, 74-364; *Fowler v. Strawberry Hill*, 74-644.

The incompetence of counsel will not ordinarily constitute ground for a new trial. Indeed, in civil cases, the rule may be regarded as almost invariable: *State v. Benge*, 61-658.

c. *Accident or Surprise.*

Absence of witness: A new trial should not be granted on account of the absence of a witness where the party goes to trial without asking for a continuance: *Mays v. Deaver*, 1-216: *Gee v. Moss*, 68-318.

Cases of surprise: The granting of a new trial where it was shown that a reply to defendant's answer had been prepared and handed to the clerk for filing and not filed, *held* proper: *Barnes v. McDaniels*, 35-381.

Where, by agreement of attorneys, a cause was to be continued, and the attorney for plaintiff was to see that the entry was made, and owing to his absence from court plaintiff

employed another attorney and procured judgment without a defense and without the knowledge of defendant, *held*, that there was such surprise as to entitle defendant to a new trial: *Chicago & N. W. R. Co. v. Gillett*, 38–434.

When a new trial has been granted on the ground of error in instructions given, a party cannot claim, upon another trial, that he is taken by surprise by the giving of the same instructions: *Lowe v. Lowe*, 40–220.

Mistake: A party will not be granted a new trial on account of mistake of law on his part founded in negligence: *Russell v. Nelson*, 32–215.

Accident; sickness: Where a party, who was also an important witness, was detained by illness from being present, but a continuance was not asked, *held*, that, under the circumstances, sufficient diligence was not shown to entitle him to a new trial on the ground of accident: *Whilworth v. Murphy*, 29–470.

The fact that a material witness who is expected to be present at the trial is accidentally delayed and unable to reach the place of trial in time would be ground for a new trial. But if he might be introduced after the conclusion of the testimony, and even after some of the arguments have been made to the jury, application for leave to introduce him should be made: *Smith v. State Ins. Co.*, 58–487.

The affidavit of defendant, on a motion for a new trial, to the effect that he was unable to be present on account of sickness, *held* not sufficient, as not showing that a continuance might not have been asked; also, in not showing that the facts which he proposed to testify to would have been admissible under the issues: *Nolan v. Grant*, 53–392.

Where the attorney of the party, not being able to be present at the term of court, employed another attorney to be present, and his failure to do so was not due to want of ordinary diligence, *held*, that the judgment was properly set aside and a new trial granted on account of accident and surprise: *First Nat. Bank v. Harwick*, 74–227.

d. *Excessive or Deficient Verdict.*

Reduction of excessive verdict: If the damages are deemed excessive, the court may fix a reasonable amount and give the successful party the option to accept such sum or submit to a new trial: *Brockman v. Berryhill*, 16–183.

But the party cannot, by offering to remit the amount found excessive, without specifying any amount, compel the court to say how much is excessive. The court may refuse to fix any amount and order a new trial: *La Salle v. Tift*, 52–164.

Where a verdict is excessive the court may give the plaintiff his election to remit the excess or submit to an order for a new trial. In like manner, when the verdict is too small, defendant may be given the election to submit to a proper verdict or have a new trial, and if defendant submits to the larger verdict fixed by the court, plaintiff cannot have a new trial: *Callanan v. Shaw*, 24–441.

The court has no power to render judgment for a less sum than the verdict without giving the successful party the option of accepting such less amount or accepting a new trial: *Noel v. Dubuque, B. & M. R. Co.*, 44–293; *Brown v. McLeish*, 71–381.

Where the court has reduced the verdict because excessive under the instructions, it cannot afterward set it aside because contrary to instructions: *Morlan v. Russell*, 71–214.

Where the trial court, on a motion for a new trial upon the ground that the damages are excessive, reduces the amount of recovery, to which the successful party consents, the case stands as though a verdict of the jury in that amount had been returned, and defendant cannot complain on the ground of excessive damages unless the amount thus allowed is excessive: *Van Winter v. Henry County*, 61–684; *Duffy v. Dubuque*, 63–171.

The court has no authority to direct a *remittitur* of a portion of the verdict and enter a judgment for the balance where it is ascertained that there has been misconduct of the jury vitiating the verdict. In such case the verdict should be set aside entirely and a new trial granted: *Darland v. Wade*, 48–547.

Verdict against evidence: In an action sounding in tort a wide latitude is allowed the jury, and the court will seldom interfere with the verdict because excessive or because in the opinion of the judge it may be less than he would have given; but where the fact that the amount is less than the amount to which the party is entitled is susceptible of ascertainment by computation, a verdict which is not supported by the evidence as to the amount will be set aside: *Fawcett v. Woods*, 5–400.

The provision of § 4046 is an absolute limitation upon the power of the courts to grant new trials on account of smallness of damages for injury to person or reputation, but it does not follow that they are required to grant a new trial where the damages do not include the actual pecuniary injuries sustained: *Hubbard v. Mason City*, 64–245.

That the verdict is excessive, as, for instance, in allowing actual damages when only nominal damages are proper, can only be taken advantage of by motion for new trial; arrest of judgment cannot be granted on that ground: *Carl v. Granger Coal Co.*, 69–519.

Correction of verdict by jury: Where, under the direction of the court to correct an error, the jury reduced the amount of their verdict, and there was nothing to show that the party against whom the verdict was rendered could have escaped the first verdict, *held*, that a motion by him for a new trial was properly overruled: *Hamilton v. Barton*, 20–505.

e. *Verdict Against the Evidence or the Law.*

When sufficient to warrant new trial: The rule of the supreme court, that it will not interfere with the decision of the court below in refusing a new trial on account of the insufficiency of evidence where there is a conflict, has no application whatever to *nisi prius* courts. They should independently exercise the power to grant new trials, whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails

to administer substantial justice to the parties. using caution, however, in the exercise of the power, so as not to invade the legitimate province of the jury: *Dewey v. Chicago & N. W. R. Co.*, 31-373.

To justify the granting of a new trial on the ground that the verdict is against the weight of evidence the want of evidence must relate to a material issue legitimately made by the pleadings: *Parker v. Hendrie*, 3-263.

A verdict should not be set aside as against the evidence when that evidence is irrelevant or immaterial under the issues: *Scott v. Morse*, 54-732.

The fact that a jury by a special verdict show that they excluded from their consideration a material fact appearing from the evidence may be ground for a new trial: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 63-210.

Where it appears that one of the findings of fact made by the jury, which relates to a matter having an important bearing upon the liability of defendant, is contrary to the evidence, a new trial should be granted: *Heath v. Whitebreast Coal, etc., Co.*, 65-737.

Where the general conclusion reached by the jury appears to the court to be wrong, and it is shown by special findings that the jury are unable to assign any certain or tangible grounds for their conclusion, it is clearly the duty of the court to interfere and grant a new trial: *Ford v. Central Iowa R. Co.*, 69-627.

Where the direct testimony and circumstances shown could be reconciled and made harmonious, *held*, that a verdict in conflict with such testimony should have been set aside and a new trial granted: *Sullivan v. Wabash, St. L. & P. R. Co.*, 58-602.

In a particular case, *held*, that the verdict was not so wanting support in the evidence as to warrant the court in saying the jury were governed by either passion or prejudice, and therefore it could not reverse the judgment: *Beazan v. Mason City*, 58-233.

Conflict in the evidence will not warrant reversal for failure of the trial court to grant a new trial: See notes to § 4424.

Passion and prejudice: In a particular case, *held*, that the damages allowed were so disproportionate to the actual injury as to lead irresistibly to the conclusion that the verdict was not the result of a deliberate and dispassionate examination of the testimony, and a ruling refusing a new trial was reversed: *Sadler v. Bean*, 38-684.

A special finding against the express admission of the party in whose favor the verdict was found, *held* to sufficiently indicate passion on the part of the jury: *Jeffrey v. Keokuk & D. M. R. Co.*, 51-439.

Variance: A new trial will not be granted for variance between the allegations and proof when no objection was offered to the evidence when introduced: *Schrimper v. Heilman*, 24-505.

Verdict against instructions: That the verdict of the jury is contrary to the law as laid down in the instructions of the court will be a ground for new trial, regardless of the correctness of the instructions, see notes to § 3996.

f. *Newly-discovered Evidence.*

Such as to produce different result: An application for new trial on this ground should be denied when it is apparent that the ground relied on is technical, and that the rights of the parties have been once fairly adjudicated and settled: *McLain v. Lawson*, 25-277.

A new trial in such cases should not be granted, unless the court should think that upon a new trial such newly-discovered evidence might probably lead to a different reresult: *Millard v. Singer*, 2 G. Gr., 144: *State v. Bowman*, 45-418: *Cornish v. Chicago, B. & Q. R. Co.*, 49-378; *Carpenter v. Brown*, 50-451; *Harber v. Sexton*, 66-211.

Must be material: The party moving for a new trial on the ground of newly-discovered evidence must make it appear that the proposed evidence is competent and material: *Manson v. Ware*, 63-345; *Lisher v. Pratt*, 9-59; *Harnett v. Harnett*, 59-401.

What sufficient showing: Affidavits as to what a certain party had told others, without a statement that affiant believed such facts to be true, or that such party would so testify if called as a witness, *held* not sufficient to require the granting of a new trial: *State v. Wells*, 48-671.

Where a party seeks to prosecute a new trial on the ground of newly-discovered evidence, it should give the court the best evidence possible of the truth of the allegations that such evidence has been discovered, where it is, and that it can be had at the proper time: *Reeves v. Royal*, 2 G. Gr., 451.

The application for a new trial on the ground of newly-discovered evidence should be accompanied by the affidavit of the newly-discovered witness, where it can be procured, stating the facts to be established by his testimony: *Warren v. State*, 1 G. Gr., 106; *Mays v. Deaver*, 1-216; *Manix v. Malony*, 7-81; *Sully v. Kuehl*, 30-275; *Hand v. Langland*, 67-185.

To authorize a new trial on the ground of newly-discovered evidence, the facts to be proven by such evidence must be made to appear so that the court may determine whether it is material or not: *State v. Bowman*, 45-418

After remanding of case in equity Where, after the remanding of an equity cause, tried *de novo* in the supreme court, and before the final decree in the lower court, a party makes such showing of newly-discovered evidence as to entitle him to a new trial, he may file amended pleadings, if necessary, and introduce such evidence before final decree is rendered: *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Shorthill v. Ferguson*, 47-284.

But in such case the trial will be limited to the new issue presented. The issues previously determined are to be regarded as already adjudicated: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

Due diligence: If a party is surprised on the trial by evidence which he is not prepared to meet, he should ask a continuance, and, if he does not do so, the discovery of evidence to meet it afterwards will not entitle him to a new trial. Diligence to procure the evidence

in time for trial must be shown: *Dunlavey v. Watson*, 38-398; *Hopper v. Moore*, 42-563; *Mehan v. Chicago, R. I. & P. R. Co.*, 55-305.

Where witnesses are discovered before the termination of the trial, although after the proper time for the introduction of their testimony, the party should ask to have their testimony received, and, upon failure to do so, cannot ask a new trial on the ground of such testimony as newly-discovered evidence: *Dettman v. Zimmerman*, 53-709.

The fact that the attorney for the party applying for a new trial because of newly-discovered evidence knew of facts tending to rebut the testimony of the opposite party, and did not take the stand as a witness for his client, *held* not sufficient to constitute negligence on the part of his client. An attorney should avoid, if possible, being a witness for his client: *Alger v. Merritt*, 16-121.

It must appear that reasonable diligence has been exercised to discover the evidence, the discovery of which is relied upon as a ground for new trial: *Bingham v. Foster*, 37-339, 341; *Mather v. Butler County*, 33-250; *Lay v. Wissman*, 36-305; *Kilburn v. Mullen*, 22-498; *Reeves v. Royal*, 2 G. Gr., 451; *Millard v. Singer*, 2 G. Gr., 144; *Hesser v. Doran*, 41-468; *Stuckslager v. McKee*, 40-212; *Carman v. Roenan*, 45-135; *Clark v. Nelson*, 40-678; *Norris v. Hix*, 74-524.

Where a party had on the trial introduced evidence of a particular character, and afterwards asked a new trial on the ground of the discovery of new evidence of the same character, without showing diligence in seeking to obtain such newly-discovered evidence before the trial, *held*, that a new trial was properly refused: *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572.

It is not sufficient to show that the testimony was not discovered before the close of the trial, but the party must show that he used diligence to ascertain whether such testimony was in existence or that such diligence would have been unavailing: *Pelamourges v. Clark*, 9-1; *Lisher v. Pratt*, 9-59; *Hopper v. Moore*, 42-563; *State v. Bowman*, 45-418.

Where the new evidence relied upon was that of a party to the suit, *held*, that it would be presumed, in the absence of the clearest showing, that the omission to introduce it on the original trial was through his own negligence: *Jack v. Des Moines & Ft. D. R. Co.*, 53-399.

Where newly-discovered evidence relied upon is that of a witness who was called and examined on the first trial, a new trial will not be granted: *Fanning v. McCraney*, Mor., 398.

In particular cases, *held*, that sufficient diligence in discovering the evidence on account of which a new trial was asked was not shown: *Smith v. Wagaman*, 58-11; *Roziene v. Wolf*, 43-393; *Bailey v. Landingham*, 52-415; *Lindauer v. Hay*, 61-663.

What sufficient diligence: Only reasonable diligence to discover the evidence is required to be shown in an application for a new trial on the ground of newly-discovered evidence: *Stineman v. Beath*, 36-73.

Showing of diligence in particular cases *held* sufficient: *Eckel v. Walker*, 48-225; *Wayt v. Burlington, C. R. & M. R. Co.*, 45-217; *Van Horn v. Redmon*, 67-689.

Facts constituting diligence: A general allegation of diligence as to the discovery of the evidence on which a new trial is asked is not sufficient. The party must show what he did towards discovering the evidence in order that the court may judge whether it constituted due diligence: *Carson v. Cross*, 14-463; *Sully v. Kuehl*, 30-275; *Cohol v. Allen*, 37-449; *Moody v. Priest*, 69-23; *Boot v. Brewster*, 75-631.

Cumulative evidence: A new trial will not be granted for newly-discovered evidence which is merely cumulative: *Reeves v. Royal*, 2 G. Gr., 451; *Manix v. Malony*, 7-81; *Sturgeon v. Ferron*, 14-160; *Wilhelmi v. Thorington*, 14-537; *Keys v. Francis*, 28-321; *Cohol v. Allen*, 37-449; *Bingham v. Foster*, 37-339; *German v. Maquoketa Savings Bank*, 38-368; *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572; *Morrow v. Chicago, R. I. & P. R. Co.*, 61-487.

Though the evidence be in some respects cumulative, still, if in any degree it has an independent and distinct bearing upon the issue it will be sufficient: *Stineman v. Beath*, 36-73; *Humbel v. Williams*, 37-224.

What deemed cumulative: Evidence which is simply additional to evidence already introduced of the same kind upon the point in dispute, and which would not be conclusive, is cumulative: *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572.

Evidence may tend to establish the same issue and yet be so unlike and distinct from any evidence before produced as not to be deemed cumulative: *German v. Maquoketa Savings Bank*, 38-368.

That new evidence tends to establish the same ultimate fact, if it is not of the same kind and to the same point, will not render it cumulative: *Eckel v. Walker*, 48-225; *Able v. Frazier*, 43-175; *Alger v. Merritt*, 16-121.

Evidence is not necessarily cumulative because it tends to establish the same issue which was controverted on the trial. It must not only be to the same point, but of the same kind as that before produced: *Wayt v. Burlington, C. R. & M. R. Co.*, 45-217.

Admissions or declarations of party: Therefore, *held*, that evidence as to an admission of the opposite party as to a matter in controversy was not cumulative with original evidence of a different kind as to the same point: *Ibid.*

Evidence as to declarations of a party in relation to the terms of the contract sued upon is not to be deemed cumulative with other evidence of such contract: *Cook v. Smith*, 58-607.

Evidence of admissions of the opposite party in a particular case, *held* sufficient to authorize a new trial where it could not have been discovered before the trial: *Eckel v. Walker*, 48-225.

Newly-discovered evidence, consisting of admissions of plaintiff showing negligence on his part such as to defeat his recovery, *held* sufficient ground for a new trial on the part of defendant where it appeared that there was no negligence in not discovering the evidence in time to introduce it on the trial, notwithstand-

ing the alleged admission was denied in an affidavit by the party by whom it was claimed to have been made: *Spears v. Mt. Ayr*, 66-721.

Where the testimony on the former trial was conflicting and the preponderance doubtful, *held*, that newly-discovered evidence as to the statements of plaintiff in which he claimed much less than the sum recovered was sufficient to warrant the granting of a new trial: *Woodman v. Dutton*, 49-398.

In a particular case, *held*, that the showing as to admissions made by a plaintiff was sufficient to entitle defendant to a new trial for the purpose of introducing such newly-discovered evidence: *Seeley v. Perry*, 52-747.

Mitigation of damages: A new trial will not be granted on account of newly-discovered evidence which would go in mitigation of damages: *Ruble v. McDonald*, 7-90.

Impeaching testimony: A new trial will not be granted on account of newly-discovered evidence impeaching an opposing witness: *Wise v. Bosley*, 32-34: *Dunlavey v. Watson*, 38-398; *Morrow v. Chicago, R. I. & P. R. Co.*, 61-487.

Evidence of admissions and conversations of defendant inconsistent with the whole theory of the defense, but not relating to the veracity of defendant or contradicting his statements as a witness, *held* not to be impeaching, but original evidence, and if discovered after the trial, a sufficient ground for new trial: *Alger v. Merritt*, 16-121.

g. *Error of Law.*

What sufficient: An erroneous statement of the law upon a material matter, orally made by the judge to the jury in the progress of the trial, will entitle the unsuccessful party to a new trial: *Beardsley v. Bridgman*, 17-290.

Exception necessary: Error of law is not ground for new trial unless duly excepted to: *Darrance v. Preston*, 18-396.

Under previous statutory provisions, *held*, that error in giving instructions might be made a ground for sustaining a motion for new trial, although the instructions were not excepted to at the time: *Farr v. Fuller*, 8-347.

Also that mere failure to except to an error, where it did not appear that the nature of the error was apparent at the time it was committed, would not necessarily render the granting of a new trial erroneous: *Head v. Langworthy*, 15-235.

Error in instructions: An error in giving an instruction will not be ground for reversal where it appears that any other verdict than that reached by the jury would have been clearly against the evidence and ought to have been set aside: *Middleton v. Middleton*, 31-151.

4045. When to be made. 2838. The application must be made at the term and within three days after the verdict, report, or decision is rendered, except for the cause of newly-discovered evidence; must be by motion upon written grounds, and if for the causes enumerated in subdivisions two, three, and seven of the preceding section, may be sustained and controverted by affidavits. [R., §§ 3114, 3115; C., '51, §§ 1808, 810.]

Time for filing: Except when based upon the ground of newly-discovered evidence the application must be made at the term, and within three days after the verdict or decision: *Boardman v. Beckwith*, 18-292.

Where the record shows that the motion was not made in time the decision of the trial court in overruling it will not be reviewed. If the record is wrong in this respect it should be corrected in the court below: *Stiles v. Botkin's Estate*, 30-60.

A motion filed after the time specified cannot be considered for any cause except newly-discovered evidence: *Clinton Nat. Bank v. Graves*, 48-228; *Patterson v. Jack*, 59-632.

Where a court takes a recess during the term, such recess is not to be excluded in determining the time when a motion for a new trial shall be filed: *Ewaldt v. Furlow*, 62-212.

Under facts in a particular case, *held*, that there was not sufficient excuse for not filing motion for new trial by the time stipulated by the parties, even conceding that in a proper case such failure might be excused: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

It is not required that a motion to reinstate a cause which has been dismissed for want of prosecution shall be filed within three days, as in case of a motion for a new trial: *Byington v. Quincy*, 61-480.

On account of newly-discovered evidence: If a motion is made on the ground of newly-discovered evidence after the expiration of three days it should be by petition and within one year, as provided in § 4384: *First Nat. Bank v. Murdough*, 40-26.

Where the time for filing a motion for new trial is extended by consent beyond the term, such motion, if on the ground of newly-discovered evidence, may be made at the next term, provided it is made within the time agreed upon, and need not be, in such cases, by petition: *Eckel v. Walker*, 48-225.

Amendment: A motion for new trial on the ground of newly-discovered evidence is not required to be filed within three days after the verdict, and therefore an amendment to a motion on that ground, filed more than that length of time after the verdict, but during the same term, may be considered: *Van Horn v. Redmon*, 67-689.

If the motion be made in proper time, an amendment thereto, germain to the object and purposes of the original motion, may be made after the time specified: *Sowden v. Craig*, 20-477.

An amendment to a motion for a new trial filed more than three days after the verdict in accordance with the order of court, in which the opposite party was given time to make resistance to such motion, such party making no objection to accepting the provisions of the order in his behalf, *held* sufficient: *Spears v. Mt. Ayr*, 66-721.

Motion after judgment: A judgment entered before the expiration of the time for filing motion for a new trial, under the statute or stipulation of the parties, could not be set aside on that account: *Beems v. Chicago, R. I. & P. R. Co.*, 58–150.

The granting of a new trial after a formal entry of judgment upon the verdict operates as a vacation of the judgment entered: *Low v. Fox*, 56–221.

Continuance of motion: The law primarily contemplates the disposition of motions for new trial at the trial term, and they should never be continued except from the necessities of the case: *Laird v. Ashley*, 1–570.

It is not required that the motion for new trial be determined at the term at which it is filed. It stands like any other matter submitted to the court, and upon final adjournment, in absence of agreement that it may be decided in vacation, goes over to next term by operation of law; and the court has jurisdiction to determine it at such term: *Van de Haar v. Van Domseler*, 56–671.

Waiver: Where a motion for judgment, notwithstanding the general verdict, is made and overruled, the party is not thereby deprived of his right to file a motion for new trial if filed within the proper time: *Stone v. Hawkeye Ins. Co.*, 68–737.

The ground relied on must be set out in the motion, otherwise affidavits in support thereof cannot be received: *Beal v. Stone*, 22–447.

Affidavits: Where the grounds for a motion do not appear in the record, they should be established by extrinsic proof before the court can be required to act on them: *Cochrane v. Knowls*, 3 G. Gr., 115.

Affidavits of jurors to impeach verdict: Affidavits of jurors may be received for the purpose of avoiding a verdict by showing any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself. But such affidavits cannot be received as to any matter essentially inhering in the verdict itself, as that a juror did not assent to it, that he misunderstood the instructions, that he was unduly influenced or mistaken, etc., etc.: *Wright v. Illinois & Miss. Tel. Co.*, 20–195; *Cowles v. Chicago, R. I. & P. R. Co.*, 32–515; *Garretty v. Brazell*, 34–100; *Shepherd v. Brenton*, 15–84; *Turney v. Barr*, 75–758.

It cannot be shown by affidavits of jurors that they did not voluntarily assent to the verdict: *Cook v. Sypher*, 3–484; *State v. Douglass*, 7–413.

The affidavit of one juror that he agreed to the verdict because he was sick, and that of another that he agreed thereto solely on account of the sickness of the first and the threatened injury to him by reason of longer confinement, etc., *held* not receivable for the purpose of impeaching the verdict: *Brown v. Cole*, 45–601.

Affidavits of jurors cannot be received to show that the special findings were not assented to by all the jury: *Garretty v. Brazell*, 34–100.

A juror cannot be allowed to make affidavit that his judgment did not approve of the verdict rendered. The ground upon which he agreed to the verdict is a matter essentially inherent in it, and his affidavit cannot be received to explain or contradict it: *Fox v. Wunderlich*, 64–187.

The affidavit of a juror is not receivable to show that he only concurred in the verdict because he had learned that his father was very sick, and for that reason was unwilling to hold out longer, and that the verdict was not his deliberate judgment: *Ibid.*

Affidavit of a juror cannot be received to show that the jurors concurred in the verdict under a misapprehension of the law: *Ward v. Thompson*, 48–588.

Such affidavits were held not competent where they were produced to show that the jury supposed that exemplary damages, allowed in an action for damages for sale of intoxicating liquors to plaintiff's husband, would go to the school fund and not to plaintiff: *Ibid.*

Such affidavits are not admissible to show that the jury misunderstood the instructions of the court or the testimony: *Davenport v. Cummings*, 15–219; *Jack v. Naber*, 15–459; *Moffit v. Rogers*, 15–453.

Nor are affidavits of jurors receivable to show the motives which influenced their decision: *Darrance v. Preston*, 18–396.

Nor to show that they read and were influenced by a part of the answer in the case which had been stricken out on demurrer: *Cowles v. Chicago, R. I. & P. R. Co.*, 32–515.

Nor that they were unduly influenced by fellow jurors in the determination of the verdict: *Bingham v. Foster*, 37–339.

Nor that their action was influenced by statements made by one of their number of his own knowledge: *Dunlavey v. Watson*, 38–398.

Nor that their action was influenced by what was said to the jury by the bailiff: *State v. Cowan*, 74–53.

Nor that they erroneously rejected evidence which was properly before them: *State v. McConkey*, 49–499.

Affidavits of jurors are not receivable to explain their verdict by showing what items of account were allowed and what rejected: *Lloyd v. McClure*, 2 G. Gr., 139.

Affidavit of a juror is not competent to show a mistake in calculation or an error in judgment in reaching a verdict: *Wilkins v. Bent*, 66–531.

Affidavits of jurors that it was agreed that if the court made no response to a request for instructions as to certain points a verdict of guilty was to be rendered, which was done on failure of the court to give any instructions on the points in question, *held* not competent for the purpose of impeaching the verdict: *State v. McConkey*, 49–499.

Affidavits of jurors to show misconduct: Affidavits of jurors are receivable to show misconduct of the jury, as taking with them and considering a deposition not introduced in evidence: *Stewart v. Burlington & M. R. R. Co.*, 11–62.

Or to show the statement, by a juror to his fellows, of a fact outside the case made in court: *Hall v. Robison*, 25–91.

Or to show that a fellow juror made statements of his own personal knowledge as to the

matters in issue: *Griffin v. Harriman*, 74-436.

Or to show that the verdict was a quotient verdict: *Schanler v. Porter*, 7-482; *Manix v. Malony*, 7-81; *Hendrickson v. Kingsbury*, 21-379; *Darland v. Wade*, 48-547; *Fuller v. Chicago & N. W. R. Co.*, 31-187.

Also to show that the verdict was arrived at by lot: *Ruble v. McDonald*, 7-90; *Wright v. Illinois & Miss. Tel. Co.*, 20-195.

Affidavits of jurors to sustain verdict: While affidavits of jurors are not receivable for the purpose of impeaching their verdict with reference to matters which inhere therein, it does not necessarily follow that such affidavits are not admissible for the purpose of sustaining their verdict; and where it appeared that a deposition had been improperly taken by the jury to their room, *held*, that the affidavits of jurors showing that no prejudice resulted from that fact were receivable: *Morris v. Howe*, 36-490.

Matters not inhering in the verdict may be shown by the affidavits of jurors, as, for instance, that in determining whether a witness had, as he testified, signed a paper which was in evidence, they compared it with another paper which was erroneously supposed to be one which he also claimed to have written: *Kruidenier v. Shields*, 70-428.

Therefore, *held*, also, that affidavits of jurors selected to assess damages for taking right of way might be received to show when such assessment was actually made: *Jamison v. Burlington & W. R. Co.*, 69-670.

When it is sought to sustain the verdict, or to show the basis upon which the verdict was found, not for the purpose of impeaching, but for the purpose of determining the rights of the parties in a mere matter of costs, affidavits of jurors may be considered; for instance, on the question whether any allowance of interest was included in the verdict: *Swails v. Cissna*, 61-693; *Butt v. Tuthill*, 10-585.

Voluntary affidavits: The affidavits of jurors which may be received on a motion for a new trial must be voluntary. The court cannot, by rule upon the jury, compel them to answer under oath as to the manner of making up their verdict: *Forshee v. Abrams*, 2-571; *Grady v. State*, 4-461; *Crumley v. Adkins*, 12-363.

Affidavits as to statements by jurors: Affidavits of the attorney of the unsuccessful party as to statements made to him by jurors, showing misconduct of the jury, *held* not admissible to impeach such verdict. Such evidence is merely hearsay: *State v. Quinton*, 59-362.

An affidavit showing that a juror has made statements to the effect that the jury did not take into consideration the instructions of the court, and that members of the jury refused to make affidavit as to that fact, cannot be considered: *Grady v. State*, 4-461.

4046. For smallness of damages. 2839. A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained. [R., § 3113.]

It does not follow from this section that a court is required to grant a new trial where the damages allowed do not equal the pecuniary injury received: *Hubbard v. Mason City*, 64-245.

4047. Costs. 2840. The costs of all new trials shall either abide the event of the suit or be paid by the party to whom such new trial is granted, according to the order of the court to be made at the time of granting such new trial. [R., § 3117.]

4048. On conditions. 2841. The court may determine not to grant a new trial, unless certain terms or conditions named by the court shall be agreed to by the opposite party; in the event of his agreement to which, the terms or conditions named shall be entered on the record, and no new trial shall be granted if the party refuse to agree to the terms or conditions upon which a new trial shall be awarded. [R., § 3118.]

The court may make the filing of a bond for the payment of judgment and costs the condition upon which a new trial will be granted: *Loring v. Holt*, 39-574.

It may also give the successful party the alternative of submitting to certain terms or to a new trial: *Brockman v. Berryhill*, 16-183.

4049. If for omitted statement that alone may be tried. 2842. Upon any motion for a new trial in arrest of judgment, or for judgment notwithstanding the verdict by reason of the non-averment of some material fact, the party whose pleading is thus alleged defective may, if the court deem it necessary, file a statement of the omitted fact, which, if true, would remedy the alleged defects, and such statements shall be filed before the hearing of the motion and shall suspend the same. If the facts thus stated would not, if proved, defeat the object of the motion, it shall be granted. If such new averments would, if proved, defeat the object of the motion and be not ad-

mitted, they must be denied, or confessed and avoided by the opposite party within such time as the court shall direct unless the same are denied by legal operation, and in such case the law of pleading and of procedure applicable to actions and pleadings of that kind shall obtain, except that the party stating the new fact shall be held the plaintiff therein, and the statement and response shall not need to be verified. [R., § 3119.]

Amending after motion in arrest: Under this section an objection made upon motion in arrest of judgment on account of the non-averment of some material fact may be obviated by the filing of a statement of such omitted fact: *Boude v. Methodist Ep. Church*, 47–705.

Therefore it is not proper to direct a verdict against a party on account of the insufficiency of his petition in failing to aver an essential fact, as, for instance, the performance of the conditions of a contract on which he relies, as such action of the court would deprive him of the benefit of the statutory provision for curing such defect: *Wrought Iron Bridge Co. v. Greene*, 53–562.

Where the averments of a petition are too indefinite to entitle plaintiff to any relief, and upon a recovery by him being attacked by motion in arrest, he does not proceed as provided in this section, he cannot be relieved from such defect on appeal: *Sloan v. Rebman*, 66–81.

Where plaintiff amends his petition to avoid an objection after verdict, which should have been made before trial, he cannot afterwards be heard to insist that such amendment was unnecessary: *Coates v. Galena & C. U. R. Co.*, 18–277.

Arresting judgment: The court has full control over the action of the jury by arresting judgment upon their verdict and granting the injured party a new trial; and it will not grant to a defendant a judgment notwithstanding the verdict: *Bradshaw v. Hedge*, 10–402.

A judgment on a verdict will not be arrested on the ground that it is excessive: *Carl v. Granger Coal Co.*, 69–519.

4050. Judgment; costs. 2843. If the facts thus stated be admitted or found to be true, the party stating the same shall be entitled to such judgment as he would have been entitled to if such facts had been stated in the original pleading and admitted as proved on the trial, together with the costs of and occasioned by the new pleading and the proceedings therein; but if the fact be found untrue, the opposite party shall be entitled to his costs of and occasioned by the new pleading and proceedings therein, in addition to any other costs to which he may be entitled. [R., § 3120.]

DISMISSAL OF ACTION.

4051. When proper; without prejudice. 2844. An action may be dismissed, and such dismissal shall be without prejudice to a future action:

1. By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is by the court;

2. By the court, when the plaintiff fails to appear when the case is called for trial;

3. By the court, for want of necessary parties, when not made according to the requirement of the court;

4. By the court, on the application of some of the defendants when there are others whom the plaintiff fails to prosecute with diligence;

5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action. [R., § 3127; C., '51, §§ 1803, 1804.]

At what time permitted: The provision that plaintiff may dismiss his action at any time before final submission is equivalent to a denial of a right to dismiss after such submission: *Belzor v. Logan*, 32–322.

After final submission it is too late to take a nonsuit: *Hays v. Turner*, 23–214; *Mansfield v. Wilkerson*, 26–482.

Plaintiff may dismiss his suit before the filing of an answer: *Allen v. Van*, 1–568.

Where, after submission of the case, the court allowed plaintiff to file an amended petition, not for the purpose of conforming the pleadings to the evidence, but in order to raise a new issue, *held*, that plaintiff might thereupon dismiss the action, it being presumed that the first submission had been set aside in order to permit the new issue to be tendered: *Jones v. Currier*, 65–533.

What deemed final submission: The direction of the court to the jury, after the giving of the instructions, to enter upon the consideration of the cause, is the final submission to the jury: *Harris v. Beam*, 46–118.

Where, by the ruling of the court, in an action tried before it, all of plaintiff's evidence was excluded, and he was left without testimony, *held*, that he should be allowed to

dismiss, although the court was ready to give its decision: *Partridge v. Wilsey*, 8–459.

Where the character of the court's instructions to the jury was stated to the parties, but they had not yet been read over to the jury, *held*, that the plaintiff had a right to dismiss: *Mullen v. Peck*, 57–430.

Plaintiff may withdraw a portion of his petition after the instructions are given but before the cause is finally submitted to the jury: *Livingston v. McDonald*, 21–160.

A submission to a referee not being mentioned, a party may dismiss at any time before the filing of the referee's report, notwithstanding the referee stands in the place of the court: *Belzor v. Logan*, 32–322.

Plaintiff may dismiss after filing of the affidavit provided for, in case interrogatories annexed to the answer are not responded to. Such affidavit only entitles to judgment on trial, and does not operate immediately as a judgment: *Perry v. Heighton*, 26–451.

If a case has been fully tried, submitted, and the decree determined, the court should refuse leave to withdraw it and dismiss: *Chicago, I. & D. R. Co. v. Estes*, 71–603.

On appeal from justice's court: Where a cause is being tried on appeal from a justice's court, the right to dismiss is the same as in an action originally brought in the higher courts; certainly so in an action which might originally have been prosecuted in such court: *Harris v. Laird*, 25–143; and see notes to § 4833.

After cause remanded by supreme court: Where a cause is remanded after reversal on appeal it is not error to allow plaintiff to dismiss without prejudice: *Rynear v. Neilin*, 4 G. Gr., 524.

As to one cause of action: A party may dismiss as to one or more of several causes of action and prosecute as to others: *Ballinger v. Davis*, 29–512; *Cooper v. Wilson*, 71–204.

There is nothing to prevent plaintiff's withdrawing a part of his demand before trial commences: *Campbell v. Ayres*, 9–108.

As to one defendant: In actions *ex contractu* as well as *ex delicto*, plaintiff may enter a *nolle prosequi* as to a part of the defendants, if they have severed in their defenses and have pleaded matters going to their personal discharge: *Quigley v. Merritt*, 4–475.

In a suit upon a joint and several note plaintiff may dismiss as to one defendant and take judgment as to the other: *Young v. Brown*, 10–537.

Where an action was pending against a partnership and was by plaintiff dismissed as to one partner, *held*, that such dismissal operated to dismiss the action against the partnership, and it could not be continued as an individual action against the other partner: *Storm v. Roberts*, 54–677.

The dismissal of an action as to one defendant who has already appeared and moved for change of place of trial to the county of his residence will not defeat his right to have an allowance made for his expenses in attending in the wrong county: *Farmers' & Traders' Bank v. Cohen*, 71–473.

Reinstating: The granting or refusal of a motion to reinstate a cause of action is within the discretion of the district court, and where there has been unreasonable delay in making it, and it is then made without notice to or appearance by the adverse party, an appellate court will not reverse the order refusing to reinstate the cause, even when wrongfully dismissed: *Chapman v. Lobey*, 21–300.

Before the adjournment of the term an order of dismissal may be set aside, proper excuse for the failure to prosecute being shown: *Taylor v. Lusk*, 9–444.

Where the cause has been dismissed for want of prosecution and not for default in pleading, the court may, at its discretion, reinstate it on the motion of plaintiff: *Byington v. Quincy*, 61–480.

Dismissal waives error: A plaintiff who voluntarily dismisses his action cannot complain, on appeal, of any action of the court previous to such dismissal: *Marsh v. Graham*, 6–76.

Effect of dismissal: After plaintiff has manifested his intention of dismissing his cause, and both parties have acted accordingly, the action is deemed dismissed, and its pendency cannot be relied upon to defeat a subsequent action for the same cause: *First Nat. Bank v. Haire*, 36–443.

Without prejudice: Although it is provided by statute that the dismissal of an action shall be without prejudice, yet this does not enlarge nor extend the statute of limitations, and a new suit cannot be brought after the expiration of the statutory period except under the special circumstances authorized by § 3742: *Archer v. Chicago, B. & Q. R. Co.*, 65–611.

4052. On the merits. 2845. In all other cases upon the trial of the action the decision must be upon the merits. [R., § 3128.]

This section and the preceding are applicable in equitable actions as well as in actions at law, and the court has no authority upon the final submission of an equitable action to dismiss the bill at plaintiff's cost without prejudice: *Forsythe v. McMurty*, 59–162.

A decree of the circuit court of the United States showing that an equitable cause was submitted to the court upon pleadings and proofs, and that complainant's bill was dismissed with costs, shows an adjudication upon the merits and is a bar to another action. The fact that it appears from the record that an attorney for plaintiff withdrew his appearance before such submission will not change its effect: *Scully v. Chicago, B. & Q. R. Co.*, 46–528.

The statutory provisions as to dismissal of actions are not applicable in determining the effect of a decree in equity in the federal court dismissing complainant's bill: *Ibid.*

A decree dismissing a bill in chancery absolute in terms, unless not made on grounds going to the merits, is a bar to further litigation on the subject between the same parties: *Adams County v. Graves*, 36 N. W. Rep., 889.

4053. Counter-claim tried. 2846. In any case, when a counter-claim has been filed, the defendant shall have the right of proceeding to the trial of

his claim, although the plaintiff may have dismissed his action or failed to appear. [R., § 3129; C., '51, § 1801.]

Unless an answer setting up a counter-claim has been filed, defendant cannot prevent a dismissal of the action by plaintiff on the ground that he desires to interpose a counter-claim: *Kuhn v. Bone*, 10-392: *Holmes v. Hull*, 48-177.

Withdrawal of plaintiff's suit does not authorize the dismissal of defendant's cross-bill against his objection: *King v. Thorp*, 21-67.

But for this section the dismissal of an action would end all proceedings in the case, and a counter-claim pleaded could not be tried or would be regarded as dismissed. The statutory provision was not intended to authorize the trial of new causes of action in favor of defendant not set up before the dismissal: *Page v. Sackett*, 69-226.

The withdrawal by one of two joint plaintiffs to an action of his claim does not dismiss a counter-claim of defendant against him: *Stepanek v. Kula*, 36-563.

A plaintiff who dismisses his action cannot insist on the dismissal of a counter-claim against him on the ground that he has the right to dismiss without prejudice, and that if the counter-claim is allowed it will be prejudicial to him: *Sigler v. Hidy*, 56-504.

Dismissal of an action by plaintiff on appeal from a justice of the peace does not warrant a judgment against him upon a counter-claim of defendant without proof of the amount thereof: *Joy v. Huit*, 31-22.

Notwithstanding the dismissal of plaintiff's action, defendant may proceed with the trial of the case made by a cross-bill: *Foster v. Ellsworth*, 71-262.

As to effect of dismissal in replevin on defendant's claim for damages, see notes to § 4469.

4054. Or dismissed. 2847. The defendant may, also, at any time before the final submission of the cause to the jury, or to the court when the trial is by the court, dismiss his counter-claim without prejudice. [R., § 3130; C., '51, § 1802.]

Defendant cannot take a nonsuit on his counter-claim after the case has been finally submitted to the court: *Gunsaulis v. Cadwallader*, 48-48.

4055. Dismissal in vacation. 2848. Any party to any claim may dismiss the same in vacation, and the clerk shall make the proper entry of dismissal on the record, and, if the costs are not paid, may enter judgment against such party therefor in favor of the party entitled thereto, and issue execution therefor at the order of such party. The party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal. [R., § 3131; C., '51, § 1822.]

JUDGMENT.

4056. Final adjudication. 2849. Every final adjudication of the rights of the parties in an action, is a judgment; and such adjudication may consist of many judgments, one of which judgments may determine for the plaintiff or defendant on the claim of either as an entirety; or when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may, in either of these ways, determine on the claims of co-parties on the same side against each other. [R., § 3121; C., '51, §§ 1814-15.]

Nature: A judgment is not, in a strict sense, a contract: *Sprott v. Reid*, 3 G. Gr., 489; *Johnson v. Butler*, 2-535.

But it is a debt: *Gray v. Ferreby*, 36-146.

A judgment is not an "action" or a "special proceeding commenced." It is the determination of an action or a special proceeding: *Gray v. Iliff*, 30-195.

What constitutes: A final judgment is not a resolve or decree of the court, but the sentence of the law pronounced in the court upon the action or question before it: *Zeigler v. Vance*, 3-528.

The filing and allowance of a claim against an estate in a probate court which has no authority to issue execution upon such allowance is not a judgment: *Smith v. Shawhan*, 37-533.

A judgment or decree of the court controls the written opinion, and, if they are at variance, the former prevails and determines the rights of the parties: *Goodenow v. Litchfield*, 59-226.

Final judgment is the application of the law by the court to the particular case before it, and specifically denying or granting the remedy sought by the action: *Taylor v. Runyan*, 3-474.

Form: While no particular form of words is necessary there must be something to show that the judgment stated or indicated by the court has been entered by the clerk: *Ibid.*

A mere memorandum of the minutes of the judge from which the record of the case is afterwards to be drawn up does not constitute a judgment: *Ibid.*

A record not corresponding in form to what would be necessary for a judgment in this state may be shown by the laws, practices and usages of the state in which the suit is brought to be sufficient to constitute a judgment there: *Ibid.*

Further as to what is a sufficient entry to constitute a judgment, see notes to § 258.

An order for the recovery of money against one of two defendants, without naming which, is sufficient if it is manifest from the whole record which one is referred to: *Finnagan v. Manchester*, 12-521.

A judgment rendered against "Daniel Dougherty, Treasurer," *held* to be a personal judgment, and that in order to make it a judgment against him in his official capacity only it should have been rendered against him "as treasurer:" *Dougherty v. McManus*, 36-657.

It is not necessary to set out in a decree the facts upon which it is founded: *Campbell v. Ayres*, 6-339.

Where the petition in an action upon a foreign judgment alleged that it was duly rendered by the court, and set forth the entry thereof, which recited the name of the court, the title of the case, service, entry of judgment, etc., and was signed by the clerk, *held*, that a demurrer to the petition on the ground that the judgment record showed that judgment was rendered by the clerk instead of the court was properly overruled: *Thompson v. Cook*, 21-472.

As to form of judgments in justices' courts, see notes to § 4801.

On contract payable in property: A judgment upon a promissory note payable in county orders should be for such property, and not for money, unless the notes have become money demands: *Ransom v. Stanberry*, 22-334.

Alternative: The finding of the court that defendant is indebted in one or the other of two different amounts, leaving the question as to which of the two is proper to be determined in the future, is not a judgment. A judgment cannot be alternative, conditional or contingent: *Battell v. Lowery*, 46-49.

A judgment awarding an execution against a party for costs if not paid within a time limited is not a condition, but a final and absolute judgment: *Sprott v. Reid*, 3 G. Gr., 489.

Deceased defendant: Where defendant dies after the submission of the cause, and before the rendition of judgment, the judgment should be entered as of the date of submission or at least of a date prior to the death. It is irregular to enter it as of a date subsequent to the death: *Flock v. Wyatt*, 49-466.

Deceased plaintiff: A judgment in a party's favor, after his death, is not void but voidable: *Gilman v. Donovan*, 53-362.

4057. Judgment for part. 2850. Any party who succeeds in part of his cause, or in part of his causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part. [R., § 3122.]

4058. In abatement. 2851. Where matter in abatement is plead in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare. [R., § 3124.]

The judgment in a particular case finding for defendant, and reciting an offer to plaintiff of a nonsuit and the acceptance thereof by plaintiff, *held* sufficient to indicate that the judgment was upon matter in abatement pleaded in the action and not on the merits: *Atkins v. Anderson*, 63-739.

Section applied: *Clise v. Freeborne*, 27-280.

As to how matter in abatement is to be pleaded, etc., see § 3939.

4059. When special execution desired. 2852. Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon. [R., § 3125.]

4060. Several plaintiffs and defendants. 2853. In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them whenever a several judgment is proper, leaving the action to proceed as to the others. [R., §§ 3123, 3126; C., '51, § 1816.]

In actions against several defendants jointly and severally liable, judgment may be taken as to one and the case continued as to others, and such judgment will not bar a right to recover against those as to whom the case is continued, when the cause is ripe for disposition as to them: *Smith v. Cooper*, 9-376.

In an action of replevin against joint defendants judgment may be rendered against one, although plaintiff is not entitled to judgment against the other: *Carothers v. Van Hagan*, 2 G. Gr., 481.

If plaintiff maintains his cause of action against one of several defendants, he may have judgment against that one, and the other

defendants may have judgments against plaintiff for their costs: *Eyre v. Cook*, 9-185.

Judgment against one of several defendants jointly and severally liable may be rendered without the cause being disposed of as to the others: *Poole v. Hintrager*, 60-180.

Where one of two joint defendants pleads matter going to the cause of action or which constitutes a defense for both in its nature, the other defendant, though in default, should have the benefit of such defense: *Morrison v. Stoner*, 7-493; *Campbell v. McHarg*, 9-354.

It often happens in actions in chancery that the same relief is not sought or granted against all the parties joined as defendants: *Taylor v. Branscombe*, 74-534.

The practice is where there are two defendants to an action on contract, one of whom makes defense, whilst the other suffers judgment to be given against him by default, not to enter final judgment against the party in default until the issues joined by the other defendant are disposed of: *Pierson v. David*, 4-410; *Loeber v. Delahaye*, 7-478; *Greenough v. Shelden*, 9-503.

Where judgment is entered against two defendants, motion for new trial may be granted as to one without vacating the judgment as against the other: *Gordon v. Pitt*, 3-385; *Terpenning v. Gallup*, 8-74.

Where defendant has recovered on a cause of action against joint defendants on which they are severally liable, the fact that, as between them, one rather than the other is under obligation to satisfy the judgment, will not affect plaintiff's right as to its enforcement: *Palmer v. Stacy*, 44-340.

So *held* in an action for injuries received by reason of the obstruction of a street, brought against the city and the party guilty of the obstruction jointly: *Ibid.*

Where separate judgments are rendered against two or more defendants jointly sued for the same tort, plaintiff may elect what judgment he will enforce, and when it is satisfied the other will be regarded as discharged: *Putney v. O'Brien*, 53-117.

In an action for damages for a tort against two or more defendants sued jointly, judgment may be rendered against the defendant found liable: *Boswell v. Gates*, 56-143.

A judgment cannot be rendered in favor of one defendant against a co-defendant unless such judgment is asked for and there is an adjudication of the claims between them: *Beall v. West*, 13-61.

4061. Judgment against one of joint defendants. 2854. Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against such alone. [R., § 3132.]

4062. Relief asked or that is consistent granted. 2855. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his petition. But, in any other case, the court may grant him any relief consistent with the case made by the petition and embraced within the issue. [R., § 3133; C., '51, § 1820.]

Relief not called for by the pleadings will not be granted by the decree: *Byam v. Cook*, 21-392.

A judgment different from that prayed for in the petition should not be entered: *Lafever v. Stone*, 55-49; *Marder v. Wright*, 70-42.

The court should not grant to the plaintiff relief in any respect greater than that claimed in the petition: *Tice v. Derby*, 59-312.

When an answer is filed the plaintiff is not limited to the relief asked by his petition: *Wilson v. Miller*, 16-111.

If the court has jurisdiction of the subject-matter and of the defendant, a judgment in excess of that asked is not void, but voidable only: *O'Connell v. Cotter*, 44-48.

Where the petition prayed for foreclosure of an equity of redemption, *held*, that personal judgment could not be rendered upon default: *McGlaughlin v. O'Rourke*, 12-459.

Where the petition asked only for judgment for the amount due at the commencement of the action, *held*, that it was error to give judgment for instalments of the indebtedness falling due after the suit was commenced and before decree: *Blake v. Blake*, 13-40.

4063. When part controverted. 2856. If only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted. [R., § 3135.]

If only part of the claim is controverted by the pleading, judgment may be rendered for the part not controverted: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633, 638.

Where plaintiff sued on two notes, and in a third count in his petition claimed the attorney's fee provided for therein, *held*, that a denial of the right to the attorney's fee did not put in issue the counts for amounts due upon the notes respectively, and judgment was properly rendered thereon for want of denial: *Musser v. Crum*, 48-52.

In an action to recover real property the party showing himself entitled to an undivided interest may recover such interest, but not full title, and may have the right of possession as against a stranger: *Hughes v. Holliday*, 3 G. Gr., 30.

A party is not entitled to judgment for part of a claim not controverted, when such claim has not yet matured: *King v. Howell*, 28-65.

4064. Judgment on verdict. 2857. When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special or the court orders the case to be reserved for future argument or consideration. [R., § 3136.]

4065. When verdict is special. 2858. When the verdict is special, or when there has been a special finding on particular questions of fact or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered. [R., § 3137.]

To justify a court in rendering a judgment upon a special finding of facts against a general verdict, such finding must be manifestly inconsistent with the general verdict: *Bonham v. Iowa Cent. Ins. Co.*, 25-328; *Clark v. Warner*, 32-219; *Mershon v. National Ins. Co.*, 34-87.

To warrant such judgment, the special verdict must be such that, when taken together with the facts admitted in the pleadings, it establishes the right of the party to recover: *Lamb v. First Presb. Society*, 20-127; *Hardin v. Branner*, 25-364.

It is only where the general and special verdict are so inconsistent that both cannot stand that the latter will be allowed to defeat the former. The mere fact that the special verdict does not support the general will not render judgment on the general verdict erroneous: *Phœnix v. Lamb*, 29-352.

The court cannot properly render judgment for a party upon a special verdict, unless, taken in connection with the pleadings, it is such as to show conclusively that the party is entitled to judgment: *Crouch v. Deremore*, 59-43.

When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359; *Evans v. St. Paul Harvester Works*, 63-204.

Under peculiar facts, *held*, that a special verdict was not sufficient to entitle plaintiff to judgment in a case where a general verdict for defendant was set aside on account of error in the instructions: *Pettus v. Farrell*, 59-296.

Where the special finding of the jury is in direct conflict with the general verdict, the judgment must be entered on the finding: *O'Donnell v. Hastings*, 68-271.

Where, after judgment upon a general verdict, the court on motion, without having first set aside such judgment, rendered a judgment for the opposite party upon a special verdict, *held*, that such final judgment was valid: *Mornyer v. Cooper*, 35-257.

The fact that it appears by the special verdict of the jury that they excluded from their consideration a material fact appearing in the evidence may be a ground for a new trial: *Baldwin v. St. Louis, K. & N. R. Co.*, 63-210.

As to special verdict see § 4015.

4066. Judgment notwithstanding verdict. 2859. When, by the statements of the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party, unless the other party proceed as provided in section two thousand eight hundred and forty-two of this chapter [§ 4049]. [R., § 3138.]

Where there was no answer, *held*, that judgment should have been rendered for plaintiff, notwithstanding evidence on the part of the defendant disproving the claim had been erroneously received: *Singer Mfg. Co. v. Billings*, 39-347.

Also *held*, that where defendant pleads a tender, judgment in plaintiff's favor for the amount of the tender should be rendered, although the verdict of the jury is for defendant: *Sheriff v. Hull*, 37-174.

Where, upon motion for judgment for an amount admitted on the pleadings to be due, the opposite party asked to amend and leave was granted, *held*, that the court properly refused to enter judgment on the pleadings until the amendment was filed: *Snyder v. Phillips*, 66-484.

Under the former system of pleading and practice, a motion for judgment notwithstanding the verdict was only entertained by the court under a certain state of the pleadings and findings of the jury, and was never entertained on behalf of the defendant. It is only for plaintiff that such a judgment can be rendered: *Bradshaw v. Hedge*, 10-402.

4067. Excess of counter-claim. 2860. If a counter-claim, proved, exceed the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment must then be given therefor. [R., § 3139; C., '51, § 1798.]

4068. Judgment by agreement. 2861. Any judgment in a case pending other than for divorce which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing, signed and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may

issue forthwith unless therein otherwise agreed upon between the parties. [R., § 3143; C., '51, §§ 1821-2.]

An agreement for judgment, when properly filed, becomes a part of the record in the case, and a subsequent pleading inconsistent therewith should be stricken from the files: *Vail v. Stone*, 13-284.

The fact that counsel for a party is in court when judgment is rendered against his client and makes no objection thereto does not show that the judgment thus rendered is by agreement or consent: *Hershee v. Hershey*, 15-185.

Where an action for recovery of real estate was tried under an agreed statement of facts which recited that the plaintiffs were entitled to the realty, excepting improvements thereon, unless prevented by the facts stated, *held*, that a judgment determining rights to the improvements as well as to the land was erroneous: *Burns v. Keas*, 21-257.

When parties by agreement determine the amount which is to be paid by way of compromise of the suit, their determination stands in place of a judgment of the court, and upon payment of the sum agreed upon defendant has the right to demand that the plaintiff shall do what in his petition he has expressed a willingness to do, although defendant has not asked such specific relief: *Robertson v. Central R. Co.*, 57-376.

Where a petition embraced two claims, and an offer to compromise by permitting judgment was accepted, *held*, that both claims were thereby satisfied and adjusted: *Ibid.*

Where an officer holds liquors under a warrant in a proceeding for their condemnation he has no authority to stipulate for judgment against him in a proceeding by a third party for their recovery: *Fries v. Porch*, 49-351.

4069. No distinction between debt and damages. 2862. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages. [R., § 3144.]

4070. Provisions as to juries to govern court. 2863. The provisions of this chapter relative to juries, are intended to be applied to the court when acting as a jury on the trial of a cause so far as they are applicable and not incompatible with other provisions herein contained. [R., § 3145; C., '51, § 1823.]

Where the cause is submitted to trial by the court without a jury, questions both of law and of fact are for the court, and the fact that it treats a question belonging to one class as though it belonged to another will not be reversible error if the result reached is correct: *Ayres v. Bane*, 39-518.

The same rules as to the admission or rejection of evidence are applicable in trials to the court as in trials to the jury: *Williams v. Soutter*, 7-435, 439.

In a particular case, *held*, that by the terms of a stipulation with reference to the trial the judge was authorized in vacation to pass upon all matters and interlocutory motions in the same manner as in case of a trial before the court: *Clews v. Traer*, 57-459.

Where the cause is tried to the court without a jury, a judgment of the court stands as a general verdict of the jury, and will not be interfered with unless palpably against the weight of evidence: *Woods v. Gevecke*, 28-561; *Mellenger v. Parsons*, 51-58.

Where there is a conflict in the evidence the court will not set aside a judgment because it is not supported by the testimony: *Boone County v. Wilson*, 41-69.

To authorize the supreme court to reverse a judgment on the ground of want of evidence for its support, there must be such absence of proof as to warrant the conclusion that the decision of the lower court was the result of passion or prejudice: *Murray v. Wells*, 57-26; *Melendy v. Rice*, 94 U. S., 796; *Patterson v. Seaton*, 70-689.

In the absence of a special finding of facts by the court it will be presumed that the judgment is based upon facts which in the proper exercise of judicial discretion the court below could have found under the evidence: *Bower v. Webber*, 69-286.

The supreme court may review the findings of the court below in like manner as it may re-examine the verdict of a jury, but for that purpose the entire evidence must be taken up. This takes the place of a motion to set aside the verdict of the jury for the reason that it is not supported by the evidence: *Snell v. Kimmell*, 8-281.

As to finding of facts by the court and review thereof, see § 3950 and notes.

CLERK.

4071. Judgments and orders entered. 2864. All judgments and orders must be entered on the record of the court and must specifiy clearly the relief granted, or order made in the action. [R., § 3140.]

As to entry of judgments of record, see § 258 and notes.

4072. Satisfaction of judgment. 2865. Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memo-

randum thereof on the column left for that purpose in the judgment docket. [R., § 3141; C., '51, § 1819.]

4073. Complete record. 2866. In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause and enter it in the proper book. But in no other case need a complete entry be made except at the request of a party who will pay the expense of such record. [R., § 3142; C., '51, § 1817.]

This section contemplates only cases where plaintiff claims title in himself and defendant disputes such claim, and not a case where it is sought to subject real estate, standing in the name of the wife, to a judgment against the husband. In a proper case for making the record here provided, all that should be recorded is the original notice and return, the pleadings and the judgment or decree: *Smith v. Cumins*, 52-143.

DISCHARGE OF JUDGMENT.

4074. On motion. 2867. A defendant against whom a judgment has been rendered, or any person interested therein, having some good matter of discharge which has arisen since the judgment, may, upon motion, in a summary way, have the same discharged either in whole or in part, according to the circumstances. [R., § 3146.]

In the absence of statutory authority the court has no jurisdiction to cancel a judgment, and the right to cancel given by statute arises only out of matters subsequent to the judgment: *Brett v. Myers*, 65-274.

In some cases the question whether the judgment has been satisfied or not may be raised by motion, while in others it might be necessary to go into equity to obtain proper relief: *Traer v. Lytle*, 20-301.

Sureties, upon paying a judgment rendered upon contracts whereon they are bound, are not entitled to take an assignment of the judgment and enforce it by execution; but payment is a satisfaction of the judgment: *Bones v. Aiken*, 35-534; *Drefahl v. Tuttle*, 42-177; *Johnston v. Belden*, 49-301.

But if judgment is rendered against the maker of a promissory note and one who indorses it after the payee, such indorser may, upon payment of the judgment, take an assignment thereof and enforce it against the maker: *Schleissman v. Kallenberg*, 72-338.

4075. Fraudulent assignment. 2868. The court shall have power, on motion, to inquire into the facts attending or connected with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void either in whole or in part, whenever such assignment or use shall be determined to be inequitable or fraudulent, or in bad faith. [R., § 3147.]

DEFAULT.

4076. When made and entered. 2869. If a party fail to file or amend his pleading by the time prescribed by the rules of pleading, or, in the absence of rules, by the time fixed by the court; or if, having plead, his answer or reply on motion or demurrer is held insufficient or is struck out, and he fail to amend or to answer or reply further as required by the rules of or by the court, or if he withdraw his pleading without authority or permission to replead, judgment by default may be rendered against him on demand of the adverse party made before such pleading is filed. [R., § 3148; C., '51, § 1824.]

What constitutes default: When a party seeks to prevent his adversary from a hearing upon the merits, he ought to show that such adversary has failed to comply with some statute or some special or general rule of court: *Wright v. Howell*, 24-150.

Failure to file pleading: A pleading is in time to prevent default if filed previous to the actual entering of the default, in the absence of express rules to the contrary: *Davis v. Brady*, Mor., 101.

Where an answer was filed some eighteen days after the time allowed for filing of answer by agreement of parties, but some months before the next term of court, and in answer to an amended petition setting up a new cause of action, and in pursuance of an order of court made in vacation upon application extending the time, but without notice to the adverse party, *held*, that there was no abuse of discretion on the part of the court in refusing to grant default on motion: *Redfield v. Miller*, 59-393.

Under the showing in a particular case, *held*, that it was not error to refuse a motion for default for want of answer and allow an an-

swer to be filed: *Walker v. Hutchinson*, 50–364.

As to when pleadings should be filed, see § 3842.

In a suit against joint defendants: Judgment by default should not be entered in an equitable action against a portion of defendants when one of them has on file a demurrer or answer going to the merits of the action as to all of them: *Jenkin v. McCully*, Mor., 447.

Final judgment should not be rendered against one of two joint debtors by default so long as an answer by one of them going to the validity of the cause of action remains undetermined: *Campbell v. McHarg*, 9–354.

Where there are two defendants, one of whom makes default and the other appears, it is not the practice to enter judgment on default against the first, before the issue raised by the answer of the second is disposed of: *Greenough v. Shelden*, 9–503.

Failure to answer an amended petition will be accompanied with the same consequences as failure to plead to the original, and the fact that a plea to the original is on file will not prevent defendant from being in default if he has been ruled to replead to the amended petition: *Porter v. Moffett*, Mor., 58.

A failure to answer an amended petition entitles plaintiff to default as fully as if the original petition had not been answered: *Brenner v. Gundershiemer*, 14–82.

Where plaintiff, after the filing of an answer to his unverified petition, amends the same by adding a verification, defendant must file a verified answer, and will be deemed in default upon failing to do so: *Wilson v. Preston*, 15–246.

Appearance without answer: Where defendant enters a written appearance, but does not file any pleading nor ask time to plead, it is not error to enter default and judgment at once: *Shaw v. National State Bank*, 49–179.

Where defendant who was in default for want of answer was present when the case was submitted, making no objection, and there was no issue to try, *held*, that the case was properly heard as one of default, and there being nothing to show upon what evidence the case was heard, the judgment would be affirmed on appeal: *White v. Kelley*, 23–275.

Negligence in filing pleading: Where the defendant is ruled to answer by a certain day in vacation, if he is unable to do so then, for a good reason, he should do so as soon thereafter as possible; and on a motion to set aside a default for a failure to answer, an excuse will not be sufficient which applies to the failure to answer on the day fixed, but does not apply to the failure to answer subsequently and before default was taken: *Thatcher v. Haun*, 12–303.

An action at law being commenced to recover rent by attachment, and defendant, after the lapse of nearly three years, having filed his answer and cross-petition, the latter being in equity and bringing in a new party and praying affirmative relief, *held* that, no notice having been given plaintiff, a decree for defendant based on *ex parte* testimony should be vacated upon motion: *Allen v. Rogers*, 27–106.

Failure to file pleading in vacation: Where an action for an injunction was commenced during term time, and defendants were required to appear and show cause why a temporary injunction should not be allowed, and did appear and demur to the petition, which demurrer was overruled, *held*, that plaintiff was not entitled to default for want of answer until the next term, which was the regular appearance term of the action: *Matter v. Phillips*, 52–232.

Where, by rules of court, defendant was required to plead by demurrer or answer in vacation within ten days after service, and upon failure to do so was to be regarded as in default, *held*, that the fact that the notice simply advised him that he was to answer by the time therein fixed could not have misled him as to the character of the pleading which he was entitled to file, and that, not having filed any pleading, default was properly entered: *Lyman v. Bechtel*, 55–437.

Default as to one count: Where one of several counts remains unanswered, but the defense interposed as to other counts is equally applicable to it, the refusal to grant default on such count will not constitute reversible error: *Kinyon v. Palmer*, 20–138.

After ruling on demurrer: Where a demurrer to an answer is sustained default should not be rendered for failure to answer further, in the absence of any rule or order of the court fixing the time in which an answer must be filed: *Wright v. Howell*, 24–150; *Rollins v. Coggshall*, 29–510.

Defective answer: It is erroneous to render judgment by default against defendant who has an answer on file undisposed of, although it may be defective: *Arbuckle v. Bowman*, 6–70; *Canal Bank v. Newberry*, 7–4; *Burlington & M. R. R. Co. v. Marchand*, 5–468; *Keeney v. Lyon*, 10–516; *Markey v. Mettler*, 1–528; *Brown v. Hollenbeck*, 2 G. Gr., 318; *Wolff v. Hagensick*, 10–590; *Mallory v. Sailing*, 48–699; *Levi v. Monroe*, 11–453.

Two answers: Also *held* that it was erroneous to grant default, where defendant had two answers on file, one of which was assailed by demurrer but the other remained undisposed of: *Crafts v. Clark*, 31–77.

Motion on file: It is error to render judgment by default where defendant has a material motion on file: *Coffin v. Kemp*, 4 G. Gr., 119.

Answer not raising issue: An answer denying the amount of defendant's indebtedness as claimed by plaintiff, but not denying his cause of action, does not entitle defendant to trial, but leaves him substantially in default: *Mann v. Howe*, 9–546.

Failure of defendant to appear at trial, when he has an answer on file, is not a ground of default, but the issue should be tried by a jury: *Brown v. Hollenbeck*, 2 G. Gr., 318.

A judgment against a defendant who has appeared to an action and filed an answer, but at time of trial fails to appear, is not a judgment by default: *Douglass v. Langdon*, 29–245.

Presumption: Where default is granted upon motion it must be presumed, in support

of the court's action, in the absence of a showing to the contrary, that a sufficient ground for the default was made to appear to the court: *Thompson v. Savage*, 43-398.

Party in contempt: While a party is in contempt the court may refuse to receive pleadings offered by him, and treat him as in default: *Saylor v. Mockbie*, 9-209.

Where defendant in a suit for divorce was in contempt for failure to pay temporary alimony as ordered by the court, *held*, that it was error to strike his answer from the files without granting leave, which he asked, to show cause why he had failed to comply with the order: *Peel v. Peel*, 50-521.

A party who is in contempt has no right to be heard in defense of the action and will be deemed in default. But this rule does not apply to the mere failure to pay temporary alimony awarded in an action for divorce, where judgment has been entered: *Baily v. Baily*, 69-77.

Filing pleading after default: The answer of a defendant who is in default when the answer is filed should be stricken from the files on motion. Defendant is not entitled to plead in such case until the default is set aside: *Brayton v. Delaware County*, 16-44; *Clute v. Hazleton*, 51-355.

Waiver of default: An answer being filed after entry of default without leave of court, and no steps being taken to strike the answer from the files, but issue being joined upon it and trial had, *held*, that complainant waived any objection on account of defendant's default: *Jones v. Jones*, 13-276.

The subsequent filing of an amended petition bringing in other parties, but not changing the relief asked against the defendant in default, will not operate to set aside a default: *McDonald v. Donaghue*, 30-568.

Discretion: The question of allowing defaults and setting them aside is largely within the discretion of the court: and where it appeared that the court did not consider a petition to have been filed a sufficient length of time before the term to entitle plaintiff to default at that term, and continued the case instead of dismissing it, *held*, that its action in refusing the default would not be reversed on appeal: *Jones v. Merrill*, 73-234.

Judgment: The judgment here contemplated is one purely by default, and may be set aside as provided for by § 4078: *Park v. Ratcliffe*, 42-42.

It is not essential that the judgment of default be first rendered; the final judgment may embrace the judgment of default as well as the determination of the liability of defendant on the cause of action: *Davis v. Burt*, 7-56.

4077. Notice. 2870. Where no appearance is made, default shall not be had until the court determines from an inspection of the record that notice has been given as required by this code. [R., § 3149; C., '51, § 1826.]

This provision is simply directory; and if service has been actually made, a judgment rendered thereon by default is not void, even though there is no return of service: *Lawrence v. Howell*, 52-62.

Where judgment by default is rendered, it will be presumed that proper notice appeared to have been had, unless the contrary is alleged and clearly proved: *Hale v. First Nat. Bank*, 50-642.

Where there is service, though defective, a judgment by default will not be void, even when it is error in the court to render it: *Pratt v. Western Stage Co.*, 27-363; *Muscatine Turn Verein v. Funck*, 18-469.

The affidavits, etc., required to be filed in cases of service by publication are essential to the validity of a judgment on such service; if materially defective, the judgment will be erroneous, even though it recites that defendant was served with notice. The presumptions in favor of the jurisdiction of the court do not cure such a defect: *Tunis v. Withrow*, 10-305.

Where a judgment is taken by default it should appear affirmatively that there has been such service and compliance with the provisions of the law as gives the court jurisdiction over the person of defendant, and it is clearly irregular to take such judgment where the record discloses the fact that there has not been such service and compliance: *Woodward v. Whitescarver*, 6-1.

Default rendered without legal authority should be set aside without a compliance with the terms prescribed in the next section: See notes to that section.

4078. Setting aside; terms. 2871. Default may be set aside on such terms as the court may deem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits be filed and a reasonable excuse shown for having made such default, nor unless application therefor be made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term. [R., § 3150; C., '51, § 1827.]

On application of co-defendant: Where a judgment by default against one defendant will affect the interest of a co-defendant who is not in default, such judgment should be set aside: *Broghill v. Lash*, 3 G. Gr., 357.

Affidavit of merits: The defendant seeking to have a default set aside must present an affidavit of merits, as well as a reasonable excuse: *Smith v. Watson*, 28-218; *McDonald v. Donaghue*, 30-568; *King v. Stewart*, 48-334.

It is not sufficient to state generally that defendant has a good and substantial defense, but the facts should be stated that the court may determine therefrom the question of merits: *King v. Stewart*, 48-334; *Jaeger v. Evans*, 46-188; *McGrew v. Downs*, 67-687.

The party seeking to have a default set aside must in an affidavit of merits set out and show the facts constituting the defense which he claims to be meritorious, to the end that the court itself may adjudge whether it be so. In the absence of such showing it is error to set aside the default: *Palmer v. Rogers*, 70–381.

The filing of an affidavit of merits, after the motion to set aside the default has been overruled for want of such affidavit, is not sufficient to cure the defect: *Thompson v. Savage*, 43–398.

Grounds for setting aside default: The fact that defendant failed to defend for the reason that he was advised by an attorney that he had no defense, where it appears that such advice was given by the attorney of the opposite party, and it does not appear that the fact that the attorney giving this advice was employed by the opposite party was known to defendant, will be ground for setting aside the default: *Simmons v. Church*, 31–284.

A mistake, even though it relate to a matter concerning which the party is charged by law with notice, may offer sufficient ground of excuse; so also may an assurance of the judge as establishing a course which will be pursued in reference to the trial of the case, even though unauthorized, if it has in good faith been acted on by the party: *Jean v. Hennessy*, 74–348.

Where rules of court provided for the filing of a copy of petition for the use of defendant, and three days before the appearance day defendant applied for such copy and it was not on file, and he thereupon filed an affidavit of such fact and asked to have a copy, and to be allowed reasonable time thereafter to defend, and thereafter was detained at home by sickness for nine days, *held*, that upon proper application default against him entered on the regular appearance day should have been set aside: *Brett v. Farr*, 58–442.

In a particular case, *held*, that the sickness of defendant did not appear to have been of so serious a character as to warrant interference with the action of the lower court in refusing to set aside default on that ground: *Reiher v. Webb*, 73–559.

The excuse shown for having made default, *held* sufficient in particular cases: *McNulty v. Everett*, 17–581; *Willett v. Millman*, 61–123.

Negligence: Default should not be set aside where it is the result of a party's own negligence: *Harrison v. Kramer*, 3–543: *Thatcher v. Haun*, 12–303.

An excuse based upon forgetfulness and carelessness of counsel, *held* not sufficient to justify interference with the refusal of the court below to set aside the default: *State v. Elgin*, 11–216.

A party should not be relieved from the consequences of his own neglect or that of his attorney: *Reiher v. Webb*, 73–559; *Ordway v. Suchard*, 31–481.

But under the particular facts, *held*, that default due to oversight of attorney, caused by mislaying papers, should have been set aside: *Ordway v. Suchard*, 31–481.

Held a sufficient excuse for setting aside a default that the attorney of the party in default was so ill that forgetfulness of his employment in the case could not be imputed to him as negligence: *Montgomery County v. American Emigrant Co.*, 47–91.

Variance between the notice and the petition may be made a ground for setting aside a default: *Wright, etc., Manuf'g Co. v. Kleigel*, 70–578.

Where it appears that a default was rendered on the first day of appearance term, and the attention of the supreme court is not called to any rule of the court authorizing default on the first day, it will be presumed that the default was properly set aside: *Huebner v. Farmers' Ins. Co.*, 71–30.

Agreement of parties: A judgment on default should not be set aside for an alleged oral understanding between the parties as to the time for appearance, when such agreement was not communicated to the court, or satisfactorily and clearly established in the application: *Dixon v. Brophey*, 29–460.

Sufficiency of showing: A default will not be set aside merely upon the affidavit of defendant that his attorney filed an answer to plaintiff's petition, and that the same was not marked "filed" by some accident and was lost from the papers, it not being satisfactorily shown that such answer was in fact ever filed: *Barnes v. Anderson*, 19–70.

In a particular case, *held*, that the affidavit of merits did not set up any defense, and that the motion to set aside the default was, therefore, properly overruled: *District T'p v. White*, 42–608.

The showing of excuse in a particular case *held* not sufficient to require a reversal of the action of the court below in refusing to vacate a judgment by default: *Miracle v. Lancaster*, 46–179.

Where a showing to set aside a default was sufficient as to the term to which default was taken, but it appeared from the record that defendant had failed to answer for more than two years anterior to the term in question, for which no reason or explanation was given, *held* not an abuse of discretion to overrule the motion: *Kreisinger v. Icarian Community*, 16–586.

Judgment of nonsuit for failure to file declarations in time may be set aside upon showing of excuse: *Martin v. Van Bergen*, 1 G. Gr., 314.

An answer should accompany the application to set aside the default: *Thatcher v. Haun*, 12–303.

Where the motion to set aside a default was accompanied with a verified answer, which, if true, constituted a complete defense to the action, and defendant asked that the answer might be accepted and taken by the court as an affidavit of merits, *held*, that the court might properly so consider it: *Huebner v. Farmers' Ins. Co.*, 71–30.

Defendant is required, in addition to presenting an excuse for default, to plead issuably and forthwith, and a statement in his affidavit that he has an answer ready to file will not be sufficient to show that the court erred in refusing to permit him to file such answer where it does not appear what the answer contained: *King v. Stewart*, 48–334.

Defendant is not entitled to file his answer until the default is set aside: *Ibid.*

The affidavit of merits may be made by the attorney if it appears that the attorney has full knowledge of the facts constituting the defense: *Jean v. Hennessy*, 74–348.

A judgment by default cannot be set aside because it is in the alternative unless defendant files an answer and affidavit of merits: *Brunson v. Nichols*, 72–763.

The showing of a defense must be by giving a statement of the facts constituting such defense; but *held*, that the allegation that the matters alleged in the petition were involved and litigated in a former action, and declared invalid, was sufficient: *Jean v. Hennessy*, 74–348.

Defendant must show by his affidavit that he has a meritorious defense, and also that he has a reasonable excuse for having made default; but no evidence in addition to that offered in support of the motion can be received as to the merits of the defense. If the affidavit shows a defense good in law it must be accepted, and there can be no further inquiry as to the truth of the facts stated: *Joerns v. La Nicca*, 75–705.

Where default is set aside on an affidavit of merits, defendant may be required to plead by answer and the court may refuse to consider a demurrer: *Perkins v. Davis*, 3 G. Gr., 235.

The fact that the defendant has, after the setting aside of the default, filed a demurrer instead of an answer, cannot be raised as an objection to the action of the court in not setting the default aside. In such a case plaintiff should file a motion to strike the demurrer from the files: *Jean v. Hennessy*, 74–348.

Default against garnishee for failure to appear and answer should be set aside on showing of slighter excuse or diligence than would be necessary in case of default against a defendant debtor: *Evans v. Mohn*, 55–302.

Default improperly granted: The provision requiring an affidavit of merits before a default shall be set aside applies only to cases where the party is really in default. Where default has been entered by mistake or improperly, it should be set aside without such affidavit: *Messenger v. Marsh*, 6–491; *Rice v. Griffith*, 9–539; *Boals v. Shules*, 29–507; *United States Rolling Stock Co. v. Potter*, 48–56.

Where default has been improperly granted, it should be set aside upon motion without the showing of a meritorious defense: *Beasley v. Cooper*, 42–542.

Default improperly entered should be set aside without showing of excuse or affidavit of merits: *Brandt v. Wilson*, 58–485.

Where a default was attempted to be set aside because a copy of the petition was not served with the notice as required by a rule of court, *held*, that such service of the petition was not a jurisdictional prerequisite, and, there being no affidavit of merits, the default should not be set aside. In the absence of a showing the presumption is that such rule was complied with: *Knapp v. Haight*, 23–75.

Time for setting aside: It would seem that the limitation of time within which a motion to set aside a default may be made applies to judgments by default and not to simple defaults, and that the latter may be set aside at any time before or at the term when judgment is rendered thereon, whilst it might also be true that simple defaults taken in vacation are to be set aside at the commencement of the succeeding term: *Harper v. Drake*, 14–533.

Dismissal: Where a cause has been dismissed, not for default in pleading, but merely for failure of the plaintiff to appear and prosecute at the time set for trial, it may be reinstated on motion of the plaintiff at the discretion of the court: *Byington v. Quincy*, 61–480.

Discretion: The court has a large discretion in passing upon motions to set aside defaults, and unless it is shown that such discretion is abused the appellate court will not interfere: *Marsh v. Colony*, 36–603; *Rogers v. Cummings*, 11–459; *Gilbert v. Wilcox*, 33–594.

Unless it appears that the court has improperly exercised its discretion in refusing to set aside a judgment on default, the judgment will be affirmed on appeal: *King v. Kinney*, 8–521.

While motions to set aside a default are not to be granted as of course, yet the court has a large discretion, and the supreme court will not interfere with its ruling unless it is manifest that such discretion has been abused: *Clarke v. Hedge*, 10–528.

The matter of setting aside a default granted for failure to file pleadings within the time required by rules or order of court is largely within the discretion of the court, and the supreme court will not interfere unless such discretion has been abused: *Bolander v. Atwell*, 14–35; *Clute v. Hazleton*, 51–355.

But the ruling will be reversed when there is a clear abuse of discretion or misapprehension of duty; and default should be set aside on application made before judgment is rendered, when based upon proper grounds: *Simmons v. Church*, 31–284.

It will require a stronger case to warrant the reversal of the action of a court in setting aside a default than in case of refusing to set it aside: *Westphal v. Clark*, 46–262.

The presumption in favor of the correctness of the rulings of the court in respect to setting aside a default is stronger than in other cases: *Willett v. Millman*, 61–123.

The terms upon which a default will be set aside rest within the sound discretion of the judge, and his action thereon will not be interfered with unless an abuse of discretion be made to appear: *Blough v. Van Hoorebeke*, 48–40.

Canceling order: Where the court cancels a previous order setting aside default and granting leave to answer, the answer filed in pursuance of such previous order is to be regarded as stricken from the files: *Kirby v. Gates*, 71–100.

Review on appeal: Before judgment on default will be reviewed in the supreme court, motion to set it aside must have been made and overruled in the court below: *Downing v. Harmon*, 13–535; *Hunt v. Stevens*, 25–261.

Where judgment is rendered at a time earlier than that at which defendant can be required to answer, a motion to correct the judgment should be made in the trial court before prosecuting the error on appeal: *Pigman v. Denney*, 12–396.

4079. When clerk to compute amount. 2872. When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount, but no fee shall be charged therefor. When long accounts are to be examined, the court may refer the matter. In other cases the court shall assess the damages, unless a jury be demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor. [R., § 3151; C., '51, §§ 1828–30, 1832.]

What deemed admitted by default: Upon an answer controverting the amount of indebtedness claimed by plaintiff to be due, but not denying his cause of action, the court may proceed to render judgment as upon default: *Mann v. Howe*, 9–546.

A party in default cannot contest the right of plaintiff to recover something. He cannot question the sufficiency of the petition: *Loeber v. Delahaye*, 7–478.

Where no cause of action is stated in the petition a default does not admit any indebtedness. Although defendant may be concluded by default, where the facts stated do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer, yet where the petition omits a necessary averment to show liability against defendant, the court can and should, even upon default, refuse to enter judgment: *Bosch v. Kassing*, 64–312.

A default admits matters well pleaded, but entitles plaintiff to recover nothing more than the relief sought in the petition; and a judgment should not be rendered by default where no judgment is prayed for: *Johnson v. Mantz*, 69–710.

Assessment of damages: A judgment by default admits the averments of the cause of action as alleged in the petition, and that something is due and payable. The only matter to be found in such case is the amount of damages: *Whittey v. Douge*, 9–597.

But where the amount due upon a subscription of stock was dependent upon how many instalments had been called for by the board of directors, etc., *held*, that such facts must be proved to the court before it could assess the amount of recovery: *Burlington & M. R. R. Co. v. Shaw*, 5–463; *Burlington & M. R. R. Co. v. Marchand*, 5–468.

Where the amount to be computed by the clerk was left blank, to be filled in when ascertained, and was not filled in, *held* that, although the rights of third parties had intervened, the judgment was not void as to them: *Lind v. Adams*, 10–398.

Where a reasonable attorney's fee is provided for, it may be proved up and should be allowed, although the petition does not state the amount claimed on that account: *Nelson v. Everett*, 29–184.

Defendant's demurrer being overruled, and he being in default for want of an answer, *held* error to render judgment against him without an assessment of damages: *Musser v. Hobart*, 14–248.

An assessment of damages is not necessary on an appeal from a justice of the peace. If appellant does not appear in such case, judgment of affirmance may be rendered: *Taylor v. Barber*, 2 G. Gr., 350.

A cause will not be reversed upon appeal because testimony was improperly admitted when the appellant is in default and liable to judgment on the pleadings: *Pfantz v. Culver*, 13–312.

Default against joint defendants: Where some of several defendants answer, and others make default, plaintiff should not have any greater relief against those in default than against those who answer: *Pierson v. David*, 4–410.

And in such case, if the cause of action is not made out against those who appear, judgment should not be rendered against those in default, but the action should be dismissed as to them also: *Curtis v. Smith*, 42–665.

A defendant, though in default, should have the benefit of a matter pleaded by a co-defendant going to the cause of action, or in its nature constituting a defense for both: *Morrison v. Stoner*, 7–493.

A party in default is not entitled to have the damages against him assessed by jury: *Wilkins v. Treynor*, 14–391; *Carleton v. Byington*, 17–579; *Armstrong v. Catlin*, 17–581; *Clute v. Huzleton*, 51–355.

A party in default waives his right to demand a jury to assess the damages: *Preston v. Wright*, 60–351.

Default waives jury trial: See § 4021.

An attorney's fee is a part of the costs, and defendant in default as to the principal indebtedness cannot put in issue the amount of such fee and claim a jury trial thereon: *Musser v. Crum*, 48–52.

Where plaintiff in a replevin suit dismisses his action he is to be regarded as in default, and cannot demand a jury trial upon the question as to the amount of defendant's damages: *Wilkins v. Treynor*, 14–391.

It is immaterial when the witnesses of plaintiff are examined, and whether any one attends for the purpose of making cross-examination, where the party in default has not claimed the right of such cross-examination: *Olm v. Chicago, M. & St. P. R. Co.*, 61–250.

4080. Cross-examine witnesses. 2873. The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose. [R., § 3152; C., '51, § 1831.]

The party in default cannot object to the admissibility of witnesses called by the plaintiff to establish his claim: *McLott v. Savery*, 11–323.

Nor can he object to the introduction of evidence by the opposite party: *Wright v. Lacy*, 52–248.

The party in default has no right to offer

evidence, address the jury, nor ask instructions: *Cook v. Walters*, 4-72.

A party in default may appear at the time of the assessment of damages and cross-examine the witnesses against him, but for no other purpose. He cannot introduce evidence in his own behalf: *Carleton v. Byington*, 17-579.

A party in default cannot object to the evidence offered, nor cross-examine the witness in relation to portions of the claim which are not referred to in the testimony in chief of such witness; thus *held*, that where a portion of plaintiff's claim was sufficiently established by a sworn account, and a witness was introduced to prove another portion, the cross-examination could not be extended to items of account established by the sworn account: *Lyman v. Bechtell*, 58-755.

4081. In equitable proceeding. 2874. When the action is of an equitable character, the court, upon hearing the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules of equity. [R., § 3153; C., '51, § 1833.]

Where a bill is taken as confessed, all definite and positive allegations are to be taken as true without proof; but if the allegations are indefinite, or the prayer is uncertain, the certainty requisite to a proper decree must be afforded by proof: *Harrison v. Kramer*, 3-543; *Bolander v. Atwell*, 14-35.

Where a bill is taken *pro confesso*, all distinct and positive averments are to be considered as true; but if allegations are indefinite, or plaintiff's demand is uncertain, the requisite certainty must be afforded by the proof: *Atkins v. Faulkner*, 11-326.

A decree by default or *pro confesso* cannot be assailed by a bill of review on the ground that it was taken without evidence to support it, when it is recited therein that the cause was heard on the evidence: *Barnes v. Anderson*, 19-70.

The allegations in a petition to quiet title, that defendant holds certain real estate fraudulently and in trust for another, are to be taken as true when default is made: *Greeley v. Sample*, 22-338.

4082. When no personal service. 2875. A defendant served by publication alone, shall be allowed at any time before judgment to appear and defend the action, and upon a substantial defense being declared, time may be given on reasonable terms to prepare for trial. [R., § 3154.]

SERVICE BY PUBLICATION.

4083. Security required. 2876. When judgment by default is rendered against a defendant who has not been personally served, the court, before issuing process to enforce such judgment, may, if deemed expedient, require the plaintiff to give security to abide the future order of the court as contemplated in the following section. [R., §§ 3156-9; C., '51, § 1834; 9 G. A., ch. 150.]

4084. New trial after judgment. 2877. When a judgment has been rendered against a defendant or defendants served by publication only and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action retried, and, security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be retried as to such defendants as if there had been no judgment; and upon the new trial, the court may confirm the former judgment or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action or under the judgment and not restored. [R., § 3160; C., '51, § 1835.]

The filing of the motion here provided for, with the clerk, within a proper time is a sufficient "appearance in court," even though filed in vacation, and though the time therefor has expired before a term of court commences: *Conklin v. Johnson*, 34-266.

Upon the filing of such motion the defendant is entitled to a retrial of the entire proceeding: *Fleming's Heirs v. Hutchinson*, 36-519.

Upon the retrial depositions which were taken upon a notice filed with the clerk as provided in § 4984 are admissible. The fact that there was no cross-examination by defendant will not exclude them: *Watson v. Russell*, 18-79.

Where, upon a retrial, no sufficient defense is found to the action, the original judgment should be confirmed. It is not necessary that plaintiff again introduce evidence which he had before produced in taking the default, as, for instance, the note sued on: *Morton v. Coffin*, 29-235.

This section authorizes a retrial in all cases where a judgment by default has been rendered against one served by publication only. It has no reference to a case wherein a judgment is void for want of jurisdiction to render it: *Smith v. Griffin*, 59-409.

The provisions of this section are applicable where the party is served by publication with notice of the application by an executor to sell real estate under § 3593. Such party may, in the time and manner here provided, have an order of sale, made in pursuance of such application and notice, set aside: *Huston v. Huston*, 29-347; but these provisions are not applicable to divorce suits; and whether they are not limited in their application to actions *in rem*, *quære: Gilruth v. Gilruth*, 20-225; *Whitcomb v. Whitcomb*, 46-437.

The provisions of this section are, under § 4765, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

A defendant personally served outside of the state cannot claim the benefit of this section: *McBride v. Harn*, 52-79.

A defendant served by publication only cannot appeal until he has moved for a retrial as here provided (see § 4397): *Berryhill v. Jacobs*, 19-346; but an affirmance on appeal for failure to make such motion will not deprive the party of the right to still make the motion, if within proper time: *Berryhill v. Jacobs*, 20-246.

Section *held* not applicable in a particular case: *Hulverson v. Hutchinson*, 39-316.

The statute does not provide that notice of the motion shall be served upon the plaintiffs, and such notice is not required. The theory of the statute is that the case remains virtually in court for two years for the purpose of such motion, if any defendant shall see fit to make it. The court should, however, exercise some proper discretion as to the time for which the cause should be set for trial: *Pollock v. Simpson*, 67-519.

One who was not a party to the proceeding cannot in his own right have a new trial under this section: *Parsons v. Johnson*, 66-455.

The legal representatives of a party served by publication only may have the action retried under the provisions of this section: *Williamson v. Wachenheim*, 62-196.

4085. Title to property not affected. 2878. The title of a purchaser in good faith to any property sold under attachment or judgment, shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff and not bought of him in good faith by others. [R., § 3163; C., '51, § 1836.]

Section applied: *Union Bank v. Ames*, 37-672.

4086. Serving copy of judgment. 2879. The plaintiff may, at any time after the judgment, cause a certified copy thereof to be served on a defendant served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial shall be reduced to six months after such service. [R., § 3161.]

4087. Manner. 2880. The service of the copy of the judgment shall be, whether made within or without the state, actual and personal by delivery of copy, and made and returned as in case of original notice. [R., § 3162.]

4088. Personal judgment. 2881. No personal judgment shall be rendered against a defendant served by publication only who has not made an appearance. But a personal judgment shall be rendered against a defendant, whether he appear or not, who has been served in any mode in this code provided other than by publication, whether served within or without this state. [R., § 3164.]

Service by publication or by personal service without the state, upon one who is not a citizen or resident, confers no jurisdiction either as to the person or property of such non-resident, other than is acquired *in rem*: *Parrance v. Preston*, 18-396.

In a proceeding by attachment, when the defendant is personally served, the judgment should be *in rem* only, and a personal judgment would be void even though the attached property were sold thereunder: *Smith v. Griffin*, 59-409.

As personal service without the state only stands in place of notice by publication, no personal judgment can be rendered thereon: *Bates v. Chicago & N. W. R. Co.*, 19-260. And see notes to §§ 3823 and 3827.

LIENS OF JUDGMENTS.

4089. In state courts. 2882; 17 G. A., ch. 129, § 1. Judgments in the supreme, district [or circuit] court of this state, are liens upon the real estate

owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment. [R., §§ 4105, 4109; C., '51, §§ 2485, 2489.]

I. COMMENCEMENT AND CONTINUANCE.

When lien attaches: A verdict without the rendition of judgment thereon does not give plaintiff any interest in the property of defendant in advance of the rendition of judgment: *Miller v. Wolf*, 63–233.

A *nunc pro tunc* judgment will not become a lien upon property prior to its actual rendition so as to bind third persons: *Ibid.*

As between the judgment debtor and a purchaser under execution on such judgment, the purchaser may show by the pleadings or record in the action that the judgment attached as a lien on the property purchased by him, though from the face of the judgment that fact does not appear: *Markham v. Buckingham*, 21–494.

So *held* where individual property was sold under judgment nominally against a partnership: *Ibid.*

A judgment on a debt contracted prior to the time that property assumes the homestead character, although rendered after that time, is a lien on such property, certainly as to persons chargeable with notice of the character of the debt; and if one claims under a homestead right he is bound to ascertain when such right began: *Hale v. Heaslip*, 16–451.

As between judgment creditors and third persons it is not competent for the judgment creditor to extend the lien of his judgment by proof *aliunde*, but as between the parties to the judgment and their heirs such proof is admissible: *Delavan v. Pratt*, 19–429.

Under prior statutory provisions, the lien of a judgment on a note secured by mortgage attached as between the parties from the date of the recording of the mortgage, but as to third persons the lien only attached from the date of the rendition of the judgment unless the property was described in the judgment and a special execution directed: *State v. Lake*, 17–215.

In such case the mortgage lien continues until the debt is satisfied and is not merged in the judgment on the note secured: *Ibid.*

How long lien continues: The lien of a judgment expires in ten years, and cannot be revived or continued after that time by any proceeding on the judgment: *Denegre v. Haun*, 13–240; *Virden v. Shepard*, 72–546.

A judgment lien which has expired by limitation cannot be revived as against another judgment lien acquired after the expiration of the ten years and prior to such revivor: *Boyle v. Maroney*, 73–70.

But although the lien ceases the judgment itself is not barred until the expiration of twenty years, and during that time an execution may be issued and a sale had thereunder; but an execution issued after the expiration of the ten years only operates as a lien from the time of its levy: *Stahl v. Roost*, 34–475.

In case of a mortgage foreclosure the lien of the mortgage is not merged in that of the judgment, and continues after the judgment lien ceases, and until the judgment itself is barred: *Ibid.*; *Hendershott v. Ping*, 24–134; *Shearer v. Mills*, 35–499.

If, on appeal from the judgment, it is affirmed and a *procedendo* issues, the lien of the judgment continues; but if a new judgment is rendered in the supreme court upon the appeal bond, the former judgment is merged therein, and its lien is lost: *Swift v. Conboy*, 12–444.

The lien of a judgment will not be destroyed by a sale of the property under a judgment subsequently rendered: *Lathrop v. Brown*, 23–40.

A judgment upon the former judgment, not by way of revivor, but as upon a debt, merges the old judgment in the new, and the lien of the old judgment ceases to exist: *Denegre v. Haun*, 13–240.

Release of lien: In order to establish a parol release of real estate from a judgment lien the proof must be clear, satisfactory and conclusive: *Dalby v. Cronkhite*, 22–222.

Where a judgment is canceled the lien thereof ceases to exist: *Polk County v. Nelson*, 75–648.

After death of judgment debtor: A judgment may be enforced against property upon which it is a lien, after the death of a debtor, without filing it as a claim against the estate; but this must be done while the judgment lien exists: *Baldwin v. Tuttle*, 23–66; *Davis v. Shawhan*, 34–91; *Boyd v. Collins*, 70–296.

Effect of bankruptcy: A valid, subsisting judgment lien in a state court existing at the time of bankruptcy of defendant cannot be assailed in the bankrupt court, and a decree in the state court subsequent to the bankruptcy, subrogating a surety to the benefit of such lien on account of payment of the judgment made before bankruptcy, will not be void, although the assignee in bankruptcy is not made a party to the action: *Perry v. Miller*, 54–277.

II. UPON WHAT PROPERTY.

Origin of judgment liens: Before the statute of Westminster 2, judgments could not be collected by sale of land, but by that statute creating the writ of *elegit*, although no lien was created, yet lands were considered as subject to judgment and the courts inferred a lien from the power to take lands on execution: *Woods v. Mains*, 1 G. Gr., 275.

The mortgagee's interest being deemed personal property, a judgment against the mortgagee does not become a lien upon the real property covered by the mortgage: *Scott v. Mewhirter*, 49–487.

Claim for tort: The holder of a judgment against one having a claim for a tort has no equities as against such claim which give him a prior right thereto over a creditor to whom the claim may be assigned: *Gray v. McCallister*, 50–497.

A leasehold interest is such interest in real estate as is subject to the lien of a judgment: *First Nat. Bank v. Bennett*, 40–537.

The creditor does not, in such cases, need the aid of a court of equity to enforce his

judgment. He can sell the leasehold interest upon execution: *Sweezy v. Jones*, 65-272.

The lien of a judgment attaches to the interest of a tenant in real property leased by him and a building erected thereon, unless the right to remove such building at the expiration of the tenancy appears, and the lien of the judgment will be prior to that of a chattel mortgagee of such building: *Hayden v. Goppinger*, 67-106.

It appears that the same rule would apply even where the right of the tenant to remove the building at the expiration of the lease is shown: *Ibid.*

License: A judgment lien will not attach to a mere license or privilege to use real property for a particular purpose, which may be terminated at pleasure by the party having such privilege: *Melhop v. Meinhart*, 70-685.

A building erected under a license upon the land of another is a chattel and is not subject to the lien of a judgment: *Walton v. Wray*, 54-531.

A vendor's lien is not such an interest in real estate, without a judgment against the purchaser, that it can be enforced against such real estate. Equitable proceedings, or proceedings by garnishment, must be resorted to for that purpose, and until such proceedings are commenced the purchaser of the real estate may discharge the lien by payment to the vendor: *Baldwin v. Thompson*, 15-504; *Woodward v. Dean*, 46-499.

Does not attach to fund: Where land subject to a lien is sold, the lien still remains on the land, and does not attach to the fund: *Sullivan v. Leckie*, 60-326.

Option to purchase: The mere right of an option to purchase real property is not a right in the property to which a judgment lien can attach: *Sweezy v. Jones*, 65-272.

A pre-emption right to lands being a right which is temporary in its nature and unknown to the common law is not subject to the lien of a judgment: *Harrington v. Sharp*, 1 G. Gr., 131.

Naked legal title: A judgment lien does not attach to property, the naked legal title of which passes through the judgment debtor without any interest in such property having vested in him: *Atkinson v. Hancock*, 67-452.

In enforcing a judgment lien the law looks for the equitable interest in the property. If defendant has no such interest and holds only the legal title, the lien does not attach. If he has such interest, and another person holds the legal title, the lien will attach: *Rice v. Kelso*, 57-115.

Therefore, *held*, that a judgment would not attach to property already acquired by the judgment defendant which had been mortgaged by him previous to its acquisition. In such case the prior mortgage would attach to the subsequently acquired title before the attachment of the judgment lien: *Ibid.*

The lien of a judgment attaches, not to the naked legal title of property, but to the interest which the debtor has therein: *Blaney v. Hanks*, 14-400; *Patterson v. Linder*, 14-414; *Churchill v. Morse*, 23-229.

Equitable interests: A judgment becomes a lien upon any interest in real estate owned by the debtor, whether it be equitable or legal: *Blain v. Stewart*, 2-378; *Crosby v. Elkader Lodge*, 16-399.

But the unsatisfied portion of a judgment does not remain a lien upon the debtor's interest in property which has been sold in partial satisfaction of such judgment: *Clayton v. Ellis*, 50-590. On this point see notes to § 4331.

A judgment is a lien upon any equitable interest in land in the judgment debtor which may be sold on execution, but is subordinate to vendors' liens and homestead rights existing prior to the judgment: *Twogood v. Stephens*, 19-405.

A judgment is a lien upon the equitable interest of the debtor in real estate, and if such equitable interest is of record it may be sold under execution, and the title thereby acquired will prevail as against an equitable action to subject such interest to the payment of another judgment on the same debt: *Lippencott v. Wilson*, 40-425.

A judgment is enforceable as a lien against an equitable interest in real property: *Bartle v. Curtis*, 68-202.

As between the parties, it is immaterial whether the equitable interest appears of record or not: *Denegre v. Haun*, 13-240; *Lathrop v. Brown*, 23-40.

A purchaser at the execution sale of an equitable interest takes only such interest as the debtor actually has in the property. The lien of a judgment on such equitable interest will not affect the legal title of a person holding *bona fide* without notice of such equity: *Harrison v. Kramer*, 3-543; *Hultz v. Zollars*, 39-589.

A junior judgment creditor taking advantage of the proceedings provided by § 4379 *et seq.* for subjecting equitable interests to the satisfaction of a judgment may acquire by reason of his greater diligence a lien upon such property which will be superior to that of a prior judgment: *Bridgman v. McKissick*, 15-260; *Boyle v. Maroney*, 73-70.

A judgment lien upon an equitable interest in real property will not prevail as against subsequent *bona fide* purchasers without notice: *Stadler v. Allen*, 44-198; *Farmers' Nat. Bank v. Fletcher*, 44-252.

Interest of partnership in real property: A judgment being a lien upon equitable interests in real property is a lien upon land owned by a partnership where the naked legal title is still in the former owner: *Lathrop v. Brown*, 23-40.

Whether a judgment in an action brought against a partnership in their firm name alone is a lien only upon the partnership property, *quære: Markham v. Buckingham*, 21-494.

A judgment against a firm is not a lien upon real estate equitably belonging to it, but held in the name of one partner: *Stadler v. Allen*, 44-198.

The lien of a judgment rendered upon a partnership debt, if prior in time to one on an individual debt, is not postponed to the latter. The rule that individual creditors are to have priority as to individual property applies only in equity: *Gillaspy v. Peck*, 46-461.

The fact that the holder of a judgment against a partnership releases land which is subject to the lien of the judgment will not

relieve one of the partners from liability under such judgment: *Gegner v. Warfield*, 72-11.

Property held in trust: A judgment is a lien upon the equitable interest of the debtor in property conveyed by trust deed, and the surplus in the hands of the trustee may be subjected to the payment of the judgment, but the lien does not attach to such surplus until steps are taken to subject it to the payment of the judgment: *Cook v. Dillon*, 9-407.

If proceedings have been commenced to reach the surplus in the trustee's hands, the jurisdiction of the court in such proceedings will not be ousted by garnishment of the trustee to subject the money in his hands to a judgment against the debtor: *Ibid.*

A judgment against a person in his individual capacity does not become a lien upon land conveyed to him as trustee: *Boardman v. Willard*, 73-20.

Property fraudulently conveyed: A judgment recovered by a creditor after a fraudulent conveyance by his debtor does not become a lien upon the property so conveyed, in the absence of proceedings to subject the property to such judgment. The conveyance is absolute as to the grantor, and leaves no interest in him subject to the lien: *Howland v. Knox*, 59-46.

Where the debtor has made a fraudulent conveyance of his property to one who purchases in bad faith, the lien of the judgment attaches, and the creditor may sell the land under execution, and after expiration of the time of redemption may bring action to set aside the fraudulent conveyance and quiet his title: *Harrison v. Kramer*, 3-543.

Survivor's right in homestead: A judgment against the husband does not become a lien on his right to occupy the homestead as survivor upon the death of the wife, owning the fee: *Smith v. Eaton*. 50-488.

Exempt property: The lien of a judgment does not attach to property which is exempt from execution, as, for instance, a homestead: *Lamb v. Shays*, 14-567; *Cummings v. Long*, 16-41.

Therefore, a judgment against a city does not become a lien upon its public buildings which by § 4273 are exempt from sale on execution: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276.

III. EFFECT OF LIEN; PRIORITIES.

Nature of lien: A judgment lien upon land constitutes no property or right in the land itself: *Independent School Dist. v. Werner*, 43-643.

Rights of owner subject to lien: The owner of property subject to a judgment lien has the right to cut wood and timber upon the land. Timber thus cut but not removed becomes personal property, and does not pass under a sale of the property, under execution subsequently levied: *Ibid.*

Enjoining sale: Where execution is levied on real property upon which the judgment is not a lien, a sale may be enjoined to prevent a cloud being cast upon the title: *Key City Gas Light Co. v. Munsell*, 19-305.

But if the judgment is a lien it cannot be enjoined on the ground that it is inferior to the lien of plaintiff. The senior lienholder is not entitled to an injunction to prevent the junior lienholder from selling: *Wiedner v. Thompson*, 66-283.

Redemption by lienholder: The holder of a judgment lien not made a party to a foreclosure proceeding may make equitable redemption from a purchaser at the foreclosure sale: *Wright v. Howell*, 35-288.

Priority of lien: The lien of a judgment creditor is subject to equities against the property of the debtor existing in favor of third persons at the time of the recovery of the judgment: *Jones v. Jones*, 13-276; *Parker v. Pierce*, 16-227; *Welton v. Tizzard*, 15-495.

A specific lien, though unrecorded, such as that specially arising by stipulation in a confession of judgment, takes priority over a judgment lien: *Sigworth v. Merian*, 66-477.

A judgment creditor, not having a specific lien upon the property, but merely such lien as the statute gives, acquires no priority over an unrecorded mortgage or other conveyance. *Seevers v. Delashmutt*, 11-174; *Welton v. Tizzard*, 15-495; *Hays v. Thode*, 18-51; *Hoy v. Allen*, 27-208; *Rice v. Kelso*, 57-115.

A judgment lien will not take priority over a subsequent mortgage given in renewal of a previous mortgage: *Young v. Shaner*, 73-555.

If the prior unrecorded instrument is recorded before sale of the property under an execution issued upon the judgment, the purchaser at such sale is affected with notice thereof. In this respect the assignee of the judgment stands in no better position than the original judgment creditor, and is equally affected with all equities and conveyances of which he has notice before becoming a purchaser at the sale: *Chapman v. Coats*, 26-288.

That a judgment creditor is not a purchaser in such sense as to be protected against prior unrecorded instruments, see notes to § 3112.

Neither a judgment creditor nor an assignee of such judgment acquires any interest in lands standing in the name of the judgment debtor, such as will be paramount to the right of one who has conveyed such lands, to have the conveyance set aside on the ground that it was procured by fraudulent representations: *Rider v. Kelso*, 53-367.

One who purchases property subject to a mortgage and pays the amount of such mortgage does not thereby acquire rights superior to the lien of the judgment upon the premises, even though it is subsequent to the mortgage: *First Nat. Bank v. Thompson*, 72-417; *Goodyear v. Goodyear*, 72-329.

A vendor's lien is subordinate to a judgment lien acquired without notice of the vendor's rights: *Cutler v. Ammon*, 65-281.

Prior sale under junior judgment: The purchaser at a sale under a judgment which is in existence as a lien will acquire priority over a purchaser at a sale prior in point of time, but under a junior judgment: *Marshall v. McLean*, 3 G. Gr., 363.

Judgments of same date: As between judgment creditors whose liens are of the same date, he who first takes the property in execution has the preference to be first paid: *Cook v. Dillon*, 9-407: *Lippencott v. Wilson*, 40-425; *Wilson v. Baker*, 52-423.

Priority of seizure: Where neither of two judgments is a lien upon the real property in question the one under which the real property is first seized by actual levy will be a prior lien thereon: *Lathrop v. Brown*, 23-40.

As between judgments for partnership and individual debts: A judgment against an individual partner for a partnership debt which is prior in time to a judgment against him for an individual debt will be prior in lien also. Such priority is not affected by the rule for marshaling assets in such cases: *Gillaspy v. Peck*, 46-461.

Lien under judgments by agreement: With regard to the effect of particular stipulations in judgments with respect to the liens thereof, see *Perry v. Miller*, 54-277; *Sigworth v. Meriam*, 66-477.

Subrogation: Where a surety pays off a judgment the judgment is considered discharged and can no longer be enforced at law, but in equity the lien will be regarded as surviving for his protection, and by an action in equity he may avail himself of the lien. But the action to recover from the principal the amount paid is based upon an implied promise, and is barred in five years from the time of payment: *Johnston v. Belden*, 49-301.

The statements of the petition in a particular case *held* sufficient to entitle plaintiff, as surety, having paid the claim, to subrogation to the rights of the judgment creditor against the estate of a deceased defendant, whether such deceased defendant was the principal debtor or a co-surety with plaintiff: *Hollingsworth v. Pearson*, 53-53.

The purchaser of a judgment in foreclosure becomes subrogated to the rights of the original holder, and may have the premises, upon which the judgment is a lien, sold thereunder: *Shimer v. Hammond*, 51-401.

4090. When attach. 2883. When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition. [R., § 4106; C., '51, § 2486.]

4091. In another county. 2884. If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. [R., § 4107; C., '51, § 2487.]

As to filing transcripts in another county, see § 4256.

As to transcripts of judgments in justices' courts, see § 4816 and notes.

4092. Transcript docketed. 2885. Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same in the same manner as though rendered in the court of his own county. [R., § 4108; C., '51, § 2488.]

The clerk of the court where the transcript is docketed cannot issue execution thereon: *Seaton v. Hamilton*, 10-394.

LIENS OF JUDGMENTS IN FEDERAL COURTS.[1]

4093. Filing copy. 17 G. A., ch. 129, § 2. Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens

[1] The following recent act of congress is of importance in relation to this subject:

"AN ACT to regulate the liens of judgments and decrees of the courts of the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"SEC. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"SEC. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county.

"Approved August 1, 1888."

upon the real estate owned by the defendant, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment, by filing an attested copy of the judgment in the office of clerk of the state district court of the county in which the land lies; and no lien shall attach to the lands in any county of this state until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition.

4094. Duty of clerk. 17 G. A., ch. 129, § 3. The clerk shall, on the filing of such transcript in his office, immediately proceed to docket and index the same in a separate book kept for that purpose, in the same manner as though rendered in the court of his own county, and he shall be allowed to charge and receive the same fees as provided by law for like service.

4095. Satisfaction of judgment. 17 G. A., ch. 129, § 4. When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing, referring to the judgment, and have it duly acknowledged and filed in the office of the clerk of the district court in every county where the judgment is a lien. If he fails to do so within sixty days after having been requested in writing so to do, he shall forfeit to the *plaintiff*, [defendant,] the sum of fifty dollars.

CONVEYANCE BY COMMISSIONER.

4096. When authorized. 2886. Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another;

2. Where such property has been sold under a judgment or order of the court, and the purchase money paid. [R., § 3165.]

4097. Deed. 2887. The deed of the commissioner shall refer to the judgment, orders, and proceedings authorizing the conveyance. [R., § 3166.]

4098. Title. 2888. A conveyance made in pursuance of a judgment, shall pass to the grantee the title of the parties ordered to convey the land. [R., § 3167.]

4099. Parties to the action. 2889. A conveyance made in pursuance of a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding. [R., § 3168.]

4100. Approval by court. 2890. A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance and recorded with it. [R., § 3169.]

4101. Form. 2891. It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the name of such parties shall be recited in the body of the conveyance. [R., § 3170.]

4102. Recorded. 2892. The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it. [R., § 3171.]

4103. Approval by judge. 2893. In all cases under this code, whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, it shall be lawful for the judge of the court, in vacation, to confirm or approve the same, and to cause the proper entry or entries thereof to be made required by law and the rules of such court.

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

4104. How entered. 2894. A judgment by confession without action, may be entered by the clerk of the district [or circuit] court in the manner hereinafter prescribed. [R., § 3397; C., '51, § 1837.]

The statute does not authorize the confession of a judgment by the debtor without the knowledge or consent of the creditor. Such a judgment may be canceled on motion of the creditor: *Farmers', etc., Bank v. Mather*, 30–283.

4105. Only for money. 2895. Such confession can be only for money due, or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum. [R., § 3398; C., '51, § 1838.]

4106. Statement. 2896. A statement in writing must be made and signed by the defendant and verified by his oath to the following effect, and filed with the clerk:

1. If for money due or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due as the case may be.

2. If for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same. [R., § 3399; C., '51, § 1839.]

It is not sufficient to state that the sum for which judgment is confessed is due upon a note, but the statement should show the manner in which the indebtedness arose for which the note was given, and it must state that the amount is justly due: *Edgar v. Greer*, 7–136.

Where the statement was that the amount was due on a promissory note given for a balance due on settlement, and it was not alleged that the amount was justly due, *held*, that a judgment on such statement was illegal and should not affect third parties, and that an existing creditor, subsequently obtaining judgment, might have the judgment by confession set aside on motion: *Bernard v. Douglas*, 10–370.

As between the parties judgments by confession are valid, although the statement does not substantially comply with the statute in showing how the indebtedness arose. (Criticising *Edgar v. Greer*, 7–136, and *Kennedy v. Lowe*, 9–380, which held that the defendant himself might take advantage of such defect): *Plummer v. Douglas*, 14–69. And see *Churchill v. Lyon*, 13–431.

A statement that the amount due was for money borrowed from plaintiff and interest, etc., evidenced by a promissory note, etc., *held* sufficient: *Vanfleet v. Phillips*, 11–558.

And so *held* where the statement was for "money borrowed:" *Marvin v. Tarbell*, 12–93; *Kendig v. Marble*, 58–529.

As to sufficiency of statements in particular cases, see *Daniels v. Claflin*, 15–152; *Miller v. Clarke*, 37–325.

In a particular case, *held*, that the statements of the confession of judgment did not render a party thereto liable to judgment thereon as principal, but only as surety: *Jarosh v. Easton*, 57–569.

The mere fact that the statement for the confession of judgment is sworn to before a notary public who at the time is one of the attorneys of the plaintiff does not necessarily render it void. But such circumstance might be considered if it were claimed that fraud was practiced in procuring the confession: *Vanfleet v. Phillips*, 11–558.

Failure of the notary to affix his seal to the jurat of the affidavit to the statement will render judgment thereon erroneous: *Chase v. Street*, 10–593.

Where the jurat to the statement for confession of judgment was defective in that the notary public omitted to sign his surname, but the seal attached gave his name in full, *held*, that the authentication was sufficient and the confession valid: *Grattan v. Matteson*, 54–229.

As between the parties, the statement will be sufficient without being sworn to. A defect in that respect may be amended on leave of court: *Thorp v. Platt*, 34–314.

As between the parties, if defendant swears that a certain sum is due and consents to the rendition of judgment for that amount, there is no necessity for a sworn statement: *Plummer v. Douglas*, 14–69.

If the honesty and integrity of the transaction is affirmatively shown, the judgment will not be invalid as to creditors or parties, though based upon a defective statement: *Vannice v. Greene*, 16–574.

A confession of judgment can only be made as here provided, and a warrant of attorney to confess judgment which would be valid in another state where it is executed will not be sufficient in this state to authorize the entry of judgment thereunder: *Hamilton v. Schoenberger*, 47–385.

One partner has no authority to confess judgment against the firm, and such a judgment would be void as to the other partners: *Christy v. Sherman*, 10–535.

But it would be binding as to the partner confessing judgment: *North v. Mudge*, 13–496.

Where the statement was signed in the firm name, and sworn to by one member, and the judgment entry recited that the firm acknowledged themselves justly indebted, etc., *held*, that the judgment would bind the firm: *Edwards v. Pitzer*, 12–607.

4107. Judgment; execution. 2897. The clerk shall thereupon make an entry of judgment in his court record for the amount thus confessed and costs, and shall issue execution thereon as in other cases. [R., § 3400; C., '51, §§ 1840–1.]

Entry by clerk: All the power the clerk has to render judgment on confession is given by the statute, and, unless its provisions are strictly complied with, the power of attorney under which the clerk acts is a nullity: *Edgar v. Greer*, 7–136: *S. C.*, 10–279.

The statute authorizing confessions of judgment does not give judicial powers to the clerk of the court. The judgment entered is to be treated as one entered by the court itself: *Grattan v. Matteson*, 54–229.

In vacation: Judgment may be entered by the clerk in vacation and approved at the next term: *Vanfleet v. Phillips*, 11–558: *Kendig v. Marble*, 58–529.

Appearance by attorney is not necessary in order to support a confession of judgment: *Edmonds v. Montgomery*, 1–142.

Lien of: Where a confession of judgment stipulated that execution thereon should not be issued for two years, and that the judgment should be a lien upon the property described therein until fully paid, *held*, that such confession of judgment constituted in effect a mortgage upon the property described which would have priority over the lien of a subsequent judgment creditor, even after the expiration of ten years from the time of rendering judgment on the confession: *Sigworth v. Meriam*, 66–477.

Alteration of record: Evidence in a particular case, *held* insufficient to establish the alteration of the record of a judgment by confession: *Wright v. Howell*, 35–288.

Appeal: The judgment when entered is a judgment by the court, and is subject to revision on appeal in the same manner as any other judgment: *Edgar v. Greer*, 7–136; *Troxel v. Clarke*, 9–201: *Burge v. Burns*, Mor., 287.

Execution: Process may issue for the enforcement of a judgment by confession before the approval of the record of such judgment: *Vanfleet v. Phillips*, 11–558; *Wright v. Howell*, 35–288.

Effect of: In the absence of fraud or other ground of equitable relief, the judgment is conclusive as to any defense, such as usury, which might have been interposed before judgment: *Twogood v. Pence*, 22–543; *Troxel v. Clarke*, 9–201; *Miller v. Clarke*, 37–325.

But a judgment by confession, entered into with the purpose of evading the usury laws, is void, as between the parties, as to the amount in excess of the sum lawfully due: *Mullen v. Russell*, 46–386; *Ohm v. Dickerman*, 50–671.

The mere fact that the note upon which judgment by confession is rendered is usurious does not in itself show that the parties caused judgment to be entered for the purpose of concealing usury or to avoid the statute against it: *Kendig v. Marble*, 58–529.

Where a surety's signature to a note was obtained by false representations amounting to fraud on the part of the payee, *held*, that a confession of judgment thereon, made before the fraud was known to the surety, would not estop him from setting up that fact in an action to set aside the judgment: *Melick v. First Nat. Bank*, 52–94.

Where, in an action of foreclosure, mortgagee set up a written agreement by mortgagor to confess judgment, and an issue was made upon the allegation that such agreement was obtained by fraud, which issue was found for plaintiff, *held*, that such determination only settled the validity of the agreement, and that defendant could still file another answer, setting up usury: *Lyon v. Welsh*, 20–578.

Confession of judgment by a principal will not bar action thereon against a surety: *Citizens' Savings Bank v. Olsen*, 47–492.

Errors or irregularities, not rendering the judgment by confession void, cannot be taken advantage of by a garnishee: *Henny Buggy Co. v. Patt*, 73–485.

In justices' courts: See § 485.

4108. Offer to confess before action. 2898. Before an action for the recovery of money is brought against any person, he may go before the clerk of the courts of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action as provided for in the foregoing sections. Whereupon, if such person, having had the same notice as if he were defendant in an action, that the offer would be made, of its amount and of the time and place of making it, refuses to accept it, and should afterwards commence an action upon such cause and not recover more than the amount so offered to be confessed, he shall pay all the costs of action; and on the trial thereof, the offer shall not be deemed to be an admission of

the cause of action or amount to which the plaintiff was entitled, nor be given in evidence. [R., § 3403.]

4109. Offer to confess after action brought. 2899. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had three days' notice that the offer would be made, of its amount and of the time of making it, fails to attend, and on the trial does not recover more than was so offered to be confessed, such plaintiff shall pay the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or amount to which the plaintiff was entitled, nor be given in evidence upon trial. [R., § 3404.]

Under this section an offer to confess judgment may be made orally, and there is nothing requiring it to be a matter of record. It is therefore competent, when the amount of the offer is questioned, to prove it by parol: *Barlow v. Buckingham*, 68-169.

An offer to confess judgment for a certain amount carries with it liability for costs, and it is not necessary that the offer to confess expressly include costs: *Manning v. Irish*, 47-650.

Where in an action for balance on mutual accounts an offer to confess was made for a certain amount, *held*, that it was an offer to confess a balance of that amount due and not merely to confess items of indebtedness on defendant's part to plaintiff amounting to the sum specified: *Ibid.*

The offer to confess must be confined to claims embraced in the suit: *Phillips v. Shearer*, 56-261.

An offer to confess, unless accepted, does not entitle plaintiff to judgment for the amount offered: *Holmes v. Hamburg*, 47-348.

If the offer to confess is insufficient it is to have no effect on the question of costs: *McClatchey v. Finley*, 62-200.

The provisions as to offer to confess judgment are applicable in cases of appeal from the award made by commissioners in assessing the damages for taking right of way: *Harrison v. Iowa Midland R. Co.*, 36-323.

Where an offer to confess was made in a justice's court, and plaintiff recovered judgment for a larger amount than the amount of the offer, but on appeal judgment was given for an amount not greater than the offer, *held*, that plaintiff should pay the costs. The provisions of this section have reference to the amount finally recovered: *Watts v. Lambertson*, 39-272.

The provision as to offering to confess judgment does not contemplate admissions or confessions contained in the pleadings: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

CHAPTER 11.

OF AN OFFER TO COMPROMISE.

4110. Offer of judgment. 2900. The defendant in an action for the recovery of money only, may, at any time after service of notice and before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum of money, or to the effect therein specified with costs. If the plaintiff accept the offer, and gives notice thereof to the defendant or his attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be entered upon record and judgment shall be rendered by the court accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs but shall pay the defendant's costs from the time of the offer. [R., § 3405.]

Under this section it is error to allow the statement of an offer to compromise to be made to the jury: *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345.

The only effect of the offer is as to costs: *Ibid.*

Where an offer to allow judgment to be taken is not accepted, an attempt on the part

of the counsel for the party to whom it is made to introduce it in evidence constitutes misconduct, but no steps being taken at the time to have the jury discharged and a new one impaneled on account of such misconduct, *held*, that the act of the party objecting in proceeding with the trial of the cause was a waiver of his objection: *Riech v. Bolch*, 68-526.

An offer to pay a sum of money and costs if plaintiff will dismiss his action is not within the provisions of this section: *Quinton v. Van Tuyl*, 30-554.

Where, in a proceeding to condemn the right of way for a street, plaintiff offered to submit to judgment in a certain amount, and on the trial a less amount was found for defendant, *held*, that it was not a case for taxing costs against defendant, the action not being one for the recovery of money: *Cherokee v. Sioux City & I. F. Town Lot Co.*, 52-279.

Where an offer to confess judgment has been made which is insufficient in amount, it will have no effect upon the question of costs where the matter to which the confession relates is only one of the questions upon which the controversy is determined: *McClatchey v. Finley*, 62-200.

4111. Conditional offer. 2901. In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing, that if he fails in his defense the amount of recovery shall be assessed as a specified sum. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after it was served, or within three days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff does not so accept the offer, he shall prove the amount to be recovered as if the offer had not been made, and the offer shall not be given in evidence or mentioned on the trial. And if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense, and in respect to the question of amount, to be taxed under the direction of the court. [R., § 3406.]

4112. No cause for continuance. 2902. The making of any offer pursuant to the provisions of this chapter, shall not be a cause for a continuance of an action or a postponement of a trial. [R., § 3407.]

CHAPTER 12.

OF RECEIVERS.

4113. When and how appointed. 2903. On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits, and such other proof as the court or judge deems proper, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned. [R., § 3419; C., '51, § 1656.]

Insolvency not sufficient: Insolvency of the defendant *held* not sufficient to authorize the appointment of a receiver in an action to recover possession of real property: *Cofer v. Echerson*, 6-502.

Other remedies: It does not seem to be the practice of the courts to appoint a receiver where the question is upon the legal right, or where a party can assert his right by a direct action at law as for possession: *Ibid.*

In a law action: Under this section a receiver may be appointed in a law action, and, in a proper case, before the defendant is affected with notice of the pendency of the suit: *Jones v. Graves*, 20-596.

Probable right: It is not necessary that it should conclusively appear that the party is entitled to recover, before a receiver can be appointed; a probable right only is required: *Des Moines Gas Co. v. West*, 44–23.

In equity; settlement of partnership accounts: It is a legitimate and regular mode of proceeding for a court of equity, in an action for the settlement of accounts between partners, to appoint a receiver to take charge of the partnership assets, etc.: *Saylor v. Mockbie*, 9–209.

In such a case it must first be made to appear that there is a partnership in existence, and a right in the party applying to share in the profits; a mere agreement for a partnership will not be sufficient: *Hobart v. Ballard*, 31–521.

In a particular case, *held*, that the facts were not sufficient to authorize the appointment of a receiver of partnership property on the petition of one of the partners: *Loomis v. McKenzie*, 31–425.

In action against bank: In a particular case, *held*, that, although the facts shown were not consistent with entire good faith on the part of the officers of a bank, they were not sufficient to justify the appointment of a receiver to take charge of the business of the bank: *French v. Gifford*, 30–148.

Rights of third parties: While it is competent for a court of equity to take possession of property, which is the subject of litigation, by an interlocutory order, yet if the rights of third persons, not parties to the record, have intervened, as by purchase in good faith, the property will not be ordered into the possession of a receiver in this summary manner: *Levi v. Karrick*, 13–344.

Attached property: As to appointment of receiver of attached property, see § 4184.

Particular facts: Under the facts in a particular case, *held* the party was not entitled to the appointment of a receiver: *Sleeper v. Iselin*, 59–379.

Mortgaged property: The appointment of a receiver to take charge of mortgaged premises, after final judgment of foreclosure, is allowable, if at all, only upon a strong showing: *Adair v. Wright*, 16–385.

Where a mortgagor is insolvent and the mortgaged property is insufficient to pay the debt, if the rents and profits are included in the mortgage, the general rule is to appoint a receiver as of course: *Des Moines Gas Co. v. West*, 44–23.

There is a clear and well defined distinction as to the right to have a receiver appointed where the bonds and mortgage pledge the rents or income for the payment of the debt, and where they do not: *Ibid.*

Where the rents and profits are applied to the mortgage debt there is no occasion for the appointment of a receiver and none will be appointed: *Fitzgerald v. Daniels*, 52–744; *Myton v. Davenport*, 51–583. And see *Barnett v. Nelson*, 54–41.

The possession of mortgagor, pending proceedings to foreclose, should not be disturbed by the appointment of a receiver, except in cases of fraud clearly proved, or in order to protect the rights of a party having a clear, strong claim: *Callanan v. Shaw*, 19–183.

In order to authorize the appointment of a receiver of mortgaged property it must appear that the property, or its rents and profits, are in danger of being lost or materially impaired. Where a mortgagee is in possession of a stock of goods and selling them out in the usual course of trade, and it does not appear that he is an improper person to be intrusted with the property, a receiver will not be appointed at the instance of a creditor of the mortgagor who garnishes the mortgagee: *Silverman v. Kuhn*, 53–436.

Whether a receiver can be appointed on foreclosure of a mortgage to collect the rents and profits during the period of redemption, *quære: Goodhue v. Daniels*, 54–19.

Even though a mortgage creates a lien upon rents and profits and stipulates for the appointment of a receiver, yet the mortgagee is not as a matter of course entitled to such receiver after judgment of foreclosure, where it does not appear that such rents and profits are being wasted or that they are being properly applied to prior mortgages: *Paine v. McElroy*, 73–81.

Where a chattel mortgagee brought an action in equity to foreclose his mortgage against the mortgagor and certain attaching creditors, the mortgage being upon a stock of dry goods which would have been greatly depreciated in value if taken and withheld from sale by the mortgagee, and the mortgagee having by the mortgage the right to take possession whenever he should choose to do so, and proceed to subject the property to the payment of the amount due or to become due on his mortgage, *held*, that the case was a proper one for the appointment of a receiver upon request of such mortgagee, although the action was commenced before the mortgage indebtedness had become due: *Maish v. Bird*, 59–307.

As to appointment of receiver when mortgagor is guilty of fraud, see *Callanan v. Shaw*, 19–183; *White v. Griggs*, 54–650.

One tenant in common cannot have a receiver appointed for a co-tenant who is in possession of the premises, unless the circumstances are such as to make the co-tenant liable to account: *Varnum v. Leek*, 65–751.

Errors of court and of receiver: Any errors in the proceedings of the court appointing a receiver and controlling and directing his action must be corrected by the proper application to the court, or by appeal from its orders or decisions as provided by the law applicable to such cases. Errors or irregular proceedings of the receiver must be corrected by the court having control of his action. They cannot be set up in an action brought by him under the direction of the court: *Stewart v. Lay*, 45–604.

Fraud in appointment of receiver; when to be pleaded: Fraud in the appointment of a receiver of a corporation should be set up in the action in which the receiver is appointed and not that in which the receiver sues for a stock subscription: *Schoonover v. Hinckley*, 48–82.

Res adjudicata: Where the appointment of a receiver is asked in an action to wind up a partnership, and refused, after which the action is dismissed by the plaintiff, it is not a *res adjudicata*, and a party may apply again

in a new action brought for the same purpose some time afterwards: *Anderson v. Powell*, 44–20.

Appointment in vacation: The judge may appoint a receiver in vacation. Such appointment should not, except under peculiar circumstances, be made without notice to the opposite party, and where peculiar circumstances are relied on they should be set forth: *French v. Gifford*, 30–148; *Bisson v. Curry*, 35–72, 80; *Howe v. Jones*, 57–130.

Notice: Where the adverse party is not within the jurisdiction of the court and cannot be served with notice, the court may, under some circumstances, appoint a receiver without notice: *Maish v. Bird*, 59–307.

Improper appointment: Where a bond was required of the party asking the appointment of a receiver, *held*, that he might be liable on such bond for injury resulting from an improper appointment, although the receiver was guilty of no act rendering him liable on his bond: *Thayer v. Hurlburt*, 5–521.

Where the court appoints as receiver a person agreed upon by the parties, it will be considered that the parties have consented that the receiver be appointed: *Jaffray v. Raab*, 72–335.

4114. Oath and bond of. 2904. Before entering upon the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be by him approved, in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties and that he will obey the orders of the court in respect thereto. [R., § 3420; C., '51, § 1657.]

4115. Power of. 2905. Subject to the control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized. [R., § 3421; C., '51, § 1658.]

Failure to intervene; no appeal: A receiver who does not intervene and have himself made a party to the action against the former holder of the property, over which he claims custody by virtue of his receivership, cannot maintain the appeal from the judgment rendered: *Borgalthous v. Farmers', etc., Ins. Co.*, 36–250.

In what court receiver may be sued: The fact that a corporation is in the hands of a receiver will not deprive another court of jurisdiction to entertain an action against such receiver of the corporation without the consent of the court appointing the receiver having been first obtained. But the court appointing the receiver may interfere and protect the possession of its receiver whenever such possession is sought to be disturbed: *Allen v. Central R. Co.*, 42–683.

To bring an action in a state court against a receiver appointed in a federal court, leave not having first been obtained, constitutes a contempt: *Thompson v. Scott*, 4 Dillon, 503.

Garnishment of receiver: Receivers of insolvent debtors being representatives of the court are not subject to garnishment even where permission to proceed against the receiver is given by the judge in vacation. Even as between judgment creditors, while they may ask to have the funds in the hands of the receiver applied to the payment of their judgments, they cannot acquire priority, one over the other, by means of garnishment: *McGowan v. Myers*, 66–99.

Errors of receiver: Errors or irregular proceedings of a receiver must be corrected by the court having control of his action, and cannot be set up in an action brought by him: *Stewart v. Lay*, 45–604.

A receiver may appeal from an order erroneously fixing the amount of property in his hands, and directing him to turn over more than he has in custody: *How v. Jones*, 60–70.

Fraud in the appointment of a receiver should be set up in the action in which the receiver is appointed, and not in an action in which the receiver brings the suit: *Schoonover v. Hinckley*, 48–82.

Powers: Where a receiver was appointed to receive the rents and profits of "Burrow's Lock and Mills," it was held that this language included and covered a wharf located on the block and which was constructed and used in furtherance of the business of the mills: *Grant v. Davenport*, 18–179.

Conversion and distribution: When the receiver converts the property into money the money takes the place of the property and is distributed to the parties who establish their rights to the property: *Gilbert v. Greenbaum*, 56–211.

Disbursement for attorney's fee: Disbursements by a receiver for attorney's fees and other charges in collecting money made in good faith, which are necessary and beneficial to the parties ultimately entitled to the fund, should be paid out of the fund: *How v. Jones*, 60–70.

Preference given by debtor after receiver appointed: After the appointment of such receiver without resistance on the part of the debtor and without appeal from the order of appointment, such debtor has no such control over the fund and power to direct its application that he can by assignment give one creditor preference over another: *McGowan v. Myers*, 66–99.

Railroads; personal injuries: It seems that the court appointing a receiver may provide for the payment by him of all just claims arising out of the operation of the road, while in his charge, including damages for personal injuries, but the claim for such damages cannot be enforced against the purchaser of the road at a foreclosure sale who takes his deed before the rendition of judgment on such claim: *White v. Keokuk & D. M. R. Co.*, 52–97.

Larceny from a receiver: In a prosecution for larceny of goods from the hands of a receiver it is not necessary for the state to prove that a bond had been given before the property was taken by such receiver, it appearing that he was acting under a proper order of the court, and that defendant, before the commission of the acts charged, knew that he was so acting: *State v. Rivers*, 60-381.

Ownership may be laid in the receiver: The ownership of the goods may be laid in the receiver. It is not a case falling under the provisions of § 5221, which relates to the wrongful taking of property while in possession of an officer by virtue of legal process: *Ibid.*

Resistance: One who resists a receiver seeking to take possession of property under the order of the court is guilty of the crime of resisting a "person authorized by law . . . to execute a legal order" (§ 5268): *State v. Rivers*, 64-729; *S. C.*, 66-653.

Control of property pending an appeal from appointment: Where the order of the court appointing a receiver is affirmed on appeal, the property of the debtor corporation comes under the control of the receiver only when such appeal is determined and the order appointing the receiver confirmed: *Cook v. Cole*, 55-70.

Receiver to complete a railroad; certificates issued by: Where an order of the court appointing a receiver conferred upon him unusual powers as to purchasing material and borrowing money for the completion of a line of railroad, and to issue certificates therefor, which should be a first lien upon said road, *held*, that the receiver had no implied powers other than those conferred by the order of the court, and could not issue valid certificates except for material actually furnished, and a holder of certificates improperly issued was chargeable with notice of the powers of the receiver and could not claim protection as an innocent holder: *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48-518.

To incur expenses in extension: The question as to what expenses a receiver of a railway may be authorized to incur, and as to whether he may be authorized to incur indebtedness for extensions which shall be a first lien upon the whole property, considered, and *held*, that where a lienholder was not a party, the expenses of an extension could not be made paramount to his lien: *Snow v. Winslow*, 54-200.

Sale by receiver as affecting lienholders not parties: A receiver appointed in a proceeding to which a lienholder is not a party does not represent such lienholder, and cannot sell the property divested of the lien, nor can an execution sale be made in such case which will divest said lien: *Ibid.*

Mingling of private and trust funds: The fact that a receiver mingles money received by him as such with his individual funds, and from the aggregate amount draws money for his own use, will not be sufficient to justify his being required to pay interest upon money received: *Radford v. Folsom*, 55-276.

Settlement of accounts: The mere fact that a receiver's report is held incorrect as to certain matters, when it is not shown that the errors were intentional or for dishonest purposes, is not enough to tax him with the costs incurred in passing upon his accounts, no bad faith or fraud being shown: *Ibid.*

Charging receiver with interest: It is error to charge a receiver with interest upon money in his hands, without any evidence of wrong on his part: *How v. Jones*, 60-70.

Receiver's report; mistake: Where a receiver shows to the court that there was a mistake in the former report, in that he charged himself therein with money not received, such mistake should be corrected by the court: *Ibid.*

Negligence of the receiver: Action for injuries to personal property resulting from the fraud or negligence of a receiver must be brought against him and not the plaintiff at whose instance he was appointed, when the latter acted in good faith upon probable cause: *Kaiser v. Kellar*, 21-95.

Compensation: While a receiver should receive compensation according to the degree of his business capacity, and the integrity and responsibility required in the case, yet such compensation should be limited to what would have been necessary to employ a person of such qualifications to perform the services by private contract: *French v. Gifford*, 31-428.

When no question is made as to the legality and propriety of the appointment of a receiver and he has closed up the business in pursuance of his appointment, his compensation should be paid from the funds in his hands: *Radford v. Folsom*, 55-276.

Receiver improperly appointed: Where it has been determined that the receiver has been improperly appointed, and he is ordered to turn over property coming into his hands to an intervenor who establishes his right thereto against the receiver and the party to the suit at whose instance the receiver was appointed, the costs and expenses of the receivership and the compensation of the receiver should not be deducted out of the fund or the property thus directed to be turned over, but the receiver should look for his compensation to the party procuring his appointment: *How v. Jones*, 60-70.

Where a receiver wrongfully appointed paid out a portion of the funds coming into his hands in good faith under order of the court, *held*, that he was entitled to credit for money thus paid out, even though it was afterwards determined that such third party was not entitled to the payment. But *held*, that as to that portion of the amount claimed to have been paid out to such third person, which he retained as attorney's fee due to himself from such third party, he could not assert priority over the rightful claimant of the fund: *Ibid.*

It is a general rule that the compensation of the receiver is not taxable to the parties, but is taken from the sum in controversy between them: *Jaffray v. Raab*, 72-335.

A receiver who refuses to pay over money in accordance with an adjudication against him may be held to pay interest from the time of such adjudication: *Howe v. Jones*, 71-92.

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

4116. Judgments on motion. 2906. Judgments or final orders may be obtained on motion by sureties against their principals, by sureties against their co-securities, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables, and other officers, for the receiving of money or property collected for them, and damages, and in all other cases specially authorized by statute. [R., § 3422.]

The court, under this section, may order an attorney to pay to the client money collected for him in the course of professional employment, and disobedience to such order may be punished under § 296: *Cross v. Ackley*, 40-493.

So the court may make an order against a clerk to compel payment of money received by him on a judgment: *Elliott v. Jones*, 47-124.

4117. Notice; service. 2907. Notice of such motion shall be served on the party against whom the judgment or order is sought at least ten days before the motion is made. [R., § 3423.]

4118. Form. 2908. The notice shall state in plain and ordinary language the nature and grounds of the motion, and the day on which it will be made. [R., § 3424.]

See *Mansfield v. Wilkerson*, 26-482.

4119. When abandoned. 2909. Unless the motion is made and filed with the case on or before the day named in the notice, it shall be considered as abandoned. [R., § 3425.]

4120. No written pleadings. 2910. The motion shall be heard and determined without written pleadings, and judgment given according to law and the rules of equity. [R., § 3426.]

See *Mansfield v. Wilkerson*, 26-482.

CHAPTER 14.

OF MOTIONS AND ORDERS.

4121. Motion defined. 2911. A motion is a written application for an order addressed to the court, or to a judge in vacation, by any party to a suit or proceeding, or by any one interested therein. [R., § 3428.]

A decree or judgment is not an order within the meaning of the words here used: *Wagner v. Tice*, 36-599.

4122. Several objects. 2912. Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made. [R., § 3438.]

4123. Proof by affidavit. 2913. Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required to appear by the court or judge and submit to a cross-examination. [R., § 3440.]

Similar provision, see § 4946.

Trial of motion on affidavits: Matters which may be tried on motion by affidavit are limited, but it is difficult to define the limit; and *held*, that a motion to discharge the attached property might be submitted on affidavits showing that the attachments were

made outside of the limits of the county in which the officer was authorized to act: *Pomroy v. Parmlee*, 9-140, 148.

Where certain affidavits were presented on a motion to discharge garnishee, *held* proper to consider the same affidavits on a subsequent motion to the same effect: *Scholes v. Murray Iron Works Co.*, 44-190.

After the decision upon a motion leave was granted to the unsuccessful party to file additional affidavits; *held*, that such action amounted to a suspension of the decision upon the motion, and that the new affidavits were properly considered: *Winet v. Berryhill*, 55-411.

4124. Notice of motion. 2914. A party who has appeared in an action, or who has been served with the original notice in such action in any manner provided by this code, shall take notice of all motions filed during term time upon the same being filed by the clerk and entered in the appearance docket. All motions filed in vacation shall be entered on such docket and served as herein required. [R., § 3429.]

A party must take notice of motions filed during term. No other notice is necessary: *Wagner v. Tice*, 36-599.

Notice of a motion for change of venue, made in vacation (under § 3796), should be given as here required: *Preston v. Winter*, 20-264; *Loomis v. McKenzie*, 31-425.

A motion to set aside a judgment rendered at a prior term should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21-277.

Notice of a motion affecting an action, but in which no parties are named, will not bind the party upon whom it is served: *Eastman v. Moore*, 14-586.

Where a motion to set aside a decree rendered on default was filed after the expiration of the term, and was granted without notice to the opposite party, but such opposite party appeared and filed a motion to set aside the order thus made and was fully heard, *held*, that the want of notice would not render the action of the court erroneous: *Rivers v. Olmsted*, 66-186.

Where the opposite party appeared in connection with a motion to vacate the judgment and excepted to the ruling, *held*, that he could not object that formal notice was not served on him: *Billings v. Kothe*, 49-34.

4125. Notice; what to contain. 2915. When notice of a motion is required to be served, it shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, and the place where, and the day on which it is to be heard, and, if affidavits are to be used on the hearing, the notice shall be accompanied with copies thereof and shall be served such length of time before the hearing as the court or judge deems reasonable. [R., § 3430.]

SERVICE.

4126. How made. 2916. Notices, and copies of motions mentioned in this chapter, may be served by any one who would be authorized to serve an original notice. [R., § 3431.]

4127. On each party. 2917. The service shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record of such party. [R., § 3432.]

4128. Personal or on attorney. 2918. The service may be personal on such party or attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney by being left at his office with any person having the charge thereof. [R., § 3433; C., '51, § 2496.]

4129. Return. 2919. Any officer authorized to serve any notice, shall serve at once the same and make prompt return to the party who delivered the same to him, and a failure to do so shall be punished as a disobedience of the process of the court. [R., § 3435.]

4130. What to state. 2920. The return of proof of service must state the manner in which it was made. [R., § 3436; C., '51, § 2499.]

4131. When court may direct. 2921. When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving notices, and on whom they shall be served. [R., § 3437.]

ORDERS.

4132. Order defined. 2922. Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order. [R., § 3427.]

There is a distinction between an order and a judgment. An order is not a judgment in such sense that the statute of limitations applies to it: *Smith v. Shawhan*, 37-553, 535.

4133. May issue in vacation. 2923. For good cause shown, a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties. [R., § 3795; C., '51, § 2210.]

Under this section, *held*, that where the sheriff published notice of sale in another paper than that designated by plaintiff, the judge in vacation, upon proper application, might make an order directing the publication to be made in the proper paper: *Herriman v. Moore*, 49-171.

This section furnishes a plain, adequate and speedy remedy to the party claiming a right to have execution issued on a judgment, and he cannot, therefore, maintain *mandamus* against the clerk to enforce the issuance of such execution: *Pickell v. Owen*, 66-425.

4134. How long in force. 2924. Such order shall be in force only during the vacation in which it is granted and for the first two days of the ensuing term. [R., § 3796; C., '51, § 2211.]

This section applies only to an order directing officers of the court in relation to the discharge of their duties and not to a temporary injunction granted in vacation: *Curtis v. Crane*, 38-459.

Nor does such provision apply to an order in a proceeding by *habeas corpus*: *Shaw v. McHenry*, 52-182

4135. Bond. 2925. The judge granting it may require the filing of a bond as in case of an injunction, unless from the nature of the case such requirement would be clearly unnecessary and improper. [R., § 3797; C., '51, § 2212.]

4136. Filed and entered of record. 2926. Orders made out of court shall forthwith be filed with and entered by the clerk in the journal of the court in the same manner as orders made in the term. [R., § 3439.]

CHAPTER 15.

OF SECURITY FOR COSTS.

4137. When required. 2927. If a defendant shall, at any time before answering, make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state or a private or foreign corporation, before any other proceeding in the cause shall file in the clerk's office a bond, with a sufficient security to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter-affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. [R., §§ 3442, 3448.]

These provisions apply to domestic as well as to foreign corporations: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

But they are not applicable to proceedings in justices' courts: *Smith v. Humphrey*, 15-428.

Whether, in an action on appeal from a justice's court, security for costs can be required, *quære;* but the motion therefor should at least be made at the earliest practicable moment: *Adae v. Zangs*, 41-536, 540.

These provisions for requiring a cost bond

have relation to the ordinary forms of action and are not applicable to a proceeding for the trial of exceptions to a claim or demand filed against the estate of an insolvent: *Meyer v. Evans*, 66–179.

This section does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something, and if he chooses to make the motion, he must make it instanter, or within such time as is given him by the court. If he fails, without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur: *Sprague v. Haight*, 54–446.

Where defendant did not file his motion for security for costs by noon of the second day of the term, nor by the further time fixed by the court therefor, but filed such motion after the time fixed by the court for answering, *held*, that the right to insist on such motion was waived and the motion properly overruled: *Ibid.*

The affidavit that the party has a good defense need not state the facts constituting such defense. The affidavits and counter-affidavits provided for in the latter part of the section are as to facts on which the motion is based, for instance, the residence or non-residence of plaintiff: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

An appeal will lie from an order dismissing the action for want of a bond when required, but not from an order requiring a bond: *Ibid.*

4138. Cause dismissed. 2928. An action in which a bond for costs is required by the last section, shall be dismissed if a bond is not given in such time as the court may allow. [R., § 3443.]

4139. When plaintiff becomes non-resident. 2929. If the plaintiff in an action, after its institution, becomes a non-resident of this state, he may be required to give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter. [R., § 3444.]

The requirement that defendant must file his affidavit before answering (§ 4137) is applicable under this section: *Gilbert v. Hoffman*, 66–205.

4140. Additional security. 2930. In an action in which a bond for costs has been given, the defendant may, at any time before trial, make a motion for additional security on the part of the plaintiff; and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or is not sufficient for the amount thereof, it may dismiss the action, unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff. [R., § 3445.]

4141. Attorney or officer cannot be. 2931. No attorney or other officer of the court shall be received as security in any proceeding in court. [R., § 3446.]

This provision applies not only to the bond for costs, but to injunction, attachment and other bonds: *Massie v. Mann*, 17–131.

An attorney who tenders himself and is accepted as surety cannot escape liability through the provisions of this section: *Wright v. Schmidt*, 47–233.

4142. Judgment on bond rendered on motion. 2932. After final judgment has been rendered in an action in which security for costs has been given as required by this chapter, the court, on motion of the defendant or any other person having the right to such costs or any part thereof, may render judgment summarily, according to the chapter on summary proceedings, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff or so much thereof as may remain unpaid. [R., § 3447.]

CHAPTER 16.

OF COSTS.

4143. Recoverable by successful party. 2933. Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is

otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of costs. [R., § 3449; C., '51, § 1811.]

When taxable to plaintiff: Where defendant's answer was in effect a counter-claim, and he was successful thereon, *held*, that the costs incurred by reason of the trial of such issue should be taxed to plaintiff: *Judd v. Day*, 50–247.

Where, as to the matter in litigation, defendant was successful, but was ordered to pay off a claim upon the property involved which was acquired by plaintiff pending the suit, *held*, that no costs appearing to have been incurred as to the repayment of such claim, it was proper to tax costs to plaintiff: *Semple v. McCrary*, 46–37.

Where the merits of a proceeding by injunction were found substantially against plaintiff, *held*, that the costs were properly taxed against him, although as to a matter which might have been corrected without action he was successful: *Tredway v. McDonald*, 51–663.

Under the peculiar circumstances of a particular case, *held*, that the costs were properly taxed to plaintiff: *Bare v. Wright*, 23–101.

In an equitable action under § 1378 to redeem from a tax sale, the costs of establishing the right to redeem should be taxed to and paid by plaintiff as a part of the expense of making the redemption: *Serrin v. Brush*, 74–489.

Where defendant admitted plaintiff's claim, and the only contest was on a counter-claim in which defendant was successful, *held*, that plaintiff should pay all costs excepting those for commencing action and entering judgment for balance found due him: *Hall v. Clayton*, 42–526. See, also, *Judd v. Day*, 50–247.

Costs against defendant: Where plaintiff sought, by motion, to have a judgment which had been discharged restored, and defendant resisted, *held*, that upon the sustaining of the motion all of the costs should have been taxed against the defendant: *Kanke v. Herrum*, 48–276.

Where plaintiff sought to set aside a tax title for fraud, and offered to pay the amount justly due from him to the owner of such title, and succeeded in the action, *held*, that costs should be taxed against defendant notwithstanding judgment was entered in his favor for taxes, interest and penalties: *Springer v. Bartle*, 46–688.

Disclaimer: A party who, having filed a disclaimer of interest and moved to be dismissed, after such motion is denied contests plaintiff's right to recover, and is defeated, is liable for costs notwithstanding such disclaimer: *Wilcox v. Goldsmith*, 44–573.

In action by minor: In an action for an infant by his next friend, such "next friend" is liable for costs: *Vance v. Fall*, 48–364.

In an action by a minor in his own name a valid judgment for costs may be rendered against him: *Albee v. Winterink*, 55–184.

In action against administrator: Where, in an action by the widow against the administrator of her deceased husband's estate, the administrator did not defend, but counsel appearing for the heirs defended in his name and plaintiff secured judgment, *held*, that the costs of the suit should not be taxed against the estate, but against the heirs in whose behalf the defense was conducted: *Drummond v. Irish*, 52–41.

In probate proceeding: Costs in a proceeding to probate a will where the will is not admitted to probate should not be taxed against proponents if the result is not due to undue influence exercised by them, but to want of testamentary capacity: *Meeker v. Meeker*, 74–352.

Judgment: Where a court has jurisdiction to render judgment it may also render a valid judgment for costs: *Sprott v. Reid*, 3 G. Gr., 489.

One who is served with notice of an action which does not state that no personal claim is made against him cannot, after default and judgment against him for costs, have such judgment corrected or inquired into by an injunction. Having the power to render such judgment, the court's action can only be corrected by motion or on appeal: *Davis v. Keith*, 23–419.

A provision in a judgment for the recovery of costs by the successful party against his adversary is an adjudication with reference thereto: *Fairbairn v. Dana*, 68–231.

And the correctness of such determination cannot be urged by motion to retax the costs: *Ibid.*

4144. Apportionment. 2934. In actions where there are several plaintiffs or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor. [R., § 3451.]

When proper: While these provisions as to apportioning costs refer primarily to a case where the petition embraces several causes of action, or where several issues are joined thereon, or upon new matter in the answer, they may include a case where plaintiff recovers upon his demand, and defendant in whole or in part upon his counter-claim: *Arthur v. Funk*, 22–238.

Where plaintiff sued defendant for assault and battery and slander, and defendant defended and also set up a counter-claim for slander, and the jury returned a verdict of ten dollars for plaintiff for the assault and battery and a like amount for defendant for slander, *held*, that the action of the court below in taxing certain unnecessary costs to one party and dividing the balance equally between them was proper, it being impossible to assort the witnesses and apportion the

costs on each issue tried: *Ferguson v. Thorpe*, 54–422.

Where plaintiff asked the reformation of a deed, but the relief granted was only a portion of that asked, *held*, that the claim was not indivisible and that an apportionment of the costs was proper: *Strayer v. Stone*, 47–333.

In an action before a justice upon four separate items, plaintiff recovered judgment, but upon appeal he obtained a general verdict for a less amount; *held*, that the case was a proper one for apportionment of costs, and that §§ 4841, 4842, as to costs in cases of appeal from justices, did not prevent such apportionment: *Howder v. Overholser*, 48–365.

In an action for the recovery of certain articles of specific personal property, where plaintiff recovered as to certain articles and failed as to others, *held*, that an apportionment of costs was proper: *Whitaker v. Sigler*, 44–419.

So *held*, also, where plaintiff failed as to a part of his demand, and had increased the costs by bringing his action in equity, when, as to a part of his claims, an action might have been brought at law: *Hatch v. Judd*, 29–95.

Where a number of witnesses were summoned by plaintiff, and in attendance, to testify touching an issue presented by the pleadings, and the defendant, just before the impaneling of a jury, withdrew his answer and thereby rendered the testimony of such witnesses unnecessary, *held*, that although defendant was successful in the suit, it was proper to tax up a portion of the costs against him: *Whitney v. Hackney*, 20–460.

Equitable apportionment of costs made in a particular case: *Starr v. Case*, 59–491.

As to apportionment of costs of compensation of a receiver, see *French v. Gifford*, 31–428.

Where plaintiff's claim is indivisible and he recovers a portion of the amount claimed, the costs should be taxed to defendant. There is no ground in such case for apportionment: *Upson v. Fuller*, 43–409.

Where plaintiff recovers the whole of his claim, an apportionment of costs should not be made: *Drummond v. Irish*, 52–41.

Nor should apportionment be made when recovery is had for less than his claim, if the claim is indivisible: *Hammond v. Sioux City & P. R. Co.*, 49–450.

Failure of plaintiff to recover a portion of the amount claimed does not exempt the defendant from liability for any part of the costs unless there was a tender made and pleaded, or an offer to permit judgment to be entered for a sum equal to or greater than the amount of the judgment finally entered: *Rand v. Wiley*, 70–110.

Where plaintiff obtains relief in part, the costs may properly be charged to defendant in the discretion of the court: *Burton v. Mason*, 26–392.

Where final judgment is rendered for defendant upon a voluntary nonsuit or plea in abatement, there should not be an apportionment of costs: *Hyde v. Cole*, 1–106.

Where plaintiff sued to redeem in equity from a tax sale and deed, and offered to pay such amount as should be found due defendant, but did not tender any specific sum, the amount to be paid not being ascertainable in advance, *held*, that it was not error to tax one-half the costs to defendant: *Elliott v. Parker*, 72–746.

Where certain costs in an action in equity would not have been necessary except for the laches of the party in failing to rescind as early as he might have done and before the making of improvements, *held*, that he could not complain of the apportionment of costs, even though he was successful: *McMurray v. Day*, 70–671.

Discretionary: An order apportioning the costs will not be interfered with on appeal where the record does not show the basis on which the order was made below: *Brinck v. Neiweg*, 29–444.

The order as to costs is largely discretionary, and where no abuse of discretion is apparent the action of the court below will not be disturbed on appeal: *Boone County v. Wilson*, 41–69.

The question of costs rests very largely in the sound discretion of the trial court. Where a petition embraced several distinct charges, amounting to $249, and plaintiff recovered only $5, *held*, that it was not error to assess one-third of the costs against him: *Andrews v. Zimmerman*, 42–708.

The apportionment of costs in certain cases is in the discretionary power of the trial court, and that discretion will not be interfered with on appeal unless an improper exercise thereof is shown: *Bush v. Yeoman*, 30–479.

The presumption in regard to the action of the court as to apportionment of costs is in favor of the correctness of such action, and the ruling will not be disturbed on appeal unless all the facts and circumstances are before the court, and it is manifest that the ruling is wrong: *Koestenbader v. Peirce*, 41–204.

When the record does not disclose the facts or circumstances attending the trial, the action of the lower court in refusing to tax in defendant's favor costs accrued in support of his cross-claim, only a small portion of which was established, will be presumed to have been based upon sufficient reasons: *Arthur v. Funk*, 22–238.

The mere fact that a decree in favor of the defendants directed that they pay the costs in the first instance, to be afterward recovered by them of the plaintiffs, *held* not of itself sufficient to warrant a reversal, when the facts on which the court acted were not shown: *Scott's Adm'rs v. Cole*, 27–109.

4145. Collection. 2935. All costs accrued at the instance of the successful party which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party. [R., § 3452.]

The judgment, so far as it covers costs, is for the use of the parties entitled to such costs, and the successful party has no interest in that part of the judgment except in so far

as such costs have been paid by him; therefore a payment to him of the costs covered by the judgment will not release his judgment debtor from the claims of parties entitled to such costs: *McConkey v. Chapman*, 58-281.

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in this section. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *Ibid.*

Officers and witnesses entitled to fees in a case cannot have process issued for the collection of such fees. The judgment is subject to the control of the party in whose favor it is rendered: *Ex parte Hampton*, 2 G. Gr., 137.

If fees are unreasonably delayed in their collection the person entitled thereto may proceed against the party liable: *Ibid.*

4146. What included in. 2936. The necessary fees paid by the successful party in procuring copies of deeds, bonds, wills, or other records filed as a part of the testimony, shall be taxed in the bill of costs. [R., § 3453.]

4147. Same. 2937. Postage paid by the officers of the court, or by the parties in sending process, depositions, and other papers being part of the record by mail, shall be taxed in the bill of costs. [R., § 3454.]

4148. Costs; allowed party who confesses matter which arose after action. 2938. When a pleading contains a defense stating matter which arose after the commencement of the action, whether such matter of defense be alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and thereupon shall be entitled to the costs of the cause as to the party pleading such matter up to the time of such pleading. [R., § 3455.]

4149. On dismissal of action or death of party. 2939. When a plaintiff dismisses the action or any part thereof, or suffers it to abate by the death of the defendant or other cause, or where the suit abates by the death of the plaintiff, and his representatives fail to revive the same according to law, judgment for costs may be rendered against such plaintiff or representative, and, if against a representative, shall be paid as other claims against the estate. [R., § 3456.]

Plaintiff is liable not only for costs taxed at the time of such dismissal, but for all costs properly taxed in the case: *Acres v. Hancock*, 4-568.

4150. Between co-parties. 2940. The co-parties against whom judgment has been recovered, are entitled as between themselves to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the co-parties, and inured exclusively to his benefit. [R., § 3457.]

4151. When dismissed for want of jurisdiction. 2941. Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause. [R., § 3458.]

4152. Clerk to tax. 2942. The clerk shall tax in favor of the party recovering costs, the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the cause or may deem just to be taxed. [R., § 3459.]

The court may tax in addition to compensation for services specially mentioned a further sum for other matters when deemed just. Thus, *held*, that the cost of writing down the testimony by a person appointed by the court for that purpose, on agreement of the parties, might be taxed as costs: *Kuhnlee v. Independent Dist.*, 36-99.

But this section affords no warrant for taxing up as costs any fee for officers, except it is allowed by law: *Sprout v. Kelly*, 37-44.

The losing party may be taxed with costs of witness fees for witnesses who were properly subpœnaed and attended the trial, although they gave no material evidence. The fact that a witness does not give material evidence in a case is no reason why his fees should not be taxed to the losing party. It may be proper and necessary to summon witnesses whose evidence afterwards becomes immaterial and unnecessary: *Hanners v. McClelland*, 74-318.

As to taxing jury fees, see § 5088.

4153. When cause of action assigned. 2943. In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party. [R., § 3460.]

4154. Retaxation. 2944. Any person aggrieved by the taxation of a bill of costs, may, upon application, have the same retaxed by the court, or by a referee appointed by the court, in which the application or proceeding was had, and in such retaxation all errors shall be corrected; and if the party aggrieved shall have paid any unlawful charge by reason of the first taxation, the clerk shall pay the costs of retaxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charges. [R., § 3461; C., '51, § 1813.]

The ruling on a motion to retax costs because certain costs taxed in the case were unnecessary cannot be reviewed where it is not affirmatively shown to what extent, if at all, unnecessary costs were taxed: *Toohey v. Lowell*, 68-661.

A motion to retax costs cannot be made in the lower court while the case is pending in the supreme court on appeal: *Levi v. Karrick*, 15-444.

The court may, in determining the matter of costs, consider affidavits and counter-affidavits, or may require the affiants brought in and subjected to examination and cross-examination: *Packer v. Packer*, 24-20.

4155. On appeals to supreme court. 2945. In cases of appeals from the district [or circuit] court, the clerk shall make a complete bill of costs showing the items which shall accompany the record, and a copy of the same shall be placed upon the execution docket of the court below. [R., § 3462.]

4156. Costs in supreme court. 2946. When the costs accrued in the supreme court and the court below are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court and take his receipt for the same. [R., § 3463.]

4157. Duty of clerk below. 2947. On receiving such costs, the clerk of the court below shall charge himself with the money upon his execution docket, and pay it to the persons entitled to the same. [R., § 3464.]

4158. Interest. 2948. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk and added to the costs of the party entitled thereto. [R., § 3466.]

See notes to § 3253.

ATTORNEYS' FEES.

4159. Limited. 18 G. A., ch. 185, § 1. In any action upon a written contract for the payment of money, made after the taking effect of this act, in which it is an agreement to pay an attorney's or collection fee, no greater recovery for attorney's fee shall be had against the maker of such contract than is provided for in section two hereof, anything in said contract contained to the contrary notwithstanding.

Contract for, valid: A stipulation in a contract or note for the payment of an attorney's fee in case action shall be brought thereon is valid: *Kuhn v. Myers*, 37-351: *Shugart v Patlee*, 37-422. So in case of mortgage: *Williams v. Meeker*, 29-292.

Does not affect negotiability: Such a provision in a note does not destroy its negotiability: *Sperry v. Horr*, 32-184.

If the note is usurious an attorney's fee provided for therein cannot be recovered: *Butler v. Gardner*, 49-234.

Surety liable for: A surety on a note providing for attorneys' fees is liable therefor: *First Nat. Bank v. Breese*, 39-640.

What is bringing of action: Where a note provided for taxation of reasonable attorneys' fees for collection if an action should be brought thereon, *held*, that a resort to legal proceedings was contemplated as the occasion for taxing such fee, and that filing the note as a claim against the estate of the maker, and proving it as such claim, was sufficient to warrant the allowance of the fee: *Davidson v. Vorse*, 52-384.

Liquidated damages: Where the contract or note specifies the amount to be taxed as attorneys' fees, the amount thus specified is not in the nature of a penalty, but is liquidated damages, for which recovery may be

had without proof of the reasonable value of the services: *McIntire v. Cagley*, 37-676.

Evidence of value: Upon default in an action upon a note providing for the allowance of reasonable attorneys' fees it is error to allow an amount for such fees without evidence as to their value: *First Nat. Bank v. Krance*, 50-235.

Attorney's testimony: The testimony of plaintiff's attorney as to the value of his services in an action on a contract providing for the allowance of attorneys' fees will, in the absence of other evidence, be taken as establishing such value; and the court will not, for itself, judge of the value of such services: *Schlicht v. Stivers*, 61-746.

Pleading: Where the claim for attorneys' fees is in a separate count of the answer an answer to that count will not be regarded as putting in issue the averments of the other counts: *Musser v. Crum*, 48-52.

Where the provision is for the allowance of a reasonable amount as attorney fees it is not necessary in the petition to aver what is a reasonable amount: *Nelson v. Everett*, 29-184.

Actual fee alone taxed: Whether the note provides for a fixed sum or a reasonable fee no more can be taxed than the actual fee. It is not by such agreement intended that the party shall, in any event, have any part of the fee taxed: *White v. Lucas*, 46-319.

Collusive taxation of excessive fee: Where, apparently to reduce the balance which would remain after satisfaction of the mortgage, and be subject to a judgment lien, it was agreed between defendant and plaintiff's attorney in a foreclosure suit that a larger amount than the attorney claimed should be taxed as attorney's fee, and the excess returned to defendant, *held*, that action by defendant to recover such excess from the mortgagee purchasing under the foreclosure could not be maintained: *Remley v. Johnson County Savings Bank*, 52-575.

Provision in mortgage: Where the provision authorizing the taxation of attorneys' fees is in the mortgage and not in the note secured, judgment for the fee should be against the mortgagor alone and not against parties who are liable on the note but are not parties to the mortgage: *Floyd County v. Morrison*, 40-188.

Not usurious: A stipulation for attorney's fee does not render a contract usurious: *Nelson v. Everett*, 29-184.

4160. Amount of. 18 G. A., ch. 185, § 2. When judgment is recovered on a written contract, made after the taking effect of this act, containing an agreement to pay an attorney's fee, there shall be an attorney's fee allowed by the court, and taxed as part of the costs, except as provided in sections three and four hereof; but in no case shall the amount allowed be greater than the following, to wit: For the first two hundred dollars, or fraction thereof, ten per cent. of the amount found due. For the excess of two hundred dollars, up to five hundred dollars, five per cent. For the excess of five hundred dollars, up to one thousand dollars, three per cent. For all in excess of one thousand dollars, one per cent.; *provided*, that the plaintiff shall be entitled to recover not to exceed one-half of the above collection fee in case payment is made after commencement of suit and before return day, and in case of payment before judgment and after return day, the plaintiff may recover not to exceed three-fourths of the said amount and have judgment therefor; and no fee shall be allowed if suit has not been commenced or expense incurred.

Taxed as costs; not assessed by jury: Attorneys' fees provided for in a contract are to be treated as costs in the action and not as part of the amount in controversy: *Spiesberger v. Thomas*, 59-606.

The defendant is not entitled to have the amount thereof assessed by jury: *Musser v. Crum*, 48-52.

But where the parties consent, or fail to object, to a submission of the matter to the jury, they cannot be heard afterward to say that the trial was not in the proper tribunal: *Dent v. Smith*, 53-262.

The taxation of the fee is an independent matter, and may be made after the services in the case are concluded. Therefore, where a motion to tax attorney's fee was not made until after taking appeal, *held*, that such taxation was improper at that time, and should be postponed until the termination of the appeal: *Mason v. Searles*, 56-532.

The amount of attorneys' fees to be taxed may be determined after the trial and decision of the case; and where it appears that they have been thus taxed, it will be presumed on appeal, in the absence of any showing on the subject, that there was evidence to support such taxation, and that the judgment was in accordance therewith: *Kelso v. Fitzgerald*, 67-266.

4161. Fee for attorney only; affidavit. 18 G. A., ch. 185, § 3. Before any allowance of attorney's fee shall be made by the court, the court shall be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit shall be filed with the original papers, that there has been and is no agreement expressed or implied, between the attorney and his client, or between the attorney and any other person, except a practicing attorney en-

gaged with him as attorney in the cause, for any division or sharing of the fee to be taxed; and no fee shall be taxed except in favor of a regular attorney, and in compensation for services actually rendered in the cause.

The attorney's affidavit required by statute, that there is no agreement to divide the fee, is not evidence to be introduced by the plaintiff; it is rather a condition precedent to be performed by the attorney before the attorney's fee can be allowed in his favor: *Spiesberger v. Thomas*, 59–606.

Such affidavit should be filed with the original petition: that is, at the same time that the original petition is filed: *Wilkins v. Troutner*, 66–557.

The attorney's fee must be disallowed where the affidavit is not filed: *Sweney v. Davidson*, 68–386.

A requirement that an attorney shall file an affidavit that he has not directly or indirectly received any compensation for his service from any source must be complied with; it is not sufficient that his affidavit states that the claim is just and true: *Ryce v. Mitchell County*, 65–447.

The allowance of attorneys' fees will not be held erroneous on the ground that no affidavit was filed in the lower court, where the abstract does not show on appeal whether the affidavit was filed or not: *Mills County Nat. Bank v. Perry*, 72–15.

These provisions as to filing affidavit, as well as the other provisions of this statute, are not applicable to contracts made before its passage: *Eikenberry v. Edwards*, 71–82.

4162. Opportunity to pay. 18 G. A., ch. 185, § 4. Before any attorney's fee shall be allowed by the court, the court shall be fully satisfied that the defendant, if he be a resident of the county and the suit is not aided by an attachment, had information of the whereabouts of the contract, and had a reasonable opportunity to pay the same before suit was brought. But this provision shall not apply when the contract is by its terms payable at a particular place, and the maker of the contract has not tendered the money due at the place named in the contract.

TITLE XVIII.

OF ATTACHMENTS, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENTS AND GARNISHMENT.

4163. Property attached. 2949. The plaintiff in a civil action may cause any property of the defendant which is not exempt from execution to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed. [R., § 3172; C., '51, § 1846.]

In equitable actions: An attachment may issue in an equitable proceeding as well as in an action at law: *Baldwin v. Buchanan*, 10-277; *Crouch v. Crouch*, 9-269.

In an equitable action by one partner against another to recover the amount due on partnership account, plaintiff may have an attachment, if there are proper grounds, although he may also be entitled to a receiver: *Curry v. Allen*, 55-318.

Against one of several defendants: In an action against several defendants, the plaintiff may have an attachment against any as to whom there are proper grounds therefor, without regard to whether there are any grounds as to the others or not. (Overruling *Courrier v. Cleghorn*, 3 G. Gr., 523; *Ogilvie v. Washburn*, 4 G. Gr., 548): *Chittenden v. Hobbs*, 9-417; *Austin v. Burgett*, 10-302.

Where there are several defendants, the property of a non-resident defendant may be attached, it being shown that the resident defendants are insolvent: *Smith v. Coopers*, 9-376.

A debtor who has made a fraudulent conveyance is regarded as a *cestui que trust* having an interest in the trust property which may be attached in a civil action: *Taylor v. Branscombe*, 74-534.

By landlord against property of tenant to enforce landlord's lien for rent, see § 3193.

When action deemed commenced: Under the statute allowing an attachment "at the commencement or during the progress of the proceeding," the action may be regarded as commenced as soon as the petition is filed, and before notice is placed in the hands of the sheriff, or served: *Hagan v. Burch*, 8-309.

Where it appears that the original notice and attachment were issued at the same time, it will be considered that the suit was commenced before the issuance of the attachment: *Nichols v. Mitchell*, 4 G. Gr., 432.

So, where the filing of petition and issuance of writ bear the same date, it will be presumed that the writ was issued after the filing of the petition: *Pitkins v. Boyd*, 4 G. Gr., 275.

Return of "not found" unnecessary: In case of attachment against a non-resident it is not necessary that the return of "not found" be made before issuance of attachment: *Elliott v. Stevens*, 10-418.

Where brought: Proceedings by attachment against a resident are, by § 3785, required to be brought in the county of the defendant's residence or the county in which the contract is to be performed, and if they are brought in another county the attachment will be invalid and should be dismissed, even if the case is, upon application of defendant, transferred to the county of his residence: *Wasson v. Millsap*, 70-348.

Service by publication, see § 3823.

4164. Separate petition. 2950. If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto. [R., § 3173; C., '51, § 1847.]

Separate petition: Even when the attachment is asked at the beginning of the action it is not improper to file a separate petition setting forth the grounds of the attachment: *Shapleigh v. Roop*, 6-524; but it is not necessary: *Van Winkle v. Stevens*, 9-264; *Shaffer v. Sundwall*, 33-579.

The attachment and the suit are distinct, and any irregularity in the former will not affect the latter: *Elliot v. Mitchell*, 3 G. Gr., 237.

Amount due: If the amount due is stated in the body of the petition asking judgment, it need not be repeated in that part asking the writ. It is not essential that the portion of the petition asking an attachment be separate and distinct from that in the main cause and contain all the essential averments: *Shaffer v. Sundwall*, 33-579.

4165. What petition must state. 2951. The petition which asks an attachment must in all cases be sworn to. It must state:

1. That the defendant is a foreign corporation, or acting as such; or,
2. That he is a non-resident of the state; or,
3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts; or,
4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,
5. That the defendant is about to dispose of his property with intent to defraud his creditors; or,
6. That he has absconded, so that the ordinary process cannot be served upon him; or,
7. That he is about to remove permanently out of the county and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff; or,
8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff; or,
9. That he is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; or,
10. That he is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or,
11. That he has property or rights in action which he conceals; or,
12. That the debt is due for property obtained under false pretenses. [R., § 3174; C., '51, § 1848; 13 G. A., ch. 161, § 1.]

I. IN GENERAL.

Verification: The verification of the petition may be by a person other than the plaintiff without any peculiar means of knowledge as to the facts being shown: *Pitkins v. Boyd*, 4 G. Gr., 255.

But it is desirable that the means of knowledge of such party be shown: *Bates v. Robinson*, 8-318.

Affidavit by plaintiff's attorney, stating a knowledge on his part of the facts, *held* sufficient: *Chittenden v. Hobbs*, 9-417.

If the petition is actually sworn to, the fact that the jurat is not signed by the officer administering the oath will not invalidate subsequent proceedings: *Cook v. Jenkins*, 30-452.

Attachment must be asked for in the petition: *Dawson v. Jewett*, 4 G. Gr., 157; *Queen v. Griffith*, 4 G. Gr., 113.

Amendments to petition are allowable which do not interpose any new cause of action and will not affect the attachment: *McCarn v. Rivers*, 7-404.

But that an amended petition shall support an attachment already issued, the petition as amended must state the cause to have existed at the date of the attachment: *Wadsworth v. Cheeny*, 10-257; *Crouch v. Crouch*, 9-269; *Bundy v. McKee*, 29-253.

If the amendment changes the cause of action, and under the petition as amended no cause of attachment appears to have existed at the time of the issuance of the attachment, it will be deemed to have been wrongfully sued out: *Young v. Broadbent*, 23-539.

Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed: *Gourley v. Carmody*, 23-212.

Verification of amendment: Where the amendment does not change the ground of the attachment nor introduce a new cause of action, nor claim a greater amount, but is merely a new statement of the same cause, it need not be verified: *Hamill v. Phenicie*, 9-525.

Defective affidavit of verification to the petition may be cured by amendment: *Bunn v. Pritchard*, 6-56; *Langworthy v. Waters*, 11-432; *Shaffer v. Sundwall*, 33-579; *Lowenstein v. Monroe*, 52-231. And see § 326.

Effect of amendment: A party is not to be prejudiced by any defects which are corrected by amendment: *Waasworth v. Cheeney*, 13-576.

And the attachment should not be dissolved for such a defect after its correction: *Gourley v. Carmody*, 23-212.

Where, after the filing of a motion to quash for a defect in the affidavit, such defect is cured by amendment, the motion should not be sustained: *Stout v. Folger*, 34-71.

So, where the action of the lower court in overruling a motion to quash the attachment for a defect in the affidavit was reversed on appeal and the cause remanded, and thereupon the defect was cured by amendment, *held*, that the proceedings under the attachment were thereby rendered valid: *Stadler v. Parmlee*, 14-175.

Leave to amend: Where it does not appear that plaintiff asked for leave to amend, to cure a defect raised by motion to dissolve the attachment, it is not necessary that it appear from the record that leave to amend was given: *Pittman v. Searcey*, 8-352.

As to amendment in general, see § 4246.

II. STATEMENT OF GROUNDS.

Following statute: In alleging the cause of attachment the petition need not follow the exact language of the statute. It is sufficient if there is a substantial compliance with its provisions, the requisite facts being clearly stated: *Drake v. Hager*, 10-556; *Crew v. McClung*, 4 G. Gr., 153.

Alternative: Two or more causes for attachment may be stated, but they cannot be stated in the alternative: *Stacy v. Stichton*, 9-399. And see § 4246.

Non-residence: The allegation that defendant is "not now an inhabitant of this state" is equivalent to saying that he is a "non-resident of the state:" *Wiltse v. Stearns*, 13-282.

Removing property out of state: To justify an attachment on the ground that defendant is about to remove his property out of the state, etc., the contemplated removal must be of a permanent character, and not merely temporary: *Warder v. Thrilkeld*, 52-134.

Where attachment is asked on that ground, an intention to defraud creditors need not be averred: *Branch of State Bank v. White*, 12-141; *Sherrill v. Fay*, 14-292.

Actual fraud need not exist in such cases. (Overruling *Lockard v. Eaton*, 3 G. Gr. 543; *Bowen v. Gilkison*, 7-503; *Pittman v. Searcey*, 8-352, all decided under the Code of 1851): *Mingus v. McLeod*, 25-452.

Disposal of property with intent to defraud creditors is not shown by allegation of disposal "with intent to delay and hinder creditors and prevent and defeat them from the collection of their claims." An intention to defraud must be alleged to bring the case within that ground: *Torbert v. Tracy*, 12-20.

Evidence of intent to defraud: Where the ground is that defendant is about to dispose of his property with intent to defraud his creditors, the allegation should be predicated upon some indication by word or act warranting a reasonable belief that defendant is about to defraud his creditors: *Lewis v. Kennedy*, 3 G. Gr , 57.

Contemplated removal of property from state is not ground for attachment unless it also appears that sufficient is not left to pay debts: *State v. Morris*, 50-203.

Absconding: That defendant is absenting himself from the state does not alone constitute an absconding: *Ibid.*

The fact that defendant appears to the action does not disprove the allegation that he has absconded: *Phillips v. Orr*, 11-283.

Contemplated removal of person: To make a contemplated removal and refusal to pay or secure the debt a ground for attachment, it must appear that defendant was not willing either to pay or secure: *Drummond v. Stewart*, 8-341.

Inconsistent grounds: The allegation, in stating one ground, that defendant has property not exempt from execution and refuses to pay or secure, and in stating another, that he has disposed of all his property with intent to defraud creditors, are not necessarily inconsistent and contradictory: *Holloway v. Herryford*, 9-353.

Sufficiency of grounds not raised by demurrer: The averments of the grounds of attachment are not a part of the petition in the sense that they can be demurred to. If they are insufficient, a motion to dissolve the attachment is the proper remedy; if inconsistent grounds are alleged, the plaintiff may, on motion, be required to elect between them: *Holloway v. Herryford*, 9-353; *Hunt v. Collins*, 4-56.

Truth of grounds of attachment not in issue: No issue can be joined in the principal suit on the averment of facts constituting the ground for the attachment. The party injured by the wrongful suing out of the writ has no other remedy than by an action on the bond, unless in cases where an action of trespass would lie: *Veths v. Hagge*, 8-163, 192; *Churchill v. Fulliam*, 8-45: *Sackett v. Partridge*, 4-416; *Sample v. Griffith*, 5-376; *Berry v. Gravel*, 11-135; *McLaren v. Hall*, 26-297. And see § 4242.

Therefore an answer raising such an issue may be stricken from the files on motion: *Burrows v. Lehndorff*, 8-96.

Much less can such an issue be made by an entire stranger to the suit: *Whipple v. Cass*, 8-126.

Truth of grounds cannot be raised by motion to dissolve: A motion to dissolve the attachment, based upon affidavits that the cause for attachment, as stated in the petition, is not true, cannot be sustained. No issue can be joined as to the facts stated as cause for the attachment. The only remedy is on the bond: *Sturman v. Stone*, 31-115.

4166. Issued on Sunday. 2952. Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day. [10 G. A., ch. 14.]

4167. On contract; amount due. 2953. If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment. [R., § 3175; C., '51, § 1849.]

Amount due: A writ of attachment should be quashed when the petition therefor founded on contract does not state that something is due, and as nearly as practicable the amount due: *Blakley v. Bird*, 12-601; *Kelley v. Donnelly*, 29-70.

It is the petition, and not the affidavit attached to it, which is to state the amount claimed to be due: *Chittenden v. Hobbs*, 9-417.

It is not necessary that the portion of the petition asking the attachment state the

amount due when that amount is stated in the portion of the petition asking judgment: *Shaffer v. Sundwall*, 33-579.

But where the petition stating the cause of action on contract is not under oath, the sworn petition asking an attachment must state the amount due: *Blakley v. Bird*, 12-601.

False statement as to amount due: That the amount sworn to as due is unconscionable and unreasonable is no ground for dissolving an attachment, although it may render plaintiff liable on his attachment bond: *Lord v. Gaddis*, 6-57.

In actions for tort: When the plaintiff's claim is not founded on contract he is not required to state in his petition the amount due: *Sherrill v. Fay*, 14-292. And see § 4169.

Nor is it required in such actions, as it is in actions on contract, that the amount sued for must exceed five dollars to authorize an attachment: *Weller v. Hawes*, 49-45.

In justice's court the amount must exceed five dollars: See § 4855.

4168. Amount of property attached. 2954. The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent. greater in value than that amount. [R., § 3176; C., '51, § 1850.]

4169. Allowance of amount. 2955. If the demand is not founded on contract, the original petition must be presented to some judge of the supreme, district [or circuit] court, who shall make an allowance thereon of the amount in value of the property that may be attached. The provisions of this section apply only to cases in the district [and circuit] court. [R., § 3177; C., '51, § 1851; 13 G. A., ch. 161, § 2.]

Not necessary in actions on contract: Where plaintiff's right of action arises out of contract, no allowance of the amount for which attachment may issue is necessary, although the case is one in which, under the common-law rules of pleading, an action in tort might have been brought: *McGinn v. Butler*, 31-160.

Unliquidated damages; penal bond: If the action is on contract and not in tort, no allowance is necessary even though the damages are unliquidated. The distinction intended by the statute is that between actions arising *ex contractu* and those arising *ex delicto*. Therefore, no allowance is necessary in an action on a penal bond: *Lord v. Gaddis*, 6-57.

Action on judgment: Where a judgment has been recovered for a tort, the cause of action on such judgment is no longer *ex delicto*, but is *ex contractu*, and the amount due being properly stated, no allowance is required: *Johnson v. Butler*, 2-535.

Action to recover penalty: No allowance is required in an action to recover a liquidated sum as a forfeiture provided by a penal statute or ordinance, the remedy being by action of debt: *Decorah v. Dunston*, 34-360.

Action for false representations: An action for damages for false representations as to the soundness of sheep sold, *held* to be an action founded on contract, so that no allowance was required: *Swan v. Smith*, 26-87.

In actions for tort: An attachment under any circumstances in actions for tort is not allowed in many of the states; and never, unless under some restrictions other than those provided in actions on contract; and hence, under our Code, an allowance is required of the amount of property to be attached which is not required in actions on contract: *Raver v. Webster*, 3-502.

Conversion: Actions for tortious conversion of property still in possession of defendant cannot be considered as on contract, and an allowance is necessary: *Moses v. Arnold*, 43-187.

Misrepresentation in sale of land: In an action for damages sustained by reason of misrepresentations as to the quality of land sold, not being founded upon a written contract, and the damages being unliquidated, there must be an allowance: *Gates v. Reynolds*, 13-1. (This case is not consistent with the latter one of *Swan v. Smith*, 26-87, *supra*. The statute does not, and did not when the above case was decided, require the action to be on *written* contract to render an allowance unnecessary.)

Allowance relating back; amendment: Where a writ of attachment, in an action not founded on contract, issues and is levied, without an allowance being made as required by statute, and a motion is made to quash the writ on that ground, the court may then make an allowance, to relate back, as between the parties, to the issuance of the writ, and fix the additional amount of property which may be levied on: *Magoon v. Gillett*, 54-54.

Allowance to be by judge: The allowance is to be made by a judge acting in his individual capacity and need not be attested by the seal of his court: *Sherrill v. Fay*, 14-292.

But it would seem that an allowance by the judge of the court in which the action is pending, while sitting as the court and not as a judge individually, would be sufficient: *Magoon v. Gillett*, 54-54.

Subsequent allowance: Upon a motion to discharge attached property on the ground that there has been no allowance when required, the court may make an order as to how much property shall be held: *Ibid.*

FOR DEBTS NOT DUE.

4170. What petition must state. 2956; 21 G. A., ch. 29. The property of a debtor may be attached previous to the time when the debt becomes

due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states:

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or

2. That he is about to remove or has removed from the state and refuses to make any arrangements for securing the payment of the debt when it falls due, and which removal or contemplated removal was not known to the plaintiff at the time the debt was contracted; or,

3. That the defendant has disposed of his property in whole or in part with intent to defraud his creditors; or,

4. That the debt was incurred for property obtained under false pretenses. [R., § 3178; C., '51, § 1852.]

A surety upon indebtedness not yet due, and which he has not paid, cannot have an attachment against the principal, under the provisions for attachment in case of unmatured indebtedness: *Dennison v. Soper*, 33-183.

To bring a case within these provisions, a disposition or removal of the property must be with intent to defraud: *Pride v. Wormwood*, 27-257.

That defendant is about to dispose of his property with intent to defraud his creditors will bring a case within these provisions, without alleging a refusal to make any arrangements for securing the indebtedness: *Danforth v. Carter*, 1-546.

In an action under these provisions in regard to unmatured indebtedness, the defense that the debt is not due cannot be set up: *Churchill v. Fulliam*, 8-45.

Where suit was brought for a debt as due, and attachment procured, and defendant denied the indebtedness on the ground that it was not mature, and asked damages for wrongful suing out of the attachment, *held*, that it was proper to give him judgment for such damages, without giving plaintiff judgment for the amount of the claim: *Wetherell v. Sprigley*, 43-41.

4171. When to plead. 2957. If the debt or demand on which the attachment suit is brought is not due at the time of the service of the attachment, the defendant is not required to file any pleadings until the maturity of such debt or demand; but he may, in his discretion, do so and go to trial as early as the cause is reached. [R., § 3179.]

4172. Judgment. 2958. And no final judgment shall be rendered upon such attachment unless the party consents as in the last section, until the debt or demand upon which it is based becomes due. But property of perishable nature may be sold as in other attachment cases. [R., § 3180.]

BOND.

4173. Must be given; amount. 2959. In all cases, before an attachment can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars in a court of record, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. [R., § 3181; C., '51, § 1853.]

[The word "it" is erroneously substituted in the printed Code for "an attachment" in the first line of this section.]

The amount of the bond is to be double the value of the property which the sheriff may attach, or three times the amount sworn to by plaintiff. It is not sufficient that it be double the amount sworn to, or double the value of the property which is actually attached: *Churchill v. Fulliam*, 8-45; *Hamill v. Phenicie*, 9-525; *Van Winkle v. Stevens*, 9-264; *Hamble v. Owen*, 20-70.

Surety: One surety is sufficient if his pecuniary responsibility satisfies the requirements of the law: *Elliott v. Stevens*, 10-418.

Signature of plaintiff is not essential: *Pitkins v. Boyd*, 4 G. Gr., 255.

Partnership name: A bond signed by both principal and sureties in their partnership name is not *prima facie* insufficient: *Danforth v. Carter*, 1-546; *Churchill v. Fulliam*, 8-45.

Where an attachment was sued out against a member of a firm for a partnership indebtedness, *held*, that a bond executed to the firm was not sufficient: *Courrier v. Cleghorn*, 3 G. Gr., 523.

Where the bond runs to a firm and the writ issues against firm property, it will not cover damages for wrongful attachment of the individual property of a member of the firm, although such partner is joined as defendant in the action: *Mason v. Rice*, 66–174.

Giving an appeal bond does not release from liability on the attachment bond: *McCall v. Bradley*, 3 G. Gr., 200.

Motion to dissolve the attachment for insufficiency of the bond may be made where the amount is not as large as required by statute: *Hamble v. Owen*, 20–70.

And this remedy, and not demurrer, is available for failure to give bond: *Brace v. Grady*, 36–352.

As to amending defective or insufficient bond, see, also, §§ 4246 and 326.

4174. Additional security. 2960. The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated and restitution directed of any property taken under it, unless, in a reasonable time to be fixed by the court or judge, security is given by the plaintiff. [R., § 3182.]

This section relates to a case where additional security becomes necessary because of the removal of the surety, or the like: *Hamble v. Owen*, 20–70.

4175. Action on. 2961. In an action on such bond, the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond. [R., § 3183; C., '51, § 1854.]

[The word "fixed," in the fifth line, is erroneously printed "filed" in the Code.]

Independently of statute: An action might be maintained independently of the statute against a party who, maliciously and without probable cause, should sue out a writ of attachment; but in the absence of proof of malice and want of probable cause, the only remedy is on the bond: *Tallant v. Burlington Gas Light Co.*, 36–262.

Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common-law principles, aside from the remedy on the attachment bond: *Preston v. Cooper*, 1 Dillon, 589.

The only remedy of the attachment defendant, *it seems*, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was *wrongfully* procured, but there must be allegations of malice and want of probable cause: *Ibid.*

Where by statute no bond in attachment is required and none given, the defendant, in the absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out, because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution: *Ibid.*

Action should be on bond: An action for wrongfully suing out an attachment should be brought on the bond: *Abbott v. Whipple*, 4 G. Gr., 320.

That the truth of the facts alleged as ground for attachment can only be questioned in action on bond, see § 4242.

Want of actual ground or reasonable belief: The question in an action on the bond, for improperly suing out the writ, is not alone whether the facts alleged as grounds for attachment were actually true, but whether plaintiff, exercising that degree of caution that a reasonably prudent man should have exercised, had good cause to believe that they were true: *Winchester v. Cox*, 4 G. Gr., 121; *Mahnke v. Damon*, 3–107; *Burton v. Knapp*, 14–196; *Nordhaus v. Peterson*, 54–68.

Defendant may show, as a defense, either that he had good cause to believe the ground stated to be true, or that it was true in fact, irrespective of his grounds of belief: *Vorse v. Phillips*, 37–428.

To constitute reasonable ground of belief that the facts alleged for securing an attachment are true, it is not necessary that the facts be such as to lead a reasonably prudent man to act in matters of the highest moment to himself. Reasonable grounds of belief of their truth is sufficient: *Carey v. Gunnison*, 51–202.

A verdict allowing a recovery on the bond necessarily implies a finding that the plaintiff in attachment had not reasonable grounds to believe his allegations true, as well as that they were not true: *Nockles v. Eggspieler*, 53–730.

Pleading breach: In an action on the bond the conditions of such bond must be set out, and facts alleged constituting their breach: *Ryder v. Thomas*, 32–56.

As, for instance, the non-payment of damages which the party injured claims to have suffered: *Horner v. Harrison*, 37–378.

A failure to make such averment may be

raised for the first time on motion in arrest of judgment, at least where no evidence of damage is offered: *Hencke v. Johnson*, 62–555.

An allegation that "the attachment was wrongfully sued out with wilful wrongfulness," *held* a sufficient allegation of want of reasonable belief of the truth of the grounds set out on the part of the plaintiff in the attachment: *Abbott v. Whipple*, 4 G. Gr., 320.

Action accrues when: The breach of the bond consists in the wrongful suing out of the writ, and whatever damages have resulted to defendant are to be deemed a claim held by him at the commencement of the suit and filing of the bond, when they are concurrent acts; but otherwise if the attachment is sued out subsequently to the commencement of the action: *Reed v. Chubb*, 9–178.

The right of action on the bond accrues as soon as the defendant in the attachment is disturbed in the possession of the property levied on by virtue of the writ, if it is wrongfully issued, and he need not wait until the termination of the principal suit to sue on the bond: *Campbell v. Chamberlain*, 10–337.

By way of counter-claim: Therefore (without the statutory provision to that effect now found in § 4242, which see), *held* that, where the attachment was sued out at the commencement of the action, a claim on the bond for damages for the wrongful suing out of the attachment might be interposed as a set-off or counter-claim: *Reed v. Chubb*, 9–178; *Stadler v. Parmlee*, 10–23.

The decision of the court on this point in the foregoing cases would be subject to very grave doubts did not the statute now expressly authorize suit on the bond by way of counter-claim: *Branch of State Bank v. Morris*, 13–136.

Assignment of claim on bond: Where the debtor, after the suing out of the attachment, makes a general assignment, the assignee may intervene in the attachment proceeding in which the debtor has set up the claim for damages on the bond as a counter-claim: *Dunham v. Greenbaum*, 56–303.

Where defendant had, previous to the attachment, made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim in the action against him: *Rumsey v. Robinson*, 58–225.

No indebtedness: If there was no indebtedness from defendant to plaintiff in the attachment suit, that fact alone would probably be conclusive evidence that the attachment was wrongfully sued out: *Nordhaus v. Peterson*, 54–68.

The plaintiff's belief in such case with reference to the truthfulness of the grounds of attachment would not prevent such liability: *Porter v. Wilson*, 4 G. Gr., 314.

Dismissal of attachment suit by plaintiff therein and release of attached property does not, of itself, show that the attachment was wrongfully sued out: *Nockles v. Eggspieler*, 47–400.

Amendment: Where the petition stating the indebtedness in an attachment suit was amended after the suit was brought, so as to set up another cause of action, *held* that, as the second cause of action, as stated, arose after the bringing of suit, and was also inconsistent with the first, the filing of the amendment must be deemed an abandonment of the first cause of action and an admission that it did not exist when the attachment was sued out: *Young v. Broadbent*, 23–530.

Recovery of less than five dollars does not, in actions of tort, show that the attachment was wrongfully sued out. (See § 4167, distinguishing *Gaddis v. Lord*, 10–141): *Weller v. Hawes*, 49–45.

The judgment in the attachment suit may be introduced in evidence in an action on the bond, and is conclusive as to the indebtedness between the parties, but not as to the plaintiff's belief in regard to the truth of the matters stated in his petition: *Gaddis v. Lord*, 10–141; *Raver v. Webster*, 3–502.

Proof of cause of action not conclusive: The attachment may be wrongful, or even wilfully wrongful, although the cause of action is a just one: *Drummond v. Stewart*, 8–341.

The burden of proof is upon the party claiming that the attachment was wrongfully sued out, to establish that fact: *Burrows v. Lehndorff*, 8–96; *Veiths v. Hagge*, 8–163, 191.

The party seeking to recover for the wrongful suing out of the writ has the burden of showing, not only that the grounds stated therefor were not true, but also that the party suing out the writ did not have reasonable ground to believe that they were true: *Dent v. Smith*, 53–262.

Although plaintiff in the attachment suit in which defendant sues on the bond, by way of counter-claim, may have the burden of proof as to the alleged liability of defendant on the cause of action, yet if no evidence to that effect is offered the defendant has the opening and closing on the question of plaintiff's liability on the bond: *Whitney v. Brownewell*, 71–251.

Intent of debtor: Testimony as to the intent of defendant is immaterial with reference to whether plaintiff had reason to believe that defendant was about to dispose of his property with intent to defraud his creditors: *Selz v. Belden*, 48–451; *Charles City Plow, etc., Co. v. Jones*, 71–234.

The opinion of a witness as to the debtor's intention in disposing of property is not admissible: *Carey v. Gunnison*, 51–202.

Refusal to secure or pay, while no ground for suing out an attachment, is admissible in evidence on the question whether the attachment was wrongfully sued out: *Myers v. Wright*, 44–38.

So, also, refusal of defendant to secure or pay indebtedness to others, such fact being known to plaintiff before suing out the attachment, may be shown: *Dent v. Smith*, 53–262.

Defendant's indebtedness at the time of attachment may be material as bearing on the question whether plaintiff was actuated by malice in suing out the attachment: *Mitchell v. Harcourt*, 62–349.

Deeds of conveyance by defendant of his property, made subsequent to the issuance of the attachment, are not admissible on the

question as to whether he was about to dispose of his property at the time of attachment with intent to defraud his creditors: *Dynes v. Robinson*, 11–137.

The writ and return thereon are admissible as evidence in an action on the bond: *Drummond v. Stewart*, 8–341.

Statements of attaching plaintiff at the time of suing out the attachment are not admissible in evidence for the purpose of showing want of malice: *Shuck v. Vanderventer*, 4 G. Gr., 264.

Such statements made after the commencement of suit, and not connected with its commencement, are not receivable to show malice: *Burton v. Knapp*, 14–196.

Evidence that plaintiff, on the day on which attachment was levied, said, concerning the levy, that defendant therein "had had his time, and now he [plaintiff] would have his," *held* admissible to show the wrongful suing out: *White v. Beck*, 64–122

Advice of counsel will go to rebut the idea of malice, but it must be proved that the party submitted his cause to the attorney, and was by him advised that he had a right to sue out an attachment. Proof of such advice may defeat the recovery of exemplary, but not of actual, damages: *Raver v. Webster*, 3–502.

It must appear that a full and fair statement of the facts was made to the attorney: *Porter v. Knight*, 63–365.

The fact that the attorney consulted was a stockholder and officer in the corporation suing out the attachment, or was not in practice, will not preclude the corporation from showing such legal advice. In such cases the question is whether plaintiff acted in good faith on the advice of counsel, and that is for the jury: *Charles City Plow, etc., Co. v. Jones*, 71–234.

The conversation with the attorney may be shown by plaintiff for the purpose of showing that the advice was given on a full and fair statement of the facts of the case: *Ibid.*

Damages; expenses of defending: In an action on the bond, either original or by way of counter-claim, the party, if entitled to recover at all, may recover all expenses incurred in making defense to the attachment proceeding: *Vorse v. Phillips*, 37–428.

Attorneys' fees: In the absence of any express statutory provision, the party suing on an attachment bond cannot recover, as a part of the costs or expenses covered by the bond, the fees of his attorney in prosecuting such suit: *Ibid.*

Nor even his attorneys' fees on defending against the principal suit: *Plumb v. Woodmansee*, 34–116.

The allowance of attorneys' fees for the services of attorneys in defending the entire case will not be erroneous where the whole defense made tended to show the wrongfulness of the attachment: *Whitney v. Brownewell*, 71–251.

Attorneys' fees; how assessed: Under this section the jury have nothing to do with fixing the amount of such fee. The better practice would be not to introduce any evidence as to the fee during the trial, but if, in answer to a special interrogatory, the jury find that the attachment was wrongfully sued out, then evidence as to the amount of the fee should be introduced to the court and a finding made, and the amount so fixed should then be added to or deducted from the amount found by the jury, as the case may require: *Selz v. Belden*, 48–451.

Attorneys' fees constitute a part of the costs, and the legislature may authorize the court to fix the amount, without submitting the question to the jury: *Weller v. Hawes*, 49–45.

A verdict for actual damages, in an action on the bond, and a special finding that the attachment was wrongfully sued out, are sufficient to warrant the allowance of an attorney's fee. That there was no reasonable cause to believe the ground upon which the attachment was issued to be true is implied in such verdict and special finding: *Nockles v. Eggspieler*, 53–730.

In fixing the attorney's fee the court is not to take into account the trial of the principal case, but only the fee for prosecuting, by original action or counter-claim, the cause of action on the bond, on account of the wrongful suing out of the attachment: *Porter v. Knight*, 63–365.

The misprint of "filed" for "fixed" in this section in the Code is referred to and recognized as an error in *Selz v. Belden*, 48–451, and *Weller v. Hawes*, 49–45.

Actual and not remote damages: Where the suing out of an attachment was not wilful and malicious, the damages recoverable are confined to actual compensation for damages immediately consequent upon the wrongful act: *Plumb v. Woodmansee*, 34–116.

Use: While the party against whom the attachment issues is entitled to compensation for the loss sustained by reason of being deprived of the use of property levied on, the value of this use must be predicated upon the condition of the property when it was attached and not upon what its condition was before, or what it was intended to be in the future: *Ibid.*

Value of goods: In an action on the bond the true measure of the value of the goods attached is the cost of replacing them at the place where levied upon: *Selz v. Belden*, 48–451.

The measure of damage is the fair cash value of the property at the time when it was wrongfully taken and interest thereon: *Porter v. Knight*, 63–365.

The elements of damage to be considered include diminution in value of stock by reason of the levy and the closing up or stopping the business; also rent of store during the time the business is stopped; also loss of employment during the interruption in business if the debtor had been giving his personal labor and attention to the business and has been unable to obtain other employment: *Lowenstein v. Monroe*, 55–82.

The defendant in the attachment is to recover such losses as he may have sustained by reason of being deprived of the use of the property levied on, and any injury thereto by its loss or depreciation in value: *Ibid.; Campbell v. Chamberlain*, 10–337.

Injuries to character, or credit, or business are too remote and speculative to be considered: *Ibid.*

Loss of profits in the retail of the goods is to be disregarded: *Lowenstein v. Monroe*, 55–82.

Injuries to credit cannot be shown as an element of damage: *Mitchell v. Harcourt*, 62–349.

Chattel mortgage: Where property levied on in attachment was taken from the officer under a prior chattel mortgage and sold, the balance only in excess of the mortgage being turned over to the officer by virtue of his levy, the damage for the wrongful act in suing out the writ will be limited to the balance paid the officer after the satisfaction of the mortgage, and interest, and the damages sustained by being deprived of the property during its detention under the attachment: *Porter v. Knight*, 63–365.

Rents: Where the rent of a mill was included in the claim for damages on the bond given in an attachment sued out by the landlord against the tenant on an independent indebtedness, *held*, that the tenant was thereby barred from afterward setting up the interruption of his possession as a defense in an action for the rent, although the claim on the bond had been interposed before the entire damage had accrued and the whole amount thereof was not then recoverable: *Davis v. Milburn*, 4–246.

Attachment defendant cannot recover, in an action on the bond, for the use of a storebuilding in which the goods levied on are kept, where it appears that the attachment defendant had the privilege of using the building during that time, and voluntarily relinquished such privilege: *Charles City Plow, etc., Co. v. Jones*, 71–234.

Attachment of property of wrong party; trespass: Where the proceeding was commenced against a firm and its members, but the bond was to the firm only, and the writ was directed against firm property only, *held*, that although the attachment was wrongfully sued out, yet there could not be a recovery on the bond by a member of the firm for damages caused to him by the levy of the attachment on his property, for the reason that the levy was not authorized under the writ and was a trespass by the officer for which the plaintiff in attachment was not liable on the bond: *Mason v. Rice*, 66–174.

Exemplary damages: To entitle a party to exemplary damages it must appear that the attaching plaintiff procured the attachment without reasonable grounds to believe the truth of the matter stated in his application, and with the intention, design or set purpose of injuring the defendant therein: *Gaddis v. Lord*, 10–141; *Raver v. Webster*, 3–502.

Something more must be made to appear than that the ground alleged for the attachment did not exist, and that attaching plaintiff had no ground to believe it did. These facts must be proven to establish the right to recover actual damages. To recover exemplary damages it must be shown that plaintiff acted with the intention, design or set purpose of injuring him: *Nordhaus v. Peterson*, 54–68.

There cannot be a recovery of exemplary damages where actual damages are not recoverable: *Myers v. Wright*, 44–38.

Judgment not binding on sureties: A judgment on the bond, in an action to which the sureties are not parties, is not binding upon them: *Bunt v. Rheum*, 52–619.

MODE OF ATTACHMENT.

4176. To whom directed. 2962. The clerk shall issue an attachment, directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated. [R., § 3185; C., '51, § 1856.]

The object of the writ is to seize and hold the property of the defendant, or its equivalent, to await the event of the suit. If plaintiff recovers, the property is considered as having been levied on under execution, and defects in the writ or the proceedings thereunder cannot vitiate the proceedings in the suit in which the attachment is secured, the proceedings by attachment being merely auxiliary: *Carothers v. Click*, Mor., 54.

The cause of action or its nature need not be stated in the writ: *Wadsworth v. Cheeney*, 13–576; *Pitkins v. Boyd*, 4 G. Gr., 255; *Westphal v. Sherwood*, 69–364.

The fact of bond being given need not necessarily be recited in the writ: *Hays v. Gorby*, 3–203 (commenting upon *Barber v. Swan*, 4 G. Gr., 352): *Ellsworth v. Moore*, 5–486: *Westphal v. Sherwood*, 69–364.

The duties of the officer as to manner of making levy, return, etc., need not be stated in the writ: *Westphal v. Sherwood*, 69–364.

Against one of several defendants: It is not necessarily a ground for quashing the writ that it is against only one of several defendants in the action, or that the bond is to the one against whom the writ issues and not to all: *Patterson v. Stiles*, 6–54.

Successive writs may issue in the same county until the proper amount of property is attached: *Hamill v. Phenicie*, 9–525.

Or to different counties without the filing of a new affidavit or bond: *Elliott v. Stevens*, 10–418.

Defects in affidavit: The writ is not void in the hands of the officer for defects in the affidavit which might be cured if objected to: *State v. Foster*, 10–435.

Amendment; absence of seal: Under the provisions of § 4246, it is held that the absence of the seal of the court, or the affixing of the seal of the wrong court, is a defect which may be cured by amendment: *Murdough v. McPherrin*, 49–479.

Amendment as to amount claimed: Where the writ is defective in not stating the sum claimed in the action, it may be amended in this respect after levy: *Atkins v. Womeldorf*, 53–150.

Lost writ: Where the writ under which a levy has been made is lost, but the date and title of the cause and amount of property au-

thorized to be attached are established, there will be a *prima facie* presumption that the writ was issued by the proper officer, in due form, and under seal: *French v. Reel*, 61–143; *McNorton v. Akers*, 24–369.

4177. Several writs to different counties. 2963. Attachments may be issued from courts of record to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court; and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus. [R., § 3184; C., '51, §§ 1855, 1858.]

4178. Property attached. 2964. The sheriff shall in all cases attach the amount of property directed if sufficient, not exempt from execution, found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable. [R., § 3186; C., '51, § 1857.]

Beyond jurisdiction: An attachment levy made by a sheriff outside of his county, or secured by fraud or violence, is void, and may be dissolved by motion: *Pomroy v. Parmlee*, 9–140.

What acts constitute: To constitute a valid levy, even between the parties, the officer should do that which would amount to a change of possession, or something equivalent to a claim of dominion coupled with the power to exercise it: *Crawford v. Newell*, 23–453.

Therefore, *held*, that the act of the sheriff in barricading the front door of the building in which a stock of goods was situated, without entering and taking possession of the goods, the owner of the stock having a key to the back door, by which he might have access thereto, such door not being barricaded or guarded, was not sufficient to constitute a levy: *Bickler v. Kendall*, 66–703.

The officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor: *Allen v. McCalla*, 25–464.

Therefore, *held*, that a levy upon certain patterns, which remained locked up in a building, the key of which was in the possession of the owner, was not sufficient: *Rix v. Silknitter*, 57–262.

The mere intention to levy, where no levy is actually made, will not create a lien as against a subsequent mortgagee: *Collier v. French*, 64–577.

Abandonment of levy: Where the officer, after levying his attachment, put the property in the possession of a workman on the premises, taking his receipt for it, and did not afterwards, either himself or through his agent, assert any possession over or control of the property, and permitted an assignee to take possession of such property and apply it to the payment of the debts of the owner, and gave him no notice of the fact of levy, and made no claim upon him for the property until more than two years after the levy, *held*, that the lien of the attachment was lost and the levy would be regarded as having been abandoned: *Littleton v. Wyman*, 69–248.

An attachment lien upon personal property is lost by surrender of possession: *Ibid.*

Possession must be taken: It seems that a levy upon property not capable of manual delivery may be valid as between the parties, although the same is left in possession of the attachment defendant; but where property capable of possession, such as beer in tubs and vats, was left in defendant's possession, with authority to use as he wished by sale or otherwise, provided he should keep the quantity good, *held*, that the levy was not sufficient and was invalid, even as between the parties: *Nockles v. Eggspieler*, 47–400.

The thing against which the proceeding is directed must be brought within the jurisdiction of the court by virtue of a seizure, the evidence of which is the service of the writ and the return: *McDonald v. Moore*, 65–171.

Time of levy: Levy of the attachment may be made at any time before judgment and before the return: *Westphal v. Sherwood*, 69–364.

The interest of mortgagor in chattels covered by a chattel mortgage cannot be attached. The provision of this section as to giving preference to property in which defendant has a legal and unquestionable title relates to the duty of the officer as to the order in which property shall be seized, but does not establish a rule as to what interests may be levied upon: *Wells v. Sabelowitz*, 68–238.

Unassigned dower right of a widow in lands of her deceased husband was not at common law subject to attachment, nor did the act of 1862, which enlarged the dower to a fee-simple interest, change the rule. Whether the provisions of § 3644 as to the dower interest have changed it, *quære: Rausch v. Moore*, 48–611.

Landlord's share of crops: The right of a landlord to receive as rent a share of the crops grown upon the premises does not give him such interest in the crops, before his share is set off to him, that such share can be levied on under attachment. The landlord's interest can be reached only by garnishment of the tenant: *Howard County v. Kyte*, 69–307.

A mere license or privilege to erect buildings upon real property and use the same for a particular purpose, which may be surrendered at any time, does not constitute an interest in real estate, but is personal property, which can be levied upon only as other personal property: *Melhop v. Meinhart*, 70–685.

Equitable interests in real property, the legal title to which is in third persons, are not to be reached by garnishment: *Seymour v. Kramer*, 5-285.

The statement in the incumbrance book of an attachment of an equitable interest in land, not appearing of record, does not constitute notice to a purchaser or mortgagee of the person holding the legal title: *Farmers' Nat. Bank v. Fletcher*, 44-252.

Wrongful levy; trespass of officer: Where the writ is substantially defective, it will constitute no defense in an action against the officer for trespass in acting under it: *Deforest v. Swan*, 4 G. Gr., 357.

A United States marshal seizing property under attachment issued from a federal court can be sued personally by the owner of property seized by him which is not subject to the writ: *Sperry v. Ethridge*, 70-27.

A bond to indemnify the officer for not levying, in accordance with his legal duty, is void both as to the officer and the party injured: *Cole v. Parker*, 7-167.

Trespass in plaintiff: The possession of an officer who has taken property under an attachment is the possession of plaintiff in the attachment proceeding, and the latter will be held liable for a wrongful levy to the same extent as the former, whether he has actual knowledge of the seizure or not: *Robinson v. Keith*, 25-321.

Where chattel property in the possession of the mortgagor under a valid mortgage is levied upon in an attachment proceeding, and sold by order of the court procured by the attachment plaintiff, such plaintiff becomes liable to the mortgagee in an action of trespass: *Meyer v. Gage*, 65-606.

Conversion; liability of plaintiff: Where the seizure under the writ is not shown to be wrongful, the attachment plaintiff cannot be held liable for conversion without an allegation and proof that he did, or authorized the officer to do, some unlawful act with reference to the property: *Burt v. Decker*, 64-106.

Liability of attorney: An attorney is not liable for causing property to be seized under an attachment, if he acts in obedience to the instructions of his client: *Dawson v. Buford*, 70-127.

Appraisement of the property levied on is not necessary to make the levy good; it is only required where a delivery bond is given: *Smith v. Coopers*, 9-376; *Woodward v. Adams*, 9-474.

4179. Several attachments. 2965. Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [R., § 3187.]

4180. Following property. 2966. If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after removal. [R., § 3188.]

This section has no application to the case of the removal of the debtor: *Budd v. Durall*, 36-315.

4181. What attached and how. 2967. Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows:

1. By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment;

2. If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found;

3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached.

4. Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof. [R., § 3194; C., '51, §§ 1859-60.]

Notice of the levy, required in case of attachment of property in possession of defendant or a third person, is not necessary in case of garnishment: *Phillips v. Germon*, 43-101.

It seems that the direction that notice be given to defendant extends to levies on all property subject to attachment: *First Nat. Bank v. Jasper County Bank*, 71-486.

Corporate stock: At common law, shares of stock in an incorporated company could not be levied on. The only method, at present, of effecting levy under attachment is to follow the method pointed out by this section: *Mooar v. Walker*, 46-164.

The attaching creditor acquires priority over a transfer of the stock which does not appear on the books of the company as required by § 1628: *Fort Madison Lumber Co. v. Batavian Bank*, 71-270.

Debts due defendant are levied on by garnishment, which is a mode of attachment: *Woodward v. Adams*, 9-474.

Judgments owned by defendant are only to be reached, as other debts due him, by gar-

nishment, there being no statutory provision, as there is in case of execution (§ 4271), for levy of the writ thereon: *Ochiltree v. Missouri, I. & N. R. Co.*, 49-150. And see *Osborn v. Cloud*, 21-238.

Interest of mortgagee: The lien of a mortgagee upon land cannot be levied on by attaching the land. Garnishment is the method of reaching such interest: *Courtney v. Carr*, 6-238.

4182. Examination of defendant. 2968. Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or the officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and, it being shown to the judge of any court by affidavit, that the defendant has property within the state not exempt, the defendant may be required by such judge to attend before him, or before the court in which the action is pending, and give information on oath respecting his property. [R., § 3189; 13 G. A., ch. 137, § 21.]

It is not necessary to show otherwise than by the affidavit here contemplated that suit is pending in which an attachment has issued: *Lutz v. Aylesworth*, 66-629.

4183. When property bound. 2969. Property attached otherwise than by garnishment, is bound thereby from the time of the service of the attachment only. [R., § 3215; C., '51, § 1874.]

No lien in garnishment: In case of attachment a lien is acquired against the property, but no personal claim against a third party; while in garnishment there is no lien upon the property, but a personal claim is acquired against garnishee: *Mooar v. Walker*, 46-164; *McConnell v. Denham*, 72-494.

Lien on corporate stock: A levy on shares of stock by notice to the officers of the corporation, as provided by statute, gives rise to a lien. The proceeding is not in the nature of a garnishment: *Ibid.*

The lien is a vested right which nothing subsequent can destroy except the dissolution of the attachment. The legislature may suspend the enforcement of such liens, but cannot destroy them: *Hannahs v. Felt*, 15-141.

Therefore, *held*, that a statute providing that levies already made upon property of volunteers in the United States army should be discharged was unconstitutional: *Ibid.*

The death of defendant will not destroy a lien already acquired: *Lord v. Allen*, 34-281.

Abandonment: Where the second writ was levied before the officer levying under a previous writ had taken possession, but the second levy was abandoned and the officer levying under the first writ was garnished, *held*, that there was no right acquired by the second levy: *Hanson v. Taper Sleeve Pulley Incorporation*, 72-622.

Inconsistent rights: An attaching plaintiff who has seized property as that of defendant cannot afterward assert a prior right in himself thereto, as under a pledge or sale: *Citizens' Bank v. Dows*, 68-460; *Crawford v. Nolan*, 70-97.

Rights not greater than those of defendant: An attaching creditor acquires no greater right in the property attached than was held by the defendant at time of attachment: *Manny v. Adams*, 32-165; *Harshberger v. Harshberger*, 26-503; *Bacon v. Thompson*, 60-284; *Rogers v. Highland*, 69-504.

Prior unrecorded conveyance: The lien of an attachment does not, under our registry laws, take priority over an unrecorded conveyance, even though the attachment creditor had no notice of such conveyance: *First Nat. Bank v. Hayzlett*, 40-659; *Savery v. Browning*, 18-246; *Norton v. Williams*, 9-528.

Notice to the officer before receiving the writ of attachment under which the levy is made of prior claims on the property must be deemed notice to the attaching plaintiff: *Lyons v. Hamilton*, 69-47.

And see notes to § 3094.

Assignment: If the property has been assigned prior to the levy and the assignee is diligent in asserting his rights, he will be entitled to a release of the levy: *Stephenson v. Walden*, 24-84.

Evidence of transfer; bill of sale: But evidence of a bill of sale, not accompanied by evidence of change of possession, cannot be received to defeat a levy of attachment on the property as that of the grantor: *Bevan v. Hayden*, 13-122.

Judgment; res inter alios acta: Where an intervenor sought to defeat an attachment lien, under claim that he was the owner of the property attached, *held*, that a decree in an action between him and attachment defendant, to which attaching plaintiff was not a party, was not admissible: *McBride v. Harn*, 48-151.

The burden of proof is upon an attachment creditor claiming priority over an atment which is first in point of time: *Allen v. Loring*, 37-595.

Actual levy necessary: The mere intention to levy, where no levy is actually made, will not give the attaching creditor any priority over a mortgage of the property subsequently executed: *Collier v. French*, 64-577.

4184. Receiver appointed. 2970. The court before whom the action is pending, or the judge thereof in vacation, may, at any time, appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage, and control the same, and pay over the pro-

ceeds according to the nature of the property and the exigency of the case. [R., § 3216.]

Under this section something more than the mere fact of attachment must be shown to justify the appointment of a receiver. Facts must be shown rendering the exercise of the power necessary or proper: *Silverman v. Kuhn*, 53-436.

4185. Money paid clerk. 2971. All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk to be by him retained till the further action of the court. [R., § 3217; C., '51, §§ 1875, 1882.]

4186. Other property. 2972. The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and where there is no direction upon the subject he shall safely keep the property subject to the order of the court. [R., § 3218.]

In custody of the law: Where property was held by the sheriff under attachment in an action for breach of warranty in the sale thereof, *held*, that being thus in the custody of the law, defendant was not entitled, on application to the court, to an order allowing him temporary possession thereof, for the purpose of trying whether it would conform to the terms of the warranty: *Rogers v. Hanson*, 35-283.

Care required of officer: The officer holding property under writ of attachment is only held to the exercise of ordinary care in the preservation of the property in his hands: *Cresswell v. Burt*, 61-590.

As to compensation for keeping, see § 4238.

PARTNERSHIP PROPERTY.

4187. Inventory and appraisement. 2973. In executing an attachment against a person who owns property jointly or in common with another, or who is a member of a partnership, the officer may take possession of such property so owned jointly, in common, or in partnership, sufficiently to enable him to inventory and appraise the same, and for that purpose shall call to his assistance three disinterested persons; which inventory and appraisement shall be returned by the officer with the attachment, and such return shall state who claims to own such property. [R., § 3190.]

4188. Equitable proceedings. 2974. The plaintiff shall, from the time such property is taken possession of by the officer, have a lien on the interest of the defendant therein, and may, either before or after he obtains judgment in the action in which the attachment issued, commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances and conditions provided in chapter twelve, of title seventeen. [R., §§ 3191-2.]

By the garnishment of a partner, a creditor cannot acquire a greater interest in the property of the debtor than as provided in this section. In case of an attachment of partnership property, it is only the defendant's interest in the funds garnished which can be reached: *Cox v. Russel*, 44-556.

LEVIES UPON MORTGAGED PERSONAL PROPERTY.

4189. How made. 21 G. A., ch. 117, § 1. Personal property not exempt from execution hereafter mortgaged, or heretofore mortgaged when the debt secured thereby is due, may be taken on attachment or execution issued at the suit of a creditor of a mortgagor, but before the property is so taken the officer or plaintiff must pay or tender to the holder of the mortgage the amount of the mortgage debt and interest accrued, or must deposit the amount thereof with the clerk of the district court of the county wherein the mortgaged property is found payable to the order of the holder of the mortgage. When the debt secured by a mortgage hereafter made is not due, as shown by such chattel mortgage, he must also deposit with the clerk, interest on the principal sum at the agreed rate specified in the mortgage, for the term of sixty days from

the date of deposit; *provided however*, if the debt secured fall due in less than sixty days from the date of deposit, then interest shall be deposited only for such shorter period; and when such sums are tendered to the holder of the mortgage, or deposited with the clerk, the attaching creditor shall be subrogated to all the rights of the holder of the mortgage; and the proceeds from the sale of the mortgaged property shall go, first to the discharge of such indebtedness and costs of execution; *provided however*, that if the judgment debtor shall pay the debt for which the attachment or execution was issued, the property shall be released, and the creditor shall be entitled to receive money deposited to pay the mortgage debt, and shall have no right or interest in the mortgage, or in the mortgaged property.

Aside from statute, the mortgagee has the title and right of possession, subject to be divested only on performance of the condition, and the mortgagor has therefore no interest in the property which can be seized and sold under execution: *Campbell v. Leonard*, 11-489; *Gordon v. Hardin*, 33-550; *Vanslyck v. Mills*, 34-375; *Porter v. Knight*, 63-365.

Nor is such interest subject to levy under attachment: *Wells v. Sabelowitz*, 68-238.

The reason of holding that the interest of the mortgagor in the mortgaged property cannot be levied on and sold under execution is not that he has no interest therein which could be appropriated in satisfaction of his debts, but that the statutes of the state have made no provision under which his interest can be appropriated to that object by judicial sale: *Ibid.*

If mortgagee has the right to take possession, he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59-658.

Where a contract creating a lien carries with it the right to take possession, if, in the exercise of this right, possession is taken forcibly and by violence, the mortgagee may be liable for the injury done in thus taking possession, but not for the value of the property taken in accordance with the terms of the agreement for the lien: *Brown v. Allen*, 35-306.

Where the mortgagor of chattels is in possession and has the right to possession of the mortgaged property for a definite period, his interest prior to the expiration of such period is the subject of levy and sale. But it is otherwise when the mortgagee may take possession at his pleasure, or where the mortgagor's right of possession is for no definite time: *Rindskoff v. Lyman*, 16-260.

4190. Amount to be paid. 21 G. A., ch. 117, § 2. The holder of the mortgage shall state over his signature and under oath on the back of said mortgage, the amount due. or to become [due] thereon, and deliver the same to the person paying him said amount, and if the said sum has been deposited with the clerk of the district court, the holder of the mortgage shall only receive the amount so stated to be due, and shall surrender to the clerk the mortgage and other evidence of indebtedness, and the surplus, if any, shall be returned to the person who made the deposit; *provided however*, that the execution or attaching creditor shall have the right to controvert, in the court from which the process issued, such statement of indebtedness in the manner provided in other garnishment proceedings, if he give notice in writing to the clerk at the time of the deposit; and the clerk shall hold the deposit until such matter is determined. If the attaching or judgment creditor fail to sustain his claim against the mortgage, he shall pay to the holder of the mortgage interest upon the debt at the rate of ten per cent. per annum, together with the costs of the proceeding, and an attorney's fee of ten per cent. on the amount of the debt.

4191. Bid for debt and costs. 21 G. A., ch. 117, § 3. At the sale of said property no bid shall be received for a less sum than the amount then due, on said mortgage, together with the costs made by virtue of such levy of attachments or executions, and the costs of said sale. And unless there shall be a bid of more than such amount, the execution or attachment creditor shall pay the costs made by such levy and sale. If said property shall sell for more than the amount due on said mortgage and the costs aforesaid, the officer shall immediately pay the sum due on said mortgage to the person who paid the same, and shall apply this surplus on the execution or attachment held by him.

4192. Validity contested. 21 G. A., ch. 117, § 4. But nothing contained in this act shall in any way affect the right of any creditor to contest for any reason the validity of such mortgage.

4193. Statement of amount due. 21 G. A., ch. 117, § 5. Upon written demand of a creditor, his agent, or attorney, or of any mortgagor of personal property other than exempt property, the person entitled to receive said debt shall deliver to said creditor a statement in writing under oath, which statement shall show the nature and amount of the original debt secured by the mortgage, the date and amount of each payment, if any, which has been made thereon, and an itemized statement of the amount then due and unpaid.

4194. Failure to comply. 21 G. A., ch. 117, § 6. The refusal of the person entitled to receive said mortgage debt, or his failure within a reasonable time after demand to deliver to the attachment or execution creditor, or to his attorney or agent, or either of them, the statements required by the second and fifth sections of this act, is hereby declared to be a misdemeanor, and wilfully swearing to a greater amount of mortgage debt than is actually due, shall be deemed perjury. The person who fails or refuses to furnish the verified statements or either of them, required by the second and fifth sections of this act, shall also be liable to the attachment or execution creditor for all damages which shall result from such refusal or failure, and for reasonable attorney's fees and costs in any action brought to recover such damages, or to ascertain the amount of the mortgage debt.

INDEMNIFYING BOND.

4195. Levy; notice of ownership. 20 G. A., ch. 45, § 1. An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy. But if after such levy he shall receive notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest and the facts showing how he acquired such interest and for what consideration, such officer may release the property unless a bond is given as provided in the next section. But such officer shall be protected from all liability by reason of such levy until he receives such written notice.

The officer may, at the peril of showing the real ownership of the property, discharge it on the ground that it is not the property of defendant in attachment, the burden of proof being on him to show that fact. Therefore, in an action against the officer for damages for wrongfully discharging attached property, evidence of ownership of the property by another person than the defendant in attachment should be admitted: *Wadsworth v. Walliker*, 45-395; *S. C.*, 51-605.

An officer who has levied upon property, the title of which is in doubt, will render himself liable on his official bond by releasing such property if it is found that it was in fact subject to the attachment: *Wadsworth v. Walliker*, 51-605.

The provsions of this and the following sections as to indemnifying bond are not unconstitutional: *Cheadle v. Guittar*, 68-680.

These sections are similar to those of §§ 4280-4282, with reference to executions. Those sections are not applicable to attachments; but *held*, that in case the property was afterwards held under an execution subsequently issuing in the same case, such provisions would apply: *Allen v. Wheeler*, 54-628; *Wadsworth v. Walliker*, 45-395.

And *held*, that even if such bond should be given in an attachment case, it would only have the effect of a common-law bond, and would not render the officer liable absolutely for releasing property from the levy: *Wadsworth v. Walliker*, 45-395.

A bond to indemnify the officer for not levying under the writ, in accordance with his official duty, is void, both as to the officer and the party injured: *Cole v. Parker*, 7-167.

The notice to the officer by a third person, claiming the property, stating the nature and extent of his interest therein, and under what right he claims, is sufficient. Where such claim is based upon a mortgage securing notes, the consideration for the notes and mortgage need not be stated: *Crawford v. Nolan*, 70-97.

4196. Notice to plaintiff; bond. 20 G. A., ch. 45, § 2. When the officer receives such notice, he may forthwith give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sureties, to be approved by the officer, to the effect that the obligors will protect and indemnify him against the damages which he may sustain in consequence of the seizure and

sale, and warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer shall proceed to subject the property to the attachment, and shall return the bond aforesaid to the district [or circuit] court of the county in which the levy is made.

The return of the sheriff is evidence of the service of the notice, and any other proof thereof is wholly unnecessary: *Crawford v. Nolan*, 70–97; *S. C.*, 72–673.

4197. Where bond not given. 20 G. A., ch. 45, § 3. If such bond is not given, the officer holding the attachment may, within a reasonable time after demand being made by said officer, restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

4198. In justices' courts. 20 G. A., ch. 45, § 4. The provisions of the foregoing sections shall apply to attachments issued by justices of the peace, and such bonds shall be returned to the justice issuing said writ.

4199. 20 G. A., ch. 45, § 5. All acts and parts of acts in conflict with this act are hereby repealed.

GARNISHMENT.

4200. How effected. 2975; 18 G. A., ch. 58. The attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due by him to the defendant or thereafter to become due, and that he must retain possession of all property of the said defendant then, or thereafter, being in his custody or under his control, in order that the same may be dealt with according to law, and the sheriff shall summon such persons as garnishees as the plaintiff may direct. But no judgment shall be entered in any garnishment proceedings condemning the property or debt in the hands of the garnishee until the principal defendant shall have had ten days' notice of such proceedings. If the case is pending in the district [or circuit] court, the notice shall be served in the same manner as original notices are required to be served. If the case is pending before a justice of the peace, the defendant shall have at least five days' personal notice of such proceeding, if he be a resident of the county; otherwise service of such notice may be made by posting the same in three public places in the township in the manner provided by sections three thousand six hundred and nine and three thousand six hundred and ten of the code [§§ 4858, 4859]. The fact that the defendant is not a resident of the county may be shown by the affidavit of the plaintiff or his attorney, filed with the justice before such notices are posted. [R., § 3195; C., '51, § 1861.]

Attachment necessary: Garnishment is simply a mode of attachment: *Woodward v. Adams*, 9-474.

It is only where the sheriff has a writ of attachment that he is authorized to garnish: *Vanfossen v. Anderson*, 8-251.

Garnishment is, however. also an incident of execution: See §§ 4276, 4277.

How shown: The proper evidence of the fact of garnishment is the officer's return on the writ of attachment. Such fact cannot be proved by parol evidence of the officer nor his indorsement of service upon the notice to the garnishee: *Rock v. Singmaster*, 62-511.

When the fact of garnishment is put in issue the proper evidence of it is the same as the evidence of any levy, to wit, the return thereof. The fact that the garnishee appears and answers the interrogatories does not preclude him from afterwards putting in issue the fact of garnishment: *McDonald v. Moore*, 65–171.

Effect: The effect of the garnishment is to stop the payment of any debt, but it does not prevent any transaction which does not grow out of the relation of debtor and creditor, as a sale of property to the garnishee for cash in hand, or a loan to him by the execution debtor, for a limited time, of a horse, etc.: *Victor v. Fire Ins. Co.*, 33–210, 214.

Garnishment does not effect a lien: See notes to § 4183.

Jurisdiction: Garnishment being in the nature of a proceeding *in rem*, the thing against which the proceeding is directed must be brought within the jurisdiction of the court by a virtual seizure thereof, and the court does not acquire jurisdiction except by the proper issuance of the writ of attachment and notice of garnishment thereunder: *Ibid.*

A proceeding in garnishment is in the nature of a proceeding *im rem* and the *res* or thing which is subject to the action must be before

the court. Therefore, *held*, that a justice of the peace acquired no jurisdiction in a garnishment proceeding under an execution issued in another county than that in which the notice of garnishment was served: *Gage v. Maschmeyer*, 72-696.

If the proceeding is by publication and it is sought to effect the attachment by service of notice of garnishment, and no debt is due at the time so as to be actually reached by such garnishment, the court acquires no jurisdiction whatever in the case, and cannot acquire jurisdiction by reason of a debt afterwards arising from the party garnished to the defendant: *Morris v. Union Pacific R. Co.*, 56-135.

Notice: Though the notice to a garnishee to appear and answer specifies the wrong court, yet, if answers are taken by the sheriff under execution from the proper court and such answers are duly returned, that court acquires jurisdiction to render judgment against the garnishee: *Fanning v. Minnesota R. Co.*, 37-379.

A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58-703.

Where a garnishee seeks in equity to have a judgment against him set aside on the ground that the notice was not sufficient to give the court jurisdiction, the burden is not upon him to show that the judgment is also erroneous, but is upon the adverse party who insists that it is just. The garnishee is not presumed to be indebted: *Ibid.*

The garnishment process may be served before service of notice of action by attachment: *Phillips v. Germon*, 43-101.

By this section as it now stands notice to the defendant in the principal action is required before the rendition of judgment against the garnishee, and such notice should be served ten days before the trial of the issue, and, in case there is no issue, ten days before judgment is rendered against the garnishee: *Williams v. Williams*, 61-612.

This notice is essential to the jurisdiction of the court over the subject-matter in controversy, and if the garnishee fails to assert his right to be discharged on account of such want of notice, but submits the case without making that question of record, it is proper for the court to set aside the trial and submission as premature and continue the cause for such action as either of the parties may take: *Ibid.*

Service of original notice of the action itself does not make this service of notice of the garnishment proceedings unnecessary: *Wise v. Rothschild*, 67-84.

Where it is sought to attach the sum due by a railway company to a land owner for right of way taken by the company, the notice of garnishment should be served on the company and not upon the agent of the company individually, although such agent is authorized to procure the right of way, and is doing so at his own risk for a gross sum: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494.

Property in hands of agent: Where the answer of a garnishee showed that he was auditor and cashier of the corporation defendant in the principal action, and had charge of the accounts, receipted for cash remitted by its agents, made collections and disposed of the cash from time to time as directed by the general manager of the corporation, and that he had, at the time of the garnishment, certain money belonging to the corporation kept in the safe provided by it, to which he alone had a key, *held*, that it was his duty as garnishee to retain the money on hand subject to the garnishment, and he could not escape liability on the ground that he did not have independent control of the money, but was under obligation to dispose of it as directed by his superiors: *First Nat. Bank v. Davenport & St. P. R. Co.*, 45-120.

Though the answer of the garnishee discloses that it was his duty to pay out the money in his possession on the order of another, the process of garnishment imposes upon him a paramount duty to retain it in his possession: *Ibid.*

The possession or control referred to in this section is something more than constructive possession or control. In order to make the garnishee liable he must have the property in his possession so that he can surrender it, if the court so directs, in exoneration of his liability as garnishee. If out of possession and he can obtain it on demand, it may be that he is bound to make such demand, but nothing more can be required: *Smalley v. Miller*, 71-90.

The fact that a railroad company receiving household goods for transportation detains the same for some time under garnishment proceedings, without knowledge of the fact that they are claimed as exempt, but releases them within a reasonable time after receiving notice of that fact, will not render the company liable for damages on account of such detention: *Hynds v. Wynn*, 71-593.

Money held for third person: Where, by agreement between a railway company and a contractor, it was provided that the former might reserve out of money due the latter such amount as might become due by the contractor to laborers, and superintend the payment of the same, *held*, that the money in the hands of the railway company thus reserved to be paid over to laborers was not subject to garnishment for the debts of the contractor: *Taylor v. Burlington & M. R. R. Co.*, 5-114.

Equitable custodian: A garnishment will be valid as against a fund of which the garnishee is the equitable custodian, although it is not within his possession: *Des Moines County v. Hinkley*, 62-637.

As to executor, see next section.

What rights reached: The garnishee process only reaches the right which the defendant actually has at the time in the property thereby sought to be attached: *Thomas v. Hillhouse*, 17-67.

The liability of a garnishee is measured by his obligation to the execution defendant at the time of service of garnishment: *Huntington v. Risdon*, 43-517.

The garnishee cannot be held for a debt which had no existence at the time of the garnishment but was subsequently contracted: *Thomas v. Gibbons*, 61-50.

It must be made to appear that the garnishee was indebted to defendant at the time of service of notice. Where the service of notice and the assignment by the debtor of his claim against the garnishee appeared to be of the same date, *held*, that the garnishee would not be liable without further proof that the service was prior to the assignment: *Weire v. Davenport*, 11-49.

Judgment should not be rendered against the garnishee where it appears that his indebtedness to the principal debtor is only conditional and it is not shown that the condition has been fulfilled: *Williams v. Young*, 46-140.

Where the claim of a land owner against a railway company for damages for right of way was pending in court upon a claim for a greater amount of damages than allowed by the commissioners, *held*, that the garnishment of the railway company would hold any amount afterwards found due or which the company should agree to pay in satisfaction of the claim: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494.

Garnishee should not be held liable on a judgment where he has a cause of action which he might bring against the judgment creditor greater in amount than the amount of the judgment, even though such cause of action might have been interposed as a defense in the proceeding in which the judgment was recovered: *Fairfield v. McNany*, 37-75.

If a third person is garnished, in an action against one of two persons, for notes in his hands belonging to a partnership, and it appears that the partners are entitled to equal shares therein, and no claim of fraud is set up by partnership creditors, judgment may be rendered against him for the interest of defendant partner remaining in his hands: *Harlan v. Moriarty*, 2 G. Gr., 486; *Robinson v. Moriarty*, 2 G. Gr., 497.

Where the purchaser of property was advised, after making the contract of purchase, that the property belonged to another, and gave his note to such other for the balance of the purchase price, and was subsequently garnished as the debtor of the person with whom the contract was made, *held*, that he would not be protected in making payment to the payee of the note, with knowledge that the indebtedness was actually due to the party from whom the purchase was made: *Kesler v. St. John*, 22-565.

The fact that an innkeeper has a lien on the baggage of his guest for his charges will not prevent the guest from being garnished as the debtor of the innkeeper. The guest could, by paying over to the sheriff the amount due, release his baggage from the lien: *Caldwell v. Stewart*, 30-379.

Where a conveyance of property from grantor to grantee is rescinded by the action of the grantor, after a conveyance has been made to a subsequent grantee, the original grantor is not a debtor of his first grantee and subject to garnishment as to the consideration which is to be refunded, but his liability inures to the benefit of the subsequent grantee: *Deere v. Young*, 39-588.

Where horses belonging to a married woman were entered at a fair by her husband in his name, and the entrance fee was paid with money belonging to her, *held*, that under circumstances rendering the return of the entrance money proper, such money was not liable to garnishment by the creditor of the husband, although the payment thereof by the society to the husband would have relieved it from further liability: *McArthur v. Garman*, 71-34.

Capital stock: At common law stock in an incorporated company could not be reached under an attachment, nor a valid transfer thereof prevented. The attaching creditor must follow the mode pointed out by § 4181, which requires notice to the president or other officer that the stock has been attached. Garnishment of the secretary as an individual will not accomplish the object, even though he understands that the attachment of the stock is intended: *Mooar v. Walker*, 46-164.

Interest of mortgagee: The interest of the mortgagee of real property cannot be seized under attachment by levy on the land. The method of procedure is by garnishment: *Courtney v. Carr*, 6-238.

A landlord's right to a share of the crops grown on the leased premises can only be reached by garnishment of the tenant: *Howard County v. Kyte*, 69-307.

Interest of mortgagee of chattels: A mortgagee of personal property not in his possession is not liable on garnishment for such property, or the amount by which the value thereof exceeds his claim: *Curtis v. Raymond*, 29-52; *First Nat. Bank v. Perry*, 29-266.

But the mortgagee in possession may be garnished for the surplus remaining in his hands: *Doane v. Garretson*, 24-351.

Unconditional judgment cannot be rendered against a chattel mortgagee, as garnishee, for the excess of the value of the mortgaged property over his debt, where he is not in actual possession of the property by virtue of the mortgage: *Fountain v. Smith*, 70-282.

The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property and passes under a general assignment. After such general assignment the mortgagee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 58-414.

Where it was agreed by and between the mortgagor and attaching creditors and the mortgagee that the property should be sold in bulk and the proceeds applied upon the attachment, *held*, that the proceeding operated as a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor of the surplus in the sheriff's hands after the satisfaction of the first mortgage: *Phelps v. Winters*, 59-561.

The mortgagee of a stock of merchandise, when garnished while in possession, may discharge the landlord's lien for accrued rent out of surplus left after satisfying his mortgage, without being liable under garnishment for the amount thus applied: *Doane v. Garretson*, 24-351.

Fraudulent mortgagees, who are garnished by the mortgagor's creditors, must retain the property or its proceeds, and if they part with

the same in payment of the mortgagor's debts they act at their peril: *Brainard v. Van Kuran*, 22-261.

A person holding property under a bill of sale to secure him for any liability as surety may be garnished for the proceeds of such property remaining after satisfying his claim: *Davis v. Wilson*, 52-187.

Exempt earnings: While a garnishment of an employer for wages of his employee will hold not only wages due but such as afterwards become due, yet, as the employee, if a married man, is entitled to have ninety days' wages exempt (under § 4299), the employer is not to be held liable to judgment in such case, unless it appears that at the time of garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands: *Davis v. Humphrey*, 22-137.

The burden rests upon defendant or garnishee to show that an amount due to the defendant in the principal action is exempt as earnings, and, unless that fact clearly appears, the debt will be held subject to garnishment: *Oakes v. Marquardt*, 49-643.

The debtor cannot, in a garnishment proceeding, appear and plead an exemption under the laws of another state: *Leiber v. Union Pacific R. Co.*, 49-688.

A debt due to a non-resident for services performed in another state may be attached in an action in this state by publication against such non-resident, by garnishment of the debtor in this state, notwithstanding any custom of the garnishee to pay for such services in the state where they are rendered: *Mooney v. Union Pacific R. Co.*, 60-346.

Exemption laws of another state are not to be relied upon as a defense, either by the garnishee or by the judgment debtor: *Broadstreet v. Clark*, 65-670.

A creditor cannot, by instituting a garnishment proceeding in another state, seize a debt due the debtor in this state, and which would be here exempt from execution: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70-746.

Assignment: Where the creditor of the garnishee has, by assignment, in any form appropriated the property or indebtedness, and the assignment has been accepted by the assignee, the garnishee cannot be held liable: *Smith v. Clarke*, 9-241.

An equitable assignment will secure the property against garnishment for a debt of the assignor, though no notice be given to the party holding the property prior to the attachment, if such notice is given in time to enable the garnishee to bring it before the court in time for judgment: *Ibid.*

The assignee of a non-negotiable debt should give notice of the assignment to the garnishee in time to enable him to show such assignment in his answer, or at least before judgment against him: *Walters v. Washington Ins. Co.*, 1-404.

A garnishee who has notice of the assignment before answering and fails to set up that fact by way of defense, and allows judgment to go against him, cannot plead such judgment against the assignee: *Ibid.*; *Dalhoff v. Coffman*, 37-283.

The assignment of a debt will be good as against a garnishment of the debtor in a proceeding against the original assignor, though the claim is not taken by the assignee as payment but only as collateral security: *Moore v. Lowrey*, 25-336.

The assignor of a judgment taking it subject to garnishment of the judgment debtor acquires no right as against the plaintiff in the garnishment: *Phillips v. Germon*, 43-101.

A debtor having notice of the assignment of the debt before garnishment cannot be held liable in an action against the assignor: *Bailey v. Union Pacific R. Co.*, 62-354.

As to negotiable paper, see § 4215.

4201. Garnishment of officer, judgment debtor, executor, municipal corporation. 2976. A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk and by him minuted as an assignment on the margin of the judgment docket, and also an executor for money due from the decedent to the defendant may be garnished, but a municipal or political corporation shall not be garnished. [R., § 3196; C., '51, § 1862.]

Property in hands of officer: Where money of a debtor was taken under a search-warrant sworn out by a third person, and was in the hands of a justice of the peace to whom the search-warrant was returned, *held*, that a creditor of the prisoner might attach such money for his debt: *Patterson v. Pratt*, 19-358.

So an officer who in making an arrest has searched the person of the prisoner and taken therefrom property, such as a watch, money, etc., may be garnished for such property by a creditor of the prisoner, it not appearing that the arrest was collusively made or with any fraudulent purpose: *Reifsnyder v. Lee*, 44-101.

But property taken by an officer from the person of a prisoner which is not connected with the crime is to be deemed in the personal possession of the prisoner and cannot be attached in the officer's hands: *Commercial Exchange Bank v. McLeod*, 65-665.

Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21-535.

A sheriff may, at the suit of the creditor of the mortgagor, be garnished for any balance of proceeds of the sale of property under a chattel mortgage, put in his hands for collection, remaining after satisfying the mortgage: *Hoffman v. Wetherell*, 42-89.

And in such case, *held*, that a garnishment proceeding against the mortgagee of the property would not bind the balance in the hands of the officer: *Ibid.*

Where a deputy sheriff, proceeding to foreclose a chattel mortgage, seized a sum of money not covered by the mortgage, *held*, that he was liable therefor in a garnishment proceeding in which he was served with notice of garnishment before paying the money over to the mortgagee to apply on his claim: *Minthorn v. Hemphill*, 73-257.

An executor cannot be held liable as garnishee in his individual capacity for an indebtedness due as executor: *Clark v. Shrader*, 41-491.

Exemption from garnishment: The exception of municipal corporations from liability to garnishment is the only exemption from such liability: *Caldwell v. Stewart*, 30-379.

Corporations generally may be garnished. So *held* of a railroad company: *Taylor v. Burlington & M. R. R. Co.*, 5-114.

Under statutory provisions which did not exempt a municipal corporation from garnishment, *held*, that a corporation, whether public or private, might be garnished, and that if there was any exemption of a municipal corporation, such an exemption was a privilege which it alone could assert, and which could not be interposed by the debtor: *Wales v. Muscatine*, 4-302; *Burton v. District T'p*, 11-166.

Municipal corporations: The provisions of this section as to municipal corporations apply to all cases and without condition, and are not dependent upon whether such exemption is necessary to protect them against embarrassment in the execution of their political, civil or corporate duties: *Jenks v. Osceola T'p*, 45-554.

Waiver: The municipal corporation itself may waive the exemption in its favor: and where the objection was not raised until upon a second trial, when the court first instructed in regard thereto, *held*, that the right to the exemption had been waived and could not then be raised: *Clapp v. Walker*, 25-315.

Where a municipal corporation, at the same term at which its answer in the garnishment proceeding, made before a commissioner, was reported to the court, raised the question of its right to exemption under the law, *held*, that such claim was in time and not waived: *Jenks v. Osceola T'p*, 45-554.

The fact that a county brings an action to determine to whom it shall pay a sum of money due by it to a contractor, and makes a creditor who has attempted to garnish the county for its indebtedness to him a party to the action, does not constitute a waiver of exemption from garnishment: *Des Moines County v. Hinkley*, 62-637.

4202. Fund in court. 2977. Where the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court a copy thereof, with notice, specifying the fund. [R., § 3197.]

Money in the hands of an officer of the court may be attached as here provided. So *held*, where the money of a debtor, being taken under a search-warrant sworn out by another person, and being in the hands of a justice, was attached for a debt due his creditor: *Patterson v. Pratt*, 19-358.

Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21-535.

4203. Death of garnishee. 2978. If the garnishee die after he has been summoned by garnishment and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives. [R., § 3198.]

4204. Garnishee to appear. 2979. Unless exempted as provided in the next section, the notice must also require the garnishee to appear on the first day of the next term of the court wherein the main cause is pending, or on the day fixed for trial if in a justice's court, and answer such interrogatories as may be then propounded to him, or that he will be liable to pay the entire judgment which the plaintiff eventually obtains against the defendant. [R., § 3199; C., '51, § 1863.]

The creditor has the right to examine the garnishee personally, and where the garnishee did not appear, but filed a sworn answer, *held*, that such answer was properly stricken from the files and judgment rendered against him on default: *Penn v. Pelan*, 52-535.

A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58-703.

4205. Sheriff may take answers. 2980. When the plaintiff, in writing, directs the sheriff to take the answer of the garnishee, the sheriff shall put to the garnishee the following questions:

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money or property which is not yet due? If so, state the particulars;

2. Have you in your possession or under your control, any property, rights, or credits of the said defendants? If so, what is the value of the same, and state all particulars;

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights, or credits belonging to him and now in the possession or under the control of others? If so, state the particulars; and append the examination to his return. [R., §§ 3200–1; C., '51, §§ 1864–5.]

It is only when the sheriff has a writ of attachment that he is authorized to take answers as provided by statute: *Vanfossen v. Anderson*, 8–251.

A deputy sheriff may administer the oath to the garnishee: *Conable v. Hylton*, 10–593.

As to answers, see § 4207 and notes.

MODE.

4206. Required to appear in court. 2981. If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer on the first day of the next term of court, or on the day fixed for trial as above provided, and so he may be required in any event, if the plaintiff so notify him. [R., § 3202; C., '51, § 1866.]

The questions need not be propounded or filed until the garnishee has appeared to answer: *Parmenter v. Childs*, 12–22.

The plaintiff is not precluded by the fact that the garnishee makes answer to the sheriff from prosecuting the examination further if he sees fit: *Thompson v. Silvers*, 59–670.

4207. Examination. 2982. The questions propounded to the garnishee in court, may be such as are above prescribed to be asked by the sheriff, and such others as the court may think proper and right. [R., § 3203; C., '51, § 1867.]

Written interrogatories: It is within the discretion of the court to require that questions to be propounded to the garnishee shall be reduced to writing and submitted to the court before answer: *Elwood v. Crowley*, 64–68.

Answers of wife: A wife who is garnished as the debtor of her husband is not exempt from answering on the ground that her answers would be testimony against her husband. It is not to be regarded as against her husband's interest that his property in her hands is subjected to payment of his debts: *Thompson v. Silvers*, 59–670.

Answer of corporation: Where a corporation aggregate is garnished it may answer in writing through some officer or agent duly authorized: *Bailey v. Union Pacific R. Co.*, 62–354.

Objections to questions: Where the garnishee objects to the competency of a question asked him, he should, after the court has determined that the question is a proper one, have an opportunity to respond before being charged absolutely: *Sawyer v. Webb*, 5–315.

Answer as evidence: The answer of garnishee is competent evidence on the trial of the issue as to his liability: *Fairfield v. McNany*, 37–75.

The credit and weight to which the answer of the garnishee is entitled should be left to the jury: *Drake v. Buck*, 35–472.

The garnishee's answer is not a pleading in the case, but is in the nature of evidence, and, therefore, is not a part of the record unless made so by a bill of exceptions: *Brainard v. Simmons*, 58–464.

While the garnishee may be required not only to answer with reference to his liability, but to disclose what he knows with reference to other persons who may have property or credits of the debtor under their control, such answer does not bind any one but the one making it. Therefore, the answer of a member of the firm, garnished individually, will not be binding upon the firm: *Bean v. Barney*, 10–498.

The garnishee's answer is not competent evidence on an issue raised by an intervenor claiming the debt sought to be reached by the garnishment: *Easley v. Gibbs*, 29–129.

Setting up defendant's exemptions: A debtor who procures himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and does not set up such exemption, or notify his creditor so that the latter may do so, is guilty of fraud, and will not be released from liability by a judgment against him: *Smith v. Dickson*, 58–444.

Whether a garnishee is required to set up any defense that the debtor may have, as that the property or debt is exempt, or should notify the debtor of the fact of garnishment, in order that the latter may set up such defense, *quære: Moore v. Chicago, R. I. & P. R. Co.*, 43–385; *Leiber v. Union Pacific R. Co.*, 49–688.

An answer of the garnishee that he was informed and believed that the defendant was a married man living with his family, *held* not sufficient to show the right of exemption, for the reason that it did not allege such to be the fact, nor allege that he was a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60–312.

Where the garnishee interposes an objection that the indebtedness is exempt and defendant has notice of the proceeding, and judgment is nevertheless rendered against garnishee, such judgment is conclusive against defendant in any subsequent action to recover the indebtedness. It is his duty to set up the exemption and to appeal from the judgment rendered, if erroneous: *Wigwall v. Union Coal, etc., Co.*, 37–129.

Setting up assignment: An assignee of non-negotiable paper must give the maker notice of the assignment before such maker is required to answer as garnishee in a suit against the assignor, or at least before judgment is rendered against such garnishee, or he will be barred by such judgment: *Walters v. Washington Ins. Co.*, 1–404: *McCoid v. Beatty*, 12–299.

If the paper is assigned after the garnishment of the maker he may be held liable, notwithstanding he knew of the assignment before answering: *Stevens v. Pugh*, 12–430.

Up to final judgment against him the garnishee may protect himself from liability by showing the assignment of the debt to a third person, and judgment in garnishment will not bar an action against the garnishee by such assignee if the garnishee had notice of the assignment before final judgment: *McPhail v. Hyatt*, 29–137.

Where an attorney was garnished for money collected by him on a note, and had knowledge of facts which, if made known, would have protected the rights of an assignee of such note, *held*, that he should have set up such facts in his answer: *Large v. Moore*, 17–258.

Where a debtor is garnished in a suit against a creditor, but no judgment has been rendered in the proceeding, he may, in defense to an action by an assignee of his creditor's claim, to whom such claim has been assigned after the garnishment, plead the pendency of such proceeding as matter in abatement, but not in bar of the action: *Clise v. Freeborne*, 27–280.

4208. Witness fees. 2983. Where the garnishee is required to appear at court, unless he has refused to answer as contemplated above, he is entitled to the pay and mileage of a witness, and may, in like manner, require payment beforehand in order to be made liable for non-attendance. [R., § 3204; C., '51, § 1868.]

If his fees are not tendered the garnishee may refuse to attend, but will not be released from his obligation to retain any property belonging to, or money due, defendant, and his attendance may be secured at a subsequent term by proper summons and tender of fees: *Westphal v. Clark*, 42–371.

The power to compel the attendance of a garnishee is not limited to seventy miles, as is provided in case of witnesses: *Ibid.*

The non-payment of the fees of a garnishee, if lawfully demanded, will excuse his failure to testify, but if he appears without prepayment of fees, he cannot then demand mileage before testifying, and judgment may be rendered against him for failure or refusal to testify on account of such non-payment: *Stockberger v. Lindsey*, 65–471.

4209. Failure to appear or answer. 2984. If, when duly summoned, and his fees tendered when demanded, he fail to appear and answer the interrogatories propounded to him without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and shall be dealt with accordingly. [R., § 3205; C., '51, § 1869.]

Where a garnishee refuses to answer questions propounded before a referee appointed to take such answers, and plaintiff, upon the facts being reported by the referee, moved for an order requiring her to answer at a particular time, at which time she refused to answer and her refusal was sustained by the court, *held*, upon appeal, that although the plaintiff might have been entitled to judgment by default against the garnishee for refusal to answer questions propounded by the referee, yet, having obtained an order for further examination, he could not have judgment against the garnishee for refusal to answer when the court sustained her objections, although in so doing the court erred: *Thompson v. Silvers*, 59–670.

Default: Where the garnishee was notified to appear and answer at the March term, but no appearance being made by him then, or at any time, default was taken at the October term of the next year, *held*, that such default was properly rendered, and it was immaterial whether a continuance from term to term was entered or not: *Langford v. Ottumwa Water Power Co.*, 53–415.

A slighter showing of diligence or excuse will be sufficient to warrant setting aside default against a garnishee than in case of default against a defendant: *Evans v. Mohn*, 55–302.

Where a court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer, the garnishee should not be judged in default for failure to appear and answer unless notified by the commissioner of the time and place fixed for taking his answer: *Thomas v. Hoffman*, 62–125.

Where judgment has been rendered against garnishee for failure to appear when he has not been served with notice to appear, he may at a subsequent term have the judgment against him vacated upon motion: *Ibid.*

4210. May show cause. 2985. But, for a mere failure to appear, he is not liable to pay the amount of the plaintiff's judgment, until he has had an opportunity to show cause against the issuing of an execution. [R., § 3206; C., '51, § 1870.]

It is not essential that such notice be served ten days before the term at which judgment is sought. Where it was served during the term, but more than ten days before the time at which the garnishee was required to show cause, *held*, that it was sufficient. Also, *held*, that it was not error, in the absence of any appearance by the garnishee in response to such notice, to render final judgment against him at a later day in the term than that fixed in the notice: *Langford v. Ottumwa Water Power Co.*, 53–415.

Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause why execution should not issue against him, appears and protests that the court has acquired no jurisdiction, will not render judgment by it valid: *Padden v. Moore*, 58–703.

The garnishee may, when called upon to show cause why judgment should not be rendered against him, answer to the original notice of garnishment, although he is in default by failing to appear as required in such notice. His answer to the merits should be presented with his excuse for default, but it is not to be considered until his excuse is held sufficient and his default set aside: *Fifield v. Wood*, 9–249.

Garnishee should not only rebut the presumption of indebtedness, but show sufficient excuse for his default: *Parmenter v. Childs*, 12–22.

Where default has been rendered against a garnishee who has appeared, but has failed to answer in accordance with an order of the court, judgment by default may be rendered against him as for failure to plead, and such a default can only be set aside under the provisions relative to setting aside judgments by default in general: *Seamahorn v. Scott*, 42–529.

As long as the judgment against the garnishee stands as only for failure to appear, and until he is called on to show cause, he may protect himself from liability by showing an assignment of the debt from the judgment debtor to another, and the judgment in garnishment will not bar an action against the garnishee by the assignee of the claim: *McPhail v. Hyatt*, 29–137.

Further as to assignment, see notes to § 4207.

The notice required to be given defendant of an opportunity to show cause is not a *scire facias*: *Duncan v. Sangamo F. Ins. Co.*, 35–20.

The showing in a particular case *held* sufficient to sustain the setting aside of default against the garnishee for failure to appear: *Westphal v. Clark*, 46–262.

The judgment which can be rendered against garnishee after he has been given an opportunity to show cause, in default of appearance, should not be greater than that for want of appearance. It is not proper to add interest or costs: *Langford v. Ottumwa Water Power Co.*, 53–415.

4211. Paying or delivering. 2986. A garnishee may, at any time after answer, exonerate himself from further responsibility, by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached, all of which may afterwards be treated as though attached in the usual manner. [R., § 3207; C., '51, § 1871.]

The garnishee cannot be held liable for not turning over property to the sheriff, where he holds such property under a lien which has not been satisfied: *Smith v. Clarke*, 9–241.

A failure to tender or bring into court money or property in his hands liable to garnishment does not subject the garnishee to costs: *Randolph v. Heaslip*, 11–37.

A garnishee is not liable for interest unless it be shown that he used the money for which he is liable, instead of setting it apart as a separate fund; and this rule is not changed by the fact that he might, under the provisions of statute, pay over the money to the sheriff: *Moore v. Lowrey*, 25–336.

Where property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court, and carried out: *Buckham v. Wolf*, 58–601.

The statutory provision with reference to turning over property does not authorize the discharge of a judgment against a garnishee upon the payment of a sum less than the amount of such judgment, even though the judgment rendered is for an amount greater than the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 37–620.

4212. Answer controverted. 2987. When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert the same by pleading by him filed, and issue may be joined and the same tried in the usual manner. The answer of the garnishee shall be competent testimony on such trial. [R., § 3208; C., '51, § 1872.]

Notice of subsequent proceedings: The garnishee is bound to take notice of proceedings subsequent to his answer until he is discharged. He may move for a discharge upon filing his answer: *Chase v. Foster*, 9–429.

If issue is not taken upon the answer of the garnishee at the term it is filed, the garnishee is entitled to notice: *Kienne v. Anderson*, 13–565.

Issue upon garnishee's answer: The plaintiff may take issue upon the general answer of the garnishee denying indebtedness: *Bebb v. Preston*, 3–325.

While it may be that formal pleadings are

not necessary in reply to the answer of a garnishee in order to enable the defendant to dispute its truthfulness by evidence, yet, when the plaintiff files an answer setting up the facts upon which he bases the denial of the garnishee's answer, thus presenting an issue of fact he cannot depart therefrom and ask recovery upon grounds not pleaded: *Freese v. Co-operative Coal Co.*, 67–42.

Where plaintiff, seeking to take issue on the garnishee's answer, filed a pleading controverting and denying the same and alleging that the garnishee was indebted to plaintiff in a certain sum, and asking judgment therefor without stating the facts constituting the indebtedness, *held*, that such pleading not having been assailed by motion or demurrer, the garnishee could not object to the introduction of evidence thereunder on the ground that it did not raise any issue: *Ruby v. Schee*, 51–422.

Whether the facts disclosed in the answer of the garnishee show an indebtedness to the principal debtor is a question of law which may be reviewed upon an appeal to the supreme court, but when the garnishee's answer is denied and evidence is introduced on both sides upon the issue thus made, which issue is tried and decided, the supreme court cannot pass upon the correctness of the decision without having the entire evidence before it: *Sheppard v. Downing*, 14–597.

Where plaintiff sought to take issue upon the answers of two garnishees by one pleading, and one of them was on motion discharged from the issue raised thereby, *held*, that it was error to strike from the files a subsequent pleading by the plaintiff controverting the answer of such other garnishee: *Coffman v. Ford*, 56–185.

When an intervenor in the garnishment proceeding who claims an assignment of the debt to him prior to the service of garnishment process has introduced evidence tending to establish such claim, he is entitled to judgment unless other facts are properly shown which defeat his claim, and the garnishee's answer is not competent evidence on such issue: *Easley v. Gibbs*, 29–129.

It is not necessary that plaintiff's pleading shall in express language controvert the answer of the garnishee. It is sufficient if it denies the allegations thereof: *Henny Buggy Co. v. Patt*, 73–485.

A pleading controverting garnishee's answer need not be sworn to: See § 3881.

Venue: Garnishment proceedings upon an execution cannot be brought in any other court than that in which the judgment to be satisfied is entered. No other court would have jurisdiction and the garnishee must take notice of that fact: *McGuire v. Pitts' Sons*, 42–535.

The issue raised on the answer of garnishee must be tried in the court wherein the principal action is pending, and the venue cannot be changed to the county of the garnishee's residence: *Miller v. Mason*, 51–239; *Smith v. Dickson*, 58–444.

Where a change of venue is taken by defendant in the principal case, such change does not apply to the garnishee unless he joins in the application therefor, and the case should be tried as to him in the court where the proceeding is commenced: *Westphal v. Clark*, 42–371.

Trial: When a trial is required to determine the rights of all the parties, the question as to whether the garnishee is indebted to the defendant is not to be presented separate from that as to whether the debt in the hands of the garnishee is to be condemned for the payment of such indebtedness: *Williams v. Williams*, 61–612.

A justice has jurisdiction in proceedings against a garnishee, although the judgment on which garnishment issues be for more than one hundred dollars: *Gillett v. Richards*, 46–652.

As a proceeding in garnishment must be tried as an ordinary proceeding, or as an action at law, none but legal as distinguished from equitable issues can be tried therein. Plaintiff cannot controvert the answer of garnishee by showing an independent cause of action against the garnishee: *Seers v. Thompson*, 72–61.

A garnishee is not relieved from the garnishment liability by a failure to have the garnishment proceedings continued from one term to another by order of the court. If he pays the debt before an order of discharge, it is at his peril: *Hughes v. Monty*, 24–499.

The fact that one or more terms intervene between the garnishment process and the judgment against the garnishee does not show an abatement of the proceeding: *Phillips v. Germon*, 43–101.

Evidence: While the answer of the garnishee is competent evidence on the trial, *Fairfield v. McNany*, 37–75, the credit and weight to which it is entitled should be left to the jury: *Drake v. Buck*, 35–472.

JUDGMENT.

4213. May be entered. 2988. If, in any of the above methods, it is made to appear that the garnishee was indebted to the defendant, or had any of the defendant's property in his hands, either at the time of being served with the garnishee notice aforesaid or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him, to the full amount of that judgment, or to the amount of such indebtedness and of the property so held by him; and a conditional judgment shall be entered up against him accordingly, unless he prefers paying or delivering the same to the sheriff as above provided. [R., § 3209; C., '51, § 1873.]

Garnishee's liability: Primarily the garnishee is taken to be an innocent person, and to stand indifferent between the parties, and if no issue is raised on his answer it is the sole

test of his indebtedness. His rights are to be carefully protected, and he is not to be placed in a situation where he will be compelled to pay the debt twice: *Walters v. Washington Ins. Co.*, 1-404.

The garnishee is not presumed to be indebted: *Padden v Moore*, 58-703.

He is in no case to be placed in a worse condition than he would be if the defendant himself was enforcing his claim: *Williams v. Housel*, 2-154; *Smith v. Clarke*, 9-241; *Burton v. District T'p*, 11-166.

Judgment should not be rendered against a garnishee except by default, unless his liability is clearly established: *Brainard v. Simmons*, 67-646.

The indebtedness of the garnishee or his possession of property must be affirmatively shown in order to render him liable: *Morse v. Marshall*, 22-290.

Where there is nothing in the special verdict or evidence to justify charging the garnishee, a judgment against him will be reversed: *Kiggins v. Woodke*, 78-34.

While the garnishee is to be looked upon as an indifferent person as between the plaintiff and defendant, and is not to be required to pay his debt but once, yet he will not be protected against the consequences of his own carelessness and negligence, especially where such negligence may result to the injury of *bona fide* creditors: *Houston v. Wolcott*, 7-173.

While the garnishment stops the payment of any debt due from garnishee to defendant, it does not prevent any transaction not growing out of the relation of debtor and creditor, nor prevent the payment by the garnishee to defendant of money which such garnishee is under no legal obligation to pay: *Victor v. Hartford F. Ins. Co.*, 33-210.

Where a person, being insolvent, by an attorney in fact sold his entire stock of goods to a creditor to secure the payment of a debt, and after such creditor had taken possession he was garnished under an attachment issued in favor of another creditor, *held*, that the garnishee was not to be presumed liable, and the burden was upon plaintiff to show such liability, either from the garnishee's answer or by taking issue thereon, and showing it by evidence on such issue, and that upon failure to show that the garnishee did not hold the goods under a valid sale or pledge he was not to be held liable: *Farwell v. Howard*, 26-381.

Where the garnishee answered that the note in his hands sought to be reached by the garnishment proceeding was received by him from the defendant for the specific purpose of paying a judgment on which the garnishee was liable as surety, *held*, that the action as to garnishee was properly dismissed: *Dryden v. Adams*, 29-195.

Garnishee's liability is to be measured by his responsibility and relation to the defendant. Therefore, *held*, that where garnishee was surety for defendant and authorized to pay the secured debt out of property held by garnishee belonging to defendant, he should not be liable for so much of the proceeds of such property as was necessary to satisfy the secured debt: *Cox v. Russell*, 44-556.

Where the creditor requires payment or pledge to secure payment in advance of the contracting of indebtedness, no indebtedness is created that can be the subject of garnishment: *Caldwell v. Stewart*, 30-379.

The garnishee is not to be held liable for proceeds of exempt property of the debtor, held by him at the time of garnishment under mortgage which he has sold or allowed to be sold for the debtor's benefit: *Brainard v. Simmons*, 67-646.

A garnishee fraudulently appropriating property in his hands to his own use may be lawfully charged with interest from the day of such appropriation: *Risser v. Rathburn*, 71-113.

When answer shows liability: To charge a garnishee on his answer alone, there must be in it a clear admission of a debt due to, or the possession of attachable property of, the defendant. If there is a reasonable doubt whether he is chargeable, he is entitled to judgment in his favor: *Morse v. Marshall*, 22-290; *Church v. Simpson*, 25-408; *Hibbard v. Everett*, 65-372.

But, although the garnishee deny generally having property of, or being indebted to, the defendant, if it appear from the other statements of his answer that he is so indebted, judgment should be rendered against him: *Bebb v. Preston*, 1-460.

Although the admissions of the answer are not explicit, yet if from the entire answer it clearly appears that the garnishee is liable, judgment should go against him: *Smith v. Clarke*, 9-241.

Where the answer of the garnishee stated that he was indebted to the judgment debtor at a certain date, "about the time of the service of garnishment, in the sum of," etc., *held*, that the answer was sufficient to justify the conclusion that he was indebted at the time of service of notice, which was on the next day after the day mentioned in his answer: *Hoops v. Culbertson*, 17-305.

The statement of a person that he is indebted to defendant, and a promise on his part to retain the amount of such indebtedness in his possession until a garnishment proceeding can be instituted against him, will not estop him from stating, when summoned as garnishee, that he is not indebted to the defendant in such proceeding: *Starry v. Korab*, 65-267.

Judgment: The judgment rendered against the garnishee should not exceed the amount of the judgment against the original debtor and the costs of the proceeding in which such judgment was obtained: *Timmons v. Johnson*, 15-23.

Without a recovery against the debtor there can be no judgment against the garnishee: *Barton v. Smith*, 7-85.

And a judgment against a garnishee will be reversed on appeal where it does not appear from the record that judgment was rendered against the defendant in the main action: *Bean v. Barney*, 10-498; *Toll v. Knight*, 15-370.

Conditional judgment: Where the garnishee is found indebted to defendant on a contract payable in property other than money, the judgment should be conditioned that it may be discharged in property, or, on

failure thereof, become absolute, and a general execution issue: *Stadler v. Parmlee*, 14–175; *Ransom v. Stanberry*, 22–334.

Where it appears that the garnishee has a lien upon property of defendant in his hands the judgment should be conditioned that it be discharged upon the property being turned over to the sheriff, the proceeds to be applied to the original judgment, after satisfying the lien of the garnishee: *Hawthorn v. Unthank*, 52–507.

It would not be proper in such a case to render an unconditional money judgment against the garnishee and thus make him a purchaser of the property without his consent: *Ibid.*

Alternative judgment: While the judgment against garnishee may be, in one sense, conditional, that is, contingent upon final recovery of judgment against the principal debtor, it should be absolute as to the amount of his indebtedness. If the judgment is for one of two amounts in the alternative, depending upon a future contingency, it cannot be regarded as final: *Battell v. Lowery*, 46–49.

A judgment that plaintiff recover from garnishee, providing that the garnishee be first fully indemnified, as by law provided, or that the notes be surrendered, is not a final judgment: *Seals v. Wright*, 37–171.

Defendant may set up exemptions: The defendant in the principal action may set up, by way of objection to a judgment against the garnishee, that the indebtedness is exempt from execution, or that the judgment is satisfied, etc. But he cannot interpose an objection which is personal to the garnishee: *Wales v. Muscatine*, 4–302.

Other points as to judgment: Where garnishee was under obligation to account to defendant for one-half the proceeds of certain uncollected notes and accounts, *held*, that judgment could not be rendered against him for one-half the amount thereof, as some of them might be uncollectible, and the garnishee, being owner of the other half of such notes and accounts, was not under obligation to turn them over to the sheriff to escape liability: *Cox v. Russell*, 44–556.

Where the judgment in a garnishment proceeding was rendered jointly against different garnishees, who answered separately, and a reply was filed as to all of such answers, and no showing was made that a joint liability was not established, *held*, that the judgment was proper: *Boyd v. Rutledge*, 25–271.

Where the liability of the other garnishees would be increased by the discharge of one, such other garnishees have an interest in the determination of the liability of their co-garnishee: *Creasap v. Bower*, 41–210.

The judgment in the garnishment suit need not in express terms recite the satisfaction of the indebtedness from the garnishee to defendant: *Stadler v. Parmlee*, 14–175.

The garnishee cannot object to a judgment by confession under which he is sought to be held liable on account of errors or irregularities not rendering such judgment void: *Henny Buggy Co. v. Patt*, 73–485.

A judgment discharging the garnishee cannot be rendered by a judge in vacation: *Laughlin v. Peckham*, 66–121.

Effect of judgment: The legal effect of a judgment against a garnishee is to satisfy, to the extent of such judgment, the indebtedness between such garnishee and the principal debtor: *Stadler v. Parmlee*, 14–175.

The garnishee is protected by the judgment, although for error therein it might be reversed on appeal: *Houston v. Walcott*, 1–86.

If the debtor brings a suit against the garnishee, in this state, for a debt due him, the latter can successfully defend by setting up the fact that he has been garnished upon such debt in another state: *Moore v. Chicago, R. I. & P. R. Co.*, 43–385; *Leiber v. Union Pacific R. Co.*, 49–688.

Although exemption laws can have no territorial effect, yet where the debtor and creditor both reside in this state, and the creditor caused proceedings to be brought in another state, and an indebtedness due to the debtor in this state, and exempt here, to be garnished, *held*, that the debtor might maintain an action against the creditor to enjoin the prosecution of such proceedings, and that the creditor, having violated such injunction and collected the amount of the indebtedness in the foreign jurisdiction, might be held liable in damages therefor in the same action: *Teager v. Landsley*, 69–725; *Hager v. Adams*, 70–746.

The judgment against the garnishee by a court having jurisdiction as to the subject-matter, that is, a debt due from the garnishee, is a judgment *in rem* and cannot be attacked in a collateral proceeding: *Moore v. Chicago, R. I. & P. R. Co.*, 43–385.

Where defendant relies upon garnishment proceeding in another state as a bar to an action, it is competent to show that the principal judgment on which the garnishment proceeding was based was invalid for want of service sufficient to give the court jurisdiction: *O'Rourke v. Chicago, M. & St. P. R. Co.*, 55–332.

The release of a garnishee who is in fact indebted does not estop the creditor from levying on property bought with money paid by the garnishee to the debtor and which was due and unpaid at the time of garnishment and release: *Milligan v. Bowman*, 46–55.

Where a judgment debtor has been garnished and judgment rendered against him without notice of a prior assignment of the judgment, the assignee cannot compel payment while the judgment in the garnishment proceeding remains in full force: *McGuire v. Patts' Sons*, 42–535.

Money paid out by the garnishee in connection with the proceedings in the original case, but not in accordance with any judgment in such case, cannot be allowed in satisfaction of his indebtedness: *Myers v. McHugh*, 16–335.

A grantee to whom real property has been conveyed in fraud of creditors is not subject to garnishment at the suit of creditors for the value of such property, and a discharge in such garnishment proceeding will not bar a subsequent proceeding against the grantee by a creditor to set aside such conveyance: *Boyle v. Maroney*, 73–70.

One who is simply a pretended purchaser of property without consideration paid or agreed to be paid or without transfer of possession to him does not become liable as garnishee: *Kiggins v. Woodke*, 78–34.

Appeal: See § 4218 and notes.

4214. When debt not due. 2989. If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. [R., § 3210.]

4215. Negotiable paper. 2990. The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [R., § 3211.]

Under a similar provision, *held*, that a judgment on a mortgage lien could not be rendered unless the mortgage was delivered or the mortgagee exonerated: *Timmons v. Johnson*, 15-23.

Held, also, that such statutory provision was applicable to the case of negotiable paper after maturity, and that the maker thereof could not be held liable as garnishee without exoneration or indemnity: *Hughes v. Monty*, 24-499.

But without reference to such provision, *held*, that the maker of a note who was garnished after maturity thereof, without notice or knowledge of any assignment, might be held liable as a debtor of the payee of the note: *McCoid v. Beatty*, 12-299.

Held, also, that this rule was applicable where the assignment of the note past due was made after service of the notice of garnishment, but before the answer of the garnishee, if the garnishee at the time of answering had notice of such assignment, the rights of the assignee being subordinate to the garnishment: *Stevens v. Pugh*, 12-430.

These provisions as to indemnity in case of negotiable paper may be taken advantage of by the garnishee, but if waived by him the failure to comply with them does not affect the power of the court to render judgment: *McPhail v. Hyatt*, 29-137.

But though the garnishee fails to demand indemnity and allows judgment to go against him, such judgment will be no defense against a holder of the paper who acquired it before the garnishment: *Yocum v. White*, 36-288.

In the case of negotiable paper, the court may order that plaintiff have judgment when the provisions as to indemnity are complied with. But such order will not be a final judgment upon which execution may issue: *Seals v. Wright*, 37-171.

Where the garnishee, after notice of garnishment, paid a note, made to the defendant or bearer, to the indorsee of such note, *held*, that under the evidence as to ownership introduced in the case, a judgment in favor of garnishee was not so wholly unsupported as that it should be reversed: *Kauffman v. Jacobs*, 49-432.

4216. Judgment conclusive. 2991. The judgment in the garnishment suit condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant. [R., § 3212.]

[The word "in," in the first line, is erroneously printed "of" in the Code.]

As to effect of judgment, see notes to § 4214.

As to when assignee is bound, see notes to § 4207.

4217. Docket to show garnishments. 2992. The docketing of the original case shall contain a statement of all the garnishments therein, and when judgment is rendered against a garnishee, the same shall distinctly refer to the original judgment. [R., § 3213.]

This section is sufficiently complied with if the record entry of the judgment against the garnishee contains the title of the cause in which such original judgment was rendered: *Boyd v. Rutledge*, 25-271.

4218. Appeal. 2993. An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervenor claiming the property or money. [R., § 3214.]

If the garnishee allows judgment to go against him for an amount in excess of his indebtedness, and does not appeal therefrom, he cannot be relieved, even on payment of the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 37-620.

A judgment against a garnishee will not be reviewed on appeal when the appellant has taken no exceptions to any ruling of the court, or submitted any motion to set aside the judgment: *Eason v. Gester*, 31-475; *Robison v. Saunders*, 14-539.

The principal defendant may appeal from a judgment against the garnishee: *Sinard v. Gleason*, 19-165.

Where a judgment is rendered against the garnishee, defendant cannot complain thereof on appeal unless he has ground of objection to the judgment rendered against him for the indebtedness sued upon: *Fanning v. Minnesota R. Co.*, 37-379.

The decision that garnishee is indebted to defendant is not conclusive, although the garnishee does not appeal. If the case is again opened by appeal, other parties, claiming that the indebtedness is due to them, may intervene: *Daniels v. Clark*, 38-556.

An order discharging a garnishee is an order substantially affecting the rights of the parties and may be appealed from: *National Bank v. Chase*, 71-120.

RELEASE OF ATTACHED PROPERTY.

4219. By defendant executing a bond. 2994. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties to be approved by the officer having the attachment, or, after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action. [R., §§ 3191, 3192, 4129.]

[The word "sureties," in the third line, is erroneously printed "securities" in the Code.]

Terminates the lien: Where the statutory bond discharging the attachment is executed, the property seized may be levied on under other attachments. The lien of the attachment is discharged by giving the bond: *Jones v. Peasley*, 3 G. Gr., 52.

The bond here contemplated must be for the performance of the judgment. A bond for the return of the property on demand does not release it from the lien of the attachment and terminate the detention for which the defendant may claim damages on the attachment bond in case the attachment is wrongful: *Selz v. Belden*, 48-451.

This bond is a new security taking the place of the attachment lien, and a motion to dissolve the attachment cannot properly be made after such bond is given: *Austin v. Burgett*, 10-302.

Charges for keeping; costs: When such bond is given it is erroneous to require defendant to pay the charges accrued for keeping the attached property before releasing it to him. Such charges go with the costs in the case: *Milburn v. Marlow*, 4 G. Gr., 17.

Formalities of the bond: The plaintiff may sue on the bond, although not executed to him but to the sheriff: *Moorman v. Collier*, 32-138.

It is not essential that it be signed by defendant: *Selz v. Belden*, 48-451.

A bond, irregular in form, *held* sufficient: *Sheppard v. Collins*, 12-570.

Presumption of regularity: It will be presumed, in the absence of anything in the record to the contrary, that a bond taken and approved by the clerk was taken under such circumstances as to render his action proper: *Budd v. Durall*, 36-315.

Not released by appeal bond: The giving of a *supersedeas* bond on appeal does not affect a bond previously given to discharge the attachment. The plaintiff may recover to the full amount of the discharge bond if necessary to satisfy his judgment, and, if there is any part of the judgment unsatisfied, may also recover upon the *supersedeas* bond to that extent: *State v. McGlothlin*, 61-312.

Discharge of sureties: Where the sureties on such bond have been discharged upon judgment against plaintiff without exception to the order of discharge, but on reversal, upon appeal, there is a new trial and plaintiff recovers, he cannot have judgment against the sureties if, after the order of discharge, they have surrendered indemnity previously held: *Barton v. Thompson*, 66-526.

4220. Judgment on bond. 2995. Such bond shall be part of the record, and, if judgment go against the defendant, the same shall be entered against him and sureties. [R., § 3193.]

This remedy on the bond is additional to the remedy by action: *State v. McGlothlin*, 61-312.

4221. Delivery bond. 2996. The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, but if that sum would exceed three times the claim, then in such sum as equals three times the claim, conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court. [R., § 3219; C., '51, § 1876.]

Does not discharge attachment: A bond given under this section does not terminate the attachment, nor prevent defendant from moving for its discharge: *Allerton v. Eldridge*, 56-709.

Nor does it prevent a third party claiming title to the property from disputing the validity of the attachment by summary proceedings (under § 4241): *Tuttle v. Wheaton*, 57-304.

The execution of a delivery bond for the release of the property constitutes a waiver of any objection to irregularities or defects in the return of the attachment: *Case Threshing Machine Co. v. Merrill*, 68-540.

Being for benefit of plaintiff, the bond is not limited to the officer serving the process, but delivery must be made, if delivery becomes necessary, to the officer who has the final process: *Ramsey v. Coolbaugh*, 13–164.

Defects in form: A mistake in the bond as to the court in which the attachment issued will not render the bond invalid as to the sureties: *Ripley v. Gear*, 58–460.

A delivery bond, though so defective as not to be sufficient under the statute, may still be enforced as a common-law bond, and the attachment defendant will be liable thereon if judgment goes against him in the proceedings in which the attachment was issued: *Garretson v. Reeder*, 23–21.

Order for sale of the property, upon the rendering of judgment against defendant, is not necessary in order to fix liability on a delivery bond on which the property has been released: *Ibid.; Waynant v. Dodson*, 12–22.

Applicable in garnishment: Under the corresponding provision of Code of '51, *held*, that debts or property attached by garnishment might be released in the same way as property actually seized, and that the provisions as to appraisement were applicable to such cases: *Woodward v. Adams*, 9–474.

Action on the bond may be brought by the assignee of the attachment plaintiff: *Rowley v. Jewett*, 56–492.

An alteration made in the bond at the time of delivery to the officer, for the purpose of more fully describing the property, *held* not to release the sureties, although made without their knowledge, for the reason that the bond would have been sufficient without the alteration, which was therefore immaterial: *Ibid.*

The validity of the levy, not being questioned on the trial of an action on the delivery bond, cannot be first objected to on appeal in the supreme court: *American Ex. Co. v. Smith*, 57–242.

The execution of an appeal bond, on appeal to the supreme court from a judgment rendered in an attachment proceeding, does not operate to discharge the delivery bond. The plaintiff may avail himself of either or both such securities: *Williams v. Robison*, 21–498.

An appeal bond does not take the place of the delivery bond: *Jennings v. Warnock*, 37–278.

The appraisement provided for by statute to determine the amount of the bond to be given is not *prima facie*, at least, essential to the validity of the bond, and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9–474.

4222. Appraisement. 2997. To determine the value of property in cases where a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after having been sworn by him to make the appraisement faithfully and impartially, shall proceed to the discharge of their duty. If such persons disagree as to the value of the property, the sheriff shall decide between them. [R., § 3220; C., '51, §§ 1877-8.]

The appraisement is not, *prima facie* at least, essential to the validity of the bond, and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9–474.

Appraisement is not necessary in attachment except under the circumstances here provided: *Smith v. Coopers*, 9–376.

4223. Defense. 2998. In an action brought upon the bond above contemplated, it shall be a sufficient defense that the property for the delivery of which the bond was given, did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment. [R., § 3221; C., '51, § 1879.]

A defendant in an action on a bond, who seeks to take advantage of the fact that the property did not belong to him, must state in his answer to whom it did belong: *Blatchley v. Adair*, 5–545.

SALE OF PERISHABLE PROPERTY.

4224. How and when made. 2999. When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualification of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial

day, he shall thereupon give the same notice as for sale of goods in execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding. [R., § 3222; C., '51, § 1881; 13 G. A., ch. 167, § 22.]

SPECIFIC ATTACHMENTS.

4225. In what actions. 3000. In an action to enforce a mortgage of, or lien upon personal property, or for the recovery, sale, or partition of such property, or by a plaintiff having a future estate or interest therein, for the security of his rights, where it satisfactorily appears by the petition, verified on oath or by affidavits, or the proofs in the cause, that the plaintiff has a just claim, and that the property has been or is about to be sold, concealed, or removed from the state, or where plaintiff states on oath that he has reasonable cause to believe, and does believe, unless prevented by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property. [R., § 3225; 13 G. A., ch. 167, § 23.]

Grounds urged in a particular case, *held* not sufficient: *Allerton v. Eldridge*, 56-709.

4226. By vendor. 3001. In an action by a vendor of property fraudulently purchased, to vacate the contract and have a restoration of the property, or compensation therefor, where the petition shows such fraudulent purchase of property and the amount of the plaintiff's claim, and is verified by his oath, an attachment against the property may be granted. [R., § 3226.]

4227. By whom granted; terms. 3002. The attachment in the cases mentioned in the last two sections may be granted by the court in which the action is brought, or by the judge of any court, upon such terms and conditions as to security on the part of the plaintiff for the damages which may be occasioned by them, and with such directions as to the disposition to be made of the property attached, as may be just and proper under the circumstances of each case. [R., § 3227; 13 G. A., ch. 167, § 24.]

4228. Describe property; indorsed. 3003. The attachment shall describe the specific property against which it is issued, and shall have indorsed upon it the direction of the court or judge as to the disposition to be made of the attached property. It shall be directed, executed, and returned as other attachments. [R., § 3230.]

4229. Terms of bond to discharge. 3004. The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment or to retain the attached property. [R., § 3231.]

INDEBTEDNESS DUE THE STATE.

4230. Security demanded. 3005. In all cases in which any person is indebted to the state of Iowa, or to any officer or agent of the state for the use or benefit of the state, the proper district [county] attorney, or the attorney-general, shall demand payment or security therefor, whenever, in the opinion of said district [county] attorney or attorney-general, the debt is not sufficiently secured. [10 G. A., ch. 133, § 1.]

4231. Attachment. 3006. In all suits for money due to the state of Iowa, or due to any state agent or officer for the use of the state, it shall be lawful for an attachment to issue against the property or debts of the defendant not exempt from execution, upon the filing of an affidavit by the district

[county] attorney of the proper district [county], or of the attorney-general, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused to pay or secure the same, and that unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the state. [Same, § 2.]

It is evidently contemplated that an attachment shall issue for the cause herein stated only when demand has been made upon the debtor for payment or security and is refused; and that the defendant is absent from the state, so that demand cannot be made upon him, does not change the rule: *State v. Morris*, 50-203.

4232. No bond required. 3007. The attachment so issued shall be levied as in other cases of attachment, and no bond shall be required of the plaintiff in such cases, and the sheriff shall not be authorized to require any indemnifying bond before levying the same. [Same, § 3.]

4233. Delivery bond. 3008. Any property taken on attachment under the provisions of the two preceding sections, shall be subject to be released upon the execution of a delivery bond, with sufficient security as provided by law in other cases. [Same, § 4.]

4234. Sheriff indemnified. 3009. In case any sheriff shall be held liable to pay any damages by reason of the wrongful execution of any writ of attachment issued under the three preceding sections, and if a judgment be rendered therefor by any court of competent jurisdiction, the amount of such judgment when paid by such sheriff shall become a claim against the state of Iowa in favor of such sheriff, and a warrant therefor shall be drawn by the auditor upon proper proof. [Same, § 5.]

SHERIFF'S RETURN; DISPOSITION OF PROPERTY.

4235. Shall show what; when made. 3010. The sheriff shall return upon every attachment what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also the appraisement above contemplated, when such has been made. When garnishees are summoned, their names, and the time each was summoned, must be stated. And where real property is attached, the sheriff shall describe it with certainty to identify it, and, where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. He shall return with the writ all bonds taken under it. Such return must be made immediately after he shall have attached sufficient property, or all that he can find; or, at latest, on the first day of the first term on which the defendant is notified to appear. [R., § 3224.]

Want of: The officer may justify under a writ under which a levy has been made, although the writ has not yet been returned: *Kingsbury v. Buchanan*, 11-387.

Defects in: It is the levy of the attachment, and not the sheriff's return on the writ, that gives the court jurisdiction of the subject-matter; and a defect in the return will not render the proceedings void, nor subject to collateral attack; but they will be voidable only, and subject to correction in a direct proceeding: *Rowan v. Lamb*, 4 G. Gr., 468.

The fact that the return does not state the property levied on to be that of defendant will not render subsequent proceedings under such levy void. (Overruling *Tiffany v. Glover*, 3 G. Gr., 387): *Rowan v. Lamb*, 4 G. Gr., 468.

Irregularities or defects in the return of an officer to the attachment are waived by acquiescence in the levy and consenting to the property being put into the possession of the officer. Such consent is shown by executing a delivery bond for the release of the property as authorized by law: *Case Threshing Machine Co. v. Merrill*, 68-540.

When to be made: It is not required that the writ be returned the first day of the first term succeeding its issuance. The levy of the writ may be made at any time before judgment or before its return: *Westphal v. Sherwood*, 69-364.

Return as evidence; parol to vary: The return of the writ, being the act of a sworn officer, is *prima facie* evidence of the facts therein stated. Whether it can be contradicted by parol testimony, *quære: Kingsbury v. Buchanan*, 11-387.

The return is the statutory evidence of what it purports to show. It constitutes, with the writ, one record. Without a return the court has no proper evidence before it on which to base any proceedings against specific property

levied upon, or credits garnished: *Rock v. Singmaster*, 62-511.

The service and return of the writ are the evidence of the levy: *McDonald v. Moore*, 65-171.

The return of the writ showing service upon the sheriff of notice by a third person claiming ownership of the property is sufficient evidence of the service of such notice: *Crawford v. Nolan*, 72-673.

The return should show what property was attached and the disposal made of it, and all acts done by the officer in the execution of it, and such return is evidence against the parties as to the acts done by the parties in executing it, which are required by law to be shown by the return, but it is not evidence of facts not necessarily involved in the execution of the writ, such as a malicious trespass: *Charles City Plow, etc., Co. v. Jones*, 71-234.

Levy after return of the writ and after default upon service by publication will not confer jurisdiction over the property, and a sale thereunder will be a nullity: *Osborn v. Cloud*, 23-104.

Amendment of return: See notes to § 4246.

4236. Judgment, how satisfied. 3011. If judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court shall apply in satisfaction thereof, the money arising from the sales of perishable property, and if the same is not sufficient to satisfy the plaintiff's claim, the court shall order a sale by the sheriff of any other attached property which may be under his control. [R., § 3232; 13 G. A., ch. 167, § 25.]

A special execution may be issued in case of property held under attachment to await the rendition of judgment, although the judgment be general and no particular allowance of a special execution be made therein: *Corriell v. Doolittle*, 2 G. Gr., 385.

In case of judgment in attachment proceedings a special execution in pursuance thereof cannot issue after the death of the judgment debtor: *Welch v. Battern*, 47-147.

Where attached property is sold it will be presumed that it was sold under special execution as provided by statute: *Peterson v. Foli*, 67-402.

The lien of the attachment is not lost by reason of an omission to order a special execution. The property may be sold under a general execution: *Kingsbury v. Buchanan*, 11-387.

In an attachment suit commenced by publication of notice, in which the court does not acquire jurisdiction over the person of defendant by personal service or appearance, the plaintiff cannot have judgment for a general execution for any residue of the debt left unsatisfied after exhausting the attached property: *Johnson v. Dodge*, 19-106.

4237. Court may control property. 3012. The court may, from time to time, make and enforce proper orders respecting the property, sales, and the application of the moneys collected. [R., § 3233.]

4238. Expenses for keeping. 3013. The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs. [R., § 3234.]

While the sheriff is entitled to be allowed his necessary expenses for keeping the attached property he is not to have any compensation for personal services in addition to his statutory fees and salary: *King v. Shepherd*, 68-215.

The sheriff is liable to a person employed by him to take care of attached property, and this claim for necessary expenses of keeping such property is to be presented by the sheriff, and not by the person employed by him for that purpose: *Rowley v. Painter*, 69-432.

4239. Surplus. 3014. Any surplus of the attached property and its proceeds shall be returned to the defendant. [R., § 3235.]

4240. Discharge of property. 3015. If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him. [R., § 3236.]

Judgment against plaintiff upon demurrer or nonsuit discharges the attachment: *Harrow v. Lyon*, 3 G. Gr., 157; *Brown v. Harris*, 2 G. Gr., 505.

Not revived by reversal: Where attachment has been dissolved by judgment against plaintiff, it is not revived by reversal of the judgment on appeal: *Harrow v. Lyon*, 3 G. Gr., 157.

Nor by setting aside nonsuit: Where the attachment is released by judgment of nonsuit, it is not revived by an order setting aside the nonsuit upon motion: *Brown v. Harris*, 2 G. Gr., 505.

Judgment dissolving the attachment on motion is suspended by appeal, if the appeal is taken within a reasonable time, and if the judgment is reversed the attachment remains: *Danforth v. Carter*, 4-230.

Such a judgment is a final adjudication upon all questions involved therein, unless appealed from in proper time. To continue the lien as to third persons the appeal must be taken forthwith [but see now, statutory provision referred to below], but as between the parties four days is a reasonable time. In the absence of notice that the plaintiff purposes appealing from the judgment dissolving the

attachment on motion, the officer holding money which is the proceeds of the attached property may at once pay it over to the party thus appearing to be entitled thereto: *Danforth v. Rupert*, 11-547.

Where the special verdict of the jury showed that at the time the attachment issued plaintiff had no cause of action, *held*, that the attached property was discharged, although there was a verdict for plaintiff on an amended petition subsequently filed: *Cramer v. White*, 29-336.

Judgment against plaintiff discharges the attachment without any order of court, and an appeal, taken after the two days from the rendition of such judgment, allowed by § 4244, within which to appeal, will not revive the attachment: *Harger v. Spofford*, 44-369.

The fact that defendant afterward formally moves for a dissolution will not enable plaintiff, by appealing within two days from such order, to keep the attachment in force: *Ibid.*

Sureties discharged: Where no exception was taken to an order discharging sureties on a discharge bond upon a judgment being entered against plaintiff, *held*, that a subsequent reversal would not entitle plaintiff to judgment against the sureties, it appearing that after the order discharging them they had released indemnity which they held: *Barton v. Thompson*, 66-526.

The invalidity of judgment for plaintiff, for whatever cause, does not defeat the attachment lien, but the case stands as if no judgment had been rendered, all rights depending upon the preceding steps being unimpaired: *Hodson v. Tibbetts*, 16-97.

4241. Intervention. 3016. Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in, or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court. [R., § 3237.]

A third party claiming the property may avail himself of the summary proceedings here provided to have his right to the property determined, although he has already secured possession of the property by a delivery bond: *Tuttle v. Wheaton*, 57-304.

This section simply provides an additional remedy to the third person whose property is wrongfully seized. He is not bound to follow it: *Sperry v. Ethridge*, 70-27.

By this section any person other than defendant may intervene at any time before the sale of attached property or before the proceeds thereof, or the attached debt, is paid over to the plaintiff in the action, and make a claim to the property or money. This section is, by virtue of § 4276, also applicable in garnishments under execution: *Edwards v. Cosgro*, 71-296.

Damages for the use or loss of service of the property cannot be recovered in such proceeding. Such relief can be had only in an independent action: *Jennings v. Hoppe*, 44-205.

Any claim, lien, interest or title to or in the property attached may be set up at any time before the proceeds are paid to the plaintiff in attachment: *Howe v. Jones*, 57-130.

Applicable in general as well as specific attachments: These provisions are not limited to cases of specific attachment: *Jennings v. Hoppe*, 44-205.

Upon appeal from judgment of a justice against a garnishee, taken by the defendant in the action, a third person may intervene and assert his claim to the debt under these provisions although the garnishee does not appeal: *Daniels v. Clark*, 38-556.

A proceeding under this section is not necessarily in equity: *Clinton Nat. Bank v. Studemann*, 74-104.

4242. Remedy on bond. 3017. The fact stated as a cause of attachment, shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may in his discretion, sue thereon by way of counter-claim, and in such case shall recover damages as in an original action on such bond. [R., § 3238.]

The facts stated as ground of attachment cannot be contested in the action: See notes to § 4165.

As to suing by way of counter-claim on the bond, see notes to § 4175.

A suit on a bond, by way of counter-claim, is an answer in the action sufficient to prevent default: *Town v. Bringolf*, 47-133, 135.

4243. Discharge motion. 3018. A motion may be made to discharge the attachment, or any part thereof, at any time before trial, for insufficiency

of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or on some part of the property held. [R., § 3239.]

For a defect apparent on the record: Attached property will be discharged on motion only where it is apparent of record that it should not have been levied on; a third party claiming the property should proceed in accordance with the provisions of § 4241: *Tidrick v. Sulgrove*, 38–339; *Williams v. Walker*, 11–77.

That the petition for attachment does not state sufficient ground therefor cannot be raised by demurrer, but must be reached by motion as here provided: *Hunt v. Collins*, 4–56.

Discharge not defeated by ground of attachment subsequently accrued: Where it appears that, at the time the writ issued, plaintiff had no cause of action, the property should be discharged, although a cause of action, as made out in an amended petition, has accrued subsequently to the writ: *Cramer v. White*, 29–336.

For defects in petition: In a particular case, *held*, that an attachment should have been quashed for defects in the affidavit to the petition: *Stadler v. Parmlee*, 10–23.

Insufficiency of amount of bond may be a proper ground for motion to dissolve: *Hamble v. Owen*, 20–70.

Defect in writ or want of bond is to be raised in this manner, and not by demurrer: *Brace v. Grady*, 36–352.

Failure of plaintiff to recover on the whole of the claim sued on is not ground for quashing the attachment, *pro tanto*, after judgment: *Sackett v. Partridge*, 4–416.

The truth of the facts alleged as ground of attachment cannot be questioned on motion to dissolve. The remedy is by suit on the attachment bond: *Sturman v. Stone*, 31–115.

Exemption: That property levied on is exempt from execution may be set up as a ground for its release: *Wilson v. Stripe*, 4 G. Gr., 551.

Where it was shown that the property attached was exempt, *held*, that it should have been discharged upon motion, and that such showing was not inconsistent with the allegations in the petition for attachment, that plaintiff was about to remove his property from the state: *Hastings v. Phœnix*, 59–394.

If the party fails to take advantage of his exemption by motion to have the property released, he may still do so by replevin: *Wilson v. Stripe*, 4 G. Gr., 551.

Where attached property was released on motion as exempt, *held*, that upon seizure of the same property upon execution in the same action defendant might recover it by replevin, although a writ of error had been taken from the decision on the motion, no *supersedeas* bond being filed: *Pellersells v. Allen*, 56–717.

Exemption must be clearly shown: To justify the discharge of property on motion on the ground of exemption, the case should be made clear and entirely satisfactory. Otherwise the party should be left to other and ordinary means for testing the liability of the property to seizure under the writ: *McLaren v. Hall*, 26–297.

Wrongful levy: The fact that the property was attached by the sheriff outside of his county, or that the levy was secured by fraud or violence, is a ground for discharge of the property on motion: *Pomroy v. Parmlee*, 9–140.

Title to real property: The question whether certain real estate is subject to attachment may properly be determined on motion, but if the title to such property be a matter of dispute between the parties, upon the facts, it cannot properly be determined in this manner: *Rausch v. Moore*, 48–611.

Want of an allowance of the amount of property to be attached, as required in actions on tort, will not be ground to discharge the entire attachment where the action is both on contract and tort; but if more property is seized than can be held under attachment on the portion of the action founded on contract, the excess may be released: *Moses v. Arnold*, 43–187.

Where there is an absence of such allowance in an action on tort, and motion is made to discharge the attachment on that ground, the court may then make an allowance to relate back, as between the parties, to the issuance of the writ, and refuse to discharge the attachment: *Magoon v. Gillett*, 54–54.

Pleading; evidence; estoppel: No pleading controverting the motion is required or allowed. Evidence of any facts controverting the ground for release set up in the motion may be introduced without pleading them, even though they establish an estoppel: *Joyce v. Miller*, 59–761.

Dissolution after discharge by bond: Dissolution of the attachment should not be ordered after the attachment has been discharged by bond: *Austin v. Burgett*, 10–302.

Appearance by motion to release attached property is a general appearance to the action: *Chittenden v. Hobbs*, 9–417.

4244. Time for appeal. 3019. When an attachment has been discharged, if the plaintiff then announce his purpose to appeal from such order of discharge, he shall have two days in which to perfect his appeal, and during that time such discharge shall not operate a return of the property nor divest any lien, if such appeal be so perfected at the end thereof. [R., § 3240.]

4245. Same. 3020. But, if judgment in the action be also given against the plaintiff, he must also, within the same time, take his appeal thereon, or such discharge shall be final. [R., § 3241.]

Judgment against plaintiff discharges the attachment without any order of court, and an appeal, taken after two days from the rendition of such judgment, will not revive the attachment: *Harger v. Spofford*, 44-309. And see notes to § 4240.

4246. Liberal construction; amendments. 3021. This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has, or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings; the causes for attachment shall not be stated in the alternative. [R., § 3242.]

Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed, and the attachment should not be dissolved for any defects thus corrected: *Gourly v. Carmody*, 23-212.

A party is not to be prejudiced by any defects which are corrected by amendment: *Wadsworth v. Cheeney*, 13-576.

An amendment is allowable correcting a defect in the form of the affidavit: *Shaffer v. Sundwall*, 33-579; *Lowenstein v. Monroe*, 52-231; or a defect in the bond: *Cheever v. Lane*, 9-193; *Holmes v. Budd*, 11-186.

A substituted bond is to be treated in all respects as if filed at the beginning of the action: *Branch of State Bank v. Morris*, 13-136.

The objection that the bond is not sufficient in amount may be avoided by substitution of a sufficient bond: *Van Winkle v. Stevens*, 9-264.

This section is broader than Rev., § 3242, and clearly authorizes an amendment to a writ that is defective by reason of having the seal of the wrong court attached thereto: *Murdough v. McPherrier*, 49-479 (overruling *Foss v. Isett*, 4 G. Gr., 76, and *Shaffer v. Sundwall*, 33-579, decided under prior statutes).

Where the writ was defective in not stating the sum claimed in the action, *held*, that it might be amended in this respect after levy: *Atkins v. Womeldorf*, 53-150.

The sheriff's return on the writ of attachment may be amended upon application to the court after as well as before the expiration of his term of office: *Jeffries v. Rudloff*, 73-60. And further as to the return, see notes to § 4262.

As to amendment of petition, see notes to § 4165.

4247. Entry on incumbrance book. 3022. No levy of attachment on real estate shall be notice to a subsequent vendee or incumbrancer in good faith, unless the sheriff making such levy shall have entered in a book which shall be kept in the clerk's office of each county by the clerk thereof, and called "incumbrance book," a statement that the land, describing it, has been attached, and stating the cause in which it was so attached, and when it was done and signed by such sheriff; and such book shall be open as other books kept by such clerk to public inspection. [R., § 3243.]

Until the return of the writ, persons acquiring an interest in the property are not affected with notice thereof: *First National Bank v. Jasper County Bank*, 71-486.

The mere entry in the incumbrance book of a statement of the fact of levy (as required by statute), coupled with the intention to make a levy, will not constitute a levy. The purpose of the entry is not as a part of the levy, but as constructive notice thereof: *Collier v. French*, 64-577.

An entry of the fact of levy on lands under an attachment against the husband constitutes no notice to a purchaser from the wife holding the legal title: *Bailey v. McGregor*, 46-667.

The entry in the incumbrance book of an attachment on an equitable interest in land is not notice to a vendee or mortgagee of the person holding the legal title: *Farmers', etc., Bank v. Fletcher*, 44-252.

Failure to enter the levy in the index of liens will not defeat the effect of the entry of the proper statement in the incumbrance book. The entry in the incumbrance book constitutes notice and affects the lien; the indexing, while directed to be made, is not made essential to the validity of the entry in the incumbrance book: *Blodgett v. Huscamp*, 64-548.

Section applied: *First National Bank v. Hayzlett*, 40-659.

Where an attachment is levied in proceedings pending at a place where court is held other than the county seat, failure of the deputy clerk to transmit a transcript there and have it entered in the incumbrance book as required by § 237 will prevent such attachment becoming a lien on the land: *Benjamin v. Davis*, 73-715.

4248. Sheriff; constables. 3023. The words "sheriff" as used in this chapter, is meant to apply to constables when the proceedings are in a jus-

tice's court, or the like officer of any other court. [R., § 3244; C., '51, § 1883.]

4249. Justice; clerk. 3024. When the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated. [R., § 3245; C., '51, § 1884.]

CHAPTER 2.

OF EXECUTIONS.

4250. Limitation on issuance of. 3025. Executions may issue at any time before the judgment is barred by the statute of limitations, and but one execution shall be in existence at the same time. [R., § 3246.]

No notice of the issuance of execution need be given the defendant therein: *Ayres v. Campbell*, 9–213.

Within what time may issue: At common law, if execution was not sued out within a year and a day after judgment, it was presumed that the judgment was satisfied or execution released, and a proceeding by *scire facias* was necessary before execution could afterwards issue: *Von Puhl v. Rucker*, 6–187.

Under the statute, execution on a judgment of a court of record may issue at any time within twenty years, but as the lien of such judgment upon real property terminates at the end of ten years, an execution on the judgment after that time only operates as a lien upon real property from the time of levy: *Stahl v. Roost*, 34–475.

Execution on a judgment of a justice of the peace cannot issue after the expiration of ten years unless a transcript thereof has been filed: *Givens v. Campbell*, 20–79.

Where the time within which an execution might be issued upon a judgment was extended by statute, *held*, that such statute was applicable to judgments already in existence and extended the time within which execution might be issued thereon: *Gray v. Iliff*, 30–195.

Judgment essential to validity: If there is no valid existing judgment when the execution is issued, it is void: *Balm v. Nunn*, 63–641.

But one execution: The statutory provision that but one execution can be in existence at the same time is mandatory and not merely directory. Nevertheless it may be waived by the party for whose benefit it is enacted: *Merritt v. Grover*, 61–99.

The mere issuance of a second writ before the return of the prior execution under which the levy has been made is not of itself sufficient to establish the abandonment of such levy: *West v. St. John*, 63–287.

A second execution should not be issued until a levy under a prior execution has been disposed of: *McWilliams v. Myers*, 10–325.

4251. On judgments or orders; attachment for contempt. 3026. Judgments or orders requiring the payment of money, or the delivery of the possession of property are to be enforced by execution. Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempt. [R., § 3247; C., '51, § 1885.]

Proceedings for contempt: The proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt: *State v. Baldwin*, 57–266.

Failure to pay money awarded as temporary alimony in a divorce suit, and for which judgment has been entered, cannot be treated as a contempt: *Baily v. Baily*, 69–77.

An order to pay to the clerk a sum allowed in a divorce suit for temporary alimony may be enforced by execution: *Allen v. Allen*, 72–502.

A certified copy of an order appointing a receiver and directing him to take possession of property serves the same purpose as the writ itself, and a resistance to the receiver acting thereunder will constitute a resistance to the execution of an order of court: *State v. Rivers*, 66–653.

4252. Into any county. 3027. Executions from any court of record may issue into any county which the party ordering them may direct. [R., § 3248; C., '51, § 1888.]

See notes to § 4256.

4253. On Sunday. 3028. An execution may be issued and executed on Sunday, whenever an affidavit shall be filed by the plaintiff or some person in

his behalf, stating that he believes he will lose his judgment unless process issue on that day. [R., § 3263.]

4254. On demand of party; duty of clerk. 3029. Upon the rendition of judgment, execution may be at once issued, and shall be by the clerk on the demand of the party entitled thereto; and upon its issuance, the clerk shall enter on the judgment docket the date of its issuance, and to what county and what officer issued, and shall also enter on said docket the return of the officer with the date of the return, the dates and amount of all moneys received into or paid out of the office thereon; and these entries shall be made at the time of the thing done. [R., § 3265.]

As to the return, see § 4263.

4255. Penalty. 3030. The clerk wilfully neglecting or refusing to perform any one of the duties in this chapter imposed, shall be liable to a penalty of five hundred dollars, and to damages to the party aggrieved, and shall be guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office. [R., § 3266.]

4256. Transcript in another county. 3031. In case execution is issued to a county other than that in which the judgment is rendered, a transcript of such judgment must be filed in the office of the clerk of the district court of such county, who shall make an entry thereof in the judgment docket of such court, and the officer having such execution shall return a copy thereof, with his return and doings indorsed thereon, to such clerk, who shall make entries thereof in the same manner and extent as if such judgment had been entered in and execution issued from such court. [R., § 3249.]

This section is directory only, and a sale of lands in one county may be made on an execution issued from another county without the filing of the transcript provided for. The effect of failure to file the transcript will be that the levy and sale under the execution will not impart constructive notice to a subsequent purchaser of the property before the recording of the sheriff's deed. But actual notice of the proceedings will supply the want of such record notice: *Hubbard v. Barnes*, 29-239; *McGinnis v. Edgell*, 39-419.

When the sheriff's deed is recorded in pursuance of such a sale, it will operate as constructive notice of the title of the purchaser, although a transcript of the judgment was not filed: *Foreman v. Higham*, 35-382.

Execution cannot be issued on the transcript. It must issue from the court originally rendering the judgment: *Seaton v. Hamilton*, 10-394; *Furman v. Dewell*, 35-170.

As to transcript, see, also, § 4091.

4257. Return from another county; money, how sent. 3032. When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money cannot thus be sent except by the direction of the party entitled thereto, or his attorney. [R., § 3250; C., '51, § 1889.]

4258. General form. 3033. The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for money; and, if not for money, it must state what specific act is required to be performed. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution. [R., § 3251; C., '51, § 1890.]

Form: While an execution must pursue and be warranted by the judgment, yet a mere irregularity as to date will not render a sale thereunder void. If it so describes and identifies the judgment as to render certain the authority on which it is issued, it is sufficient to vest the sheriff with power to sell: *Sprott v. Reed*, 3 G. Gr., 489.

An execution which did not state the amount to be made out of the property, but which contained a statement of the sum due under the decree, *held* sufficient: *Cooley v. Brayton*, 16-10.

A simple variance between the execution and judgment *held* not sufficient to affect the validity of the sale: *Cunningham v. Felker*, 26-117.

An execution showing that the judgment under which it was issued was recovered before a person described by name, but not stated

to be a justice of the peace, *held* not sufficient to render the writ void, where the writ was so described and identified as to render certain the authority on which it was issued: *Dean v. Goddard*, 13-292.

An execution from a justice of the peace specifying who recovered the judgment, and against whom it was recovered, but not the names of the parties, *held* sufficient: *Williams v. Brown*, 28-247.

In a particular case, *held*, that the execution sufficiently referred to the judgment and stated the matters necessary to be stated as required by statute: *Burdick v. Shigley*, 30-63.

In whose name to issue: Execution can only issue in the name of the judgment creditor except in case of his death, bankruptcy, or the like. It cannot issue in the name of the assignee of the judgment: *Corriell v. Doolittle*, 2 G. Gr., 385.

The assignment of the judgment carries with it as a necessary incident the right to use the name of the party in whose favor the judgment was rendered, for the purpose of issuing execution: *McWilliams v. Myers*, 10-325.

Alteration: Where it appeared that the name of the execution debtor had been changed in the execution, and it was sought to defeat the sale on the ground of such alteration, *held*, that it would not be presumed that the alteration was fraudulently made by one not authorized to make it, and after the sale, but that the sale would be upheld: *Preston v. Wright*, 60-351.

Recall by court: Where a general execution was improperly issued on a judgment, *held*, that on motion of defendant an order should have been granted in the court in which the judgment was rendered, recalling the execution and releasing the levy made thereunder: *Mayfield v. Bennett*, 48-194.

4259. Against representatives. 3034. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property. [R., § 3252.]

4260. For delivery of possession. 3035. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment out of the property of the party against whom it was rendered subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property. [R., § 3253.]

4261. When for performance of any other act. 3036. When it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. [R., § 3254.]

See notes to § 5904.

4262. Officer to receipt for. 3037. Every officer to whose hands an execution may legally come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from such delivery. [R., § 3255.]

Failure to return: An execution must be regarded as existing until it is returned, although the return day has passed; and a sale under a second execution, issued before the first is returned, should, as to the judgment creditor purchasing thereat, be set aside: *Merritt v. Grover*, 57-493.

The failure of the sheriff to make return of a sale within the year following, during which redemption is allowed, will not render the sale void: *Cooper v. French*, 52-531.

Failure to return execution within the time here required does not render the officer liable to an action for damages, unless special injury is alleged and proved: *Musser v. Maynard*, 55-197.

Sale after expiration of execution: If a levy be made while the execution is alive a sale thereunder will be valid, although made after the execution itself has expired: *Stein v. Chambless*, 18-474; *Moomey v. Mass*, 52-380; *Childs v. McChesney*, 20-431; *Butterfield v. Walsh*, 21-97; *Thorington v. Auld*, 21-291; *Wright v. Howell*, 35-288.

The rule that a sale made after the expiration of the execution is valid applies to executions issued by justices of the peace: *Walton v. Wray*, 54-531.

Where the right of the sheriff to subject the property levied on to the satisfaction of the execution is contested by an action of replevin he should not make any return until after the disposition of the replevin suit. Having made a levy it is competent for him to exhaust the property on that execution, no matter what time expires between the levy and sale of the property: *Cox v. Carrier*, 62-551.

4263. Indorsement by officer. 3038. The officer to whom an execution is legally issued, shall indorse thereon the day and hour when he received it, and the levy, sale, or other act done by virtue thereof, with the date, and the dates and amounts of any receipts or payment in satisfaction thereof; the indorsements must be made at the time of the receipt or act done. [R., § 3257.]

How made; evidence: The officer's return indorsed on the writ is the evidence as to what property is covered by the levy, and it is not proper for the officer as a witness to testify as to whether other property was levied upon: *Flannigan v. Althouse*, 56-513.

If the execution and return be shown to be lost, parol evidence may be introduced to show the contents of such return, but for no other purpose: *Le Barron v. Taylor*, 53-637.

An officer is required to make his return in writing indorsed on the execution. If the execution is lost or destroyed, it may be that it would be competent to make the return on a copy, but unless the fact of such loss or destruction is shown by the return, a return made upon a copy cannot be introduced in evidence; nor can the return be explained by parol, unless it is shown that it has been made and lost or cannot be produced: *West v. St. John*, 63-287.

Where the sale is treated as a nullity by the parties, parol evidence that it was never completed may be received: *Winnebago County v. Brones*, 68-682.

A return upon an execution should be a statement of what is done by the officer in obedience to the writ; and a statement therein purporting to show the acts of a person other than the officer is without authority of law, and surplusage; therefore, *held*, that a statement in the return that the execution was satisfied by defendant giving security, which was taken by order of plaintiff, and an entry by the clerk upon the judgment record of the same facts, did not show a satisfaction upon which a subsequent incumbrancer could rely: *Aultman v. McGrady*, 58-118.

The return of the officer "no property found" is sufficient evidence to show that property of defendant, on which to make a levy, has not been found within the state: *Cameron v. Boyle*, 2 G. Gr., 154.

Statements made by the officer in his return as to acts which are no part of his official duty are not evidence of such acts: *Wickersham v. Reeves*, 1-413.

As to return of writ of attachment, see § 4235 and notes.

Effect of irregularities: The validity of the sale does not depend upon the regularity of the sheriff's return, and a purchaser at such sale who pays his money and receives his deed cannot be prejudiced by want of or irregularity in the sheriff's return of the sale: *Hopping v. Brunam*, 2 G. Gr., 39; *Corriell v. Doolittle*, 2 G. Gr., 385.

Failure to state in the return that notice was given to the execution defendant will not invalidate the deed in a collateral attack: *Humphry v. Beeson*, 1 G. Gr., 199.

PRINCIPAL AND SURETY.

4264. Property of principal first liable. 3039. When a judgment is against a principal and his surety, the officer having the collection thereof shall exhaust the property of the principal before proceeding to sell that of the surety. [R., § 3258; C., '51, § 1915.]

One of two joint judgment debtors cannot compel the creditor to resort to the other one first, unless so directed in the judgment, although as between the two the latter is primarily liable: *Palmer v. Stacy*, 44-340.

This provision only applies when judgment has been obtained against both principal and surety, and not then, unless the order of liability is stated in the judgment: *State v. McGlothlin*, 61-312.

4265. Meaning of surety. 3040. The term "surety" in the foregoing section, shall embrace accommodation indorsers, stayers, and all other persons whose liability on the claim is posterior to that of another; but the surety shall, if requested by the officer, show property of the principal to entitle himself to the benefit of this provision. [R., § 3259.]

4266. Property of surety. 3041. After exhausting the property of the principal, the officer shall subject the property of the other parties in the order of their liability in the execution. But the party subsequently liable, shall, if requested by the officer, show property of the party liable before him so as to entitle himself to the benefit of this provision. [R., § 3260.]

4267. Order of liability. 3042. But all the parties will be considered as equally liable in all cases, unless the order of liability is shown to the court and recited in the judgment, and the clerk issuing execution on the judgment

containing such recital shall state the order of liability in the execution. [R., § 3261.]

The object of this provision is to enable one who is a surety to have it so declared of record, to the end that the property of the principal may be exhausted; but such a finding by the court will not be an adjudication as to the facts, at least unless the principal debtor was a party to the proceeding: *Walters v. Wood*, 61-290.

LEVY.

4268. How made and indorsed. 3043. When an execution is delivered to an officer, he must proceed to execute the same with diligence; if executed, an exact description of the property at length, with the date of the levy, shall be indorsed upon or appended to the execution, and if the writ was not executed, or only executed in part, the reason in such case must be stated in the return. [R., § 3262.]

No notice of a levy need be given to the execution defendant: *Ayres v. Campbell*, 9-213.

Description: A levy in the following words, "levied upon a lot of lumber, consisting of fencing, flooring, sheeting, etc., etc., as the property of," etc., *held* not sufficiently definite as to the description of the property to be valid. The levy should describe the property with such certainty as to enable either the successor of the officer or the purchaser at the sale to find and identify it: *Payne v. Billingham*, 10-360.

Return: See notes to §§ 4262, 4263.

Levy constitutes satisfaction: After levy of execution on goods and chattels sufficient to satisfy the judgment, and defendant in the execution is divested of his right to the property, and the officer making the levy becomes liable to the plaintiff for the debt in case of failure to perform his duty with reference to the property, such levy becomes *prima facie* satisfaction of the judgment: *Lucas v. Cassaday*, 2 G. Gr., 208.

And the subsequent release of such a levy without the knowledge of a surety will operate as a release of the surety: *Sherraden v. Parker*, 24-28.

While proceedings for the satisfaction of a judgment are going on, and property sufficient to satisfy it is held under execution, the judgment cannot be sued on: *Peck v. Parchen*, 52-46.

Levy on sufficient personal property to satisfy the judgment is only considered a satisfaction in certain cases, as where the rights of a junior execution creditor intervene, or where the delay in the sale is occasioned by the plaintiff himself without the agency or consent of defendant, but as between the parties, levy is not satisfaction; and where property which at the time of levy was sufficient to satisfy a claim afterwards depreciated in value, owing to the postponement of the sale at the request of defendant, *held*, that the levy did not constitute a satisfaction: *Williams v. Gartrell*, 4 G. Gr., 287.

The rule that a levy upon personal property is a satisfaction of the judgment under which the levy is made does not apply in case of levy upon real property. Therefore, where a levy was made upon real property supposed to belong to defendant, and the same was bid in by plaintiff, but it afterwards appeared that defendant had no title, *held*, that plaintiff might recover from defendant the amount of the bid: *Reed v. Crosthwait*, 6-219.

4269. What acts necessary. 3044. The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution. [R, § 3267; C.,'51, § 1904.]

What acts: In order to make a legal and valid levy upon personal property the officer must take possession and control, by doing such acts as that, but for the protection of the writ, he would be liable in trespass therefor. Levy upon property which remained locked in an outbuilding, the key of which was in possession of the debtor, *held* not sufficient: *Rix v. Silknitter*, 57-262.

Merely noting the fact of levy upon personal property without taking and keeping possession of it, *held* not sufficient to create a lien: *Techmeyer v. Waltz*, 49-645.

As to levy of attachment, see notes to § 4178.

Leaving property with defendant, who remains in possession without giving a delivery bond, will prevent the levy being valid as against a subsequent levy under execution, under which possession is taken: *Border v. Benge*, 12-330.

Growing crops: A levy of execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise or sell as to evince an intention on the part of the judgment creditor to hold the levy for a time merely as security, and especially if it is reasonably certain at the time of the issuance of the writ that it cannot be fully executed by the sale of the crop during the life of the writ, but that the judgment debtor must be put to the expense of another writ: *Burleigh v. Piper*, 51-649.

Where the sheriff levied upon corn in the field ungathered, and notified parties claiming the property of his intention to levy, going

into the field for the purpose of making a levy, *held*, that having done all that could be done in order to take possession and give notice to persons interested, the sheriff was not required, in order to maintain his levy, to do more than owners of property usually do under such circumstances to retain possession: *Barr v. Cannon*, 69–20.

Where crops were levied upon as property of a tenant and left in his hands as agent, *held*, that this was a sufficient levy to constitute a conversion as to the landlord, who had a chattel mortgage on the crops, and that the conversion dated from such levy, and not merely from the time of sale: *Stuart v. Phelps*, 39–14.

Estoppel: The action of a party in disclaiming ownership in property before levy thereon cannot be relied on as estopping him from setting up a claim subsequently acquired, the party making the levy not having been deceived or induced to act by any precedent act or declaration of the party thus claiming under the subsequently acquired claim: *Davidson v. Dwyer*, 62–332.

Liability for preserving property under levy: An officer is required to exercise only ordinary care in the preservation of property held by him under execution or attachment: *Cresswell v. Burt*, 61–590.

After the officer has levied upon personal property it is, in legal contemplation, in his possession, custody or control; and if left with a third person as bailee for safe keeping, such custody is deemed the custody or possession of the officer and for his benefit. Although the bailee may be liable in replevin, it by no means follows that the officer is not also liable: *Ralston v. Black*, 15–47.

Where, in an action against a constable for the value of property levied on by him, it was alleged that he had negligently permitted the same to be stolen from him, *held*, that evidence of the fact that the property was so stolen was admissible in behalf of defendant, notwithstanding the fact of the levy appeared from his return on the writ: *Harper v. Moffit*, 11–527.

A constable who is unable by reason of sickness to discharge his duties as to property levied upon may relieve himself from responsibility by turning the property over to another constable, and it seems that the latter may in such case demand indemnity if indemnity should properly be given, and could not then refuse to receive the property: *Evans v Thurston*, 53–122.

Liability for execution of process: If the officer in executing process acts in good faith, and in entering upon the premises of the party against whom the writ is directed is guilty of no oppression, and makes no disturbance further than is necessary in making the seizure, the trespass, even if made without authority, is nominal only, and nominal damages will limit the extent of the recovery against him: *Plummer v. Harbut*, 5–308.

The sheriff who seizes property beyond the limits of his own county is a wrong-doer, and is liable to the owner and possessor in an action for trespass: *Parmlee v. Leonard*, 9–131.

A process in a case over which the court or officer issuing it had jurisdiction, but in exercising which he does not in all particulars fulfill the requirements of the law, is not void. The officer cannot in such case determine the validity of the proceeding, nor refuse to execute the writ, and is therefore protected under it: *State v. Foster*, 10–435.

A sheriff who commits a trespass by taking goods illegally is liable after going out of office, though his successor sells the same and receives the money: *Duke v. Vincent*, 29–308.

Failure to make levy: A sheriff is not liable in damages for failure to levy execution upon property in defendant's hands if he uses ordinary skill and reasonable diligence in the discharge of his duties: *Crosby v. Hungerford*, 59–712.

4270. What property. 3045. The officer shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may, at any time thereafter, make other levies if he deem it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof. [R., § 3268; C., '51, § 1903; 9 G. A., ch. 174, § 10.]

Property which may be seized: The general rule is that the right to seize and sell is co-extensive only with the power to take and deliver possession: *Campbell v. Leonard*, 11–489.

Interest of pledgor: The pledgee under a valid pledge has a right to the property prior to that acquired thereon by levy of execution against the pledgor with knowledge of the pledgee's rights: *Reeves v. Sebern*, 16–234.

Interest of mortgagor of chattels: See § 4189 and notes.

Leasehold interest: A leasehold interest is subject to sale under execution: *Sweezy v. Jones*, 65–272.

But the rights of a tenant in possession, with option of purchasing, are not greater than a leasehold interest, and cannot be sold distinct therefrom: *Ibid.*

An equitable interest in real property, which is a matter of record, may be sold under execution without an equitable action being brought to subject it to the judgment: *Lippencott v. Wilson*, 40–425.

A building erected by one person upon land of another under a parol license, being chattel property, may be sold by a constable under execution from a justice of the peace: *Walton v. Wray*, 54–531.

Real property of a person deceased cannot be seized under a judgment recovered in an action against the administrator. Such sale would not be binding against the heirs: *Lepage v. McNamara*, 5–124.

The right of redemption and possession during the redemption period which a debtor has in property which has been sold at judicial sale is subject to levy and sale, at least in a case where the debtor would not be entitled

to redeem from a second sale, and a surety may require that such property be subjected to the payment of the debt before his property is levied on: *Barnes v. Cavanagh*, 53–27. And see notes to § 4331.

Property intended for special use is subject to a levy although it cannot thereafter be applied to such use and does not realize on sale the amount of money it would have brought for use for the purpose intended. In such case the officer will not be liable for the damage resulting, if the levy is rightful: *Coffey v. Wilson*, 65–270.

Property in the hands of a receiver appointed by a court is not liable to seizure by an officer under execution: *Martin v. Davis*, 21–535.

Excessive levy will be ground for setting aside a sale, even though the whole property sold has been previously attached in the same action: *Cook v. Jenkins*, 30–452.

A second levy cannot be made until the first is disposed of: *Downard v. Crenshaw*, 49–296.

The assignee of a judgment cannot disregard a levy already made and issue a second execution and have another levy made thereunder until the levy under the first execution has been disposed of in some way known to the law: *McWilliams v. Myers*, 10–325.

Where real estate has been levied on, such levy must be disposed of by sale or abandonment, or set aside by a court, before a second execution can issue, except as authorized by § 4315: *Downard v. Crenshaw*, 49–296.

But one execution can be in existence at the same time: See § 4250

Lien on personal property: A writ of execution does not become a lien upon personal property until actual levy is made: *Reeves v. Sebern*, 16–234.

4271. Judgments; bank-bills; things in action. 3046. Judgments, bank-bills, and other things in action, may be levied upon and sold, or appropriated as hereinafter provided, and assignment thereof by the officer shall have the same effect as if made by the defendant. [R., § 3272; C., '51, § 1893; 13 G. A., ch. 167, § 26.]

Judgments: Aside from the provisions of this section, judgments cannot be levied on and sold as property, but garnishment of the judgment debtor would be the proper remedy: *Osborn v. Cloud*, 2–104.

Although by express statutory provisions a judgment may now be levied on and sold under execution, it is nevertheless a debt and not to be reached under an attachment by a levy, but only by garnishment: *Ochiltree v. Missouri, I. & N. R Co.*, 49–150.

Where an agent recovers a judgment in his own name, but for the benefit of the principal, and to which the principal is entitled, such agent has no interest therein which can be subjected to his debts: *Beaver Valley Bank v. Cousins*, 67–310.

Negotiable notes may, by the above statutory provision, be taken and sold by indorsement, and such transfer will vest the transferee with a title discharged of infirmities: *Earhart v. Gant*, 32–481.

The word "defendant" will apply to a defendant in a garnishment proceeding as well as to the defendant in the original action: *Ibid.*

Without reference to statutory provision, *held*, that a *bona fide* purchaser of a note levied on and sold under execution was protected against a prior purchaser of the note by verbal transfer from the judgment debtor, where the note was found in the hands of payee's agent, and without any marks of assignment to the purchaser: *Allison v. King*, 21–302.

A purchaser of a note at a sale under execution against one with whom it had been left after maturity for collection, and who had wrongfully converted it to his own use, acquires no title and cannot maintain action thereon: *McCormick v. Williams*, 54–50.

Bonds of a railroad company which had been negotiated and afterwards bought back by the company, but not delivered to it, *held* subject to be levied on by execution against the company: *Hetherington v. Hayden*, 11–335.

4272. Persons indebted may pay. 3047. After the rendition of judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor. [R., § 3273; C., '51, § 1894.]

[The word "sheriff" is erroneously inserted in the Code following "necessary," in the third line of this section.]

4273. Public property. 3048. Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such. [R., § 3274; C., '51, § 1895.]

Public buildings of a municipal corporation are exempt from execution. Therefore, a judgment against the corporation owning them is not a lien thereon: *Davenport v. Peoria M. & F. Ins. Co.*, 17–276.

As such buildings cannot be seized and sold

under execution, a mechanic's lien cannot be enforced against them: *Lewis v. Chickasaw County*, 50–234; *Loring v. Small*, 50–271; *Charnock v. District T'p*, 51–70; *Whiting v. Story County*, 54–81.

An averment that property levied on is that of a municipal corporation, and necessary and proper for its use in carrying out its purposes, is a sufficient allegation as to its public character: *Fort Dodge v. Moore*, 37–388.

4274. Tax levied to pay corporate debt. 3049. If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elect not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the judgment creditor, or to the clerk of the court in which the judgment was rendered, in satisfaction thereof. [R., § 3275; C., '51, § 1896; 13 G. A., ch. 43; 14 G. A., ch. 87.]

This section confers upon such corporations no additional power to tax which is not otherwise granted to them, and a corporation cannot be compelled under such provision to levy a tax in excess of the limit imposed by its charter or the limit imposed by statute or the constitution: *Clark v. Davenport*, 14–494; *Polk v. Winett*, 37–34; *Iowa R. Land Co. v. Sac County*, 39–124: *Jeffries v. Lawrence*, 42–498, 505; *Supervisors v. United States*, 18 Wall., 71 (modifying *Butz v. Muscatine*, 8 Wall., 575).

But the limitations found in § 676, as to the rate of city taxes, apply only to taxes there specified, and do not prevent the levying of additional taxes to pay indebtedness on which a judgment has been rendered: *Rice v. Walker*, 44–458.

A judgment creditor has, under this provision, the right to require that the levy and collection of a tax to pay his judgment be made, and a sufficient amount thereof set apart for the payment of his claim, and this duty may be enforced by *mandamus: State ex rel. v. Davenport*, 12–335.

But the payment of a claim not yet reduced to judgment cannot be thus enforced: *Ibid.*

A judgment creditor, having demanded the levy of a tax for the payment of his judgment, is entitled to have his debt paid in preference to other simple contract debts, and may have an order in an action by *mandamus* for the levy of a tax for the specific payment of such judgment: *Coy v. City Council of Lyons*, 17–1.

The order may direct that if the amount which may be legally levied is not sufficient, similar taxes shall be levied for that purpose for subsequent years: *Ibid.*

Mandamus is the appropriate remedy to compel the authorities to levy the tax when it is their duty to do so: *Butz v. Muscatine*, 8 Wall., 575.

Where a tax has been levied and collected, as provided by statute, an action of *mandamus* will lie to compel the treasurer to pay it over to the creditor: *Brown v. Crego*, 32–498.

Where a judgment cannot be paid out of the proper fund under a full legal levy in addition to the ordinary expenses of the municipal government, the payment of the judgment will be distributed and partial payments required, such as can be legally made: *Coffin v. City Council of Davenport*, 26–515.

But where the tax cannot be levied by reason of the limit of taxation, *mandamus* will not be awarded: *Polk v. Winett*, 37–34; *Rice v. Walker*, 44–458; *Supervisors v. United States*, 18 Wall., 71.

Where the limit of taxation has been reached, and it appears that the payment of a judgment would seriously embarrass the county in meeting its current expenses, a writ of *mandamus* will not lie to compel the county to reserve a part of the tax collected in order to pay the judgment: *Clay County v. McAleer*, 115 U. S., 616.

Where taxes were levied for judgment fund and for city judgment tax, *held*, that the officers of the city could be enjoined at the suit of judgment creditors from diverting the proceeds to other purposes, and that evidence was not admissible to show that the levy was for another purpose: *Rice v. Walker*, 44–458.

The statutory provisions as to the enforcement of judgments are applicable to a school district, and *mandamus* may be brought against its officers to compel the levy of a tax as provided: *Boynton v. District T'p*, 34–510; *Stevenson v. District T'p*, 35–462, 471; *Curry v. District T'p*, 62–102.

Under the provisions of Revision of 1860, that a judgment creditor might have the amount of his judgment and costs in the ordinary evidences of indebtedness of the corporation, *held*, that a creditor could not be compelled to take such evidences of indebtedness in payment of his judgment: *State ex rel. v. Davenport*, 12–335; *Oswald v. Thedinga*, 17–13; *Porter v. Thomson*, 22–391.

The fact that a city cannot meet an indebtedness out of the funds raised by one year's levy, by reason of a restriction on the amount of such levy, cannot operate to defeat the right of a party having a contract with the city to ultimate payment: *Davenport, etc., Co. v. Davenport*, 13–229.

The fact that a judgment when rendered cannot be enforced against the city by reason of the want of power of the city to levy a tax to pay such judgment will not be a defense to the action: *Slusser v. Burlington*, 42–378.

4275. Stock; debts; property in hands of third persons. 3050. Stock or interests owned by the defendant in any corporation, and also debts due him, and property of his in the hands of third persons, may be levied

upon in the same manner provided for attaching the same. [R., § 3269; C., '51, § 1892.]

[The provisions as to attachment are in § 4181. Levy upon mortgaged personal property is provided for by §§ 4189-4194.]

PROCEEDINGS BY GARNISHMENT.

4276. Notice; issue; trial. 3051. In proceedings by garnishment on execution, the garnishee shall be served as in case of attachment. The plaintiff may, also, if the garnishee is called into court, have a case docketed against him without docket fee, and upon his answer to the officer, issue may be made and notice thereof given him, or issue may be made on his answer in court without any notice thereon, if made at the same term; and in all these and every other particular, the proceedings shall be the same as under garnishment on attachment, as near as the nature of the case will allow. [R., § 3270.]

If issue is not taken upon the answer of the garnishee at the term it is filed, the garnishee is entitled to notice: *Kienne v. Anderson*, 13-565.

There is no provision requiring notice of the garnishment proceeding to be served on the judgment debtor, and the court may proceed against the garnishee without having jurisdiction of such debtor: *Smith v. Dickson*, 58-444. But *contra*, *Williams v. Williams*, 61-612.

If the judgment on which the execution was issued, although voidable for error on appeal, is not void, it is sufficient to protect the garnishee, and he cannot object thereto: *Houston v. Walcott*, 1-86.

The proceeding by garnishment does not obtain where the creditor seeks to subject the real estate of his debtor in the hands of third persons to the payment of his debts. The provisions for garnishment under execution relate to personal property, and not to proceedings where the equitable interest of the debtor in real property is sought to be reached: *Seymour v. Kramer*, 5-285.

The provisions of § 4241 as to intervention are applicable in cases of garnishment under execution as well as in garnishment under attachment: *Edwards v. Cosgro*, 71-296.

In general, see notes to § 4200.

4277. Not affected by expiration of execution. 3052. Proceedings by garnishment on execution shall not be in any manner affected by the expiration of the execution or its return; and where parties thereunder have been garnished, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as the garnishments thereon are concerned. [R., § 3271.]

JOINT OR PARTNERSHIP PROPERTY.

4278. Inventory and appraisement. 3053. When an officer has an execution against a person who owns property jointly, in common, or in partnership with another, such officer may levy on and take possession of the property owned jointly, in common, or in partnership, sufficiently to enable him to appraise and inventory the same, and for that purpose shall call to his assistance three disinterested persons, which inventory and appraisement shall be returned by the officer with the execution, and shall state in his return who claims to own the property. [R., § 3287; C., '51, § 1917.]

4279. Equitable proceeding. 3054. The plaintiff shall, from the time such property is so levied on, have a lien on the interest of the defendant therein, and may commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances provided in chapter twelve of title seventeen of this code. [R., §§ 3289-91.]

A partner's interest in partnership property is liable to execution which may be levied thereon and will remain a lien until satisfied by sale or otherwise. The equitable proceedings contemplated by this section in such cases simply pertain to the method of enforcing the liability of the property to the writ: *Lambert v. Powers*, 36-18.

In determining the interest of the debtor in the partnership, partners and creditors may

be made parties to the equitable proceeding, and where the case demands, the partnership may in such proceeding be fully settled and wound up: *Richards v. Haines*, 30-574.

Where a creditor levied on firm property under an individual judgment against one partner, and sold the property without bringing the equitable action provided for by statute, just referred to, *held*, that a creditor of the firm obtaining judgment against the partners individually might subsequently levy upon such property and maintain an equitable action to have the property subjected first to the payment of the firm debt, it appearing that there was no other firm property: *Aultman v. Fuller*, 53-60.

Where an execution against the partnership was returned *nulla bona* as to the partnership and also as to an individual partner, except as to certain property standing in his wife's name, *held*, that before a proceeding by *scire facias* (authorized by statutory provisions not now in force), plaintiff could maintain his action in equity to subject the property to the satisfaction of the execution, and require defendant to show cause in the same action why individual property should not be levied on to pay the firm debts: *Ticonic Bank v. Harvey*, 16-141.

INDEMNIFYING BOND.

4280. When required. 3055. An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing from some other person, his agent, or attorney, that such property belongs to him; or, if after levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice. [R., § 3277; C., '51, § 1916.]

Duty to levy; bond: An officer is bound to levy on any personal property in the possession of, or that he has reason to believe belongs to, defendant, or any on which the plaintiff directs him to levy, and is not liable in any way by reason of such levy until he receives the notice provided for in this section. He cannot demand an indemnifying bond until such notice is served. His remedy by interpleader is merely cumulative: *Kaster v. Pease*, 42-488.

A simple disclaimer at the time of the levy, by the execution debtor, of any interest in the property, will not be sufficient in itself to put the officer on inquiry as to the ownership of the property, or justify him in postponing the levy and incurring the risk of having the execution debtor dispose of the property or otherwise place it beyond his reach: *West v. St. John*, 63-287.

Where the execution plaintiff has given an indemnifying bond, the officer must hold the property at all events and apply it to the execution unless it is taken from him by legal process, and cannot escape liability for not so doing by showing that it was not the property of the judgment defendant: *Evans v. Thurston*, 53-122.

But the officer is not liable in damages for failure to levy upon property in defendant's possession, if it is shown that such defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59-712.

Where the officer has been indemnified it is his duty to use the proper means to make the levy effective on the property: *Cox v. Currier*, 62-551.

This section does not apply to a case where the execution defendant claims that the property is exempt from execution: *McCoy v. Cornell*, 40-457; *Parsons v. Thomas*, 62-319.

These provisions as to the indemnifying bond, as they originally stood, did not apply to levies under attachment: *Wadsworth v. Wallicker*, 45-395 *Hall v. Ballou*, 58-585. But now see §§ 4195-4199.

Where the officer, without requiring an indemnity bond, proceeds to sell property as to which a third person has given him proper notice of ownership, such owner may maintain against him an action of replevin for the property, although at the time the action was brought the property was not in the possession of the officer: *Hardy v. Moore*, 62-65.

Joint bond: Where an officer has several writs of execution by different judgments against the same defendant, and is served with notice of a claim to the property by a third person, an indemnifying bond may be given jointly by the execution plaintiffs, and on such bond an action against them jointly may be maintained: *Baxter v. Rey*, 62-336.

The notice provided for by statute in order to authorize the officer to require an indemnifying bond must be delivered to him. It is not sufficient to simply read it to him: *Gray v. Parker*, 49-624.

The object of this notice is not for the purpose of proving claimant's title to the property, but to enable him to maintain an action against the officer. It should run to the officer and be unequivocal in character: and *held*, that a bill of sale from judgment defendant to the claimant, for the property levied on, was not a sufficient notice under the statute: *Gray v. Parker*, 53-505.

Service of the written notice upon the deputy sheriff who makes the levy is sufficient: *Burrows v. Waddell*, 52-195.

But an acceptance of service of such notice by the sheriff's deputy is not binding: *Chapin v. Pinkerton*, 58-236.

If the levy is by the deputy sheriff service of notice of the claim upon the property by a third person made upon the sheriff is sufficient: *Headington v. Langland*, 65-276.

The fact that upon a claim by a third party to the property the levy has been released, upon failure of the execution plaintiff to give an indemnity bond, will not render the seizure of such property under a second execution invalid as against the owner of the property or a fraudulent grantee thereof: *Clark v. Reiniger*, 66-507.

Remedy against officer: In the absence of the notice of ownership of, or claim to, the property required by statute in order to authorize the officer to demand an indemnifying bond, replevin will not lie against the officer to recover the property levied on: *Finch v. Hollinger*, 43-598; *Peterson v. Espeset*, 48-262.

And in an action to recover the property from the officer holding it under a levy, it is necessary to allege the giving of such notice: *Allen v. Wheeler*, 54-628.

Although the officer is to be protected from all liability by reason of the levy until notice is received, he cannot maintain an action for expenses and attorneys' fees in defending a replevin suit for the property levied on, in which he is successful: *Rickabaugh v. Bada*, 50-56.

Where plaintiff gives an indemnifying bond upon notice being served upon the officer by a third person that he has a lien upon the property as mortgagee, and the property is then seized and sold, recovery on the bond cannot be defeated on the ground that the mortgagee still has a lien upon the property, and may take it under the mortgage: *Rand v. Barrett*, 66-731.

4281. Conditions. 3056. When the officer receives such notice he may forthwith give the plaintiff, his agent, or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the district court of the county in which the levy is made. [R., § 3277.]

4282. If not given levy discharged. 3057. If such bond is not given, the officer may refuse to levy, or if he has done so, and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged. [R., § 3278.]

4283. Officer protected. 3058. The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property if the surety on the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond, and recover such damages as he may be entitled to. [R., § 3279.]

This section is unconstitutional so far as it denies to a claimant of property levied on the right to maintain an action for its recovery against an officer levying on such property under execution against another person, in that it deprives the owner of his property without due process of law, by substituting the liability of the party to the bond for that of the officer for his trespass: *Foule v. Mann*, 53-42; *Craig v. Fowler*, 59-200. And see *Sunberg v. Babcock*, 61-601; *Cheadle v. Guittar*, 68-680.

The owner of property wrongfully seized is not bound to bring an action upon the indemnifying bond, but in whatever proceeding recovery for the wrongful seizure and sale is claimed, payment by and discharge of one wrong-doer, as, for instance, the execution plaintiff, will discharge other joint wrong-doers, for instance, the sheriff: *Atwood v. Brown*, 72-723.

4284. Application of proceeds. 3059. Where property, for the sale of which the officer is indemnified, sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested. [R., § 3280.]

4285. Executions by justices. 3060. The provisions of the preceding sections as to bonds, shall apply to proceedings upon executions issued by justices of the peace. Indemnifying bonds shall be returned in such cases with the execution under which they are taken. [R., § 3286.]

STAY OF EXECUTION.

4286. How effected. 3061. On all judgments for the recovery of money, except those rendered in any court on an appeal or writ of error thereto, or against any officer, person, or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs from the time of rendering judgment until paid, as follows:

1. If the sum for which judgment was rendered, inclusive of costs, does not exceed one hundred dollars, three months;

2. If such sum and costs exceed one hundred dollars, six months; *provided*, that the provisions of this chapter in relation to stay of execution shall not apply to existing contracts, but such contracts shall be governed by the laws in force at the time they were made, which are as follows:

When judgment has been rendered against any one for recovery of money, he may, by procuring one or more sufficient freehold securities to enter into a recognizance acknowledging themselves security for the defendant for the payment of the judgment, together with the interest and costs accrued and to accrue, have a stay of the execution from the time of rendering judgment, as follows:

If the sum for which judgment was rendered, inclusive of costs, does not exceed five dollars, one month;

If such sum and costs exceed five, but not twenty dollars, two months;

If such sum and costs exceed twenty, but not forty dollars, three months;

If such sum and costs exceed forty, but not sixty dollars, four months;

If such sum and costs exceed sixty, but not one hundred dollars, six months;

If such sum and costs exceed one hundred, but not one hundred and fifty dollars, nine months;

If such sum and costs exceed one hundred and fifty dollars, twelve months;

And provided further, that all judgments shall bear interest at the rate of ten per cent. per annum on which stay is taken. [R., § 3293.]

The privilege of staying the judgment is extended to any one who, being a party to the proceeding, has such an interest as that, in equity, as between him and the judgment debtor, he may be compelled to pay the debt. Therefore, *held*, that a subsequent purchaser of mortgaged premises, who had assumed the payment of the incumbrance, might stay a judgment against the original mortgagor under a foreclosure proceeding to which both were parties: *Moses v. Clerk of Court*, 12-139.

While the legislature may abridge or take away the right to a stay of execution existing when the contract was made or the judgment rendered, the intention to do so should be clearly expressed; and where the time during which stay might be applied for was abridged, *held*, that in the absence of any expression of an intention to the contrary, the new statute was not applicable to the time within which stay might be taken as to judgments existing at the time of the change: *Du Boise v. Bloom*, 38-512.

Under a prior statute which did not forbid stays of judgment on appeal, *held*, that the provisions as to stay applied also to judgments in the supreme court: *Peoria F. & M. Ins. Co. v. Dickerson*, 29-98.

4287. Affidavit of surety. 3062. Officers approving stay bonds shall require the affidavit of the signers of such bond that they own real estate, not exempt from execution and aside from incumbrance, to the value of twice the amount of the judgment.

Failure of the clerk to require the sureties to justify will not defeat the stay: *Du Boise v. Bloom*, 38-512.

As to liability of clerk for approval of insufficient bond, see § 328 and notes.

4288. No appeal. 3063. No appeal shall be allowed after such stay has been obtained, nor shall a stay be taken on a judgment entered as herein contemplated against one who is surety in the stay of execution, nor shall such

stay be allowed to any judgment obtained by a laboring man or mechanic for his wages. [R., § 3294.]

Appeal waived: The right of appeal is waived by taking a stay: *Seacrest v. Newman*, 19–323.

Even though stay of execution is not taken in the form prescribed by statute, yet if, by consent of the parties, judgment is entered, so that there is a stay under a substantial waiver of further proceedings, an appeal should not be allowed: *Warford v. Eads*, 10–592.

4289. Clerk to take and record. 3064. The surety for stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in case of other judgments. [R., §§ 3295, 3298.]

This section is not obnoxious to the objection that it deprives the parties on the bond of the right to trial. Such right of trial is waived by the execution of the bond: *Cavender v. Smith's Heirs*, 5–157, 186.

Under previous statutory provisions, somewhat different from the present, *held*, that a stay bond, although filed, would not become a lien on the property of a surety as against persons not having actual notice, unless entered of record as provided by statute: *Waldron v. Dickerson*, 52–171.

The determination of the clerk as to whether the bond is filed within the time required by statute, or whether the filing within the time specified is essential to its validity, in a case where such question arises, is a judicial act, and an error in his decision on that question will render a judgment against the sureties voidable only and not void: *Maynes v. Brockway*, 55–457.

Where an instrument intended as a bond for stay of execution is accepted and approved, and recorded as such by the clerk, it has the force and effect of a judgment against the property of the sureties, and cannot be questioned in a collateral proceeding by proof that it was not given until long after the expiration of the period for taking such stay, or that the cause was one in which a stay was not allowable: *Wishard v. Biddle*, 64–526.

Where a stay bond was accepted by the clerk but not recorded, *held*, that although as between the parties it became a lien upon the property of the sureties, subsequent mortgagees and purchasers without notice were not affected thereby: *Waldron v. Dickerson*, 52–171.

4290. Execution recalled. 3065. When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon. [R., § 3296.]

4291. Property released. 3066. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered. [R., § 3297.]

4292. Execution against debtor and sureties. 3067. At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein. [R., § 3299.]

Delay in issuing execution after expiration of stay does not discharge the lien of the judgment: *Parish v. Elwell*, 46–162.

4293. Objection by surety. 3068. When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which judgment is founded, there shall be no stay of execution allowed if the surety object thereto at the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the principal defendant. [R., § 3300.]

Unless the surety in the original judgment objects to the granting of a stay thereof, he will be presumed to have consented to the stay, and thereby to have waived the right to redeem his property if sold under execution, no right to redemption being allowed from a sale under a judgment which has been stayed (§ 4331): *Chase v. Welty*, 57–230.

4294. Surety may terminate. 3069. Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will

be liable for the judgment, interest and costs thereon unless execution issues immediately; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk as in other cases. [R., § 3301.]

4295. Other surety given. 3070. If other sufficient surety be entered, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety. [R., § 3302.]

4296. Lien not released. 3071. Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the said execution shall return thereon what amount was made from the principal debtor, and how much from the surety. [R., § 3303.]

EXEMPTIONS.

4297. Property enumerated; selection. 3072; 15 G. A., ch. 42; 19 G. A., ch. 49. If the debtor is a resident of this state and is the head of a family, he may hold exempt from execution the following property: All wearing apparel of himself and family kept for actual use and suitable to their condition and the trunks or other receptacles necessary to contain the same; one musket or rifle and shot gun; all private libraries, family bibles, portraits, pictures, musical instruments, and paintings, not kept for the purpose of sale; a seat or pew occupied by the debtor or his family in any house of public worship; an interest in a public or private burying ground, not exceeding one acre for any defendant; two cows and calf; one horse, unless a horse is exempt as hereinafter provided; fifty sheep and the wool therefrom and the materials manufactured from such wool; six stands of bees; five hogs, and all pigs under six months; the necessary food for all animals exempt from execution, for six months; all flax raised by the defendant on not exceeding one acre of ground and the manufactures therefrom; one bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture, not exceeding two hundred dollars in value; all spinning wheels and looms, one sewing-machine and other instruments of domestic labor kept for actual use; the necessary provisions and fuel for the use of the family for six months; the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor; the horse, or the team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with the proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer habitually earns his living; and to the debtor, if a printer, there shall also be exempt a printing press and the types, furniture, and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars. Any person entitled to any of the exemptions mentioned in this section does not waive his rights thereto by failing to designate or select such exempt property or by failing to object to a levy thereon, unless failing or refusing so to do when required to make such designation or selection by the officers about to levy. [R., §§ 3304, 3305, 3308; C., '51, §§ 1898-9; 11 G. A., ch. '91; 13 G. A., ch. 167, §§ 27, 28; 14 G. A., ch. 42.]

Head of family: The term "head of a family" is used in reference to the relation existing between the members of the family as recognized by law and the usages of society; and where a woman, who, as a widow and the mother of children, held the team belonging to her former husband exempt from execution, subsequently remarried, *held*, that she thereby ceased to be the head of the family, and the team became subject to execution on a judgment against her: *Van Doran v. Marden*, 48-186.

The question as to who is head of the family is one of law and not of fact: and when the husband is subject to no disability, he, and not the wife, is the head of the family, with-

out regard to which one is the owner of the property: *Ibid.*

Where a widower kept house, employing a domestic, and having living with him his son and son's wife, who paid no compensation, *held*, that he was the head of a family: *Tyson v. Reynolds*, 52–431.

An unmarried man with whom his brother and brother's wife lived and for whom they kept house, he furnishing the necessaries, *held* not to be the head of a family: *Whalen v. Cadman*, 11–226.

Where husband and wife lived separate for seven years prior to his death, he neither contributing to nor being asked to contribute to her support, and it not appearing that the separation was intended to be temporary, *held*, that he was not the head of a family, and, therefore, his widow was not, after his death, entitled to have set off to her (under § 3575) personal property which would have been in his hands as head of a family exempt from execution: *Linton v. Crosby*, 56–386.

Team and vehicle with which debtor earns his living: *Held*, that the two horses with which a physician habitually earns his living will be exempt although he does not use them as a team, but singly; but he must show that they are so used, before he can have the benefit of the exemption: *Corp v. Griswold*, 27–379.

Evidence *held* sufficient in a particular case to show that the horses of a farmer were exempt as habitually used to earn his living: *Bevan v. Hayden*, 13–122.

One who abandons one employment, and procures a team or part of a team, intending to complete the same, for the purpose of using it in good faith to earn his livelihood, may have the same exempt, without regard to the amount of use he has made thereof: *Ibid.*

A person may be a farmer within the meaning of this section if that is his business, although he does not at the time own a farm or have a lease for one and is not doing any specific thing as a farmer: *Hickman v. Cruise*, 72–528.

Where plaintiff, whose stock of goods as a retail grocer had been taken on execution, continued to use a spring wagon for the purpose of delivering goods for the person buying the stock, whether with or without compensation it did not appear, and had no other occupation or method of earning a living, *held*, that he was entitled to the wagon as exempt, although he had been using it in that manner but for a day or two: *Baker v. Hayzlett*, 53–18.

One who is engaged in the livery business is or may be a laborer, and if he in such business uses a team of horses, or wagon, or other vehicle, and thereby earns his living, the same is exempt: *Root v. Gay*, 64–399.

Where, at the time of seizure of a buggy by the officer, it was the vehicle by the use of which the plaintiff, as a physician, habitually earned his living, *held*, that it was exempt from seizure irrespective of the time when or the motive with which it had been procured: *Farner v. Turner*, 1–53.

Where it appears that the debtor has the right to select one of several vehicles as exempt, and such selection is made before levy, it should be respected by the officer: *Parker v. Haley*, 60–325.

Two cows and a calf: A yearling heifer is not exempt under the provision with reference to two cows and a calf: *Mitchell v. Joyce*, 69–121.

Tools: A party claiming tools as exempt must show that he is a mechanic, and that they are the tools of his trade; but he need not show that by the use of them he habitually earns his living: *Perkins v. Wisner*, 9–320.

The tools contemplated are those used or handled by the mechanic, and do not include the building or place where the trade is pursued. Therefore, *held*, that the building used by a photographer in carrying on his business, although shown to be personal property, was not exempt in the absence of any showing that a building constructed in a particular manner is required in that business: *Holden v. Stranahan*, 48–70.

A threshing-machine owned and used for the purpose of gain, by threshing for others, is not a part of the proper tools of a farmer so as to be exempt: *Meyer v. Meyer*, 23–359, 375.

The ordinary office furniture of a lawyer who is the head of a family is exempt under this section: *Abraham v. Davenport*, 73–111.

Provisions for the family do not include provisions for strangers or boarders lodging with the family. Therefore, *held*, that provisions prepared for boarders by the keeper of a restaurant were not exempt from execution: *Coffey v. Wilson*, 65–270.

Partnership property: A partner cannot hold partnership property exempt from execution for the debts of the firm, and this is so without regard to the rights and liabilities existing between the partners: *Van Staden v. Kline*, 64–180.

Life insurance is exempt from the debts of the assured: See §§ 1756 and 3576.

Exchange of exempt property: Where exempt property is exchanged for property not by law exempt from execution, such newly-acquired property becomes liable for the owner's debts: *Friedlander v. Mahoney*, 31–311.

Use of: Wages for personal services earned in the use of exempt property are exempt, and it is not fraudulent for the husband to contract to render such services to another: *Patterson v. Johnson*, 59–397.

Sale: When property is exempt from execution the owner may transfer it free from any claim of his creditors without regard to the uses to which he diverts the proceeds, there being no provision in the statute to the contrary: *Waugh v. Bridgeford*, 69–334.

Therefore, where the wife of an absconding husband becomes entitled to property which was exempt in his hands, she may sell the same, and the property sold and the proceeds thereof will remain exempt: *Ibid.*

The mortgagee of chattel property taking possession thereof and selling the same for the benefit of the mortgagor is not liable as garnishee so far as such property is exempt from execution, whether the mortgage is in itself fraudulent or not: *Brainard v. Simmons*, 67–646.

Proceeds of a voluntary sale of exempt property are not exempt from execution, and

a judgment against the purchaser of such property for the purchase money may be levied on by garnishment: *Harrier v. Fassett*, 56–264.

Where exempt property is invaded and converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time: *Kaiser v. Sealon*, 62–463; *Mudge v. Lanning*, 68–641.

Liens on exempt property: The statutory provisions as to exemptions were not designed to prevent the accruing of liens otherwise recognized, such, for instance, as an innkeeper's lien, and such lien can be enforced against property to which it attaches without regard to the exemption: *Swan v. Bournes*, 47–501.

A lien, such as that of an innkeeper or agister, may arise upon exempt property under the same circumstances as upon property not exempt: *Munson v. Porter*, 63–453.

Wrongful levy upon: A mortgagor of exempt property may maintain an action for the wrongful levy upon such property under execution as to which the property is exempt: *Evans v. St. Paul Harvester Works*, 63–204.

In an action by replevin to recover exempt property wrongfully levied upon under execution, the residence of plaintiff need not be alleged. It is for defendant to allege and prove non-residence as a defense: *Newell v. Hayden*, 8–140.

As to the remedy against the officer for wrongful levy upon exempt property, see notes to § 4280.

A creditor resident in this state may be restrained by injunction from proceeding in an action brought in another state to subject to his judgment property of a debtor, also a resident of this state, which under the statutes of this state is exempt from execution: *Mumper v. Wilson*, 72–163.

Liberal construction: Exemption laws will be liberally construed: *Davis v. Humphrey*, 22–137; *Bevan v. Hayden*, 13–122; *Kaiser v. Sealon*, 62–463.

Pertain to remedy: Exemptions relate to the remedy and are to be governed by the law of the forum and not by the place of the contract: *Newell v. Hayden*, 8–140.

When exemption must be claimed: The owner of personal property exempt from execution may claim such exemption from levy at any time during the progress of the sale thereof, until the sale becomes effectual in law: *Bevan v. Hayden*, 13–122.

Selection: Where the debtor is to select the animal to be held exempt, such selection may be made by serving written notice on the sheriff claiming the animal levied on: *Malvin v. Christoph*, 54–562.

Waiver of exemption: A simple waiver of the benefit of exemption laws, made contemporaneously with the contract or debt, will not entitle the creditor, in case of a failure to pay, to levy an execution under a judgment thereon upon exempt property, against defendant's objection: *Curtis v. O'Brien*, 20–376.

A stipulation in a lease by which the landlord is given a lien for his rent upon crops, stock, etc., of the tenant upon the premises, whether exempt or not, is in the nature of a mortgage and is valid: *Fejavary v. Broesch*, 52–88.

Prior to the enactment of the statute forming the last sentence of the section as it now stands, it was held that a voluntary surrender of property to the sheriff having the execution, or allowing the levy to be made without objection, precluded the debtor from afterwards setting up the exemption: *Richards v. Haines*, 30–574; *Angell v. Johnson*, 51–625; *Moffitt v. Adams*, 60–44. And see *Green v. Blunt*, 59–79.

Under the section as it now stands, *held*, that mere silence of defendant, when informed of the levy, and failure to object thereto for two weeks, would not estop him from claiming his exemption, it not appearing what, if any, expense had been incurred by the officer in consequence of the levy: *Ellsworth v. Savre*, 67–449.

An interest in the property itself would not be waived by a failure to assert it at the time of the seizure, unless the party making the seizure was thereby misled or induced to change his relations with reference to the property: *Gunsel v. McDonnel*, 67–521.

4298. Family defined. 3073. The word "family," as used in the last section, does not include strangers or boarders lodging with the family. [R., § 3906; C., '51, § 1900.]

4299. Personal earnings. 3074. The earnings of such debtor for his personal services, or those of his family, at any time within ninety days next preceding the levy, are also exempt from execution and attachment. [R., § 3307; C., '51, § 1901.]

Earnings: The exemption of earnings extends to professional men as well as to laborers: *McCoy v. Cornell*, 40–457.

If the employer of the debtor is garnished, he is not liable unless more than ninety days' earnings are in his hands. The earnings for that length of time, whether accruing before or after the garnishment, are exempt: *Davis v. Humphrey*, 22–137.

The object of the exemption of earnings is to protect the earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal service of those conducting it; therefore, *held*, that the business of keeping a boarding-house involves many elements of profit aside from the mere personal earnings of the proprietor and his family, and that money due to him in that business is not exempt from execution as personal earnings: *Shelly v. Smith*, 59–453.

The earnings of a debtor as subcontractor for personal services are exempt. Whether a contractor who furnishes materials on his own

account, as well as labor, may divide his claim and hold exempt the proceeds of his labor, *quære: Banks v. Rodenbach*, 54-695.

The person entitled to hold earnings exempt from execution may use such earnings in payment of property purchased by his wife, and such property will be held by the wife free from his debts: *Robb v. Brewer*, 60-539.

Earnings of non-resident: To entitle a debtor to this exemption it must be shown that he is a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60-312.

If defendant is a non-resident he cannot claim exemption of earnings, even if they are rendered in the state of his residence, and are exempt by the laws of that state: *Mooney v. Union Pacific R. Co.*, 60-346.

Foreign exemptions: The exemption laws of another state or territory cannot be relied upon and pleaded as a defense, either by a garnishee or judgment debtor: *Broadstreet v. Clark*, 65-670.

A creditor cannot, by instituting a proceeding by garnishment in another state, seize a debt due to a debtor in this state, and which would be here exempt from execution: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70-746.

And see notes to § 4200.

4300. Unmarried persons; non-residents. 3075. There shall be exempt to an unmarried person not the head of a family, and to non-residents, their own ordinary wearing apparel and trunk necessary to contain the same. [R., § 3308; C., '51, § 1902; 13 G. A., ch. 167, § 28.]

4301. Persons starting to leave the state. 3076. Where the debtor, if the head of a family, has started to leave this state, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property, in addition, as he may select, in all not exceeding seventy-five dollars in value; which property shall be selected by the debtor and appraised according to the provisions of section two thousand nine hundred and ninety-seven of chapter one of this title [§ 4222], but any person coming into this state with the intention of remaining, shall be considered a resident within the meaning of this chapter. [R., § 3308; C., '51, § 1902; 13 G. A., ch. 167, § 28.]

A person who had avowed his purpose to remove from the state, had placed his wagon in position for loading, had boxed some of his goods, and removed them from the house, *held* to have "started to leave the state:" *Graw v. Manning*, 54-719.

The mere expression of intention on the part of a debtor to leave the state will not be sufficient to justify the levy upon his goods, which would otherwise be exempt from execution, and if, by reason of a subsequent change of intention, the debtor is not about to leave the state, the levy will be wrongful: *Tubbs v. Garrison*, 68-44.

The fact that the officer making the levy is informed that the debtor is about to leave the state is not admissible as a defense for the wrongful levy: *Ibid.*

Facts indicating an intention to remove from the town, without more, are not admissible as evidence of an intention to leave the state: *Ibid.*

While the word "start," in connection with leaving the state, in this statutory provision, is not limited to the actual setting out upon a journey, yet, where the intention with which a removal was effected was to change the residence from one part of the state to another, *held*, that there could not be any starting to leave the state within the definition of the statute: *Ibid.*

4302. Purchase money. 3077. None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. [13 G. A., ch. 167, § 27.]

4303. Absconding debtor. 3078. Where a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them. [R., § 3309.]

To constitute an absconding the departure need not be without the knowledge and consent of the wife: *Malvin v. Christoph*, 54-562.

The wife of an absconding husband may sell property which he held exempt, and which by statutory provision remains exempt in her hands, and hold the proceeds free from his debts: *Waugh v. Bridgeford*, 69-334.

4304. Sewing-machine. 19 G. A., ch. 62, § 1. If the debtor is a seamstress, one sewing-machine shall be exempt from execution and attachment.

4305. Pension money. 20 G. A., ch. 23, § 1. All money received by any person, resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or at-

tachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not.

The exemption of pension money under the provisions of the Revised Statutes of the United States applies only to money due the pensioner while in course of transmission to him, and not after the money comes into his possession and is deposited in a bank or invested in property: *Webb v. Holt*, 57-712; *Triplett v. Graham*, 58-135.

But where a pensioner transferred his pension check to his wife, who purchased real property therewith in her own name, *held*, that such property was exempt from the husband's debts, and the transfer could not be deemed fraudulent: *Farmer v. Turner*, 64-690.

By this section pension money, whether in the pensioner's possession or deposited, loaned or invested, remains exempt. But this act is not applicable to such money coming into the pensioner's possession before it took effect: *Baugh v. Barrett*, 69-495.

From the time of the taking effect of this act exempting pension money, any pensioner had power to make a gift of his pension money, or the donee to receive the same or the property purchased therewith, free from the claim of donor's creditors; but where an action to subject such pension money to the payment of the pensioner's debts was brought before the taking effect of the statute exempting such money, *held*, that such statute could not be given effect: *Goble v. Stephenson*, 68-270.

This statute is unconstitutional so far as it attempts to make exemption of property purchased with pension money apply to liability under a contract previously entered into: *Foster v. Byrne*, 76-295.

The pension money is not exempt from execution because the pensioner is the head of a family, and therefore, upon his death, his wife does not become entitled thereto under the provision of § 3575, with reference to property exempt to her husband as the head of a family: *Perkins v. Hinckley*, 71-499.

4306. Homestead. 20 G. A., ch. 23, § 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner contracted prior to the purchase of such homestead.

4307. Absconding debtor. 20 G. A., ch. 23, § 3. When a debtor absconds and leaves his family, the property exempted by this act, shall also be exempt to his wife and children, or either of them.

SALE.

4308. Notice. 3079. The sheriff must give four weeks' notice of the time and place of selling real property, and three weeks' notice of personal property. [R., § 3310; C., '51, § 1905.]

4309. How given. 3080. Notice shall be given by being posted up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two publications of such notice in some newspaper printed in the county, if there be one. In constables' sales, there shall be no newspaper publication, and the notice shall be posted in three public places of the township of the justice, and one of them at his office door. The time of such notice shall be two weeks. [R., § 3311; C., '51, § 1906.]

The proprietor of a newspaper cannot, by *mandamus*, compel publication in his paper: See notes to § 1355.

4310. Penalty for selling without notice. 3081. An officer selling without the notice above prescribed shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [R., § 3312; C., '51, § 1907.]

If it appears that the officer sold the property, without notice, for a sum equal to its value, and applied the proceeds upon the execution and costs, so that the property owner sustained no actual damage for want of notice, the latter cannot recover the penalty of $100 authorized by this section: *Coffey v. Wilson*, 65-270.

So where plaintiff in such case on the trial withdrew his claim for actual damages, *held*, that the penalty could not be recovered: *Enfield v. Blyler*, 67-295.

4311. Time and manner. 3082. The sale must be at public auction, between nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice. [R., § 3313; C., '51, § 1908.]

After expiration of execution, not invalid: See notes to § 4262.

Failure to make return of sale before the expiration of a year from the date thereof will not render the sale void: *Cooper v. French*, 52–531.

Injunction against sale: A sale of property on which the judgment is not a lien will be enjoined: *Key City Gas Light Co. v. Munsell*, 19–305.

But the sale will not be enjoined if the judgment is a lien on the property, although it is inferior to other liens: *Wiedner v. Thompson*, 66–283.

Who may be purchaser: One of several execution defendants has the right at the sale to purchase the property of another defendant: *Windle v. Brandt*, 55–221.

Where, at a foreclosure sale, a corporation not party to the foreclosure became the successful bidder, and by consent of the court the bid was transferred to the plaintiff in the foreclosure, to whom the deed was issued, *held*, that the latter was the purchaser and not the former: *Gilman v. Des Moines Valley R. Co.*, 42–495.

Property of one not party: Property of one person cannot be sold under a decree to which he is not a party, and a sale cannot be made under a decree in one action for the satisfaction of a judgment in another action, even though it is intended thereby to apply the property to the satisfaction of different claims thereto. Such a sale should be treated as entirely invalid: *Brown v. Brown*, 73–430.

Rights of purchaser: The rights acquired by a purchaser of personal property at execution sale are only the rights of a judgment defendant at the time of levy. They are subject to the rights of a prior purchaser: *Rakestraw v. Hamilton*, 14–147.

Where, without fraud, the execution defendant has sold his interest in the property before seizure under the process, although notice of such sale is not brought home to the execution plaintiff or the officer until after such seizure, the rights acquired under such previous sale are paramount to those acquired under the process: *Thomas v. Hillhouse*, 17–67.

A purchaser at sale under execution acquires no title where it is apparent of record that the judgment debtor has no interest in or title to the property sold: *Stuart v. Hines*, 33–60.

The purchaser at execution sale without actual notice of a mortgage executed after the lien of the judgment has attached, and not recorded until after the sale, is not affected thereby: *Wood v. Young*, 38–102.

Where the purchaser at execution sale had notice of a prior conveyance of the property, but such conveyance appeared by the record to have been made at such time that it was subject to the lien under which the judicial sale was had, *held*, that in order to affect the purchaser at the execution sale with notice that such conveyance was superior to his rights, it must appear that there was something to indicate that the conveyance was made in fact before the time indicated by the record of the deed: *Brown v. Wade*, 42–647.

A purchaser at an execution sale does not acquire priority over the purchaser at a previous foreclosure sale under a mortgage executed and of record before the sale under execution was had: *Bell v. Hall*, 4 G. Gr., 68.

Facts of a particular case *held* not to impute to the purchaser at judicial sale notice of an equitable interest in the property held by a third party: *Bonnell v. Allerton*, 51–166.

A sheriff's deed under a sale on execution not only operates to transfer the premises sold, but relates back to the day when the judgment became a lien on the premises, and as against the purchaser avoids all immediate liens and alienations: *Kane v. Mink*, 64–84.

The attorney of the execution plaintiff, purchasing at a sale under execution of property levied on by attachment, is not to be deemed an innocent purchaser. He and his heirs holding under him are chargeable with equities or any illegalities in the proceedings: *Cook v. Jenkins*, 30–452.

An execution plaintiff who purchases at the sale in good faith, and before notice of appeal, will be protected to the same extent as a stranger: *Frazier v. Craft*, 40–110.

A judgment creditor purchasing under execution an equitable interest in real estate takes subject to prior equities of third persons of which he has no notice: *Wallace v. Bartle*, 21–346.

The plaintiff in execution who purchases at the sale is protected against outstanding equities of which he has no notice, actual or constructive, before the sale. He stands upon the same ground as any other purchaser: *Butterfield v. Walsh*, 36–534, and cases cited. And see *Bear v. Burlington, C. R. & M. R. Co.*, 48–619.

Purchaser protected: A purchaser at an execution sale, even if he is the plaintiff in execution, is protected against equities and unrecorded instruments of which he has no notice: See notes to § 3112.

A sale en masse of tracts which could advantageously be sold separately will be set aside, either on motion or in an independent proceeding in equity for that purpose: *White v. Watts*, 18–74; *Boyd v. Ellis*, 11–97; *Bradford v. Limpus*, 13–424.

So *held* in case of a sale in gross of distinct parcels under judgment of foreclosure on a mortgage covering all of them: *Lay v. Gibbons*, 14–377.

But such a sale, after an offering in parcels without a bid, will not be irregular: *Hill v. Baker*, 32–302.

And see, with reference to sales of homestead, notes to § 3167.

Distinct or separate parcels or tracts which can have no increased value by reason of being sold together cannot be sold *en masse* even if no bid is made for them when offered separately. And this is the common-law rule: *Williams v. Allison*, 33–278.

It may be questioned whether sale of two lots together, instead of separately, is such an irregularity as can, after the execution of the deed, be made available to defeat the title in a third party, though it is available to set aside a sale to the execution plaintiff: *Love v. Cherry*, 24–204.

Held, that a sale *en masse*, not shown to have been to the injury of the debtor and not attacked for six years, would not be set aside: *Cunningham v. Felker*, 26–117.

A sale of a large tract within the corporate limits of a city, *held* not invalid as a sale *en masse*, it not being shown that it had been divided into lots: *Wallace v. Berger*, 25–456.

Whether or not a sale of two parcels for a gross sum will avail in a direct proceeding to set aside the deed, it is clear that such deed cannot be regarded as void in a collateral attack: *Foley v. Kane*, 53–64.

If in case of a levy upon a congressional subdivision of land there should be an excess over all execution claims of the least legal subdivision thereof, it should not be sold: *Humphrey v. Beeson*, 1 G. Gr., 199.

Fraud of officer or purchaser: An averment that there was a fraudulent agreement between the purchaser and the officer, by which the former was to pay nothing on the property and that the return should not be made during the year for redemption, etc., etc., *held* not sufficient to affect the validity of the sale: *Cooper v. French*, 52–531.

In a particular case, *held*, that the facts were not sufficient to show fraud: *Wallace v. Berger*, 25–456.

The rights of a purchaser at an execution sale will not be affected by the improper conduct of the sheriff in the absence of a fraudulent combination between them: *Swortzell v. Martin*, 16–519.

Where it appeared that the purchaser at a sale under partition proceedings had for a consideration persuaded others intending to bid from doing so, *held*, that the sale and approval thereof by the court should be set aside for fraud: *Fleming's Heirs v. Hutchinson*, 36–519.

Illegality: Where a second execution was issued at the instance of the judgment creditor before the return of the first, *held*, that the sale under the second should be set aside, at least in a case where the creditor was himself the purchaser at such sale: *Merritt v. Grover*, 57–493.

Further *held*, that in such case an execution could properly issue for the sale of the property levied on, and remaining undisposed of by reason of the setting aside of the sale: *Ibid.*

Inadequacy of price: Gross inadequacy of price is not of itself sufficient to require the setting aside of a sale, but may become an element quite controlling in connection with other circumstances: *Cavender v. Smith's Heirs*, 1–306, 355; *Bond v. Ellis*, 11–97; *Williams v. Allison*, 33–278.

So *held* where there was a sale *en masse* of separate parcels at an inadequate price: *Boyd v. Ellis*, 11–97; *King v. Tharp*, 26–283.

It seems that when inadequacy of price is great and the bidders were few, and the power to adjourn was not judicious exercised, the sale should be set aside upon application seasonably made: *Swortzell v. Martin*, 16–519.

A sale was set aside in favor of beneficiaries under an unrecorded mortgage when some of them were minors, the price was inadequate, there was a prior levy undisposed of, the legal title was in another than the judgment defendant, and application was made before the rights of third parties had attached and was accompanied with a tender of the amount of the judgment: *Miller v. Colville*, 21–135.

That the interest in real estate sold *en masse* under execution was not only merely equitable, but also contingent, and that there were other claims against the property prior to that of the judgment creditor, may be considered by the court in determining the adequacy of the amount paid at the sale: *Twogood v. Stephens*, 19–405.

Where there was an incumbrance on record against the property amounting to more than the value thereof, *held*, that the sale on execution of such property would not be set aside on account of inadequacy of price, although subsequently the incumbrance was held fraudulent and void: *McDonald v Johnson*, 48–72.

In a particular case, *held*, that the sum realized at the execution sale was so inadequate as to constitute ground for setting the sale aside: *Wood v. Young*, 38–102.

In a particular case, *held*, that the inadequacy in price was not sufficient to invalidate the sale: *Wallace v. Berger*, 25–456.

Gross inadequacy of price is not available to impeach the sale as to the original purchaser, who was a stranger to the transaction, the premises having in good faith been sold to a third person: *Hill v. Baker*, 32–302. And see *Shine v. Hill*, 23–264.

Where property is sold subject to redemption it is not expected that there will be competition at the sale, and the protection of the judgment debtor against inadequacy of price is to be found in his right to redeem: *Equitable Trust Co. v. Shrope*, 73–297.

Gross inadequacy of price is not sufficient to avoid a judicial sale, and a sale to the judgment creditor, having a small claim, of an indivisible tract of land much greater in value, upon a bid of the amount of his judgment and costs, will not be set aside: *Peterson v. Little*, 74–223.

It is not allowable for defendant in execution to institute an original action in equity at any time within the statute of limitations to set aside a sale under such execution upon the ground of inadequacy of consideration, where the sale has been regular and no fraud appears: *Sigerson v. Sigerson*, 71–476.

Mistake as to title: Where the defendant in execution did not have any interest at the time of the sale in the property sold, or where all the interest he did have has been taken away from the purchaser by virtue of a prior claim, the sale may be set aside. The doctrine of *caveat emptor* does not apply to such cases: *Rutter v. Hanshaw*, 7–97.

An action in equity may be maintained to set aside an execution sale where the officer mistakenly understood that the property was covered by incumbrances to a greater amount than it was in fact, especially where the

cumstances show bad faith on the part of the purchaser: *Whitney v. Armstrong*, 32-9.

Where property was bid in at execution under mistake as to the quantity sold, *held*, that the sale should be set aside: *Kellogg v. Decatur County*, 38-524.

Where the property was sold and bid in under a mistaken description, *held*, that the sale should be set aside, and that, under the circumstances, there was no such negligence on the part of the attorney of purchaser as to deprive him of the right to such remedy: *Latimer v. Jones*, 55-503.

Where, in recording a decree rendered in a foreclosure proceeding, the clerk omitted to include a portion of the property therein described, and this omission was perpetuated in the execution and at the sale at which plaintiff's attorney bid off the property for the amount of the debt, supposing that he was purchasing all that was embraced in the mortgage, *held*, that the sale should be set aside: *Snyder v. Ives*, 42-157.

Equity will refuse to correct a mistake of this kind on the ground of negligence only where the party seeking relief is bound to make inquiry which would have enabled him to correct the mistake or obviate its consequences and he negligently fails to make it. In such a case the law requires only reasonable diligence, to the end that culpable negligence may not be encouraged: *Ibid.*

Mere uncertainty of description of the property will not be a ground for setting aside the sale in equity where the land sold is actually the same as that levied on: *Hackworth v. Zollars*, 30-433.

As to setting aside for defective title, see § 4319.

Setting aside sale does not release surety: If the judgment is against principal and surety, and the sale is set aside as authorized in the statutory provision just referred to, the surety will not be held discharged, unless he has by reason of the sale changed his condition or be prejudiced: *Ibid.*

Caveat emptor; defective title: The doctrine of *caveat emptor* applies to the purchaser at the sale under execution, and such sale will not ordinarily be set aside to relieve one who has acquired a defective title. If the execution defendant has some interest in or title to the property, the sale will be upheld, although such interest be of no value: *Hamsmith v. Espy*, 19-144: *Holtzinger v. Edwards*, 51-383. And see § 4319.

Thus where the legal title was in defendant, but by reason of a sale under a prior execution and other prior liens the interest acquired by plaintiff was valueless, *held*, that there was no ground for setting aside the sale or the satisfaction of judgment affected thereby: *Holtzinger v. Edwards*, 51-383.

A purchaser at execution sale cannot avoid his bid or excuse himself from paying the amount by showing a defective title in the judgment debtor: *Dean v. Morris*, 4 G. Gr., 312; *Cameron v. Logan*, 8-434.

The fact that property sold at judicial sale is covered by liens to nearly its entire value will not entitle the purchaser to rescind the sale: *Downard v. Crenshaw*, 49-296.

Other grounds for setting aside: Where the levy is excessive the sale will be set aside, even though the whole property sold had been previously attached in the same action: *Cook v. Jenkins*, 30-452.

If the sale of the property of a debtor is made to satisfy a joint indebtedness, the fact that the joint debtor is prejudiced by such sale will not be a ground on which the judgment creditor can have the sale set aside: *Miller v. Felkner*, 42-458.

The indorser of a note secured by a mortgage under foreclosure of which the sale is made, and who is collaterally liable on the indebtedness, has such interest as to be entitled to maintain an action for setting aside the sale: *Whitney v. Armstrong*, 32-9.

Where land was sold by a sheriff under the representation that the excess bid over the amount of the execution would be applied to satisfy a mortgage existing thereon, and the purchaser bid the whole amount of the judgment and mortgage, under the belief and representation that the excess would be so applied, *held*, that the mistake under which the parties acted was a mixed mistake of law and fact, and that the sale should be set aside upon application of the purchaser: *Bay v. Harnett*, 58-344.

Where the price was inadequate, and the deed was issued at once in denial of execution defendant's right to redeem, *held*, that the sale should be set aside in an action in equity: *Fitzgerald v. Kelso*, 71-731.

Notice of motion to set aside: An order setting aside a sale on motion, without notice to the other party or a voluntary appearance by him, is not binding upon him: *Wright v. Leclaire*, 3-221; *Lyster v. Brewer*, 13-461.

The sale will not be set aside on motion when the purchaser is not a party to the execution, at least without notice to him: *Osborn v. Cloud*, 21-238.

Restraining sale: Where the rights of a lienholder are such that they will not be affected by judicial sale under another lien, he cannot maintain an action in equity to restrain such sale: *Ruthven v. Mast*, 55-715.

Canceling satisfaction of judgment: Where a sale has been judicially set aside, the satisfaction of the judgment which followed the sale and was entered of record by reason thereof should be also set aside: *Farmer v. Sasseen*, 63-110.

Where a special execution contained a description of a larger tract than the judgment was against, and plaintiff bid it in for the judgment, *held* competent for plaintiff by motion to have the satisfaction entered upon the execution canceled to the extent of the excess at which the extra quantity of land was bid off, leaving his judgment unsatisfied to that amount: *Parks v. Davis*, 16-20.

Where land was sold under execution to which defendant had no title, but there was no evidence as to the price for which the land was sold, or whether it was sold in separate tracts, or the relative value of the tracts at the date of sale, *held*, that the credit on the judgment entered in pursuance of such sale could not be set aside: *State Bank v. Harrow*, 26-426.

Diligence: Application to vacate a sale should be reasonably made. Acquiescence may be inferred from delay, and long delay with knowledge of the facts may justify a re-

fusal of relief, especially if intervening rights have attached or the circumstances have essentially changed: *Chambers v. Cochran*, 18–159.

A motion to set aside a sale filed fifteen months after the sale was made, *held* too late: *Stewart v. Marshall*, 4 G. Gr., 75.

Jurisdiction to set aside: Where a case was taken from one court to another on change of venue, and the decree rendered was ordered to be recorded in the court from which the change was taken, *held* that such court had not jurisdiction to set aside a sale on execution under such judgment: *White v. Hampton*, 14–663.

Failure to object; estoppel: Where the debtor consents to the proceedings at the sale, and they are made under an agreement to which he is a party, he is estopped from setting up illegality or fraud for the purpose of defeating such sale as against the purchaser: *Crawford v. Ginn*, 35–543.

Where the debtor has knowledge of a contemplated private sale and does not object thereto, he will be estopped from complaining: *Maquoketa v. Willey*, 35–323.

Objection to a sale on the ground that it was made *en masse*, not raised until eleven years afterwards, it not appearing that the execution defendant was in any manner injured thereby, *held* not sufficient to warrant setting it aside: *Wood v. Young*, 38–102.

Where irregularities in a sale were not taken advantage of for eight years, *held*, that by such lapse of time they were cured: *Cornell v. Ham*, 4 G. Gr., 455.

The execution defendant, having knowledge of irregularities in the manner of sale before the making thereof, and not objecting thereto, cannot defeat the title under the deed, at least without offering to refund the purchase money. The irregularities should be taken advantage of by motion in the court to which the execution is returnable: *Cooley v. Wilson*, 42–425.

Where a surety, against whom judgment on a debt was recovered jointly with the principal, directed execution to be levied upon property of the principal, which was sold thereunder, *held*, that such surety could not afterwards, as against the purchaser at the sale, insist upon and foreclose a mortgage given him on the same property by the principal, to secure him for any liability which he might incur as such surety: *Exline v. Lowery*, 46–556.

Where it appeared that the party against whom execution was issued knew that another execution was in existence under the same judgment, and not only stood by and made no objection to the sale under the second, but at the expiration of the time for redemption surrendered the possession of the property, *held*, that he could not thereafter, in the absence of a showing that the land was sold for less than its value and an offer to pay the judgment, take advantage of the error: *Merritt v. Grover*, 61–99.

Where the execution purchaser has conveyed portions of the property to other purchasers in good faith, even though there is such irregularity in the sale that it might have been held void as to such purchasers, if promptly asserted, yet great delay in taking it may be ground for upholding the sale as to them: *Williams v. Allison*, 33–278.

Return of purchase money: A party seeking to have an execution sale to him set aside must return or offer to return the property, or, if he has sold it in good faith before knowledge of defect in the sale, must tender the proceeds: *First Nat. Bank v. Conger*, 37–474.

Where, on account of irregularities, a sale was set aside so far as the property remained in the hands of the purchaser, but there was no proof of fraud, *held*, that as to the portions of the property conveyed by him, he would be charged with its proportion of the amount bid and not with the amount for which it had been sold by him, the owner having lost his right to proceed against the persons deriving title from the purchaser by reason of laches: *Williams v. Allison*, 33–278.

A judgment plaintiff who has received the proceeds of a sale under his judgment, which is of doubtful validity, and afterwards accepts money deposited as a tender, will be held to have taken such tender in full satisfaction of his judgment, and will be required to account for the full proceeds of the sale: *Cotter v. O'Connel*, 48–552.

No tender of the amount bid need be made to the purchaser where it is sought to set aside a sale which is void: *Osborn v. Cloud*, 23–104.

Where the purchaser at an execution sale pays his money without any knowledge of irregularities therein, he is entitled, upon the sale being set aside, to have refunded to him the money paid, and for that purpose may be subrogated to the rights of the execution plaintiff, although such plaintiff may have afterwards received full satisfaction of his judgment: *Fleming v. Maddox*, 32–493.

Liability for rent or waste: The purchaser of premises under a foreclosure sale afterwards set aside is not liable for rent or waste accruing between such sale and annulment, if possession was taken by another without his knowledge and he was not in any manner connected with the acts of the tenant: *Vulgamore v. Stoddard*, 21–115.

Evidence of sale: To establish title under a sale on execution, the purchaser may give in evidence the judgment and execution under which the property was sold and prove the sale, which may be done by the sheriff's deed or the return on the execution: *Lepage v. McNamara*, 5–124.

Validity; presumptions: A purchaser at execution sale is only required to look at the judgment, execution, levy and sale under appraisement. If these are in conformity with the law, *prima facie* he is justified in paying the price required by law for the property, and he is only required to ascertain the amount as returned and need not go into an examination of the action of the appraisers: *Johnson v. Carson*, 3 G. Gr., 499.

When such a sale appears to have been regularly conducted by virtue of a judgment rendered, final and conclusive, the rights of a purchaser cannot be affected by any error or irregularity in the judgment: *Ibid.*

The purchaser depends upon the judgment,

levy and deed. All other questions are between the parties to the judgment and the officer. Therefore, a failure to make an appraisement as required by law would not render the sale void as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

The purchaser has a right to rely upon the judgment, levy and deed. These being valid he cannot be affected by other irregularities of which he has no notice: *Cooley v. Wilson*, 42-425.

Where the officer making the sale has power to make it, and there is merely a failure on his part to comply with some statutory provision, directory in its character, the title of the purchaser will be protected in the absence of fraud: *Cavender v. Smith's Heirs*, 1-306.

A sale should not be held void and liable to collateral attack for mere irregularities, for instance in the selection of appraisers: *Hill v. Baker*, 32-302; *Davis v. Spaulding*, 36-610.

A *bona fide* purchaser, even if he be the execution plaintiff, is not affected by any irregularity of the sheriff in giving notice and conducting the sale: *Coriell v. Ham*, 4 G. Gr., 455.

Irregularities such as a sale *en masse* or before the hour fixed in the notice will not affect the title in such purchaser: *Olmstead v. Kellogg*, 47-460.

It will be presumed that the officer did his duty and made the sale within the hours directed by law, although the notice fixed the time for the sale during hours some of which are not thus authorized by law: *Cole v. Porter*, 4 G. Gr., 510.

As to the presumption of regularity arising from the execution of the deed, see § 4355.

Liability of officer: A purchaser of property on which execution has been levied under a void judgment may maintain action against the officer for unlawfully selling the property. It is not necessary to entitle him to recover that he should have owned the property prior to levy: *Gates v. Neimeyer*, 54-110.

The policy of the law is to uphold judicial sales, and they will not be held invalid for irregularities in the acts of the officer. If the one making the sale holds himself out to be a public officer, or acts as an officer *de facto*, he cannot be heard to object that he is not an officer *de jure*. By acting as an officer he estops himself from denying his right to do so, even when indicted for malfeasance: *State v. Stone*, 40-547.

4312. Officer may postpone. 3083. When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may postpone the sale for not more than three days, without being required to give any farther notice thereof; but he shall not make more than two such postponements, and such postponement shall be publicly announced when the sale should have taken place. [R., § 3314; C., '51, § 1909.]

The discretion of the sheriff, as to adjournment, should be exercised with a fair and impartial attention to the interests of all parties concerned. Where his power in that respect is not judiciously exercised, it may be a ground for setting the sale aside: *Swortzell v. Martin*, 16-519.

The fact that there was one more adjournment than is authorized by statute, and that the time was extended beyond the period allowed, *held*, a mere irregularity, to be taken advantage of only on a showing of prejudice: *Reese v. Dobbins*, 51-282.

The adjournment of a sale by plaintiff's attorney is a gross irregularity, and a sale at a time to which it is so adjourned will be void: *Wolf v. Van Metre*, 27-348.

The postponement of the sale by public proclamation and agreement of the parties in interest will not render a subsequent sale invalid: *Coriell v. Ham*, 4 G. Gr., 455.

Postponement of the sale at the instance and for the benefit of defendant in execution will not render it invalid between the parties: *Payne v. Billingham*, 10-360.

4313. Overplus. 3084. When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands on which said overplus may be rightfully applied. [R., § 3315; C., '51, § 1910.]

Aside from this provision the sheriff would not be authorized to apply such overplus to another execution in his hands. The money being deemed in the custody of the law would not be subject to levy, but must first be paid to the party whose property is sold: *Payne v. Billingham*, 10-360.

4314. Another execution. 3085. If the property levied on sell for less than sufficient for that purpose, the plaintiff may order out another execution, which shall be credited with the amount of the previous sale. The proceedings under this second sale shall conform to those hereinbefore prescribed. [R., § 3316; C., '51, § 1911.]

4315. Levy holds good. 3086. When property is unsold for want of bidders, the levy still holds good; and, if there be sufficient time, it may again be advertised or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause

may be added, that if such property does not produce a sum sufficient to satisfy such execution, the officer shall proceed to make an additional levy, on which he shall proceed as on other executions, or the plaintiff may, in writing filed with the clerk or justice, abandon such levy upon paying the costs thereof. In which case execution may issue with the same effect as if none had ever been issued. [R., § 3317; C., '51, § 1912.]

A second levy cannot be made until the first is disposed of: *Downard v. Crenshaw*, 49-296.

A sale under an execution which has expired is valid if the levy was made while the execution was in force: *Butterfield v. Walsh*, 21-97. And see notes to § 4262.

4316. Notice to defendant; sale void without. 3087. If the defendant is in actual occupation and possession of any part of the land levied on, the officer having the execution, shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; and sales made without the notice required in this section, may be set aside on motion made at the same or the next term thereafter. [R., § 3318.]

Notice is not required where defendant is not personally in possession or actual occupation of the property: *Babcock v. Gurney*, 42-154; *Bennett v. Burton*, 44-550.

The owner is not, within the meaning of this section, "in the actual occupation" of land leased to, and occupied by, a tenant; but where the owner is in the actual use and enjoyment of the property, although not residing thereon, he is in such actual occupation and possession as is here required. So *held* where the owner, by means of employees residing on the land, was operating a saw-mill thereon: *Fleming v. Maddox*, 30-239.

The provision that in the cases here referred to the sale may be set aside does not invest the court below with such discretion that its action cannot be reviewed on appeal. Though mandatory rather than permissive, it seems there might be cases within the letter of the statute where it would not be enforced: *Jensen v. Woodbury*, 16-515.

This section applies to sales under special as well as under general execution: *Ibid.*; *Fleming v. Maddox*, 30-239.

It is not essential that the return of the execution show notice to the party in possession of the premises. It would be presumed that such notice was given according to the requirements of the statute: *Corriel v. Doolittle*, 2 G. Gr., 385.

4317. Plan of division. 3088. At any time before nine o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs and no more. If no such plan is furnished, the officer may sell without any division. [R., § 3319.]

This section applies to sales under special as well as general execution: *Taylor v. Truloch*, 59-558.

Distinct or separate parcels or tracts which can have no increased value by reason of being sold together cannot be sold *en masse*, even if no bid is made for them when offered separately. This is the common-law rule. The provision of this section as to subdivision does not affect that rule except as here specified: *Williams v. Allison*, 33-278, 288. And as to the effect of a sale *en masse*, see notes to § 4311.

4318. When purchaser fails to pay. 3089. When the purchaser fails to pay the money when demanded, the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement as above authorized. [R., § 3320; C., '51, § 1913.]

Where the execution debtor bid off the property and afterwards failed to pay the money, *held*, that the officer could not, on the next day, accept the next highest bid and strike off the property to such bidder: *Swortzell v. Martin*, 16-513.

While the sheriff must sell for cash, yet if the person entitled to the proceeds is the purchaser, he can properly treat the satisfaction of the judgment as a cash payment: *Beal v. Blair*, 33-318.

Where the execution creditor bids in the property, although he cannot be required to pay to the sheriff that part of the purchase money which is to be credited on his judgment, he is to pay the costs, and if he does not do so the sheriff is to treat the sale as a nullity: *Reese v. Dobbins*, 51-282.

Where a purchaser at the sale bids with the understanding, and upon the condition, that the amount bid is first to be used to satisfy existing liens on the premises, his bid cannot be enforced unless the proceeds are thus applied: *Vanslyck v. Mills*, 34-375.

Where the property sold was defendant's undivided interest in a crop, and the bid was by the acre, *held*, that under the circumstances of the case the bid should be considered as so much per acre for the acres which defendant's portion of the crop would amount to, and not as that amount for defendant's undivided interest in each acre of the crop: *Denny v. Cochran*, 51–652.

Where the property has been sold to the plaintiff in execution he has not a right thereafter to withdraw his bid and prevent the satisfaction of the judgment, at least without the assent of the sheriff, and probably also that of the execution debtor: *Downard v. Crenshaw*, 49–296.

Where an agent, acting for the execution creditor, by mistake bid more for land offered at the sale than he was authorized, but immediately withdrew his bid and paid costs of sale, *held* that, as the execution debtor had not changed his position on account of the sale, the withdrawal was authorized and the property might be again offered for sale: *Fuson v. Connecticut General L. Ins. Co.*, 53–609.

Where it was claimed that the bid was misunderstood by the sheriff, and by mistake the record thereof differed from the bid made, *held*, that the bidder having notice of the record, and having failed to comply with the bid as claimed to have been made, was not entitled to relief after redemption of the premises: *Morrison v. Spencer*, 72–445.

4319. Sales vacated. 3090. When any person shall purchase at a sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the court shall set aside such sale on motion, notice having been given to the debtor as in case of action, and a new execution may be issued to enforce the judgment, and upon the order being made to set aside the sale, the sheriff or judgment creditor shall pay over to the purchaser the purchase money; said motion may also be made by any person interested in the real estate. [R., § 3321.]

This section *held* not applicable to a case where defendant had title to the property sold, and the judgment was not a lien thereon, because it was rendered in another county and no transcript was filed in the county where the land was situated: *Chambers v. Cochran*, 18–159.

If the judgment is against principal and surety, and the sale be set aside, as here provided, the surety will not be held discharged, unless he has, by reason of the sale, changed his condition or been prejudiced: *Ibid.*

See, also, notes to § 4311.

4320. Money levied on. 3091. Money levied upon may be appropriated without being advertised or sold. The same may be done with bank-bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value. [R., § 3322; C., '51, § 1914.]

The excess remaining in the sheriff's hands from sale of property under execution may be appropriated as here provided: See § 4313 and notes.

Bank-bills, etc., may be levied on and sold: See § 4271 and notes.

4321. Judgment against executor or decedent. 3092. When a judgment has been obtained against the executor of one deceased, or against the decedent in his life-time, which the personal estate of the deceased is insufficient to satisfy, the plaintiff may file his petition in the office of the clerk of the court where the judgment is rendered against the executor, the heirs and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same. [R., § 3323; C., '51, § 1918; 13 G. A., ch. 167, § 29.]

[The printed Code has "a lien" in the fifth line, in place of "rendered," as above and as in the original. The section so stood in the bill as reported by the Code commissioners, following 13 G. A., ch. 167, § 29, but before adoption by the legislature it was amended to read as here given and as it originally stood in the Revision. This amendment was not incorporated into the printed Code.]

The judgment should be filed and approved as a claim of the fourth class, within the time specified in § 3625, for payment out of the personal estate: *Bayliss v. Towers*, 62–601.

4322. Notice. 3093. The person against whom the petition is filed shall be notified by the plaintiff to appear on the first day of the term, and show cause, if any he have, why execution should not be awarded. [R., § 3324; C., '51, § 1919; 13 G. A., ch. 150, § 1.]

4323. How served and returned. 3094. The notice shall be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance as in civil actions, and service of such notice on non-resident defendants may be had in such cases by publication. [R., § 3325; C., '51, § 1920; 13 G. A., ch. 150, § 2.]

4324. Execution awarded. 3095. At the proper time the court shall award the execution unless sufficient cause be shown to the contrary. [R., § 3326; C., '51, §1921.]

4325. Non-age. 3096. The non-age of the heirs or devisees shall not be deemed such sufficient cause. [R., § 3327; C., '51, § 1922.]

4326. Mutual judgments set off. 3097. Mutual judgments, the executions on which are in the hands of the same officer, may be set off the one against the other; except that the costs shall not be set off, unless the balance of cash actually collected on the large judgment is sufficient to pay the costs of both judgments, and such costs shall be paid therefrom accordingly. [R., § 3328; C., '51, § 1923.]

Judgment against two persons, jointly, may be set off against a judgment in favor of one of them against the creditor in such joint judgment: *Ballinger v. Tarbell*, 16-491.

Judgments cannot be set off, the one against the other, unless they are strictly mutual and are still in fact the property of the respective parties thereto: *Bell v. Perry*, 43-368.

Where the judgment has been fraudulently assigned for the purpose of preventing the set-off, such set-off may be obtained in an action in equity: *Hurst v. Sheets*, 14-322.

But where the assignment was verbally made, before the recovery of the judgment sought to be set-off, the assignment not appearing to be fraudulent, a set-off was denied: *Gray v. McCallister*, 50-497.

Where judgment was rendered against one party for costs, and subsequently in a second action the same party recovered a judgment for debt against the other party, *held*, that the judgment for costs should be set off against the judgment for debt, notwithstanding the assignment of the judgment for debt to the attorney in satisfaction of his claim for services in the action for which he had filed a claim for a lien: *Tiffany v. Stewart*, 60-207.

In an attachment suit, where the defendant sued, by way of counter-claim, on an attachment bond executed by plaintiff to others, *held*, that he might have judgment thereon set off against a judgment in favor of such plaintiff: *Branch of State Bank v. Morris*, 13-136.

This provision as to setting off mutual judgments is not defeated by an attorney's lien: *National Bank v. Eyre*, 3 McCrary, 175.

Where judgments are originally mutual, but have ceased to be mutual by reason of the assignment of one of them, they cannot be set off, the one against the other: *Gallaher v. Pendleton*, 55-142.

4327. When sale absolute. 3098. When real property has been levied upon, if the estate is less than a leasehold having two years of an unexpired term, the sale is absolute. [R., § 3329; C., '51, § 1924.]

4328. When redeemable. 3099. When the estate is of a larger amount, the property is redeemable as hereinafter prescribed. [R., § 3330; C., '51, § 1924.]

APPRAISEMENT OF PERSONAL PROPERTY.

4329. How made; effect. 3100. Personal property levied upon and advertised for sale on execution must be appraised before sale by two disinterested householders of the neighborhood, one of whom shall be chosen by the execution debtor and the other by the plaintiff, or in case of the absence of either party, or if either or both parties neglect or refuse to make choice, the officer making the levy shall choose one or both, as the case may be, who shall forthwith proceed to return to said officer a just and true appraisement, under oath, of said property if they can agree; and in case they cannot agree, they shall choose another disinterested householder, and with his assistance they shall complete such appraisement, and the property shall not be sold for less than two-thirds of said valuation; *provided*, the same shall be offered for three successive days at the same place and hour of day as advertised, and if no offer equal to two-thirds the value thereof be made, then it shall be lawful to sell said property for one-half of said valuation.

Where one of the appraisers selected by an execution creditor lived thirty-five miles from the property, *held*, that the sale should be set aside as against such creditor, who was a pur-

chaser thereat, it appearing that the appraisement was at less than one-half the value of the land, the selection of the appraiser being in violation of the requirement that he should be a householder of the neighborhood: *Woods v. Cochrane*, 38-484.

The fact that one of the appraisers is selected by the deputy sheriff does not vitiate the sale. It is a mere irregularity, not affecting the power of the officer to sell nor the validity of the title acquired by the purchaser: *Davis v. Spaulding*, 36-610.

The fact that where it appears that the sheriff appointed one appraiser, his return does not show that the party for whom he acted in making such appointment was absent or refused to appoint, will not render the sale void: *Preston v. Wright*, 60-351.

Whether the appraisers in fixing the value of the property should find the amount of prior liens and incumbrances and fix the value with reference thereto, or should fix the whole value without reference to prior liens, and leave the matter of ascertaining such liens to the sheriff, *quære.* But *held*, that a judicial sale could not be set aside as having been made for an amount less than the two-thirds value, except it should be made to appear that it was for less than two-thirds of the value after deducting incumbrances: *Brown v. Butters*, 40-514.

Where a party sought relief on the ground that the sale was for less than two-thirds of the appraised value, *held*, that he had the burden of showing such fact, and unless it was established affirmatively, the sale could not be set aside: *Barber v. Tryon*, 41-349.

Further *held*, that the purchaser at such a sale is not bound to look beyond the records for the purpose of determining whether apparent liens or incumbrances have not been discharged. Where the records show an incumbrance which, added to the amount paid, makes two-thirds of the appraised value, the sale should not be set aside, although evidence is introduced to show that the incumbrance has been in fact satisfied: *Ibid.; McDonald v. Johnson*, 48-72.

The property appraised must be sold for a sum which, when added to the prior incumbrance, shall realize to the debtor two thirds of the fair value of the property as the same has been ascertained by the appraisement: *Sargent v. Pittman*, 16-469; *McDonald v. Johnson*, 48-72.

A sale for a less proportion than that authorized will be invalid, at least as between the parties, and the fact that the debtor's title is doubtful, or other circumstances affecting the value of the property, will be immaterial. Such fact should be taken into account by the appraisers, and the value fixed by them should be that of defendant's interest in the property: *Maple v. Nelson*, 31-322.

Rent accruing after the execution of the sheriff's deed is not directly the subject of sale, but passes merely as an incident. It is not necessary, therefore, that it be appraised separately from the land. It would be presumed that that right was considered in determining the appraised value of the property: *Townsend v. Isenberger*, 45-670.

An appraisement is not proper evidence of the value of the property in an action by a third person claiming to be the owner thereof and seeking to recover for its conversion: *Flannigan v. Althouse*, 56-513.

Failure to have the appraisement made, *held* not to affect the validity of the sale as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

The purchaser at the sale is not required to take notice of the regularity of the appraisement: *Johnson v. Carson*, 3 G. Gr., 499.

But, *per contra*, *held*, that the provisions as to appraisement were not merely directory, but affected the question of power to sell, on which the validity of the sale depended: *Sprott v. Reid*, 3 G. Gr., 489.

Any change in the appraisement laws calculated to impair rights under existing contracts cannot be made applicable to an execution sale in an action brought under such contract: *Burton v. Emerson*, 4 G. Gr., 393.

Where, at the time of the making of a contract, the law does not provide for appraisement, and, at the time of judgment thereunder, appraisement is provided for, the sale should be made under the law in force at the time of the contract, and appraisement should not be allowed: *Olmstead v. Kellogg*, 47-460.

While legislation depriving the judgment debtor of the benefit of appraisement or redemption laws is not inhibited by any constitutional provision, still under the statutory provision that the repeal of a prior statute shall not affect any act done or right accruing, and which has been established, etc., *held*, that a judicial sale upon a judgment rendered before the taking effect of the Code should be made under the law as to appraisement and redemption existing when the judgment was rendered, and not in accordance with the law in existence at the time of the sale, under which the right to appraisement was taken away: *Holland v. Dickerson*, 41-367.

But where the judgment was rendered after the taking effect of the Code upon a contract made before that time, *held*, that the sale should be according to the Code provisions which took away the right of appraisement, and not in accordance with the law as it existed at the time of the making of the contract: *Babcock v. Gurney*, 42-154; *Fonda v. Clark*, 43-300.

Appraisement pertains to the remedy, and is to be governed by the law of the forum and not that of the *lex loci contractus: Shaffer v. Bolander*, 4 G. Gr., 201.

REDEMPTION.

4330. Deed or certificate. 3101. If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to such purchaser a certificate containing a description of the property and the amount of money paid

by such purchaser, and stating that unless redemption is made within one year thereafter according to law, he or his heirs or assigns, will be entitled to a deed for the same. [R., § 3331; C., '51, § 1925.]

Deed: As there might possibly be circumstances under which a court of equity might order a sale of real property without redemption, a decree ordering a sale without redemption, while it may be erroneous, will not be void for want of jurisdiction: *Truer v. Whitman*, 56-443.

So, although it is held in the federal courts that decrees in foreclosure proceedings in such courts in this state where, by state laws, redemption from foreclosure sale is provided for, should not order an absolute sale without redemption, yet such a decree, though erroneous, will not be void and cannot be collaterally attacked: *Moore v. Jeffers*, 53-202.

Where land was sold under the appraisement law of 1860, and notice of election to have the sale made subject to redemption was not filed with the clerk within the time required by that statute, *held*, that defendant was not entitled to have the sale set aside and made subject to redemption: *Gillett v. Edgar*, 22-293.

Where a purchaser takes a deed immediately after the sale, relying upon the claim that the opposite party has no right to redeem, it is not necessary that an offer to redeem be made in order to entitle the execution defendant to have the deed set aside: *Fitzgerald v. Kelso*, 71-731.

And see notes to § 4353.

Assignment of certificate: The assignment to a junior lienholder of the certificate of purchase "and the lands therein described," *held* to transfer to the assignee not only the title under the certificate, but also the purchaser's right under a tax title which was matured in his hands at the time of the assignment: *Scribner v. Vandercook*, 54-580.

The assignee in good faith of the certificate of purchase from a purchaser at the sale cannot be held responsible for the application of the purchase money by the sheriff: *Gray v. Dye*, 39-360.

Where a creditor pays money to the purchaser, claiming it to be by way of redemption, and takes an assignment of the certificate, he acquires by such assignment the rights of the purchaser, even though his redemption is not effectual: *Wilson v. Conklin*, 22-452; *Rush v. Mitchell*, 71-333.

A junior lienholder may become the purchaser at a sale under a prior lien, or may take an assignment of a certificate of purchase under such sale; and where the acts of such junior lienholder were not such as required by statute in case of redemption, *held*, that they would be considered as a purchase rather than an attempt to redeem: *Streeter v. First Nat. Bank*, 53-177.

Where the holder of a portion of the notes secured by mortgage foreclosed the mortgage and bid off a portion of the land, and also procured the assignment to him of the certificate of purchase of the same premises at a sale of the balance of the land for the remaining note secured by the mortgage, and also purchased at judicial sale the equity of redemption of a grantee of the land who had taken it agreeing to pay the mortgage, *held*, that the assignment of the certificate was in the nature of a redemption: *Brooks v. Keister*, 45-303.

The assignee of a certificate of purchase takes it subject to any equities existing against the assignor: *Van Gorder v. Lundy*, 66-448.

A purchaser of an equity of redemption has no rights other than those of the execution debtor, and cannot, on making redemption from the holder of the certificate of purchase, insist upon the assignment of such certificate: *Hurn v. Hill*, 70-38.

The legal title of the owner of the property is not divested and transferred to the purchaser until the expiration of the period of redemption. During the period of redemption the purchaser has an equitable title only, which may or may not ripen into a legal title: *Shimer v. Hammond*, 51-401.

The purchaser acquires only a lien for the amount of his purchase money and interest, which may ripen into a perfect title at the expiration of the time allowed for redemption: *Curtis v. Millard*, 14-128.

4331. By defendant. 3102. The defendant may redeem real property at any time within one year from the day of sale as herein provided, and will, in the meantime, be entitled to the possession of the property. But in no action where the defendant has taken an appeal from the [circuit or] district court, or stayed execution on the judgment, shall he be entitled to redeem. [R., § 3332; C., '51, § 1926; 13 G. A., ch. 167, § 30.]

Period for redemption: Under a statutory provision, not now in force, which authorized action at law on a note secured by mortgage, and provided that the judgment in such case might be declared a lien from the date of the recording of the mortgage, and that the mortgagor or a lienholder might redeem from such sale as from any other sale under execution, *held*, that a lienholder, although not a party to the proceeding, could not redeem except within the time and in the manner thus provided: *Mayer v. Farmers' Bank*, 44-212.

Where the execution and return were kept in the office of the attorney for the execution plaintiff, and not filed in the clerk's office, and an inquiry there, and also of the attorney, failed to secure a knowledge of the amount necessary to effect redemption, *held*, that upon a tender being made after the expiration of the time for redemption it should have been allowed: *Hammersham v. Fairall*, 44-462.

The fact that property is misdescribed in a mortgage and sale thereunder, and that the description is subsequently corrected during

the period of redemption, the party entitled to redeem being a party to the proceeding and asking no relief, will not operate to extend the period for redemption: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50–116.

The statutory right to redeem within one year cannot be extended by an act of the party claiming the right, such as a suit to redeem, or the like, without more: *Hughes v. Feeter*, 23–547.

In a particular case, *held*, that an action brought by a purchaser of land at an execution sale against execution defendant during the period for redemption, in which it was sought to have the title declared to be in the purchaser as against such execution defendant, did not constitute a fraud against the execution defendant, such as to entitle him to make equitable redemption after the statutory period had expired: *Bradford v. Bradford*, 60–201.

Where, by reason of a mistake of the clerk in computing the amount required to redeem, the amount paid was not quite sufficient, *held*, that the redemptioner might, after the expiration of the year, have equitable relief against the deed upon paying the deficiency and interest on the whole amount up to the time of completing the redemption: *Wakefield v. Rotherham*, 67–444.

In computing the year allowed for redemption the day of sale is excluded, and redemption may be made any time during the corresponding day of the same month of the next year: *Teucher v. Hiatt*, 23–527.

The statutory right of redemption can be exercised only within the period and in the manner prescribed by the statute creating it: *Teabout v. Jaffray*, 74–28.

Where the party does not tender and bring into court the amount necessary for making the redemption he cannot, after the time for redemption has expired, have equitable relief against the issuance of the deed: *McConkey v. Lamb*, 71–636.

Redemption waived: Under the provision that the taking of an appeal defeats the right of redemption, it is immaterial whether a *supersedeas* bond is filed on the appeal or not: *Dobbins v. Lusch*, 53–304.

The provision that stay of execution waives the right of redemption is applicable to cases where such stay is taken in a justice's court where the judgment is rendered, and afterwards a sale of real property under such judgment is had by filing a transcript thereof in the circuit court: *Brown v. Markley*, 58–689.

The restriction upon the right of redemption in case of taking an appeal or stay of execution does not apply to creditors who would otherwise be entitled to redeem, and such creditors have the same right to redeem in case the debtor takes an appeal or a stay as in other cases: *Sieben v. Becker*, 53–24.

An appeal or stay of execution by the execution debtor will not defeat the right of redemption by his vendee: *Thayer v. Coldren*, 57–110.

Where a surety does not object (as provided in § 3068) to stay of execution being granted, he will be considered as having assented thereto, if taken, and held to have thereby waived the right to redeem his property, if sold under such judgment: *Chase v. Welty*, 57–230.

When the appeal is not perfected by serving notice upon the clerk as well as upon the opposite party until after the sale, the right to redeem from the sale exists, and a deed executed immediately will be invalid as against the subsequent redemption: *Fitzgerald v. Kelso*, 71–731.

By defendant's vendee: The right of redemption may be in both the judgment debtor and his vendee where the property has been conveyed with covenants of title prior to the execution sale: *Harvey v. Spaulding*, 16–397.

The vendee of an execution defendant may redeem. He is to be considered as within the meaning of the term "defendant," as used in this section: *Thayer v. Coldren*, 57–110. And see § 4352.

Further as to who may redeem, see § 4333 and notes.

Sale of debtor's redemption right: Defendant's right of possession and redemption during the statutory period may be levied upon and sold under execution: *Barnes v. Cavanagh*, 53–27; *Crosby v. Elkader Lodge*, 16–399.

But such redemption right cannot be sold under an execution issued on the balance of the same judgment under which the original sale was made: *Hardin v. White*, 63–633.

By the first sale the creditor exhausts his right as to the property, and it is immaterial that the same indebtedness is embraced in two different decrees, one by foreclosure of a personal property mortgage, and the other upon foreclosure of a mortgage on real property. If real property is sold under special execution issued under a decree on foreclosure of the real property mortgage, the debtor's right of redemption therein cannot be levied on and sold under a general execution issued upon a decree rendered in foreclosure of the personal property mortgage: *Ibid.*

A judgment recovered against the debtor during the period allowed him for redemption becomes a lien on his interest in property in which he has the right of redemption, and in case he or his grantee by conveyance made after such judgment redeems from the prior sale, such judgment may be enforced against the property so redeemed, although the holder of the judgment failed to exercise his own statutory right of redemption from the sale: *Curtis v. Millard*, 14–128.

After redemption by the debtor or his grantee or assignee of land sold in partial satisfaction of a judgment, it at once becomes liable to pay the unsatisfied balance of such judgment: *Crosby v. Elkader Lodge*, 16–399; *Stein v. Chambless*, 18–474.

Therefore, *held*, where a debtor conveyed his right of redemption to his wife and furnished her the money to make redemption, with intent to hinder and delay his creditors, the land so redeemed remained subject to the balance of the judgment: *Peckenbaugh v. Cook*, 61–477.

The execution debtor does not, by redemption from a sale of his property for a portion of the judgment, acquire the same rights which would be acquired by a creditor or by a purchaser who is a stranger to the judgment,

or by a mortgagee in case of redemption from such sale, and the land may be sold again in case of such redemption under execution for the balance of the judgment: *Campbell v. Maginnis*, 70-589.

The purchaser of property from a judgment debtor which has been sold upon execution has the same right to redemption which the judgment debtor has. Where the sale is under foreclosure of mortgage covering different instalments and for the amount of only one of such instalments, the grantee, having redeemed, holds the property free from the lien of the judgment for other instalments covered by the same mortgage, whereas, if the judgment debtor had himself redeemed, the property would have become subject to the payment of such other instalments: *Harms v. Palmer*, 73-446.

While a party cannot have successive foreclosures of the same mortgage lien, this rule has no application where the right to foreclose for notes not yet due is expressly reserved by the decree of the court: *Burroughs v. Ellis*, 76-61

Where the debtor's right of redemption was sold under a second execution, *held*, that he might within the time for redeeming from the first sale make redemption from both sales, and that the purchaser at the second sale had no ground of objection to such redemption: *Harrison v. Wilmering*, 72-727.

Redemption in foreclosure proceedings: Where it was provided by statute that foreclosure sales should be subject to redemption as in case of sales under general execution, and afterwards other statutory provisions as to redemption were made, *held*, that such provisions were applicable to sales on foreclosure although such sales were not specifically mentioned: *Davis v. Spaulding*, 36-610.

The provisions of this section are applicable to foreclosure sales: *Barret v. Blackman*, 47-565.

4332. When by creditors. 3103. For the first six months after such sale, his right to redeem is exclusive; but if no redemption is made by him at the end of that time, any creditor of the defendant whose demand is a lien upon such real estate, may redeem the same at any time within nine months from the day of sale. But a mechanic's lien, before judgment thereon, is not of such character as to entitle the holder to redeem. [R., § 3333; C., '51, § 1927.]

Time for redemption by creditor or lienholder: A creditor or lienholder cannot make statutory redemption after the expiration of nine months: *Newell v. Pennick*, 62-123.

And this is so even though the purchaser is also a junior judgment creditor: *George v. Hart*, 56-706.

Redemption by creditor within the first six months, during which the debtor's right to redeem is exclusive, will be good as to a subsequent lienholder. It is only the debtor and purchaser who can object to such redemption: *Wilson v. Conklin*, 22-452.

The time within which the creditor may redeem cannot be enlarged by the assent of the purchaser: *Hurn v. Hill*, 70-38.

Method of making redemption: See § 4335 and notes.

By agent: A redemption of real property from sale under execution, made within the proper time by a sub-agent under color of authority, whose act was subsequently ratified by the principal, *held* sufficient against the purchaser under the sale: *Teucher v. Hiatt*, 23-527.

Mechanic's lien: The holder of a mechanic's lien before judgment thereon not being entitled to redeem, he does not become entitled to redeem by obtaining a mere money judgment on his claim as against a person not the owner of the property upon which the lien is claimed: *Spink v. McCall*, 52-432.

4333. Who creditor. 3104. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors, may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due. [R., § 3334; C., '51, § 1928.]

A holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder, after the execution of the sheriff's deed, made in pursuance of a sale thereunder. So *held* in case of a sale under foreclosure of a mechanic's lien, made under the Revision, which provided that such actions should be at law: *Diddy v. Risser*, 55-699.

The purchaser of property at a sale under a judgment which is junior to a mortgage may redeem from such mortgage before the foreclosure thereof, in the same manner as the debtor himself might have redeemed: *Hammond v. Leavitt*, 59-407.

A mortgagee may redeem from an execution sale of the property covered by his mortgage, although the liability secured by the mortgage is only a contingent one and may possibly never ripen into a certainty: *Crossen v. White*, 19-109.

A mortgagee cannot, after buying in the property at his own foreclosure sale for a portion of his judgment, redeem under such sale by virtue of the judgment held by him, either before or after a redemption is made by the mortgagor. The purchase of the property at the sale exhausts his lien with reference thereto: *Todd v. Davey*, 60-532.

Neither can an assignee of a portion of the mortgage debt redeem from a sale on foreclosure of another portion of such debt, whether his assignment was made before or after such foreclosure: *Harms v. Palmer*, 61-483.

A party who has no interest in the property sold, but is only liable as surety or otherwise for the payment of the indebtedness for which

the sale is made, has not a right to redeem: *Brooks v. Keister*, 45–303: *Miller v. Ayres*, 59–424.

A judgment creditor who has purchased the property under his execution may redeem from a sale made under a senior judgment lien: *Seevers v. Wood*, 12–295.

And an attorney who has bought in the property for his client at a sale under execution in favor of such client may exercise such right of redemption which the client would have as against another sale under senior judgment: *Ibid.*

A junior lienholder whose debt antedates the homestead may redeem from the sale of the homestead under a senior lien, and, for the purpose of entitling himself to thus redeem, may show by evidence *aliunde*, as against the senior lienholder who has purchased at the execution sale, the fact as to the date of his claim with reference to the commencement of the homestead right: *Phelps v. Finn*, 45–447.

A creditor holding a judgment which is a lien upon real property of his debtor may become the purchaser of such real property at a sale under another judgment, and make redemption from such sale in the same manner as if some other person had been the purchaser: *Citizens' Savings Bank v. Percival*, 61–183.

An execution creditor who has bid in the property under his own execution does not have a lien upon such property for any unsatisfied balance of his claim by virtue of which he or his assignee can reedeem under such sale. (Overruling *Crosby v. Elkader Lodge*, 16–399): *Clayton v. Ellis*, 50–590.

Where the execution defendant has no right of redemption, a judgment creditor, who did not become such until after the sale, cannot redeem: *Brown v. Markley*, 58–689.

Where the party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity declared subject to their judgments and sold to satisfy the same, *held*, that redemption could not be made by him: *Hayden v. Smith*, 58–285.

A judgment creditor of a grantor, who has made a fraudulent conveyance, has not such a lien upon the property thus conveyed as to entitle him to redeem the same from execution sale, made under a decree obtained by other judgment creditors subjecting such property to the lien of their judgments: *Howland v. Knox*, 59–46.

4334. May redeem from each other. 3105. Creditors having the right of redemption may redeem from each other within the time above limited, and in the manner herein provided. [R., § 3335; C., '51, § 1929.]

4335. Terms of. 3106. The terms of redemption in all cases will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien, with interest upon the whole at the rate of ten per cent. per annum, together with costs, subject to the exception contained in the next section. But where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, a rebate of interest at the rate of ten per cent. per annum must be made by such mortgagee on his claim. [R., § 3336; C., '51, § 1930.]

Method of making redemption: In redemptions made before the expiration of nine months before the date of sale the redemption is to be performed by the parties themselves, without the aid of the clerk, and the only evidence of the transaction necessary is the proper transfer of the certificate of sale. The statutory provisions with reference to the action of the clerk are applicable only to redemptions, as provided for, after the expiration of nine months: *Goode v. Cummings*, 35–67.

A redemption after six and prior to nine months of the sale can be made between the parties, without the aid of the clerk: and if the parties do just what, in law, is necessary to effect the redemption, the act will be deemed a redemption: *Lamb v. Feeley*, 71–742; *West v. Fitzgerald*, 72–306.

These provisions as to the amount to be paid in order to effect redemption refer to statutory redemption from execution sale, and not to a case where a junior lienholder, not made party to a foreclosure proceeding, seeks to redeem from the sale thereunder by an action in equity: *Jones v. Hartsock*, 42–147. And as to equitable redemption, see notes to § 4557.

Such junior lienholder seeking to redeem in equity from a prior judgment under which there has been no sale must pay the full amount of such judgment, but in making statutory redemption from a sale under the judgment he is only required to pay the amount for which the property was bid in at the sale, with interest, costs, etc.: *Hays v. Thode*, 18–51; *Tuttle v. Dewey*, 44–306; *Iowa County v. Beeson*, 55–262.

In redeeming from an execution creditor who has bought in the property at the sale the debtor need only pay the amount bid by such creditor, and is not required to pay, in addition thereto, any portion of the judgment remaining unsatisfied by the sale. Such balance is not a lien upon the property sold. (Overruling *Crosby v. Elkader Lodge*, 16–399): *Clayton v. Ellis*, 50–590.

There is no distinction between the debtor and the creditor as to the matter of making redemption: *Ibid.*

Where a junior creditor attempts to redeem from a senior creditor who has taken an assignment of a certificate of purchase, he must pay to such senior creditor the amount of purchase money and also the amount of the senior creditor's lien: *Wilson v. Conklin*, 22–452.

Where a mortgage was foreclosed for one instalment of the debt secured thereby, and the decree directed that the entire property covered should be sold and any balance realized in excess of the instalment due should be applied to the payment of instalments not

yet due, and the property was bid in by the mortgagee for the entire amount secured by the mortgage, *held*, that the mortgagor could not redeem from such sale upon payment simply of the amount of the instalment already due with interest and costs, but only upon payment of the entire amount for which the property was bid in by the purchaser, although such purchaser had not paid to the clerk any sum except the costs: *Williams v. Dickerson*, 66-105.

A judgment creditor whose lien is subsequent to an unrecorded deed cannot defeat the priority of the deed by first redeeming from a prior judgment creditor. The grantee in the deed may redeem from the subsequent judgment creditor in such case by paying the amount due the prior judgment creditor: *Fords v. Vance*, 17-94.

Where a party redeems from a sale under a judgment which by mistake is for too small an amount, he is under no obligation to tender more than the amount for which the property was bid in with interest and costs: *Day v. Cole*, 44-452.

Where the holder of the first two of three mortgages on the same property foreclosed the first and bid in the property at the sale thereunder, and thereafter the holder of the third foreclosed and bid in the property at his sale, and then redeemed from the sale under the first after nine months from the date of such sale, *held*, that such redemption was made under the right of the mortgagor and not as junior creditor, and that the redemptioner did not thereby acquire priority over the second mortgage: *Dickerman v. Lust*, 66-444.

4336. Senior creditor. 3107. When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens. [R., § 3337; C., '51, § 1931.]

4337. Junior may prevent. 3108. The junior creditor may in all such cases prevent a redemption by the holder of the paramount lien, by paying off the lien, or by leaving with the clerk beforehand the amount necessary therefor. [R., § 3338; C., '51, § 1932.]

4338. Junior may redeem. 3109. A junior judgment creditor may redeem from a senior judgment creditor, by paying to the party, the clerk, or the sheriff, if execution has issued, the full sum due, with interest and costs, and shall become thereby vested with the title to the judgment so redeemed. [R., § 3339.]

4339. Money paid to sheriff. 3110. If paid to the sheriff, he shall give to the party redeeming a certificate that he has paid such sum for the redemption of the judgment, describing it, which being presented to the clerk, he shall enter such redemption on the judgment docket, as he shall also do if the money is paid to himself. [R., § 3340.]

4340. Junior in turn from senior. 3111. Whenever a senior creditor redeems from a junior creditor, the latter may in return redeem from the former, and so on, as often as the land is taken from him by virtue of a paramount lien. [R., § 3341; C., '51, § 1933.]

4341. When right expires. 3112. After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other except as hereinafter provided. But the defendant may still redeem at any time before the end of the year as aforesaid. [R., § 3342; C., '51, § 1934.]

The following provisions (§§ 4342 to 4348) apply only to redemptions after the expiration of nine months: *Goode v. Cummings*, 35-67.

See, as to this section, notes to § 4332.

4342. Who gets property. 3113. Unless the defendant thus redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely. [R., § 3343; C., '51, § 1935.]

4343. Claim extinguished. 3114. In case it is thus held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in the next section. [R., § 3344; C., '51, § 1936.]

The omission to file the statement will not prejudice the right of other creditors to redeem, nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to file his statement: *Goode v. Cummings*, 35-67.

Where a junior mortgagee did the acts necessary as between the parties to amount to a redemption after six months and prior to the expiration of nine months from the sale, and did not, within ten days after the expiration of the nine months, enter on the sale book the amount he was willing to credit on his claim, *held*, that his mortgage was extinguished: *Lamb v. Feeley*, 71-742.

This provision, as to the whole of the redemptioner's claim being satisfied, unless the steps pointed out by statute are taken to prevent its having that effect, are applicable to redemptions made before the expiration of nine months as well as those made after that time: *West v. Fitzgerald*, 72-306.

4344. Exception; entry of credit. 3115. If he is unwilling to hold the property and credit the defendant therefor with the full amount of his lien, he must, within ten days after the nine months aforesaid, enter on the sale book the utmost amount that he is thus willing to credit on his claim. [R., § 3345; C., '51, § 1937.]

Omission by a creditor who has made redemption to make the entry in the sale book as required by this section, in case he is not willing to credit the execution defendant with the full amount of the claim under which such redemption is made, will not prejudice the rights of other creditors to redeem nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to make such entry: *Goode v. Cummings*, 35-67.

Such provisions apply only to redemptions made after the expiration of nine months from the date of sale. Previous to that time no entry in the sale book is required: *Ibid.*

Redemption in all cases except where otherwise provided by statute has the effect to discharge and satisfy the whole of the debt and lien under which it is made: *West v. Fitzgerald*, 72-306.

The absolute right of redemption on the part of creditors is terminated at the end of nine months from the date of the sale, and it is for the creditor last redeeming within the nine months to determine whether the right of redemption shall be again opened to the other creditors. If he is willing to have his lien and claim wholly extinguished he is entitled to hold the property at that price, and no further redemption can be made by the creditors. If he is not willing to take the property in full satisfaction, then he must, within ten days, enter on the sale book the utmost amount he is willing to credit on his claim, and by so doing he confers upon the other creditors the right to redeem under the provisions of § 4345: *Woonsocket Institution v. Goulden*, 28 Fed. Rep., 900.

The statute does not prescribe the statement to be entered by a junior creditor redeeming from a judgment sale as to the amount which he is willing to allow on his claim, and if it indicates with sufficient certainty such amount it is sufficient: *Craig v. Alcorn*, 46-560.

Failure of the clerk to enter in the sale book the amount which a redeeming creditor is willing to allow on his claim, when a statement thereof is furnished by the creditor in due time, the statement being in fact known to the parties affected thereby within the ten days given by statute for making the entry, will not operate to defeat the effect of such entry, the object of the requirement being to secure to the debtor notice of the intention of the redemptioner; and actual notice will effect that purpose: *Ibid.*

4345. Farther redemption. 3116. Any unsatisfied lien creditor, within ten days after the expiration of the time thus allowed to make the entry required in the last section, may redeem the property by paying the amount of the legal disbursements of the last holder as hereinbefore regulated, added to the amount thus entered on the sale book, together with interests and costs. [R., § 3346; C., '51, § 1938.]

[The words "of the time," following "expiration" in the second line, are erroneously omitted in the printed Code.]

Whether a senior lienholder may redeem from a junior who has already redeemed from him, *quære;* but redemption under this section must be within one year, as provided by § 4331: *Phelps v. Finn*, 45-447.

4346. Final redemption. 3117. Such redemptioner shall also credit the defendant with the full amount of his lien, unless within ten days after redeeming as aforesaid, he likewise makes a like entry on the sale book, in which case any unsatisfied lien creditor may in like manner redeem within ten days as aforesaid, and so on until there are no more unsatisfied liens, or until the expiration of the year for redemption, the defendant having the final privilege of redeeming from the last redemptioner at the end of the year. [R., § 3347; C., '51, § 1939.]

4347. Mode. 3118. The mode of making the redemption is by paying the money into the clerk's office for the use of the persons thereto entitled.

The person so redeeming, if not defendant in execution, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim. [R., § 3348; C., '51, § 1940.]

Where the party making redemption pays, and the clerk in good faith receives, a banker's check, or currency which is not legal tender, before the expiration of the time for redemption, the redemption will be complete, although in case of the check the money is not realized thereon by the clerk until after the time for redemption has expired: *Webb v. Watson*, 18-537.

Whenever a payment to the clerk would be good, a payment or tender to the party entitled to receive the money will be equally valid. The provisions of the Code of '51, allowing money to be paid to the clerk, *held* to be for the benefit of the holder, and that a payment to the execution plaintiff would be effectual: *Armstrong v. Pierson*, 5-317.

Whether the requirement that an affidavit be filed by a creditor redeeming applies to redemptions made before the expiration of nine months, doubted: *Wilson v. Conklin*, 22-452.

4348. Entry in sale book. 3119. The clerk shall thereupon give him a receipt for the money, stating the purpose for which it was paid. He must also, at the same time, enter in the sale book a minute of such redemption, of the amount paid, and the amount of the lien of the last redemptioner as sworn to by him. [R., § 3349; C., '51, § 1941.]

4349. Assignment of certificate. 3120. A creditor redeeming as above contemplated, is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed. [R., § 3350; C., '51, § 1942.]

4350. Redemption of portion. 3121. When the property has been sold in parcels, any distinct portion may be redeemed by itself. [R., § 3351; C., '51, § 1943.]

4351. Tenants in common. 3122. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately. [R., § 3352; C., '51, § 1944.]

4352. Transfer of right. 3123. The rights of a defendant in relation to redemption are transferable, and the assignee has the like power to redeem. [R., § 3353; C., '51, § 1945.]

See notes to § 4331.

SHERIFF'S DEED.

4353. Deed. 3124. If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person entitled be dead, the deed shall be made to his heirs, but the property will be subject to the payment of the debts of the deceased in the same manner as if acquired during his life-time. [R., § 3354; C., '51, § 1946.]

Sheriff's deed: The recital of the execution in a sheriff's deed is not essential to its validity, and any variance or mistake in such recital will not impair the deed: *Humphry v. Beeson*, 1 G. Gr., 199.

Sufficiency of description in the deed may cure any uncertainty of description in the levy and return: *Hopping v. Burnam*, 2 G. Gr., 39.

The sheriff in office at the time the deed is executed is the proper person to make a deed, and not a person who was sheriff at the time of the sale but whose term of office has expired: *Conger v. Converse*, 9-554. And see § 483.

The fact that the deed is executed by a deputy is no cause for setting it aside at the instance of the defendant in execution: *Chase v. Parker*, 14-207.

A deed issued prior to the expiration of the period of redemption is not necessarily void. It may be equivalent to a certificate of purchase, and admissible in evidence for the purpose of showing the sale: *Warfield v. Woodward*, 4 G. Gr., 386.

The fact that the sheriff gives a deed absolute in form instead of issuing a certificate of purchase will not defeat the right of redemption, and cannot be considered prejudicial to a party entitled to redeem: *Olmstead v. Kellogg*, 47-460.

The fact that the deed is improperly executed before the expiration of the period of redemption will not render it invalid, if redemption is not made: *Conner v. Long*, 63-295.

If the deed is issued to one who is not a purchaser, the presumption is that the sheriff had evidence of the fact that the purchaser's rights had been transferred to the person to whom the deed was issued: *Ibid.*

To whom deed made: The judgment debtor and the purchaser are ordinarily the only parties who can object that the right of

redemption has not been properly exercised; and where money had been paid for the purpose of making the redemption, by a party claiming the right to redeem, and had been accepted by the purchaser and the certificate assigned, *held*, that the sheriff could not refuse to make a deed to the assignee of the certificate on any real or supposed right in the execution plaintiff to resist such redemption: *Kilbride v. Munn*, 55–445.

The sheriff may make his deed to a different person from the purchaser, with such purchaser's consent: *Ehleringer v. Moriarty*, 10–78.

Where the person making redemption is the owner, or redeems as owner and not as creditor, he is not entitled to a sheriff's deed: *Dickerman v. Lust*, 66–444.

If a party not entitled to redeem, nevertheless pays money for that purpose and secures an assignment of the certificate of purchase, he is entitled to a deed. The execution defendant or his grantee has no ground of objection: *Rush v. Mitchell*, 71–333. And see notes to § 4330.

Right to crops, rent, etc.: The estate of the debtor is not divested until execution of the deed, and any crops upon the premises already matured do not pass thereby, although they were not matured when the purchaser became entitled to his deed: *Ereringham v. Braden*, 58–133.

A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed, and the fact that the sale is in an action by attachment upon notice by publication does not prevent the application of the rule: *Townsend v. Isenberger*, 45–670.

Where a party, by holding over after the execution of a sheriff's deed to the premises, becomes a tenant at will, he becomes so as to the land in its condition at that time and liable to action for the rental value of the premises with unmatured crops growing thereon: *Martin v. Knapp*, 57–336.

After the execution of the sheriff's deed the tenant of the former owner ceases to have any right to the possession, and if he takes crops therefrom he must account to the execution purchaser and not to the former owner: *Ibid.*

A tenant of the execution defendant, sowing or planting crops after the sale, with knowledge that they cannot be harvested before the expiration of the period of redemption, is not entitled to possession for the purpose of harvesting such crops, after the right of the purchaser to possession under his deed has become complete: *Wheeler v. Kirkendall*, 67–612.

Taking deed for benefit of another: A contract whereby a third person was to purchase certificates of sale of real property sold under execution, and upon securing a deed to the property convey a portion or all of it to the other party to the contract, who had lost his right of redemption, *held* not to constitute a mortgage, or to entitle the latter to any right of redemption except in accordance with the express terms of the contract: *Hensley v. Whiffin*, 58–426.

Where a purchaser under execution agrees to convey to the debtor the property purchased upon being paid a certain amount within a certain time, the debtor cannot, after failure to pay the amount within the time agreed, maintain an equitable action to redeem: *Tarkington v. Corley*, 59–28.

In a particular case, *held*, that even though a purchase at execution sale was made for the benefit of another with the right to him to avail himself thereof upon payment of certain specified amounts, yet the party seeking to avail himself of the purchase did not show such payments as to entitle him to the benefits of the agreement: *Jack v. Brown*, 60–271.

Under particular facts, *held*, that the purchase at execution sale was in trust, and that sufficient steps for redemption having been taken, the execution of the sheriff's deed should have been ordered to be made to the person who, by agreement between the parties, had effected the redemption: *Kennedy v. Stranahan*, 39–205.

4354. Recording. 3125; 21 G. A., ch. 146. The purchaser of real estate at a sale on execution, need not place any evidence of his purchase upon record until sixty days after the expiration of the full time of redemption. Up to that time, the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer. [R., § 3355; C., '51, § 1947.]

Recording; notice: One who, in good faith, purchases the property after the expiration of the period allowed for recording the deed, and before it is recorded, is not affected with constructive notice of the proceedings: *Harrison v. Kramer*, 3–543: *Churchill v. Morse*, 23–229.

But a failure to record the deed is not material as against one who is not a purchaser in good faith, or who purchases with actual notice of the sale: *Harrison v. Kramer*, 3–543; *Walker v. Schreiber*, 47–529, 533.

Only a *bona fide* purchaser, without notice, is protected against a deed not recorded: *Rush v. Mitchell*, 71–333.

A party cannot complain of delay in taking and recording the sheriff's deed unless he acquires his interest after the period allowed for recording: *Wood v. Young*, 38–102.

The constructive notice of the sheriff's sale, imparted by the publicity of the proceedings themselves and the recording of the sheriff's deed, affects only those persons claiming under the title divested by the sale and not those claiming under an independent or hostile title: *Hultz v. Zollars*, 39–589; *Gardner v. Jaques*, 42–577.

Where the certificate is assigned by the purchaser to a third person, failure by the assignee to put his deed on record will not defeat his claims as against a subsequent purchaser from the assignors. The requirement of notice applies only as against purchasers from the judgment defendant: *Lindley v. Mays*, 66–265.

A levy upon and sale of land in another county than that in which the judgment is rendered, without the filing of a transcript of the judgment, are not proceedings of which a subsequent purchaser of the property is bound to take notice until the deed is actually recorded: *McGinnis v. Edgell*, 39-419.

The deed, when duly executed and recorded, is notice of the prior proceedings, and it is immaterial whether the judgment under which the execution issued was properly indexed or not: *Cushing v. Edwards*, 68-145.

4355. Deeds imply regularity. 3126. Deeds executed by a sheriff in pursuance of the sales contemplated in this chapter, are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof. [R., § 3356; C., '51, § 1948.]

Where a sheriff's deed is silent as to the nature of the writ under which the sale is made, and no other evidence is offered, the sale is to be presumed regular: *Childs v. McChesney*, 20-431.

But aside from statutory provisions, it is not evidence of the regularity of prior proceedings, nor even of the existence of the judgment or execution. So *held* in case of a sale under strict foreclosure without proceedings in court, according to the provisions of Code of '51: *Seevers v. Drennon*, 29-225.

Recitals in a sheriff's deed to the effect that at the sale the property conveyed was struck off to the purchaser "together with other real estate . . . for the sum of," etc., *held* not sufficient to show a sale for a gross sum and overcome the presumption that the officer selling did his duty: *Foley v. Kane*, 53-64.

4356. Damages. 3127. When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance. [R., § 3357; C., '51, § 1949.]

See § 4575.

4357. "Defendant," "plaintiff." 3128. The term "defendant" as herein used, is intended to designate the party against whom, and the term "plaintiff" the party in favor of whom, any execution is issued. [R., § 3358; C., '51, § 1951.]

The term defendant, as here used, must be construed to mean the particular debtor or person who has the legal, or possibly an equitable, title in and to the premises sought to be redeemed, but does not include the surety for the indebtedness who has no interest in the property sold: *Miller v. Ayres*, 59-424.

4358. Applicable to justice's proceedings. 3129. The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff" and "clerk" are accordingly to be understood, as qualified in this chapter, in the same manner in this respect as in that relative to attachment. [R., § 3359; C., '51, § 1952.]

REVIVOR OF JUDGMENTS.

4359. Death of plaintiff; how execution may issue. 3130. The death of one or all the plaintiffs shall not prevent an execution being issued, but on such execution the clerk shall indorse the death of such of them as are dead, and if all be dead, the names of the personal representatives, or the last survivor, if the judgment passed to the personal representatives, or the names of the survivors' heirs, if the judgment was for real property. [R., § 3482.]

An execution issued in the name of a deceased plaintiff without the indorsement here provided for may be enjoined: *Meek v. Bunker*, 33-169.

Where action is brought, by mistake, in the name of a deceased person, and judgment is rendered and sale had thereunder, the proceedings are invalid: *White v. Secor*, 58-533.

And see notes to § 4056.

4360. Officer's duty. 3131. The sheriff, in acting upon an execution indorsed as provided in the last section, shall proceed as if the surviving plaintiff or plaintiffs, or the personal representatives or heirs, were the only plaintiffs in the execution, and take bonds accordingly. [R., § 3483.]

4361. Affidavit required. 3132. Before making the indorsements named above, an affidavit shall be filed with the clerk by one of the plaintiffs or personal representatives, or heirs or their attorney, of the death of the defendant, and that the persons named as such are the personal representatives or heirs, and in the case of personal representatives, they shall file with the clerk a certificate of their qualification, according to law in this state. [R., § 3484.]

[The words "of the defendant," in the third line, should evidently be "of the plaintiff," but the section stands as here given, both in the printed Code and the original bill.]

4362. Death of part of defendants. 3133. The death of part only of the defendants, shall not prevent execution being issued, which, however, shall operate alone on the survivors and their property. [R., § 3485.]

At common law an execution cannot be issued on a judgment after the death of defendant therein, and sales made in pursuance of such execution are void, and this rule is recognized by this section. The fact that the property levied on under the execution is already held by the sheriff by writ of attachment levied before the death of the judgment debtor will not affect the rule: *Welch v. Battern*, 47-147.

The right to issue an execution against property of execution defendant terminates at his death, and, in the absence of any order or proceeding re-establishing such right, the sale and deed under such execution are ineffective for any purpose: *Boyle v. Maroney*, 73-70.

The death of defendant after levy, but before sale, cannot be shown for the purpose of defeating the sale. So *held* where the judgment was in partition for costs, and was made a special lien upon the shares of the property of vendee: *Sprott v. Reid*, 3 G. Gr., 489.

A judgment against a person afterwards deceased should be filed with claims against the estate and approved as a claim of the fourth class, within the time specified in § 3625, in order to secure payment out of the personal estate. If not thus filed, the action authorized by § 4321 to subject real property of decedent to execution thereon cannot be maintained: *Bayless v. Powers*, 62-601.

A judgment against a decedent may be revived against his administrator: *Carnes v. Crandall*, 10-377.

A creditor cannot bring an action to revive, as against the heirs, a judgment rendered against decedent in his life-time. The only method provided for the enforcement of such a judgment is by proceedings against decedent's estate: *Bridgman v. Miller*, 50-392.

4363. Execution quashed. 3134. The defendant may move the court to quash an execution, on the ground that the personal representatives or heirs of a deceased plaintiff are not properly stated in the indorsement on the execution, and, during the vacation of the court, may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued. [R., § 3486.]

CHAPTER 3.

PROCEEDINGS AUXILIARY TO EXECUTION.

4364. Defendant examined. 3135. When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the district, [circuit], or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered or a transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor. [R., § 3375; C., '51, § 1953.]

4365. Upon affidavit as to property. 3136. The like order may be obtained at any time after the issuing of an execution, upon proof, by the affidavit of the party or otherwise, to the satisfaction of the court or officer who is to grant the same, that any judgment debtor has property which he un-

justly refuses to apply towards the satisfaction of the judgment. [R., § 3376; C., '51, § 1954.]

A second examination without a new affidavit may be held as a continuation of an examination previously had: *McDonnell v. Henderson*, 74-619.

4366. By whom order granted. 3137. Such order may be made by the district [or circuit] court of the county in which the judgment was rendered, or to which execution has been issued, or in vacation by a judge thereof. And the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts. [R., §§ 3377, 3385; C., '51, § 1955.]

4367. Debtor interrogated. 3138. The debtor, on his appearance, may be interrogated in relation to any facts calculated to show the amount of his property, or the disposition which has been made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made. And the interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath, and no person shall, on such examination, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud. [R., § 3378; C., '51, § 1956.]

4368. Witnesses examined. 3139. Witnesses may be required by the order of the court or judge, or by subpœnas from the referee, to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue. [R., § 3379.]

Proceedings for contempt in violating an order of the court are to be tried before the court without a jury: *McDonnell v. Henderson*, 74-619.

4369. Disposition of property. 3140. If any property, rights, or credits, subject to execution are thus ascertained, an execution may be issued and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be delivered up, or in any other mode applied towards the satisfaction of the judgment. [R., § 3380; C., '51, § 1957.]

4370. Receiver. 3141. The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith. [R., § 3381.]

4371. Equitable interest. 3142. If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person holding the legal estate, or having any lien on, or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey such real estate or the debtor's equitable interest therein, in the same manner as is provided by this code for the sale of real estate upon execution. [R., § 3382.]

4372. Sheriff liable. 3143. If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such. [R., § 3383.]

4373. Continuance. 3144. The judge or referee acting under the provision of this chapter, shall have power to continue his proceedings from time to time until they shall be completed. [R., § 3384.]

4374. Defendant failing to appear. 3145. Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories thus propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party, or witness, disobey an order of the court or judge, or referee, duly served, such person, party, or witness may be punished as for contempt. [R., § 3386; C., '51, § 1958.]

The corresponding provisions of Revision, §§ 3375-3390, for compelling the judgment debtor to appear and answer as to his property, and to deliver in satisfaction of the execution any property thus discovered, on penalty of contempt, were held unconstitutional, not because providing for imprisonment for debt, but as authorizing the determination in a summary proceeding, without a jury, and in a court of inferior jurisdiction (the county court), of questions as to liability of property, etc., not adjudicated in the original judgment, and the enforcement by imprisonment of an order made in such proceedings: *Ex parte Grace*, 12-208.

The foregoing sections are constitutional, the proceedings provided for being required to be before a court of general jurisdiction or a judge thereof: *Eikenberry v. Edwards*, 67-619.

4375. Service of order. 3146. The order mentioned herein shall be in writing and signed by the court or judge or referee making the same, and shall be served in the same manner as an original notice in other cases. [R., § 3387.]

Where it appears that a party was present at every stage of the proceedings and had opportunity to be heard, it is not necessary to show that he was served with the written order here contemplated: *McDonnell v. Henderson*, 74-619.

4376. Compensation of officers and witnesses. 3147. Sheriffs, referees, receivers, and witnesses, shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same shall be enforced by an order. [R., § 3388.]

4377. Warrant of arrest. 3148. Upon proof to the satisfaction of the court, or officer authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, the said court or officer, instead of the order aforesaid, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or officer authorized to take his examination as hereinbefore provided. After being thus brought before the said court or officer, he may be examined in the same manner and with the like effect as is above provided. [R., § 3389; C., '51, § 1959.]

4378. Bond. 3149. Upon being brought before the court or officer, he may enter into an undertaking in such sum as the court or officer shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court or officer as shall be directed, and will not, in the meantime, dispose of his property, or any part thereof; in default whereof he shall continue under arrest, and may be committed to jail on the warrant of such court or officer from time to time for safe keeping until the examination shall be concluded. [R., § 3390.]

EQUITABLE PROCEEDINGS.

4379. How and when brought. 3150. At any time after the rendition of a judgment, an action by equitable proceedings may be brought to subject any property, money, rights, credits, or interest therein belonging to the defendant, to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of securities for the same, may be made defendants. [R., § 3391.]

The provisions of this section are applicable to equitable interests in real estate: *Bridgman v. McKissick*, 15-260.

4380. Answers verified; petition taken as true. 3151. The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such order made or judgment rendered as the nature of the case may require. [R., § 3392.]

4381. Lien created. 3152. In the case contemplated in the two preceding sections, a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property or any interest therein. [R., §§ 3393, 3394.]

While a judgment at law is a lien upon any equitable interest of the debtor in real property (§ 4089 and notes), it is not so in such sense as to affect *bona fide* purchasers without notice, and a judgment creditor may, by proceedings under this and the preceding sections, acquire a superior lien upon the property by reason of his greater diligence: *Bridgman v. McKissick*, 15–260.

4382. Surrender of property enforced. 3153. The court shall enforce the surrender of the money, or securities therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power to do so. [R., § 3395.]

TITLE XIX.

OF PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS, OR THE PROCEEDINGS OF BOARDS OR INDIVIDUALS ACTING JUDICIALLY.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS IN THE COURTS IN WHICH RENDERED.

4383. By court where rendered. 3154. The district [or circuit] court in which a judgment has been rendered, or by which, or by the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order:

1. By granting a new trial for the cause, within the time, and in the manner prescribed by the sections on new trials;
2. By a new trial granted on proceedings against defendants served by publication only, as prescribed in title seventeen, chapter nine, section two thousand eight hundred and seventy-seven [§ 4084];
3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;
4. For fraud practiced by the successful party in obtaining the judgment or order;
5. For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the errors in the proceedings;
6. For the death of one of the parties before the judgment in the action;
7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;
8. For error in a judgment shown by a minor within twelve months after arriving at full age. [R., § 3499.]

Petition to vacate: The application should be by petition and not by motion; but where a motion was filed and the question as to the right to a new trial was determined thereunder without objection, *held*, that the action of the court would not be reversed on appeal: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62–218.

The fact that a motion for a new trial has been previously made and overruled does not debar the party from seeking, by proceedings under this section, to have the judgment vacated on other grounds than those previously urged. Such application may be united with other facts than those directly connected with the cause in which the vacation is sought, when such facts constitute a defense to the claim upon which the judgment was founded: *Reno v. Teagarden*, 24–144.

Where judgment is against joint defendants and one of them shows himself entitled to have it set aside, it should be set aside as to both: *Storm Lake v. Iowa Falls & S. C. R. Co.*, 62–218.

In what cases granted: The statutory provisions as to vacating judgments are applicable to judgments in adversary proceedings, but not to an order for a guardian's sale of property: *Bunce v. Bunce*, 59–533.

Grounds for vacating; fraud: The term fraud is used in this section in its ordinary sense: *Lumpkin v. Snook*, 63–515.

It may admit of question whether a false statement in a pleading, which the opposite party has a full and fair opportunity to deny, can amount to fraud practiced by the successful party: *Miller v. Albaugh*, 24–128.

Fraud and negligence of defendant's attorney in not interposing a valid defense is not a ground for vacating a judgment and granting a new trial: *Jones v. Leech*, 46–186.

Under the facts of a particular case, *held*, that a combination was shown to surprise and defraud the plaintiff in the proceeding in which the judgment had been rendered from which relief was sought: *Pfiffner v. Krapfel*, 28–27.

A party cannot be charged with fraud in procuring a judgment, unless some device or

artifice is resorted to in obtaining it whereby the court is misled or deceived, and the party against whom it is rendered is prevented from asserting his claim or making his defense. The mere fact of offering in evidence a tax deed, valid on its face, but which may be invalid by reason of some fact connected with a prior proceeding in which the deed was obtained, and of which the person offering it has no knowledge, will not constitute fraud: *Brownell v. Storm Lake Bank*, 63–754.

The production of false testimony may amount to such fraud as to entitle the adverse party to a new trial, but this will not be so if the opposite party, being advised in advance that testimony of that character would be resorted to, neglects to produce evidence which he knows of to meet such false testimony: *Heathcote v. Haskins*, 74–566.

Where it appears that a defendant had allowed default to be rendered against him under a promise of the attorney of a co-defendant that his interests would be protected without his appearance, *held*, that he was entitled to a new trial: *Bennet v. Carey*, 72–476.

Dismissal of an action cannot be considered as having been procured by fraud where it is alleged to have been on the ground that the party was lulled into a sense of security by promises on the part of the other party to make some fair offer of compromise: *Dahlhoff v. Keenan*, 66–679.

The promise of a person seeking to foreclose a mechanic's lien, that he will pay the claim of a prior lienholder upon the premises if such lienholder will not appear and assert his prior lien, will not constitute fraud authorizing the setting aside of the judgment thus obtained on failure of the promisor to make such payment, even though the promise was made without intention of performance: *Lumpkin v. Snook*, 63–515.

A court of equity can only grant relief from a judgment for grounds specified by the statute, even though such relief is not sought until after the expiration of the year within which the proceedings provided for by statute are to be brought: *Ibid.*

The district court has jurisdiction of an action in which it is sought to set aside a judgment in the probate court for fraud: *Cowin v. Toole*, 31–513.

Fraud of the prevailing party on the former trial being shown which is sufficient to constitute reasonable grounds to believe that a different result may be anticipated on the retrial, the judgment should be vacated and the new trial ordered: *Brown v. Byam*, 59–52.

The fraud shown in a particular case *held* sufficient to warrant the setting aside of the judgment: *Independent School Dist. v. Schreiner*, 46–172.

In divorce cases: A decree of divorce obtained by fraud of the successful party may be set aside under the statutory provision, even though the rights of innocent third parties have intervened by reason of a remarriage, and in the petition for such relief it need not be alleged that rights of innocent parties have not intervened, that fact being immaterial: *Rush v. Rush*, 46–648; *S. C.*, 48–701.

The fact that the party procuring the fraudulent decree has again married will not prevent its being set aside: *Whitcomb v. Whitcomb*, 46–437.

A party who has remarried after procuring a fraudulent decree of divorce which is set aside upon application of the opposite party may be convicted of adultery in such remarriage: *State v. Whitcomb*, 52–85.

Casualty or misfortune: That a party intended to appear and defend an action, but was prevented from doing so by a severe illness which rendered him incapable of attending to and interposing his defense, *held* sufficient ground for a vacation of the judgment against him by default: *Luscomb v. Maloy*, 26–444.

And so *held* where defendant, having left home in time to return to the trial, was prevented from doing so by sickness: *Brewer v. Holborn*, 34–473.

The evidence in a particular case *held* not to establish casualty or misfortune sufficient under this section to warrant the setting aside of a judgment: *Niagara F. Ins. Co. v. Rodecker*, 47–162.

That defendant was misled by an error in the copy of the notice served upon him in regard to the date of commencement of the term of court might be a sufficient averment of unavoidable casualty or misfortune, but where the petition contained an inconsistent averment that defendant had taken legal advice as to whether the error relieved him from obligation to appear at the proper time, *held*, that he did not make out a case for relief: *Irions v. Keystone Mfg. Co.*, 61–406.

Where it appeared that notice of the action was served on a married woman who was defendant therein, and she testified that she did not suppose that it concerned her individually, and therefore failed to defend, *held*, that there was not sufficient unavoidable casualty or misfortune shown to entitle her to have it set aside: *Teabout v. Roper*, 62–603.

The fact that a party asking a new trial is a foreigner, and laboring under that disadvantage in making defense, will not be sufficient to constitute casualty or misfortune entitling him to a new trial: *Heathcote v. Haskins*, 74–566.

Sickness of counsel is a sufficient excuse for want of attention to the case, where it appears that such sickness has not been of such long standing that the party must be deemed guilty of negligence in not employing another attorney to take his place: *Snell v. Iowa Homestead Co.*, 67–405.

Irregularity: A judgment rendered by default upon a petition not filed by the time stated in the notice, as required by § 3805, *held* sufficiently irregular to be set aside upon application: *Morgan v. Small*, 33–118.

In case of death of plaintiff before judgment: A judgment rendered in a party's favor after his death, without substitution of his representatives, is not void, but only voidable, and is not to be set aside as a matter of course. Such judgment would, at least in another action, be conclusively presumed to have been rendered while plaintiff was living: *Gilman v. Donovan*, 53–362.

At any rate, under this section, proceedings to have such judgment set aside must be brought within a year, and the judgment will not be vacated until it is determined that

there is a valid defense to the action in which the judgment was rendered: *Ibid.*

Lost record: The fact that after rendition of judgment all the written evidence upon which an equity case had been tried was lost, *held* not to be a sufficient reason for granting a new trial: *Loomis v. McKenzie*, 48–416.

In case of judgment against minor: Under this section the right of an infant defendant to attack a judgment against him is fixed and determined, and it is not allowable for the infant to come in as a matter of course with a new defense, or new evidence, and try the case over again: *Bickel v. Erskine*, 43–213; *Webster v. Page*, 54–461.

The minor can only take advantage of error in the judgment apparent on the record, and such as would be ground for reversal on writ of error or appeal: *Ibid.*

A minor cannot, after the expiration of the year allowed by this section, question the correctness of a judgment against him by collateral proceedings: *Dahms v. Alston*, 72–411.

Where in an action against a minor an attorney appeared for him, and was during the trial appointed guardian *ad litem*, and made defense, *held*, that there was no ground, in the absence of prejudice being shown, to authorize setting aside the verdict and granting a new trial: *Webster v. Page*, 54–461.

Where the court appointed a guardian *ad litem* to answer for a minor, and an answer was filed by him denying the allegations of the petition, but it appeared that neither the minor nor the guardian knew of the facts which showed that no claim existed, *held*, that the minor was entitled to a new trial under the provisions of this section: *Heathcote v. Haskins*, 74–570.

Negligence: The fact that a judgment is for an amount in excess of what was actually due will not be a ground for setting aside the judgment where the party was represented by an attorney, who consented to the entry of judgment, and it does not appear that there was any fraud or concealment. The judgment can be modified as to the amount of the recovery only for mistake or omission of the clerk, fraud by the successful party in obtaining the judgment, or unavoidable casualty or misfortune preventing the party from prosecuting or defending. Relief will not be granted for negligence of the party in ascertaining the defense in time to plead it in the action: *McConkey v. Lamb*, 71–636.

To entitle a party to new trial on the ground of newly discovered evidence, it must appear that he exercised all reasonable diligence to discover the evidence before the trial and rendition of judgment, and that he was unable to do so: *Heathcote v. Haskins*, 74–566.

4384. Petition for new trial. 3155. Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered. [R., § 3116.]

In what cases: This provision contemplates application for a new trial made after the expiration of the three days. If made within that time, it should be by motion; if afterwards, by petition: *First Nat. Bank v. Murdough*, 40–26.

Where the ground for a new trial is discovered so near the close of the term that application cannot be made at that term, it may be made at the following one: *Alger v. Merritt*, 16–121.

Time for application: Where an amended petition for a new trial was filed after the expiration of one year, setting out new grounds, *held*, that it could not be considered: *Harnett v. Harnett*, 59–401.

Laches cannot be imputed to a party who brings his action within the time given: *Independent School Dist. v. Schreiner*, 46–172.

The petition in such cases need only show the facts upon which the new trial is asked as in other cases: *Stineman v. Beath*, 36–73.

The petition should be entitled as in the original cause: *Hintrager v. Sumbargo*, 54–604.

Notice: Where the original proceeding is by attachment, notice of petition for new trial by a plaintiff in the original action may be served in the same manner as the original notice in an attachment proceeding; that is, by publication or personal service on defendant without the state: *Darrance v. Preston*, 18–396.

Grounds of: A petition charging that the attorney of defendant procured a charge in the entry of judgment after the record had been read and approved by the court, *held* to sufficiently set out fraud on the part of defendant and entitle plaintiff to a new trial. Also *held*, that it was not necessary in the petition to charge fraud in words, but that fraud was sufficiently set out by alleging the facts constituting it without designating them as fraud: *Lafever v. Stone*, 55–49.

Sickness of the party's attorney will be ground for a new trial only when it has not been of such long duration that the party is guilty of negligence in failing to employ another attorney. If it appears that the case is such that another attorney, if employed, might have conducted it as well as the one disabled, it will not be a sufficient ground: *Snell v. Iowa Homestead Co.*, 67–405.

Where a party bases his petition for a retrial on the ground of accident or surprise, he must show that he could not, by reason of the

accident or surprise, with reasonable diligence, properly defend the action, or could not, by such diligence, have discovered the evidence previously to the trial: *Richards v. Nuckolls*, 19–555.

Newly-discovered evidence set out in a particular case as a ground for a new trial in an action for divorce, *held* not sufficient: *Harnett v. Harnett*, 59–401.

Where it appeared that one of the attorneys for a party did not appear through misunderstanding as to the extent of his employment, and the other, living out of the district, was misinformed by the opposite attorney as to the time for holding the term of the court, in consequence of which judgment was rendered against defendant, *held*, that there was not such negligence as to defeat the right to another trial upon petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

Where the newly-discovered evidence was that of a witness on the former trial whose testimony was entirely contradictory to that first given, *held*, that the new trial was properly refused, as such evidence would not authorize a different judgment from that rendered: *Carpenter v. Brown*, 50–451.

The rules applicable in determining when newly-discovered evidence will be a ground for a motion for new trial are also applicable in determining when such newly-discovered evidence will be sufficient to entitle the applicant to relief upon petition for new trial: *Morrow v. Chicago, R. I. & P. R. Co.*, 61–487.

Diligence: A party asking a new trial on the ground of newly-discovered evidence must show the exercise of diligence in procuring or discovering such evidence: *Stuckslager v. McKee*, 40–212: *Miller v. Albaugh*, 24–128.

But only reasonable diligence need be shown: *Stineman v. Beath*, 36–73.

Where a petition for a new trial on account of newly-discovered evidence stated that such evidence did not come to plaintiff's knowledge until about the close of the trial, *held*, that he should have asked a continuance on account of such evidence, and, having failed to do so, was not entitled to relief: *Bailey v. Landingham*, 52–415.

But he need only allege that he could not with reasonable diligence have discovered the testimony before the trial; what was done by him, or what facts existed to show due diligence, is matter of evidence, and need not be stated in the petition, although necessary in an affidavit accompanying a motion for a new trial on such ground: *Woodman v. Dutton*, 49–398; but, holding *contra*, see *Cohol v. Allen*, 37–449.

Change of venue: Upon the trial of the petition a change of venue may be granted as in other cases: *Gibbs v. Buckingham*, 48–96; *State v. Whitcomb*, 52–85.

Trial of the petition: The court may first hear and decide upon the grounds to vacate the judgment, and such trial should not be by jury. (Overruling *Chicago & N. W. R. Co. v. Gillett*, 38–434): *Carpenter v. Brown*, 50–451.

The provision that the case should be tried as other cases refers to the mode of producing evidence in the ordinary manner instead of by affidavit, as in the case of the motion: *Ibid.*

Although a trial by jury is not authorized in such a case, yet if a party asks a jury he cannot afterwards complain of the submission of questions of fact to it: *Bennett v. Carey*, 72–476.

Pendency of appeal: The fact that an appeal from the original judgment is taken and pending cannot be pleaded in bar of an action under this provision: *Cook v. Smith*, 58–607.

Effect of petition: The filing of a petition for a new trial under this section cannot have any greater force and effect than would a motion seeking the same thing when filed within the time prescribed by statute. The petition for a new trial is deemed denied by operation of law, and before there can be a new trial the court must make an order granting it, which should be entered of record among the proceedings of the court: *Brown v. Byam*, 59–52.

No new question: In this proceeding a party seeking a new trial is not entitled to raise any new question such as that of estoppel; the only effect of the order is the award of a new trial in the original cause: *Bennett v. Carey*, 72–476.

New trial in equity: An action in equity asking a new trial cannot be sustained where a plaintiff may have relief under the statutory provisions as to a petition for new trial: *Hintrager v. Sumbargo*, 54–604.

A court of equity will direct new trials in actions at law, in cases where such new trials would have been ordered by the courts wherein the actions were tried, had timely application been made to them, provided proper reasons are shown why application was not made in time, or the grounds upon which the interference of chancery is claimed arose after the courts of law were deprived of power to grant the relief: *Bowen v. Troy Portable Mill Co.*, 31–460.

Courts of equity have jurisdiction to grant relief against a judgment where the ground of relief is not discovered until after the expiration of one year; but the extent of the jurisdiction of a court of equity is to grant relief on the grounds enumerated in the preceding section: *McConkey v. Lamb*, 71–636.

4385. Mistakes of clerk and irregularity. 3156. The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year; and when made to vacate a judgment because of irregularity in obtaining it, must be made on the second day of the succeeding term. [R., § 3500.]

Payment and satisfaction of a judgment by defendant will not bar a proceeding by plaintiff, within proper time, to correct a mistake of the clerk: *Goldsmith v. Clausen*, 14–278.

This section does not apply to an application for the entry of a judgment *nunc pro tunc* which has been entirely omitted: *Fuller v. Stebbins*, 49-376.

Nor does such statutory provision apply to a motion to correct a record, made by a party against whom the court has by mistake rendered a personal judgment without having jurisdiction to do so: *Shelley v. Smith*, 50-543.

Where a mistake of the clerk has remained undiscovered until too late to correct it by motion, under the statutory provision, the party being without fault and remediless in law, may be granted relief in an action in equity, and the fact that the erroneous judgment has been affirmed on appeal will not affect such right: *Partridge v. Harrow*, 27-96.

4386. When petition must be filed. 3157. The proceedings to obtain the benefit of subdivisions four, five, six, seven, and eight of section three thousand one hundred and fifty-four, of this chapter [§ 4383], shall be by petition, verified by affidavit setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action if the party applying was a defendant, and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability. [R., § 3501.]

Application to vacate a judgment must be made within a year: *Hunt v. Stevens*, 26-399.

The time within which the proceedings must be instituted commences to run from the entry of the judgment, and not from the time of final judgment on appeal. It seems that taking an appeal waives the right to this proceeding: *Gray v. Coan*, 48-424.

If the proceeding to set aside a judgment for fraud is brought within the period allowed by statute it cannot be objected to as not prosecuted with sufficient diligence. The fact that the judgment has been assigned to an innocent party before the bringing of the action does not defeat the right to relief against it: *Independent School Dist. v. Schreiner*, 46-172.

The statutory limitations to proceedings to vacate or set aside a judgment do not apply to actions in equity founded upon the general jurisdiction which equity exercises to grant relief in cases of fraud: *District T'p v. White*, 42-608.

A court of equity will grant a new trial in an action at law, if the time for applying for relief under the statute has elapsed, only when proper reasons are shown for such application: *Ibid.; Bowen v. Troy Portable Mill Co.*, 31-460; *Bond v. Epley*, 48-600.

A party who has knowledge of the error complained of before the expiration of the year, and does not pursue his remedy as herein provided, cannot have equitable relief against the judgment: *Freeman v. Hart*, 61-525.

A judgment cannot be set aside in an equitable proceeding or enjoined on grounds which would be sufficient to secure a new trial under the statutory provision above referred to: *Hintrager v. Sumbargo*, 54-604.

The law contemplates that the motion to set aside a judgment should be made at the term next succeeding the one at which entry of the judgment was made. If such motion is afterwards made, the mistake should be clearly manifest and the court fully satisfied that no prejudice could result therefrom: *Keeney v. Lyon*, 21-277.

That the petition to set aside is not verified as required by statute will not render the proceedings thereunder void. Such defect should be taken advantage of by motion to strike the pleading from the files: *Rush v. Rush*, 46-648, 651.

That the application for vacating or setting aside does not set forth the facts constituting a defense is a defect which must be taken advantage of by motion for more specific statement, or possibly by demurrer, but cannot be made available on a trial on the merits or by objection on appeal: *Turner v. First Nat. Bank*, 30-191.

4387. Proceedings. 3158. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that defendant shall introduce no new cause, and the cause of the petition shall alone be tried. [R., § 3502.]

The proceedings authorized under this statute are in the nature of a writ of error *coram nobis* and are provided for a review of a case, after final judgment, in the very court wherein it was rendered. The jurisdiction of all other courts of such proceeding is thereby excluded, and a change of venue cannot be had: *Gilman v. Donovan*, 59-76 (apparently overruling *State v. Whitcomb*, 52-85, in which it was held that if the proceeding was properly commenced in the court where the judgment was rendered, a change of venue to another county might be had as in other cases).

No new cause such as that a party asking a new trial is estopped from claiming it can be introduced: *Bennett v. Carey*, 72-476.

4388. Valid defense. 3159. The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action

in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [R., § 3503.]

The proceedings provided for by this section contemplate a trial as to whether there is a valid defense. Plaintiff need not again introduce the evidence necessary in the first instance to entitle him to recovery: *Morton v. Coffin*, 29-235.

If the court finds that there are not sufficient grounds for vacating the judgment, it need not inquire into the validity of the defense offered. If it becomes necessary to do so, however, not only the sufficiency of the answer, but the truth of its averments must be determined: *Niagara Ins. Co. v. Rodecker*, 47-162.

The judgment is only to be vacated after a trial of the defense on its merits, and the finding of the sufficiency thereof: *Brewer v. Holborn*, 34-473.

No showing of defense to the action in which the judgment was obtained being made, the judgment should not be set aside: *Russell v. Pottawottamie County*, 29-256.

It must appear that a plaintiff seeking relief from a judgment against him has a valid action before the judgment can be vacated: *Coleman v. Case*, 66-534.

Where irregularity and fraud in obtaining a judgment were found, but there was no evidence that there was a valid defense, *held* error to order the judgment vacated: *Dryden v. Wyllis*, 51-534.

The court should first try the question of the validity of the defense, and if that should appear insufficient should overrule the application: *Miracle v. Lancaster*, 46-179.

The court, without a jury, is to decide upon the question of whether the judgment shall be vacated or not, and a new trial granted: *Carpenter v. Brown*, 50-451.

It is not the duty of the court, where it is sought to have a judgment vacated on the ground of fraud in procuring it, to carefully weigh the evidence and determine upon which side there is a preponderance as to whether there is a defense to the action or not, but to examine the evidence produced, and therefrom, in connection with the evidence introduced on the former trial, determine whether there is a reasonable ground to believe that a different result will be reached upon a retrial; and it is not proper for the court to render another judgment without first having decided whether the original judgment should be set aside and a new trial ordered: *Brown v. Byam*, 59-52.

Where the party asking that a judgment be set aside presents a meritorious defense, the court will not pass upon the sufficiency of the evidence to support it. If the evidence tends to support it, even though it is not conclusive as to the facts, that will be sufficient: *Bowen v. Troy Portable Mill Co.*, 31-460; *State Ins. Co. v. Granger*, 62-272.

The court in which a judgment is rendered may, in a proceeding to set it aside, inquire as to whether jurisdiction was acquired by service of notice or otherwise, although the judgment itself recites the fact of service: *Newcomb v. Dewey*, 27-381.

Such a proceeding is a direct attack, and the fact of want of service being shown, the judgment should be vacated: *State Ins. Co. v. Granger*, 62-272.

An appeal lies from a proceeding to vacate a judgment for fraud: *Dryden v. Wyllis*, 51-534.

Such appeal is not triable in the supreme court *de novo: Independent School Dist. v. Schreiner*, 46-172.

A party cannot, by moving to vacate a judgment, and then appealing from the order refusing to grant such relief, extend the time for taking appeal from the judgment: *Russell v. First Nat. Bank*, 65-242.

4389. First try grounds to vacate. 3160. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action. [R., § 3504.]

4390. Injunction. 3161. The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. [R., § 3505.]

4391. When judgment is affirmed. 3162. In all cases of affirmance of the judgment or order, when the proceedings have been suspended, judgment shall be rendered against the plaintiff in error for the amount of the former judgment, interests, and costs, together with damages at the discretion of the court, not exceeding ten per cent. on the amount of the judgment. [R., § 3506.]

CHAPTER 2.

OF APPELLATE PROCEEDINGS IN THE SUPREME COURT.

4392. From what appeals taken. 3163. The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character. [R., § 2631; C., '51, § 1555.]

[The jurisdiction of the supreme court is provided for in article five of the constitution.]

I. JURISDICTION.

Not original: The supreme court has no original jurisdiction. It can review or correct judgments of a lower court only upon appeal or writ of error: *Powell v. Spaulding*, 3 G. Gr., 417; *Westbrook v. Wicks*, 36–382; *Reed v. Murphy*, 2 G. Gr., 568; *Preston v. Daniels*, 2 G. Gr., 536.

It can only try issues presented on appeal. It cannot, by way of a ruling on a motion, determine that, by reason of matters arising pending the appeal and shown by affidavit, appellee should be barred from further prosecuting the case: *Simonson v. Chicago, R. I. & P. R. Co.*, 48–19.

Appeals are tried upon the record in the court below. Original pleading and proceedings are never filed or had in the supreme court: *Manatt v. Starr*, 72–677.

Not conferred by consent: Parties cannot by agreement confer jurisdiction upon the supreme court in a case in which an appeal is not authorized. So *held*, where, by consent, an appeal in a criminal case was taken without judgment having been rendered: *Rutter v. State*, 1–99.

For correction of errors: In a law case it is a court for the correction of errors at law, and it will not decide a case upon an agreed statement of facts which does not purport to embody the evidence, and when no error of law is presented: *Harvey v. Miller*, 25–219.

Appeals in equity: The distinction between the law and equity attributes of the supreme court as recognized in Const., art. 5, § 4, is too well defined to be erased by legislative action: *Claussen v. Lafrenz*, 4 G. Gr., 224.

The supreme court can only acquire jurisdiction in a chancery cause by appeal, and it can only review and decide questions made in and decided by the court below. Upon a trial *de novo* of a chancery cause, it cannot consider new testimony, and it has no power to entertain a bill of review: *McGregor v. Gardner*, 16–538.

The method to be pursued for securing a trial *de novo* upon appeal may be regulated by statute: *Richards v. Hintrager*, 45–253.

The right to a trial *de novo* upon appeal cannot be insisted upon unless the method prescribed by statute for securing such form of trial has been pursued: *Cross v. Burlington & S. W. R. Co.*, 51–683.

The right of trial *de novo* may be limited with respect to the amount in controversy: See notes to § 4402.

But the right of trial *de novo* in equitable actions cannot be entirely taken away by statute: *Sherwood v. Sherwood*, 44–192.

Jurisdiction of the supreme court in chancery cases can be exercised only upon appeal and not upon writ of error: *Stockwell v. David*, 1 G. Gr., 115.

The supreme court has jurisdiction to hear a case *de novo* on appeal only in actions in chancery and not in special proceedings: *Brett v. Myers*, 65–274.

Its jurisdiction may be restricted by the general assembly; and therefore, *held*, that where an act gave the district court *final* jurisdiction in a matter, there was no right of appeal from its judgment to the supreme court: *Lampson v. Platt*, 1–556.

II. APPEALS FROM FINAL JUDGMENT.

Forfeiture of bail bond: An order declaring a bail bond forfeited, and taxing costs to defendant, is a final judgment in such sense that an appeal may be taken therefrom: *State v. Conneham*, 57–351.

Dismissal of appeal from justice: The overruling of a motion to dismiss the appeal from a justice on the ground that the court has no jurisdiction of such an appeal is such final order as may be appealed from: *Curran v. Excelsior Coal Co.*, 63–94.

A decree in a partition proceeding, settling the rights and interests of the parties, is final in its nature, and may be appealed from before the division of the property in accordance therewith is actually made: *Williams v. Wells*, 62–740.

Decree for an accounting: Where, in an equitable action, plaintiff sought to have a deed set aside and also asked to have an accounting, and a decree for a reconveyance was made with an order of reference for an accounting, *held*, that an appeal from the decree for reconveyance might be taken, and that therefore an appeal from the decree for accounting would not bring up the question as to the correctness of the decree for reconveyance: *McMurray v. Day*, 70–671.

Void judgment: The fact that a judgment is entered wholly without authority, as, for instance, by a person not qualified as judge, before whom the trial is had by consent, will not prevent the correction of the error on appeal, although the judgment itself is absolutely void: *Petty v. Durall*, 4 G. Gr., 120.

Judgment by default: An appeal may be taken from a judgment by default: *Doolittle v. Shelton*, 1 G. Gr., 271; *Woodward v. Whitescarver*, 6–1.

An order denying to the district attorney the right to appear for the county, where the county is a party, is a de-

cision from which an appeal may be taken: *Clark v. Lyon County*, 37-469.

Arrest of judgment: An order of court arresting judgment is not such a final judgment as that an appeal may be taken therefrom: *Wallis v. Sparks*, Mor., 20.

An order punishing for contempt cannot be reviewed by appeal: See § 4748.

When cross-bill is pending: An appeal may be taken from a decree which determines the rights of the parties to property in controversy, even though a cross-bill be still pending: *Lucas v. Pickel*, 20-490.

Ministerial act: Under a statute allowing an appeal from "all decrees and decisions of the county court," *held*, that an appeal could not be taken from the mere ministerial act of the county judge: *Kennedy v. Cress*, 19-42.

Judgment must appear: The record must show the rendition of judgment, that being a jurisdictional fact: *Heath v. Groce*, 10-591; *Warder v. Schwartz*, 65-170.

A party against whom no judgment has been rendered cannot appeal: *Boyce v. Wabash R. Co.*, 63-70.

III. RIGHT OF APPEAL AND WAIVER.

Must affirmatively appear: The supreme court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken. The judgment must be affirmatively shown, and the court will dismiss the case where it does not appear that such judgment has been rendered, even though the parties fail to present the objection; for, being jurisdictional in its nature, the parties cannot waive it by silence or consent: *Green v. Ronen*, 59-83; *Groves v. Richmond*, 58-54.

Where the record shows a verdict to have been rendered, but does not show that a judgment has been entered thereon, the appeal should be dismissed: *Heath v. Groce*, 10-591; *Pittman v. Pittman*, 56-769.

By what law determined: The right of appeal is governed by the law in force at the time judgment was rendered: *Rivers v. Cole*, 38-677; *Davenport v. Davenport & St. P. R. Co.*, 37-624.

Another remedy: The fact that there is another remedy for the error complained of does not take away the right of appeal from an erroneous judgment or decision in cases where an appeal is authorized: *Wilson v. Shorick*, 21-332.

Waiver by accepting benefits; estoppel: A party who accepts the benefits of an adjudication, so far as favorable to him, thereby waives his right to appeal therefrom: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55-157; *Independent Dist. v. District T'p*, 44-201; *Mississippi & M. R. Co. v. Byington*, 14-572.

The acceptance of a portion of the judgment admitted to be due will not waive the right to appeal from a part of the judgment claimed to be erroneous: *Upton Mfg. Co. v. Huiske*, 69-557.

If the right of appeal has been waived the appeal will be dismissed on motion: *Independent Dist. v. District T'p*, 44-201.

Whether such question can be raised on motion after the appeal has been determined, *doubted;* but under the peculiar facts of a particular case, *held*, that there had been no such acceptance of benefits as to constitute a waiver: *Crane v. Guthrie*, 48-693.

Where a party to the suit has had his claim satisfied by reason of having redeemed the property from execution sale, he thereby loses his right to appeal: *West v. Fitzgerald*, 72-306.

Acceptance of fine: Under a statute allowing to the prosecution an appeal from the action of a justice of the peace in criminal cases, *held*, that the acceptance by the county treasurer of the fine imposed by the justice would not deprive the state of the right to appeal: *State v. Tait*, 22-140.

Payment of judgment: A party who has paid a judgment against him cannot afterward appeal from such judgment: *Borgalthous v. Farmers', etc., Ins. Co.*, 36-250.

An appeal cannot be maintained after the judgment complained of has been satisfied, if such satisfaction is made solely for the purpose of relieving property from the lien of such judgment. Such a satisfaction must be considered voluntary: *Hipp v. Crenshaw*, 64-404.

The mere payment of the fees of an officer for his service in an action will not estop the unsuccessful party from prosecuting an appeal: *State ex rel. v. Martland*, 71-543.

Involuntary payment; under protest: Payment of the judgment, to prevent its satisfaction by sale of real property under execution which has already been levied thereon, will not constitute such voluntary payment as to defeat the right to appeal: *Grim v. Semple*, 39-570.

So *held*, also, as to payment made after the taking of appeal and under protest to prevent sale of property under special execution: *Burrows v. Stryker*, 45-700.

Acceptance of tender: Where the amount of a tender was paid into court and judgment was rendered for plaintiff for that amount, from which he appealed, claiming an additional sum as interest, and plaintiff, after the announcement of the judgment and signing of the bill of exceptions, had accepted the amount of the tender, *held*, that the right of appeal was not thereby waived: *Dudman v. Earl*, 49-37.

It will not amount to a waiver of an appeal that money paid in to the clerk by the opposite party is applied in part by the clerk in satisfaction of a claim for an attorney's lien, without the knowledge of appellant, where he, as soon as he becomes aware of the fact, repudiates the transaction, and pays back to the clerk the amount so paid in: *Jewell v. Reddington*, 57-92.

Change of venue by consent: Where, after perfecting his appeal from a judgment, the party consented to a transfer of the case to another court for trial, *held*, that the appeal was thereby waived: *Lillie v. Skinner*, 46-329.

Issuance of execution: The issuance of execution after perfecting the appeal and filing transcript and abstract in supreme court, on which execution nothing was realized, *held* not to be a waiver of the appeal, on which

the appeal would be dismissed on motion: *Hornish v. Peck*, 53–157.

Filing transcript in another county: The right to appeal is not waived by filing transcripts of the judgment in other counties so as to make it a lien on property in such counties: *Tama County v. Melendy*, 55–395.

Action to enjoin judgment: An action in equity to enjoin the collection of a judgment waives the right to appeal from such judgment: *Gordon v. Ellison*, 9–317.

The bringing of a second action waives any error in dismissing a former action brought for the same indebtedness: *Ibid.*; *Liebuck v. Stahle*, 66–749.

Judgment procured by the party appealing: A party will not be allowed to appeal from a judgment which he caused to be rendered on his own motion: *Hughes v. Feeter*, 23–547.

Taking stay of execution is, by § 4288, made a waiver of the right to appeal: *Seacrest v. Newman*, 19–323.

4393. From orders. 3164. Appeal may also be taken to the supreme court from the following orders:

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

2. A final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment;

3. When an order grants or refuses, continues or modifies a provisional remedy; or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment; when it grants or refuses a new trial, or when it sustains or overrules a demurrer;

4. An intermediate order involving the merits and materially affecting the final decision;

5. An order or judgment on *habeas corpus*. [R., § 2632; C., '51, § 1556.]

Order vacating a judgment: A final order in a proceeding to vacate a judgment for fraud is a "final order in a special proceeding, affecting a substantial right therein," from which an appeal may be taken: *Dryden v. Wyllis*, 51–534.

Certiorari proceeding: An appeal will lie in a *certiorari* proceeding from a decision granting the writ and ordering a stay of proceedings in the court to which the writ issues: *Iske v. Newton*, 54–586.

Revocation of permit to sell liquor: An order of a district judge (§ 2368), revoking a permit to sell intoxicating liquors, is a final order in a special proceeding, affecting a substantial right, from which an appeal may be prosecuted: *State v. Schmidtz*, 65–556.

A provisional remedy is one provided for temporary purposes, as to meet a present exigency, and an order for temporary alimony may therefore be appealed from: *Blair v. Blair*, 74–311.

Intermediate orders must affect the merits: An appeal will not lie from an intermediate order or ruling, as upon questions of practice or the admission or exclusion of evidence, but only from such judgments or orders as determine the rights of the parties to the relief or remedy asked, or to a substantial right as to the course of proceedings, whereby the cause is determined or is tried in a manner not authorized by law. The decision appealed from must be one affecting the merits of the case. (Explaining *McCoy v. Julien*, 15–371): *Richards v. Burden*, 31–305.

Erroneous action of the lower court in allowing a party to introduce additional evidence, when an equity case is remanded to the lower court for a decree in harmony with the opinion of the supreme court, is not a ruling so materially affecting the final decision as to authorize an appeal therefrom before final decision is rendered. It cannot be said that there will necessarily be an adjudication against the party complaining by reason of such error: *Garmoe v. Sturgeon*, 67–700.

Continuance: An order of continuance is a mere intermediate order, not materially affecting the merits, and an appeal does not lie therefrom: *Jaffray v. Thompson*, 65–323.

A finding of facts, even though considered as an intermediate order, is not considered as so far prejudicial to the substantial rights of the party to whom it is adverse that an appeal can be taken therefrom before final judgment: *Boyce v. Wabash R. Co.*, 63–70.

Order as to prosecution in disbarment: The ruling of the court in a disbarment proceeding, in refusing to compel a member of the bar to prosecute the case, is not such as that an appeal can be taken therefrom: *Byington v. Moore*, 70–206.

Motion to expunge: An appeal lies from an order sustaining a motion to expunge a final order from the records, such an order for a change of the record virtually constituting a new trial: *Guthrie v. Guthrie*, 71–744.

The ruling on a motion to suppress depositions cannot be reviewed on appeal before final judgment: *Baldwin v. Mayne*, 40–687.

Exceptions to interrogatories: A ruling upon exception to interrogatories, answers to which would be used as evidence in the trial of the case, *held* not to be a ruling from which an appeal could be taken: *State v. Arns*, 72–555.

Change of venue: Appeal cannot be taken from an order granting or refusing a change of venue: *Allerton v. Eldridge*, 56–709.

On such an appeal the supreme court acquires no jurisdiction, and will refuse to entertain the case, although no objection on

that ground is made by either party: *Groves v. Richmond*, 58–54.

Where the court has jurisdiction of the subject-matter and of the parties, the fact that the action is brought in the wrong county will not render the overruling of a motion for a change of venue such ruling as may be reviewed upon appeal before final judgment: *Horak v. Horak*, 68–49.

But where the motion for change of venue was treated as raising the question whether the action on a bail bond was properly brought in the county where the suit was commenced, and by that county, for the use of the school fund, or whether it should not have been brought in and by another county, *held*, that the decision of that question would be treated in the same manner as though made upon a demurrer, and an appeal therefrom would be entertained: *Lucas County v. Wilson*, 59–354.

If, however, the ruling upon the motion for change of venue is properly excepted to, an appeal from the final judgment will bring up the ruling for review if it was adverse to the party appealing: *McCracken v. Webb*, 36–551; *Allerton v. Eldridge*, 56–709.

Intermediate order reviewed on appeal from final judgment: In general, error in intermediate orders upon questions of practice, the admission of evidence, etc., from which an appeal cannot be directly taken, may be urged upon appeal from the final judgment: *Richards v. Burden*, 31–305.

But in such cases the error in the intermediate order will not be considered unless the record shows that a final judgment was rendered: *Shannon v. Scott*, 40–629; *Jordan v. Henderson*, 19–565.

An intermediate order may be reviewed on appeal from the final judgment taken within the proper time after the rendition of such judgment, although the time for appeal from such intermediate order separately has elapsed. The failure to appeal from an intermediate order, even when such appeal is allowable, will not waive the right to have such order reviewed on appeal from final judgment: *Jones v. Chicago & N. W. R. Co.*, 36–68.

An appeal from final judgment brings up for review all intermediate rulings to which exceptions are taken. So *held* as to a ruling setting aside a default: *Palmer v. Rogers*, 70–381.

An order requiring security for costs cannot be appealed from, but appeal may be taken from an order dismissing an action for failure to give such security: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

Order not contemplated by law: Where an intermediate order was one which the law did not contemplate, *held*, that it would be presumed that such order would not affect the final decision, and an appeal therefrom would not lie: *Bottell v. Lowery*, 46–49.

Ruling on demurrer: An appeal may be taken from the ruling on a demurrer if the party against whom the ruling is made excepts and elects to stand on his demurrer or pleading, as the case may be. It is not necessary that it appear that final judgment has been rendered: *Cowen v. Boone*, 48–350.

But if the party pleads over or amends, he thereby waives any error in the ruling: See notes to § 3860.

A plaintiff, to whose petition a demurrer has been sustained, has the right to appeal, unless it appears that such right has been in some manner waived: *Hampton v. Jones*, 58–317.

An appeal may be taken from the action of the court in overruling plaintiff's demurrer to defendant's answer and dismissing the action upon plaintiff's refusing further to plead, and giving a judgment for costs against plaintiff: *Arnold v. Kreulzer*, 67–214.

Motion to strike: A ruling striking matter from a petition on motion, thus preventing plaintiff from introducing evidence of matter thus alleged, may be reviewed by appeal before final judgment: *Stanley v. Davenport*, 54–463.

The fact that the cause is still pending below does not prevent the supreme court from determining an appeal from an intermediate order involving the merits: *Ibid.*

A refusal by the court to sustain a motion to strike out a part of a petition not designed to show a distinct cause of action is not a ruling from which direct appeal will lie: *Specht v. Spangenberg*, 70–488.

The ruling on a motion to strike a petition of intervention from the files on the ground that the original action had been settled, *held* to be an intermediate order from which an appeal would lie: *First Nat. Bank v. Gill*, 50–425; *Bicklin v. Kendall*, 72–490.

Motion for new trial: This section expressly provides that an appeal may be taken where the court refuses a new trial, and it is immaterial whether any judgment has been rendered on the verdict or not: *Baldwin v. Foss*, 71–389.

Ad quod damnum: An appeal in an *ad quod damnum* proceeding from a decision of the court overruling a motion to set aside the verdict and quash the writ, *held* proper without final judgment being rendered: *Burnham v. Thompson*, 35–121.

Dissolution of attachment: An appeal lies from an order dissolving or sustaining an attachment: *Johnson v. Butler*, 1–459.

But such appeal does not bring up the main case for review, except so far as material to the understanding and disposition of the order from which the party appeals: *Berry v. Gravel*, 11–135.

Judgment in garnishment: An appeal may be taken from a judgment holding or discharging a garnishee: *Bebb v. Preston*, 1–460; *National Bank v. Chase*, 71–120.

Dissolution of injunction: An appeal will lie from the action of a court in dissolving an injunction granted by a judge in vacation: *Trustees v. Davenport*, 7–213.

The action of a judge allowing or refusing an injunction in vacation may be reviewed by appeal therefrom (an express statutory provision having changed the law under which *Monticello Bank v. Smith*, 25–248; *Jewett v. Squires*, 30–92; *In re Curley*, 34–184, and other cases, were decided): *Bennett v. Hetherington*, 41–142.

Appointment of receiver: An appeal may be taken from an order appointing or refusing to appoint a receiver: *Callanan v. Shaw*, 19–183.

Recommitment of cause to arbitrators: An order recommitting a cause to arbitrators is a decision from which an appeal lies: *Brown v. Harper*, 54-546.

Substitution of other defendants: An order of court substituting other defendants in a case and releasing the original defendants may be appealed from, and such appeal may be prosecuted even though after such substitution the new defendants have procured a transfer of the case to the circuit court of the United States: *Sunberg v. District Court*, 61-597.

Dismissal of habeas corpus proceedings: Under a statute authorizing an appeal from a county court to the district court, upon the merits, of any matter affecting the rights and interests of individuals, *held*, that an order of the county court overruling a motion to dismiss proceedings under a writ of *habeas corpus* was not a final judgment from which an appeal would lie: *Smith v. Bigelow*, 19-459.

4394. Order by judge. 3165. If any of the above orders are made by a judge, the same is reviewable in the same way as if made by a court. [R., § 2633.]

4395. Court may prescribe rules. 3166. The court may, also, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as is deemed expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the court from which the appeal is taken. [R., § 2634; C., '51, § 1557.]

4396. Mistake of clerk below. 3167. A mistake of the clerk shall not be ground for an appeal until the same has been presented and acted upon by the court below. [R., § 3498.]

Section applied: *Daniels v. Claflin*, 15-152; *Rising v. Teabout*, 73-419.

4397. Motion to correct error. 3168. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made there and overruled. [R., § 3545.]

When necessary: Any objection to erroneous action of the court below, which might have been corrected in that court if attention had been called thereto, will not be considered if first raised in the supreme court: *Garvin v. Cannon*, 53-716.

So *held* as to an objection which might have been raised in the lower court by motion in arrest of judgment: *Smith v. Warren County*, 49-236.

So *held*, also, in regard to the objection that the judgment was excessive, no motion to correct such error having been made in the court below: *Black v. Boyd*, 52-719; *Dickey v. Harmon*, 26-501; *Finch v. Billings*, 22-228; *Keller v. Jackson*, 58-629.

So *held*, also, where the objection that the judgment below was improperly entered in vacation was not made in that court: *Carmichael v. Vandebur*, 50-651.

A party who has failed to ask for the correction of a judgment in the court below, in a matter as to which it might have been there corrected, cannot complain thereof on appeal: *Richman v. Board of Supervisors*, 70-627.

If plaintiff has failed to show himself entitled to recovery defendant should move the court to direct a verdict in his favor or ask an instruction to that effect. He cannot have a reversal without motion in the lower court for a verdict upon the ground that the evidence does not sustain the allegations of the petition: *Kirk v. Litterst*, 71-71.

An error or mistake as to the amount of the judgment cannot be corrected in the supreme court unless a motion to correct the same has first been made in the lower court: *Rising v. Teabout*, 73-419. But see *Kenyon v. Tramel*, 71-693.

Motion to set aside default: A judgment by default will not be reviewed in the supreme court until a motion to set it aside has been made and overruled in the court below: *Hunt v. Stevens*, 25-261; *Savings Bank v. Horn*, 41-55.

Thus, objection to judgment by default, that the notice was not served in time to render defendant in default, cannot be raised on appeal if no motion to set aside default was made below: *Pigman v. Denney*, 12-396; *McKinley v. Betchtel*, 12-561.

So *held*, also, as to objections to judgment by default, on the ground of defective manner of service, or defect in the notice itself: *Van Vark v. Van Dam*, 14-232; *Bethel v. Leay*, 14-592; *Downing v. Harmon*, 13-535; *Decatur County v. Clements*, 18-536; *Pratt v. Western Stage Co.*, 27-363.

Errors in taxation of costs cannot be urged in the supreme court unless motion for retaxation has been made in the court below: *Hemphill v. Salladay*, 1 G. Gr., 301; *Yeager v. Circle*, 1 G. Gr., 438.

Motion for retrial by defendant served by publication: As the statute gives to a defendant served by publication only a right to retrial upon motion within a specified time, he cannot, on appeal, object to the sufficiency of the service, unless such motion for retrial has first been made and overruled in the lower court: *Berryhill v. Jacobs*, 19-346; *S. C.*, 20-246.

Reason of the provision: The statutory provision above referred to was designed to prevent the expense and delay of appeal where the error relied upon is a mere irregularity, mistake or omission on the part of

some ministerial officer, or the court itself, which could readily be corrected in the trial court on motion: *Pigman v. Denney*, 12–396.

Other cases, applying the statutory provision, are as follows: *Robison v. Saunders*, 14–539; *Barnes v. Hayick*, 15–602; *Carleton v. Byington*, 17–579; *Boyd v. Rutledge*, 25–271; *Coakley v. McCarty*, 34–105; *Grimes v. Hamilton County*, 37–290.

Mistakes of clerk cannot be urged as objections to the judgment on appeal unless a motion to correct such error has first been made in the lower court: *Daniels v. Claflin*, 15–152.

Applicable in appeals from justices' courts: The same provision is applicable in case of appeal from the judgment of a justice of the peace: *Smith v. Parker*, 28–359; *Leonard v. Hallem*, 17–564.

But not in case of writ of error from the judgment of a justice of the peace which is entered without jurisdiction: *Holmes v. Hull*, 48–177.

What deemed sufficient calling attention of court to error: Where a motion for change of venue is resisted on the ground that the court to which it is proposed to send the case has no jurisdiction of such cases, and notwithstanding such objection the change is granted to such court, the error may be reviewed on appeal, although no motion to change the order and send the case to a court which would have had jurisdiction is made by the objecting party: *Sayles v. Deluhrey*, 64–109.

Statute not applicable: Such provision applies only to such errors as without motion would not be called to the attention of the lower court: *Brown v. Rose*, 55–734.

Motion for new trial: The necessity of a motion being made below to correct errors, etc., is not removed by the following section, making motion for new trial unnecessary to secure the review of a cause in the supreme court: *Webster v. Cedar Rapids & St. P. R. Co.*, 27–315.

4398. Motion for new trial. 3169. The supreme court may review and reverse on appeal any judgment or order of the district [or circuit] court, although no motion for a new trial was made in such courts. [11 G. A., ch. 49, § 1.]

The preceding section applies only to such errors as, without motion, would not be called to the attention of the lower court. This section renders a motion for new trial in the lower court unnecessary in order to authorize the appellate court to review any judgment or order of the court below: *Brown v. Rose*, 55–734; *Drefahl v. Tuttle*, 42–177.

Before the enactment of this statutory provision, *held*, that a judgment would not be reversed, on the ground that the verdict was contrary to the evidence, when a motion for a new trial upon that ground had not been made in the court below: *Brayton v. Boone*, 19–506.

But the question was unsettled whether a motion for a new trial was necessary to bring up for review errors of law occurring at the trial: *Presnall v. Herbert*, 34–539; *Rindskoff v. Lyman*, 16–260.

A motion for new trial was, however, held not necessary in order to enable the supreme court, on appeal, to review a decision upon the admissibility of evidence properly excepted to when such decision virtually disposes of the whole case: *McCoy v. Julien*, 15–371.

This provision affects the remedy, and hence is not unconstitutional as applying to actions arising before its passage: *Johnson v. Semple*, 31–49.

Nor is it in conflict with Const., art. 5, § 4, providing that in actions at law the supreme court shall be a court for the correction of errors. Previous to the enactment of this provision, that court would review, as matter of law, the ruling of the lower court upon a motion for a new trial on the ground that the verdict was contrary to the evidence, and this act simply authorizes the court to treat the case as if such motion for a new trial was made and entered, and may be regarded as a standing motion in all cases: *Coffin v. City Council*, 26–515.

Where exceptions are duly preserved in the course of the trial they may be brought up on appeal, although the motion for new trial is stricken from the files because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 58–150.

The necessity of a motion being made below to correct errors, etc., is not removed by the provision making motion for new trial unnecessary to secure the review of a cause in the supreme court: *Webster v. Cedar Rapids & St. P. R. Co.*, 27–315.

Under this provision, however, errors of law committed by the judge might be reviewed on appeal without any motion for new trial: *Delvee v. Boardman*, 20–446; *Presnall v. Herbert*, 34–539.

Nor does such provision dispense with the necessity of taking exceptions to rulings objected to: *Root v. Illinois Cent. R. Co.*, 29–102; *Eason v. Gester*, 31–475.

Where defendant moved in arrest of judgment, and thereupon, in order to cure the defect insisted upon, plaintiff amended his petition and introduced certain evidence to which a demurrer was sustained, the judgment arrested, and defendant recovered costs. *held*, that no motion for a new trial was necessary in order to present the exceptions, duly taken, on appeal: *Coates v. Galena & C. U. R. Co.*, 18–277.

4399. Finding of facts; evidence certified. 3170. Where a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same whenever it shall appear from a certificate of the

judge, agreement of parties or their attorneys, or, in case the evidence consists wholly of written testimony, from the certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below. [11 G. A., ch. 49, § 2.]

How reviewed: Before the enactment of this section it was held that, in order to enable the supreme court, on appeal, to review the correctness of the findings of the court below upon the facts, exceptions must have been taken to such findings and a new trial asked for: *Kelso v. Ely*, 11-501; *Gillett v. Foreman*, 11-512.

Before the enactment of this section there was, in an action at law tried by the court without a jury, no way of securing the review on appeal of the conclusions of the court upon the evidence, unless there was a special finding of facts by the court, except by a motion for new trial based upon the ground that the judgment was against the evidence, and an exception to the ruling on such motion: *Warner v. Pace*, 10-391; *Corner v. Gaston*, 10-512; *Roberts v. Hoyt*, 12-345: *Allman v. Gilbert*, 14-538; *Robison v. Saunders*, 14-539; *Reynolds' Heirs v. Miller*, 14-97.

The certificate referred to cannot be made by the judge in vacation, unless by agreement of parties. The term "judge" means the same as if the word "court" had been used: *Luse v. Des Moines*, 22-590.

In the absence of the certificate, or an agreement of the parties, the supreme court cannot, on appeal, review the conclusion of the court upon the evidence: *Wormley v. District T'p*, 45-666.

It is only when the evidence is all before the supreme court that it can review a finding of the court below as to a question of fact: *Van Riper v. Baker*, 44-450.

As to certificate of clerk, short-hand notes, etc., see notes to § 4414.

Assignment of errors: This section does not dispense with assignment of errors: *Sisters of Visitation v. Glass*, 45-154.

Trial de novo on appeal: The section is applicable only in actions at law, and therefore does not interfere with the provisions for securing a trial *de novo* in equity cases: *Ibid.*; *Vinsant v. Vinsant*, 47-594.

Finding of facts, and effect thereof, see § 3950 and notes.

As the finding of the court upon a question of fact in an action at law has the force of a verdict of a jury, the admission of improper evidence in such a case will be a ground for reversal, as fully and to the same extent that it would be in an action tried by a jury, where it does not appear but that such improper evidence was considered by the court in its final determination of the case: *Jaffray v. Thompson*, 65-323.

4400. How docketed. 3171. The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. [R., § 3508.]

A case should on appeal be entitled as in the lower court: *Hollenbeck v. Stearns*, 73-570.

Where a case is docketed in the supreme court under another title than that in which it is tried in the lower court the appeal will be dismissed: *Lewis v. Minthorn*, 73-80.

4401. Process. 3172. The court may issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction. [R., § 2635; C., '51, § 1558.]

4402. Time for taking; amount in controversy; certificate. 3173. Appeals from the district [and circuit] courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. But no appeal shall be taken in any cause in which the amount in controversy between the parties as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court, but this limitation shall not affect the right of appeal in any cause in which is involved any interest in real property. [R., § 3507; C., '51, § 1973.]

I. TIME FOR TAKING.

In computing the six months within which an appeal may be taken, the day on which judgment was rendered will be excluded and the corresponding day at the end of the time included: *Carleton v. Byington*, 16-588.

Therefore, *held*, that an appeal taken September 30, from a judgment rendered March 30, was in time: *Parkhill v. Brighton*, 61-103.

The service of the notice within the time specified is sufficient. It is not necessary that it be filed with the clerk within that time: *Baldwin v. Tuttle*, 23-66.

Securing the clerk's fees for a transcript is not necessarily a part of the perfecting of the appeal which must be completed within six months: *Fairburn v. Goldsmith*, 56-347.

An appeal from final judgment taken within the proper time will raise objections to previous proceedings in the case although

more than the time prescribed for taking the appeal has elapsed since such previous proceedings: *Holladay v. Johnson*, 12-563.

Where judgment relates back: Where judgment is entered in vacation as of the preceding term, by agreement, the period for taking appeal will commence to run from the time the decision is, in fact, made, and not from the time to which by agreement it relates back: *Carter v. Sherman*, 63-689.

Where the judgment appealed from bore date more than the prescribed length of time before the taking of the appeal, but it appeared that the cause was held under advisement and decided in vacation and within the prescribed time, without any agreement that judgment should be entered as of the last day of the preceding term, *held*, that the appeal was not barred: *Kendall v. Lucas County*, 26-395.

Where a decree, in an action seeking to have set aside a deed of real property, and for a reconveyance thereof, and also for an accounting of rents and profits and improvements, was rendered for reconveyance upon payment by plaintiff of the sum paid, with interest, and also the value of the improvements, less rents and profits, etc., and the case was sent to a referee to take an account, *held*, that an appeal from the decree as to the reconveyance, etc., must be taken within six months from the time such decree was entered, and that the questions involved therein could not be raised on an appeal taken more than six months after that time, but within the six months after a final decree, based upon the referee's report, as to the accounting. Such decree is to be deemed final, although something further is required to be done afterwards: *McMurray v. Day*, 70-671.

Where a decree was rendered in a cause, adjudicating all the issues between the original parties, but the final disposition of the cause was delayed by reason of an intervention, *held*, that the time for taking an appeal from the decision of the issues between the original parties commenced to run from the time of such first decree, and its correctness could not be called into question in any appeal taken after six months from such decree: *Carter v. Davidson*, 73-45.

Ruling on motion for new trial: An appeal taken within six months from the decision of the court on a petition for a new trial, but more than six months from the rendition of the judgment upon the verdict, does not bring up for review the action of the court in rendering such judgment and its proceedings prior thereto, the appeal therefrom being barred: *Cohol v. Allen*, 37-449; *Carpenter v. Brown*, 50-451.

Where judgment is entered and afterwards a motion for new trial is made and overruled, an appeal from the judgment must be taken within six months after the entry thereof, and an appeal from the overruling of the motion for a new trial will not raise any question not involved in the ruling upon such motion: *Patterson v. Jack*, 59-632.

An appeal in an equity case not taken until more than six months after the rendition of judgment, although within six months from the time of the overruling of a motion for a new trial, does not bring up for consideration in the supreme court any of the proceedings of the court prior to the filing of the motion, and therefore does not enable the court to try the case *de novo*: *Bosch v. Bosch*, 66-701

II. AMOUNT IN CONTROVERSY.

Determined by the pleadings: To justify an appeal it must appear from the pleadings that it was possible for the court, consistently therewith, to render judgment against one of the parties to the action for more than one hundred dollars: *Madison v. Spitznogle*, 58-369.

When the amount in controversy appears by the pleadings to exceed one hundred dollars an appeal may be taken, and it is immaterial that, upon the trial, the evidence does not support the claim to that amount: *Ormsby v. Nolan*, 69-130.

The allegations and not the prayer of the pleading govern in determining the amount in controversy: *Cooper v. Dillon*, 56-367.

The amounts of the original claim and a counter-claim cannot be added together in determining the amount in controversy under this section: *Madison v. Spitznogle*, 58-369; *Fox v. Duncan*, 60-321.

Where defendant concedes a part of the claim, the amount in controversy is the part not admitted: *Thompson v. French*, 57-559.

Tender: Thus, if by tender defendant reduces the amount of plaintiff's claim which is contested to not exceeding one hundred dollars, there can be no appeal without a certificate: *Marlow v. Marlow*, 56-299.

If plaintiff's claim is admitted and a counter-claim interposed, the counter-claim determines the amount in controversy: *Alsip v. Hard*, 38-697.

Where defendant claims a credit of more than one hundred dollars on a claim for less than that amount, but does not interpose a counter-claim, the amount in controversy does not exceed the plaintiff's claim: *Kurtz v. Hoffman*, 65-260.

Part of claim abandoned: Where the plaintiff claims more than one hundred dollars, but no evidence is introduced in support of a part of it, so that such part may be deemed abandoned, such part will not be considered in determining the amount in controversy: *Ibid.*

If by reason of dismissal of a part of plaintiff's cause of action the amount in controversy is reduced below one hundred dollars, the right of appeal does not exist: *Cooper v. Wilson*, 71-204.

So by amending after verdict plaintiff may reduce the amount of claim so as to prevent the right of appeal: *Wilson v. Hawkeye Ins. Co.*, 74-212.

Consolidation of actions on appeal from a justice, whereby the amount in controversy is increased to over one hundred dollars, will entitle to an appeal: *Brock v. Barr*, 70-390; *Edwards v. Cosgro*, 71-296.

Interest included: Where an action to set aside a previous judgment for one hundred dollars and costs was brought a year after the rendition of such judgment, *held*,

that the interest accrued on the judgment would be included in determining the amount in controversy: *Dryden v. Wyllis*, 51–534.

Where the claim in controversy is for one hundred dollars and interest from commencement of suit, it is sufficient to entitle to an appeal: *Koltze v. Messenbrink*, 74–242; *Griffin v. Harriman*, 74–436.

Where writ of error was brought in the circuit court to review the judgment of a justice of the peace for one hundred dollars, *held*, that interest accrued on the judgment before suing out the writ of error would be included in determining the amount in controversy in the circuit court, and that the amount involved exceeded one hundred dollars: *Holmes v. Hull*, 48–177.

But in case of an appeal from a judgment of a justice of the peace for one hundred dollars, *held*, that the amount in controversy in the circuit court was to be determined by the pleadings in the justice's court, and that interest on the justice's judgment could not be included: *Hays v. Chicago, B. & Q. R. Co.*, 64–593

Costs taxed in the case and included in the judgment cannot be considered in determining the amount in controversy. That depends upon the pleadings: *Hakes v. Dott*, 54–17; *Bradenberger v. Rigler*, 68–300.

Costs in justice's court: In an appeal from the action of a court on appeal from a judgment before a justice of the peace, the costs in the justice's court cannot be included in determining the amount in controversy: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723.

In an action of replevin wherein defendant does not claim ownership of the property but only an interest therein, less than one hundred dollars in value, such interest and not the entire value of the property determines the amount in controversy: *Mohme v. Livingston*, 54–458; *Davis v. Upright*, 54–752.

Appeal dismissed: Where the amount in controversy does not exceed one hundred dollars, and there is no certificate of the judge, the appeal will be dismissed: *Harrington v. Pierce*, 38–260.

Amount must appear to defeat jurisdiction: As the supreme court has appellate jurisdiction in every case not falling within the exception of the statutory provision as to amount in controversy, the fact as to the amount, to bring a case within the exception and defeat the jurisdiction of the supreme court on appeal, must affirmatively appear: *Babcock v. Board of Equalization*, 65–110; *Henkle v. Keota*, 68–334.

This provision as to the amount in controversy applies only to cases where the amount in controversy as shown by the pleadings does not exceed one hundred dollars. It does not have reference to cases where the pleadings show no amount in controversy: *District T'p v. Independent Dist.*, 72–687.

III. CERTIFICATE AS TO QUESTION INVOLVED.

Must state the question: It is not sufficient that the certificate of the judge states that the case "involves the determination of a question of law," etc., but it must state the question of law upon which the decision of the supreme court is desired. (So *held* in pursuance of a rule of court requiring the question to be set out, overruling in this respect *Fell v. Burlington, C. R. & M. R. Co.*, 43–177, decided before the adoption of such rule.) If the question is not thus set out where a certificate is necessary, the appeal will be dismissed: *King v. Derby*, 51–11; *Wetz v. Austin*, 51–342; *Minnich v. Chicago, R. I. & P. R. Co.*, 51–363; *Throckmorton v. Horton*, 52–737; *Dawley v. Houck*, 53–733.

And such rule of the court is not void as limiting the jurisdiction of the court further than authorized by statute: *Wilson v. Iowa County*, 52–339.

The question must be one of law, as distinguished from one of fact, and the certificate must specifically point out the questions of law, which must not be mingled with questions of fact: *Gilbooby v. Chicago, M. & St. P. R. Co.*, 61–53; *Chilton v. Chicago, R. I. & P. R. Co.*, 72–689.

The certificate should not submit questions of fact: *Riddle v. Fletcher*, 72–454.

It is not sufficient that the certificate states that "a question" is involved: it must state that the case involves "a question of law:" *Kierulff v. Adams*, 40–31.

Questions presented in a particular case *held* not to be questions of law: *Landers v. Boyd*, 59–758.

Where the court is required to determine the law on a given state of ultimate facts, as certified, all of the necessary facts should be found by the trial court: *Vreeland v. Ellsworth*, 71–347.

Mere abstract questions: The statute does not contemplate that mere abstract questions of law shall be certified, but only such as are decisive of the case: *Eckert v. Fickel*, 59–545.

Certificate must intelligibly state the questions without the record: The certificate must point out the questions upon which it is desirable to have the opinion of the court in such a way as to be intelligible in and of themselves, without requiring the court to examine the whole case and determine what the questions are: *Hawkeye Ins. Co. v. Lewis*, 63–514.

The certificate must be sufficiently explicit and definite to explain itself without reference to the record or any part of it: *Meeker v. Chicago, M. & St. P. R. Co.*, 64–641; *White v. Beatty*, 64–331; *Bower v. Kavanaugh*, 62–757.

The questions certified should embrace statements of the specific facts which are to be taken into consideration by the court; it is not sufficient to refer generally to the facts as shown by the evidence: *Brown v. Petrie*, 56–209.

A certificate of the judge which fails to indicate the specific question or questions to be determined, but presents the whole case and every question involved therein, without showing what they are, or what one or more of them it is deemed desirable to present for determination, is not sufficient: *Dunn v. Zoller*, 61–227.

The certificate must contain the abstract question of law which it is desired the supreme court shall determine. It will not make an examination of the record in order

to determine what ruling it is desired to review: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62–494; *Long v. Chicago, M. & St. P. R. Co.*, 64–541.

A question of law should be plainly set out in the certificate: *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

The certificate should point out the question to be determined and recite the facts upon which the question of law arises, so that it may be determined without resorting to the evidence in the case. It is not sufficient to refer the court to the record and ask it to determine whether there was error in particular matters: *Ibid.*

The certificate must set out and define the question which it is thought desirable to have determined, and the question set out should be so explicit as to render an examination of the record unnecessary: *Bennett v. Parker*, 67–451.

It is not proper to certify a general question which cannot be fully determined without a search of the entire record and a determination of two or more questions: *Wheaton v. Foster*, 58–661.

Where the certificate stated that there was a question of law involved in certain instructions which involved more than one question, and did not point out which one it was desired to have determined, *held*, that it was not sufficient: *Gregg v. White*, 55–744.

Several questions must be so stated that the supreme court can readily ascertain the point to be determined, and that it is a question of law. Questions of law and fact cannot be mingled together under the guise of a question of law: *Centerville v. Drake*, 58–564.

The certificate in a particular case *held* sufficient: *Nichols v. Wood*, 66–225.

Examination of the record: The court will sometimes look at the record for the purpose of determining whether the question certified properly arises in the case, and will refuse to consider the question if it appears that it has not been properly raised: *Swails v. Cissna*, 61–693; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69–320.

The court will not, upon a certificate, consider an instruction differing from that which appears by the record to have been given in the case: *Cunningham v. Chicago, B. & Q. R. Co.*, 67–514.

The court cannot answer questions certified, but which are not presented in the record: *Ibid.*; *Miller v. Buena Vista County*, 68–711.

And the court will not consider a certificate sufficiently specific which requires examination of the record to determine what the question certified is: *Votaw v. Corwin*, 62–39.

Certificates held defective: A certificate of a question as to whether judgment could be rendered for a party "upon the agreed statement of facts filed in the case," *held* not sufficient: *Dawley v. Houck*, 53–733.

Held, in a particular case, that the certificate did not sufficiently point out the question of law upon which the opinion of the supreme court was desired: *Fitch v. Flynn*, 58–159.

In cases which come before the supreme court only upon a question certified by the judge of the lower court, the supreme court has jurisdiction only to determine such questions of law as may be certified. If the question certified is one of fact, it cannot be determined: *Hanna v. Collins*, 69–51.

Must set out question: A certificate which does not set out the question of law upon which it is desirable to have the opinion of the supreme court is not sufficient: *Bradenberger v. Rigler*, 68–300.

A certificate is not sufficient which asks whether certain action was erroneous "in view of all the evidence in the case:" *Gilloolby v. Chicago, M. & St. P. R. Co.*, 61–53.

Where the appellant's abstract failed to show that the judge's certificate stated that it was desirable to have the opinion of the supreme court on the question certified, *held*, that the supreme court did not acquire any jurisdiction by the appeal: *Milliken v. Daugherty*, 59–294.

Sufficiency of evidence: While the sufficiency of the evidence to support a verdict may, in a certain sense, be said to be a question of law, yet it is not such a question as can be certified: *Hudson v. Chicago & N. W. R. Co.*, 59–581.

Questions involved: The certificate must state that the questions certified are involved in the case: *Van Sickle v Downs*, 72–624; *Ball v. Van Riper*, 74–146; *Beach v. Donovan*, 74–543.

Questions must be such as arise and are argued: It is not the province of the supreme court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued where it is shown that they do not arise in the case: *Spiesberger v. Thomas*, 59–606.

Questions not certified: Only such questions as are presented in the certificate will be considered: *Thorpe v. Dickey*, 51–676; *Miller v. Haley*, 66–260.

The supreme court has no jurisdiction in such cases to determine any questions except those certified: *Ardery v. Chicago, B. & Q. R. Co.*, 65–723; *Vreeland v. Ellsworth*, 71–347; *Chilton v. Chicago, R. I. & P. R. Co.*, 72–689.

Questions presumed to have arisen: Where the question is certified by the trial judge, it will be presumed that it arises in the case unless it is shown affirmatively otherwise: *Noble v. Chase*, 60–261.

It will be presumed that the facts are correctly found, whether any finding appears of record or not, unless the contrary appears: *Thorpe v. Dickey*, 51–676.

Questions certified will be presumed to have been involved in the case; but where it is claimed by the appellee that such questions did not arise in the case the supreme court will look into the record to determine that fact: *Parker v. Michaels*, 74–209.

The court will not go back of the record to determine whether an assumption of facts therein is warranted: *Miller v. Haley*, 66–260.

Or whether the case involves the question of law stated in the certificate: *Curran v. Excelsior Coal Co.*, 63–94.

Presumption as to facts; remanding: The presumption being that the court found the fact upon which the question of law is based, and that such fact appeared of record, upon a

determination of the question of law the case may be remanded for final judgment, and the party will not be entitled to a further trial unless on account of newly-discovered evidence: *Andrews v. Burdick*, 64–692.

Provisions constitutional; cases in equity: The statutory provision requiring a certificate in cases involving less than the amount named applies to chancery cases as well as actions at law, and as thus applied is not unconstitutional, as depriving a party in such cases of a right of appeal and trial *de novo*. It amounts simply to a restriction or regulation of appeals in such cases: *Andrews v. Burdick*, 62–714; *Johns v. Pattee*, 61–393; *Teager v. Landsley*, 69–725.

Time of making certificate: The certificate of the judge must be made at the time of the trial, and before the adjournment of the term of court at which the judgment is rendered: *Fallon v. District T'p*, 51–206; *Independence v. Purdy*, 48–675; *Rose v. Wheeler*, 49–52; *Lomax v. Fletcher*, 40–705; *Rivers v. Cole*, 38–677; *Hershfield v. First Nat. Bank*, 39–699; *Nicely v. Rogers*, 39–441.

The parties cannot by stipulation provide that the certificate may be made in vacation: *Fallon v. District T'p*, 51–206.

The certificate must be given at the time of the trial, unless delayed upon order or for cause: *Angus v. Shannon*, 60–311.

Where the date of certificate shows that it was given after the term at which the case was tried it cannot be considered: *Sayles v. Smith*, 71–241.

The certificate must be signed by the trial judge at the term at which the case is tried. A signature afterwards made *nunc pro tunc* will not give the supreme court jurisdiction, even though the failure to sign the certificate at the term was an oversight on the part of the judge: *Hinesley v. Mahaska County*, 69–511.

The certificate cannot be properly made until the case is finally disposed of, as by the ruling on a motion vacating a judgment and granting a new trial: *Hickok v. Buell*, 51–655.

The making and filing of a certificate during the same term, but subsequent to the rendition of judgment, is not sufficient; it must be made by the time the final judgment is rendered: *Foye v. Walker*, 62–251.

Where the certificate was filed after judgment, but it did not appear when it was signed, *held*, that the appeal would be dismissed: *Hakes v. Dott*, 54–17.

Where the certificate was entitled of a proper term, but did not show when it was made, nor that it was made at the time of the trial, or even during the term of the trial, *held*, that it was not sufficient: *Babcock v. Chickasaw County*, 60–752.

Where it appears that the certificate was signed at the proper time it will be presumed that it was also filed in proper time: *Long v. Chicago, M. & St. P. R. Co.*, 64–541.

Not a matter of right: The purpose of the law in requiring a certificate in such cases was to prevent appeals in such cases in which the amount is trifling, unless there is an important question of law involved which should be decided in order that the decision may serve as a precedent, and the trial judge should not give a certificate unless he deems such question to be involved: *Meeker v. Chicago, M. & St. P. R. Co.*, 64–641.

Cannot be stipulated for: The parties cannot stipulate that the judge shall give a certificate in such cases. It is not a right of the unsuccessful party to have the certificate, and it can only properly be made where the judge believes it to be desirable for the proper administration of justice that some specified question in the case should be settled by the court of last resort: *Fallon v. District T'p*, 51–206.

Appellant cannot question the correctness of a certificate given by the trial judge, stating the questions on which the opinion of the supreme court is desired. The court is not bound to give any certificate at all, and if the appellant does not get the questions certified which were tried he is not bound to appeal: *Hager v. Adams*, 70–746.

The certificate is jurisdictional: The sufficiency of the certificate is a jurisdictional matter, and if it is not sufficient the court will take notice of it, although the objection is not made: *White v. Beatty*, 64–331.

Jurisdiction is conferred by the certificate and not by the pleadings or the evidence: *Beach v. Donovan*, 74–543.

IV. INTEREST IN REAL ESTATE.

Right of public highway: Where the case involves the right of the public to occupy and use real estate as a highway, an interest in real estate is involved within the meaning of this section: *McBurney v. Graves*, 66–314.

Establishment of lien: The fact that it is sought to establish a lien, special or general, upon real estate, does not make the case one involving an interest in real property, authorizing an appeal without regard to the amount in controversy: *Colyar v. Pettit*, 63–97; *Johns v. Pattee*, 61–393.

Therefore, *held*, that an action to foreclose a mechanic's lien was not within the exception: *Andrews v. Burdick*, 62–714.

4403. Appeal by co-parties. 3174. A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court. [R., § 3517; C., '51, § 1979.]

Co-parties: It is essential in an appeal from the decree in a partition proceeding taken by one defendant that notice of appeal be served upon his co-defendant, otherwise the supreme court cannot review a ruling which would necessarily affect the interest of such co-defendant, and the appeal will be dismissed: *Hunt v. Hawley*, 70–183.

Failure to serve notice upon co-parties is not jurisdictional, but the court can consider such questions in the case as affect only the rights and interests of the appellant and the adverse party: *Moore v. Held*, 73–538.

Where the *supersedeas* bond recited expressly that one of two defendants alone had appealed, and such defendant's name alone

appeared in the heading of the notice of appeal, *held*, that he only could be considered as having appealed, although the body of the notice spoke of the appeal being by defendants: *Webster v. Cedar Rapids & St. P. R. Co.*, 27-315.

One defendant cannot upon appeal complain of any error which results in injury only to his co-defendant: *Eyre v. Cook*, 9-185.

Must be party to the record: One who has not had himself made a party to the record cannot appeal from the judgment, although having an interest therein: *Borgalthous v. Farmers', etc., Ins. Co.*, 36-250; *Ferguson v. Board of Supervisors*, 44-701.

If a person having an interest in the result desires to question the action of the court, he should apply to be made a party. Until he is thus made a party he is in no way liable for costs, and therefore cannot be allowed to interfere with the rights of the original parties in the suit by appeal: *State ex rel. v. Jones*, 11-11.

If such a person should apply to be made a party and his application be refused, such refusal might be investigated upon appeal: *Phillips v. Shelton*, 6-545.

Where the complainant simply asks to redeem, a senior incumbrancer may appeal from an improper order in permitting the redemption, so that he does not get the full amount due on his mortgage, although he did not answer the bill: *White v. Hampton*, 13-259.

The parties for whose benefit suit is brought or defended, under § 3754, are not parties in such sense as to have the right of appeal: *Fleming v. Mershon*, 36-413.

In an action against the unknown owners of certain land, *held*, that there could be no appeal on behalf of the land, or the owners thereof, unless some one appeared in the action and made himself a party as the owner: *Fuller v. Unknown Owner, etc.*, 9-430.

Persons for whom plaintiff sues, but not named in the petition as plaintiffs, cannot appeal. And plaintiff in such a case has no ground to complain if the court strikes from the petition such parts thereof as have reference to such plaintiffs not named: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72-556.

A deceased party cannot appeal nor can the right of his estate be adjudicated if an appeal in form is taken: *Tracy v. Roberts*, 59-624.

4404. Parties not joining. 3175. If the other co-parties refuse to join, they cannot, nor can any of them, take an appeal afterwards; nor shall they derive any benefit from the appeal, unless from the necessity of the case. [R., § 3518; C., '51, § 1980.]

A party who has not appealed cannot insist upon other or different relief from that awarded him in the court below: *Alexander v. Buffington*, 66-360; *Devoe v. Hall*, 60-749.

A party not appealing can have no relief: *Huff v. Olmstead*, 67-598; *Lamb v. Council Bluffs Ins. Co.*, 70-238.

Parties who do not join in the appeal cannot present questions affecting their claims or interest not involved in the questions arising upon the appeal as taken by appellant. They can have no modification of the decree: *Butler v. Barkley*, 67-491.

4405. When deemed to join. 3176. Unless they appear and decline to join, they shall be deemed to have joined and shall be liable for their due proportion of costs. [R., § 3519; C., '51, § 1981.]

If such co-defendant does join in the appeal, appellant may thereupon urge any objection as to the judgment against his co-defendant which ultimately affects his own liability: *Engleken v. Webber*, 44-558.

If co-parties, upon being served, elect to join in the appeal, they are entitled to all the benefits thereof, and may be allowed to file an assignment of errors, and be heard: *Barlow v. Scott's Adm'rs*, 12-63.

4406. Part of judgment or order. 3177. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment, or part of a judgment, or order not appealed from, but the same shall proceed as if no such appeal had been made. [R., § 3510.]

NOTICE AND FILING TRANSCRIPTS.

4407. How taken; notice. 3178. An appeal is taken by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [R., § 3509; C., '51, § 1974.]

Error in notice: The fact that the notice of appeal designates the judgment as having been rendered at a different day from that shown by the transcript will not defeat the appeal, it not being claimed but that the appeal is from the judgment intended to be re

ferred to in the notice or that it is not taken in time: *Kennedy v. Rosier*, 71-671.

Service of notice: To give the supreme court jurisdiction, the service of notice upon appeal is as essential, where there is no voluntary appearance, as is the service of original notice in suits commenced in the lower court: *McClellan v. McClellan*, 2-312; *Lewis v. Miller*, 4 G. Gr. 95.

Service of notice of appeal upon the adverse party and upon the clerk is necessary to give the supreme court jurisdiction of the cause, and the fact of such service should be stated in the abstract: *Phillips v. Follett*, 69-39.

Appellant can have no relief on appeal as against a judgment in favor of a party not served with notice: *Hunt v. Clark*, 46-291.

Where the notice of appeal was directed to J. M. W. instead of to John M. W., and acceptance of service was made by the attorney of the proper person, *held*, that the defect was immaterial: *Horst v. Wagner*, 43-373.

The statute makes no provision for service by leaving a copy with a member of the party's family, as is authorized in case of service of an original notice, and such a service will not be valid: *Draper v. Taylor*, 47-407.

Service of notice of appeal upon the wife of attorney for appellee is not sufficient. Such notice of appeal can be served only in the manner prescribed by statute: *Webster v. Carson*, 69-243.

Service of notice of appeal may be made by taking a written acknowledgment of service by the person upon whom it is served: *Sanxey v. Iowa City Glass Co.*, 68-542.

Service of notice of appeal on the deputy clerk, shown by an acceptance of service signed by him with the name of the clerk by himself as deputy, is sufficient notice of appeal: *Ibid.*

Service of notice cannot be made by a party to the action: *Draper v. Taylor*, 47-407; *Marion County v. Stanfield*, 8-406.

Previous to the enactment of the provisions of § 4444, there was no method authorized for service of notice of appeal by publication: *McClellan v. McClellan*, 2-312.

Filing with clerk: It is not necessary that the notice be filed in the office of the clerk within the time allowed for perfecting the appeal: *Baldwin v. Tuttle*, 23-66.

But, upon service of the notice, it should be filed or deposited with the clerk, and it thereupon becomes one of the original papers in the case and a part of the record. It is such a portion of the record as that it may be corrected by proper proceedings in the court in which it is filed, for instance, for the purpose of making it show the correct date of service upon the clerk: *Brier v. Chicago, B. & P. R. Co.*, 66-602.

New notice after delay in procuring appeal: Where four years had intervened between the taking of the appeal and the filing of the transcript, *held*, that the case would not be heard on motion of the appellant without additional notice to appellee, who had made no appearance: *Byington v. Robinson*, 16-591.

Must appear: Service of notice of appeal is essential to give the court jurisdiction of the case, and that fact must be shown by the record: *Michel v. Michel*, 74-577.

The fact of the taking of the appeal must be shown in the abstract or the appeal will not be considered: *Names v. Names*, 74-213.

Substituted defendant: Where plaintiff appealed from an order substituting a third party in place of the sheriff against whom the action was brought, *held*, that the appeal might be prosecuted by plaintiff upon the sheriff without notice being served upon the substituted party, the substitution having been made on the joint application of the sheriff and such third party: *Sunberg v. Babcock*, 61-601.

Notice upon supervisors: The county auditor is not the agent of the board of supervisors in such sense that service of notice of appeal can be made upon him in an action against the members of such board: *Polk v. Foster*, 71-26.

A notice of appeal from a judgment brings up all the objections properly saved on the trial of the cause, including the motion for a new trial: *Gulliher v. Chicago, R. I. & P. R. Co*, 59-416.

Appearance in the supreme court is a waiver of any irregularity in taking the appeal: *Romaine v. Commissioners*, Mor., 357. But if the lower court had no jurisdiction it will not be conferred by an appeal: *Burlington University v. Stewart's Ex'rs*, 12-442.

Such appearance is a waiver of notice: *Morrow v. Carpenter*, 1 G. Gr, 469.

Where there is no judgment rendered in the court below from which an appeal may be taken, consent of parties will not give the supreme court jurisdiction: *Long v. Long*, Mor., 381; *Rutter v. State*, 1-99; *Kimble v. Riggin*, 2 G. Gr., 245.

Appearance in the supreme court by filing additional abstract, etc., will not waive objection on account of want of notice, if such appearance is made prior to the expiration of the time during which notice might be served: *Brier v. Chicago, B. & P. R. Co.*, 66-602.

Unless the abstract shows the taking of an appeal it does not show that the supreme court has acquired jurisdiction of the case, and the appeal will be dismissed, even though the appellee appears and does not urge the objection: *Plummer v. People's Nat. Bank*, 73-752.

Effect of appeal: An appeal from a final decree in a chancery case deprives the trial court of all further jurisdiction in the case until it is remanded. It cannot make an order retaxing the costs, or amending the record: *Levi v. Karrick*, 15-444; *McGlaughlin v. O'Rourke*, 12-459.

And this rule applies also in actions at law, when the entire cause is brought to and pending in the supreme court on appeal: *Turner v. First Nat. Bank*, 30-191; *Carmichael v. Vandebur*, 51-225.

Correction of record: The appeal does not so divest the jurisdiction of the lower court but that it may order a lost record substituted, or correct its record by supplying omissions, and do whatever else is proper to be done to enable the supreme court to review its alleged errors: *Steiner v. Steiner*, 49-70; *Becker v. Becker*, 50-139; *State v. Dillard*,

52-749; *Mahaffy v. Mahaffy*, 63-55; *Maxon v. Chicago, M. & St. P. R. Co.*, 67-226; *Buckwalter v. Craig*, 24-215.

The court below may settle and sign a bill of exceptions after appeal is taken, if done within the time allowed for that purpose: *Tiffany v. Henderson*, 57-490.

The lower court retains jurisdiction after the taking of the appeal to perfect the record by giving the certificate as to the evidence introduced in an equitable case: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

After the taking of appeal, a motion to amend the record cannot be entertained by the lower court without notice to the opposite party: *Eno v. Hunt*, 8-436.

4408. When perfected; transcript. 3179; 22 G. A., ch. 35. An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk shall forthwith transmit by mail, express, or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant in writing in the notice has directed, to which shall be appended copies of the notices of appeal, and of the supersedeas bond if any. But no transcript of the record need be forwarded to the supreme court until a denial of appellant's abstract of the record has been served and if no denial shall be made no transcript of the record shall be required. If such denial shall be entered without good and sufficient cause therefor the costs for such transcript of the record shall be taxed to the party making the denial. [R., § 3511; C., '51, §§ 1975-6.]

Appeal perfected: Where the abstract states that plaintiff appealed it will be assumed, in the absence of any showing to the contrary, that everything was done which was necessary in order to take an appeal: *Day v. Hawkeye Ins. Co.*, 72-597.

The appeal is not taken and perfected until the proper notice is served on the clerk of the court: *Fitzgerald v. Kelso*, 71-731; *State v. Rogers*, 71-753.

The appeal is perfected when service of notice is made, etc., as here contemplated, although the notice to co-parties provided for in § 4403 is not given: *Moore v. Held*, 73-538.

Fee for transcript: The appeal is not perfected until the fees for transcript are paid or secured, and giving a *supersedeas* bond cannot be regarded as "securing" such fees; and *held*, that after service of notice of appeal and filing of *supersedeas* bond, but before paying or securing costs of transcript, appellant had the right to abandon his appeal, and that the trial court had authority to entertain application by such party for a new trial, and grant it: *Loomis v. McKenzie*, 57-77.

The time within which the appeal is to be perfected by paying or securing the fees for transcript is not fixed. Filing an abstract and having the cause docketed is evidence of good faith, and the cause will not be dismissed for want of transcript. While one must be furnished, if insisted upon by appellee, time will be given to do so, unless appellant or his counsel have had notice that one would be required, and through negligence have failed to furnish it: *Fairburn v. Goldsmith*, 56-347.

Failure to file transcript: The objection that appellant has not filed a transcript must be raised by motion and not after submission upon the argument: *Simplot v. Dubuque*, 49-630.

Appeal dismissed or judgment affirmed for failure to file transcript, see § 4410.

When abstract is to be deemed denied so that a transcript is necessary, see notes to § 4424.

Transcript may be unnecessary; reporter's notes: Where the abstract of appellant is satisfactory to the opposite party, there is no necessity for the clerk's transcript, nor for the transcript of the reporter's notes which have been properly filed in the original form in the court below. The appellant may make out his abstract from whatever source he sees fit: *Hampton v. Moorhead*, 62-91.

If the abstract is not controverted by appellee, the court will not look into the transcript of the original evidence, nor will it refuse to try the case simply because such transcript is not filed: *Austin v. Bremer County*, 44-155.

4409. When tried. 3180. The notice of appeal must be served at least thirty days, and the cause filed and docketed at least fifteen days before the first day of the next term of the supreme court, or the same shall not then be tried unless by consent of parties. If the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term. [R., § 3513; C., '51, § 1978.]

4410. Failure to file transcript and docket. 3181. If the appellant fails to file a transcript and have the cause docketed as provided in the preceding section, or fails to file at the time the transcript should be filed, the certificate of the clerk of the inferior court, stating when he was served with notice, and that he has not had sufficient time to prepare the transcript, the appellee may file a certified copy of the judgment or order appealed from,

and of the notice served on such clerk, and, on motion, have the appeal dismissed or the judgment or order appealed from affirmed. [R., § 3514.]

In the absence of the certificate of the clerk below, excusing the failure to file a transcript on the ground that he has not had sufficient time to prepare it, the appellee may, by filing a certified transcript of the judgment, have the judgment affirmed on motion. This section is not merely directory, but must be complied with to entitle a party to be heard in the supreme court, unless waived by agreement or act of the appellee: *Turner v. Hine*, 37–500.

Appellee can only have the appeal dismissed or the judgment affirmed when notice of appeal has been served the proper length of time before the term; but a showing that the clerk was served in time will be sufficient to authorize an affirmance on motion for failure to file the transcript, without a showing that the party also was served: *Pratt v. Western Stage Co.*, 26–241.

By § 4412 the appeal is not to be dismissed or the judgment affirmed on account of failure to docket or file transcript, if it appears that the appeal was taken in good faith and not for delay, and an affirmance, where bad faith does not appear, will be set aside: *Engleken v. Schultz*, 40–703.

If appellee, upon being served with the abstract, or within a reasonable time thereafter, does not indicate to appellant that he desires a transcript, but insists thereon at the term at which the cause is to be submitted by filing a motion to dismiss or affirm, time will be given to procure a transcript, and if necessary a continuance for that purpose will be granted: *White v. Savery*, 49–197.

Where the parties stipulate that a transcript shall be dispensed with, unless the court requires one to be filed and provide that reasonable time shall be granted for that purpose, the court will grant such time: *Artz v. Culbertson*, 71–366.

The court will not dismiss the appeal on motion for failure to file a transcript, but order the transcript to be filed and continue the case until it can be done: *Manson v. Ware*, 63–345; *Aldrich v. Price*, 57–151.

Failure to file a transcript can only be taken advantage of by motion to dismiss the appeal or affirm the judgment, and cannot be urged on final hearing: *Holmes v. Hull*, 48–177.

A judgment of affirmance may be set aside upon a proper showing such as to authorize such action: *Scarf v. Patterson*, 37–503.

If the motion to dismiss the appeal is overruled by the court *pro forma*, in order that it may be left for determination on the final submission, such action will not prevent its full consideration on the final determination of the cause: *Green v. Ronen*, 62–89.

4411. Filing by appellee. 3182. If the transcript has been sent up, but the appellant does not file the same when the same should be filed as herein provided, the appellee may file the same, and may, on motion, have the appeal dismissed or the judgment affirmed, as the court, from the circumstances of the case, shall determine. [R., § 3515.]

The provision of the rules of the court for affirmance on motion for failure of the appellant to file a printed abstract does not supersede the provision of this section authorizing an affirmance on motion for failure to file the transcript with the clerk, but in the latter case appellee, to be entitled to an affirmance, must file a certified copy of the judgment as a basis of the court's action, which is not required where the failure is merely to file the printed abstract: *Hunger v. Patterson*, 37–501.

4412. Failure in good faith. 15 G. A., ch. 56, § 1. No appeal to the supreme court of the state shall be dismissed or judgment of court below affirmed because the said cause was not docketed or transcript filed in supreme court, if it be made to appear that an appeal was taken in good faith and not for delay, or if, from the conduct of appellee or his counsel, appellant was induced to believe no motion to dismiss or affirm would be made.

Section applied: *Engleken v. Schultz*, 40–703. And see notes to §§ 4408 and 4410.

4413. Failure to assign errors. 3183. If, the transcript being filed, errors are not assigned and filed with the clerk of the supreme court, and a copy of the same served on the appellee or his attorney ten days before the first day of the trial term, the appellee may have the appeal dismissed or the judgment or order affirmed, unless good cause for the failure be shown by affidavit. [R., § 3516.]

If the assignment of errors is filed at the time required, it cannot be stricken from the files, although not served or filed until appellee's argument is filed: *Conner v. Long*, 63–295.

Appeal will be dismissed if assignment of errors is not served in time. It seems that, if properly served on the appellee, he could not complain of the mere non-filing of the same with the clerk: *Independent Dist. v. Independent Dist.*, 48–206.

An assignment of errors presented by appellant in connection with his reply to appellee's argument will not be considered: *Betts v. Glenwood*, 52–124.

Where the assignment of errors is not filed until after the term to which the appeal is taken, nor until after appellee's argument is

filed, questions raised by the assignment cannot be considered: *Wise v. Usry*, 72–74.

An assignment of errors not filed within ten days before the first day of the term, and not until appellant's argument is filed, cannot be considered: *Russell v. Johnston*, 67–279.

Whether appellant may, upon proper showing, file an assignment of errors after the time fixed by statute, *quære: Walker v. Russell*, 73–340.

This section has reference to the original assignment of errors, and not to any amended or additional assignment that may be filed. An amended assignment may be filed on leave to do so; but costs in the case up to the time of filing the amended assignment may be taxed to the appellant: *Stanley v. Barringer*, 74–34.

Objection for want of assignment must be made prior to the final trial and submission or it will be deemed waived, although the court may, notwithstanding such waiver, require an assignment: *Andrews v. Burdick*, 62–714.

Appellant may, after objection is made to his assignment of errors as not being sufficiently specific, amend such assignment by leave of court: *Loughran v. Des Moines*, 72–382.

An amended assignment, filed more than ten days before the term at which the cause is submitted, and duly served, will be considered: *Kendig v. Overhulser*, 58–195.

An amended assignment of errors which is not in time for the term to which the case was appealed, but was in time for a subsequent term to which the case was continued, and at which it was tried, *held* to be filed in sufficient time: *Brown v. Rose*, 55–734.

Assignment made at end of appellant's argument, and not objected to by appellee until after the filing of his argument and within two days of the submission of the case, *held* sufficient: *University of Des Moines v. Livingston*, 57–307.

Further as to assignment of errors, see § 4437 and notes.

4414. What shall be sent up. 3184. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified when not material to the determination of the appeal, the court may direct the person blamable therefor to pay the costs thereof. [R., § 3512; C., '51, § 1977.]

Matters outside the record cannot be considered: The record of the proceedings in the lower court is the only basis for action in the supreme court. Extrinsic evidence cannot be considered: *Bell v. Pierson*, Mor., 21.

The supreme court has no original jurisdiction and cannot review or correct judgments of the lower court upon motion and affidavits outside of the lower court, showing fraud in the procurement of the judgment: *Powell v. Spaulding*, 3 G. Gr., 417.

Even in an equity case the supreme court cannot hear depositions taken after the trial of the case in the court below and never submitted to such court: *Perkins v. Testerment*, 3 G. Gr., 207.

An amended return of service of notice cannot be filed originally in the supreme court: *Pilkey v. Gleason*, 1–85.

The record in the supreme court cannot be changed or explained by affidavits presented for that purpose, nor by the certificate of the clerk of the court below, except so far as such certificate is as to the matters appearing of record in his court: *Musgrave v. Brady*, Mor., 456.

A paper purporting to be a bill of exceptions, but not certified as part of the record, cannot be considered: *Conrad v. Baldwin*, 3–207.

What deemed parts of record: An agreement of attorneys with reference to the extension of the time for filing a bill of exceptions, when reduced to writing and filed, becomes a part of the record without being embodied in a bill of exceptions: *State ex rel. v. Chamberlin*, 74–266.

And see § 4042 and notes.

Certificate of clerk: A certificate of the clerk as to what evidence was presented in an action tried by ordinary proceedings will not be regarded; such evidence must be made matter of record by being embodied in the bill of exceptions signed by the judge: *Jordan v. Quick*, 11–9: *Garber v. Morrison*, 5–476.

A paper cannot be made a part of the record by mere certificate of the clerk: *State ex rel. v. Jones*, 11–11: *Harmon v. Chandler*, 3–150.

The bill of exceptions filed in the trial court, a transcript of which is sent to the supreme court, cannot be contradicted by the certificate of the clerk of the trial court. So *held* where the bill of exceptions showed a note sued on to be non-negotiable, while the note filed by plaintiff's attorney after the trial of the cause, and certified by the clerk by copy to the supreme court, showed that it was negotiable: *Daniels v. Gower*, 54–319.

The supreme court cannot notice matters certified by the clerk of the lower court which do not appear of record in such court: *Keller v. Killion*, 9–329.

It is not the duty of the clerk to certify or set out the evidence offered, and the supreme court cannot act upon his statements as to what

the evidence was. It must be embodied in a bill of exceptions properly certified by the judge: *Potter v. Wooster*, 10–334.

The certificate of the clerk that certain instructions were given and were objected to by appellant, *held* not sufficient to raise the question as to their insufficiency: *Knight v. Kelley*, 10–104.

The certificate of the clerk as to what appears of record in his court will not prevail against the recital of the record itself as transmitted by him: *Holmes v. Budd*, 11–186.

The affidavit of the clerk is not admissible to contradict his certificate to the transcript showing it to be full, complete and perfect: *Corliss v. Conable*, 74–58.

Certificate of judge is not competent to contradict the recitals in a bill of exceptions: *Pearson v. Maxfield*, 47–135; *Dedric v. Hopson*, 62–562; *Conner v. Long*, 63–295.

A motion to strike evidence from the abstract because not preserved by a bill of exceptions properly raises the question whether there was a bill of exceptions or not: *Morris v. Steele*, 62–228.

On such a motion the record must speak for itself and can neither be attacked nor supported by affidavits: *Ibid.; Moriarty v. Central Iowa R. Co.*, 64–696.

Where it appears that a bill of exceptions is embodied in the abstract without having been properly made a part of the record in the lower court it may be stricken out on motion: *Wadsworth v. First Nat. Bank*, 73–425.

The fact that the evidence is not so certified as to be properly a part of the record may be raised by motion to strike it from the record, but will not be a ground for affirming the judgment, as the record, without the evidence, may show error entitling appellant to reversal: *Bracket v. Belknap*, 40–704.

The supreme court will determine upon final hearing whether the record is such that the case can be considered upon its merits, especially where appellee insists in his argument that it cannot: *Alexander v. McGrew*, 57–287.

Defects in record: An objection that the record on appeal does not properly embody the evidence cannot be supported by affidavit. If the objection does not appear on the face of the record, it may be amended upon suggestion of diminution, or if the record in the court below requires change to make it correspond with the facts, proper steps should be taken to amend it there: *Hughes v. Stanley*, 45–622.

That the entire record is not before the supreme court is not sufficient either to warrant the dismissal of the appeal or to strike from the files what is there. The extent to which a loss of a portion of the record will prejudice the parties will be considered on the final determination of the cause: *Mayo v. Temple*, 16–585.

If it should appear in a law case that the evidence is not all before the supreme court, it would not dismiss the appeal if there were questions which might be determined without all the evidence being before it: *Balm v. Nunn*, 63–641.

If the record is in such condition that the supreme court cannot determine from the pleadings what the issues are, it may remand the cause in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8–79.

Evidence must be of record below: A bill of exceptions cannot be considered in the supreme court unless it is embodied in the record certified from the court below: *Platner v. Mofford*, 1 G. Gr., 476.

But if no question is made the court presumes the evidence presented in filing the abstract was properly preserved. If that fact is called in question by a denial, the court will go to the transcript to determine it: *Wilson v. First Presbyterian Church*, 60–112.

Even if it appears that the transcript contains a paper not properly identified by the bill of exceptions, this fact will not warrant the striking the whole bill of exceptions from the record: *Hardy v. Moore*, 62–65.

Where no steps are taken to strike from the files a portion of the record claimed to have been erroneously certified, it cannot be disregarded on final hearing: *Edie v. Applegate*, 14–273.

As to how writings, etc., must be identified in the bill of exceptions, see § 4041 and notes.

Although the record purports to contain all the evidence heard before a referee, yet if it does not appear that the evidence was preserved by a bill of exceptions, or a certificate of the referee, or otherwise identified, the court cannot consider that it has the evidence before it: *Donovan v. Hayes*, 62–36.

Where it is made to appear that the bill of exceptions was not presented to the attorney of the opposite party, as required by rule of the lower court, such bill of exceptions should be stricken out on motion in the supreme court: *Christenson v. Central Iowa R. Co.*, 63–703.

To secure a review of a law action it is not essential that the evidence and instructions should be certified by the judge. It is sufficient that the evidence is properly made part of the record by bill of exceptions, and the instructions are identified by the bill of exceptions or in other proper manner: *Wilson v. First Presbyterian Church*, 60–112.

Parties may, by stipulation, agree as to what the evidence was on which the case was tried in the court below, for the purpose of having a trial on appeal upon errors assigned, although the case is equitable: *Hutchinson v. Wells*, 67–430.

Insufficient record: Where the evidence and instructions referred to in the bill of exceptions, and by it made part of the record, are not actually included in the transcript, for the reason that they are not found on file by the clerk, the supreme court cannot pass upon errors in rulings upon the evidence or instructions to the jury, it not appearing that the abstract corrects such defect: *Bonney v. Cocke*, 61–303.

Transcript of the record: While a bill of exceptions in an action by ordinary proceedings should be brought to the supreme court by copy, and not in its original form, yet an error in this respect only works a continuance to obtain a correct transcript: *Fernow v. Dubuque & S. W. R. Co.*, 22–528.

A bill of exceptions transmitted to the supreme court with the record, but not embraced

in it, nor certified to by the clerk as being a part of the record, cannot be considered: *State v. Leis*, 11-416.

It will not be a ground for striking the transcript from the files that it appears that it was delivered to the attorney of the party, where it is not shown that it was not afterward forwarded in the manner directed: *Dedric v. Hopson*, 62-562.

As to bringing up an original paper for inspection, see § 4439.

In equity cases: On appeal in a case tried by ordinary proceedings, a transcript should be sent up, but if tried by equitable proceedings upon written testimony, the depositions and papers are to be sent up in their original form: *Baldwin v. Tuttle*, 23-66.

If the original evidence is not certified up in such cases, the same presumption obtains in favor of the correctness of the ruling below as in an action at law: *State v. Orwig*, 27-528.

An objection that papers of record in the court below are certified to the supreme court by copy instead of in their original form should be raised in time to permit the other party to correct the error, if it be one, by filing the original papers. Such an objection not made before the final submission of the case will not be regarded: *McDonald v. Farrell*, 60-335.

Certificate of clerk: It is to be presumed that the papers certified by the clerk as a part of the record in the case were properly filed in such case, although the fact of their authenticity and connection with the transaction does not appear from the papers themselves: *Mays v. Deaver*, 1-216.

The certificate of the clerk to which he attaches loose and detached depositions in their original form, stating that the transcript contains the original depositions in the case, is not sufficient to enable the court to try the case anew: *Wetherell v. Goodrich*, 22-583.

Evidence presented in the record in an equity case, triable *de novo*, which is in no way certified or identified as that upon which the trial was had in the court below, will be stricken out on motion: *Bracket v. Belknap*, 41-592.

In an equitable action tried on written evidence it is not necessary that such written evidence be embodied in and preserved by bill of exception, but the certificate of the clerk that it is all sent up is sufficient to enable the supreme court to act upon it: *Ticonic Bank v. Harvey*, 16-141.

A certificate of the clerk that the transcript contains all the evidence "appearing on file" will not be sufficient: *Davenport v. Ells*, 22-296; *Grant v. Grant*, 46-478.

The certificate of the clerk that the record contains all the evidence offered in the court below, in a case tried wholly upon depositions and papers on file, is sufficient to enable the supreme court to consider the case on appeal; and the provisions of § 3949, as amended, requiring a certificate of the judge to be given at the trial term, has no application in such a case: *Cross v. Burlington & S. W. R. Co.*, 58-62.

Where the clerk certified as follows: "The depositions accompanying this transcript, marked A, B, C, D and E, are all of the evidence in such case used on the trial thereof," and the depositions were found thus marked, *held*, that they were sufficiently identified, in the absence of a suggestion or showing of substitution: *Chambers v. Ingham*, 25-222.

Reporter's notes: In order to make the evidence as taken down by the short-hand reporter a part of the record, it must be transcribed by him, and filed in the court below: *Gaylord v. Taft*, 53-756; *Lowe v. Lowe*, 40-220.

The reporter's translation of his notes does not become a part of the record unless certified to by him as correct. A certificate of the judge, that the notes referred to in a bill of exceptions contain all the evidence, will not be sufficient: *Richards v. Lounesbury*, 65-587.

The evidence in a case may be preserved by the short-hand report thereof duly certified, without being embodied in a bill of exceptions: *De Long v. Lee*, 73-53.

Where the judge certifies to a short-hand writer's transcript of the evidence it is thereby sufficiently made part of the record, although the reporter was not appointed by the court, but acted at the request of one of the parties: *Lutz v. Aylesworth*, 66-629.

If there is a certificate of the judge to the reporter's notes, to the effect that they contain all the evidence introduced or offered in the case, it will be presumed that the statement is true, and that no evidence was afterwards introduced, although the judgment was not rendered until some time subsequent to the making of such certificate: *Royer v. Foster*, 62-321.

As to how reporter's notes are made part of the record, see § 5029 and notes to § 4042.

Under § 3949 as it now stands the certificate of the clerk is for the purpose of identifying and authenticating the record, and not for the purpose of making written evidence a part of the record, which must be done by the certificate of the judge: *Runge v. Hahn*, 75-733.

4415. Power to obtain perfect transcript. 3185. The appellant shall file a perfect transcript, and to that end the clerk of the court below must, at any time, on his suggestion of the diminution of the record and on the payment of fees, certify up any omitted part of the record, according to the truth, as the same appears in his office of record; and such applicant shall not be entitled to any continuance in order to correct the record, unless it shall clearly appear to the court that he is not in fault. Subject to which requirement, either party may, on motion before trial day, obtain an order on the clerk below, commanding him to transmit at once to the supreme court a true copy of such imperfect or omitted part of the record as shall be in general

terms described in the affidavit or order. Such motion must be supported by affidavit, unless the diminution be apparent or admitted by the adverse party, and must not be granted unless the court is satisfied that it is not made for delay. [R., § 3524.]

Correction of record: Upon suggestion of diminution of the record, a party may have the record in the lower court corrected or amended by proper proceedings therein, and present the record as thus amended to the supreme court by supplemental abstract: *Mahaffy v. Mahaffy*, 63–55.

Mistake in the record as to date of service of notice of appeal on the clerk may be corrected upon motion in the court in which the notice is filed: *Brier v. Chicago, B. & P. R. Co.*, 66–602.

While evidence not offered or relied upon in the court below cannot be considered by the supreme court on appeal, yet where the record as filed is incomplete, it is competent for the lower court, even after appeal, to order all the evidence submitted at the trial to be certified: *Campbell v. Long*, 20–382.

Where it was made to appear to the court by affidavit that the record was defective, *held*, that the court might, in the exercise of a sound discretion, remand the case for the purpose of ascertaining and embodying in a proper bill of exceptions the evidence upon which the former trial was had: *Tasker v. Marshall*, 4–544.

The record before the court must be taken as conclusive of the facts recited. If erroneous in any respect, the error should have been corrected by proper proceedings in the court below: *Stiles v. Botkin's Estate*, 30–60.

The record on which the case is to be tried on appeal must be made up in the court below. The supreme court will not, on motion, amend such record, as by inserting a finding of facts alleged to be lost: *Dobbins v. Lusch*, 53–304.

Lost records of the court below cannot be supplied by affidavit in the supreme court: *Morris v. Steele*, 62–228.

The substitution of a lost pleading in the court below is to be made in that court and not in the supreme court: *Tomlinson v. Funston*, 1 G. Gr., 544.

Correction of omissions or mistakes: Appeals are based upon the records of the cause remaining in the court below. The supreme court has no jurisdiction to correct mistakes or supply omissions in such records: *Bartle v. Des Moines*, 37–635.

A motion made in the supreme court, supported by affidavits, to strike out the bill of exceptions as not correctly embodying the evidence, cannot be considered: *Hughes v. Stanley*, 45–622.

Any correction of the record must be made in the court below. The transcript is the authoritative record in the supreme court, and, after being certified, it cannot be impeached by a certificate of the clerk of the court below, or by any extrinsic evidence: *Gardner v. Burlington, C. R. & N. R. Co.*, 68–588.

Motion for correction of a record may properly be made in the lower court without any order or leave from the supreme court: *Reynolds v. Sutliff*, 71–549.

Since the abolition of the circuit court, applications for change in or correction of the records of that court should be made to the district court: *De Wolfe v. Taylor*, 71–648.

Supplying lost records: The written evidence upon which an equity case is tried becomes a part of the record, and if it is lost it is to be supplied by substitution. Such loss after judgment, and pending appeal, is not ground for a new trial: *Loomis v. McKenzie*, 48–416.

Where, after the taking of an appeal, the papers were lost without appellant's fault, *held*, that the court below should, on motion, have ordered substitution thereof: *Steiner v. Steiner*, 49–70.

Where a party, while his appeal was pending, filed in the court below a motion to supply his lost notice of appeal, which was done after the hearing of evidence with reference thereto, *held*, that as the evidence was conflicting, the order would not be disturbed: *State v. Dillard*, 52–749.

Where an additional transcript of a justice of the peace filed in the lower court in a proceeding by writ of error from the judgment of such justice of the peace was not sent to the supreme court with the transcript, but appeared to be lost, *held*, that the certificate of the judge and clerk were receivable to show that such amended transcript had been filed in the lower court: *Coffeen v. Hammond*, 3 G. Gr., 241.

Further as to correction or substitution of the record in lower court after appeal, see notes to § 4392.

Partial record: If appellant presents a partial record, which is, however, sufficient to clearly show the ruling appealed from, and it is manifest that the omitted parts could not aid the opposite party, the record will be sufficient to enable the court to pass upon the questions thereby raised: *Hall v. Smith*, 15–584.

STAY OF PROCEEDINGS.

4416. Supersedeas bond. 3186. An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties to be approved by such clerk, a bond to the effect that the appellant shall pay the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment or order appealed from in case it shall be

affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When such bond has been approved by the clerk, and filed, he shall issue a written order commanding the appellee and all others to stay proceedings on such judgment or order, or on such part as is superseded as the case may be. No appeal or stay shall vacate or affect the judgment appealed from. [R., §§ 3527–8; C., '51, § 1983.]

An appeal is not perfected by the filing of a *supersedeas* bond alone, but service of notice of appeal is also necessary, and until such notice is served, at least on the clerk, such officer should not recall an execution or issue an order to stay proceedings thereunder: *Pratt v. Western Stage Co.*, 26–241.

A bond, irregular in form, *held* sufficient as a statutory appeal bond: *Field v. Schricher*, 14–119

An order of discharge in a *habeas corpus* proceeding cannot be suspended by *supersedeas* bond pending an appeal: *State v. Kirkpatrick*, 54–373.

Where no *supersedeas* bond is filed, the appeal does not vacate or affect the judgment, and proceedings thereon are not stayed: *Phillips v. Germon*, 43–101.

A *supersedeas* bond is not essential in perfecting the appeal; it does not secure the clerk's fees for transcript, so as to render unnecessary the payment or securing of the same in order to perfect the appeal: *Loomis v. McKenzie*, 57–77.

The giving of a *supersedeas* bond does not supersede or render void a delivery bond previously given to secure the release of attached property: *Williams v. Robison*, 21–498; *State v. McGlothlin*, 61–312.

A *supersedeas* bond given in an action by a party claiming a public office, and who has been adjudged entitled thereto, does not suspend his right to exercise such office in pursuance of the judgment, and to receive the salary incident thereto; and therefore in an action on such *supersedeas* bond the sureties are not liable for salary accruing pending the suit: *Jayne v. Drorbaugh*, 63–711.

When an order has been determined to have been correctly made, it is then too late for a party to claim relief because he was not allowed to supersede it: *Yetzer v. Martin*, 58–612.

Where, on appeal, judgment as to one party appealing was affirmed, but as to the co-party reversed, *held*, that the party as to whom it was affirmed and his sureties were liable on their appeal bond: *Knight v. Waters*, 15–420.

Sureties on a *supersedeas* bond are not discharged by an entry in the supreme court, by consent, of a judgment by the terms of which extension of time of payment and stay of execution are granted. Their relation to the action is not such as gives them control over it, and the party has a right to do whatever the law authorizes in such cases: *Drake v. Smythe*, 44–410.

Where the appeal is simply dismissed, allowing the judgment in the lower court to remain in full force, such dismissal has the effect of affirming the judgment of the court below, and the parties to the *supersedeas* bond become liable thereon: *Coon v. McCormack*, 69–539.

Where the defense to an action on an appeal bond was that the judgment appealed from was fraudulently obtained by depriving defendant of his day in court, *held*, that such fact, if true, was no defense to the judgment rendered in the supreme court upon trial *de novo*, to which defendant appeared and in which he was heard, it not being alleged that such fraud prevented a full and fair trial on appeal: *Knight v. Waters*, 18–345.

The language of this section relating to rents and damages which are to be covered by the bond is a specification only as to the conditions of the bond; and if such condition is not contained in the bond, the party executing it cannot in an action thereon be held liable for rents or profits accruing during the appeal: *Gill v. Sullivan*, 62–529.

4417. Conditions of bond; approval. 3187. In cases wherein the appellant has perfected his appeal to the supreme court, and the clerk of the district [or circuit] court has unjustly refused to approve the appeal bond offered, or makes the penalty therein too large, or the conditions thereof unjust, the appellant may move the supreme court if in session, or in its vacation, on such written notice to the appellee as the judge may prescribe, may move any judge thereof to determine the conditions, fix the penalty, and approve the appeal bond. The motion, verified by the affidavit of the appellant or his attorney, shall contain a brief statement of the nature of the action in which the appeal was taken, of the judgment or order appealed from, of the steps taken by the appellant with reference to his appeal, and of his giving, or offering to give, an appeal bond, of the action of the clerk of the court below with reference to such bond, and wherein he has acted wrongfully; and if the

supreme court, or any judge thereof, considers that the clerk has made unjust conditions in the bond, or the penalty thereof too high, or has wrongfully refused to approve the same, such court or judge shall issue an order prescribing the conditions of the appeal bond, fixing the penalty thereof, and either approve it or direct the clerk of the supreme court so to do, which bond shall be filed with the officer last named. The supreme court, or judge thereof, may order that all or any part of the papers and records in the cause appealed, or certified copies thereof, be produced on the hearing of such motion, and pending the disposition thereof, may make an order staying the enforcement of the judgment or order appealed from, and on such terms as are just. The order, if made by the judge, shall be in writing and signed by him, and upon the service thereof, or of a certified copy, when made in court, upon the clerk of the court below, all proceedings in the court appealed from shall be stayed, and all orders, processes, executions, or other papers issued therefrom shall be recalled, and the appellant be placed in the same condition that he was when the judgment or order appealed from was made or rendered. [14 G. A., ch. 8.]

4418. Insufficient security. 3188. If the appellee believe the bond defective, or the sureties insufficient, he may move the supreme court if in session, or in its vacation, on ten days' written notice to the appellant, may move any judge of said court, or the judge of the court below where the appeal was taken, to discharge the bond, and if the court or such judge shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or such judge shall issue an order discharging such bond, unless a good bond, with sufficient sureties, be executed by a day by him fixed. The order, if made by a judge, shall be in writing and signed by him; and upon his filing, or the filing of a certified copy of the order when made in court, in the office of the clerk of the inferior court, execution and other proceedings for enforcing the judgment or order may be taken, if a new and good bond is not filed and approved by the day as aforesaid. [R., § 3529.]

4419. New bond. 3189. But another order staying proceedings may be issued by the clerk, upon the execution before him of a new and lawful bond with sufficient sureties as hereinbefore provided. [R., § 3530.]

4420. Penalty of bond. 3190. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars. [R., § 3531; C., '51, § 1984.]

Where, in an action to foreclose a mechanic's lien, a personal judgment for the amount claimed is rendered against defendant, and the lien is declared established upon the property, and the property is ordered sold upon special execution to satisfy the judgment, and it is directed that a general execution issue for any sum remaining unpaid after exhausting said property, the penalty of the appeal bond should be twice the amount of the judgment rendered. The value of property on which the judgment is especially declared a lien cannot be taken into account in fixing the bond: *Flynn v. Des Moines & St. L. R. Co.*, 62–521

4421. Partial stay. 3191. The taking of the appeal from a part of a judgment or order, and the filing of a bond as above directed, does not cause a stay of execution as to any part of the judgment or order not appealed from. [R., § 3532; C., '51, § 1985.]

4422. Execution recalled. 3192. If execution has issued prior to the filing of the bond above contemplated, the clerk shall countermand the same. [R., § 3533; C., '51, § 1987.]

4423. Property surrendered. 3193. Property levied upon and not sold at the time such countermand is received by the sheriff, shall forthwith be delivered up to the judgment debtor. [R., § 3534; C., '51, § 1988.]

It seems that this section refers only to personal property: *Swift v. Conboy*, 12–444.

TRIAL — JUDGMENT.

4424. Proceedings. 3194. The supreme court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the inferior court or judge should have done, according as it may think it proper. [R., § 3536; C., '51, § 1989.]

I. THE ABSTRACT.

Form: The fact that what is filed and intended as an abstract is not so entitled or designated will not prevent the court from considering it if its nature is apparent: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

Where the questions of law and fact involved in different cases are the same, they may be presented to the supreme court on one record: *King v. Glass*, 73-205.

Should contain what: It is not proper to set out in the abstract the entire testimony of witnesses, by question and answer, without excluding matter that is immaterial: *Vaughn v. Smith*, 58-553; *Tootle v. Taylor*, 64-629.

Nor should writs, services, and other writings not material to the case, be set out: *Tootle v. Taylor*, 64-629.

The abstract should show the fact of service of notice of appeal: *Phillips v. Follett*, 69-39.

Costs of improper abstract: The appellant, although successful, should not be allowed the full cost of an abstract containing unnecessary matter: *Chandler v. Fremont County*, 42-58; *Macomber v. Peck*, 39-351; *Martin v. Cole*, 38-699; *York v. Clemens*, 41-95; *Byerlee v. Mendel*, 39-382; *Dye v. Young*, 55-433; *Poole v. Hintrager*, 60-180; *Donahue v. McCosh*, 70-733; *Baldwin v. Foss*, 71-389.

Costs of additional abstract of appellee should not be taxed to appellant where his own abstract fairly presents the questions to be determined: *Brown v. Byam*, 59-52.

An agreed abstract; amendment: If an agreed abstract is presented, the case will be heard on that, and no amendment presented by one of the parties will be considered: *Holmes v. Lucas County*, 53-211.

But an agreed abstract will not operate to waive statutory requirements as to appeal: *Lewis v. Pearson*, 50-702; nor the objection that the abstract does not appear to contain all the evidence: *Allen v. Hull*, 56-767.

Case determined upon abstract: The supreme court does not look beyond the abstract where a case has been argued and submitted with an apparent understanding that such abstract contains all that is material to its determination: *Montgomery County v. American Emigrant Co.*, 47-91.

Unless there is a disagreement in the abstracts the supreme court does not examine the transcript, and the abstracts constitute the record. Where a certificate of the judge is necessary to entitle the party to appeal it should be set out in the abstract: *Barnes v. Independent Dist.*, 51-700.

The supreme court will not, as a general rule, look into the transcript except for the purpose of determining the correctness of the abstract, where that is disputed in the manner required by the rules of court: *State v. Smouse*, 49-634.

In the absence of a conflict of abstracts the court treats the abstract as the record in the case, and if it is not sufficiently intelligible to show the rulings made the court acts upon the presumption that there is no error: *Eldredge v. Bell*, 64-125.

Should show appeal: The abstract must show the taking of an appeal: *Plummer v. People's Nat. Bank*, 73-752; *Names v. Names*, 74-213.

How correctness of abstract questioned: The correctness of the statements of the abstract cannot be impeached by a mere statement in argument: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245; *Rankin v. Miller*, 43-11.

Where the abstract, although failing to show that a bill of exceptions was filed in the court below, contains matter which it could not properly contain unless made of record, the court will regard the appellant as claiming that it was made of record, and a direct statement to that effect will not be necessary. If the appellee desires to claim that no bill of exceptions was filed he must do so in an additional abstract: *Thompson v. Silvers*, 59-670.

Where the abstract filed by appellant purports to be an abstract of all the evidence, it will be assumed, in the absence of any showing to the contrary, that the evidence set out therein was properly made of record. If the opposite party wishes to claim that the evidence was not made of record he should file an additional abstract so stating, and the statement of such additional abstract will be assumed to be true if not denied: *State v. Tucker*, 68-50.

Where appellant's abstract stated the taking of an exception, which was not denied in the amended abstract, *held*, that the court would consider that the exception properly appeared in the record: *Palmer v. Rogers*, 70-381.

An abstract cannot be impeached or contradicted by a certificate of the clerk of the court below: *White v. Savery*, 49-197.

Nor can it be altered or changed by affidavit or certificate of the judge: *Pearson v. Maxfield*, 47-135.

A so-called amended abstract, setting out affidavits showing the judgment to be different from that contained in the abstract, will not be considered: *Holmes v. Lucas County*, 53-211.

Where an abstract purports to contain a copy of a paper which is part of the record, it is not necessary for it to state that what it sets out is the whole paper, but it will be presumed to be so unless the contrary is shown: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

Motion to strike evidence from abstract: If the abstract sets forth evidence not made of record, the appellee may, on motion, have such evidence stricken therefrom: *Mudge v. Agnew*, 56-297.

If no question is made as to the filing of the bill of exceptions, the court presumes that the evidence has been properly preserved. If the

appellee states in his abstract that no proper bill of exceptions has been filed, and moves to strike out the evidence on that ground, the court does not take the statement as true, but refers to the transcript for a determination: *Wilson v. First Presbyterian Church*, 60–112.

A statement in appellee's abstract that no exceptions were taken as set out in the appellant's abstract will be deemed true if not denied or avoided by appellant: *Armstrong v. Nillen*, 70–51.

Court will not look beyond abstract: Where the evidence in a case was stricken from the abstract and the transcript as not being properly embodied therein, and leave was given to perfect the record, and a perfect transcript was filed, but no new abstract, *held*, that the court could only consider the original abstract with the evidence stricken therefrom: *Weider v. Overton*, 47–538.

Matter must be of record: The court cannot take the abstractor's statement of a fact where there is no claim that the fact appears from the record: *Dickerman v. Lubiens*, 70–345; *Anderson v. Leaverich*, 70–741.

Abstract of all the evidence: The court will not, against the objection of appellee, review a finding of facts made by a court, jury, or referee, unless the abstract purports to contain all the evidence introduced on the trial below: *Andrews v. Kerr*, 49–680; *Price v. Burlington, C. R. & M. R. Co.*, 42–16; *Rice v. Plymouth County*, 53–635; *Walker v. Plummer*, 41–697; *Wisconsin, I. & N. R. Co. v. Secor*, 70–647.

Where a review of the findings of a jury on the evidence is sought, the abstract should contain the statement that it contains all the evidence: *Kearney v. Ferguson*, 50–72; *Andrews v. Kerr*, 49–680; *Parsons v. Parsons*, 66–754.

It is not sufficient that it appear that all the evidence is in the bill of exceptions: *Rice v. Plymouth County*, 53–635.

Where an abstract fails to state that all the evidence is before the supreme court, that court will not review the findings of the court below on a question of fact: *Van Riper v. Baker*, 44–450; *Commercial Bank v. King*, 47–64.

It must also appear from the abstract that all the evidence is made of record: *Wormley v. District Tp*, 45–666.

Where the abstract does not purport to be an abstract of all the evidence, an objection that the damages are excessive cannot be considered: *Brant v. Lyons*, 60–172.

Where the abstract shows that it does not contain all the evidence, the case will not be reversed if there might have been evidence supporting the judgment: *Enix v. Miller*, 54–551.

That it appears from the abstract itself that it does not contain the testimony of all the witnesses will prevent the supreme court from trying the case *de novo: Hart v. Hart*, 74–487.

On an appeal from the ruling of the lower court in setting aside an indictment it is not necessary that the abstract shall show all the evidence presented on the motion, where it appears that the ground for setting it aside was not sufficient: *State v. Smith*, 74–580.

The fact that an abstract does not contain immaterial evidence received on the trial in the lower court will not prevent trial of the case anew: *Buck v. Holt*, 74–294

Where the ground upon which the lower court gives judgment is that, upon the facts specially found, plaintiff is not entitled to recover, it is not necessary that the abstract on appeal contain the evidence or the instructions of the court: *Conners v. Burlington, C. R. & N. R. Co.*, 71–490.

Must purport to contain all the evidence: An abstract which states that all the evidence in the case was reported and certified to by the reporter of the court, and duly certified by the court as being all the evidence offered in said trial, will not be sufficient to enable the court to try the case *de novo* if it fails to state that it (the abstract) contains all the evidence, that is, an abstract of all the evidence upon which the case was tried: *Cassady v. Spofford*, 57–237; *Ward v. Snook*, 61–610; *Hall v. Harris*, 61–500; *Phenix Ins. Co. v. Findley*, 59–591; *Ohrt v. Ober*, 51–540: *Conwell v. House*, 57–754; *Names v. Names*, 74–213.

If a party wishes to make it appear that his abstract is an abstract of all the evidence, that fact should be specifically stated in the abstract. It is not sufficient to set out in the abstract the certificate of the judge, or clerk or reporter, showing that the evidence is all made of record in the lower court: *Porter v. Stone*, 62–442; *Wisconsin, I. & N. R. Co. v. Secor*, 70–647; *Fulliam v. Muscatine*, 70–436; *Woodrum v. Carraher*, 69–145: *Hasner v. Patterson*, 70–681; *Morgan v. Wilfley*, 71–212; *Drake v. Kaiser*, 73–703; *Polk County v. Nelson*, 75–648.

While the abstract should purport to contain all the evidence, it is not usually necessary nor desirable that it should, in fact, contain all the evidence: *Huff v. Farwell*, 67–298.

An abstract stating that "the testimony was taken on written deposition, and was essentially as follows," is not sufficient to show that the abstract contains all the evidence: *Britt v. Case*, 58–757.

The language of the record may be abbreviated in an abstract, but it is not proper for counsel to determine what are the facts established, or what is the effect of the evidence, or to substitute what they may consider as substantially the same: *Blohm v. Sweney*, 66–604.

A statement in an abstract that it contains "all the evidence bearing upon or introduced to sustain the issues and findings as to which plaintiff appealed," *held* not sufficient: *Roe v. Wilmot*, 51–689.

What sufficient to show that the abstract contains all the evidence: The statement in the abstract to show that all the evidence is comprehended therein is sufficient, if the opposite party and the court are fairly apprised that the appellant claims that he has presented an abstract of all the evidence, and in such cases the court will presume that he has, unless appellee sets out additional evidence: *Miller v. Wolf*, 63–233.

Where an abstract contains a statement that it is an abstract of all the evidence, it is assumed, not only that this statement is true, but that the evidence was made of record by due certification, unless it is made to appear

to the contrary; but where the certificate relied upon is set out, and appears to be insufficient, that presumption will not be entertained: *Alexander v. McGrew*, 57–287.

Where the abstract stated that "the foregoing evidence is by the court duly certified to be all the evidence offered by either party on the trial of this cause," *held*, that it would be presumed that the evidence had properly been made of record by a bill of exceptions: *Macleod v. Geyer*, 53–615.

A recital in the abstract that it was an abstract of all the evidence, and that within a proper time a bill of exceptions was filed embracing in the record the testimony set out, *held*, sufficient to show that the evidence was before the court on appeal: *Deere v. Needles*, 65–101.

Where the abstract purported to contain all the evidence, and recited that the evidence was taken down in writing by order of the court, and made a part of the record, *held*, that there was sufficient to entitle appellant to a trial *de novo*: *Stoddard v. Hardwick*, 46–160.

Where the abstract purports to be an abstract of all the evidence, and sets out certificates of the trial judge showing that a bill of exceptions was signed, it will be presumed that the evidence was all made of record, and is all before the supreme court, unless an additional abstract is filed by the opposite party: *Bailey v. Mutual Benefit Ass'n*, 71–689.

Where depositions were referred to in the certificate of the judge as being marked by certain letters, and the abstract did not identify the depositions and documents printed therein as being referred to in the certificate, but it was alleged in an amended abstract, filed by appellant, that all the evidence offered, introduced or used in the trial was set out in the original and amended abstracts, which allegation was denied, *held*, that the court could presume that it had all the evidence before it: *Paine v. Means*, 65–547.

Where the abstract stated that a party filed a garnishee's answer "as follows, omitting formal parts," no issue appearing to have been joined thereon, and therefore no evidence having been admissible, *held*, that this statement was sufficient to show that all the evidence on which the court acted in ruling upon a motion for judgment on the garnishee's answer appeared to be presented: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56–245.

Where by the language of the abstract the opposite party and the court are fairly apprised that appellant claims that he has presented all the evidence, it will be assumed that he has done so unless the appellee sets out additional evidence in an amended abstract: *Miller v. Wolf*, 63–233.

Where a certificate of the judge that the record contains all the evidence is essential on appeal, if the abstract sets out the fact that the certificate was made on the date thereof it is not necessary that such certificate be set out in the abstract: *Yant v. Harvey*, 55–421.

In a particular case, *held*, that appellant's abstract sufficiently purported to contain an abstract of all the evidence: *Higgins v. Mendenhall*, 51–135.

Setting out instructions: Where an abstract does not purport to set out the instructions, or any of them, in full, but simply sets forth parts of sentences of various instructions claimed to be erroneous, the court cannot pass upon their correctness: *State v. Nichols*, 38–110.

Where the abstract does not contain all the instructions given, alleged error in refusing an instruction cannot be considered: *State v. Williamson*, 68–351.

Abstract deemed true: The abstract filed by appellant, in the absence of an additional abstract, constitutes the record and is regarded as a verity: *White v. Savery*, 49–197.

If appellant's abstract is not denied by appellee and shown to be untrue by an amended abstract it will be assumed to be true: *Ibid.*; *Kearney v. Ferguson*, 50–72; *Hardy v. Moore*, 62–65.

If appellee files an amended abstract which is not denied it will be assumed to be true: *Kearney v. Ferguson*, 50–72.

If appellee's amended abstract is denied by another abstract filed by appellant, then the court will look into the transcript and determine its character: *White v. Savery*, 49–197.

In the absence of an amended abstract denying the statements contained in appellant's abstract, the latter is deemed to be true, notwithstanding such a denial is made in the argument of counsel: *Farmer v. Sasseen*, 63–110; *Weaver v. Kintzley*, 58–191; *Kendrick v. Eggleston*, 56–128.

Where appellee discusses questions raised upon the instructions without objecting or suggesting that they are not truly set out in the abstract, his denial in the amended abstract, that the instructions given and refused are not properly set out, will not be considered: *Roberts v. Leon Loan, etc., Co.*, 63–76.

Where the abstract on its face appears to be full and complete, the statement that it contains all the evidence cannot be overcome by a mere denial by appellee, so as to require an examination of the abstract, but he must set forth the omitted evidence: *Andrews v. Kerr*, 49–680; *Allen v. Bryson*, 67–591; *Mielenz v. Quasdorf*, 68–726; *Aller v. Pennell*, 51–537; *Huff v. Farwell*, 67–298; *McArthur v. Linderman*, 62–307; *Brooks v. Chicago, M. & St. P. R. Co.*, 73–179.

The party filing an additional abstract purporting to supply defects and omissions in the original abstract thereby admits that the two abstracts together contain all the evidence given on the trial: *Wells v. Burlington, C. R. & N. R. Co.*, 56–520; *Wilson v. Palo Alto County*, 65–18; *Cross v. Burlington & S. W. R. Co.*, 58–62; *Conners v. Burlington, C. R. & N. R. Co.*, 74–383

If an abstract states that it contains all the evidence, but an amended abstract is filed by appellee giving additional evidence, without claiming that, as thus corrected, the abstract does not give all the evidence, it will be presumed that the abstracts together bring all the evidence before the court: *Cross v. Burlington & S. W. R. Co.*, 51–683.

Even if appellant's abstract contains no averment that all the evidence is found therein, if appellee files an amended abstract setting out evidence alleged to have been omitted

from the original, without any statement or claim that the two abstracts together do not contain all the evidence, appellee cannot afterwards urge that the evidence is not all before the court: *Van Sandt v. Cramer*, 60-424; *Starr v. Burlington*, 45-87; *Ferguson v. Davis County*, 51-220; *Cummings v. Browne*, 61-385; *Balm v. Nunn*, 63-641; *O'Brien v. Harrison*, 59-686.

Where the abstract of appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract other portions, coupled with the denial that with these additions the abstracts contain all the evidence, and will not be estopped from relying upon such statement in denial: *Cartwright v. Copess*, 60-195; *Hall v. Harris*, 61-500; *Howe v. Jones*, 66-156; *Hassett v. Hassett*, 66-304; *Alexander v. McGrew*, 57-287; *Hunter v. Des Moines*, 74-215

And if such objection is made it will be deemed true, unless appellant shows by an amended abstract that the evidence was properly certified: *Roby v. Hall*, 57-213.

Such statement, that the abstracts together do not present all the evidence, will be deemed true unless denied by appellant: *Love v. Donaldson*, 63-631.

If an abstract is not denied by the appellee in an amended abstract, the record set out will be taken to be correct, as, for instance, it will be assumed that a bill of exceptions was filed. But if such facts are denied in an amended abstract, the denial will be taken to be true in the absence of a transcript: *Brainard v. Simmons*, 58-464.

Unless an additional or amended abstract be denied it will be regarded as presenting the record correctly, and will prevail against the original abstract: *Hart v. Jackson*, 57-75; *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Lucas v. Jones*, 44-298; *Daniels v. Langdon*, 52-741; *Cole v. Coskery*, 63-526; *Maxwell v. La Brune*, 68-689; *Brooks v. Chicago, M. & St. P. R. Co.*, 73-179.

And this is true even though it seeks to eliminate something from appellant's abstract: *Richardson v. Hoyt*, 60-68; *Burkhart v. Ball*, 59-629; *Kearney v. Ferguson*, 50-72.

The statement in an amended abstract that there is no bill of exceptions will be deemed correct unless denied: *Foley v. Hefferon*, 70-572.

Service and filing of amended abstract: Where an amended abstract is served thirty days before the cause is submitted it will not be stricken from the files because not served within the time required by the rules, where no prejudice could have resulted from the delay: *Green v. Ronen*, 62-89.

Where appellee's amended abstract was served twenty days before the case was submitted, and the motion to strike involved nothing but the cost of printing, *held*, that appellant sustained no prejudice from the delay in service, and the abstract could not be stricken from the files: *Davidson v. Carter*, 55-117.

Where an additional abstract, filed after the filing of appellee's argument, was filed three months before the cause was submitted, and appellee had opportunity to examine it and correct any misstatements or error contained in it, and filed an additional argument based, in part, upon the record as made by the additional abstract, *held*, that such additional abstract might be considered: *Palo Alto County v. Harrison*, 68-81.

The fact that an amended abstract is filed without leave or notice is not ground for striking it from the files: *Frost v. Parker*, 65-178.

An amendment to appellant's abstract, rendered necessary by reason of a motion in the court below after the record was made up and the appeal taken, should not be stricken from the files because not served upon appellee: *Peterson v. Adamson*, 67-739.

It is not unusual to allow a party to file an amended abstract when he discovers his case is not fully presented in the original abstract. This should be done, however, before the case is submitted and at such a time as that the other party will not be prejudiced thereby: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

Where a motion was submitted with the case asking the court to strike from the files an amended abstract and argument of the opposite party because not filed within the time agreed upon between the parties, *held*, that while the motion would be overruled, no costs would be taxed to the unsuccessful party for printing such abstract and argument: *Keegan v. Malone's Estate*, 62-208.

Appellant cannot, after the appellee has argued his case, amend his abstract without leave of court and thus substantially change the record upon which the case is submitted. If leave to amend is asked, it may be granted upon such terms as seem proper under the circumstances, but an amendment filed without leave after the filing of appellee's argument will be stricken out on motion: *In re Caywood's Will*, 56-301.

Appellant cannot file an additional abstract with his argument in reply except to controvert the correctness of appellee's additional abstract: *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25.

An amendment to appellant's abstract will not be stricken from the files because filed without leave, even though filed after the cause has been argued by appellee: *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74-39.

Under some circumstances, doubtless, a submission may be set aside and the case would then be open for proper changes in the record, but an amended abstract filed after the case is submitted, without the submission being set aside, will not be considered: *Fletcher v. Terrell*, 50-267; *Rogers v. Carman*, 54-715.

An application by appellant to amend his abstract after the case is submitted, which application is not accompanied by a motion to set aside the submission, cannot be allowed: *State v. Hamilton*, 57-596.

The court will not summarily affirm a cause after it is prepared for submission on the part of the appellant, on the ground of delay in presenting the abstract and argument. If prejudice has resulted to the other party by delay, redress must be sought in some other way: *Fowler v. Strawberry Hill*, 74-644.

Name of judge: A failure to comply with rule 117, requiring abstracts to show name of trial judge, will prevent the appeal being considered until such defect is corrected: *Kissinger v. Council Bluffs*, 72-471.

II. ARGUMENTS.

Failure of appellant to file argument or brief will be considered an abandonment of the appeal: *Mores v. Hanchett*, 54-747; *Dinning v. Bement*, 54-156; *Clime v. Phipps*, 62-759; *Lamp v. Sievers*, 66-85.

In such case the decision of the lower court will be affirmed: *Devore v. Adams*, 68-385.

Although in an equity case the opening and closing on appeal may fall upon appellee, yet the failure of appellee to file an opening argument will not warrant the appellant in failing to file any argument whatever. If he does so, his appeal will be regarded as abandoned: *Scott v. Neises*, 61-62.

The supreme court will never decide questions which are not argued upon both sides, except where there exists an absolute necessity for their decision: *McKern v. Albia*, 69-447.

And the court will stop the consideration of a case not argued by appellee, upon reaching the conclusion that it ought to be reversed on any one ground: *Deeds v. Chicago, R. I. & P. R. Co.*, 69-164; *Gilfeather v. Council Bluffs*, 69-310.

Assignments not argued: Assignments of error which are not discussed or insisted upon in argument will not be considered: *Clise v. Freeborn*, 29-110; *Soward v. Chicago & N. W. R. Co.*, 30-551; *Snyder v. Eldridge*, 31-129; *Hows v. Fostenson*, 31-600; *Abbott v. Board of Supervisors*, 36 354; *Cook v. Sioux City & P. R. Co.*, 37-426; *Hale v. Gibbs*, 43-380; *Huiras v. Berkey*, 51-701; *Betts v. Glenwood*, 52-124; *Hepmon v. Dubuque*, 52-713; *Rice v. Plymouth County*, 53-635; *Smith v. Hickenbottom*, 57-733; *Clark v. Epworth*, 61-750; *Beeson v. Chicago, R. I. & P. R. Co.*, 62-173; *Wood v. Whitton*, 66-295; *Wood v. Hallowell*, 68-377.

The supreme court will not consider assignments of error not argued by counsel, even though they are stated in his argument: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240; *Patterson v. Seaton*, 70-689.

An objection which is merely referred to in such a way as might be sufficient as an assignment of errors, but is not argued, will not be considered: *Goodnow v. Wells*, 67-654.

Where the only argument made in support of an error assigned is a mere restatement of the assignment, it will not be considered. If counsel are unable or unwilling to suggest cogent reasons in support of an alleged error, the court will not assume that duty: *Marker v. Dunn*, 68-720.

Where no reasons are given in support of an assignment it will not be considered by the court: *Parsons v. Parsons*, 66-754.

Errors assigned but not referred to in the opening argument are deemed waived, and cannot be referred to for the first time in appellant's reply: *Renwick v. Davenport & N. W. R. Co.*, 49-664.

Where the assignments are referred to, and the general theory of the case is argued as inconsistent with the instructions given, and calling for the instructions refused, which giving or refusing is assigned as error, the assignment will not be deemed waived, although the instructions are not specifically discussed: *Clark v. Ralls*, 50-275.

Opening and closing argument: In a trial *de novo* in the supreme court, the party having the burden of proof in the case is entitled to the opening and closing of the argument: *Steel v. Fife*, 48-99; *Alexander v. McGrew*, 57-287; *Devore v. Adams*, 68-385.

And where the burden of proof was upon appellee, *held*, that a reply filed by appellant to appellee's closing argument might be stricken out on motion: *Steel v. Fife*, 48-99.

Erroneous reasoning assigned as the ground of objection to action of the lower court will not prevent the court from considering a valid objection properly made in the lower court: *Gilman v. Donovan*, 59-76.

Filing of argument: An argument will not be stricken out on motion because not filed in time: *Bartle v. Des Moines*, 37-635.

But if the court is asked to do so, it will tax the costs to the party filing the argument after the proper time, unless the failure to file within the time prescribed by the rules has been reasonably excused: *Renwick v. Bancroft*, 59-116; *Smith v. McFadden*, 56-482.

While not striking the argument from the files because not filed in time, the court will, in a proper case, inflict penalties, or continue the case when asked to do so: *Cox v. Forrest City & S. R. Co.*, 66-289.

Especially will the argument not be stricken from the files because not filed in time, where the party moving to strike does not desire to file any argument on his part: *Kellam v. McAlpine*, 63-251.

Arguments filed with the clerk after the case is submitted are, by order of the court, not sent to the justices: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

An argument improperly filed, as where appellee has improperly filed the opening argument, may be stricken from the files, but will not entitle the opposite party to judgment for costs: *Devore v. Adams*, 68-385.

Service of argument: Where a cause is submitted in a regular manner it will not be remanded upon the mere statement of opposing counsel, in a petition for rehearing, that the argument was not properly served: *Hall v. Harris*, 61-500.

Where cases are argued together in the supreme court, in an oral argument, the court will look at the printed arguments in the cases to determine what portion of the oral argument was intended to be applicable to each, and a point raised in the oral argument will not be considered in a case the brief of which does not raise such point: *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63-285.

It is improper for counsel to present together questions peculiar to different cases, although such cases have other questions in common: *Hooper v. Sac County Bank*, 72-280; *Guise v. Early*, 72-283.

Taxation of costs: Where an argument contained numerous misleading errors, evi-

dently due to want of time or negligence in reading the proof, *held*, that the costs thereof could not be taxed with the costs in the case: *Fair v. Brown*, 40-209.

References to abstract: It is improper in a printed argument to refer to matters contained in the abstract without giving the page of the abstract where such matters may be found: *Herriott v. Kersey*, 69-111.

Improper argument: It is improper for an attorney in argument to make a statement of facts outside of the record impeaching the judicial conduct of the judge before whom the case is tried: *Paine v. Frost*, 67-282.

Improper remarks by counsel in printed argument adverted to and criticised: *Sax v. Drake*, 69-760.

On motion of appellant a portion of appellee's argument was stricken out on account of its abusive character: *Cassidy v. Palo Alto County*, 58-125.

III. WHAT QUESTIONS WILL AND WHAT WILL NOT BE CONSIDERED ON APPEAL.

a. *Question Not Raised in the Court Below.*

New objections not considered: An objection not made or question not raised in the court below cannot be considered on appeal: *Dean v. Hall*, 4 G. Gr., 425; *Hintermeister v. State*, 1-101; *Mumma v. McKee*, 10-107; *State v. Groome*, 10-308; *Berry v. Gravel*, 11-135; *Rockwell v. Kimball*, 11-524; *Elder v. Littler*, 15-65; *Starry v. Starry*, 21-254; *Kruck v. Prine*, 22-570; *McNaught v. Chicago & N. W. R. Co.*, 30-336; *Evans v. Hawley*, 35-83; *Stanberry v. Dickerson*, 35-493; *State v. Cuddy*, 40-419; *Price v. Burlington, C. R. & M. R. Co.*, 42-16; *Trayer v. Reeder*, 45-272; *Davis v. Nolan*, 49-683; *Argall v. Pugh*, 56-308; *Wetmore v. McMillan*, 57-344; *Wire v. Foster*, 62-114; *Babcock v. Board of Equalization*, 65-110; *Goodnow v. Plumb*, 67-661; *Garretson v. Equitable Mutual Life, etc., Ass'n*, 74-419.

A party is not to be surprised in the supreme court by new objections and issues not made in the court below, based upon defects of which he was not advised by motion or otherwise in the lower court, and which it would have been in his power to remedy had objection been taken thereto in proper time and manner: *Patterson v. Stiles*, 6-54.

An objection cannot be considered on appeal which is different from that made in the court below: *Oliver v. Depew*, 14-490; *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Swan v. Bournes*, 47-501.

The court will not consider objections which are not based upon exceptions taken on the trial in the court below: *Spelman v. Gill*, 75-717.

The record should show affirmatively that at some stage of the proceedings the very defect complained of was presented to the court: *Shuck v. Chicago, R. I. & P. R. Co.*, 73-333.

No change of base: A party must, on appeal, stand in the posture in which he placed himself in the lower court. He cannot change his base after the appeal: *Garland v. Wholebau*, 20-271.

No new issues: An issue not raised in the court below cannot be urged for the first time in the supreme court: *Latterett v. Cook*, 1-1; *Brazelton v. Jenkins*, Mor., 15.

The objection to plaintiff's recovery that his claim is within the statute of frauds, not having been raised below by demurrer or answer, cannot be raised on appeal: *Lower v. Lower*, 46-525.

Ruling cannot be supported on ground not urged below: A ground not urged in the court below cannot, on appeal, be relied upon to sustain a ruling of that court, which is erroneous on the ground upon which it is based: *Knapp v. Sioux City & P. R. Co.*, 65-91.

Service of notice: Objections to the service of the notice will not be considered on appeal where the record facts fail to show any ruling thereon in the lower court: *Des Moines v. Layman*, 21-153.

An objection to jurisdiction not raised in the court below cannot be raised upon appeal unless the record shows the case to be *coram non judice: Bridgman v Wilcut*, 4 G. Gr., 563.

An objection which does not go to the jurisdiction of the court below, but merely to plaintiff's right to bring action, will not be considered on appeal unless made in the lower court: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

Although the objection that the court has no jurisdiction of the subject-matter or parties may be raised for the first time in the supreme court, yet if it appears that the lower court had jurisdiction of the parties, but only erred as to the kind of proceedings adopted, the objection cannot be first raised on appeal: *Gould v. Hurto*, 61-45.

Where it appears that there is a want of jurisdiction in the court below, or where the ruling made is in excess of the authority or power of the court, it is the duty of the supreme court to recognize such want of jurisdiction, even if no objection be made: *Groves v. Richmond*, 53-570; *St. Joseph Mfg. Co. v. Harrington*, 53-380.

An objection to a pleading not raised by motion or demurrer in the court below, and passed upon by it, cannot be considered on appeal: *Ruddick v. Patterson*, 9-103; *Williams v. Sill*, 12-511; *Clews v. Traer*, 57-459; *Davis v. Burt*, 7-56; *Gifford v. Ferguson*, 19-166; *McCoy v. Cornell*, 40-457.

So *held* as to a defect in verification not objected to in the lower court: *Moses v. Risdon*, 46-251.

Objection that the petition is not sufficiently specific cannot be urged for the first time on appeal: *Davis v. Walter*, 70-465.

Objections to the form of the pleading cannot be taken for the first time on appeal: *Willson v. Harris*, 68-443.

An objection that the relief granted is not asked in the pleading cannot be raised for the first time on appeal: *Iowa Lumber Co. v. Foster*, 49-25; *Williams v. Wilcox*, 66-65.

Issues not raised: Where the parties have themselves tried a case on the theory that the question presented on the trial is raised by the pleadings, the court may properly submit such question to the jury, and a party cannot com-

plain on appeal that no such issue was raised by the pleadings: *Hoyt v. Hoyt*, 68–703.

Error in granting change of venue to an improper court will be reviewed on appeal, although the party did not, in applying for the change, designate the court to which a change was sought: *Sayles v. Deluhrey*, 64–109.

A defense not pleaded in the court below will be disregarded on appeal: *Thomson v. Lee County*, 22–206; *Barlow v. Brock*, 25–308.

A variance between the allegations and the proofs cannot be first raised on appeal: *Singer v. Given*, 61–93.

Swearing the jury: The supreme court will not disturb a judgment upon the ground that the jury in the cause was not sworn when such question was in no way raised in the court below: *State v. Schlagel*, 19–169.

Objections to evidence, what sufficient, see notes to § 4039.

Objections to instructions, see notes to § 3996.

Special verdict: Objection that the answer to an interrogatory propounded to the jury is not sufficient cannot be first made on appeal: *Timins v. Chicago, R. I. & P. R. Co.*, 72–94.

The form of the judgment cannot be objected to for the first time upon appeal: *Barlow v. Brock*, 25–308.

Where there is but a general exception to a judgment below, and the court is not asked by motion or otherwise to correct it, the appellant will not be heard to allege objections to the form of the judgment on appeal: *Robinson v. Keith*, 25–321.

A motion to vacate an injunction cannot be first made after appeal: *Bishop v. Carter*, 29–165.

Motion non obstante: A question which can only be raised by motion for judgment *non obstante veredicto* cannot be first raised on appeal: *Coonrod v. Benson*, 2 G. Gr., 179.

Objections deemed waived: Objections not made in the court below will be considered waived, and the judgment in an action at law will not be reversed on appeal upon a point not presented to, nor passed upon by, the court below: *Iowa Homestead Co. v. Duncombe*, 51–525.

By pointing out specific objections a party is deemed to have waived any objections not pointed out: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38–446.

New arguments or authorities may be presented on appeal, although no new question can be raised: *District T'p v. French*, 40–601.

New reasons: Failure of the party objecting to the action of the lower court to urge a good reason in support of his point or objection will not prevent the supreme court from considering such reason and basing its action thereon: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

The fact that the appellate court reaches its conclusions upon grounds different from those upon which the court below bases its judgment will have no effect as to such judgment if the conclusion reached is the same: *Richman v. Board of Supervisors*, 70–627.

All objections appearing of record may be urged: A party has the right to make, in the supreme court, all objections which legitimately arise on the record, whether made in the court below or not, except in cases where it is required that objections urged in the court below shall be stated in writing or made to appear of record: *McGovern v. Keokuk Lumber Co.*, 61–265.

Therefore, *held*, that the question of the sufficiency of affidavits to support a motion for change of venue was properly before the supreme court on appeal, although no objection thereto appeared of record, the party appealing having duly excepted to the ruling on the motion: *Ibid.*

b. *What the Record Must Show in Order that a Question May be Reviewed.*

Final action: Where the abstract does not show what the final action of the court was, nor that any appeal has been taken, the court cannot determine the appeal: *Pittman v. Pittman*, 56–769.

A party complaining of erroneous rulings must make it appear from the record that judgment was rendered against him: *Shannon v. Scott*, 40–629.

The court cannot entertain an appeal unless the record presented shows that the court below entered a judgment or order from which an appeal may be taken: *Tague v. Benner*, 71–651.

Must show prejudice: The supreme court will not reverse a cause for error committed below unless it is affirmatively shown by the record that such error was actually prejudicial to appellant: *Blackburn v. Powers*, 40–681; *Fulmer v. Fulmer*, 22–231.

Matters not of record: Evidence, instructions, etc., not made part of the record will not be considered on appeal: *Daniels v. Langdon*, 52–741.

Where the supreme court cannot determine from the record what issues are before it, the case may be remanded, in order that the parties may replead: *Lyon v. Tevis*, 8–79.

Evidence, how preserved and made of record, see notes to § 4042.

How fully the evidence must be set out: In order that rulings on the admission or exclusion of evidence may be reviewed upon appeal, it is not necessary that all the evidence be presented in the record. It is only necessary that the record shall show the rulings admitting or excluding the evidence, the purport of the evidence so passed upon, and the ground of objection: *Smith v. Johnson*, 45–308; *Brooks v. Chicago, M. & St. P. R. Co.*, 73–179.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. Upon no other question would it be proper to take all the evidence to the supreme court on appeal. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable, or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises: *Kelleher v. Keokuk*, 60–473.

A general statement in a bill of exceptions as to what the party sought to establish, without a statement of the exact evidence offered, will not be sufficiently definite to enable the court to pass upon an exception to a ruling on such evidence: *Cousins v. Westcott*, 15-253.

A statement in a bill of exceptions that it contains the substance of the evidence is not sufficient where it is necessary, in order to authorize the court to pass on the action of the court below, that it shall have before it all the evidence in the case: *Thompson v. Mumma*, 21-65; *Burlington Gas Light Co. v. Green*, 21-335; *Lea v. Roads*, 22-408; *McKenzie v. Kitler*, 27-254; *Jemmison v. Gray*, 29-537; *Davis v. Card*, 33-592; *Hubbard v. Epperson*, 40-408; *Walker v. Beaver*, 50-504.

Where the bill of exceptions, after setting out evidence, continued, "being all the evidence offered by the plaintiff to sustain the issue on his part," *held*, that it sufficiently appeared that the evidence was all in the record to enable the supreme court to review the ruling of the lower court on a motion for nonsuit: *Rowan v. Lamb*, 4 G. Gr., 468.

Where it is necessary that the record shall be shown to contain all the evidence, such fact must appear from the judge's certificate and not merely from his reference to such a certificate made by the short-hand reporter: *Walker v. Beaver*, 50-504.

When insufficiency of evidence is relied upon as ground for new trial in the lower court, and the motion is overruled, the ruling cannot be reviewed unless the record contains all the evidence: *State v. Lyon*, 10-340; *State v. Hockenberry*, 11-269; *Parsons v. Chapman*, 11-294: *McCool v. Galena & C. U. R. Co.*, 17-461; *Garber v. Clayton County*, 19-29; *Beal v. Stone*, 22-447; *McKenzie v. Kitler*, 27-254; *Smith v. Cedar Falls & M. R. R. Co.*, 30-244; *Davis v. Card*, 33-592: *Everett v. Union Pacific R. Co.*, 59-243; *Crystal v. Des Moines*, 65-502.

The supreme court will not disturb a verdict, on appeal, for insufficiency of evidence to support it, if it has not all the evidence before it: *Barker v. Kuhn*, 38-392.

Where the evidence on which the court below acted is not before the supreme court, the action of the lower court cannot be inquired into so far as it purports to be based upon the evidence: *Skiff v. Mershon*, 7-79.

Impeaching evidence: In order that the action of the lower court in rejecting evidence offered to impeach a witness may be reviewed, the record should show the evidence given by the witness and what it was proposed to prove for the purpose of impeachment: *Shephard v. Brenton*, 20-41.

Rulings upon evidence; prejudice must appear: Where the answers to questions objected to, or sought to be elicited by such questions, are not shown by the record, the supreme court cannot review the ruling of the lower court in sustaining or overruling such objections. It must affirmatively appear that the action of the court, even if erroneous, was prejudicial: *Mays v Deaver*, 1-216; *Speers v. Fortner*, 6-553; *Hanan v. Hale*, 7-153; *Willey v. Hall*, 8-62; *Lucas v. Jones*, 44-298.

When evidence is admitted over objection thereto: In reviewing the action of the court in overruling an objection to a question, the material inquiry is not whether an improper question was asked, but whether improper testimony was received, and error cannot be made to appear until it is shown that the question objected to was answered, and what the answer was: *Thurston v. Cavenor*, 8-155; *Campbell v. Chamberlain*, 10-337; *State v. Keeler*, 28-551; *Manny v. Woods*, 33-265; *Mosier v. Vincent*, 34-478.

It must be made to appear what the witness testified to, and that such testimony was material and prejudicial: *Oliver v. Depew*, 14-490: *Bradley v. Kavanagh*, 12-273.

Where a record is admitted over an objection thereto, but the record is not made to appear in the bill of exceptions, the ruling cannot be reviewed: *Oliver v. Depew*, 14-490.

The record must disclose facts affirmatively showing that the admission of evidence over objection was error to the prejudice of the party objecting, to warrant reversal on that ground: *Green v. Cochran*, 43-544; *Higley v. Newell*, 28-516.

But where evidence is admitted over the objection of a party it will be presumed that the court considered it, and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

When evidence is excluded: In order to determine whether prejudice has resulted to a party by the exclusion of evidence offered by him, the answers, or the facts proposed to be proved by the witness in response to the question asked, must be made to appear. Unless prejudice be thus shown, the error in sustaining objection to the question or the evidence offered will not be ground of reversal: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; *Gronan v. Kukkuck*, 59-18; *Bays v. Hunt*, 60-251; *Kelleher v. Keokuk*, 60-473; *Klaman v. Malvin*, 61-752; *Shellito v. Sampson*, 61-40; *State v. Montgomery*, 65-483.

The court must be advised by the record of the character of the proposed evidence and the facts which the party desiring to introduce it claimed would have been established by it: *Votaw v. Diehl*, 62-676; *Paddleford v. Cook*, 74-433.

When the purpose of a question is not disclosed by the record, the supreme court will not interfere with the ruling of the court below in excluding it: *State v. Ross*, 21-467.

Where the bill of exceptions is so indefinite and uncertain that it cannot be determined what the evidence excluded was to which objection is made, the supreme court will not, on appeal, pass upon the correctness of the action of the lower court: *Hunt v. Daniels*, 15-146.

A ruling of the court in refusing to require the production of a written instrument cannot be reviewed on appeal unless it appears that the instrument would have tended to establish the issue on the part of the party calling for it: *Greenough v. Shelden*, 9-503.

Error of the court in excluding evidence will be deemed without prejudice unless the record shows that such evidence was material to the issues: *Atkins v. Anderson*, 63-739.

But if the record states what the evidence rejected tended to prove, such statement will be presumed to be true, and will enable the appellate court to determine whether such re-

jection, if erroneous, was material: *Spaulding v. Adams*, 63-437; *Chase v. Scott*, 33-309.

If the materiality of the evidence sought to be introduced is apparent on the face of the question asked, it is not necessary that it appear that the party seeking to introduce it state what he expects to prove thereby; but if this is not apparent, the party seeking to introduce the evidence must state what he expects to prove, and thus make the materiality of the question appear: *Mitchell v. Harcourt*, 62-349; *Votaw v. Diehl*, 62-676; *Kuhn v. Gustafson*, 73-633.

Review of instructions: What record must show, see notes to § 3996.

Findings of fact by the court below will be presumed correct and supported by the evidence, if the evidence is not all before the supreme court: *Napier v. Wiseman*, 3 G. Gr., 246; *Hamilton v. Walters*, 3 G. Gr., 556; *Rosseau v. Fine*, 1-98; *Snell v. Kimmell*, 8-281.

An order of the lower court will not be interfered with on appeal where the supreme court has not before it all the evidence upon which the lower court acted: *Krause v. Hampton*, 11-457; *Adams v. Peck*, 14-508.

The granting of a new trial on the ground of newly-discovered evidence will not be interfered with on appeal if it does not affirmatively appear that all the evidence on which it was granted is before the appellate court: *Sowden v. Craig*, 20-477; *S. C.*, 21-580.

Statement of judge as to evidence: Where a judge, in overruling a motion for a new trial, certifies that the newly-discovered evidence on which a new trial is asked is cumulative, such statement will be regarded, on appeal, as true, when the evidence itself is not before the court: *Seymour v. Hoyt*, 23-19.

A judgment will not be interfered with, on appeal, because not warranted by the evidence, unless all the evidence is before the appellate court: *Green v. McFuddin*, 5-549.

IV. What Will and What Will Not Warrant Reversal.

a. *Presumptions of Regularity.*

In favor of action below: Every reasonable presumption is to be entertained in favor of the ruling of the court below and the correctness of its judgment: *Davis v. Moffit*, 4 G. Gr., 92; *Hendrie v. Rippey*, 9-351; *David v. Leslie*, 14-84; *Morris v. Steele*, 62-228; *Hintrager v. Krene*, 62-605; *Bower v. Webber*, 69-286; *In re Will of Norman*, 72-84.

This presumption in favor of the action of the court below will prevail unless overcome by something appearing of record: *Brobst v. Thompson*, 4 G. Gr., 135; *Lawson v. Campbell*, 4 G. Gr., 413; *Speers v. Fortner*, 6-553; *Scofield v. Ford*, 56-370.

The presumption is in favor of the action of the lower court, and it will be interfered with only where it affirmatively appears that some prejudicial error has been committed: *Hunt v. Higman*, 70-406.

If in any view the action of the court can be sustained, the presumption in favor of its correctness will prevail: *Arneson v. Thorstad*, 72-145.

An appellate court is always bound to exercise presumptions in favor of the judgment it reviews, unless it is shown that the law and justice have been violated by such judgment: *State v. Hopkins*, 67-285.

Where the record does not show what the issues in the case were, such issues will be presumed as would render the action of the court proper. *Holland v. Union County*, 68-56.

It will be presumed that there was sufficient testimony to support the judgment rendered unless the contrary appears: *Brady v. Malone*, 4-146: *Hefferman v. Burt*, 7-320; *Jennings v. Conn*, 11-542; *Willett v. Millman*, 61-123; *Phillips v. Phillips*, 46-703.

It will be presumed, in favor of the finding of the court, that lawful evidence authorizing such finding was introduced and considered: *Henry v. Evans*, 58-560.

The supreme court will not, for the purpose of reversing a cause, presume that the proof established a state of facts which would render the decision of the court below erroneous, if a state of facts can be supposed under which such decision would be correct: *Crane v. Ellis*, 31-510.

Where the record shows some evidence on which a ruling could be supported, it will be upheld, no evidence to the contrary appearing: *Blythe v. Blythe*, 25-266.

Where there is nothing in the bill of exceptions showing the existence of grounds on which a motion for new trial is based, it will be presumed in support of the action of the court in overruling such motion that such grounds were not shown to exist: *Keys v. Francis*, 28-321.

Where no finding of facts is made the presumption is that the court found such facts as will justify the conclusion of law, and the conclusion will not be held erroneous unless there is a finding of facts from which error affirmatively appears, or error appears otherwise from the record: *Oskaloosa v. Pinkerton*, 51-697.

Where it does not appear upon what facts the decision of the lower court was based, such a finding of facts will be presumed as will support the decision: *Fouts v. Pierce*, 64-71.

Where the judgment below is based upon an authentication of a judgment from another state, which is insufficient, the presumption will be entertained that there was other evidence sufficiently showing such judgment, unless the contrary appears: *Clemmer v. Cooper*, 24-185.

Where it appears that attorneys' fees were taxed, after rendition of judgment in the case, as they might properly be, it will be presumed that such taxation was made upon proper evidence being introduced, although it does not appear that there was any such evidence: *Kelso v. Fitzgerald*, 67-266.

In the absence of a showing in the record to the contrary, the supreme court will presume that there was before the lower court sufficient evidence to justify the finding that defendant had been duly and legally served with process: *Kent v. Coquillard*, 67-500.

Where appellants were defaulted, and the record did not show what proof was introduced to sustain the bill, *held*, that it would be pre-

sumed there was enough evidence to support the averment upon which judgment was rendered: *Semple v. Lee*, 13-304.

Where the decree recites that certain matters essential to the jurisdiction of the court were made to appear, it will be presumed on the appeal that they were made to appear in the proper manner and that the court rendering such decree performed its duty: *Jewett v. Miller*, 12-85.

The supreme court will presume in favor of the regularity of the proceedings below, even though such proceedings are not shown by the record: *Dixon v. State*, 3-416.

Where the record showed that the trial was not by jury, *held*, that it would be presumed that a jury was waived, although that fact did not appear: *Hawkins v. Rice*, 40-435.

Error must affirmatively appear: Error will not be presumed, and the party alleging the existence of error to his prejudice must make it affirmatively appear: *Hudson v. Mathews*, Mor., 94; *Isett v. Oglevie*, 9-313; *Way v. Lamb*, 15-79; *Carpenter v. Parker*, 23-450; *Messer v. Reginnitter*, 32-312; *Stewart v. Bishop*, 33-584; *State v. Foster*, 40-303; *Thompson v. Winnebago County*, 48-155; *Pottawattamie County v. Marshall County*, 56-410.

Must be clearly manifest: Wherever error is complained of it should be made to appear not only affirmatively but with reasonable certainty: *Randolph Bank v. Armstrong*, 11-515, *Gantz v. Clark*, 31-254.

Presumption in favor of record: Where an abstract showed an interlineation with a pen, and it appeared that the finding of the court below would not have been justified unless the allegation of the petition was such as shown by the abstract as amended by the interlineation, *held* that, in the absence of any showing to the contrary, it would be presumed that the abstract as thus amended was correct: *Mahaska County v. Ruan*, 45-328.

Defect in the record: Error cannot be presumed from mere omission or defect in the transcript. It must appear affirmatively. Unless it does so appear, the presumption of law is that the proceedings of the court below were legal and proper: *Mackemer v. Benner*, 1 G. Gr., 157.

Where a demurrer to a portion of the counts of an answer was sustained, and no action as to other counts appeared of record, but they might properly have been stricken out, *held*, that it would be presumed they were stricken out and that the action of the court was proper: *District T'p v. Smith*, 39-9.

Presumption as to pleadings: Where there was a cross-petition, and the case was tried as though a reply thereto had been filed, *held*, that the court would presume there was such reply, although none appeared in the record: *Hervey v. Savery*, 48-313.

Where ruling does not appear: If it appears that a motion or demurrer was filed in the lower court, but it does not appear that any ruling was made thereon, it will be presumed that such motion or demurrer was waived: *Sigler v. Woods*, 1-177; *Busick v. Bumm*, 3-63; *Boardman v. Beckwith*, 18-292; *State v. Ross*, 21-467; *First Nat. Bank v. Carpenter*, 41-518; *Moore v. Gilbert*, 46-508.

Incidental rulings: The presumption in favor of the correctness of the rulings of the court below is especially applicable to those questions which are ever recurring and depend for their solution upon the discretion of the court: *Clinton Nat. Bank v. Torry*, 30-85; *Thompson v. Burnham*, 35-411.

Acts done in court in the progress of the case are presumed to be in accordance with law unless the contrary is made to appear. A presumption as to the regularity of the proceedings of the lower court will always be exercised, and error in such proceedings must be affirmatively shown to warrant a reversal: *McCue v. Wapello County*, 56-698.

Facts presumed: The presumption to be entertained in support of the ruling of the lower court requires that, if it would be correct under any presumable state of facts not inconsistent with the pleadings and the record, it shall be upheld: *Ward's Heirs v. Cochran*, 36-432; *Johnson v. Mautz*, 69-710; *Stone v. Hawkeye Ins. Co.*, 68-737; *Freher v. Geeseka*, 5-472.

Where sufficient ground appears upon which the judgment of the court below can be upheld, it will be presumed that the judgment was rendered on such ground: *Frederick v. Mitchell*, 1-100; *State v. Gibbs*, 39-318; *Steel v. Miller*, 40-402.

One of several grounds: If there be several grounds upon which a ruling may have been based, it will be upheld if any of such grounds are sufficient to support it, and if, among several insufficient grounds, one would be sufficient under certain conditions that may have existed, the supreme court will presume that such conditions existed and that the ruling was based thereon: *Worthington v. Olden*, 31-419.

Where a case is submitted to the jury on two issues, and a verdict is returned in favor of one of the parties which is sustainable on one of the issues upon the evidence introduced, but not by any evidence in support of the other, it will be presumed that the verdict was upon the issue upon which there was evidence supporting it, and any error of the court below in refusing to take the other issue from the jury will be deemed to have been error without prejudice: *Calder v. Smalley*, 66-219.

Where an instruction was correct as to one question of fact involved and incorrect as to another, and it appeared that, under the evidence, the second question could not have been found as assumed in the instruction without the verdict being contrary to the evidence, *held*, that it would be presumed the verdict was found upon facts in harmony with the first branch of the instruction, and the error as to the other branch was without prejudice: *State v. Sanders*, 30-582.

If no ground can be discovered nor is pointed out upon which the action of the court can be upheld, the presumption of regularity will be overcome: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

Where but one ground of objection is urged it must be presumed the ruling was on that ground, though erroneous: *Emery v. Emery*, 54-106.

Admission of evidence: If evidence may have been admissible under some aspects

which the case may have assumed, and all the evidence is not before the court, it will be presumed that there was a state of facts authorizing the admission of the evidence objected to: *Chase v. Scott*, 33-309.

Where it appears that evidence was excluded, but it does not appear upon what ground, it will be presumed that there was some ground therefor, where the evidence is not all before the court: *Cook v. Sioux City & P. R. Co.*, 37-426.

If objection to evidence is sustained, and the record does not show the ground of the objection, if the evidence is vulnerable to any objection, it will be presumed that was the one made and sustained: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

Where no other evidence than that appearing in the record could legitimately have been presented in the court below, it will not be presumed that the action of the court was based on anything not appearing of record: *McGovern v. Keokuk Lumber Co.*, 61-265.

Where the evidence is not all before the court, the action of the court in dissolving an injunction will not be reversed, but it will be presumed that a sufficient showing was made to justify the action of the court below: *Gray v. Montgomery*, 17-66.

Where the evidence is not all before the court it will be presumed that there was evidence sufficient to support the verdict: *State v. Pitman*, 38-252.

The same presumptions of regularity obtain in favor of the proceedings in a case in equity as in an action at law. Unless the contrary appears it will be presumed that the decree was authorized by the evidence: *Garner v. Pomroy*, 11-149.

Where the evidence upon which the court below has acted is not all before the supreme court, it will be presumed that the action of the lower court was proper under the evidence: *State v. Postlewait*, 14-446; *McIntosh v. Kilbourne*, 37-420; *Laughlin v. Main*, 63-580; *State v. Drorsky*, 73-484.

Instructions: As to the presumption in regard to giving or refusing instructions, see notes to § 3996.

b. *What Errors Deemed Prejudicial.*

Exceptions on immaterial point not considered: See § 4043 and notes.

Errors waived: That amending or pleading over waives error in ruling on demurrer, see § 3860 and notes.

Application by a party for the reconsideration by the court of its ruling on a motion for a new trial will not waive error committed in such ruling and prevent the party from taking advantage thereof on appeal: *Anderson v. Cahill*, 65-252.

Error in former action: Where suit was brought against several defendants for damages arising from illegal sale of intoxicating liquors, and the owner of the property in which the business was conducted was made a joint defendant, and a judgment by default was rendered against one of the sellers, the owner asking to be allowed to defend for such party; and afterward, a change of venue being first had as to the owner, judgment was rendered against him making the first judgment a lien against his property, *held*, that he could not on appeal in the latter case raise any error committed in refusing him leave to defend in the former case: *Putney v. O'Brien*, 53-117.

Where justice has been done: Where it appears that justice has been done, and that a new trial would result in the same verdict or the same judgment, the action of the court in refusing to grant a new trial on the ground of errors of law committed will not be reversed on appeal: *Dawson v. Wisner*, 11-6.

If the court below has erred in the decision of a legal proposition, and the supreme court can see that with the necessary correction the verdict on the second trial must be the same as the first, then the granting of a new trial by the lower court might be reversed; but if it is not manifest that upon such correction of error the second trial would result as the first, the action of the lower court in granting a new trial will not be interfered with: *Braddy v. Lumery*, 11-29.

While a verdict will not be sustained that is clearly against erroneous instructions, yet, in a particular case, as the court below did not so regard it, and it appeared that substantial justice was done by the verdict, *held*, that it would not be reversed for that reason alone: *Allison v. King*, 25-56.

Judgment will not be reversed because of an alleged erroneous instruction by the court, when the judgment is more favorable to the appellant than a fair construction of the evidence justifies: *McNally v. Shobe*, 22-49.

Where the jury were not sufficiently instructed as to the measure of damages, but it appeared that their verdict was not beyond the just sum that plaintiff ought to recover as lawful damage, *held*, that the judgment should not be reversed: *Cooper v. Central R. of Iowa*, 44-134.

A judgment will be affirmed upon appeal if it is correct, although the reasons given for it by the court below may have been erroneous: *Jamison v. Perry*, 38-14; *Whiting v. Root*, 52-292.

A cause will not be reversed because of an inconsiderable error in the amount of the judgment rendered: *Callanan v. Shaw*, 24-441; *Keokuk County v. Howard*, 42-29.

Remission of excess: Where a judgment is rendered for an amount in excess of that due, but on appeal the successful party offers to remit the excess over the proper amount, the judgment will not be reversed: *Morrill v. Miller*, 3 G. Gr., 104.

Failure to give nominal damages not ground for reversal: The supreme court will not reverse a judgment because nominal damages were not allowed, even though it appears that the appellant was entitled thereto: *Watson v. Van Meter*, 43-76; *Rowley v. Jewett*, 56-492; *Phenix Ins. Co. v. Findley*, 59-591; *Case Threshing Machine Co. v. Haven*, 65-359; *Watson v. Moeller*, 63-161; *Wire v. Foster*, 62-114.

An omission to assess nominal damages, where there is a mere technical right of recovery, is not ground for reversal: *Norman v. Winch*, 65-263.

Although a case will not be reversed where

the only right involved is that to nominal damages, yet if it does not appear that no more than nominal damages could be recovered, the refusal of the court to allow any recovery may be reversed: *Madison County v. Tullis*, 69–720.

c. *Review of Ruling Granting or Refusing New Trial.*

Discretion of lower court not interfered with on appeal: See notes to § 4044.

Conflict in evidence: The action of the lower court in overruling a motion for a new trial based on the ground that the verdict is against the evidence will not be interfered with, on appeal, if the conflict in the testimony is great, and its weight is not clearly against the verdict: *Ackley v. Berkey*, 22–226.

Where there is a conflict in the evidence the action of the court below in overruling a motion for a new trial will not be disturbed, on appeal, unless a clear case of abuse of discretion is made to appear: *Hubbell v. Ream*, 31–289.

Where there is a conflict in the evidence the supreme court will not interfere with the action of the lower court in refusing to set aside the verdict on the ground that it is not supported by the evidence: *Chambers v. Brown*, 69–213.

Where the evidence is conflicting, and the court below, which heard the evidence, with full opportunity for observing the manner and appearance of the witnesses, has overruled a motion for a new trial on the ground that it is not supported by the evidence, the supreme court will not interfere: *Snyder v. Eldredge*, 31–129; *Mahaney v. Bell*, 42–383.

The discretion of the trial court in overruling a motion for a new trial on the ground that the verdict is contrary to the evidence will not be reversed where there is a conflict in the testimony: *Russ v. Steamboat War Eagle*, 14-363; *Brockman v. Berryhill*, 16–183; *Burlington Gas Light Co. v. Green*, 22–508; *Pierce v. Walker*, 23–424; *McCabe v. Knapp*, 23–308; *Callanan v. Shaw*, 24–441; *Schrimper v. Heilman*, 24–505; *Hull v. Alexander*, 26–569; *Sherman v. Western Stage Co.*, 24–515, 554; *Garland v. Wholeham*, 26–185; *Todd v. Branner*, 30–439; *Snyder v. Nelson*, 31–238; *Bergert v. Davenport City R. Co.*, 34–571.

Verdict against manifest justice: When the court conscientiously believes that a verdict is against the truth or the weight of the submitted evidence a new trial should unhesitatingly be ordered: but to justify such inference the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict is permitted to stand: *McKay v. Thorington*, 15-25.

Whenever a verdict is clearly, not doubtfully, against the manifest justice of the case, it is the duty of the trial judge unhesitatingly to set it aside; but where there is a conflict of evidence, and the jury, being clearly charged as to the law, have found a verdict which the trial court has refused to set aside, the supreme court will not interfere: *Smith v. Williams*, 23–28.

Manifest error: The error in overruling a motion for new trial must be clearly manifest to warrant a reversal: *Bellamy v. Doud*, 11–285.

Verdict against immaterial evidence: To justify the granting of a new trial on the ground that the verdict is against the weight of the evidence, such want of evidence must relate to a material issue legitimately raised by the pleadings. The refusal of the lower court to grant a new trial when the objection is that the verdict is contrary to immaterial evidence, though admitted without objection, will not be reversed or disturbed on appeal: *Parker v. Hendrie*, 3–263; *Scott v. Morse*, 54–732.

Verdict supported by evidence: It is not the province of the supreme court to overrule both the jury and the lower court in a conclusion reached by them as between conflicting evidence: *Sloan v. Central Iowa R. Co.*, 62–728.

Where the verdict finds support in the evidence the supreme court will not reverse the action of the court below in refusing to grant a new trial, although it believes that the preponderance of evidence is the other way: *Johnson v. Chicago, R. I. & P. R. Co.*, 58–348.

Excessive verdict: The court below, having a full opportunity of understanding whether the verdict is excessive, should fearlessly assume the responsibility of setting it aside on that ground, but the supreme court will be very reluctant to disturb verdicts in this respect: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Where, in an action for personal injuries, the jury has rendered a verdict which the court below has refused to set aside as excessive, the supreme court will not, ordinarily, interfere: *Brown v. Jefferson County*, 16–339.

What the record must show: The supreme court cannot undertake to say that the lower court has abused its discretion, either in granting or refusing a new trial, unless the whole case is presented to it by the record: *Barker v. Brown*, 15–70.

Action of lower court overruled: If the verdict is clearly in conflict with the evidence, and works manifest injustice, the refusal of the trial court to grant a new trial may be overruled on appeal: *Sadler v. Bean*, 38–684.

Where there is no doubt as to the incorrectness of the verdict, the supreme court will grant relief therefrom by overruling the action of the lower court in refusing a new trial: *Martin v. Orndorff*, 20–217; *Lester v. Sallack*, 31–477.

Where material findings of fact in a special verdict are wholly unsupported by the evidence, and the court below has overruled a motion for new trial, the supreme court will reverse the judgment: *McCarty v. James*, 62–257.

Passion or prejudice: But such decision will not be disturbed unless so barren of support as to warrant the finding that it was the result of passion or prejudice: *Schermer v. Gendt*, 52–742.

Verdict not the result of free and unbiased judgment: Where the mind is

brought inevitably to the conclusion that the verdict was not the result of a free, honest and unbiased exercise of judgment on the testimony submitted, and that manifest injustice will result if judgment is rendered thereon, the court below should grant a new trial; and where such a case is made clearly apparent to the supreme court a new trial will be ordered, though refused by the court below: *Jourdan v. Reed*, 1-135; *Fawcett v. Woods*, 5-100; *Byington v. Woodward*, 9-360.

Discretion subject to review: An error of the court in granting or refusing a new trial on a legal proposition is reviewable on appeal with no more presumption in its favor than a ruling made in any other stage of the case: *Byington v. Woodward*, 9-360. And see notes to § 4044.

Where the court below in granting or refusing a new trial misstates a legal proposition it is as much the subject of revision as any other question. In such cases the granting or refusing the motion is not a question of discretion, but is to be determined upon the law applicable to the case: *Stewart v. Ewbank*, 3-191; *Riley v. Monohan*, 26-507.

While in most cases the question of the granting of a new trial is within the sound discretion of the trial court, and such discretion will not be interfered with, yet if the grounds for a new trial appear of record and come within the well-recognized rules of law the action of the court in refusing a new trial may be reversed: *Jones v. Pennimore*, 1 G. Gr., 134; *Shaw v. Sweeney*, 2 G. Gr., 587; *Humphreys v. Hoyt*, 4 G. Gr., 245; *In re Will of Coffman*, 12-491.

Other grounds for new trial: Where the ground for new trial is accident or surprise, or that injustice has been done, the trial court is vested with a large discretion, which will not be interfered with on appeal unless the error affirmatively appears: *Hill v. Densslinger*, 61-240.

The action of a trial court in passing upon misconduct of counsel as a ground for new trial will be sustained on appeal unless it clearly appears to have been erroneous: *Sunberg v. Babcock*, 66-515.

Whether a new trial should be granted for misconduct of the jury is left largely to the sound discretion of the trial court, which is in a much better position to determine whether the rights of the parties have been affected by such misconduct than the supreme court can be, and if the lower court has determined that there should be another trial on that ground, its discretion will not be interfered with unless it is made to appear very clearly that there has been an abuse of discretion: *Perry v. Cottingham*, 63-41.

Where, upon the allegations of misconduct of the jury made as a ground for a new trial, there is a conflict in the evidence, the finding of the court in ruling upon such motion must have the same force as its finding upon any other question of fact arising in an action at law: *Watson v. Stotts*, 68-659.

The supreme court will not interfere with the action of the court below in refusing to grant a new trial on the ground of misconduct of the jury where there is a conflict in the evidence as to the nature of such misconduct: *Todd v. Branner*, 30-439.

A new trial will not be granted on appeal when a witness has given material evidence without being sworn, unless it be shown that the party complaining, or his attorney, did not know of the fact until after the verdict: *Riley v. Monohan*, 26-507.

Where new trial is granted: An order granting a new trial may be reviewed: *Stewart v. Ewbank*, 3-191; *Cook v. Sypher*, 3-484; *Newell v. Sanford*, 10-396.

But the supreme court will exercise a presumption in favor of the correctness of the ruling of the court below, and will not interfere with an order granting a new trial where it does not affirmatively appear that the action is erroneous: *Boardman v. Chicago & N. W. R. Co.*, 32-391.

It is a constant practice in the supreme court to refuse to disturb the action of the court below when a new trial is granted, although the ruling of the lower court would also have been upheld if the new trial had been refused: *Ibid.*; *McKay v. Thorington*, 15-25.

When the trial court determines that the verdict is contrary to the evidence, and ought to be set aside on that ground, the case must be a very clear one to warrant an appellate court in interfering with its action: *Moran v. Harris*, 63-390.

Where the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause which the law recognizes as a ground for a new trial, his action will be interfered with on appeal only when it is shown that he has abused the discretion with which the law vests him: *Rogers v. Winch*, 65-168.

The action of the court in setting aside a verdict and granting a new trial will not be interfered with where it does not appear that the discretion reposed in the trial court has been abused or erroneously exercised: *Laverenz v. Chicago, R. I. & P. R. Co.*, 53-321.

Where it appears that the court below, with full knowledge of all the circumstances transpiring at the trial, has ordered a new trial, the supreme court will not interfere therewith, unless error in the action of the court is made affirmatively to appear: *Finley v. David*, 7-3.

The supreme court seldom interferes with a ruling of the court below in granting a new trial, and would not be justified in doing so except in a clear case: *Lytton v. Chicago, R. I. & P. R. Co.*, 69-338.

A stronger case should be made to justify the interposition of the supreme court when a new trial has been granted than where it has been refused: *Ruble v. McDonald*, 7-90; *Newell v. Sanford*, 10-396; *Shepherd v. Brenton*, 15-84; *Burlington Gas Light Co. v. Green*, 21-335; *Chapman v. Wilkinson*, 22-541; *White v. Poorman*, 24-105; *Roberts v. Jones*, 30-525; *Forney v. Ralls*, 30-559; *Pickering v. Kirkpatrick*, 32-163; *Boardman v. Chicago & N. W. R. Co.*, 32-391; *Tegeler v. Jones*, 33-231; *New York Piano Forte Co. v. Mueller*, 38-552; *Howell v. Snyder*, 39-610; *Conklin v. Dubuque*, 54-571.

Where the trial court has set aside the verdict and granted a new trial, the supreme court will not be inclined to set aside the ruling on appeal: *Robinson v. Bacon*, 24-409.

Where a court grants a new trial on the ground that the jury were confused and mis-

led by the instructions, the supreme court will not interfere: *Reeves v. Royal*, 2 G. Gr., 451.

An order granting a motion for a new trial will not be disturbed on appeal when the grounds alleged are fairly supported and there is nothing to show abuse of discretion: *Sanders v. Clark*, 22–275.

While it is true that a stronger showing should be made to justify an interposition of the supreme court when a new trial has been granted than when refused, yet, where the court in ordering a new trial misapplies a legal proposition, such ruling should be reviewed where made upon motion for new trial, the same as upon the ruling on any other legal question, and in so doing the discretion of the trial court as to granting new trials is not interfered with: *Mehan v. Chicago, R. I. & P. R. Co.*, 55–305.

No discretion is reposed in the court in determining whether or not evidence which is relied on to entitle the party to a new trial on the ground of newly-discovered evidence is cumulative, and a ruling of the court in granting a new trial upon the showing as to such evidence will be reviewed as readily as though the court had refused to grant the new trial: *Manson v. Ware*, 63–345.

If the verdict is contrary to instructions, and the lower court has granted a new trial on that ground, its action will not be disturbed on appeal, nor the instructions given be reviewed. It is the duty of the jury to regard the instructions as the law, and find a verdict accordingly, whether they be right or wrong: *Caffrey v. Groome*, 10–548; *Savery v. Busick*, 11–487; *Jewett v. Smart*, 11–505; *Taylor v. Cook*, 14–501; *Porter v. Thomson*, 22–391.

Where, under the evidence, it is apparent that the jury has disregarded an instruction of the court, the supreme court will reverse the action of the lower court in failing to set aside the verdict and grant a new trial on that ground: *Nichols v. Chicago, R. I. & P. R. Co.*, 69–154.

And further as to duty of jury to follow the instructions, see notes to § 3996.

The action of the lower court in setting aside a verdict will not, in general, be interfered with on appeal on the ground that it is not sustained by the evidence: *Engs v. Priest*, 65–232.

Abuse of discretion must appear: Where a new trial is granted by the lower court on the ground that the verdict is not sufficiently supported by the evidence, the action of such court in determining such question will not be disturbed on appeal unless it appears that there has been an abuse of discretion in such ruling: *Hill v. Denslinger*, 61–240; *Stewart v. Dunlap*, 61–248; *Conklin v. Dubuque*, 54–571; *Pickering v. Kirkpatrick*, 32–163; *Able v. Frazier*, 43–175; *McNair v. McComber*, 15–368.

And where the verdict has been set aside by the court below as not supported by the evidence, and a new trial granted, it will require a stronger showing to warrant the interference of the appellate court than when a new trial asked on similar grounds has been refused: *Jenkins v. Chicago & N. W. R. Co.*, 32–97.

Where the verdict or the report of the referee is set aside by the court below, the supreme court will reluctantly interfere, and will do so only when there is nothing found in the record to support the ruling: *Lyons v. Harris*, 73–292.

Action of the court in sustaining a motion for a new trial on the ground of surprise will not be reversed unless the supreme court is well satisfied that such discretion has been abused: *Schumaker v. Gelpcke*, 11–84.

Conclusive preponderance of evidence: To authorize the reversal of the decision of the court below setting aside a verdict on account of insufficiency of evidence, there should appear such conclusive preponderance of evidence in its support as would show that injustice would be done: *Worthington v. Olden*, 31–419; *Burlington Gas Light Co. v. Green*, 21–335.

The case must be very clear to warrant the appellate court in interfering with the action of the trial court in setting aside a verdict as contrary to the evidence: *Moran v. Harris*, 63–390.

Error and abuse of discretion must be made to appear to justify a reversal of such action of the lower court: *Brett v. Bassett*, 63–340.

Excessive damages: The supreme court will hesitate long before interfering with the action of the trial court in setting aside a verdict on the ground that the damages found by the jury are excessive and appear to have been given under the influence of passion and prejudice: *White v. Beck*, 64–122.

Weight of evidence; manifest injustice: While there is no question as to the right of the supreme court to set aside a verdict and award a new trial when the verdict is against the weight of evidence or the truth of the case, yet, to justify such interference, the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict should be permitted to stand: *McKay v. Thorington*, 15–25.

Mistake as to legal proposition: The discretion with which the court is clothed as to granting a new trial is a legal discretion, and its exercise must accord with the rules of law. If a new trial is granted upon insufficient cause, or for reasons in conflict with the law, such action will be regarded as an abuse of the discretion of the court, and will be reversed on appeal with the same freedom as if made at any other stage of the trial: *Ruble v. McDonald*, 7–90; *Shepherd v. Brenton*, 15–84; *Stockwell v. Chicago, C. & D. R. Co.*, 43–470.

Although it will require a stronger case to warrant the supreme court in reversing the action of the court below where a new trial has been granted than where it has been refused, yet, if the evidence is clearly and explicitly supported by the verdict, the action of the lower court in granting a new trial may be reversed: *Cedar Falls & M. R. Co. v. Rich*, 33–113.

Concurring verdicts: Where several trials have resulted in the same verdict and the trial court has refused to set the last one aside as

against the evidence, it would require a very strong case to justify an interference by the appellate court: *Burlington Gas Light Co. v. Greene*, 28–289; *Russ v. Steamboat War Eagle*, 14–363; *Terpenning v. Gallup*, 8–74; *Hollenbeck v. Marshalltown*, 62–21.

Where concurring verdicts have been rendered and the last one is allowed to stand by the trial court, this fact will authorize the presumption on the part of the supreme court that another trial would result in the same way: *Penn v. McLaughlin*, 36–538.

However, a second verdict concurring with the previous one which has been set aside as against the evidence, by no means concludes the court from again granting a new trial, and especially when the second application is based upon a different ground from that contained in the first: *Jourdan v. Reed*, 1–135.

Where a verdict was set aside because one juror had not concurred therein, and upon a subsequent trial the same verdict was rendered, *held*, that the fact that the result had been concurred in by twenty-three jurors would have much weight in sustaining the action of the court below in refusing to grant a new trial on the ground that the verdict was contrary to the evidence: *State v. Cross*, 12–66.

But if the jury have disregarded the law, or their verdict is fairly against the evidence, a new trial will be granted, even though it is a second verdict: *Corbin v. Chicago, R. I. & P. R. Co.*, 37–316.

d. *Review of Verdict of Jury.*

Not interfered with if supported by evidence: The supreme court will not on appeal disturb the verdict of the jury as against the evidence on a question of fact, if there is any evidence to support it: *Harger v. Lapofford*, 46–11; *Cole v. Coskery*, 63–526; *Witter v. Little*, 66–431.

To warrant a reversal on that ground the verdict must be clearly against the weight of evidence: *Booth v. Small*, 25–177; *Harper v. Madren*, 21–407; *Ayres v. Hartford Ins. Co.*, 21–193; *Starker v. Luse*, 33–595.

The supreme court interferes very reluctantly with the verdict of a jury, and never unless it is clearly unsupported by the evidence or has been otherwise improperly reached: *Miller v. Mutual Benefit L. Ins. Co.*, 39–304.

Where the court instructed the jury that to warrant a verdict on a particular issue in behalf of one of the parties the evidence must be clear, satisfactory and conclusive in his favor, and a verdict was rendered for such party on such issue, *held*, that the supreme court would not on appeal set aside such verdict on the ground that the evidence was conflicting, if it appeared that the jury might, without bias or prejudice, have concluded that in their minds the evidence was of such a character: *Hoadley v. Hammond*, 63–599.

Where the evidence is conflicting the supreme court will not set aside the verdict on the ground that it is not supported by the evidence: *Hall v. Hunter*, 4 G. Gr., 539; *Pilmer v. Branch of State Bank*, 19–112; *Jones v. Jones*, 19–236; *Eason v. Webster*, 20–591; *Reeves v. Reeves*, 20–597; *Ellwood v. Wilson*, 21–523; *Law v. Illinois Cent. R. Co.*, 32–534; *Maxon v. Chicago, M. & St. P. R. Co.*, 67–226; *Cottrell v. Southwick*, 71–50.

Where there is a conflict in the evidence and the verdict is not palpably against the weight of evidence, the appellate court will not interfere: *Crabtree v. Messersmith*, 19–179.

Where the determination of a question upon the evidence involves the credibility of contradictory witnesses, it is a matter peculiarly for the jury: *Peck v. Hendershott*, 14–40.

When the jury have determined the question as to the credit which should be given to the testimony of a particular witness, when such question fairly arises in the case, their finding will not be set aside: *Cottrell v. Southwick*, 71–50.

Honest and unbiased judgment of jury: Where there is a conflict in the evidence, the supreme court will not on appeal interfere with the verdict of a jury unless it is well satisfied of the insufficiency of the evidence to convince the reason, conscience and judgment of the triers: *Todd v. Branner*, 30–439.

Unless there is some foundation for the conclusion that the findings of the jury are not the result of honest, intelligent and unbiased judgment on their part, the supreme court will not disturb their verdict: *Martin v. Algona*, 40–290.

Preponderance not controlling: Where there is a mere conflict in the evidence, even though it strongly preponderates against the verdict, and there is a conviction in the minds of the supreme court that a different result would more nearly accord with justice, these facts are not sufficient to justify it in directing a new trial: *Garretty v. Brazell*, 34–100.

Where the evidence is conflicting the supreme court will not set aside the verdict of a jury, although they might have been better satisfied upon the evidence with a different result: *White v. Clark*, 39–338; *Starker v. Luse*, 33–595; *Hyde v. Lookabill*, 66–453.

A strong preponderance of evidence against the verdict, and a conviction that a different result would more nearly accord with justice, are not sufficient to justify the supreme court in ordering a new trial, where they are not satisfied from the absence of evidence to support a verdict that it was not the result of a free, honest, unbiased and intelligent exercise of judgment and conscience on the part of the jury, and that justice will fail if the verdict is not set aside: *Garretty v. Brazell*, 34–100: *Parker v. Dubuque S. W. R. Co.*, 34–399; *Myers v. Dresden*, 40–660; *Allison v. Chicago & N. W. R. Co.*, 42–274.

Question of negligence: If the conclusion of negligence can be, by the jury, reasonably drawn from the circumstances, such conclusion will not be interfered with on appeal, although the opposite conclusion appears to the court to be the more reasonable; but if the general result appears to be wrong, and the jury, as appears from their special findings, are unable to assign any certain or tangible ground for their conclusion, the court should interfere: *Ford v. Central Iowa R. Co.*, 69–627.

Question of fraud: It being the peculiar province of the jury to determine questions of

fraud in fact, when alleged, the supreme court will not, on appeal, interfere with a judgment on the verdict in a case involving fraud, where it does not appear that the jurors could not, in the exercise of their unbiased and intelligent discretion, have properly found as they did: *Votaw v. Diehl*, 62–676.

Where the question is as to whether a transaction was fraudulent, the supreme court will not interfere with the verdict of the jury, who had the opportunity to see the witnesses and judge of their credibility, unless the evidence is so against the verdict as to raise a presumption of passion or prejudice on the part of the jury: *Enneking v. Scholtz*, 69–473.

Passion or prejudice must appear: Where there is a conflict in the evidence the supreme court will not set aside a verdict unless it appears that it is the result of passion or prejudice: *Melhop v. Doan*, 36–630: *Moore v. Moore*, 39–461; *First Nat. Bank v. Charter Oak Ins. Co.*, 40–572; *Hall v. Ballou*, 58–585; *French v. Reel*, 70–122; *Gibson v. Fischer*, 68 29.

To authorize a reversal on the ground that the verdict is against the evidence there must be such failure of proof as to raise the presumption that it was the result of passion or prejudice and not of an intelligent and honest exercise of discretion by the jury: *McCormicks v. Fuller*, 56–43.

Verdict set aside: It is with reluctance and caution that an appellate court interferes with the verdicts of juries. Where there is reasonable doubt, or a conflict of evidence, the verdict will be upheld; but if there is no such doubt or conflict, the duty to set aside the verdict is plain: and in the case under consideration the verdict was set aside: *McAunich v. Mississippi & M. R. Co.*, 20–338.

And in particular cases, *held*, that the verdict was so clearly contrary to the evidence that the judgment upon such verdict should be reversed: *Martin v. Orndorff*, 20–217: *Lester v. Sallack*, 31–477; *Miller v. Mutual Benefit Ins. Co.*, 34–222.

Where there is an entire want of evidence to support or establish a fact essential to the verdict, a judgment based upon such verdict will be reversed on appeal: *Carlin v. Chicago, R. I. & P. R. Co.*, 37–316.

If the verdict is clearly unsupported by the evidence and appears to have been the result of passion or prejudice, the supreme court will not hesitate to reverse on that ground: *Woodward v. Squires*, 39–435.

The supreme court will reverse the case where, under the law as given the jury by the court, the verdict is contrary to the undisputed evidence: *Eckerd v. Chicago & N. W. R. Co.*, 70–353.

Excessive verdict: A judgment will not be interfered with as excessive where it is within the province of the jury to determine under all the circumstances the amount that plaintiff is entitled to recover, as, for instance, where exemplary damages are allowable: *Dynes v. Robinson*, 11–137.

It is the province of the supreme court on appeal to set aside a verdict which is excessive and remand the case for trial by another jury. The court will, however, usually not make an absolute order remanding the case for another trial in such cases, but will allow plaintiff to elect whether he will take another trial or accept a certain amount which would not seem to the court to be open to the objection of being excessive: *Cooper v. Mills County*, 69–350.

Verdict contrary to instructions: A verdict in conflict with the instructions will be set aside on appeal without regard to their correctness. The instructions are the law of the case for the jury: *Sullivan v. Otis*, 39–328; *Morse v. Johnson*, 38–430; *Cobb v. Illinois Cent. R. Co.*, 38–601; *Farley v. Budd*, 14–289; *Browne v. Hickie*, 68–330. And see notes to § 3996.

If instructions are conflicting the verdict will not be set aside if in harmony with the correct instructions: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Finding of facts by court, review of, see notes to § 3950.

Judgment of court on facts, review of, see notes to § 4070.

Findings of referee, review of, see notes to § 4028.

V. HEARING AND DETERMINATION OF APPEAL.

a. *Dismissal or Affirmance.*

For failure to file transcript, etc., see §§ 4410–4413.

Where appellant's right has terminated, see § 4442 and notes.

Other grounds: Where it did not appear that a general verdict had been found or that judgment had been rendered, *held*, that the appeal ought to be dismissed on motion: *Martin v. State F. Ins. Co.*, 58–609.

The existence of the judgment from which the appeal is taken is a jurisdictional fact, and if the existence of such judgment does not appear from the abstract the appeal will be dismissed: *Warder v. Schwartz*, 65–170.

Affirmance or dismissal on motion will not be granted on the ground that the case is not triable *de novo*, and there is no assignment of errors. Such an objection can only be raised on final hearing: *White v. Savery*, 49–197.

An objection that the record, on appeal, does not sustain the errors assigned, can only be determined upon final hearing and not on motion: *Balm v. Munn*, 63–641.

Cause remanded for repleading: When the record is in such condition that the supreme court cannot determine from the pleadings what issues are before it, the cause may be remanded in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8–79.

Dismissal of appeal by appellant: The state may, as appellant, dismiss its appeal from a ruling of the lower court when it does not appear that such dismissal will prejudice the rights of the appellee: *State v. Moriarty*, 20–595.

Where a suit for *mandamus* was brought against the individuals composing the board of canvassers of an election to relocate a county seat (who were the county supervisors), and upon trial the *mandamus* was awarded, from which defendants appealed,

held, that the appeal could not be dismissed in the supreme court upon motion of a subsequently elected board of supervisors, such board being merely the nominal party: *State v. Cavers*, 22–343.

Affirmance without prejudice: It is competent for the supreme court, in the decision of a motion addressed to its discretion, to order the affirmance of the judgment without prejudice to the rights of the appellant to a new trial in the court below: *White v. Poorman*, 24–108.

Where a decree had been affirmed by reason of the defective condition of the record preventing a trial *de novo*, and afterward it was sought to have a re-investigation of the case upon a perfected record, *held*, that the decree could not be re-opened, but that, in view of the peculiar circumstances of the case, the court would order that such decree should not conclude the rights of either party in a new action: *Van Orman v. Spafford*, 20–215.

Second motion: A motion to dismiss an appeal is no bar to a motion for the same purpose made upon a new and more perfect record: *Seacrest v. Newman*, 19–323.

b. *Method of Trial of Appeal.*

In actions at law, see § 3948 and notes.

In actions in equity, see § 3949 and notes.

Correcting assessments: An appeal in an action by special proceedings is to be tried according to the method provided for ordinary or for equitable proceedings according to the nature of the action: *Davis v. Clinton*, 55–549.

Probate of will: A proceeding for the probate of a will being a special proceeding cannot be tried in the supreme court *de novo*, but must be reviewed on errors assigned in the record: *Ross v McQuiston*, 45–145; *Sisters of Visitation v. Glass*, 45–154; *In re Will of Donnely*, 68–126.

An action to test the validity of a will is not triable *de novo* on appeal: *Kelsey v. Kelsey*, 57–293.

Summary proceedings: A trial *de novo* can be had only in equitable proceedings. In summary proceedings, as, for instance, to cancel a judgment, the supreme court only has jurisdiction for the correction of errors at law: *Brett v. Myers*, 65–274.

A habeas corpus proceeding will be heard on appeal on errors assigned as in an ordinary proceeding: *Drumb v. Keen*, 47–435.

A proceeding to restore lost corners, as provided by statute, being a special proceeding involving merely a legal right, will be reviewed on appeal as an ordinary and not as an equitable action: *In re Harrington*, 54–33.

c. *Affirmance or Reversal in General; Remanding; Final Judgment.*

Want of jurisdiction of the subject-matter in the court below may be raised for the first time on appeal to the supreme court: *Walters v. Steamboat Mollie Dozier*, 24–192.

And the want of jurisdiction of the lower court may be taken notice of by the supreme court although not raised: *Groves v. Richmond*, 53 570.

Where a change of venue was granted to a court having no jurisdiction to try the case, *held*, that the want of jurisdiction in the trial court could be urged in the supreme court, although not raised below, and the judgment was reversed: *Cerro Gordo County v. Wright County*, 59–485.

Under such circumstances the supreme court will not review the questions arising on the trial in the court having no jurisdiction: *Bennett v. Cary*, 57–221; *Gilman v. Donovan*, 59–76.

After the court determines that it has no jurisdiction of the subject-matter, it will dismiss the appeal: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Affirmance where result is correct: Where the judgment of the court below is found to be correct, it will be affirmed although the reasons given therefor are erroneous: *Whiting v. Root*, 52–292; *Jamison v. Perry*, 38–14.

If a party has no standing in a court of equity upon his bill and the answer thereto, the court will not, on appeal, reverse the case because it was dismissed on motion, even though that might be an irregular method of practice: *Hoag v. Madden*, 70–612.

Cannot be affirmed on another ground: Where a motion to set aside a verdict and grant a new trial is overruled upon all the grounds urged except one, and on appeal the action of the court on this ground is held to be erroneous, the case will be reversed without inquiry as to whether the motion should not have been sustained on other grounds, the opposite party not having appealed with reference to the ruling on such grounds: *Collins v. Brazill*, 63–432.

Where a demurrer is erroneously sustained upon one ground and overruled upon another as to which it should have been sustained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have taken in the lower court if the demurrer had been sustained on the proper ground: *District Tp v. Independent Dist.*, 63–168.

Nor to party successful below: A party against whom no judgment has been rendered cannot question the correctness of the proceedings in the lower court, and if the judgment is reversed so far as it is in his favor, he should not be bound thereby so far as the proceedings are adverse to him, but should be given an opportunity for a new trial: *Boyce v. Wabash R. Co.*, 63–70.

Where a judgment contains two adjudications, one in favor of a party and one against him, and he appeals from the entire judgment, it will be presumed that he appeals from that portion adverse to him; and especially is this true where the relief sought by the appeal, if granted, would render the judgment of the court below nugatory. On such appeal the judgment will not be interfered with in behalf of the party not appealing: *Hentruger v. Hennessy*, 46–600.

In a law action, where the case is reversed on plaintiff's appeal, no relief can be furnished defendant on an appeal by him: *Minthorn v. Hemphill*, 73 257.

Entire reversal for error as to one count: Where error is committed as to only

one of two counts upon which plaintiff recovers, but it does not appear clearly as to the amount recovered on each count, the entire judgment will be reversed: *Sioux City & P. R. Co. v. Walker*, 49–273; *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

Where an ordinance provided for a fine for maintaining a nuisance, and a person was under such ordinance fined and the abatement of the nuisance ordered, and the supreme court held that the ordinance, in so far as it provided for a fine, was in excess of authority and void, *held*, that it would not sustain so much of the judgment as provided for the abatement of the nuisance, but would reverse the whole judgment: *Nevada v. Hutchins*, 59–506.

Affirmance where several issues are involved: The affirmance of a general judgment is an affirmance thereof with respect to all the issues decided thereby, although the opinion be based upon but one of such issues: *Finch v. Hollinger*, 46–216.

Where a judgment is entire it should be affirmed or reversed as to all the parties appealing: *Cavender v. Smith's Heirs*, 5–157, 195.

Case remanded as to cross-action: A cause may be remanded for new trial as to a cross-action, with an order that such trial shall extend to that alone, and that the judgment on plaintiff's original action remain undisturbed: *McAfferty v. Hale*, 24–355.

Opinion of court on points which become immaterial: When a case is reversed upon errors in instructions and sent back for a new trial, the court will not express its opinion as to errors claimed to have been made in the admission or rejection of evidence which may not occur on a new trial: *Gould v. Chicago, B. & Q. R. Co.*, 66–590.

The court will not on appeal undertake to determine any question which can have no influence in determining the rights of the parties before it, however important such question may be in the abstract, and particularly is this true when there is a difference of opinion among the members of the court as to such question: *Payne v. Humeston & S. R. Co.*, 70–584.

Effect of affirmance of ruling on demurrer: Where a demurrer was submitted without stipulation for either party to amend or plead over, and the action of the court in overruling the demurrer was excepted to, and judgment for the other party entered, *held*, that upon the affirmance of the ruling on the demurrer the judgment was final, and the unsuccessful party could not have the cause remanded for the purpose of pleading over: *Grimes v. Hamilton County*, 37–290.

In such a case the court will not, upon affirming the action of the court below, grant leave to the appellant to withdraw his demurrer and proceed to trial upon the merits: *Dunlap v. Cody*, 31–260.

The action of the supreme court in sustaining the decision of the court below overruling a demurrer will be final as against the unsuccessful party only where judgment has been entered against him in the court below for failure to plead or to proceed with the case: *Tyler v. Langworthy*, 37–555.

Effect of reversal; new trial: It is only where the facts are settled by agreement of the parties or by the finding of a court or referee, or by a special verdict of the jury, that upon reversal in the supreme court in an action triable by ordinary proceedings, the court may render final judgment for the party unsuccessful in the lower court. In other cases a new trial must be awarded: *Artz v. Chicago, R. I. & P. R. Co.*, 38–293; *Gray v. Regan*, 37–688; *Harwood v. Case*, 37–692.

Where the facts are not thus determined, and the cause is reversed and remanded to the lower court, judgment should not there be rendered without a retrial: *Harwood v. Case*, 37–692.

Where a judgment rendered below upon a report of a referee was set aside, on appeal, as in conflict with the law and evidence, and the case was remanded, *held*, that the lower court should have proceeded in the same manner as though such report had been set aside upon motion there made: *Gray v. Regan*, 37–688.

A reversal of a judgment leaves the parties in the condition they were in before the judgment was rendered, and parties who have not appealed are not deprived of their standing in the court after the reversal of the judgment by reason of their not having joined in the appeal: *Case v. Blood*, 71–682.

When final judgment will be entered on reversal: The supreme court cannot render final judgment where it reverses a cause on the ground that a new trial should have been granted below. It can only enter up such judgment as the court below should have rendered: *Payne v. Chicago, R. I. & P. R. Co.*, 47–605.

So *held* in a case where a judgment was reversed because not supported by the evidence, and it also appeared that the evidence was substantially the same on a former trial in which judgment had likewise been reversed on the same ground: *Ibid.*

Upon a determination in the supreme court that there was error in refusing to admit certain testimony offered in the court below, the supreme court cannot proceed to render judgment as though the testimony had been admitted. The offered evidence might not be sufficient proof of the fact which it tended to establish, or might have been overthrown by other evidence. The issue must be again passed upon by the lower court: *Mendell v. Chicago & N. W. R. Co.*, 20–9.

Where defendant has not had an opportunity to defend in the court below, for example, in case of default upon service by publication, the supreme court will not, in case of reversal, enter final judgment, but remand the case for the purpose of allowing defense to be made: *Doolittle v. Shelton*, 1 G. Gr., 272.

Where defendant in the court below, upon his demurrer being overruled, stood thereon and appealed, and the ruling was reversed, *held*, that he was not entitled to judgment in the supreme court, but that the case must be remanded, and the plaintiff would have leave to amend: *Ware v. Thompson*, 29–65.

Where the court below made a finding of facts unfavorable to defendant, and to which he excepted, and rendered judgment for de-

fendant upon another question, and upon appeal by plaintiff the judgment was reversed, *held*, that as the correctness of the finding of facts could not be inquired into, although defendant also appealed, for the reason that there was no judgment against him, the court would not enter up judgment upon the finding of facts, but remand the case to the district court to retry the issues of law and fact: *Boyce v. Wabash R. Co.*, 63–70.

The reversal on appeal of an order directing the issuance of a writ of possession on the ground that it is irregular merely, and not because the adverse party is entitled to possession, does not entitle such adverse party, on motion, to an order for a writ of restitution. If the writ of possession is yet undetermined the right thereto cannot be decided upon a mere motion: *Lombard v. Atwater*, 46–501.

Where the judgment upon a special verdict is reversed on an error below the supreme court may render such judgment as should have been rendered below: *Gilmore v. Ferguson*, 28–422.

Where a case is reversed on the ground that upon a finding of facts made by the court the judgment is erroneous as a matter of law, final judgment may be rendered on such finding: *Shaw v. Nachtwey*, 43–653.

In such a case the supreme court may remand the cause for final judgment in the lower court, and judgment below should be entered up without a retrial: *Roberts v. Corbin*, 28–355; *Drefahl v. Tuttle*, 42–177.

Where a party has sued under a statute authorizing the recovery of treble damages, and the judgment in his favor is held to be erroneous on appeal, the supreme court cannot give him judgment for actual damages on a different cause of action: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

Effect of reversal for conflict between verdict and instructions: Where a judgment is reversed because the verdict is inconsistent with the instructions of the court and special findings thereunder, although the correctness of the instructions will not be considered, the supreme court will not render a final judgment on the special findings, and in accordance with the instructions, but will remand the cause so that the correctness of the instructions may be determined by an appeal from the judgment of the court on the special findings: *Baird v. Chicago, R. I. & P. R. Co.*, 55–121; *S. C.*, 61–359.

Affirmance of judgment as modified: Where special findings were inconsistent with the general verdict, in so far as the latter included an allowance on one count of the petition, *held*, that the court could modify the judgment by striking therefrom the amount allowed on that count and affirm it as to the balance: *Cobb v. Illinois Cent. R. Co.*, 38–601.

Where final judgment should be entered: Where the judgment will affect the title to real estate it should be entered in the lower court, and the case will be remanded for that purpose: *Hait v. Ensign*, 61–724.

What is the final judgment: If final judgment is rendered in the supreme court on appeal, it is the judgment of that court which constitutes the final adjudication of the cause and not the judgment of the court below: *Griffin v. Seymour*, 15–30.

Final judgment at subsequent term: The supreme court having reversed a cause and remanded it for a new trial will not, at a subsequent term, on motion of appellant, render judgment in his favor. In analogy to the rule as to the lower courts, entries or orders made at a previous term will only be changed to correct an evident mistake: *Roberts v. Corbin*, 26–315, 329.

Cancellation or correction of judgments: The supreme court has power, aside from any statutory provision, to correct or cancel judgments improvidently entered through mistake or oversight: *Drake v. Smythe*, 44–410.

Additional recovery on appeal; foreclosure of mortgage: Where the mortgagee in an action to foreclose a mortgage accepted and receipted the record for the amount found due thereon, and thereafter the mortgagor conveyed the property to a third person, and afterward the mortgagee, within due time, prosecuted his appeal and obtained a decree for an additional amount, *held*, that the additional decree thus secured was not a lien as against the purchaser who took without notice of any intention on the part of the mortgagee to prosecute such appeal: *Davis v. Bonar*, 15–171.

Money paid over in pursuance of judgment: Where plaintiff, in an action to ascertain which of two persons was entitled to certain money due on real property purchased by him, paid the money into court, and it was adjudged to belong to one of the parties defendant and was paid over to him, and thereafter the other defendant appealed, *held*, that upon reversal of the judgment the appellant was not entitled to a recovery against the plaintiff for the money thus brought into court and already paid over to the other defendant: *White v. Buti*, 32–335.

Remitting excess, and final judgment in supreme court for balance: On an appeal in an action in which usury was pleaded as a defense, *held*, that plaintiff might remit the usury and take judgment in the supreme court for the principal, and that judgment might also be entered there for the ten per cent. penalty for the use of the school fund: *Thompson v. Purnell*, 10–205.

Where plaintiff, in an action to recover damages for injury to stock on defendant's railroad track, recovered double damages in the lower court, but on appeal it was considered that the service of notice was not sufficient to entitle him to double damages, *held*, that the case would be reversed unless plaintiff consented to a judgment for simple damages and submitted to pay the costs of appeal: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56–440.

Where the supreme court reversed a case for error in including certain items in the judgment therein, and, on a petition for rehearing, appellee offered to remit such portion of the judgment as was held erroneous and asked for judgment for the balance, *held*, that such offer would be accepted, even on rehearing, and a judgment for the balance was entered: *Hyde v. Minneapolis Lumber Co.*, 53–243.

Where the attention of the court is called, upon a petition for rehearing, to the fact that there is error in the allowance of interest, and the opposite party offers to remit the excess, the judgment will be reduced to the proper amount without granting a rehearing, and the costs of the appeal will be taxed to the appellee: *Gere v. Council Bluffs Ins. Co.*, 67-272.

Where the judgment is for too large an amount by reason of an erroneous assessment of interest, if the party recovering the judgment remits the amount of the excess, judgment may be affirmed with such correction, and it is not necessary that it be remanded: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Remitting in lower court: Where an offer to remit the excess in the judgment was made in the lower court, after service of notice of appeal, and the appeal was nevertheless prosecuted, *held*, that the successful party might, upon remitting the excess, have affirmance of the judgment in the court below with costs, but that if no such remission was entered, then the judgment would be reversed: *Waggoner v. Turner*, 69-127.

The successful party may, in the lower court, remit the amount of the excess or submit to a new trial: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69-440.

Remittitur where verdict is excessive: Where the verdict is evidently excessive by reason of an error in assessing the amount of recovery, the supreme court may order the successful party to remit the amount of excess or submit to a new trial: *Howe v. Sutherland*, 39-484.

In a particular case, *held*, that the amount of damages allowed in an action for personal injuries, although mental anguish was a proper element to be considered, was so excessive as to indicate passion or prejudice, and appellee was allowed the option of accepting a less amount or submitting to a reversal: *McKinley v. Chicago & N. W. R. Co.*, 44-314.

A verdict in an action against a railway company for personal injuries being deemed by the supreme court excessive under the evidence in the case, and the result of prejudice, they directed that appellee might take judgment for a certain amount, and that if he had not elected to do so within the time set, judgment should be reversed: *Lombard v. Chicago, R. I. & P. R. Co.*, 47-494.

Where judgment was entered below for less than the amount of the verdict on the ground that it was excessive, *held*, that the cause should be reversed and remanded with direction to the lower court to allow plaintiff to accept such judgment or submit to a new trial: *Noel v. Dubuque, B. & M. R. Co.*, 44-292.

A verdict will not be reduced in the supreme court on the ground that it is excessive unless such relief has been asked in the court below: *Small v. Chicago, R. I. & P. R. Co.*, 55-582; *Dickey v. Harmon*, 26-501.

Election to remit: While, if the verdict is excessive, it may be set aside on appeal and remanded, yet the court will not usually make an absolute order of remand, but allow the successful party to elect to take a certain amount which the court consider not excessive, or submit to a new trial: *Cooper v. Mills County*, 69-350.

Costs in case of remittitur: Where a judgment was modified in the supreme court on account of excessive interest having been included therein, but it did not appear that attention had been called to the error in the court below, *held*, that costs of appeal should be taxed to appellant: *Bayliss v. Hennessey*, 54-11.

Where the mistake in the judgment is such that it would probably have been corrected if a motion therefor had been made, the costs will be taxed to appellant: *Sanxey v. Iowa City Glass Co.*, 68-542; *Kaufman v. Dostal*, 73-691.

Where the judgment is excessive in amount, and it does not appear that any offer was made to remit the excess in the court below, costs of the appeal will be taxed to the appellee, although he may make the remission in the supreme court and prevent the case from being remanded: *Payne v. Billingham*, 10-360.

Where, before costs were made on appeal, the successful party offered in writing to remit all the judgment above a certain amount, which offer was refused, and, upon final hearing, the other party was allowed to recover more than the amount offered, *held*, that the costs of appeal were to be taxed to him: *Montelius v. Wood*, 56-254.

Decision of the case binding on second appeal: A decision upon appeal in a case constitutes the law of the case, and will not on a subsequent appeal in the same case be overruled or re-examined, however well satisfied the court may be that it is erroneous: *Adams v. Burlington & M. R. R. Co.*, 55-94; *Barton v. Thompson*, 56-571; *Simplot v. Dubuque*, 56-639; *Star Wagon Co. v. Swezy*, 63-520; *Ellis v. State Ins. Co.*, 68-578; *District Tp v. Independent Dist.*, 69-88; *Ramdan v. Central Iowa R. Co.*, 69-527; *Drake v. Chicago, R. I. & P R. Co.*, 70-59; *Davis v. Curtis*, 70-398; *Babcock v. Chicago & N. W. R. Co.*, 72-197.

Where the court has once definitely passed upon the case on one appeal, it will not, on a second appeal, reconsider its ruling thereon, unless there has been such change of the issues or other circumstances of the case as to raise a new question, touching the applicability of the former decision to the case as thus made on the second appeal. The only method for procuring a reconsideration of the decision on the first appeal is by rehearing: *Minnesota Linseed Oil Co. v. Montague*, 65-67.

Appeal not considered after dismissal for defects: Where an appeal is dismissed on the ground of defects in the record, it is incompetent for appellant, without obtaining a rehearing, to bring the case again before the court upon the same appeal on a corrected record: *Green v. Ronen*, 62-89.

Where an appeal is dismissed for the reason that appellant has not moved in the lower court to have the error complained of corrected, before appealing, a dismissal of the appeal and affirmance of the judgment will not prevent him, if not too late, from making the motion in the court below and again appealing from the refusal of the court to sustain it: *Berryhill v. Jacobs*, 20-246.

Where a judgment procured by appellee for failure of appellant to file a transcript was set aside on the ground that appellant had previously dismissed the appeal, *held*, that appellant could not afterwards prosecute his appeal, the formal setting aside of the judgment being a determination that the court had no longer any jurisdiction of the case: *Dewey v. Pierce*, 69-31.

To what court remanded; change of venue: Where a change of venue is improperly granted and the judgment of the court to which the change is taken is reversed for that error, the cause should be remanded to that court from which the change of venue was taken: *Ferguson v. Davis County*, 51-220: *Bennett v. Carey*, 57-221; *Gilman v. Donovan*, 59-76; *Cerro Gordo County v. Wright County*, 59-185.

Such an order was made without discussion in *McCracken v. Webb*, 36-551.

A procedendo is not necessary to authorize the court below to redocket and proceed with the case in a proper manner. That may be done, on proper notice to the adverse party, at any time after the time for rehearing has expired: *State v. Knouse*, 33-365: *Becker v. Becker*, 50-139.

Notice of further proceedings in lower court: The opposite party is entitled to some notice that the case is again upon the docket before judgment can be rendered, upon the case being remanded: *Messenger v. Marsh*, 6-491.

Proceedings in lower court after reversal and remand: After a cause is remanded with direction that a certain judgment be entered, no fact existing prior to the first hearing in the lower court can be interposed as a reason against the entry of such judgment: *Lord v. Ellis*, 11-170.

As to whether amended or additional pleadings may be filed in the court below after a cause is reversed and remanded, see notes to § 3895.

Where a decree was reversed on the ground that the court below had erred in overruling a motion to strike certain depositions from the files, for the reason that they had been taken without authority, and the cause remanded, *held*, that the court below could not be required to dismiss the cause or enter decree for the opposite party, but must proceed to try the case anew: *Kershman v. Swehla*, 62-654.

Where a cause was reversed on one point and sent back for a new trial and further proceedings not inconsistent with the opinion in the supreme court, *held*, that plaintiff (appellee on the appeal) was not required to introduce evidence on an issue determined in his favor on the former trial and which was regarded as settled in his favor on the appeal, and as to which no inquiry was authorized by the opinion; and this even though defendant, in an amended answer after the cause was remanded, had denied the fact involved therein: *Crump v. Morton*, 53-599.

Where a motion for a new trial is overruled in the court below and that action of the court is reversed on appeal, nothing remains to the court below but to proceed with a new trial. It cannot receive other affidavits and pass again upon the motion for a new trial: *Pomroy v. Parmlee*, 10-154.

If judgment is reversed for error of law in entering judgment on a finding of facts and the case remanded for a proper judgment upon such finding, judgment should be entered without a retrial: *Roberts v. Corbin*, 28-355. *Drefahl v. Tuttle*, 42-177.

Where the judgment in the supreme court leaves nothing for the lower court to do on the remanding of the cause except to enforce the performance of the duties imposed by the judgment of the supreme court upon an officer of the lower court by requiring him to pay over money in his hands, there is no occasion for a trial: *Howe v. Jones*, 71-92.

But this rule is not applicable where a motion for a verdict upon the evidence is overruled in the lower court, and on appeal it is held that such motion should have been sustained. The lower court might have, even after sustaining the motion, allowed the introduction of other evidence omitted by mistake or inadvertence, and the supreme court will not, by rendering final judgment upon the motion for verdict upon the evidence, cut off the opportunity which would have existed in the lower court to introduce such additional evidence: *Meadows v. Hawkeye Ins. Co.*, 67-57.

Where it was held on appeal that a new trial had been improperly granted on account of insufficient evidence, and the cause was remanded, *held*, that defendant was not entitled to judgment in the court below, but that it was the duty of that court to proceed and determine the issues joined in the petition for new trial as if no appeal had been taken: *Dryden v. Wyllis*, 53-390.

Where plaintiff in an action on a tax title set up generally the payment of taxes without specifying times or amounts, and the title was held invalid and the cause remanded for determination of amount plaintiff was entitled to recover for taxes paid and judgment therefor, *held*, that defendant might appear in the lower court and contest plaintiff's claim for taxes paid: *Miller v. Corbin*, 48-525.

If, from the judgment of the supreme court, it appears that the cause of action no longer exists, or, in other words, there is nothing left upon which the court below can act, the case, upon being remanded to the lower court, should be dismissed, and refusal of the lower court to do so may be corrected by *certiorari*: *Edgar v. Greer*, 14-211.

The court below should, upon the filing of a *procedendo* directing it to enter judgment in accordance with the opinion of the supreme court, proceed to enter such judgment irrespective of any notice by the adverse party of his intention to file a petition for a rehearing: *Fenton v. Way*, 44-438.

Where an answer containing three distinct defenses was demurred to, the demurrer sustained, and upon appeal the action of the court reversed as to the first cause, the other two not being passed upon, *held*, that defendant had no standing in the court below except on the first cause, but on a subsequent appeal the defendant had the right to have the sufficiency of the other defenses passed upon: *Bates v. Kemp*, 16-223.

d. *Trial of Equity Cases De Novo.*

Method of securing, see § 3949 and notes.

The hearing and determination: On an appeal in an equitable action the court will examine into the merits of the case for the purpose of administering justice, guided only by the universal principles of equity jurisprudence, not being confined to errors apparent on the record: *Austin v. Carpenter*, 2 G. Gr., 131.

On such an appeal the facts as well as the law of the case are again reviewed and adjudicated: *Pierce v. Wilson*, 2-20.

The court, however, can only act upon the testimony upon which the decree below was rendered: *Wolker v. Ayres*, 1-449.

It cannot, although the case be triable *de novo*, consider testimony not presented to and considered by the court below: *McGregor v. Gardner*, 16-538.

Upon trial *de novo* the court cannot determine a question as to which no issue is raised on the trial below: *Wheeler & Wilson Mfg. Co. v. Iasbrouck*, 68-554.

The difference between a court having appellate jurisdiction proper and a court for the correction of errors at law is, substantially, that the former tries cases *de novo* and renders such judgment as should be rendered upon the facts and the law, while the latter simply inquires into alleged errors of law committed by the lower court. Under our constitution the supreme court has jurisdiction to try *de novo* on appeal only chancery cases: *Sherwood v. Sherwood*, 44-192.

If a case is tried as an equitable one in the court below, and the proper steps are taken to secure a trial *de novo* on appeal, the case must be so tried, and not upon assignment of errors. The method of trial in the supreme court is dependent upon the manner in which the case was tried below, and not upon the nature of the case: *Blough v. Van Hoorebeke*, 48-40.

Case not to be remanded: It is not the duty of the court in a trial *de novo*, when it appears that the evidence is not sufficient to support the judgment in the court below, to remand the case for a new trial in order that the party who is unsuccessful on the appeal may have the opportunity of introducing additional evidence: *Wickersham v. Reeves*, 1-413.

Affirmance; former adjudication: A judgment in an equity case which is affirmed on appeal to the supreme court, for the reason that proper steps were not taken to secure a hearing on the merits, is conclusive as a former adjudication, and may be pleaded as such when the same question arises in another action, although the decision of the supreme court, if the case could have been heard on the merits, would have been different: *Trescott v. Baines*, 51-409.

When case will be remanded: Where the supreme court holds that an equitable action is not triable *de novo* on appeal for want of the proper steps having been taken, but reverses the judgment on errors assigned, it cannot enter a final decree, but must send the case back for further proceedings: *Jordan v. Winser*, 48-180; *Kershman v. Sudds*, 62-654.

Where objection to non-joinder of necessary parties defendant is made for the first time on the hearing of a case triable *de novo* in the supreme court, such want of proper parties will not cause the bill to be dismissed, but the action will be remanded with leave to have the necessary parties brought in: *Postlewait v. Howes*, 3-365.

Where the trial court had struck a deposition of a party from the files because not taken within the time required by order of the court, *held*, on appeal, that although such action of the court was erroneous, the supreme court would not proceed to try the case anew on the evidence submitted below and the deposition thus stricken from the files, but would remand it for the purpose of allowing the opposite party to present additional evidence, so that the party whose deposition was thus stricken out would not be able to take advantage of the error of the court below in refusing to consider his deposition: *Sweet v. Brown*, 61-669.

When an equity cause is, upon appeal, not tried *de novo*, but is reversed on errors assigned, and remanded, it stands for trial anew as a law action: *Jordan v. Winser*, 48-180.

Modification of decree: The supreme court will not, on appeal, make a modification of a decree so as to render it more favorable to the party who does not appeal, even though it may seem from the record that such change would be proper if there had been an appeal by such party: *Smith v. Wolf*, 55-555.

Where there was nothing in the record indicating that an appeal was taken for delay, and the judgment of the lower court was affirmed after the expiration of the time fixed therein for performance by the unsuccessful party, *held*, that the time for performance should be extended so as to allow an opportunity to such party to perform the decree as affirmed: *Daniels v. St. Louis, K. C. & N. R. Co.*, 56-192.

Final decree: Where an equity case is appealed and tried anew, and the action of the court below is determined to have been erroneous, the successful party is entitled to have such decree as is proper on the record as made in the court below entered up in the supreme court: *First Nat. Bank v. Baker*, 60-132.

Where an equity case is tried anew on appeal it is the duty of the supreme court to render such judgment as the court below should have rendered: *Kaufman v. Dostal*, 73-691.

While the successful party is ordinarily entitled to a decree in the supreme court, and the cause cannot be remanded, yet there are exceptions to such rule. Where it appeared that by mistake the allegations of the petition were erroneous in the description of a highway with reference to which relief was asked, *held*, that the case might be remanded for the purpose of enabling plaintiff to amend his petition so as to secure such relief, it not appearing that plaintiff or his attorney was chargeable with negligence in connection with such mistake: *White v. Farlie*, 67-628.

In lower court: While either of the parties is entitled, upon a trial *de novo*, to have a final decree entered in the supreme court, yet if the judgment is such as to affect the title to real

estate, it should properly be entered in the court where the case was tried: *Hait v. Ensign*, 61–724.

Proceedings in lower court after remand: After an equitable action has been tried *de novo* in the supreme court and remanded to the lower court for decree, in accordance with the decision of the supreme court, the party cannot amend his pleadings and present a defense that existed when the issues were first tried in the court below: *Sexton v. Henderson*, 47–131.

After reversal in a suit in equity, which is remanded for further proceedings not inconsistent with the opinion, it stands precisely as any suit in equity stands between the submission and the entry of the decree, the court being fully advised in the premises and the decision announced as to what decree should be entered upon the pleadings and evidence as they stand. The introduction of new evidence, omitted by inadvertence, or the filing of additional or amended pleadings, might be allowed in the discretion of the court, in view of the circumstances and in furtherance of substantial justice; but could not be claimed as a right: *Adams County v. Burlington & M. R. R. Co.*, 44–335.

The allowance of an amendment and tendering a new issue after trial *de novo* in supreme court, and remanding of cause for judgment in court below and *procedendo* filed, should be made only on the strongest showing of accident or mistake, or for matters arising subsequent to the decree, or the like. A party cannot be allowed to try his cause by piecemeal. But where a showing of diligence is made by affidavits, sufficient to entitle a party to show mistake and introduce a new issue, the question of diligence in discovery of the mistake is not further in issue, and neither that issue nor any of the former issues in the case, but only the new issue, is to be tried: *Adams County v. Burlington & M. R. R. Co.*, 55–91.

When an equity case is remanded for judgment in the lower court, the parties may introduce material evidence which has been discovered since the original trial, and may set up matters materially affecting the merits of the case which have occurred since the former trial, and the amendment to the pleadings necessary to such purpose may be made; but a party cannot set up by way of amendment matter existing at the time of the former trial, and which he omitted to set up at that time: *Sanxey v. Iowa City Glass Co.*, 68–542.

A grant of leave, in a decree entered under *procedendo* from the supreme court, to one defendant to withdraw her answer, *held* not to have the effect of continuing or dismissing the case as to such defendant, especially when the decree was immediately afterwards set aside, and a new decree entered without such leave: *McGregor v. McGregor*, 21–441.

Where a cause is remanded to the lower court after trial *de novo*, merely for judgment, without further directions, judgment must be rendered as a matter of course, and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial: *Austin v. Wilson*, 57–586.

Where, in an equity case, there cannot be a trial *de novo* because of error in excluding evidence in the lower court which does not appear of record, the supreme court cannot render a final judgment, but will remand the cause. In such a case the court below cannot render a final decree, but must permit a new trial: *Kershman v. Swehla*, 62–654.

Erroneous action of the lower court in allowing a party to introduce additional evidence after an equitable cause has been remanded to the court below for a decree in conformity with the opinion of the court, is not an order so materially affecting the final decision that an appeal can be taken therefrom before the rendition of final judgment: *Garmoe v. Sturgeon*, 67–700.

e. *Rules, and Exercise of Powers.*

The rules of practice in courts of last resort ought to be framed and interpreted rather with a view to the submission of causes upon their merits than to their disposition merely upon technical grounds: *Palo Alto County v. Harrison*, 68–81.

The rules of the supreme court as to the practice therein have the force and effect of laws duly enacted. They cannot be regarded as matter of mere form, and until abrogated must be substantially, at least, obeyed in the preparation of abstracts: *State ex rel. v. O'Day*, 68–213.

The constitution gives the supreme court jurisdiction and power to "exercise a supervisory control over all inferior judicial tribunals throughout the state," and while ordinarily such control must be exercised in strict accordance with the rules of procedure which obtain in actions at law or in equity, yet in anomalous and exceptional cases the court is not bound hand and foot and rendered powerless to redress palpable injustice caused by the erroneous action of a lower court: *Poole v. Seney*, 70–275.

4425. Judgment against sureties on stay bond. 3195. The supreme court, where it affirms the judgment, shall also, if the appellee moves therefor, render judgment against the appellant and his sureties on the bond above mentioned for the amount of the judgment, damages, and costs referred to therein, in case such damages can be accurately known to the court, without an issue and trial. [R., § 3537; C., '51, § 1986.]

If appellee take a new judgment against appellant and sureties on his appeal bond, the former judgment is merged therein and its lien destroyed: *Swift v. Conboy*, 12–444.

4426. Damages for delay. 3196. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or

part has been superseded by bond as above contemplated, the court shall award to the appellee damages upon the amount superseded; and, if satisfied by the record that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent. thereon, as shall effectually tend to prevent the taking of appeals for delay only. [R., § 3538; C., '51, § 1990.]

Where there is not a money judgment in the court below against appellants, this and the preceding sections do not confer power on the supreme court to render such judgment on the appeal bond. Although an appeal be taken solely for delay, yet it is only where the collection of money and the judgment therefor has been superseded by bond that damages may be awarded, as here contemplated, against the party taking the appeal: *Berryhill v. Keilmeyer*, 33-20.

It appearing that appellant had been at the expense of printing abstract and argument, presenting the question raised by the appeal, *held*, that it was not proper to award damages against appellant for having taken the appeal: *Ragan v. Day*, 46-239.

It is only where a judgment or order for the payment of money is appealed from, or where the damages can be accurately known to the supreme court without an issue or trial, that the court is authorized to award to appellee damages against appellant for taking the appeal: *Branscomb v. Gillian*, 55-235.

4427. Process. 3197. If the supreme court affirm the judgment or order, it may send the cause to the court below to have the same carried into effect, or it may itself issue the necessary process for this purpose and direct such process to the sheriff of the proper county, as the party may require. [R., § 3539; C., '51, § 1991.]

It is not obligatory upon the supreme court to issue process, etc., as here contemplated: *Roberts v. Corbin*, 26-315, 331.

4428. Restitution of property. 3198. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property or the value thereof. [R., § 3540; C., '51, § 1992.]

Restoration of property taken under the judgment appealed from cannot, in case of reversal, be given as a summary remedy where such property has, by voluntary sale or by seizure and sale, passed to an innocent purchaser, or has, in the *bona fide* discharge of a trust, pursuant to an order of court, been turned over to another: *Hanschild v. Stafford*, 27-301.

Where, upon appeal, it was decided that a writ of possession had been irregularly issued by the court below, *held*, that such fact did not, of itself, entitle the appellant to a restoration of the possession taken from him by such writ: *Lombard v. Atwater*, 46-501.

Where, at the time of sale under a judgment, an appeal therefrom was pending, upon the subsequent determination of which the judgment was reduced to an amount less than that for which the plaintiff bought in the property at the sale, *held*, that defendant was not entitled to an order upon plaintiff to repay the excess, but that the property should be restored to defendant: *Munson v. Plummer*, 58-736.

Where the judgment under which the successful party has acted is reversed, it becomes his legal duty to restore to the other party all the property or its value taken under the judgment, and, upon failure to do so, action may be brought against him without previous demand: *Zimmerman v. National Bank*, 56-133.

4429. Title not affected. 3199. Property acquired by a purchaser in good faith under a judgment subsequently reversed, shall not be affected by such reversal. [R., § 3541; C., '51, § 1993.]

Purchase at sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser, and such person is not protected as a *bona fide* purchaser: *Twogood v. Franklin*, 27-239.

In case of a purchase by a judgment creditor before notice of appeal, if he again recovers on another trial, his title is not affected: *Frazier v. Crafts*, 40-110.

Where the purchaser at a judicial sale, and the grantee holding under him, paid only the costs and not the whole amount bid, *held*, that not having paid value they could not be regarded as good faith purchasers; and *held*, further, that the attorney for the plaintiff in the lower court and on appeal could not, upon purchase of the property, become entitled to protection as a good faith purchaser: *O'Brien v. Harrison*, 59-686.

The provisions for the protection of a purchaser at judicial sale as against a subsequent reversal are not designed for the benefit of parties claiming under a distinct title: *Wood v. Young*, 38-102.

4430. Power to imprison. 3200. The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed. [R., § 3542.]

4431. Rehearing. 3201; 19 G. A., ch. 144. If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section. [R., § 3543.]

Upon the same case and record: A new case cannot be made on a petition for rehearing, nor matters insisted upon which were not presented in the original case: *Hintrager v. Hennessy*, 46-600, 604; *Mann v. Sioux City & P. R. Co.*, 46-637, 643.

So the court cannot, upon rehearing, consider an additional abstract or amended record not before them at the first hearing: *Cramer v. Burlington*, 45-627; *Nixon v. Downey*, 49-166; *Parsons v. Parsons*, 66-754.

An additional abstract filed by appellee upon rehearing cannot be considered: *Simplot v. Dubuque*, 49-630.

The fact of an appeal having been taken not being shown by the abstract, *held*, that such fact could not be shown on a petition for rehearing: *Hintrager v. Hennessy*, 46-600.

The fact that additional evidence has been discovered since the trial of the case in the court below is no ground for rehearing: *Zuver v. Lyons*, 40-510.

Certificate of appeal to U. S. supreme court: The certificate that the validity of a statute was drawn in question in the case on the ground that it was in conflict with the constitution of the United States will not be given where the question of such conflict was first raised in the petition for rehearing in the supreme court. The fact which is essential to give the supreme court of the United States jurisdiction on appeal from the state supreme court must appear on the face of the record. It is not sufficient that it be made in the argument of counsel: *Martin v. Cole*, 38-141.

Copy of opinion: Before the modification of rule 92 of the supreme court, *held*, that the requirement that a copy of the petition for rehearing should be delivered to the attorney of the adverse party must be observed: *Austin v. Wilson*, 52-731.

A petition for rehearing which does not contain the original opinion printed in full, or a reference to the number and page of the Northwestern Reporter in which the opinion is printed, will be stricken from the files: *Kervick v. Mitchell*, 68-273.

Remitting excess on rehearing: Where a cause was reversed on appeal because the judgment for plaintiff included an item erroneously allowed, *held*, that appellee might, on rehearing, offer to remit the excess over the amount of the proper judgment, and judgment for the balance would be entered in the supreme court: *Hyde v. Minneapolis Lumber Co.*, 53-243.

Not granted to party who has not argued; may be granted on court's own motion: The supreme court will not grant a rehearing upon the application of a party who failed to file or make an argument when the cause was submitted. But if it is satisfied that error has been committed, it will, on its own motion, order a rehearing for the purpose of correcting the error: *Wachendorf v. Lancaster*, 61-509.

Argument on rehearing: After the opposite party has filed a reply to the petition for rehearing, neither party has the right to file any other argument: *Webster County v. Hutchinson*, 60-721.

Bill of review: The statute having provided for a petition for rehearing and not for a bill of review, an implication arises against the right to file a bill of that kind: *McGregor v. Gardner*, 16-538.

Effect of curative act: Where a curative act is passed while a case in which the defect sought to be cured is raised is pending in the supreme court on rehearing, the case will be regarded precisely as if no opinion had been previously filed, and the defect will be deemed cured: *Iowa R. Land Co. v. Sac County*, 39-124, 151.

In case of division: Where the judgment on appeal stands affirmed by reason of a division in the supreme court, such affirmance is subject to reconsideration on rehearing as any other judgment: *Zeigler v. Vance*, 3-528.

If, on rehearing, the court is equally divided as to whether the former opinion should be adhered to, the case will stand as if the court had been equally divided on the first hearing, and the judgment will be affirmed: *Richards v. Burden*, 59-723, 754.

Effect of rehearing after procedendo: After the decision of a cause by the supreme court, a *procedendo* was filed in the court below, whereupon the proper steps were taken to remove the cause to the federal court. Subsequently, and within the proper time, a petition for rehearing was filed in the supreme court and allowed; *held*, on a motion to dismiss in the supreme court, that the cause was still pending there, and had not been removed to the federal court by proceedings in the court below: *McKinley v. Chicago & N. W. R. Co.*, 44-314: *Railroad Co. v. McKinley*, 99 U. S., 147.

Provisions applicable in criminal cases: The provisions as to rehearing found in the code of civil procedure are applicable in criminal cases as well as in civil, and in favor of the state as well as the defendant: *State v. Jones*, 64-349.

4432. Argument. 3202; 19 G. A., ch. 144. The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in sup-

port of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief either in writing or print, stating in substance that the petition[er] for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office. [R., § 3544.]

GENERAL PROVISIONS.

4433. Docketing causes. 3203. The clerk shall docket the causes as the same are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and shall cause notice of the manner he has set such causes to be published and distributed in such manner as the court may direct. [R., § 3535.]

4434. Hearing argument. 3204. The court shall hear all the causes docketed, when not continued by consent, or for cause shown by the party, and the party may be heard orally or otherwise, in his discretion. [R., § 3548.]

As to arguments, see notes to § 4424 and Rules 52-57 and 99.

4435. Opinion filed. 3205. No cause is decided until the opinion in writing is filed with the clerk. [R., § 3550.]

Section construed: *Baker v. Kerr*, 13-384.
That the opinion must be in writing, see § 182.

4436. On remand. 3206. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district. [R., § 3551.]

4437. Assignment of errors. 3207. An assignment of error need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or rulings in an exception, it must designate which is relied on as an error, and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned. [R., § 3546.]

Necessary in a law case: In a law action an assignment of errors is absolutely essential to the consideration of the case on appeal, and it is immaterial that but one point is relied upon, and that this is apparent from the record and argument: *Barnhart v. Farr*, 55-366.

The court cannot consider objections not made in the assignment of error: *Wood v. Whitton*, 66-295.

An objection not made in the assignment, but first raised in the argument, will not be considered: *Roberts v. Cass*, 27-225.

Not necessary in equity: In an equitable action triable *de novo* on appeal, an assignment of errors is not necessary: *Hackworth v. Zollars*, 30-433; *Sherwood v. Sherwood*, 44-192.

Where judgment is entered below on the admissions and allegations of the pleadings in an equity case, the cause on appeal is triable *de novo* on such allegations and admissions, and an assignment of errors is not necessary: *Early v. Burt*, 68-716.

On appeal from ruling on motion or demurrer: When an appeal is taken in an equity case from a ruling upon motion or demurrer, error must be assigned: *Powers v. O'Brien County*, 54-501; *Patterson v. Jack*, 59-632.

Trial of equitable actions upon assignment of errors: Where an equity case is not in proper form for trial *de novo*, it may be heard like an action at law on assignment of errors properly preserved by exceptions: *Schmeltz v. Schmeltz*, 52-512; *Cross v. Burlington & S. W. R. Co.*, 51-683; *Jordan v. Wimer*, 45-65; *Lutz v. Kelly*, 47-307; *Lynch v. Lynch*, 28-326; *Jones v. Clark*, 37-586; *Mallory v. Luscombe*, 31-269.

Record must show error assigned: Where the record does not show that the ruling complained of in the assignment of errors was in fact made, such question cannot be considered: *Borland v. McNally*, 48–440.

What the assignment should show: An assignment of errors should plainly state the error complained of and not merely refer to the parts of the record wherein the objection complained of is said to appear: *Wood v. Whitton*, 66–295.

Assignments held insufficient: An assignment "that the court erred in its action in regard to the jury," *held* too indefinite: *Hannon v. Chandler*, 3–150.

An assignment that there was error in allowing the introduction of evidence objected to by plaintiff, and that the court erred in finding for defendant, *held* too indefinite: *Garrett v. Wells*, 63–256.

An assignment that "the court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant," *held* not sufficiently specific: *Hoefer v. Burlington*, 59–281.

An assignment that "the court erred in rendering judgment for appellee" is not sufficiently specific: *Tomblin v. Ball*, 46–190.

The assignment that a verdict is contrary to the law as given by the court is too general: *Wood v. Hallowell*, 68–377.

Assignments that "the court erred in admitting improper and rejecting proper testimony," and that "the court erred in admitting certain evidence of the defendant against plaintiff's objection," *held* not sufficiently specific: *Merchants' Union Barbed Wire Co. v. Rice*, 70–14.

Assignments of error that the verdict is contrary to law, and that the court erred in admitting testimony on the trial, and that the court erred in excluding testimony on the trial, and that the court erred in overruling defendant's motion in arrest of judgment and for a new trial, are not sufficiently specific: *Armstrong v. Nillen*, 70–51.

Assignments *held* not sufficiently specific in the following cases: *Hawes v. Twogood*, 12–582; *Wilson v. Hillhouse*, 14–199; *Morris v. Chicago, B. & Q. R. Co.*, 45–29; *Oschner v. Schunk*, 46–293; *Bardwell v. Clare*, 47–297; *McCormick v. Chicago, R. I. & P. R. Co.*, 47–345; *Nockles v. Eggspieler*, 47–400; *Moffatt v. Fisher*, 47–473; *Benton v. Nichols*, 47–698; *Betts v. Glenwood*, 52–124; *Black v. Boyd*, 52–719; *Brown v. Rose*, 55–734; *Wilson v. Klokenteger*, 56–764; *Low v. Fox*, 56–221; *Vanderberg v. Camp*, 68–212; *Smith v. James*, 73–515; *Wadsworth v. First Nat. Bank*, 73–425.

On demurrer: A general assignment of error in the sustaining of a demurrer based on several grounds is not sufficiently specific: *Waukon v. Strouse*, 74–547.

Errors in instructions: Unless the particular points claimed to be erroneous in instructions are specifically designated, an assignment of error thereon will not be regarded: *Peck v. Hendershott*, 14–40; *Brewington v. Patton*, 1–121.

An assignment of error in giving certain instructions, in refusing certain others, and in modifying certain others, specifying them in each case, *held* sufficiently specific: *Sherwood v. Snow*, 46–481.

An assignment of errors in giving instructions, designating them by number, as in "instructing the jury that," stating in substance a brief proposition of law, *held* sufficient: *Kendig v. Overhulser*, 58–195.

An assignment of errors stating that "the court erred in giving on its own motion each of the instructions numbered," setting out the numbers of the instructions objected to, is sufficiently specific: *Clark v. Ralls*, 50–275.

The assignment that the court erred in refusing to give certain instructions mentioned by number, and each one thereof, and in giving others mentioned by number, and in giving each thereof, is sufficiently specific: *Wood v. Whitton*, 66–295; *Hammer v. Chicago, R. I. & P. R. Co.*, 70–623.

Where several instructions present but a single proposition, the assignment that the court erred in refusing to give them and each of them specifically, points out the error objected to: *Hathaway v. State Ins. Co.*, 64–239.

An assignment based upon instructions generally, without pointing out specific portions claimed to be erroneous, is not sufficient: *Peck v. Hendershott*, 14–40.

Where the assignment indicates clearly the instructions asked and refused, and that the court erred in refusing them, such assignment is sufficient without pointing out the particular objection relied upon: *Schaefert v. Chicago, M. & St. P. R. Co.*, 62–624.

Error in ruling on motion: Where a motion is made upon a statutory ground, and the overruling of the motion is assigned as error, such assignment will be sufficiently specific although the motion has specified more than one thing as constituting the irregularity complained of in the motion: *Thomas v. Hoffman*, 62–125.

Assignment of error in the overruling of a motion to dismiss, which motion was based on a single ground, *held* sufficiently specific: *Nichols v. Wood*, 66–325.

Error in ruling on motion for a new trial: A general assignment of error in overruling a motion for a new trial will not bring before the court the question whether the verdict finds sufficient support in the evidence, where that is only one of several grounds relied upon in the motion: *Leekins v. Nordyke, etc., Co.*, 66–471.

A general assignment of error in overruling motion for new trial, when such motion was based on several different grounds, is not sufficiently specific: *Reilly v. Ringland*, 44–422; *Richardson v. McCormick*, 47–80; *Stevens v. Brown*, 60–403; *Marsel v. Bowman*, 62–57; *Terry v. Taylor*, 64–35; *McCormick v. Chicago, R. I. & P. R. Co.*, 47–345; *Oschner v. Schunk*, 46–293; *Foley v. Kirkland*, 66–227; *Hasner v. Patterson*, 70–681; *Kirk v. Litterst*, 71–71.

An assignment of errors in overruling a motion for a new trial, where no specific grounds of error are pointed out, is not sufficient: *Morris v. Chicago, B. & Q. R. Co.*, 45–29.

Where the error assigned was that the court erred in overruling the first, second and third grounds of defendant's motion for a new trial, and it appeared that the grounds referred to, while stated in three different ways, amounted to the same thing and embraced a single proposition, *held*, that the assignment was suffi-

cient: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69-440.

Error in ruling on demurrers: An assignment of error in the ruling of the court sustaining the several demurrers of different defendants is not sufficiently specific: *Bradley v. Johnson*, 67-614.

Error in judgment: An assignment that the court erred in rendering judgment against the party who appeals could be valid only where the court below had rendered its decision in writing, stating the facts found and the conclusions of law thereon, or where the case had been tried by the court and the evidence was all brought up by a bill of exceptions: *Dean v. White*, 5-266.

Deciding each error: The provision requiring the court to decide on each error assigned construed: *Baker v. Kerr*, 13-384.

Filing assignment, see § 4413.

Errors not argued deemed waived: See notes to § 4424.

4438. Motion book. 3208. All motions must be entered in the motion book, and shall stand over till the next morning after the morning on which entered, and till after having been publicly called by the court, unless the parties otherwise agree, and the adverse party shall be deemed to have notice of such motion. [R., § 3547.]

4439. Original paper sent up. 3209. Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court. [R., § 3525.]

Where the objection made in the court below to the introduction of a contract in evidence was that its appearance indicated that it had been altered since its execution, and there was no evidence tending in any manner to explain such alteration, *held*, that the supreme court could not pass upon the sufficiency of such objection, where the appellant had not secured the transmission to the supreme court of the instrument to which the objection was made: *Wing v. Stewart*, 68-13.

4440. Security for costs. 3210. The appellant may be required to give security for costs under the same circumstances as those in which plaintiffs in civil actions in the inferior court may be so required. [R., § 3526.]

4441. Death of party. 3211. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district [and circuit] court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [R., § 3520.]

Where, pending an appeal in a divorce case, one of the parties dies, the action abates, both as to the claim for divorce and as to alimony: *Barney v. Barney*, 14-189.

The fact that the death of a party to the appeal is suggested to the supreme court and made a matter of record does not constitute a revival of the cause against the heirs or representatives of such party: *Ibid.*

A person claiming to be administrator of a party to an action in the lower court cannot, on appeal, object to the correctness of the abstract and other proceedings, he not having been made a party to the case in the lower court nor upon the appeal: *Magarrall v. Magarrall*, 74-378.

4442. Dismissal of appeal. 3212. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [R., § 3521.]

Where the appellant is not entitled to prosecute the appeal, as, for instance, after payment of the amount of judgment and acceptance of the same by the appellant, the appeal will be dismissed on motion: *Independent Dist. v. District Tp*, 44-201.

It is possible that where an appeal is prosecuted from an intermediate order affecting the merits, and the action is, in the meantime, prosecuted to final judgment in the court below, such fact might be brought to the attention of the supreme court as a ground for dismissal of the appeal: *Stanley v. Davenport*, 54-463.

Where appellant by motion and affidavit sought to show that pending the appeal appellee (the plaintiff) had accepted a sum of money in full settlement of the judgment recovered below, and appellant thereupon asked that the appellee should take nothing further in the cause and be barred from the further prosecution of the action, and that appellant

be discharged from further liability, which motion was resisted on the ground that a part of the judgment had been assigned before settlement, and that there was fraud in obtaining the settlement, *held*, that the court could not grant the motion and appellant must either dismiss or prosecute his appeal: *Simonson v. Chicago, R. I. & P. R. Co.*, 48-19.

To justify a dismissal of the appeal upon a showing that appellant has no further right to prosecute it, that fact should clearly appear. Where there is any doubt as to the facts the appeal will not be dismissed: *Lewis v. Tilton*, 62-100.

Where a party appealed from a decree restraining his use of property for a certain purpose, and on motion it was made to appear that he had lost his interest in the property, *held*, that the appeal would not be further entertained for the purpose of determining the question of costs: *Faucher v. Grass*, 60-505.

Where a party in whose name the action is prosecuted appears on appeal by his affidavit and otherwise not to be the real party in interest and not to have authorized the prosecution of the action, the appeal may be dismissed. Such showing by the party in whose name the appeal was prosecuted will constitute a virtual abandonment of the appeal: *Gresham v. Chantry*, 69-728.

Where a motion to dismiss an appeal, because appellant is not entitled to prosecute it, is based upon facts as to which the affidavits filed by the respective parties are in conflict, the appeal will not be dismissed: *Long v. Smith*, 67-22.

Where the claim of a party to the cause has been extinguished by reason of his having exercised the right to redeem property of the opposite party from sale under execution, such fact may be shown for the purpose of procuring the dismissal: *West v. Fitzgerald*, 72-306.

Further as to dismissal, see notes to § 4424.

4443. Proceedings in such case. 3213. The appellee may, by answer filed and verified by himself, agent, or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent, or attorney, and the questions of law or fact therein shall be determined by the court. [R., § 3522.]

4444. Notices, how served. 3214. The service of all notices of appeal, or in any way growing out of such rights or connected therewith, and all notices in the supreme court, shall be in the way provided for the services of like notices in the [circuit or] district court, and they may be served by the same person and returned in the same manner, and the original notice of the appeal must be returned immediately after service to the office of the clerk of the district [or circuit] court where the suit is pending. [R., § 3523.]

As to service of notice, see § 4407 and notes.

4445. Executions. 3215. Executions issued from the supreme court shall be the same as those from the district [or circuit] court and attended with the same consequences, and shall be returnable in the same time. [R., § 3552.]

CHAPTER 3.

OF CERTIORARI.

4446. When writ may issue. 3216. The writ of *certiorari* may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy, and adequate remedy. [R., § 3487; C., '51, § 1965.]

Discretion of court: In an action of *certiorari*, the result of which is to annul the action of an inferior tribunal, board or officer, it is peculiarly the duty of the court to interfere only in a case properly made, and even then the court may exercise a proper measure of discretion. It is not bound to grant a writ on merely technical grounds, and where no prejudice is shown: *Woodworth v. Gibbs*, 61-398; *Johnson v. Supervisors*, 61-89.

Certiorari and appeal: The writ of *certiorari* is never used to correct a mere error, but only to test the jurisdiction of a tribunal and the legality of its action: *State v. Roney*, 37-30.

When a party has the right of appeal he

cannot proceed by *certiorari: Ransom v. Cummins*, 66–137; *State v. Schmidtz*, 65–556.

Where an inferior court illegally exercises its jurisdiction, and there is no adequate remedy by appeal, the writ of *certiorari* will lie: *Coburn v. Mahaska County*, 4 G. Gr., 242; *Davis County v. Horn*, 4 G. Gr., 94.

Certiorari will not lie where there is a plain, adequate and speedy remedy by appeal: *Independent School Dist. v. District Court*, 48–182.

After reversal on appeal: The judgment of a lower court being reversed on appeal and remanded for further proceedings in accordance with the opinion, such court has no jurisdiction to take any action inconsistent with such opinion, and if it attempts to do so its proceedings may be corrected by *certiorari: Edgar v. Greer*, 14–211.

Justice of peace; summary proceeding: Where a justice of the peace exercises a new jurisdiction created by statute, in which the proceedings are summary, and in a course different from the general principles of the common law, *certiorari* and not appeal is the proper method of having the action of the justice reversed: *Dubuque v. Rebman*, 1–444.

Judgment wrongfully set aside: Where the court has jurisdiction of the parties at the time of making an order or entering a judgment, its action cannot be attacked by *certiorari;* the remedy then is by appeal: but an order made or judgment entered without jurisdiction may be corrected on *certiorari: Hawkeye Ins. Co. v. Duffie*, 67–175; *Rowley v. Baugh*, 33–201.

Failure to appeal: A party who fails to appeal within the time limited by law is not entitled to sue out the writ: *Sunberg v. District Court*, 61–597.

Where a party has, through his own fault, lost a plain, speedy and adequate remedy, which he might have availed himself of, as the right to appeal, he is not entitled to a remedy in *certiorari: Fagg v. Parker*, 11–18.

So he will not be allowed to select some erroneous ruling of an inferior tribunal and have it corrected by *certiorari: O'Hare v. Hempstead*, 21–33.

Administrator's settlement: The proper remedy for a refusal of the county court to correct a mistake in an administrator's final settlement is by appeal, and not by *certiorari: Ibid.*

Condemnation proceedings: Where, in right of way proceedings, it was not claimed that the land was such as could not be taken for right of way, nor that sufficient and proper notice had not been given, but simply that sufficient damages were not assessed and that the award was made on a day subsequent to that fixed in the notice, *held,* that the remedy, if any, was by appeal, not *certiorari: Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64–694.

Commissioners properly appointed to appraise damages for the taking of land for a right of way cannot be considered a tribunal exercising judicial functions and held liable for exceeding their jurisdiction or acting illegally when the proceedings are regular, even though the case is one in which there is no right to condemn the right of way: *Forbes v. Delashmutt*, 68–164.

The proceedings of an inferior tribunal to establish a highway will not be annulled on *certiorari* unless it is shown that it has exceeded its jurisdiction, or is otherwise acting illegally: *McCollister v. Schuey*, 24–362.

Where a board is given a discretion, a court cannot on *certiorari* inquire into the correctness of their decisions: *Hildreth v. Crawford*, 65–339.

The statutes in reference to this subject do not contemplate that the decisions of inferior tribunals in regard to matters of fact, where the tribunal is clothed with authority to decide with reference to matters submitted to it, and the subject-matter and the parties are within its jurisdiction, may be reviewed by a writ of *certiorari: Tiedt v. Carstensen*, 61–334; *Darling v. Boesch*, 67–702.

Board of equalization: *Certiorari* is not the proper proceeding to control the discretion of a board of supervisors acting as a board of equalization: *Smith v. Board of Supervisors*, 30–531. Whatever the motive of the alleged wrongful action of the board, it cannot be deemed illegal in such sense as to be reviewed in that manner: *Polk County v. Des Moines*, 70–351.

Where a board of equalization acts in a case not within its jurisdiction, *certiorari* is the proper remedy: *Royce v. Jenney*, 50–676.

County seat; relocation: The action of a board of supervisors in determining upon the sufficiency of remonstrances, and the number of names signed thereto, in proceedings for the relocation of a county seat, is ministerial, and may be reviewed on *certiorari: Herrick v. Carpenter*, 54–340.

Intoxicating liquors; permits: The court cannot on *certiorari* review the finding of the board of supervisors in granting a permit to sell intoxicating liquors, as to the good moral character of the applicant, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood. But it may determine whether the proceedings were illegal by reason of no certificate whatever, signed by the electors as required by statute, having been presented to the county auditor: *Darling v. Boesch*, 67–702.

Tax for railroad; illegal voting: The correctness of the action of township trustees in submitting a proposition to vote a tax for a railroad may be determined by *certiorari*, but not the question whether there has been fraud or illegal voting: *Jordon v. Hayne*, 36–9.

Assessor to correct errors: Where an assessor has failed to make on his books the corrections ordered by the township board of equalization, and such books have passed beyond his control into the hands of the auditor, an action of *certiorari* to have the same corrected is the proper remedy: *Keck v. Board of Supervisors*, 37–547.

School directors; illegal acts: Illegal acts of a board of school directors in directing their secretary not to certify to the board of supervisors a tax voted by the electors of the district may be corrected on *certiorari: Smith v. Powell*, 55–215.

City council; streets: *Certiorari* will lie to control the action of a city council in improperly vacating streets: *Stubenrauch v. Neyenesch*, 54–567.

Legislative acts of a city council in passing ordinances cannot be interfered with by *certiorari: Iske v. Newton*, 54-586.

Remitting taxes: The action of the city council in hearing a petition for the reduction of a tax and granting the same is a judicial action and properly brought in question by *certiorari: Collins v. Davis*, 57-256.

Who entitled to: A person in no way affected by the proceeding cannot interfere therewith by writ of *certiorari: Davis County v. Horn*, 4 G. Gr., 94; *Iske v. Newton*, 54-586.

A tax payer may, in this proceeding, question the action of a city council in remitting taxes assessed against another tax payer, although such plaintiff have no greater interest in the matter than other tax payers: *Collins v. Davis*, 57-256.

Any citizen has sufficient interest in the granting of a permit to sell intoxicating liquors to entitle him to have the proceedings reviewed and the errors and irregularities therein corrected by *certiorari* without having any pecuniary interest in the matter: *Darling v. Boesch*, 67-702.

Tax payers of different townships cannot join as plaintiffs in an action of *certiorari* to test the validity of such taxes: *Woodworth v Gibbs*, 61-398.

In a proceeding to review the action of the board of supervisors in assessing the costs of constructing a levy upon adjoining land, different property owners whose property will be subject to assessment on that question may join as plaintiffs: *Richman v. Board of Supervisors*, 70-627.

Several owners of distinct pieces of land cannot join in a proceeding by *certiorari* to correct the action in assessing damages resulting from the establishment of a road: *Chambers v. Lewis*, 9-583.

Defendant: The writ should be directed to the officer against whom it issues by name and not merely by his official title: *Ibid.*

4447. By whom granted. 3217. The writ may be granted by the district [or circuit] court, or, in vacation, by a judge or clerk thereof, but if to be directed to either of such courts or judges, then by the supreme court, or, in vacation, by a judge thereof, and shall command the defendant therein to certify fully to the court from which the same issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also to have then and there the writ. [R., § 3488; C.,'51, § 1966.]

Before the circuit court was abolished and its jurisdiction transferred to the district court it was held that the former had, under this section, exclusive jurisdiction in civil, and the latter in criminal, cases. (See, also, §§ 206 and 207): *Keniston v. Hewitt*, 48-679.

Even though the form of the writ is erroneous, yet if in response to it defendant brings for review all the facts before the court which were considered, no prejudice can result on account of such error: *Richman v. Board of Supervisors*, 70-627.

4448. Stay of proceedings. 3218. If a stay of proceedings is sought, the writ can only be issued by a court or judge, who may require a bond and fix the penalty and conditions thereof; the sureties thereon may be approved by the judge granting, or clerk who issues the writ. [R., § 3489; C., '51, § 1967.]

It not being provided that judgment upon the bond should be summarily entered against a surety as provided in the case of appeal bonds, such a judgment will be erroneous: *Smith v. Bissell*, 2 G. Gr., 379.

4449. Petition. 3219. The petition for the writ must state facts constituting a case wherein the writ may issue, and must be verified by affidavit, and the supreme court or judge issuing the writ, may require notice of the application to be given the adverse party, or may grant the writ without notice. If a stay of proceedings is sought, the writ can only be granted on reasonable notice of the time, place, and court or judge before whom the application will be made. [R., § 3490; C., '51, § 1968.]

In regard to this section the Code commissioners say: "If no stay of proceedings is sought the writ should issue, as of course, by the clerk, like writs of error to justices of the peace. If to be directed to a district or circuit court, as to whether it should issue with or without notice can be well left to the discretion of the supreme court or judge. Notice should be required in all cases where proceedings are to be stayed."

4450. Service and return. 3220. The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in a civil action, except that the original shall be left with the defendant, and the return or proof of service made upon a copy thereof. [R., § 3491; C., '51, § 1969.]

4451. Defective return. 3221. If the return of the writ be defective, the court may order a further return to be made, and may compel obedience to the writ and to such further order, by attachment if necessary. [R., § 3492; C., '51, § 1970.]

4452. Trial; judgment. 3222. When full return has been made, the court must proceed to hear the parties, or such of them as may attend for that purpose, on the record proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce pertinent to the issue, and may give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the party or either of them shall further proceed. [R., § 3493; C., '51, § 1971.]

Sufficient return: Where a proceeding by *certiorari* was brought to determine the legality of the action of the board of supervisors in submitting to vote the question of changing the location of a county seat, *held*, that the return of the board showing upon what evidence the board proceeded, and in what manner they reached the result upon which the order was based, was proper: *Stone v. Miller*, 60-243.

Upon a return of the writ of *certiorari*, *held*, that it was the duty of the court to examine not only the statement of the defendant made in the return, but also the evidence submitted: *Ibid.*

Although the writ may be defective in not having a sufficient certificate as to the record, yet if the facts deemed material are in fact certified no objection on account of the insufficiency of the writ can be afterwards raised: *Richman v. Board of Supervisors*, 70-627.

When the judge returns that notice has been given it will be taken as duly and properly established that notice was given in the proper manner; but if the proof of notice is set out, and it appears to be insufficient, the correctness of the finding of the judge as to the notice will be overcome: *Schroder v. Carey*, 11-555.

In a *certiorari* proceeding a certificate of the county auditor as to whether oral evidence was received before the board of supervisors touching a particular question is not competent to overturn the action of the board: *Woolsey v. Board of Supervisors*, 32-130.

Under the Revision, *held*, that the court could not, in this proceeding, consider errors or illegalities relating to or dependent upon facts not stated in the petition or the writ: *Everett v. Cedar Rapids & M. R. R. Co.*, 28-417; *Smith v. Board of Supervisors*, 30-531.

Also *held*, under the Revision, that the case could be heard only on the record returned and that other evidence could not be introduced: *Jordon v. Hayne*, 36-9.

Under present provisions the court is allowed to consider other evidence than that presented in the return of the writ, but it is not intended to extend the remedy so that inquiry can be made into matters other than the jurisdiction and legality of the proceedings of the inferior court. The provision for the introduction of other evidence is for the purpose of permitting the consideration of all the facts involved in the case bearing upon the issues in the proceeding, touching the jurisdiction and compliance with the law in the case reviewed: *Tiedt v. Carstensen*, 61-334.

The supreme court cannot, upon *certiorari* from a lower court, inquire whether the evidence before the latter justified the order made, and thus review, as upon appeal, its decision: *Wise v. Chaney*, 67-73.

4453. How prosecuted; appeal. 3223. The action shall be prosecuted by ordinary proceedings so far as applicable, and from the decision of the district [or circuit] court an appeal lies as in other ordinary actions, and the record shall be prepared in the same manner. [R., § 3494; C., '51, § 1972.]

Under the Revision, *held*, that the proceeding by *certiorari* was a special proceeding and not a special action: *Ainsworth v. House*, 31-504.

4454. Limitation on right. 3224. No writ shall be granted after twelve months have elapsed from the time the inferior court, tribunal, board, or officer has, as alleged, exceeded his proper jurisdiction, or has otherwise acted illegally.

The period of limitation commences to run against a proceeding by *certiorari* to correct error in the action of a board of supervisors in holding a petition for the relocation of a county seat sufficient (§ 372) from the time the board decides to submit the question to vote, and not from the time it passes upon the petition: *Jamison v. Board of Supervisors*, 47-388.

Where the board of supervisors had, without being authorized to do so, established a ditch and afterwards levied a tax to pay for the construction of the same, *held*, that a proceeding by *certiorari* to review their action in levying such tax could be brought within one year after the levy, although more than one year after the alleged establishment of the ditch had expired: *Shepard v. Supervisors of Johnson County*, 72-258.

TITLE XX.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

OF ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY.

4455. Where brought; petition. 3225. An action for the recovery of specific personal property may be brought in any county in which the property or some part thereof is situated; the petition must be verified and must contain:

1. A particular description of the property claimed;
2. Its actual value, and where there are several articles, the actual value of each;
3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership;
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process;
5. The facts constituting the alleged cause of detention thereof, according to his best belief;
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof. [R., § 3553; C., '51, § 1703.]

Venue: An action of replevin must be brought in the county where defendant resides or some portion of the property is situated. Section 4460 does not authorize the bringing of the action in the county from which the property had been wrongfully removed, unless such county is that of the defendant's residence: *Hibbs v. Dunham*, 54-559; *Parker v. Norris*, 56-295.

If the action is brought in another county than that of the residence of defendant or in which some of the property is situated, a change of place of trial should be granted upon application: *Parker v. Norris*, 56-295.

The venue in such actions is not limited to the county of the residence of the defendant, and if action is brought where the property is situated, the defendant must either disclaim any interest or claim to the property or defend the action in the county where the suit is brought; he is not entitled to a change of the place of trial to the county of his residence: *Porter v. Dalhoff*, 59-459.

This rule is applicable in actions where bond is not given, and the possession of the property before judgment is not sought. It is also applicable where, although possession of property is sought, no property is actually seized, and that fact will not entitle defendant to have the venue changed to the county of his residence: *Laughlin v. Main*, 63-580.

Failure of plaintiff to show that the property is situated in the county in which suit is brought will not defeat his action. The remedy of defendant in such case, if the action is brought in the wrong county, would be by motion to transfer it to the proper county, and in case of failure to make such application, no objection to the place of bringing the action can be interposed: *Goldsmith v. Willson*, 67-662.

Petition; verification: If the petition is not verified the writ cannot legally issue, nor be sustained if issued: *Cure v. Wilson*, 25-205.

In such an action before a justice of the peace, a sworn petition must be filed before a writ can issue, but it need not be filed before return day. The action is sufficiently commenced by service of original notice: *Duffy v. Dale*, 42-215.

Description of property: The action cannot be maintained for the recovery of an article that cannot in its nature be distinguished from others, but where the petition described the property as a "six-barreled pistol, called a six-shooter or revolver," *held*, that the specific article was sufficiently described to support the action: *Wright v. Ross*, 2 G. Gr., 266.

The description of the property as a "certain storehouse, warehouse and the goods therein contained, being the store, etc., etc., known and designated as the store of your pe-

tioner," *held* sufficient: *Ellsworth v. Henshall*, 4 G. Gr., 417.

The description in a petition designating the property by an enumeration of the different articles, followed by an averment that they were in the defendant's possession, *held* sufficient: *Fort Dodge v. Moore*, 37-388.

In an action for the possession of a piano, *held*, that a mistake in setting out the number of such instrument as a part of its description would not entitle defendant to a judgment, provided that the mistake clearly appeared: *Stephens v. Williams*, 46-540.

Plaintiff's right: Plaintiff claiming property by virtue of a chattel mortgage should not allege that he is the absolute and unqualified owner thereof, but should state the nature of his interest. Under an allegation of absolute ownership he cannot recover on proof of an interest as mortgagee: *Kern v. Wilson*, 73-490.

Wrongful detention: A failure to allege in the petition the wrongful detention of the property is a substantial defect which may be taken advantage of by demurrer or by motion in arrest of judgment or upon appeal: *Draper v. Ellis*, 12-316.

Where the petition alleged that plaintiff was the absolute owner and entitled to the property, and that defendant wrongfully detained the same, but in further stating the ground of detention showed a state of facts which did not justify the recovery by plaintiff, *held*, that a demurrer to the petition should have been sustained: *Houghtaling v. Hills*, 59-287.

Cause of detention in a particular case *held* to be sufficiently stated: *Nolan v. Jones*, 53-387.

Exemption of property: The facts constituting the exemption of the property from levy under execution and which are required by statute to be stated, where it is sought to recover property taken under execution, are the facts which render the property exempt from execution under § 4297: *Armel v. Lendrum*, 47-535.

Although such exemptions are allowed only to residents, yet in a petition to recover such property seized on execution, the fact of residence in the state need not be averred, but non-residence may be set up as a defense: *Newell v. Hayden*, 8-140.

Prayer for judgment: Although the petition in replevin may be defective in failing to ask a judgment for the possession of property, yet, if the plaintiff is found to be entitled to such possession and no objection to the petition is made in the court below, that objection cannot be raised on appeal: *Williams v. Wilcox*, 66-65.

Value: The allegations in the petition as to the value of the property or defendant's interest therein do not limit the amount of defendant's recovery in case he is successful, even though such allegations of the petition are not denied by him: *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.*, 38-377.

Answer: A denial of the essential averments of the petition which puts them in issue is sufficient to require plaintiff to maintain the cause of action set up. There is no such technical effect to be given the answer as was given some of the common-law pleas in such cases: *Jansen v. Effey*, 10-227.

Right of possession: The question in replevin is, who was entitled to the possession of the property at the time the action was brought: *Campbell v. Williams*, 39-646; *Kingsbury v. Buchanan*, 11-387.

Replevin will not lie in favor of one who is already in possession of the property in controversy, nor can it be successfully maintained against one who does not detain possession of the property: *Hove v. McHenry*, 60-227.

One who has sold the property of another, and is neither in possession of it nor colluding with his assignee as to keeping possession, cannot be made liable in an action of replevin: *Coffin v. Gephart*, 18-256.

Action of replevin cannot be maintained under an executory agreement to deliver possession of property, where no possession has been obtained nor act done under the agreement: *Berry v. Berry*, 31-415.

Detention: The gist of the action of replevin is the wrongful detention of the property: *Draper v. Ellis*, 12-316.

Ownership is not necessary to enable a party to recover. The present possession may be recovered by one entitled thereto, even against the owner: *McCoy v. Cadle*, 4-557.

A person who claims ownership in goods in an action of replevin and establishes an interest therein is entitled to recover although such interest is not the entire value of the property: *Jones v. Hetherington*, 45-681.

To entitle plaintiff to recover in an action of replevin it is not essential that he should have the legal title to the property, but he may recover on a naked right of possession, such as that of mortgagor, where mortgagee has not asserted his right to possession: *Goldsmith v. Willson*, 67-662.

Ownership as evidence of right to possession: A plaintiff may urge his right to possession and maintain it by proof of ownership, which in the absence of proof to the contrary carries with it the right to possession: *Cassel v. Western Stage Co.*, 12-47.

Proof of possession is affirmative proof of ownership, and makes out a *prima facie* case, but proof of an after-acquired possession, it appearing that it was procured wrongfully, will not avail: *Cumberledge v. Cole*, 44-181.

Burden of proof: In an action of replevin the burden of proof is upon plaintiff, and he must recover solely upon the strength of his own title and not upon the weakness of that of his opponent: *Hamilton v. Iowa City Nat. Bank*, 40-307.

In an action of replevin the burden is upon plaintiff to show himself entitled to possession of the property. If defendant relies upon the claim of plaintiff being fraudulent, the burden of proof is then upon him to establish such fraud: *Hardy v. Moore*, 62-65.

An answer by defendant setting up a purchase of the property from a third person who is alleged to have been the owner thereof, as defendant believes, is equivalent to denying plaintiff's ownership and throws the burden of proof of ownership upon him: *Litchfield v. Halligan*, 48-126.

Setting up claims of another: Where a plaintiff in a replevin suit abandoned the case,

and the issue as to who was entitled to possession was between the defendant holding possession under execution against a third party and an intervenor claiming under a bill of sale from plaintiff, *held*, that the intervenor's bill of sale made out a *prima facie* case for him, and defendant could not defeat it by showing title in plaintiff: *Burrows v. Waddell*, 52–195.

Where one took possession of certain property as purchaser, asking the payment of certain mortgages, and brought action of replevin therefor in his own name, *held*, that he was not in a position to assert or protect the rights of the mortgagees as their agent: *McNorton v. Akers*, 24–369.

Demand, when necessary: Proof of demand will only be required where it is necessary to terminate defendant's right of possession or confer such right on plaintiff: *Stanchfield v. Palmer*, 4 G. Gr., 23; *Gilchrist v. Moore*, 7–9; *Smith v. McLean*, 24–322; *Redding v. Page*, 52–406; *Oswego Starch Factory v. Lendrum*, 57–573.

One who verbally bargains for the sale of personal property but pays nothing thereon, no time or place being fixed for its delivery, must make demand and tender of the purchase money (in the absence of an agreement for credit) before the action for replevin will lie. A tender after suit brought will not entitle plaintiff to recover: *Hart v. Livingston*, 29–217.

Where the taking of the property by defendant has been wrongful, no demand before suit is necessary: *Robinson v. Keith*, 25–321; *Delancey v. Holcomb*, 26–94; *Jones v. Clark*, 37–586.

Where plaintiff and defendant claim under distinct or independent titles, demand is not necessary: *Redding v. Page*, 52–406.

Where plaintiff alleged that he was the owner of property and that defendant claimed possession thereof under a levy against a third person wrongfully claiming title thereto, *held*, that an averment of demand was not necessary: *Oswego Starch Factory v. Lendrum*, 57–573.

To recover property seized under execution or attachment: If property is erroneously seized on execution against a third party, the party entitled to the possession thereof may bring action to recover the same: *Gamble v. Ackley*, 12–27; *Shea v. Watkins*, 12–605; *Ramsden v. Wilson*, 49–211.

And this is true even though the property is not in the possession of the officer, but of his bailee: *Ralston v. Black*, 15–47.

And the same rule holds in case of a seizure under a writ of attachment against one not the owner: *Miller v. Bryan*, 3–58; *Smith v. Montgomery*, 5–370.

Replevin may be maintained by the owner of property against an officer who has seized and holds it under a writ of replevin issued against another person, in an action to which the real owner was not a party: *Davis v. Gambert*, 57–239.

The fact that the writ under which the officer claims to hold is from another court than that in which the action of replevin is brought will not deprive the latter court of jurisdiction: *Ramsden v. Wilson*, 49–211; *Seaton v. Higgins*, 50–305.

The provision for replevying property in the hands of an officer under judicial process cannot be applied as between a federal court and a state officer holding the property under the authority of a state court: *Senior v. Pierce*, 31 Fed. Rep., 625.

Replevin will lie for property wrongfully seized by an officer under execution, as, for instance, where the process under which the levy is made is void: *Armel v. Lendrum*, 47–535.

So where the levy was under process issued under an unconstitutional statute, *held*, that replevin would lie for the property: *Cooley v. Davis*, 34–128.

The general rule is that property seized on a legal writ issued by a court having jurisdiction of the subject-matter under a valid statute cannot be replevied by the owner: *Armel v. Lendrum*, 47–535.

So *held* where it was sought to show that the judgment under which the levy was made had been satisfied: *Ibid.*

Exempt property: The party whose property is attached may maintain replevin if it is exempt from execution although he has failed to move to have the attachment dissolved on that ground as he might have done: *Wilson v. Stripe*, 4 G. Gr., 551.

Notice: An action of replevin cannot be maintained against an officer to recover property claimed to have been improperly seized by him unless written notice of the claim of such person is first served upon him: See notes to § 4280.

But if the officer proceeds to trial upon the simple issue as to the right of property he may be considered as waiving the notice, and cannot afterwards, by interposing the technical defense of want of notice, defeat the action. It is enough if in such case he is allowed to recover costs: *Warder v. Hoover*, 51–491.

In what cases replevin will lie; right to office: Parties cannot in replevin try the right to office held by a person not a party to the action, as, for instance, by claiming that a levy by a person acting as an officer was not valid by reason of his not having properly qualified: *Lufkin v. Preston*, 57–28.

Between partners: The right of possession, and the value of such right, recognized in the action, must be such as are recoverable in an action at law, and the accounts of partners and the extent of interest of each, as growing out of the partnership relation, cannot be determined: *Kuhn v. Newman*, 49–424.

Possession of note: Action under this chapter may be brought by the maker to recover the possession of a promissory note: *Graff v. Shannon*, 7–508.

And it is not a valid objection in such action that the note, being paid, is of no value: *Savery v. Hays*, 20–25.

A bailee who gives a receipt for property is estopped from denying his bailor's right to possession, and cannot set up the ownership of a third party as a defense to an action of replevin: *Reed v. Reed*, 13–5.

A joint owner cannot recover in replevin from a pledgee of his co-owner's interest, where he could not if the action had been against the part owner who made the pledge. *Frans v. Young*, 24–375.

Undivided interest; growing crops: While it is well settled that where chattels of the same nature and quality belonging to different owners are mingled in one mass, any owner may claim his aliquot part by replevin, yet where property of different owners is not susceptible of division, as in case of growing crops or in case of joint ownership of a single piece of property, replevin will not lie by one joint owner, because the property sought to be recovered is not susceptible of seizure and delivery to plaintiff: *Read v. Middleton*, 62-317.

Property severed from the realty: Where a party has by his own tortious act severed an article from the realty which but for such severance would still be real property, replevin will lie for its recovery. But such an act will not render the property liable to execution, if as a part of the realty it was exempt: *Congregational Society v. Fleming*, 11-533.

Action may also be brought for the recovery of a house which, as between the parties, is mere chattel property: *District T'p v. Moorehead*, 43-466.

Replevin will lie to recover a building which is being wrongfully removed from the land of the owner: *Crum v. Hill*, 40-506.

Rescission of sale: In an action for the recovery of property sold, on the ground that a note given in consideration therefor was void, *held*, that as the note was apparently valid and was outstanding, a judgment for the recovery of the property was erroneous: *Gittings v. Carter*, 49-338.

Property seized for taxes: Property seized to satisfy a tax may be recovered in this action when the tax is levied without authority, but not in cases where the authority exists but has been irregularly exercised: *Macklot v. Davenport*, 17-379; *Buell v. Ball*, 20-282

So action will not lie in such case, when the levy was authorized and the warrant under which the treasurer acted was valid, although the assessment was erroneous: *Bilbo v. Henderson*, 21-56.

Where personal property is taken by an officer to secure payment of taxes, the owner cannot maintain replevin on the ground that a portion of the taxes were illegal, if a part were legal: *Emerick v. Sloan*, 18-139.

Intoxicating liquors: Replevin will not lie to recover intoxicating liquors seized by an officer by virtue of a search-warrant issued under the provisions of the prohibitory liquor law: *Funk v. Israel*, 5-438; *Weir v. Allen*, 47-482.

And this is true even though the recovery is sought on the ground that sufficient facts did not exist to authorize such seizure: *Cooley v. Davis*, 34-128.

4456. No counter-claim. 3226. The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counter-claim. [R., § 4175.]

Although the statute prohibits any counter-claim in such action, *held*, that an action for the possession of a note on the ground that it had been paid could properly be set up as a counter-claim to an action on the note: *Sigler v. Hidy*, 56-504.

4457. Process on Sunday. 3227. If the plaintiff allege in his petition that he will lose his property unless process issue on Sunday, the order may be issued and served on that day. [10 G. A., ch. 14.]

4458. New parties. 3228. If a third person claim the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervenor. [R., § 3561; C., '51, § 1684.]

A person claiming to hold a prior incumbrance should be allowed to become a party upon application: *Parrott v. Hughes*, 10-459.

In case of intervention the judgment concludes the original defendant and the intervenor: *Witter v. Fisher*, 27-9.

The provisions of the statute allowing intervention by a party claiming the property, or any part of it, do not prevent such person from bringing replevin against the sheriff to recover possession of the property: *Davis v. Gambert*, 57-239.

An assignee in bankruptcy acquires such an interest in the property of the bankrupt fraudulently conveyed that he may maintain an independent action to recover such property. *Wetmore v. McMillan*, 57-344.

Where a party has himself substituted for the sheriff in an action of replevin, plaintiff, if entitled to a judgment against the original defendant, is entitled to judgment against such substituted defendant for costs: *Romick v. Perry*, 61-238.

BOND — ORDER.

4459. When bond required. 3229. When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought, conditioned that he will appear at the next term of the court and prosecute his suit to judgment and return the property

if a return be awarded, and also pay all costs and damages that may be adjudged against him. The bond shall be filed with the clerk of the court, and is for the use of any person injured by the proceeding, and a judgment for money rendered against the plaintiff shall go against the sureties on the bond. [R., § 3554.]

Judgment against sureties on the bond: Where the judgment in a replevin suit determines the title of the property, it cannot be questioned in an action on the bond; but when such judgment simply determines the right to possession, the title may be afterwards investigated, in action on the bond, to determine the amount of damages: *Harman v. Goodrich*, 1 G. Gr., 13; *Buck v. Rhodes*, 11-348; *Hawley v. Warner*, 12-42.

The surety on the bond cannot appeal from a judgment against his principal in a justice's court, and relitigate his principal's claim to the property; he is bound by the judgment: *Crites v. Littleton*, 23-205.

While the judgment should direct the return of the property, nevertheless the surety will be bound, although the judgment against the principal be only for the value of the property: *Mason v. Richards*, 12-73.

Where plaintiff dismisses his action and thereupon a judgment for the return of the property is entered in favor of defendant, the question of title is not settled by the judgment, and it is competent, in an action on the replevin bond, to show by way of defense that the ownership of the property was actually in the plaintiff: *Buck v. Rhodes*, 11-348.

The judgment entered on the replevin bond is at least *prima facie* evidence of the measure of damages in an action against the obligor in a bond of indemnity given to a surety on the replevin bond; and where to this is added proof that he has paid the whole amount of the judgment, it is sufficient to establish his claim unless rebutted: *Lyon v. Northrup*, 17-314.

In an action upon a replevin bond for the non-return of the property, the record in the replevin suit is admissible in evidence: *McGinnis v. Hart*, 6-204.

The liability of the sureties cannot be increased by the action of other creditors after the bond is given and the writ served: *McNorton v. Akers*, 24-369.

The sureties are regarded as in court and bound by the judgment against the principal; and if, by his consent, a judgment is rendered against him containing a provision that it shall be stayed a certain length of time, the sureties are not thereby released: *Hershler v. Reynolds*, 22-152.

The court may render an alternative judgment and enter the same so far as it is for money against the sureties on the bond: *Wilkins v. Treynor*, 14-391.

Aside from statutory provision judgment against sureties cannot be rendered without their being made parties to an action on the bond and having their day in court: *Jansen v. Effey*, 10-227; *Mason v. Richards*, 12-73; *Hurd v. Gallaher*, 14-394.

Where the party from whom the property is taken is adjudged not to be entitled to its possession, the liability upon the bond ceases, and there is no authority for holding sureties liable to a different degree and to another party claiming under an entirely different title: *Christy v. Vest*, 36-285.

Where attached property is replevied and released by bond in that action, the attaching creditor may pursue the property or the sureties on the bond, but he cannot hold the sureties and at the same time subject the property to another liability in the same action: *Struman v. Robb*, 37-311.

Where an action of replevin was brought to recover possession of property to which plaintiff was entitled by verdict alone, and subsequently his action was consolidated with others in which the title to the property was involved, the only thing preventing a judgment for plaintiff in the replevin suit being such consolidation, *held*, that the sureties upon the replevin bond were discharged from any liability: *Edwards v. Cottrell*, 43-194.

Measure of damages: Where the property is taken under the writ, and defendant shows himself entitled to its return, the judgment on the replevin bond should be for the value of the property at the date of the trial and not for its value at the time of seizure: *Clement v. Duffy*, 54-632.

Also *held*, that, where plaintiff in the replevin suit had been to the expense of threshing and marketing grain which had been seized by him in the stack, the proper amount of such expense should be deducted from the value of the grain: *Ibid.*

4460. Clerk to issue order. 3230. The clerk shall thereupon issue an order, under his hand and seal of the court, directed to the sheriff, requiring him to take the property therein described and deliver the same to the plaintiff. And where the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the order may issue from the county whence the property was so wrongfully taken, and may be served in any county where the property may be found, in the same manner and with like effect as in the county where suit is brought. [R., § 3555; C., '51, § 1997; 14 G. A., ch. 123.]

The writ: Quashing the writ should not have the effect of abating the suit: *Minott v. Vineyard*, 11-90.

It is error to render judgment against plaintiff for mere failure to produce the writ when called for after it has served its purpose and

property has been seized thereunder: *Saubman v. Greatrakes*, 34-598.

In a summary proceeding by motion to quash a writ on the ground of fraud in procuring the jurisdiction of the property, the evidence to authorize the court to set aside its process ought to be clear and satisfactory: *Gordon v. Bucknell*, 38-438.

4461. Following property. 3231. When any of the property is removed to another county after the commencement of the action, counterparts of the proper order may issue on the demand of the plaintiff to such other county, and may be executed upon such goods found in such county, and farther orders and the necessary counterparts thereof may issue as often as may be necessary. [R., § 3556.]

ORDER — EXECUTION OF.

4462. Duty of officer. 3232. The sheriff must forthwith execute the order by taking possession of the property therein mentioned, if it is found in the possession of the defendant, or of his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the order was placed in the sheriff's hands, for which purpose he may break open any dwelling-house or other inclosure, having first demanded entrance and exhibited his authority, if required. [R., § 3557.]

4463. Defendant examined on oath. 3233. When it appears by affidavit that the property claimed has been disposed of, or concealed so that the order cannot be executed, the court or judge may compel the attendance of the defendant, and examine him on oath as to the situation of the property, and punish a wilful obstruction or hindrance, or disobedience of the order of the court in this respect as in case of contempt. [R., § 3558.]

Evidence of contempt in disobeying the order of court with reference to the property should be by affidavit as provided in relation to contempts in general. Oral evidence is not proper: *State v. Myers*, 44-580.

4464. Property delivered to plaintiff. 3234. The sheriff having taken the property, or any part thereof, shall forthwith deliver the same to the plaintiff. [R., § 3560.]

Where the sheriff, instead of taking actual possession of the property and delivering it to the plaintiff, left it with the defendant, taking his receipt therefor, *held*, that plaintiff acquired no possession of the property, and was entitled to an alternative judgment: *Davis v. Bayliss*, 51-435.

A plaintiff in an action to recover property claimed to be exempt from execution, which is levied upon by an officer, and which is returned to plaintiff upon the execution of the bond, may give good title to a third party purchasing of him, and the lien of the execution will not, upon judgment being rendered against the plaintiff, revive against the property in the hands of such purchaser. The officer can only have recourse on the bond: *Gimble v. Ackley*, 12-27.

If the plaintiff had no title to the property, then he could confer none, although the property was in his possession under the writ, and a purchaser from him would take nothing by the purchase: *Ibid.*

Where plaintiff in an action against an officer has obtained possession of property levied upon and then dismisses before issue is joined, and the property is allowed to remain in plaintiff's hands, a mortgage executed by plaintiff while the property is thus in his possession will be superior to the claim of the officer under a writ of restitution or a subsequent levy, the plaintiff being in fact the real owner: *Case v. Woleben*, 52-389.

Where defendant elects to take a money judgment, it is no defense that part of the property has been lost or destroyed while in plaintiff's possession: *Lillie v. McMillan*, 52-463.

4465. Delivery bond. 3235. At any time before the actual delivery to the plaintiff, the defendant may stay all proceedings under the aforesaid order and retain the property in his own possession, by executing a bond to the plaintiff, with sureties to be approved by the clerk or sheriff, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff if he recover judgment therefor, in as good a condition as it was when the action was commenced, and that he will also pay all costs and damages that may be adjudged against him for the taking or detention of the property.

Where defendant in an action of replevin retains the property by giving a delivery bond, subsequent loss or destruction of the property in defendant's hands will not release him from the obligation to account for its value under his bond in case of judgment against him: *Hinkson v. Morrison*, 47-167.

4466. Inspection; appraisement. 3236. But when the property is so retained by the defendant, he shall permit the sheriff and plaintiff to inspect the same; and if the plaintiff so request, the sheriff shall cause the property to be examined and appraised by two sworn appraisers, chosen by the parties to the action, or, in their default, by the sheriff himself, in the manner provided for other cases of appraisement; and he shall return their appraisement with the execution.

4467. Return of order. 3237. The sheriff must return the order on or before the first day of the trial term, and shall state fully what he has done thereunder. If he has taken any property he shall describe particularly the same. And if he has taken a bond from the defendant as provided in the preceding section, he shall file the same with his return. [R., § 3559.]

JUDGMENT AND EXECUTION.

4468. Assessment of value and damages. 3238. The jury must assess the value of the property, as also the damages for taking or detention, whenever by their verdict there will be a judgment for the recovery or the return of the property, and when required so to do by either party, must find the value of each article thereof. [R., § 3082.]

Where the jury found generally for defendant for a particular sum, but did not award him the possession of the property, *held*, that it would not be presumed that the successful party was found entitled to the possession of the property: *Hunt v. Bennett*, 4 G. Gr., 512.

Where the property is taken by plaintiff under the writ and judgment is rendered in his favor, a failure to assess the value of the property cannot be prejudicial to defendant: *Williams v. Wilcox*, 66-65.

The failure to return the value of each article will not prevent the party entitled to the property from having judgment for the aggregate value. Therefore a failure of plaintiff to prove the value of particular articles, a recovery of which is sought in the action, will not be a ground for taking the case from the jury: *Goldsmith v. Wilson*, 67-662.

Error of the jury in finding the entire value of the property instead of plaintiff's interest therein will not defeat the judgment where plaintiff has not elected to take judgment for the value of the property, and defendant may satisfy the judgment by turning over the property itself: *Ormsby v. Nolan*, 69-130.

4469. Form of judgment. 3239. The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party having no right in such property, and shall also award such damages to either party as he may be entitled to for illegal detention of such property. [R., §§ 3562, 3567.]

Judgment: Although, after the property is seized, it be determined in some other forum that plaintiff is not the owner of the property, yet defendant is not entitled to judgment as by default for its value, and plaintiff may introduce evidence upon the question of value: *Dehr v. Lampton*, 31-172.

Defendant taking a money judgment can recover only the value of his right in the property, and that value cannot exceed the amount of the claims for which he held the property when taken from him: *McNorton v. Akers*, 24-369.

Where an action of replevin is brought against a party having a lien upon the property, he is entitled to a judgment for its possession or for the value of his interest therein, but is not entitled to judgment for the full value of the property: *Knudson v. Gieson*, 38-234.

Where property is wrongfully taken from a sheriff who holds it under execution levy, the execution plaintiff in an action for damages is limited in his recovery to the amount still due him with interest and costs: *Hayden v. Anderson*, 17-158.

Where in an action of replevin to recover property seized under an execution it is determined that the execution is void, plaintiff should have a judgment for the return of the property, although his additional claim that the execution which is against another party as defendant is wrongfully levied upon property of which he is the rightful owner is not sustained: *Balm v. Nunn*, 63-641.

If plaintiff establishes his right to the prop-

erty he may have judgment for its value, although at the time suit was brought the property was not in defendant's possession: *Hardy v. Moore*, 62-65.

The entire legal rights of the parties to the suit in the property in controversy should be adjudicated in the main action, and such an adjudication is as conclusive and final as in any other action: *Hayden v. Anderson*, 17-158.

Judgment for defendant should direct the return of the property: *Chadwick v. Miller*, 6-34; *Mason v. Richards*, 12-73; *Jansen v. Effey*, 10-227.

Judgment in favor of defendant may include interest on the value of the property from the time it was taken by the plaintiff: *Hurd v. Gallaher*, 14-394.

It is only in the judgment that it is necessary to specify which party is entitled to the property. Where plaintiff was in possession under the writ, a verdict of the jury for the plaintiff, simply, was held sufficient to warrant judgment that he was entitled to the possession: *Newlien v. Reed*, 30-496.

The party found entitled to possession may have judgment for the money value, or have return of the property, at his election: *McNorton v. Akers*, 24-369.

And an alternative judgment, allowing plaintiff execution for the specific property, or, in case that cannot be obtained, then for its value, is proper: *Clark v. Warner*, 32-219.

If defendant is entitled to judgment, he may have a money judgment against plaintiff and his sureties for the value of the property: *Armel v. Lendrum*, 47-535.

Measure of damages: In an action against a sheriff to recover property illegally seized, plaintiff cannot show by way of damages that he was compelled, for the purpose of getting the writ, to deposit with his surety a bond as indemnity: *Wilson v. Hillhouse*, 14-199.

Plaintiff is not limited in recovering damages for detention of the property to cases where he takes a judgment for its possession, but may have such damages for detention also, where he elects to take judgment for the value of the property: *Cook v. Hamilton*, 67-394.

Where the petition stated that plaintiff was in possession of the goods as agent, and the value of such goods, and that defendant had deprived plaintiff of their possession, *held*, that the value of the goods stated was the amount of recovery which could be had against defendant if he could not obtain the goods: *Morris v. Burley*, 74-45

Dismissal: Plaintiff cannot, without defendant's consent, so dismiss the action as to deprive him of his right to have damages assessed and a return of the property awarded: *Hall v. Smith*, 10-45.

Where plaintiff dismisses his action, and defendant seeks to have the damages sustained by him assessed, plaintiff is considered as being in default and cannot demand a jury trial: *Wilkins v. Treynor*, 14-391.

Upon dismissal of the action by plaintiff, the defendant is entitled to the return of the property, or judgment for the value of his interest therein: *Marshall v. Bunker*, 40-121.

The dismissal of the action by plaintiff will not prevent defendant from recovering judgment for "the value of his right," and the cause should be retained for the purpose of settling such right. But if such matter is pleaded by defendant after the dismissal by the plaintiff, the latter should not be regarded as in default, but should be allowed to plead and introduce evidence upon the issue raised: *Crist v. Francis*, 50-257.

Where plaintiff sought to recover possession of property held by the sheriff, but did not allege service of notice of his ownership upon the sheriff, and thereafter, upon demurrer being interposed on that ground, the court allowed him to dismiss his action upon payment of costs, and, upon payment to the sheriff of the amount of the judgment for which the property was seized, to retain possession of the property, *held*, that under the facts appearing there was no error: *Reisner v. Currier*, 58-213.

4470. Execution; form of. 3240. The execution shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered subject to execution, and the value of property for which judgment was recovered to be specified therein, if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property. [R., § 3253.]

4471. Plaintiff's option. 3241. If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter, or otherwise, he may, at his option, have execution for the specific delivery of the property, or for the value thereof as determined by the jury. And if any article of the property cannot be obtained on execution, he may take the remainder with the value of the missing articles. [R., §§ 3563, 3568.]

Whether the successful party must make his election as to whether he will take the property or its value, at the time of judgment, or may do so when execution issues, seems left in doubt; but where the judgment was that plaintiff have immediate possession of the property, and, in default thereof, recover the value, *held*, that the judgment amounted to an election to take the property, and it should have been accepted when tend-

ered, and the judgment satisfied: *Oskaloosa Steam Engine Works v. Nelson*, 54-519.

The provision allowing the successful party to have execution for the property or its value at his option is intended to apply only to cases in which the court has jurisdiction to try and determine the merits of the controversy: *Williams v. Chapman*, 60-57.

Under the statute two distinct remedies are provided: First, the delivery of the property to plaintiff; second, where this is not or cannot be done, the rendition of a judgment in his favor for value. Only the first of these forms of proceeding is in the nature of the common-law action of replevin, and the other partakes of the nature of a common-law proceeding in detinue: *Laughlin v. Main*, 63-580.

Where the judgment was for a return of the property, and in default thereof that plaintiff recover of defendant a certain sum as the value of the same, *held*, that defendant could elect to tender the property within a reasonable time, and that when a tender was made within such time the plaintiff might be enjoined from enforcing by execution the alternative judgment for the money value: *McClellan v. Marshall*, 19-561.

Where a party took judgment for the property, *held*, that such judgment was an election by him to take the property instead of a money judgment for its value, and he was only entitled to its value in default of recovery of the property by proper process, and upon tender of the property he was bound to receive it and enter satisfaction of the judgment: *Oskaloosa Steam Engine Works v. Nelson*, 54-519.

Where by defendant's own act and the act of plaintiff the property is restored to defendant before judgment is rendered in his favor, he cannot recover the value of the property but only damages for its unlawful detention: *Harrow v. Ryan*, 31-156.

4472. Judgment on bond. 3242. When property for which a bond has been given, as hereinbefore provided, is not forthcoming to answer the judgment, and the party entitled thereto elects to take judgment for the value thereof, such judgment may be entered against the principal and sureties in the bond.

See notes to § 4459.

4473. When property has been concealed. 3243. When it appears by the return of the officer, or by the affidavit of the plaintiff, that any specific property which has been adjudged to belong to one party, has been concealed or removed by the other, the court or a judge may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in the case of contempt. [R., § 3564.]

4474. Exemption. 3244. A money judgment taken under the provisions of this chapter in lieu of property exempt from execution, shall also be, to the same extent, exempt from execution, and from all set-off or diminution either by the adverse party or by any other person, and such exemption may, at the option of the party, be stated in the judgment. [R., § 4176.]

Where the property has been voluntarily sold, a money judgment for the purchase price thereof is not exempt: *Harrier v. Fassett*, 56-264.

CHAPTER 2.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

4475. By ordinary proceedings; joinder; counter-claim. 3245. Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counter-claim therein, except of like proceedings and as provided in this chapter. [R., § 4177.]

4476. Parties; right. 3246. Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord, or tenant of the property claimed. [R., § 3569; C., '51, § 2002.]

Parties: A person who has taken possession of and erected improvements upon land under a parol license to mine has such an interest in the real estate that the owner cannot revoke the license at once, and the licensee may assert his right to possession by this action:

Bush v. Sullivan, 3 G. Gr., 344; *Beatty v. Gregory*, 17–109.

This action cannot be brought against the holder of a tax certificate. (*Arguendo*): *Eldridge v. Kuehl*, 27–160, 174.

A person who is the agent of the owner of real property cannot maintain such action in his own name: *McHenry v. Painter*, 58–365.

Although action may be brought against the tenant of a non-resident, the statute of limitations does not run in favor of such non-resident: *Heaton v. Fryberger*, 38–185.

The owner of an undivided interest may recover such interest: *Hughes v. Holliday*, 3 G. Gr., 30.

The widow may bring this action for her dower. She is not limited to a statutory proceeding for admeasurement, nor to an action in equity. The statute of limitations does not commence to run against her right until it is denied: *Rice v. Nelson*, 27–148.

An equity will not support an action at law to recover possession of land against the holder of the legal title: *Pendergast v. Burlington & M. R. R. Co.*, 53–326.

In an action at law where no equitable defense is pleaded, the legal title must prevail: *Goepinger v. Ringland*, 62–76.

In an action to recover real estate based alone upon right of possession, plaintiff cannot recover if he is not the owner of the legal title: *Kitteringham v. Blair Town Lot, etc., Co.*, 66–280.

As to equitable defenses, see notes to § 4482.

4477. Title. 3247. The plaintiff must recover on the strength of his own title. [R., § 3591; C., '51, § 2020.]

Plaintiff's title: In an action of this kind the plaintiff must recover on the strength of his own title. Under the pleadings he must show the legal title to be in himself: *Huntington v. Jewett*, 25–249.

Plaintiff must recover on the strength of his own title and not on the weakness of defendant's: *Hurley v. Street*, 29–429.

As plaintiff must recover on the strength of his own title, if he fails to establish such title he cannot sustain his action, whether defendants have any right or not: *Reed v. Wright*, 2 G. Gr., 15.

Where the conveyance upon which plaintiff relied as showing title was found to be fraudulent, *held*, that he could not recover: *Bouton v. Orr*, 51–473.

If defendant sets up an adverse and independent chain of title in a cross-bill, plaintiff cannot, by way of demurrer, object to defects and informalities in such title, raising an issue as to persons not parties in the case: *Lathrop v. American Emigrant Co.*, 41–547.

One who is in possession as a mere trespasser or intruder cannot protect himself by setting up an outstanding title in a stranger: *Williams v. Swetland*, 10–51.

Where plaintiff in an action to recover real property claimed under a tax deed and set out an abstract of the title, showing title in defendant at the time of such tax sale, *held* that, on introduction of evidence of the payment of taxes by defendant before the sale, he was entitled to judgment without proving title to have been in him at that time, the admissions in plaintiff's abstract of title being sufficient for that purpose: *Easton v. Randall*, 45–111.

The provision that plaintiff must recover on the strength of his own title is not applicable in actions to quiet title: *Russell v. Nelson*, 32–215.

If judgment is for defendant it should be that plaintiff has no title, not that defendant has title: *Litchfield v. Railroad Co.*, 7 Wall., 270.

What sufficient chain of title: Where both parties claim title through a common grantor, it is sufficient to prove the derivation of title from him without proving his title: *Cooley v. Brayton*, 16–10; *Byers v. Rodabaugh*, 17–53.

A deed of a party claiming from a grantor not shown to have had title is not sufficient to establish title in the party claiming it, nor to raise a presumption of actual possession in such party: *Wearin v. Munson*, 62–466.

In order to establish title in himself, a party must show not only a conveyance to him from another, but trace the title to the general government. The fact that a deed offered in evidence for the purpose of establishing a party's title does not clearly describe the premises is not ground for refusing to receive it: *Heinrichs v. Terrell*, 65–25.

Where plaintiff claimed title by virtue of a conveyance, but it appeared from the chain of title that prior to the deed to his grantor a deed to the property had been made by the then owner to another party, *held*, that this previous conveyance being unexplained, the title did not appear to be in plaintiff, and he could not claim anything thereunder: *Huston v. Markley*, 49–162.

In showing a good title plaintiff must not only show conveyance from a previous grantee, but that such grantee had title: *Armstrong v. Pierson*, 4 G. Gr., 45.

In an action of right plaintiff is only required to show title back to a landlord of defendant's whose title defendant has acknowledged, defendant being estopped thereby: *Morrison v. Wilkerson*, 27–374.

Parol evidence: To the general rule that parol evidence is not admissible to prove title to real estate there are exceptions. If the title paper is lost its contents may be shown; or a parol purchase of real estate may be proved, followed by payment of the purchase money or the taking of possession under such contract; or if the vendor is himself the witness to prove such sale, parol evidence is admissible: *Davis v. Strohm*, 17–421.

Sufficiency of evidence of title: One who seeks to overturn a legal title must have proof, clear, satisfactory and conclusive, and not made up of loose and random conversations: *Parker v. Pierce*, 16–227.

Where a mother had procured land from her husband under decree of divorce and granted it to her daughter, and there was nothing in the record to show but that the daughter still held the legal title, though the husband had obtained a judgment for the land in an action against the mother alone, subsequent to the conveyance, *held*, in an action by the husband against a third party for trespass, that he had failed to show title: *O'Hagan v. Clinesmith*, 24–249.

4478. Tenant in common. 3248. In an action by a tenant in common, or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial. [R., § 3605; C., '51, § 2027.]

4479. Service on agent. 3249. When the defendant is a non-resident, having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal. [R., § 3572; C., '51, § 2004.]

PETITION — ANSWER — TRIAL.

4480. Form of petition. 3250. The petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof. [R., § 3570.]

The petition may contain a general averment of the right claimed without a statement of the facts upon which it is intended to sustain such right: *Phillips v. Blair*, 38-649.

It is sufficient for plaintiff to state the extent of his interest, etc. He need not state the evidence upon which he expects to prove it: *Larum v. Wilmer*, 35-244.

Plaintiff may recover for the use and occupation as well as for the title and possession: *Dunn v. Starkweather*, 6-466. And see notes to § 4491.

4481. Abstract of title. 3251. The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other proceedings.

Under Revision, which did not contain this section, *held*, that copies of the title papers need not be attached to the petition, the provision as to setting out the writing on which the action is founded (see § 3854) not being applicable to such a case: *Boardman v. Beckwith*, 18-292.

4482. Answer. 3252. The answer of the defendant, and of each if more than one, must set forth what part of the land he claims, and what interest he claims therein generally, and if as mere tenant, the name and residence of his landlord. [R., § 3573; C., '51, § 2005.]

Before the adoption of the provision allowing equitable defenses in an action at law, (§ 3861), an equitable title was held to be no defense against a legal one: *Page v. Cole*, 6-153; *Farley v. Goocher*, 11-570.

In an action of right to recover possession of real estate it is a good equitable defense to show that defendant took possession and made improvements under a contract of sale made by plaintiff's grantor of which plaintiff had notice at the time of purchasing and which defendant has always stood ready to carry out: *Warren v. Crew*, 22-315.

In an action based on a legal title to recover possession of real property, the defendant may show as an equitable defense that he is in possession under a contract of purchase with plaintiff's grantor, of which plaintiff had notice before acquiring his title: *Baldwin v. Lowe*, 22-367.

In an action at law to recover possession defendant may plead and rely upon an equitable title as a defense, even though by reason of the statute of limitations he is precluded from affirmative relief: *Adams County v. Graves*, 75-642.

A prior adjudication may be introduced in evidence without being pleaded as an estoppel: *Larum v. Wilmer*, 35-244.

Defendant is not obliged to set out details of his title, but only what he claims; but if he undertakes to show his title he should give it such definiteness that his adversary may be informed and enabled to meet it: *Gillis v. Black*, 6-439.

4483. Landlord substituted. 3253. Whenever it appears that the defendant is only a tenant, the landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, and the judgment shall be conclusive against him. [R., §§ 3571, 3589; C., '51, § 2003.]

This section does not require the landlord to be made a party; it is only permissive: *State v. Orwig*, 34-112.

4484. Possession. 3254. Where the defendant makes defense, it is not necessary to prove him in possession of the premises. [R., § 3575; C., '51, § 2007.]

Where defendant denies plaintiff's right to the premises, his actual possession need not be proved: *Kerr v. Leighton*, 2 G. Gr., 196.

4485. Alienation. 3255. An action for the recovery of real property against a person in possession, cannot be prejudiced by any alienation made by such person after the commencement of the action. [R., § 3578.]

4486. Power to enter and survey. 3256. The court, on motion and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the land in controversy and make survey and admeasurement thereof, for the purposes of the action. [R., § 3592; C., '51, § 2021.]

4487. Order therefor. 3257. The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land. [R., § 3593; C., '51, § 2022.]

4488. Verdict. 3258. The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds and other sufficient description according to the facts as proved. [R., § 3594.]

4489. General verdict. 3259. A general verdict in favor of the plaintiff without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition. [R., § 3595.]

4490. Judgment for damages only. 3260. If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only. [R., § 3579; C., '51, § 2010.]

This section has reference to cases where plaintiff holds a limited or determinable interest which expires, and not to cases where he holds an absolute estate, and pending the suit conveys to a third person. In the latter case the suit may be prosecuted to judgment in the name of the original plaintiff (§ 3766): *Jordan v. Ping*, 32-64.

This provision was apparently framed with reference to the case of a lease or demise: *Olive v. Daugherty*, 2 G. Gr., 393.

4491. Use and occupation. 3261. The plaintiff cannot recover for the use and occupation of the premises for more than six years prior to the commencement of the action. [R., § 3576; C., '51, § 2008.]

The widow in an action for the recovery of dower may recover damages from the grantee of her husband from the time of demand for a period not exceeding the six years' limitation: *O'Ferrall v. Simplot*, 4-381.

Judgment for the use and occupation of the premises for the full six years cannot be rendered against heirs upon whom descent has been cast within that time. They are only liable for the time during which they have been in possession after the death of the ancestor. A claim for rents and profits accruing before the death of the ancestor must be prosecuted against the administrator: *Carender v. Smith*, 8-360.

This six-year limitation applies only in actions to recover real property. General actions for rents, etc., are barred in five years under the provisions of § 3734: *Muir v. Bozarth*, 44-499.

So actions for use and occupation generally are barred within five years: *Tibbetts v. Morris*, 42-120.

This limitation does not prevent a party from setting off rents and profits of real estate against a claim for improvements under the occupying claimant law: See § 3151 and notes.

4492. Improvements set off. 3262. When the plaintiff is entitled to damages for withholding, or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants. [R., § 3596; C., '51, § 2023.]

Setting off improvements: If plaintiff waives damages, or all but nominal damages, defendant cannot interpose a claim for improvements made: *Daniels v. Bates*, 2 G. Gr., 151.

Improvements upon land purchased by defendant may be set off as well as those made by him: *Wright v. Stevens*, 3 G. Gr., 63.

If defendant avails himself of the benefit of the occupying claimant law, rents and profits may be set off against his claim for improvements: See § 3151 and notes.

4493. Wanton aggression. 3263. In case of wanton aggression on the part of the defendant, the jury may award exemplary damages. [R., § 3597; C., '51, § 2024.]

4494. Tenant; extent of liability. 3264. A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterward accrue during the continuance of his possession. [R., § 3598.]

This section applies only to cases where the tenant is joined as defendant or in some manner restrained from paying rent to his landlord. Otherwise he is not bound to retain rent in his hands to await the result of the litigation: *Gardner v. Gardner*, 25–102.

4495. Growing crops. 3265. If the defendant aver that he has a crop sowed, planted, or growing on the premises, the jury finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes, with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date the sum so assessed. This bond shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity, the clerk, on the application of the plaintiff, shall issue execution thereon against all the obligors. [R., § 3599.]

These provisions are not applicable where defendant is a tenant under an execution debtor, and plants or sows his crops knowing that they cannot be harvested before his right of possession will be terminated by the expiration of the period of redemption after execution: *Wheeler v. Kirkendall*, 67–612.

4496. Writ of possession. 3266. When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and a writ of possession issued accordingly. [R., § 3577; C., '51, § 2009.]

After plaintiff in an action to recover possession has had judgment in his favor and defendant has been put out of possession by legal process, plaintiff may have an injunction in an equitable action to restrain defendant from continuing in possession of the property in disregard of the judgment and process: *Ten Eyck v. Sjoburg*, 68–625.

4497. Judgment for rent accruing. 3267. The plaintiff may have judgment for the rent of the possession which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof. [R., § 3600.]

NEW TRIAL.

4498. When granted; grounds of. 3268. In any of the cases provided for by this chapter, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required

for a new trial in other cases are not shown; but only one such new trial shall be granted. [R., § 3584; C., '51, § 2014; 13 G. A., ch. 167, § 31.]

Greater latitude is allowed in granting new trials in such actions than in other actions, though the discretion given the court is a legal one: *White v. Poorman*, 24-108.

Such discretion may be reviewed on appeal. But unless it appears that it has been improperly exercised the action of the court will not be reversed: *Coleman v. Case*, 66-534.

It cannot be said that the discretion of the court has been improperly exercised in refusing a new trial unless it fairly appears that a different result could be reasonably expected should a new trial be granted: *Ibid.*

Where an appeal is taken from a judgment in an action of right, and the cause is remanded from the supreme court to the lower court for judgment in accordance with its opinion, the judgment so rendered is a judgment of the lower court, and a new trial may be granted in the same manner as if no appeal had been taken: *Butterfield v. Walsh*, 25-263.

While these provisions apply to such actions only, yet the fact that an equitable defense was set up and tried in such action does not prevent the granting of a new trial: *Ibid.; Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49-657.

The showing for a new trial in a particular case *held* sufficient: *Floyd v. Hamilton*, 10-552.

These provisions do not apply in actions to quiet title: *Russell v. Nelson*, 32-215.

It is not contemplated by these statutory provisions that the adverse party shall have notice of the application for a new trial, nor that he shall be allowed to controvert a showing made therefor: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55-157.

4499. Notice of new trial. 3269. If the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial. [R., § 3585.]

4500. Rights not affected. 3270. The result of such new trial, if granted after the close of the term at which the first trial took place, shall in no case affect the rights of third persons acquired in good faith for a valuable consideration since the former trial. [R., § 3586; C., '51, § 2015.]

4501. Damages. 3271. But the party, who, on such new trial, shows himself entitled to lands which have thus passed to a purchaser in good faith, may recover the proper amount of damages against the other party, either in the same or a subsequent action. [R., § 3587; C., '51, § 2016.]

4502. Writ of restitution. 3272. The party who has been successful in such new trial, shall, if the case require it, have his writ of restitution to restore him his property. [R., § 3588; C., '51, § 2017.]

QUIETING TITLE.

4503. Who may bring action. 3273. An action to determine and quiet the title of real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession. [R., § 3601; C., '51, § 2025.]

Who may bring action: Action to quiet title may be brought by a party out of possession against one in possession. Plaintiff is not required to resort to an action for possession: *Lewis v. Soule*, 52-11; *Lees v. Wetmore*, 58-170.

And plaintiff may, in such case, also ask the recovery of possession: *Lees v. Wetmore*, 58-170.

But aside from statutory provision, a party not in possession cannot maintain an action to remove a cloud from his title: *Harrington v. Cubbage*, 3 G. Gr., 307.

While an action to recover real property is the appropriate and most effectual remedy where defendant is in possession, nevertheless in such cases an action to quiet title may be maintained: *Lewis v. Soule*, 52-11.

In the federal courts a party out of possession having the legal title cannot have such equitable relief, his remedy at law being sufficient: *Whitehead v. Entwistle*, 27 Fed. Rep., 778; *Newman v. Westcott*, 29 Fed. Rep., 49.

A party who has sold and conveyed all his interest in the title to land cannot thereafter maintain an action to quiet the title of the same: *Adams County v. Burlington & M. R. R. Co.*, 39-507.

One who has an equitable title to land may maintain an action to quiet title against one who has no right thereto, without first having his legal title perfected, as, for instance, by having the reformation of his deed in equity. But the purchaser of a void title has no equity as against a rightful claimant of the property: *Rankin v. Miller*, 43-11.

Executors entitled to the possession and control of land for the purpose of carrying out

the provisions of a will have sufficient interest to support this action: *Laverty v. Sexton*, 41–435.

If a tax deed upon unoccupied land has been recorded, either the tax purchaser or the original owner may bring action against the other to quiet title within the five years' limitation provided by § 1388: *Barrett v. Love*, 48–103.

One who does not show competent title in himself cannot have the title to property quieted as against the holder of a tax title, although the statutory period has run against an action by such tax-title holder to assert his rights in the property: *Varnum v. Shuler*, 69–92.

When action maintainable: The owner and possessor of real estate is entitled to go into equity to quiet his title against one who lays claim thereto and gives out and claims that he has title: *Standish v. Dow*, 21–363.

Where plaintiff had been in possession, under claim and color of title, at the time defendant acquired a void tax title, *held*, that plaintiff could recover and hold possession as against defendant holding under such void title, and be restored in equity to his rights, notwithstanding defects in his claim of title: *Keokuk & D. M. R. Co. v. Lindley*, 48–11.

Where a bond for a deed had been executed, and afterwards the agreement had been rescinded, but the bond was not delivered up, *held*, that an action to quiet title as against the holder of the bond was proper: *Smith v. Van Campen*, 40–411.

The owner of land who has remained in possession thereof for such length of time after the issuance of a tax deed that action by the holder of the tax title to recover possession is barred may maintain action against the holder of such tax title to remove the cloud caused by the tax deed, and such action will not be barred by the statute which bars an action for the recovery of real property sold for the nonpayment of taxes: *Peck v. Sexton*, 41–566.

Where defendant set up a tax deed, and plaintiff, in reply, alleged that defendant's rights thereunder were barred, *held*, that this did not amount to an admission by plaintiff of defendant's title, and would not prevent a decree for plaintiff: *Tabler v. Callanan*, 49–362.

The fact of a cloud upon the title of property sold cannot be set up as ground for enjoining an action for the purchase money, but may perhaps be interposed to prevent the enforcement of the judgment when recovered: *Dietz v. Mock*, 47–451.

This action can only be brought against a person *claiming title* (decided under Code of '51 and Revision): *Fejervary v. Langer*, 9–159; *Eldridge v. Kuehl*, 27–160, 176.

4504. Petition. 3274. The plaintiff must file his petition under oath, setting forth the nature and extent of his estate, and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the petitioner, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. The notice in such action shall accurately describe the property, and, in general terms, the nature and extent of plaintiff's claim, and shall be served as in other cases. [R., § 3602; 13 G. A., ch. 167, § 32.]

Notice of publication: The action may, by statutory provision, be brought against a non-resident defendant on notice by publication: *Miller v. Davison*, 31–455. But a judgment in such case will not bar the non-resident, who has made no appearance, from afterward asserting his right to the property in a federal court: *Pitts v. Clay*, 27 Fed. Rep., 635.

A petition substantially embodying the averments here mentioned, with a general prayer for equitable relief, will justify the granting of this relief, though it be not specifically asked: *Paton v. Lancaster*, 38–494.

4505. Disclaimer of title. 3275. If the defendant shall appear and disclaim all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the court. [R., § 3603; 13 G. A., ch. 167, § 33.]

4506. Equitable proceedings. 3276. In all other respects, the action contemplated in the three preceding sections shall be conducted as other actions by equitable proceedings, with the modifications prescribed by this chapter so far as the same may be applicable. [R., § 3604; C., '51, § 2026.]

The proceedings under these provisions for quieting title are not special proceedings: *Miller v. Davison*, 31–435.

An action to quiet title under the statute is, in effect, an equity suit and must be brought and determined as such: *Balmear v. Otis*, 4 Dillon, 558.

The provisions that, in an action to recover real property, plaintiff must rely solely on the strength of his own title (§ 4477), and in regard to new trials in such actions (§ 4498), are not applicable in actions to quiet title: *Russell v. Nelson*, 32–215.

Relief: Other equitable relief, as well as a decree quieting title, may be asked in the same petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49–657.

A court of equity has jurisdiction to quiet title and to restrain those having adverse titles from setting them up against the para-

mount title, but defects and irregularities in the title arising out of the official acts of the ministers of the law will not be cured. However, the action of the court in exercising its power in such a case would not be void for want of jurisdiction, but merely erroneous: *Stevenson v. Bonesteel*, 30-286.

Where a case stood upon a cross-bill to quiet title and a defense of an oral contract to convey, *held*, that it was of equity jurisdiction, and a motion to transfer it to the law docket was properly overruled: *Harlan v. Porter*, 50-446.

Unless it appears that the cloud upon plaintiff's title cannot be removed by an action of ejectment, or that the title could not be settled so as to prevent a multiplicity of suits without the aid of chancery, complainant will be left to his remedy at law: *Harrington v. Cubbage*, 3 G. Gr., 307.

As the right of possession to property is something distinct from the title, it does not follow that, upon judgment for defendant for costs in an equitable action to set aside defendant's title, the defendant is entitled to the right of possession: *Lombard v. Atwater*, 43-599.

Where plaintiff claims in such an action that he is owner of the property, a judgment in his favor is an adjudication of any right of ownership thereto which defendant might have set up: *Reed v. Douglas*, 74-244.

In this action the recovery of the possession of the property may be awarded by decree: *Wyland v. Mendel*, 78-739.

PERMANENT SURVEY OF LANDS; LOST CORNERS.

4507. Surveys upon agreement; record; plat. 15 G. A., ch. 8, § 1. Whenever the owner or owners of adjacent tracts of land shall desire to establish permanently the lines and corners thereof between them, he, she, or they may enter into a written agreement to employ and abide by the survey of some surveyor; and after said survey is completed, a plat thereof, with a description of all corners and lines plainly marked and described thereon, together with the written agreement of the parties, shall be recorded in the recorder's office of the county where the lands are situated; or after any survey of lands is completed and the parties interested therein as owners are satisfied with such survey, or when the owners of adjoining lands desire to perpetuate existing lines and corners heretofore made between them, it shall be lawful for them to cause a plat thereof to be made, with a description of all such lines and corners made thereon, which plat shall be acknowledged before some officer authorized to take the acknowledgment of deeds, and signed by each of said owners as an agreement between them so far as relates to such lines and corners; all of which shall be recorded in the recorder's office of the county in which the lands are situated; and the lines and corners so made and described, and recorded, shall be binding upon the parties entering into said agreement and signing said plats, their heirs, successors, and assigns, and shall never be changed.

4508. Application for commission; notice. 15 G. A., ch. 8, § 2. Whenever one or more proprietors of land in this state, the corners and boundaries of whose lands are lost, destroyed, or *are* in dispute, or who are desirous of having said corners and boundaries permanently established, *and who* will not enter into agreement as provided by section first of this act [§ 4507], it shall be lawful for said proprietor or proprietors that they shall cause a notice in writing to be served on the owner or owners of adjacent tract or tracts, if known and residing in the county where said lands are situated, or if not known and not residing in such county, by publishing in a newspaper published in such county, and if no newspaper shall be published, then by putting up in four different public places in said county, a written or printed notice to the effect that on a day named therein he, she, or they will make application to the district court of the county in which said lands are situated, at its next succeeding term, for the appointment of a commission of one or more surveyors to make survey of and permanently establish said corners and boundaries, which notice shall be posted up at least four weeks before the time appointed for said application; and one of said notices shall be in the precinct or township in which said corners and boundaries are situated.

In what cases: It is only where the location of the government corner cannot be definitely ascertained that a dispute as to a boundary line can possibly arise. If the corner

has been obliterated or lost, then evidence of its true location may be heard by the commissioners, and upon a consideration of such evidence and a survey the disputed boundary is established by them: *Mitchell v. Wilson*, 70-332.

The fact that division lines have been established by a surveyor, where such action of the surveyor is disputed, does not prevent proceedings to fix such lines from being brought and the lines established under these provisions: *Strait v. Cook*, 46-57.

Proceedings: Such proceedings are special proceedings triable on appeal like an ordinary action and not *de novo: In re Harrington*, 54-33.

Where the commissioners have determined facts which render the final location of the corner a mere matter of measurement, they may properly postpone the expense of actual survey until the court acts upon their report: *Ibid.*

The proceeding contemplated in this statute is a summary proceeding designed to determine and locate the true division line between land holders without issue in court or trial by jury: *Gates v. Brooks*, 59-510.

The statute, although not contemplating trial by jury, is not unconstitutional on that account: *Ibid.; Coombs v. Quinn*, 66-469.

Actions of this character not being triable *de novo* on appeal, the finding of the commissioners and court must have the force and effect of the verdict of a jury: *Vittoe v. Richardson*, 58-575.

The report of the commissioners cannot have the effect of the verdict of a jury. The commissioners are simply officers of the court, appointed for the purpose of aiding the court in establishing the true boundary line: *Mitchell v. Wilson*, 70-332.

When a petition is presented to the court for the appointment of a commission under this statute, the court has jurisdiction to look into the nature of the controversy and dismiss the petition if the controversy does not appear to be such as to justify the appointment of a commission: *Smith v. Scoles*, 65-733.

The petition should state the facts in dispute sufficiently to enable the court to determine the nature of the controversy. If it does not, a motion for more specific statement will be proper. If the court errs in dismissing the petition, this action can be reviewed on appeal after its dismissal. The party would not have the right to commence a new proceeding on the same facts: *Ibid.*

Where it was stated in a petition that certain persons named as defendants were the only persons that would be affected by the proceedings, and it appeared that but one of them had been served with a notice or had made appearance, *held*, that the court nevertheless acquired jurisdiction to appoint a commissioner as between the plaintiff and the defendant who appeared, unless it was shown that there were other persons who were necessary parties: *Nesselrode v. Parish*, 59-570.

Evidence: Commissioners appointed in this proceeding need not notify defendant of the time of making the survey, but if they fail to notify him so that he can offer evidence, and material evidence is thus omitted to his prejudice, the report should be rejected: *Nesselroad v. Parrish*, 52-269.

Service by publication: In such a proceeding, in order to warrant service by publication as therein contemplated, the facts authorizing such publication must appear from the record: *Ibid.*

Report: The evidence, plat and survey accompanying the report is a part of it and becomes of record in the same manner as the report, and therefore it is not necessary that they be preserved by a bill of exceptions: *Davis v. Curtis*, 68-66.

It was not the intention of the legislature to impose upon the commissioners the trial of the question of adverse possession of lands, and where they find no marked government corner, but do find one that has been acquiesced in by the adjoining proprietors for ten years, they should report that fact to the court, and it should be the end of the proceeding: *Ibid.*

Hearing: The court is authorized on hearing the report of the commissioner to strike out evidence reported and confirm his report upon the remaining evidence without resubmitting it to the commissioner: *Caldwell v. Nash*, 68-658.

An any time before the final submission of the cause, the court may, at least upon proper showing, receive any evidence tending to show the location of the corner and the boundary line; and in its discretion it may set aside the report of the commissioners and make a new reference to the same or other commissioners to consider the new evidence together with what had been previously taken, and, if deemed necessary, to make another survey: *Mitchell v. Wilson*, 70-332.

Restoring survey: The land is not to be resurveyed as if there had been no survey, but the original survey is to be restored in such manner that the different tracts affected thereby shall bear the same relation to each other as by the original survey: *Moreland v. Page*, 2-139; *Newcomb v. Lewis*, 31-488.

The true method of establishing a lost corner in a particular case considered: *Anderson v. Peterson*, 74-482.

4509. Appointment and proceedings of commission. 15 G. A., ch. 8, § 3. Upon the filing of proper petition and proof of due notice aforesaid, the said court shall appoint a commission of one or more surveyors, entirely disinterested, to make said survey, who shall proceed to make said survey and report his or their proceedings to that or the next term of said court, accompanied by a plat and notes of said survey; and each of said surveyors shall be authorized to administer an oath to any of the assistants necessary in the execution of said survey, to faithfully and impartially perform their respective duties, and take the evidence under oath administered by the

surveyor, and incorporate the same with his or their survey, of any person or persons, who may be able to identify any original government corner, or witness thereto, or government line, tree, or other noted object, or any other legally established corner, or other corners that have been recognized as such by the adjoining proprietors for over ten years.

4510. Proceedings in court. 15 G. A., ch. 8, § 4. Upon the filing of said report, any person whose interests may be affected by said survey shall be at liberty to enter his objections to said report, and the court shall hear and determine said objections, and enter an order or judgment either approving or rejecting said report, or modifying and amending the same according to the rights and interests of the parties, or may refer the same back to said commission to correct their report and survey in conformity with the judgment of the court; or the court may for good reason set aside said commission and appoint a new one, who shall proceed anew, and determine the boundaries and corners of the lands in question. The corners and boundaries established in said survey, as approved in the final judgment of the court, if not appealed from within thirty days, shall be held and considered as permanently and unalterably established according to said survey. The expenses and costs of the surveys and suit shall be apportioned among all the parties according to their respective interests.

CHAPTER 3.

OF PARTITION.

4511. By equitable proceedings. 3277. The action for partition shall be by equitable proceedings, and no joinder or counter-claim of any other kind shall be allowed therein, except as provided by this chapter. [R., § 4178.]

Partnership: Where land belongs to a partnership a partner has no such interest therein as to entitle him to an action for partition: *Pennybacker v. Leary*, 65–220.

Water-power: A water-power owned in common is subject to partition: *Doan v. Metcalf*, 46–120; *Cooper v. Cedar Rapids Water-Power Co.*, 42–398.

Dower: In action for partition the distributive share of the widow may be determined and set off, and proceedings for admeasurement of dower are not exclusive. But partition should not be brought to compel an election between the homestead and a distributive share of the property until it has been determined whether any, and if so, how much, of the realty must be sold for the payment of debts: *Thomas v. Thomas*, 73–657.

In severalty: Partition cannot be had of real estate owned in severalty by several owners, for the purpose of determining metes and bounds of the several portions: *Johnson v. Moser*, 72–523.

Joinder; counter-claim: This section does not prevent a defendant in a foreclosure proceeding from asking relief which involves the partition of the land covered by the lien: *Hammond v. Perry*, 38–217.

So, also, a claim of defendants against plaintiff, for rent, damages, etc., pertaining to the property, may be set up in the answer and should be heard: *Metcalf v. Hoopingardner*, 45–510.

But an agreement entered into by a son to pay a certain mortgage on his parents' property, the proceeds of which were advanced to him, *held* not to be after the parents' death such a lien on the son's share as could be set up against him in a proceeding under the statute for the partition of the property. But the obligation of such a son to pay taxes on said land, under the lease of the same to him, is such a lien as can be set up as a counter-claim against a grantee taking with notice of such agreement: *Rider v. Clark*, 54–292.

PLEADINGS — PARTIES — TRIAL.

4512. Petition. 3278. The petition must describe the property and respective interests of the several owners thereof, if known. If any interests, or the owners of any interests are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty. [R., §§ 3606–7; C., '51, §§ 2028–9.]

4513. Abstract of title. 3279. The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page on which the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other pleadings.

4514. Contingent interests. 3280. Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit under like order. [R., §§ 3647-8; C., '51, §§ 2069-70.]

4515. Lien creditors. 3281. Creditors having a specific or general lien upon the entire property may be made parties at the option of the plaintiff or defendant. [R., § 3608; C., '51, § 2030.]

4516. Answer. 3282. The answers of the defendants must state among other things the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and, by supplemental pleading, if necessary, may deny the interest of any of the other defendants. [R., § 3610; C., '51, § 2032.]

4517. Issues; trial. 3283. Issues may thereupon be joined and tried between any of the contesting parties, the question of cost on such issues being regulated between the contestants agreeably to the principles applicable to other cases. [R., § 3612; C., '51, § 2034.]

INCUMBRANCES.

4518. Reference to ascertain incumbrances. 3284. Before making any order of sale or partition, the court may refer to a clerk, or a referee, to report the nature and amount of general incumbrances by mortgage, judgment, or otherwise, if any there be upon any portion of the property. [R., §§ 3623-4; C., '51, §§ 2045-6.]

4519. Proof of. 3285. The referee shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amounts of such incumbrances. [R., § 3625; C., '51, § 2047.]

4520. Issue as to incumbrance. 3286. If any question arise as to the validity or amount of an incumbrance, or the payment of the same, the court may direct an issue to be made up between the incumbrancer and an owner, which shall be decisive of their respective rights; and upon a sale it may order the money to be retained or invested to await final action in relation to its disposition, and notice thereof to be forthwith given to the incumbrancer unless he has already been made a party. [R., §§ 3628-9; C., '51, §§ 2050-1.]

The holder of a mortgage not made a party to the proceedings does not lose his lien on the premises: *Lewis v. Atkinson*, 15-361.

Where partition was made in ignorance of a mortgage on part of the land and the mortgage was subsequently foreclosed, *held* under the circumstances not to be error to set aside the partition and make a new one: *Bridges v. Howard*, 18-116.

4521. Undivided interests. 3287. If the lien is upon one or more undivided interests, the holder thereof shall be made a party, and the lien shall,

after partition or sale, remain a charge upon the particular interests of the proceeds thereof, but the amount of costs is a charge upon those interests, paramount to all other liens. [R., § 3609; C., '51, § 2031.]

When liens exist on some of the shares, the lienholders should be made parties, and an account of the amount due on their liens should be taken before order of sale (when sale becomes necessary), in order that a purchaser shall know just the extent of the liens and their rate of interest, and that the interest of the respective parties and all the parties may be protected: *Metcalf v. Hoopingardner*, 45-510.

4522. Not to delay distribution. 3288. The proceedings in relation to incumbrances shall not delay the distribution of the proceeds of other shares in respect to which no such difficulties exist. [R., § 3631; C., '51, § 2053.]

4523. Confirmation. 3289. After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly. [R., § 3615; C., '51, § 2037.]

Undivided interests: These provisions clearly imply that partition is admissible only between persons owning undivided interests, that is, joint owners or tenants in common: *Johnson v. Moser*, 72-523.

Judgment conclusive: Any claim to the property not set up by a party to the suit before judgment is barred. Nor can a party afterwards set up a different right to the property than that claimed in the suit: *Olver v. Montgomery*, 39-601.

Appeal: An appeal may be taken from a decree settling the rights and interests of the parties. Such decree is in that respect final: *Williams v. Wells*, 62-740.

A party who is, by the decree, adjudged to have no interest in the property may appeal from such decree as a final judgment as to himself: *Ramsey v. Abrams*, 58-512.

PARTITION.

4524. Referees appointed. 3290. Upon entering such judgment, the court shall appoint referees to make partition into the requisite number of shares, or if it is apparent, or the parties so agree, that the property cannot be equitably divided into the requisite number of shares, a sale may be ordered. [R., §§ 3616, 3618, 3619; C., '51, §§ 2038, 2040-41.]

Referees: Where the shares of the parties or the description thereof is not settled by law, or by consent, referees are necessary. So *held* in an action for the partition of water-power: *Doan v. Metcalf*, 46-120.

Partition by selling: The power of the legislature to provide that the shares of all parties of property owned in common shall be sold where a division thereof cannot be made has been too long acquiesced in to be now called in question. The owner of an undivided interest has the right at any time to have partition made, and if the premises cannot be divided by metes and bounds, he has the right to compel a sale, and such proceeding is not depriving a party of his property without due process of law: *Metcalf v. Hoopingardner*, 45-510.

When parties by contract assume the relation of tenants in common in real estate, the law fixes their respective rights, one of which is that the partnership may be dissolved, so to speak, and that, if necessary, the common property may be sold and the proceeds divided: *Ibid.*

The court may order a sale of the property, even where it is capable of being divided, if the division will materially diminish the value: *Branscomb v. Gillian*, 55-235.

4525. Shares marked out. 3291. When a partition is deemed proper, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them therein. [R., § 3637; C., '51, § 2050.]

4526. Report of referees. 3292. The report of the referees must be in writing, signed by at least two of them. It must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot the shares to their several owners. [R., § 3638; C., '51, §§ 2060-61.]

4527. Special allotments. 3293. For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value. [R., § 3617; C., '51, § 2039.]

It is a good and sufficient reason for allotting a particular portion to one tenant in common that he has acquired a homestead in that portion of the undivided premises, or has made valuable improvements thereon: *Thorn v. Thorn*, 14-49.

In making a final settlement and division between tenants in common the court will look into the peculiar circumstances, and will protect one of the tenants who has made improvements on a portion of the premises by allowing him for such improvements, and if the land is partitioned may allow him the particular property upon which the improvement was made as a portion of his share: *Cooper v. Frederick*, 4 G. Gr., 403.

The doctrine that where a tenant in common lays out money in improvements he must be compensated therefor before partition is made, or receive in the partition the portion so improved, is not applicable to cases where the other tenants in common contributed to the improvements: *Conrad v. Starr*, 50-470.

4528. Partition of part. 3294. When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold as hereinafter provided. [R., § 3640; C., '51, § 2062.]

4529. Report set aside. 3295. On good cause shown, the report may be set aside and the matter again referred to the same or other referees. [R., § 3641; C., '51, § 2063.]

Upon setting aside the referee's report the case may again be referred to the same or any other referee. If the case is not again sent to a referee a new trial should be granted and the case again tried upon the issues of fact in the manner determined by law or the agreement of the parties. The court should not for itself, in such a case, try issues of fact, no agreement for trial in that form having been made: *Lyons v. Harris*, 73-292.

4530. Judgment. 3296. Upon the report of the referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever. [R., § 3642; C., '51, § 2064.]

A judgment in partition proceedings operating as a conveyance is to be construed by the same rules which apply to ordinary conveyances. Therefore if the estate created would be "in entirety" if held under an ordinary deed, so it must be under the judgment: *Hoffman v. Stigers*, 28-302.

4531. Costs. 3297. All the costs of the proceedings in partition shall be paid, in the first instance, by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for. [R., § 3645; C., '51, § 2065.]

In an action for partition, a defendant who disclaims any right or interest in or title to the premises at the time the action is brought, or afterwards, and does not appear to be in possession or acting inconsistently with the disclaimer, is entitled to be dismissed with his costs: *Urban v. Hopkins*, 17-105.

In determining whether there was a contest respecting the extent of the plaintiff's share, so as to affect the question of costs, the court will not be justified in taking a very critical view of the proceedings; the question is whether there was practically a contest; and if the parties actually engaged in such contest, whether regularly raised in the pleadings or not, that fact is sufficient to control the question of costs: *Duncan v. Duncan*, 63-150.

4532. Attorneys' fees. 20 G. A., ch. 184, § 1. In all actions for partition of real estate where there is no defense made no greater attorney fee shall be allowed by the court to be taxed for and as attorney fees in such action for partition than provided in section two hereof [§ 4533].

Where an action was brought in form for partition, but in fact to determine the title to real estate which was in dispute, *held*, that the fees of plaintiff's attorney could not be taxed as a part of the costs: *McClain v. McClain*, 52-272.

4533. Limit. 20 G. A., ch. 184, § 2. For the first two hundred dollars or less in value of the property to be partitioned ten per cent., for the excess of two hundred dollars to five hundred dollars five per cent., and for the excess over five hundred to one thousand dollars three per cent., for all excess over one thousand one per cent.

SALE.

4534. Referees to give bond. 3298. Before proceeding to sell, the referees shall give a bond, in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties. At any time

thereafter, the court may require farther and additional security, and upon failure of the referees to comply with such order, they may be removed by the court and others appointed; and the court may at any time, for satisfactory reasons, remove such referees and appoint others. [R., § 3620; C., '51, § 2042.]

4535. Notice; private sale; appraisement. 3299; 21 G. A., ch. 130. The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner. *Provided*, that whenever in the discretion of the court such lands can be disposed of to better advantage, and with less expense at private sale than in the manner hereinbefore provided, the same may be sold in compliance with such terms as are ordered by the court, but in such case the real estate shall be duly appraised by three disinterested freeholders to be appointed by the court, and sold for not less than the appraised value. [R., § 3621; C., '51, § 2043.]

4536. Report. 3300. After completing said sale, the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser and the price bid therefor, which report shall be filed with the clerk. [R., § 3622; C., '51, § 2044.]

4537. Conveyance. 3301. If the sale be approved and confirmed by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances pursuant to such sale. But no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage of the land so sold, or other equivalent security. [R., § 3633; C., '51, § 2055.]

Approval of sale: The approval of the sale is essential, and inadequacy of price alone is sufficient to justify the court in refusing its approval: *Loyd v. Loyd*, 61-243.

Fraud: Where it appears that the purchaser at a judicial sale, in partition, for a consideration induced other persons intending to bid from so doing, the sale and approval of the court will be set aside for fraud: *Fleming's Heirs v. Hutchinson*, 36-519.

4538. Validity. 3302. Such conveyances so executed, being recorded in the county where the premises are situate, shall be valid against all subsequent purchasers, and also against all persons interested at the time who were made parties to the proceedings in the mode pointed out by law. [R., § 3634; C., '51, § 2056.]

4539. When parties are married. 3303. If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid. [R., § 3635; C., '51, § 2057.]

4540. Sales disapproved. 3304. If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto. [R., § 3636; C., '51, § 2058.]

4541. Security to refund money. 3305. The court in its discretion, may require all or any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund such moneys, with interest, in case it afterward appears that such parties were not entitled thereto. [R., § 3632; C., '51, § 2054.]

4542. Life estates. 3306. If a tenant for life or years be entitled as such to a part of the proceeds of the sale, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested and the proceeds to be paid to the incumbrancer during the life-time of the incumbrance. [R., § 3630; C., '51, § 2052.]

Where a wife's dower interest was only a life estate it was held that it was not such a case as contemplated by this section, and that she could not be compelled to allow the property to be sold and the proceeds invested: *Clark v. Richardson*, 32-399.

CHAPTER 4.

OF THE FORECLOSURE OF MORTGAGES.

4543. Of personal property. 3307. Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale as hereinafter provided, unless a stipulation to the contrary has been agreed upon by the parties, or may be foreclosed by action in the proper court. [R., § 3649; C., '51, § 2071.]

Sale valid: In a particular case, *held*, that the foreclosure of a chattel mortgage in which the sale was in accordance with the agreement between the parties was valid, no want of good faith on the part of the mortgagee being shown: *Gear v. Schrei*, 57-666.

Personal judgment: The mortgagee is not precluded from recovery upon the mortgage debt because he permits the property covered by the mortgage to be sold for an inferior claim or lien: *Jones v. Turck*, 33-246.

If, in the foreclosure proceeding, any property be sold not covered by the mortgage, no title will pass by such sale, and therefore injunction cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which it is claimed is not covered thereby: *Rankin v. Rankin*, 67-322.

Under the circumstances of a particular case, *held*, that a sale under mortgage was valid, and that the fact that the property was by a previous appraisement higher than by a subsequent one under which it was sold, was not evidence of fraud: *Tootle v. Taylor*, 64-629.

Where a part of the chattels included in the chattel mortgage have been sold, it seems that the purchaser may require the balance of the property to be exhausted before taking the part sold, but he cannot require the mortgagee to foreclose his mortgage before it is due; and where he complains of negligence of the mortgagee in allowing other property to escape, he must show, in order to entitle himself to relief, that such property would have been sufficient to satisfy the mortgage: *High v. Brown*, 46-259.

A sale made under power to sell given by the mortgage, without the posting of notices as required by law, will not be invalid in such sense that it will not confer title upon the purchaser, but it will pass a perfect title to the property and the mortgagor will be divested of his right and interest in it: *Campbell v. Wheeler*, 69-588.

Redemption by creditor: A creditor of the mortgagor may, before forfeiture, pay the mortgage debt and levy upon the property, or, if a forfeiture has taken place, he may tender the amount, and, if refused, go into chancery to redeem at any time before the equity of redemption has been barred by foreclosure, or he may garnish the mortgagee for the value of the property in excess of the debt secured: *Torbert v. Hayden*, 11-435.

When the debt secured by the mortgage is entirely paid off by a sale of a portion of the property sufficient to pay the debt and all costs connected with the sale, the right to possession of the unsold portion of the property ceases to exist either at law or in equity against the mortgagor or his assignee: *Bellamy v. Doud*, 11-285.

In equity: A chattel mortgage may also be foreclosed by an action in equity: *Packard v. Kingman*, 11-219.

A party claiming to hold a prior incumbrance should be allowed, on application, to be made a party to the foreclosure: *Parrott v. Hughes*, 10-459.

4544. Notice. 3308. The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale. [R., § 3650; C., '51, § 2072.]

4545. Service. 3309. Such notice must be served on the mortgagor, and upon all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings. [R., § 3651; C., '51, § 2073.]

4546. Return. 3310. The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication. [R., § 3652; C., '51, § 2074.]

4547. Notice of sale. 3311. After notice has been served upon the parties, it must be published in the same manner, and for the same length of time, as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. [R., § 3653; C., '51, § 2075.]

4548. Title of purchaser. 3312. The purchaser shall take all the title and interest on which the mortgage operated. [R., § 3654; C., '51, § 2076.]

4549. Bill of sale. 3313. The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased. [R., § 3655; C., '51, § 2077.]

4550. Evidence of service perpetuated. 3314. Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof. [R., § 3656; C., '51, § 2079.]

4551. Affidavits. 3315. Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence to prove the facts they state. [R., § 3657; C., '51, § 2080.]

4552. Validity of sales. 3316. Sales made in accordance with the above requirements, are valid in the hands of a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee. [R., § 3658; C., '51, § 2081.]

4553. How contested. 3317. The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district [or circuit] court, for which purpose an injunction may issue if necessary. [R., § 3659; C., '51, § 2082.]

After a transfer of the cause to court by injunction or otherwise the case stands as a foreclosure in court, and, where usury is made to appear, a judgment of forfeiture in favor of the school fund may be rendered: *Hanlin v. Parsons*, 33-207.

The injunction is not to issue as a matter of right where it is not necessary to protect the rights of parties interested, and they have already adopted another proceeding affording a full and complete remedy: *Sweet v. Oliver*, 56-744.

This provision does not prevent one whose property is seized without shadow of right, upon the pretense that it is covered by the mortgage (as where it has been, by valid agreement, released from the mortgage at the time of its purchase from the mortgagor), from bringing an action at law to recover the property: *Black v. Howell*, 56-630.

4554. Deeds of trust. 3318. Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like mortgages. [R., § 3673; C., '51, § 2096.]

OF REAL PROPERTY.

4555. By equitable proceedings. 3319. No deed of trust, or mortgage of real estate, with or without power of sale, made since the first day of April, A. D. 1861, shall be foreclosed in any other manner than by action in court by equitable proceedings. [R., §§ 3660, 3673, 4179; C., '51, §§ 2083, 2096; 11 G. A., ch. 116.]

The nature of foreclosure proceedings discussed: *Kramer v. Rebman*, 9-114.

Remedy exclusive: This section simply requires that the holder of a mortgage shall proceed, if at all, in a certain manner. It does not refer to a case where a party seeks to redeem from an absolute deed as from a mortgage, and in such case the court may decree that plaintiff pay the amount necessary to redeem within a time fixed or the deed will become absolute: *White v. Lucas*, 46-319.

Petition: A petition asking judgment upon a note, and an execution against the property covered by a mortgage given to secure the same, is not a petition to foreclose the mortgage, and does not address itself to the chancery jurisdiction of the court: *Ballard v. Koons*, 10-534.

A bill asking foreclosure of a mortgage and making third parties defendants for the purpose of cutting off their equities is not objectionable for multifariousness: *Greither v. Alexander*, 15-470.

Prayer: Foreclosure of a mortgage may be granted in an equitable action, where it would be proper relief under the facts stated, under a prayer for general relief, although a foreclosure is not specifically asked: *Hait v. Ensign*, 61-724.

An attachment may be prayed for in connection with the action to foreclose a mortgage: *Baldwin v. Buchanan*, 10-277.

Foreclosure against right of way: The mortgagee of land from which a right of way has been condemned, and who has not been made party to such proceeding, may have a foreclosure against the entire property, with a judgment providing that the property be first

offered for sale subject to the right of way, and in case it will not sell for enough to pay off the mortgage, then that the right of way be sold with the property or separate from it as shall be found most advantageous: *Severin v. Cole*, 38-463.

For instalment: See notes to § 4561.

Claim against estate: Where the mortgagor of real estate has died and the mortgagee has filed in the county court the notes secured as claims against the estate, which have been allowed but not paid, the mortgagee may either obtain judgment in the probate court or foreclose the mortgage by separate proceeding: *Moores v. Ellsworth*, 22-299.

Correction of mortgage: The mortgagee is entitled, after foreclosure and sale of the property thereunder, to have a misdescription of the mortgage reformed: *Provost v. Rebman*, 21-419.

Notice by publication: When a non-resident executes a mortgage upon property in Iowa, it must be held that he executes the same with reference to the laws of Iowa relating to such instruments, and the statutory methods for the enforcement of such conveyances must be deemed a part of the contract of the parties. Hence, in foreclosure proceedings in the state courts, a decree of foreclosure in a proceeding against a non-resident served with notice by publication is proper, the judgment being *in rem* only: *Palmer v. McCormick*, 28 Fed. Rep., 541.

Assignees as plaintiffs: Two assignees of different notes secured by the same mortgage cannot properly bring a joint action to foreclose the mortgage: *Rankin v. Major*, 9-297.

Where, pending an action to foreclose as to part of the notes secured by a mortgage, a person acquired a note secured by the same mortgage, but junior to those sued on, and from a person not made defendant, *held*, that such assignee had a right to foreclose, subject to the prior lien, but could not assert such right in an action for possession of the property: *Kemerer v. Bournes*, 53-172.

Mortgagor as party: A mortgagor who has divested himself of all interest in the mortgaged property is not a necessary party defendant in an action to foreclose: *Murray v. Catlett*, 4 G. Gr., 108; *Johnson v. Monell*, 13-300.

This is so even though the mortgagor is the only person against whom a personal judgment might be rendered. When the only object of the proceeding is to appropriate the mortgaged property to the satisfaction of the debt, the mortgagor who has conveyed all his interest in the property is not a necessary party: *Johnson v. Foster*, 68-140.

If it appears upon the face of the proceeding that the mortgagor has divested himself of all interest in the mortgaged property, there can be no necessity or propriety in making him a party. But a mortgagor who has conveyed his interest by a deed containing covenants of warranty against incumbrances still has such interest in the foreclosure suit as to authorize his being made party defendant on his own application: *Gifford v. Workman*, 15-34.

One who defends the foreclosure of a mortgage, claiming that the mortgagors had no interest in the mortgaged premises, cannot object that the mortgagors are not in court when their absence works no prejudice to him: *Williams v. Meeker*, 29-292.

The debtor not necessary party: Where a mortgage is given to secure an indebtedness of another party, the original debtor is not a necessary party in an action to foreclose the mortgage: *Deland v. Mershon*, 7-70.

Subsequent mortgagees are not indispensable parties to the foreclosure, and the fact that such a party is not brought in cannot be made a ground of objection by other defendants: *Heimstreet v. Winnie*, 10-430; *Donnelly v. Rusch*, 15-99.

A second mortgagee is not bound by a foreclosure proceeding under a prior mortgage to which he is not made a party, although he had both actual and constructive notice of such prior mortgage: *Anson v. Anson*, 20-55.

Subsequent mortgagees and purchasers of the mortgaged premises, who are not made parties to an action to foreclose a prior mortgage, are not bound by the foreclosure: *Gower v. Winchester*, 33-303.

The senior mortgagee cannot acquire equities against a junior mortgagee by the payment of a judgment, obtained in a suit to which the latter is not a party, nor by any arrangement between the former and the mortgagor, no matter in what form the mortgage exists: *Davis v. Rogers*, 28-413.

Subsequent purchaser: The purchaser of mortgaged premises whose deed is recorded at the time of the institution of the foreclosure proceedings will not be bound by the decree unless made a party: *Porter v. Kilgore*, 32-379.

A purchaser of the premises at foreclosure sale is subrogated to the mortgagee's rights, and when the foreclosure proceeding is still pending on the cross-petition of one of the defendants, claiming a portion of the land, the purchaser may file his petition of intervention, setting forth his interests, and asking to be joined with the plaintiff in his action: *Dyer v. Harris*, 22-268.

A foreclosure in which a purchaser of a part of the land from the mortgagor is not made party is not void. Such purchaser holds the equity of redemption and nothing more, and a purchaser at the sale under the decree takes title subject to such equity of redemption: *Douglass v. Bishop*, 27-214.

Subsequent lienholder: In an action to foreclose a mortgage a person holding a subsequent lien should be made a party. Otherwise he can not only redeem from the sale within the statutory period, but, if he neglect to do so, he may still redeem from the mortgage debt by paying it with interest and any other proper charges, and may have an accounting of the rents and profits and an application made thereof as against the mortgage debt: *Bunce v. West*, 62-80.

A judgment lienholder is not a necessary party to an action to foreclose a mortgage against a homestead upon which the judgment is not a lien, and such judgment creditor has no right of redemption except the statutory right to be exercised within nine months: *Sutherland v. Tyner*, 72-232.

Holder of senior lien: While the beneficiary in a trust deed which is prior to the

mortgage is a proper, he is not a necessary, party to the foreclosure, his interests being paramount to those of the mortgagor, and not to be affected thereby. The junior mortgagee is bound to take notice of prior liens properly recorded and of rights thereunder: *Standish v. Dow*, 21–363.

Homestead rights: The rights of the wife in the homestead cannot be cut off by a sale under foreclosure to which she is not made a party, even though her marriage to the owner of the property is subsequent to the mortgage: *Chase v. Abbott*, 20–154.

The defense that property covered by a mortgage is the homestead of defendant must be set up in the foreclosure proceeding, and if not thus interposed cannot be made a ground for resisting the title of the purchaser under the foreclosure: *Haynes v. Meek*, 14–320.

Where the wife is made a party to the foreclosure of a mortgage executed by the husband alone, and the fact that the premises constitute the homestead does not appear in the mortgage nor upon the face of the petition, and such fact is not set up by the wife, the foreclosure is conclusive upon her as to any claim of homestead in the premises: *Oleson v. Bullard*, 40–9.

Mechanic's lien: Where a person claiming a mechanic's lien is made a party to the foreclosure of the mortgage, and in such action the lien of the mortgage is declared superior, the holder of the lien cannot thereafter claim such lien as against a purchaser at the foreclosure sale: *Grosbeck v. Ferguson*, 43–532.

The holder of a sheriff's certificate of purchase at execution sale, subject to be defeated by redemption, has such an interest in the property that he may be made a party defendant in an action to foreclose a mortgage against the property: *Brobst v. Thompson*, 4 G. Gr., 135.

Dower right: Where a wife does not join in a mortgage, and the husband dies before foreclosure, the widow being made a party to the foreclosure proceeding is not under obligation to set up as a defense her dower right in the property; and a foreclosure sale, in the absence of such defense on her part, will not divest her dower interest, the facts alleged in the petition not being such as to show the existence of such interest: *Moomey v. Maas*, 22–380.

Junior claims: Where a party is made defendant to the foreclosure, who, it is alleged, has some claim upon or interest in the property junior to the plaintiff's lien, it is incumbent upon such defendant, if he claims a lien superior to that of plaintiff, to allege and show the existence of such lien: *Wolfinger v. Betz*, 66–594; *Vaughn v. Eckler*, 69–332.

Administrator: In an action to foreclose, the mortgagor's administrator has a right to appear and set up the defense of usury, although the property has been sold under a subsequent deed of trust. Especially is this so when the grantee did not assume the payment of the prior mortgage: *Huston v. Stringham*, 21–36.

The administrator of the estate of a deceased mortgagor is a proper party defendant in an action to foreclose: *Hodgdon v. Heidman*, 66–645.

Purchaser pending foreclosure: A railway company which, pending a proceeding to foreclose a mortgage, acquires a right of way from defendant in such proceeding, is bound by the decree rendered therein, although not made a party: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

Subsequent proceedings as to lienholder not made a party: Where a junior lienholder has not been made party to a foreclosure, a subsequent action of foreclosure may be brought against him, in which he may set up his rights and have them enforced as fully as if he had been a party to the original proceeding, and the effect of a decree in such subsequent proceeding will be the same as if a decree had been rendered against him in the original action: *Shaw v. Heisey*, 48–468.

Where, after foreclosure and sale, a subsequent incumbrancer was made a party to the proceeding by service of notice, no reference being made therein to the fact of sale, and no rights by virtue of the sale being claimed, *held*, that a decree by default upon such service did not cut off his right to inquire into the regularity of the sale: *White v. Watts*, 18–74.

The fact that necessary parties are not joined as defendants in a foreclosure proceeding will not defeat the rights of the mortgagee under a mortgage, even though the sale to him on foreclosure is not valid: *Harsh v. Griffin*, 72–608.

4556. Separate suits on note and mortgage. 3320. If separate suits are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost. [R., § 3663; C., '51, § 2086.]

[The word "discontinued," in the fourth line, is erroneously printed "continued" in the Code.]

This section is applicable although the covenants on which the law action is based are contained in the mortgage itself: *Brown v. Cascaden*, 43–103.

Where the liability secured by a mortgage had been submitted to arbitrators and an award made, *held*, that it was proper to sue upon such award and for the foreclosure of the mortgage in the same actions: *McKinnis v. Freeman*, 38–364.

After a general judgment upon the note secured by the mortgage an action may be maintained to foreclose the mortgage; the mortgage is not merged in the judgment: *Matthews v. Davis*, 61–225; *Morrison v. Morrison*, 38–73.

Merger of the note in judgment does not merge the mortgage: *Shearer v. Mills*, 35–499.

4557. Judgment; sale and redemption. 3321. When a mortgage or deed of trust is foreclosed by equitable proceedings, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. A special execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under general execution. [R., § 3661; C., '51, § 2084.]

Costs included: A decree of foreclosure may include costs incurred up to the time of decree, but cannot be made to include items not embraced in the mortgage itself: *Bates v. Ruddick*, 2–423.

Attorneys' fees: A mortgagee is not entitled on foreclosure to attorneys' fees as against the mortgagor unless expressly stipulated for in the mortgage: *Bondurant v. Taylor*, 3 G. Gr., 561.

A stipulation in the mortgage and the note secured thereby for attorneys' fees is valid and does not constitute usury: *Weatherby v. Smith*, 30–131; *Coe v. Lindley*, 32–437.

Where there is such stipulation in the mortgage, and no stipulation for attorneys' fees is contained in the notes secured, such fees can be taxed only as against the parties to the mortgage: *Floyd County v. Morrison*, 40–188.

One who purchases property subject to a mortgage and agrees to "take up the mortgage and pay for it all" is liable for attorneys' fees under a provision in the mortgage: *Johnson v. Harder*, 45–677.

Where a mortgage provided that a certain sum as attorneys' fees should be taxed by the court and included in the costs, *held*, that the attorney's fee could not be recovered unless the action of foreclosure proceeded to final decree: *Schmidt v. Potter*, 35–426.

Where the mortgage provided for reasonable attorneys' fees, not less than fifty dollars, and there was no evidence or admission as to what amount a reasonable attorney's fee in the case was, *held*, that it was error to allow more than the minimum amount, although a claim for a larger amount was made in the petition: *Hawley v. Howell*, 60–79.

Where the mortgage provided for a reasonable attorney's fee, but it did not appear that any evidence as to the reasonable amount of the fee was introduced, *held*, that the plaintiff on foreclosure could not recover any greater fee than that specifically provided for in the notes: *Sawyer v. Perry*, 62–238.

Penalty for usurious interest: A judgment for the state by way of forfeiture for usurious interest reserved in the mortgage is not covered by the mortgage lien, and becomes a lien on the premises only from the time of rendition: *Lewis v. Barmby*, 14–88.

Amount of decree: Where the court below in a decree of foreclosure directed an accounting on the notes secured thereby, etc., and that execution issue for the amount thus appearing due, *held*, that the court should have determined the precise amount of credits and rendered judgment accordingly: *Wilson Sewing Machine Co. v. Rutledge*, 60–39.

Where the facts were such that the assignee of the mortgage became entitled to the balance due thereon after satisfaction of a prior assignee who held the same as collateral security, *held*, that it was proper to render a decree in favor of the second assignee for such balance without specifying the amount to which he was entitled: *Pike v. Gleason*, 60–150.

Lien: Where, in a foreclosure proceeding, it was stipulated that judgment should be entered and stayed without liability on the part of the surety on the stay bond, *held*, that it was the evident intent of the parties that the plaintiff should hold and not waive his mortgage lien and that he was entitled to a decree of foreclosure: *Rice v. Covey*, 54–112.

Covenants: Where a mortgagee foreclosed a mortgage and bought in the property at the sale for the full amount of the judgment, *held*, that he could not recover upon the covenants of warranty in the mortgage for the amount afterward paid to discharge prior liens thereon: *Todd v. Johnson*, 51–192.

Where the mortgagee of property bought the same in at foreclosure sale in full satisfaction of the mortgage, *held*, that he had no right of action under the covenants of the mortgage requiring the mortgagor to keep the premises in good repair, or for waste committed by the mortgagor while in possession before the sale: *Corbin v. Reed*, 43–459.

Personal judgment: If the mortgage stipulates that no general execution is to be issued thereunder, a personal judgment should not be rendered: *Kennion v. Kelsey*, 10–443.

In an action to foreclose a mortgage given by one person as security for a note executed by another, but not signed by the mortgagor, personal judgment should not be rendered against such mortgagor: *Anderson v. Reed*, 11–177.

Where one of the defendants in an action to foreclose a mortgage was not a party to the mortgage and never undertook to pay the same, and the petition did not charge a personal liability for the debt secured, *held*, that it was erroneous to render a personal judgment against him: *Carleton v. Byington*, 24–172.

Before a personal judgment in an action of foreclosure can be rendered against the mortgagor, it must appear that the relation of debtor and creditor exists between the mortgagor and mortgagee, and there must be an obligation to pay independently of and in addition to the property: *Weil v. Churchman*, 52–253.

Where the wife joins in the mortgage, but not in the note secured thereby, and there is no provision in the mortgage expressly stipulating for personal liability, she does not become personally liable for the debt: *Reed v. King*, 23–500; *Knox v. Moser*, 69–341.

It is not essential to the proceeding that personal judgment be rendered for the amount of the debt, and an action of foreclosure may be maintained against the owners of the prop-

erty, subject to the mortgage, although they are not personally liable for the indebtedness: *Johnson v. Foster*, 68–140.

Where property was conveyed subject to two existing mortgages and was then again mortgaged by the grantee, *held*, that a purchaser of the property at foreclosure sale under the last mortgage would take the property subject to such prior mortgages of which he had notice, and could not afterwards, upon an assignment of the second of such mortgages, enforce the same personally against the mortgagor without having in any way subjected the property to the satisfaction of such mortgage: *Crowley v. Harader*, 69–83.

Notice of an action to foreclose a mortgage having been properly given, the court will render a personal judgment for the amount due, although the notice does not claim any specific sum of money: *York v. Boardman*, 40–57.

Special execution: The court cannot, on rendering decree of foreclosure, order that special execution thereon be stayed for a specified time: *Carroll v. Reddington*, 7–386.

Although the general rule is that the land is to be subjected to the payment of several notes covered by one mortgage in the order of their maturity, yet the court may by decree direct otherwise, and if the last note is to be paid first, it would be error to issue a general execution on the judgment for such note without having first directed the sale of the land and application of the proceeds to its satisfaction: *Ayers v. Rivers*, 64–543.

A special execution under decree of foreclosure of a mortgage on a town lot, commanding the sheriff to sell the lot in conformity with the statute, *held* not to be illegal as requiring the whole lot to be sold: *Southard v. Perry*, 21–488.

Where a special execution was improperly issued and a sale was had thereunder, but the same sale under a general execution would have been equally effective, *held*, that the error as to the form of execution was purely technical and the sale could not be set aside: *O'Connell v. Cotter*, 44–48.

Sale of portion of premises: A decree of foreclosure should only order the sale of so much of the mortgaged premises as is necessary to satisfy the amount due. To order the sale of the whole property absolutely, and direct that the amount remaining after paying the judgment be brought into court to answer its order, is erroneous: *Malony v. Fortune*, 14–417.

Sale en masse: If the premises consist of distinct parcels which are sold in a lump, the sale should be set aside in a proceeding brought for that purpose: *Lay v. Gibbons*, 14–377.

Rights of purchaser: Where the mortgagee purchases at a sale under the mortgage he buys with full notice of all defects: *Boyd v. Ellis*, 11–97.

While a purchaser takes subject to the equitable rights of the party in possession, yet where the property has been conveyed by him by a fraudulent conveyance, he has no remaining interest which can be set up or conveyed as against such purchaser: *Wright v. Howell*, 35–288.

Dower right: A foreclosure of the mortgage in which the wife has joined and a sale of the property thereunder will defeat her dower interest in such property: *Moomey v. Maas*, 22–380; *Mead v. Mead*, 39–28.

Equity will recognize and enforce a sale and conveyance of the dower interest before the dower has been assigned or admeasured; and so where one purchases under a foreclosure of a mortgage given by husband and wife of the wife's property, which foreclosure occurred after the death of the wife and before the husband's interest had been admeasured, *held*, that such purchaser became an assignee or owner of the husband's interest, and acquired all the rights which the husband had before possessed as survivor in the premises: *Huston v. Seeley*, 27–183.

Remainder: Where it appeared that the interest of the mortgagor was that of a remainder over after a life estate in the property, *held*, that the foreclosure and sale should be made applicable to such remainder, and a purchaser should hold the same upon the same conditions as the mortgagor: *Iowa Loan & Trust Co. v. King*, 58–598.

Purchase by trustee: In the absence of any express provision in the trust deed, and against an objection of a bondholder who as intervenor had become party to the suit, *held*, that it was erroneous for the court, on the foreclosure of a trust deed made to secure bonds issued by a corporation, to direct that the trustee should bid in the property for the benefit of all the bondholders at its fair market price: *Sanxey v. Iowa City Glass Co.*, 63–707.

So *held* where bonds owned by one bondholder had been guarantied by other bondholders, so that the bidding in of the property for the entire amount of the bonded indebtedness would satisfy the judgment in favor of the bondholders and release the guarantor of such bonds: *Ibid.*

Inadequacy of price: Gross inadequacy of price of itself is a strong badge of fraud, and though not conclusive in itself, yet when coupled with other circumstances tending to prove fraud, it becomes controlling and conclusive evidence: *Boyd v. Ellis*, 11–97.

Purchase pendente lite: A purchaser from the mortgagor pending a proceeding to foreclose may, by appearing in the action, have the judgment direct that a portion of the property not affected by his purchase shall be first sold for the satisfaction of the mortgage, and if he does not do this, and the decree provides for the sale of the premises without regard to his interest, he cannot afterwards question the sale: *Jackson v. Centerville, M. & A. R. Co.*, 64–292.

Possession: A purchaser at a foreclosure sale is not entitled to possession until the expiration of the year for redemption: *Barrett v. Blackmar*, 47–565; *Myton v. Davenport*, 51–583.

Rents and profits: Defendant has the right of possession during the year for redemption after the foreclosure sale. Plaintiff, whose claim is satisfied by the sale, has no right to the rents. Neither has the purchaser at the foreclosure sale: *Hill v. Hewett*, 35–563.

Crops: The mortgagor has the right to possession until the expiration of the year of redemption, and during that time has the right to crops growing on the premises: *White v. Griggs*, 54–650.

Crops matured but not yet harvested, standing on the premises at the time of the foreclosure sale, and belonging to a tenant who has been in possession under lease from the mortgagor, do not pass by the sale, but are personal property: *Hecht v. Dettman*, 56–679.

Order of application of proceeds: Where the mortgage secures two or more notes maturing at different times, the proceeds of the foreclosure should be applied to the payment of the notes in the order in which they fall due, whether they are assigned or not and without reference to the time or order of assignment. The instalments in such case are regarded as so many successive mortgages having priority accordingly: *Isett v. Lucas*, 17–503.

In such case the holder of a portion of the notes who has proceeded to foreclose the mortgage without making the holder of another note, earlier becoming due, a party, does not cut off the lien of the holder of the previous note, who may proceed to foreclose the mortgage as to the same property, without alleging or proving any fraud in the previous action: *Sangster v. Love*, 11–580.

Sale for instalment: The sale of mortgaged property under foreclosure for an instalment of the debt discharges the property in the hands of the purchaser or the debtor or his vendees, after redemption from the lien of the mortgage, from any claim under the other instalments: *Escher v. Simmons*, 54–269.

A sale in pursuance of foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the property sold, and the purchaser takes free from the lien of the unpaid instalments: *Poweshiek County v. Dennison*, 36–244.

Where some of the notes secured by a mortgage are transferred, foreclosure and sale of the premises in an action by the assignee will exhaust the lien of the mortgagee as to notes still held by the mortgagee upon the land so sold: *Harms v. Palmer*, 61–483.

It may be provided in the decree of foreclosure for one instalment of the amount secured by the mortgage that the mortgagee's lien on the property for the notes not then due shall be preserved: *Burroughs v. Ellis*, 76–648.

Redemption: By this section there is the same right to redeem from a sale in a foreclosure proceeding as from an ordinary sale under execution, and the same right of possession by the debtor during the redemption period: *Barrett v. Blackmar*, 47–565.

This section simply declares that there may be statutory redemption from sale under a foreclosure. Such redemption may be by one who is not a party to the suit, but must be made within the time and in the manner prescribed by the statute as to other execution sales: *Newell v. Pennick*, 62–123.

The right of equitable redemption is not taken away by the provision for statutory redemption from the sale. It exists independent of statute: *American Buttonhole, etc., Co. v. Burlington Mut. Loan Ass'n*, 61–464; *Spurgin v. Adamson*, 62–661.

Under former statutory provisions by which a judgment against a firm was not a lien upon real property belonging to the firm, held in the individual name of one of the members, such judgment creditor could not redeem from a purchaser of the real property at a foreclosure sale under a mortgage given by the individual member holding the title: *Stadler v. Allen*, 44–198.

A decree cutting off the lien of a junior incumbrancer does not deprive him of any right he may have by virtue of statutory redemption: *Watts v. White*, 12–330.

Prior statutory provisions: Under the Code of '51, which did not contain express provision for redemption from sales under foreclosure proceedings, *held*, that the general provisions as to redemption from sales under execution did not apply in such cases: *Kramer v. Rebman*, 9–114; *Stoddard v. Hays*, 12–576; *Martin v. Jones*. 15–240.

Where a second mortgagee brought action to determine the priority of liens as between himself and a senior mortgagee, and a sale was ordered of the property, *held*, that such sale might properly be without redemption, the senior mortgage having been executed before the provisions for redemption at foreclosure sale took effect: *Gargan v. Grimes*, 47–180.

Who may redeem: One who has a mortgage upon property as that of another cannot claim the right of redemption after foreclosure of the mortgage on the ground that he has not been made a party to the proceeding in his own right, but only in the representative capacity in which he purported to act: *Foster v. Young*, 35–27.

The rule that the right of redemption from the mortgage debt after the foreclosure sale exists only in favor of a person who has a lien upon the identical title or interest upon which the mortgage rests means only that the lien shall not rest upon a wholly independent title, that is, one which can be valid only in case the mortgagor has no title, and does not prevent a tax purchaser from making redemption, although his lien is not derived from the mortgagor: *Ayres v. Adair County*, 61–728.

Redemption from sale for one instalment: The grantee of the mortgagor, by conveyance before the rendition of judgment in foreclosure of the mortgage, may redeem from a sale under the judgment of foreclosure for a part of the debt and hold the property free from any lien under the mortgage or under the judgment against his grantor for the balance of the debt: *Escher v. Simmons*, 54–269; *Todd v. Davey*, 60–532.

Where a mortgage is foreclosed for one instalment of the debt, and during the period for redemption the mortgagor conveys the property to a third person, agreeing to redeem, and afterwards does redeem, such third person takes the property free from the lien of the mortgage for the balance: *Micklewait v. Raines*, 58–605.

Plaintiff in a foreclosure proceeding having bought in the property and the mortgagor having redeemed from such sale, *held*, that plaintiff's remedy against the property was exhausted irrespective of whether the mortgagees were parties to the proceeding or not: *Blake v. Black*, 55–252.

After redemption by a mortgagor from sale under foreclosure for a portion of the mort-

gage debt, the mortgagee cannot again subject the land to the payment of a part of the debt remaining unsatisfied. This rule holds where the mortgage secures different notes, some of which are assigned to a third party, and the foreclosure and sale of the premises in an action by the assignee exhausts the lien of the mortgage upon such premises: *Harms v. Palmer*, 61–483.

Where a junior mortgage is assigned, and the assignment is not made of record, a foreclosure of the senior mortgage to which the junior mortgagee is made a party is binding upon the assignee of such junior mortgage, and he can only make statutory redemption, although not made a party, where the fact of his interest is not known to the party foreclosing: *Reel v. Wilson*, 64–13.

Expiration of period; misdescription: A reformation of the mortgage to correct a misdescription may be had at the suit of the mortgagee, but such reformation would not cut off the right to redeem as to property not described in the original foreclosure: *Provost v. Rebman*, 21–419.

The fact that property is misdescribed in a foreclosure and sale thereunder, and that the description is subsequently corrected in a proceeding brought during the period of redemption, to which the party entitled to redeem is made a party and in which he asks no relief, will not extend the period for redemption: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50–116.

Equitable relief: A failure to redeem from a foreclosure within the time set by statute because of losses suffered by mortgagor by reason of a grasshopper plague affords the mortgagor no ground for equitable relief against the mortgagee in possession under the decree of foreclosure. Courts of equity cannot alone base a decree against a defendant upon a misfortune of the complainant. If the legal title is vested in the defendant, as it is in this case, he cannot be deprived thereof, save upon some ground which affects him or shows that it would be inequitable or unjust for him to retain his legal advantage against the superior equity of the opposing party: *Palmer v. McCormick*, 30 Fed. Rep., 82.

4558. General execution. 3322. If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise. [R., § 3662; C., '51, § 2085.]

This section does not apply to a case where the mortgage is given to secure the debt of another party, and the mortgagor does not sign the note or become otherwise liable for the payment of the debt. (Overruling *Deland v. Mershon*, 7–70): *Chittenden v. Gossage*, 18–157; *Anderson v. Reed*, 11–177; *Weil v. Churchman*, 52–253. But see *Newbury v. Rutter*, 38–179, which refers to *Deland v. Mershon*, 7–70, with approval.

4559. Junior incumbrancer entitled to assignment. 3323. At any time prior to the sale, a person having a lien on the property which is junior to the mortgage, will be entitled to an assignment of all the interest of the holder of the mortgage, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure or discontinue it at his option. [R., § 3665; C., '51, § 2088.]

A tender made by a junior to a senior mortgagee before sale, for the principal, interest and costs then accrued, is sufficient, though not accepted until after sale: *Marshall v. Ruddick*, 28–487.

The manifest object of this provision is to secure to the junior lienholder the right to protect his lien by buying in the paramount incumbrance. If the junior lien attaches to but a portion of the property covered by the senior mortgage, and all parts of it are subject to be sold alike for the satisfaction of the debt secured by that mortgage, the junior lienholder is undoubtedly entitled, upon payment of the debt, to have an assignment of the interest of the holder of the mortgage, and may first apply the portion of the property covered by the senior mortgage alone, to the satisfaction of the debt secured by that mortgage, and afterwards may appropriate the property covered by the junior lien, or such portion of it as remains after satisfaction of the debt secured by the senior mortgage, to the payment of his claim: *Grant v. Parsons*, 67–31.

But where the senior mortgage is a lien upon premises a portion of which constitutes the homestead, while the junior mortgage covers only such portion of the same premises as are not embraced in the homestead, the junior mortgagee is not entitled, upon payment of the senior incumbrance, to an assignment thereof so far as it affects the homestead, for the reason that the homestead is only liable for the satisfaction of so much of the senior mortgage as shall remain unsatisfied after the other portion of the property is exhausted. But the junior lienholder may, if he so elects, have an assignment of the interest of the senior mortgagee in the property other than the homestead, and enforce that mortgage accordingly: *Ibid.*

The right of a junior judgment creditor to redeem from a senior creditor after the issuance of execution does not take away nor impair the right of a junior creditor to redeem from a senior mortgage previous to the foreclosure thereof: *Hammond v. Leavitt*, 59–407.

A purchaser of property at a sale under a judgment may redeem from a prior mortgage by paying or tendering to the mortgagee the full amount due thereon: *Ibid.*

In an action by the senior mortgagee to

foreclose, to which the junior mortgagee is made party, the latter may by agreement with plaintiff's attorney pay to such attorney the amount necessary to entitle him to an assignment of the mortgage with an agreement that the action shall be prosecuted for the benefit of the junior mortgagee: *Harbach v. Colvin*, 73-638.

Where a junior mortgagee is not made party to the foreclosure of a senior mortgage, the senior mortgagee buying in the property at the sale may redeem from the claim of the junior mortgagee. In such case, the junior mortgagee upon redeeming would not be entitled to a conveyance of the estate, but only to an assignment of the prior mortgage, and therefore the prior mortgagee, as purchaser of the equity of redemption at the sale, may redeem from the junior mortgage just as the mortgagor might have done: *Smith v. Shay*, 62-119.

In making such redemption from sale under foreclosure of the junior mortgage, the amount to be paid would be, not the amount bid at such sale, but the amount of the indebtedness secured by the junior mortgage: *Ibid.*

The holder of land sold at foreclosure sale which is subject to redemption by a judgment creditor not made a party to the foreclosure proceeding has a right to redeem from such lien by paying off the judgment and discharging his lien: *Kraft v. James*, 64-159.

4560. Overplus. 3324. If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. [R., § 3666; C., '51, § 2089.]

Where a surplus was realized by the sheriff from the sale of a homestead under special execution, and the defendant permitted the sheriff, without objection, to apply such surplus upon other executions, and turn the same over to such execution creditors, *held*, that the debtor was estopped from seeking to recover such surplus from the sheriff: *Brumbaugh v. Zollinger*, 59-384.

The overplus may be garnished in the hands of the sheriff by a creditor of the mortgagor: *Hoffman v. Wetherell*, 42-89.

Or such surplus may be applied to another execution against defendant in the hands of the sheriff: *Payne v. Billingham*, 10-360.

4561. Other liens. 3325. If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance will be paid to the mortgagor. [R., § 3667; C., '51, § 2090.]

A court having jurisdiction as to an instalment due may retain jurisdiction over the parties and the cause until the whole debt falls due: *McDowell v. Lloyd*, 22-448.

Where interest is made payable annually, the mortgage may be foreclosed for an annual instalment due and unpaid, although the principal is not yet due: *Bahr v. Arndt*, 9-39.

Where the sheriff is not directed as to the disposition of the surplus, and in good faith, without knowledge of subsequent liens, applies such surplus upon other executions in his hands against the mortgagor, he is not liable to the holders of such subsequent liens: *Polk County v. Sypher*, 17-358.

Contests as to the surplus may be determined upon motion: *Ibid.*

4562. How much sold. 3326. As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed. [R., § 3668; C., '51, § 2091.]

Where the mortgaged property is susceptible of division, only such portion should be sold as may be necessary to satisfy the debt, and a refusal to sell in such parcels as are sufficient for that purpose will invalidate the sale: *Grapengether v. Fejervary*, 9-163.

4563. Satisfaction acknowledged. 3327. Whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within sixty days after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars. [R., § 3670; C., '51, § 2093.]

The penalty is incurred by a failure to enter satisfaction within the time stipulated after request, and a subsequent entry of satisfaction, even before suit brought for the penalty, does not relieve therefrom: *Deeter v. Crossley*, 26-180.

There must be express satisfaction; and a conveyance from the mortgagee to the mortgagor, not referring to the mortgage, will not be sufficient: *Ibid.*

The penalty cannot be recovered from one who is assignee of the note secured by the mortgage, but has no written or recorded assignment of the mortgage: *Low v. Fox*, 56-221.

4564. Entry by clerk. 3328. Whenever a judgment of foreclosure shall be entered in any court, the clerk thereof shall make upon the margin of the record of the mortgage foreclosed, in the recorder's office, a minute showing that said mortgage was foreclosed, in what court foreclosed, and giving the date of the decree; and when such decree shall be fully paid off and satisfied upon the judgment docket of such court, the clerk of said court shall enter satisfaction in full upon the margin of such mortgage, and he shall be allowed as compensation for such service the sum of twenty-five cents, to be taxed as a part of the costs in the case. [14 G. A., ch. 67.]

4565. Foreclosure of title bond. 3329. In cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part thereof remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, such vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. [R., § 3671; C., '51, § 2094.]

Rights of parties: A title bond invests vendee with an interest which can be reached by the vendor in a manner similar to the foreclosure of a mortgage: *Mullin v. Bloomer*, 11–360.

These provisions do not take away the rights of vendor to pursue any remedies he may have without regard to such provisions: *Page v. Cole*, 6–153.

The vendor may still proceed at law for any matured and unpaid instalment of the purchase money: *Hershey v. Hershey*, 18–24; *Poweshiek County v. Dennison*, 36–244.

These provisions are merely permissive and do not take away any right which the grantor may have under the instrument by way of forfeiture: *Iowa R. Land Co. v. Mickel*, 41–402; *Johnson v. Thornton*, 54–144; *Mickelwait v. Leland*, 54–662.

Time may be made of the essence of a contract so that upon failure to pay within a time specified all rights under the bond will be forfeited: *Schmidt v. Williams*, 72–317.

As to how a vendor's lien may be reserved, see § 3111.

Until vendor declares a forfeiture vendee is deemed in possession as purchaser, and his possession is therefore adverse to vendor: *Montgomery County v. Severson*, 64–326.

This section *held* applicable to a case where the owner of land had agreed to convey to a railroad company the right of way over his land in consideration of their fencing the track and the construction of a crossing; and *held*, that the lien under such contract was superior to the claims of the purchaser of the road at foreclosure sale: *Varner v. St. Louis & C. R. R. Co.*, 55–677.

The assignee of a note given for the purchase money by the holder of a title bond has the same rights and remedies as the payee, and may bring action in his own name to foreclose the bond or contract: *Zebley v. Sears*, 38–507; *Guest v. Byington*, 14–30.

Foreclosure for one instalment: Upon the maturity of a portion of a series of notes for the purchase money, the vendor may bring action to foreclose his title bond: *Tupple v. Viers*, 14–515.

And a foreclosure for an instalment due, and a sale thereunder, has the same effect as in a similar action on the mortgage. The purchaser takes free from any claim of the vendor for unpaid instalments: *Poweshiek County v. Dennison*, 36–244.

Where the vendor proceeds to foreclose the contract of sale, he loses his lien for any balance of the purchase money not paid by the foreclosure sale: *Todd v. Davey*, 60–532.

Acceptance binds vendee: By the acceptance of a title bond specifying the sale and the vendee's contract to pay the purchase money at a specified time, the vendee becomes bound: *Huse v. McDaniel*, 33–406.

The fact that no notes or other obligations are executed by the person to whom is given a bond to convey will not show that he is not bound by the bond. Such a contract will not be considered as unilateral unless it is plain and clear that a unilateral contract was intended. In the absence of such proof of intention it will be presumed that the parties intended it to be mutually obligatory: *Flanders v. Merrill*, 38–583.

Liability of assignee: Where a contract to convey is assigned by the vendee to a third person, and accepted by him, and rights claimed thereunder, such assignee thereby assumes all the obligations of his assignor, and can be held personally liable thereunder: *Wightman v. Spofford*, 56–145.

Personal liability: Under a contract by which the owner of land held under execution had an election to repurchase within a given time, *held*, that no personal obligation was incurred on which judgment could be recovered: *Stroup v. Haycock*, 56–729.

Where, in a bond for a deed, vendee does not bind himself to pay for the premises, an acceptance of such bond creates no obligation on his part, but simply secures to him an option to pay the stipulated price and interest or take the land. When he neglects to pay according to such stipulations, the privilege of taking the land which he has under the agreement may become terminated in accordance with its provisions, and no demand against the vendee in favor of the vendor will exist after such termination: *Huston v. Kline*, 64–376.

Vendee estopped: The vendee in possession under a bond for a deed cannot acquire

tax title against the owner under a sale made prior to the execution of the bond for a deed: *Cowdry v. Cuthbert*, 71–733.

Equitable mortgage: Where the legal title is conveyed under such circumstances that it will in equity be held to be a mortgage, a separate agreement to reconvey his entire interest and rights to the debtor in the property may be foreclosed as herein provided: *Rubelman v. Rummel*, 72–40.

Tender of deed: In an action to recover the purchase money of real estate and foreclose the interest of the vendee therein no tender of conveyance is required, for the reason that the court of equity can so mould the judgment or decree as to protect the rights of the vendee: *Stevenson v. Polk*, 71–278.

Limitation: An action to foreclose a title bond is barred in the same time that an action on a mortgage would be. *Day v. Baldwin*, 34–380.

Personal judgment: A judgment against the vendee and a foreclosure of the bond may be had in the same action, as in a suit to foreclose a mortgage: *Hartman v. Clarke*, 11–510.

Subsequent purchaser made party: In an action to foreclose a title bond to convey an undivided interest in real property, *held*, that a subsequent purchaser of a part of the property was properly made defendant and might in an action ask that the lien be enforced against the portion not claimed by him, and that a partition of the land be made: *Hammond v. Perry*, 38–217.

Foreclosure, not forfeiture: In an action on a title bond for balance of purchase money it is error to declare the bond forfeited and discharge the land therefrom. The lien of the vendor for the balance due should be foreclosed and the property sold to satisfy the judgment: *Gamut v. Gregg*, 37–573.

Conveyance by plaintiff: In an action to foreclose a title bond, *held* not error to render a decree requiring plaintiff to convey the property described in the bond to the purchaser under the decree, by a deed containing the covenants stipulated in the bond, upon payment by the purchaser of the full amount found due plaintiff on the bond: *Wall v. Ambler*, 11–274.

Vendee's possession: Where vendee enters into possession under a contract of sale, he is, after the sale of the premises under foreclosure of the contract, bound to surrender possession to the holder of the legal title without notice. He cannot claim to be a tenant at will: *Cole v. Gill*, 14–527.

Execution of deed: In a proceeding to foreclose a title bond to real estate brought by an executrix, who was also under the will devisee of the property with power to convey, *held*, that a decree requiring that the deed to be delivered to defendant upon payment of the debt should be executed by plaintiff as executrix, instead of as devisee, was erroneous: *Grimmell v. Warner*, 21–11.

General execution: On the foreclosure of a title bond of real estate it is proper to award a general execution for any balance remaining due after the sale of the property on special execution: *Ibid.*

Redemption: Subsequent lienholders not made parties to the foreclosure may redeem as from sale on foreclosure of mortgage *Dukes v. Turner*, 44–575.

The grantee of a grantee under a title bond may maintain an action to redeem from the sale under foreclosure of the title bond by the grantor, to which he is not a party: *Ibid.*

4566. Vendee deemed mortgagor. 3330. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. [R., § 3672; C., '51, § 2095.]

See notes to preceding section.

CHAPTER 5.

OF ACTIONS FOR NUISANCE, WASTE AND TRESPASS.

4567. Nuisance; what constitutes. 3331. Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought thereon by any person injured thereby; in which action the nuisance may be enjoined or abated, and damages also recovered therefor. [R., §§ 3713–15; C., '51, §§ 2131–3.]

In actions at law: In an action at law damages may be recovered for a nuisance, and the nuisance itself may be abated; therefore in an action for damages for a nuisance the plaintiff is entitled to have his damages assessed by a jury, notwithstanding the fact that he may couple with his claim for damages a prayer that the defendants may be enjoined from continuing the nuisance: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Notwithstanding this provision authorizing abatement of a nuisance in an action at law,

proceedings for abatement may still be brought in equity: *Bushnell v. Robeson*, 62-540; *Gribben v. Hansen*, 69-255.

What deemed: A livery-stable in a city is not necessarily a nuisance, but may be so under some circumstances: *Shiras v. Olinger*, 50-571.

As to duties of adjoining lot owners with reference to building, etc., see *Cook v. Benson*, 62-170

The fact that stock-yards are necessary to the operation of the railroad will not prevent recovery by a property owner for damages from unwholesome odors therefrom, it not appearing that such odors were unavoidable and that the yards might not have been located elsewhere: *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74-169.

A slaughter-house may be a nuisance in residence portions of a city, even though carried on in as careful a manner as possible. Individual property owners may have damages separate from the public, and may maintain a joint action for injunction, although owning separate property: *Bushnell v. Robeson*, 62-540.

The fact that property is purchased and used for residence, while a business is being prosecuted which is afterward complained of as a nuisance, will not prevent a court of equity from exercising its discretion to grant an injunction to restrain the continuance of the nuisance: *Ibid.*

Plaintiff also in the wrong: Where plaintiff's premises themselves constitute and contribute to the nuisance of which he complains, he cannot have relief against defendant: *Cassady v. Cavenor*, 37-300.

Not only the condition but the location of the alleged nuisance must be considered in determining whether the premises are objectionable: *Baker v. Bohannan*, 69-60.

Intent: In a civil action for damages for a nuisance the intention of the defendant in doing the act complained of need not be inquired into unless upon the question of exemplary damages: *Bonnell v. Smith*, 53-281.

Public and private: A nuisance may be both public and private, and if an individual suffers special damages thereby he may maintain an action therefor: *Ewell v. Greenwood*, 26-377; *Platt v. Chicago, B. & Q. R. Co.*, 74-127.

A dam, although lawfully erected, may constitute a public nuisance in that it causes the water to overflow adjacent lands, by reason whereof such water is rendered impure and the overflowed land kept marshy and filled with noxious weeds and putrid vegetation, whereby the air becomes corrupted, infected, etc.: *State v. Close*, 35-570.

A private person has a right of action for a public nuisance only when he suffers an injury distinct from the public as a consequence of the wrongful act: *Ingram v. Chicago, D. & M. R. Co.*, 38-669.

While a nuisance may as to some matter affect the public for which a private action will not lie, if as to other things it works an injury to the individual which is not shared by the public, he may have a remedy: *Park v. Chicago & S. W. R. Co.*, 43-636.

Obstruction of highway: To entitle a party to recover damages for the obstruction of a highway he must show not only the existence of the highway and the fact of obstruction, but that he has sustained some special damage or injury therefrom not shared by the public in general: *Brant v. Plumer*, 64-33.

A nuisance resulting from an obstruction to a highway leading to the premises of a party and interfering with the access thereto, and causing other special damage, is ground for recovery in an action by the person injured. In such cases action may be maintained though many persons other than plaintiff suffer like injuries from the same nuisance: *Park v. Chicago & S. W. R. Co.*, 43-636.

As to shade trees in highways, see § 1503 and notes.

As affecting property rights: A city which has contracted for a supply of gas cannot set up a defense that the gas works were a nuisance which they had no power to legalize: *Davenport Gas, etc., Co. v. Davenport*, 13-239.

Where property used as a house of ill fame is seized by an officer without authority of law, the officer is liable for damages suffered thereby, notwithstanding the illegal character of the use: *Tieman v. Haw*, 49-312.

Measure of damages: In an action for a nuisance in allowing water to stand upon an owner's premises until it becomes offensive, the measure of damages should be limited to the diminution in value of the use of the premises affected thereby during the time during which the nuisance existed: *Quinn v. Chicago, B. & Q. R. Co.*, 63-510.

In an action for an injury to property by reason of a nuisance of such character that it may be discontinued, plaintiff is only entitled to recover depreciation in rental value during the existence of the nuisance: *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74-169.

Percolating water: Where a property owner allows water to accumulate in excavations upon his premises so as to constitute a nuisance, he will be liable for damages caused to the adjoining owner by the percolation of such water upon the premises of the latter: *Ibid.*

Surface water: A property owner has the right to construct a building upon his premises so as to cause the water falling upon such building to be discharged at one or more places, and if such discharge is caused to be made upon a street or alley, an adjoining property owner cannot complain because, by reason of his own lot being below grade, it is injured by the flow of such water thereon: *Phillips v. Waterhouse*, 69-199.

Continuance of nuisance; liability of grantee: It seems that the liability of the grantee for the continuance of a nuisance caused by the act of the grantor upon the premises prior to the conveyance is not dependent upon notice to the grantee of the continuance of the nuisance: *Drake v. Chicago, R. I. & P. R. Co.*, 63-302.

Where an injury is permanent the damage is spoken of as original and as accruing wholly when the wrongful acts are done; and is distinguished from an injury which is regarded as continuing, that is, an injury that could and should be terminated, and is to be compensated strictly with reference to the

past and upon the theory that it will be terminated. In the former case, a recovery for damages subsequently accruing from the original wrong cannot be had against a subsequent purchaser of the property: *Bizer v. Ottumwa Hydraulic Power Co.*, 70–145.

Continuing damages: Where damages from a nuisance do not occur at the time of the doing of the act from which the damage subsequently results, the party owning the property damaged at the time that the damage occurs may sue thereon, although he was not the owner at the time the act was done which caused the damage: *Miller v. Keokuk & D. M. R. Co.*, 63–680.

Where a railway company laid a side-track in the street of a city twelve feet nearer the side of the street than authorized by city ordinance, and the owner of property fronting on the street sued for damages occasioned to such property by running cars over and leaving them standing upon said side-track, *held*, that the nuisance was continuing and not permanent, and that the occupant of the property might maintain the action, although such occupant was not the owner of the property so as to be entitled to sue for the original damage in laying the track, and although an action for such original damage would be barred: *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

Abatement by board of health: Exclusive jurisdiction to determine what constitutes a nuisance and to abate nuisances is not conferred upon the local board of health, but a private action for damages against a person maintaining a nuisance by one specially injured thereby may be brought without the action of the board having been invoked: *Baker v. Bohannan*, 69–60.

Abatement by person injured: At common law a person has a right to abate a nuisance which is injurious to him as distinct from the public: *State v. Moffett*, 1 G. Gr., 247.

The right of abatement of a nuisance by private act of a party injured thereby is authorized only in case of a particular emergency requiring a more speedy remedy than can be had by the ordinary proceedings at law and must be exercised with the least practicable injury: *Moffett v. Brewer*, 1 G. Gr., 348.

A party who seeks to abate a nuisance with his own hands cannot be justified in the destruction of property unless it be absolutely necessary. It is only the offensive use of it that he is justified in abating: *Morrison v. Marquardt*, 24–35.

Nuisances may be abated by an individual only where they in fact exist. The determination of an individual that a nuisance exists does not make the thing a nuisance, and if he destroys property on the ground that it is a nuisance he is responsible, unless it is established that the property destroyed constituted a nuisance: *Cole v. Kegler*, 64–59.

Although a person may abate a nuisance upon the premises of another when the same is injurious to him or when there is a reasonable certainty that he will be injured by it, yet it cannot be said that he is negligent in not abating such nuisances unless there is an apparent danger that he will sustain some substantial damage: *Copper v. Dolvin*, 68–757.

Notice to abate: All that is required, in order to impose upon a party, whose building constitutes a nuisance by reason of throwing water upon the land of his neighbor, the duty of abating the nuisance, is that he be informed of its existence. No formal notice is necessary: *Ibid.*

Abatement in equity: A party cannot have a nuisance upon the premises of another abated on his complaint when a similar nuisance is maintained upon his own premises: *Cassady v. Cavenor*, 37–300.

Proceedings for the abatement of a nuisance are of a more summary character than actions, and a forfeiture may be enforced for that purpose: *Gosselink v. Campbell*, 4–296.

In order to abate a nuisance existing by reason of a stream or pond of water becoming impure from substances being cast into it, it is not necessary that such a stream or pond be filled up. The source from which the impurities originate may be removed or the parties operating the nuisance restrained from future acts of the kind: *Finley v. Hershey*, 41–389.

Where it is determined that premises are so occupied as to create a nuisance, but it is not found that they are a nuisance, that is, a nuisance *per se*, the court can only enjoin such use of the premises as will amount to a nuisance: *Richards v. Holt*, 61–529; *Shiras v. Olinger*, 50–571.

A blacksmith shop is not a nuisance *per se*, and a party cannot be enjoined from transacting the business of blacksmithing upon his premises. The decree in such cases should require the owner to so change his shop and so prosecute his business that no annoyance should result therefrom to others: *Faucher v. Grass*, 60–505.

Where a building on an adjoining lot is so used as to become a nuisance to plaintiff he may have the unlawful use enjoined, but not the building itself, nor will the court enjoin a use which it does not appear that the party is likely to make of the premises: *Trulock v. Merte*, 72–510.

Where smoke and soot from the smoke-stack of a water-works company came upon plaintiff's premises in such a manner as to deprive him of the comfortable enjoyment of his property, but the health of himself and family was not affected thereby or his property destroyed, *held*, that while such injury constituted a nuisance for which the plaintiff might recover at law, yet he would not be entitled to have an abatement thereof in equity. The rule in equity is that where the damages sustained can be admeasured and compensated equity will not interfere where the public benefit greatly outweighs private and individual convenience: *Daniels v. Keokuk Water-Works*, 61–549.

The fact that a party recovers damages for something, on the ground that it has been injurious to him as a nuisance, does not necessarily show that it is a nuisance at the time of the trial, and that he is therefore entitled to have it abated: *Fuller v. Chicago, R. I. & P. R. Co.*, 61–125.

Criminal nuisance: See § 5470.

4568. Waste by guardian or tenants. 3332. If a guardian, tenant for life or years, joint tenant or tenant in common, of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor. [R., § 3716; C., '51, § 2134.]

4569. Forfeiture and eviction. 3333. Judgment of forfeiture and eviction may be rendered against the defendant, whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property wasted, and when the action is brought by the person entitled to the reversion. [R., § 3717; C., '51, § 2135.]

4570. Who deemed to have committed. 3334. Any person whose duty it is to prevent waste, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it. [R., § 3718; C., '51, § 2136.]

4571. Treble damages. 3335. For wilful trespass in injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any town, or any land held by this state for any purpose whatever, the perpetrator shall pay treble damages of the suit of any person entitled to protect or enjoy the property aforesaid. [R., § 3719; C., '51, § 2137.]

4572. Timber to repair highway. 3336. Nothing herein contained authorizes the recovery of more than the just value of timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land in its immediate neighborhood. [R., § 3720; C., '51, § 2138.]

4573. Remainder and reversion. 3337. The owner of an estate in remainder or reversion, may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years. [R., § 3721; C., '51, § 2139.]

4574. Heir. 3338. An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations. [R., § 3722; C., '51, § 2140.]

4575. Purchaser under execution. 3339. Whenever lands or tenements are sold by virtue of an execution, the purchaser at such sale may maintain his action against any person for either of the causes above mentioned, occurring or existing after his purchase. [R., § 3723; C., '51, § 2141.]

See § 4356.

4576. Suitable repairs. 3340. This provision is not intended to prevent the person who occupies the lands in the meantime, from using them in the ordinary course of husbandry, or from using timber for the purpose of making suitable repairs thereon. [R., § 3724; C., '51, § 2142.]

4577. Unnecessary use. 3341. But if for this purpose he employs timber vastly superior to that required for the occasion, he will be deemed to have committed waste and will be liable accordingly. [R., § 3725; C., '51, § 2143.]

4578. Settlers on public lands. 3342. Any person settled upon and occupying any portion of the public lands held by the state, is not liable as a trespasser for improving it or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials be taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him. [R., § 3726; C., '51, § 2144.]

4579. Holder of tax certificate. 3343. The owner of a treasurer's certificate of purchase of land sold for taxes, may recover treble damages of any

person committing waste or trespass thereon as hereinbefore provided. [9 G. A., ch. 154, § 1; 10 G. A., ch. 93.]

4580. Disposition of money. 3344. All moneys recovered in an action brought under the preceding section, shall be paid by the officer collecting the same, to the auditor of the county in which such lands are situated, and the same shall be held by such auditor, and an entry thereof made by him in a book kept for that purpose, until such lands are redeemed or a treasurer's deed therefor shall have been executed to the holder of said certificate. If redemption be made, the money shall be paid to the owner of the land, and if not redeemed, to the person to whom such deed is executed. [9 G. A., ch. 154, § 8.]

CHAPTER 6.

OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

4581. For what causes. 3345. A civil action by ordinary proceedings may be brought in the name of the state as plaintiff in the following cases:

1. Against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state;

2. Or against any public officer who has done or suffered any act which works a forfeiture of his office;

3. Or against any person acting as a corporation within this state without being authorized by law;

4. Or against any corporation doing or omitting acts, which amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law;

5. Or against any persons claiming under any letters patent, granted by the proper authorities of this state, for the purpose of annulling or vacating the same, as having been obtained by fraud, or through mistake or ignorance of a material fact, or when the defendants have done or omitted an act in violation of the terms or conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same. [R., §§ 3732, 3757; C., '51, §§ 2151, 2175.]

To annul legislative act: It would seem that *quo warranto* will not lie for the purpose of declaring void or annulling a legislative act passed by a state or an inferior municipal corporation: *State ex rel. v. Lyons*, 31–432.

The right to an office cannot be determined by bringing replevin for the records, etc., of such office: *Desmond v. McCarthy*, 17–525.

But a court may determine without an action which of two persons claiming to be sheriff is the lawful officer authorized to serve its process: *McCue v. Circuit Court*, 51–60.

The right of a party to an office cannot be tested in a *habeas corpus* proceeding: *Ex parte Strahl*, 16–369.

Contested elections: Where the council of a city is, by its charter, the judge of the qualification and election of its own members, but has never provided any method of trying contested election cases, a person claiming to be elected mayor may, by proceeding by information in *quo warranto*, have his right to such office determined: *State ex rel. v. Funck*, 17–365.

Quo warranto is the proper proceeding to determine the defendant's right to exercise the functions of an office, although as between the defendant and the relator the proper board has decided in favor of the latter: *State v. Minton*, 49–591.

The right to preside at the meeting of the city council is a franchise which may be contested by this proceeding. An original bill for an injunction is not the proper remedy: *Cochran v. McCleary*, 22–75.

Organization of school district: Action in the name of the state to determine whether the electors of a certain territory are authorized to exercise the corporate powers of a school district should be against such electors in person and not against the school district as such: *State v. Independent School Dist.*, 44–227.

To close the business of a corporation: An action may be brought upon the relation of the auditor to close the business of an in-

surance company for failure to comply with the statutory provisions as to the method of conducting such business, and for the purposes of such action it will be assumed that the corporation was duly organized: *State ex rel. v. Iowa Mutual Aid Ass'n*, 59-125.

If term of office expires while proceeding pending: Where the office for the recovery of which the action is brought is one to which no compensation attaches, it is not error for the court to dismiss the suit when, at the time of trial, the term of office contested for has expired. So *held* in case of sub-director of school district: *State ex rel. v. Porter*, 58-19.

4582. Joinder; counter-claim. 3346. To such action there shall be no joinder of any other cause of action, nor any counter-claim. [R., § 4180.]

4583. When and by whom commenced. 3347. Such action may be commenced by the district [county] attorney at his discretion, and must be so commenced when directed by the governor, the general assembly, or a court of record. [R., §§ 3733-4; C., '51, §§ 2152-3.]

4584. By private person. 3348. If the district [county] attorney, on demand, neglect or refuse to commence the same, any citizen of the state having an interest in the question, may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may prosecute the action to final judgment in other respects as provided. [R., § 3735.]

4585. Petition. 3349. The petition shall contain a plain statement of the facts which constitute the grounds of the proceeding, and, with the notice, and all the subsequent pleadings and proceedings, shall conform to the rule given for procedure in civil actions in title seventeen of this code, except so far as the same are modified by this chapter. [R., §§ 3736-8; C., '51, §§ 2154-6.]

4586. Liability for costs. 3350. When such action is brought upon the relation of a private individual, that fact shall be stated in the petition, and the order allowing him to prosecute may require that he shall be responsible for costs in case they are not adjudged against the defendant. In other cases the payment of costs shall be regulated by the same rule as in criminal actions. [R., § 3746; C., '51, § 2164.]

4587. Right to an office. 3351. When the defendant is holding an office to which another is claiming the right, the petition shall set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties. [R., § 3739; C., '51, § 2157.]

4588. Several claimants. 3352. When several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto, in the manner provided by this chapter. [R., § 3743; C., '51, § 2161.]

JUDGMENT.

4589. Effect of. 3353. If judgment be rendered in favor of such claimant, he shall proceed to exercise the functions of the office after he has qualified as required by law. [R., § 3740; C., '51, § 2158.]

A *supersedeas* bond, given on appeal from the judgment of the court that the plaintiff is entitled to the office sued for, does not suspend his right to such office and to the salary incident thereto, to which he becomes entitled by the judgment; and, therefore, in an action upon such appeal bond, after affirmance of the judgment, the appellee cannot recover the salary accruing during the pendency of the appeal: *Jayne v. Drorbaugh*, 63-711.

4590. Books and papers. 3354. The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office. [R., § 3731; C., '51, § 2159.]

4591. Suit for damages. 3355. When the judgment has been rendered in favor of the claimant, he may at any time within one year thereafter, bring

suit against the defendant and recover the damages he has sustained by reason of the act of the defendant. [R., § 3742; C., '51, § 2160.]

4592. Judgment of ouster against corporation. 3356. If the defendant be found guilty of unlawfully holding or exercising any office, franchise, or privilege, or if a corporation be found to have violated the law by which it holds its existence, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceeding. [R., § 3744; C., '51, § 2162.]

4593. Judgment in other cases. 3357. If the defendant be found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges. [R., § 3745; C., '51, § 2163.]

4594. Pretended corporation; costs. 3358. In case judgment is rendered against a pretended but not real corporation, the cost may be collected from any person who has been acting as an officer or proprietor of such pretended corporation. [R., § 3747; C., '51, § 2165.]

4595. Action against officers. 3359. When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby. [R., § 3755; C., '51, § 2173.]

TRUSTEES APPOINTED.

4596. Corporation dissolved. 3360. If a corporation is ousted and dis solved by the proceedings herein authorized, the court shall appoint three dis interested persons as trustees of the creditors and stockholders. [R., § 3748; C., '51, § 2166.]

4597. Bond. 3361. Said trustees shall enter into a bond in such a penalty and with such security as the court approves, conditioned for the faith ful discharge of their trust. [R., § 3749; C., '51, § 2167.]

4598. Action on. 3362. Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties. [R., § 3750; C., '51, § 2168.]

4599. Duty of trustees. 3363. The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled. [R., § 3751; C., '51, § 2169.]

4600. Books delivered to. 3364. The court shall, upon application for that purpose, order any officer of such corporation or any other person having possession of any of the effects, books, or papers of the corporation, in any wise necessary for the settlement of its affairs, to deliver up the same to the trustees. [R., § 3752; C., '51, § 2170.]

4601. Inventory. 3365. As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court, an inventory of all the effects, rights, and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to. [R., § 3753; C., '51, § 2171.]

4602. Powers. 3366. They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders respectively, to the extent of the effects which come into their hands. [R., § 3754; C., '51, § 2172.]

4603. Penalty for refusing to obey order of court. 3367. Any person who, without good reason, refuses to obey any order of the court, as

herein provided, shall be deemed guilty of contempt of court, and shall be fined in any sum not exceeding five thousand dollars and imprisoned in the county jail until he comply with said order, and shall be farther liable for the damages resulting to any person on account of his refusal to obey such order. [R., § 3756; C., '51, § 2174.]

CHAPTER 7.

OF ACTIONS ON OFFICIAL SECURITIES, AND FINES AND FORFEITURES.

4604. Official bonds; construed. 3368. The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and also to all the members thereof, severally, who are intended to be thereby secured. [R., § 3727; C., '51, § 2145.]

For similar provisions, see § 3757.

4605. Judgment no bar. 3369. A judgment in favor of a party for one delinquency, does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking. [R., § 3728; C., '51, § 2147.]

4606. Fines and forfeitures. 3370. Fines and forfeitures not otherwise disposed of, go into the treasury of the county where the same are collected for the benefit of the school fund. [R., § 3729; C., '51, § 1158; 9 G. A., ch. 35, § 3; 11 G. A., ch. 10, § 3.]

Suit for the penalty on a bail bond may be brought by the county. It is the trustee, and entitled to sue under the provisions of § 3749: *Shelby County v. Simmonds*, 33-345.

The fact that a fine or forfeiture is to go into the county treasury does not make the county a party to the action within the provisions of § 3795 so as to give the defendant the right to a change of venue: *State v. Merrihew*, 47-112.

The county in which the action upon the appeal bond is properly brought is the county entitled to the money collected thereon: *Lucas County v. Wilson*, 61-141.

The county in which the fine is collected under this section is the county in which the judgment for the fine is rendered and execution therefor is issued, and not the county in which such execution is enforced against property of defendant: *Pottawattamie County v. Carroll County*, 67-456.

That fines and forfeitures are to go to school fund, see § 2994, and Const., art. 9, § 4.

4607. By whom prosecuted. 3371. Actions for the recovery thereof may be prosecuted by the officers or persons to whom they are by law given in whole or in part, or by the public officer into whose hands they are to be paid when collected. [R., § 3730; C., '51, § 2149.]

4608. Collusion. 3372. A judgment for a penalty or forfeiture rendered by collusion, does not prevent another prosecution for the same subject-matter. [R., § 3731; C., '51, § 2150.]

CHAPTER 8.

OF ACTIONS OF MANDAMUS.

4609. Definition of. 3373. The action of mandamus is one brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person, to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from

an office, trust, or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. [R., §§ 3761, 3763; C., '51, § 2180.]

I. IN GENERAL.

Civil action at law: The action of *mandamus* is a "civil action at law:" *Brown v. Crego*, 29–321.

Nature of the action discussed generally with reference to the Code of '51: *Chance v. Temple*, 1–179.

When action allowed: This writ should not issue unless there is some wrong on the part of the tribunal, corporation, board or person to be commanded: *Price v. Harned*, 1–473.

Writ in federal courts auxiliary: The holding of the federal courts is that a proceeding by a writ of *mandamus* to enforce a judgment is not a suit in the jurisdictional sense, but a proceeding auxiliary to the judgment, whether brought before or after it is rendered: *Ex parte Hoiman*, 28–88, 102.

But a proceeding may be maintained in a state court to enforce the judgment of a federal court: *Brown v. Crego*, 32–498.

Federal courts; state statute: *Mandamus* proceedings in the United States courts for this state are not governed by the provisions of the state statutes in relation to such proceedings: *United States ex rel. v. Union Pacific R. Co.*, 2 Dillon, 527.

Mandamus to enforce obedience to statute: The writ of *mandamus* generally issues to compel obedience to some specific duty by a public functionary, and while it will not issue to direct the action of such person, where the action is discretionary with him, yet where the law enjoins upon him the performance of a specific act, obedience to that law may be enforced by the writ: *United States ex rel. v. Commissioners*, Mor., 31.

Mandamus against a successor in office: Where the duty is only imposed upon a public functionary in his official capacity, the performance of it may be enforced against the successor of the person who should have performed the act: *Ibid.*

The only remedy: Where a positive official duty is enjoined by law upon an officer, as to the manner of the performance of which he has no discretion, the only adequate remedy, ordinarily, is the writ of *mandamus*: *Benjamin v. District T'p*, 50–648.

To compel railroad to open crossings: The duty of a railway corporation to construct an open crossing for the accommodation of a person owning land on both sides of the track, at his request, as required by law, is one which may be enforced by *mandamus*: *Boggs v. Chicago, B. & Q. R. Co.*, 54–435.

To compel removal of obstructions in highway: *Mandamus* is the proper remedy to compel a road supervisor to remove obstructions in a public highway: *Larkin v. Harris*, 36 93; *Patterson v. Vail*, 43–142.

Against board of canvassers: *Mandamus* is the proper remedy to compel a board of canvassers to declare the proper party elected and so certify under §§ 1101, 1102: *Bradfield v. Wart*, 36–291.

The board of county canvassers may be compelled to re-assemble, after having declared the result of their canvass, and recanvass the returns to correct a mistake: *Price v. Harned*, 1–473; *State ex rel. v. County Judge*, 13–139.

To turn over books to successor; replevin: *Mandamus*, not replevin, is the proper remedy to compel an officer of a corporation to produce and turn over the books of his office to his successor: *Keokuk v. Merriam*, 44–432.

To cure defective tax deed: A treasurer, who has executed a tax deed which is so irregular or imperfect as not to convey the title which the purchaser acquired at the tax sale, may, by *mandamus*, be compelled to execute a second and corrected deed (*arguendo*): *McCready v. Sexton*, 29–356, 377.

To compel auditor to draw warrant: The district court can, by writ of *mandamus*, compel the auditor of state to draw a warrant on the treasurer of state for the sum due a public officer on his salary: *Bryan v. Cattell*, 15–538.

To compel auditor to attach seal: *Mandamus* may be brought against a county auditor to compel him to attach the county seal to a warrant issued by him or his predecessor: *Prescott v. Gonser*, 34–175.

To reinstate member of religious corporation: A court will not, upon an application for a writ of *mandamus* against a religious corporation, compel the reinstatement of a member expelled and inquire into the rightfulness of such action, it appearing that no property interest or other valuable civil right has been affected: *Sale v. First Regular Baptist Church*, 62–26.

To compel official action: A public officer cannot be compelled by *mandamus* to execute a contract binding upon the state: *Chance v. Temple*, 1–179, 200.

Where a board of school directors refuse to act in a particular case *mandamus* will lie, as, for instance, to compel a board of directors to restore territory to a district township, there being no appeal from the refusal of the board to act in such a case: *Albin v. Board of Directors*, 58–77.

A board may be required by *mandamus* to act in a matter as to which a duty is enjoined upon it: *Hightower v. Overhaulser*, 65–347; *District T'p v. Independent Dist.*, 72–687.

The courts may by *mandamus* compel school directors to re-admit a pupil who has been unlawfully excluded by reason of a rule which the directors had no power to make: *Perkins v. Board of Directors*, 56–476.

The common-law rule that *mandamus* will not be granted when the right sought to be enforced is doubtful, even though applicable under the statutory provisions, does not refer to a case where the doubt is one arising upon the mere construction of a judicial order, or a legal doubt as to the effect or meaning of a record: *Larkin v. Harris*, 36–93.

The duty of school officers to obey the decisions of the state superintendent made on an

appeal to him may be enforced by *mandamus: Newby v. Free*, 72–379.

Demand is not necessary where the proceeding is brought to enforce the performance of a public duty which is pointed out by statute, although it may be necessary as to a matter of private right: *State ex rel. v. County Judge*, 7–186; *State ex rel. v. Bailey*, 7–390.

II. MANDAMUS TO COMPEL LEVY, COLLECTION, ETC., OF TAXES.

To pay debt not in judgment: A creditor by a simple contract debt has no legal right to *mandamus* to compel a city to levy a tax for his payment, unless the debt is contracted under a special law or vote authorizing such proceeding to enforce payment. But it is otherwise after judgment has been obtained and it can be paid in no other way: *State ex rel. v. Davenport*, 12–335; *Coy v. City Council*, 17–1.

If the debt is contracted under some special law or for some special purpose, and the law or contract makes it obligatory on the officers to levy, collect and place in the treasury the means to meet such indebtedness, such duty may be enforced without the return of an execution *nulla bona: State ex rel. v. Davenport*, 12–335.

To pay for property taken: Where it becomes the duty of a city to make compensation for property taken and to levy a tax therefor, the performance of such duty may be enforced by *mandamus: State ex rel. v. Keokuk*, 9–438.

When taxes ordered levied: Where county officers were directed by writ of *mandamus* to levy a tax which ought to have been made some time before, the treasurer should proceed to collect the tax in the same manner as if it had been levied when it ought to have been. The tax must therefore be treated as delinquent from the time when the levy ought to have been made and not from the time when it actually was made: *State ex rel. v. County Judge*, 12–237.

Constitutional limit of taxation: The board of supervisors cannot be compelled by *mandamus* to levy a tax beyond the constitutional limit of taxation: *Polk v. Winett*, 37–34.

Writ may direct continual levy: Where a city council is directed by *mandamus* to levy a tax not exceeding the limit of taxation to pay off a judgment against the city, the order may direct that in case the amount realized is not sufficient to pay off the judgment an additional tax for that purpose shall be levied for subsequent years: *Coy v. City Council*, 17–1.

Treasurer to pay over tax already collected: An action by *mandamus* may be maintained to compel a treasurer to pay over a tax levied and collected to pay a judgment: *Brown v. Crego*, 32–498.

And this remedy may be pursued in the state court although the judgment is in the federal court: *Ibid.*

The county treasurer may be compelled by *mandamus* to pay over to a railroad company a tax collected for its benefit: *McGregor & S. C. R. Co. v. Birdsall*, 30–255.

If the duty to levy and collect a tax for the payment of a special indebtedness is imposed, it is not performed by making the levy and providing generally for the payment of the tax, but should be specifically executed by setting apart the tax as a special fund for the purpose: *State ex rel. v. Davenport*, 12–335.

If the levy is made and the officer is proceeding with such dispatch as the law requires and permits to collect the same, he will not be in default: *Ibid.*

Tax payer's right to intervene: In an action against an officer to compel the performance of a legal duty in the levying of a tax, a tax payer cannot intervene on the ground that the tax would be void when levied: *Harwood v. Quinby*, 44–385.

Impossible performance: It is not proper to grant a writ of *mandamus* commanding a performance beyond the powers of the defendant: *Rice v. Walker*, 44–458.

Refusal of officers to obey mandate: Where the county supervisors refuse to obey the mandate of the federal court to levy a tax, but there is no refusal on the part of the county treasurer to collect the tax if one were levied, the federal court will not set aside the statute which confides to the supervisors of the county exclusively the right to assess a county tax, and assess such tax itself by its own commissioner: *Rusch v. Supervisors*, Woolworth, 313.

Power of federal courts: The federal courts may exercise the same authority by *mandamus* to compel the payment of a judgment against a municipal corporation as may be exercised by the state courts: *Riggs v. Johnson County*, 6 Wall., 166.

Mandamus and not bill in equity and injunction is the appropriate remedy in cases like the above: *Ibid.; Walkley v. Muscatine*, 6 Wall., 481.

Appointment of marshals by federal court to enforce mandate: The federal courts have the power to appoint a marshal as a commissioner to levy and collect a tax against a municipal corporation, when the board of supervisors have disobeyed or evaded the law of the state or the peremptory mandate of the federal court: *Supervisors v. Rogers*, 7 Wall., 175; *Lansing v. County Treasurer*, 1 Dillon, 522.

Federal mandate; state injunction: Where the defendants had been enjoined by the state courts from levying a tax before suit had been brought in the United States courts, *held*, that the injunction was not a sufficient answer to an alternative writ of *mandamus* commanding them to levy a tax to pay a judgment afterwards recovered. It is immaterial whether the injunction of the state court was before or after the judgment obtained in the United States court, or whether before or after the institution of the suit. It is not a question which court first obtained jurisdiction of the case: *Mayor v. Lord*, 9 Wall., 409; *Supervisors v. Durant*, 9 Wall., 415; *Riggs v. Johnson County*, 6 Wall., 166.

III. INTERFERENCE WITH DISCRETION.

Not permitted: *Mandamus* is not designed to enable a party to have a review of

the action of officers when they are clothed with a discretion, or when their action depends upon facts to be ascertained by them: *Scripture v. Burns*, 59–70.

An officer's discretion is not to be controlled by *mandamus*: *Christy v. Whitmore*, 67–60.

Courts cannot by *mandamus* compel the discretion of officers or tribunals. So, a board of supervisors cannot thus be compelled to build a bridge, or rebuild one when fallen down: *State ex rel. v. Morris*, 43–192.

Where a board of school directors have a discretion in a particular matter, such discretion cannot be controlled whether they have exercised it wisely or not: *Clark v. Board of Directors*, 24–266.

A county superintendent vested with a discretion in the matter cannot be compelled by *mandamus* to issue a teacher's certificate: *Bailey v. Ewart*, 52–111.

Mandamus will not lie to control the action of a board of equalization; it can only be brought to compel them to act: *Meyer v. Dubuque County*, 43–592.

Where an act is to be performed or omitted in the discretion of a party the performance cannot be enforced by an action of *mandamus*: *Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.*, 73–98.

It is not judicial discretion for township trustees to arbitrarily refuse to certify as by law they are required to do on grounds which they have no right to take into consideration: *Harwood v. Quinby*, 44–385.

4610. Issued by whom. 3374. The order may be issued by the district [or circuit] court, to any inferior tribunal, or to any corporation, officer, or person; and by the supreme court, to any district [or circuit] court, if necessary, and also in any other case where it is found necessary for that court to exercise its legitimate power. [R., §§ 3761, 3764; C., '51, §§ 2179, 2181.]

Mandamus cannot issue from the supreme court except to a court of record: *Westbrook v. Wicks*, 36–382.

It is a well settled principle that courts of appellate jurisdiction cannot issue a writ of *mandamus* except in aid of their appellate powers: *United States ex rel. v. Commissioners*, Mor., 31.

4611. Extent of remedy by. 3375. The plaintiff in any action, except those brought for the recovery of specific, real, or personal property, may also as an auxiliary relief have an order of mandamus to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance. [R., § 3767.]

The duty of the officers of a mutual fire insurance company to make an assessment for the payment of a loss may be enforced by *mandamus*: *Harl v. Pottawattamie County Mut. F. Ins. Co.*, 74–39.

4612. Other remedy. 3376. An order of mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, except as herein provided. [R., § 3765; C., '51, § 2182.]

That a judgment debtor has an effectual remedy against one of two joint debtors will not prevent him from proceeding by *mandamus* against the other, where that is the proper remedy against the latter: *Palmer v. Stacy*, 44–340.

Mandamus will not lie against a board of school directors, where the party has the right of appeal to the county superintendent: *Marshall v. Sloan*, 35–445; *Barrett v. Directors*, 73–134.

But *mandamus* is the proper remedy to compel a board of school directors to carry out a vote of the electors, and it is not necessary to first prosecute an appeal from their action to the county superintendent: *Benjamin v. District Tp*, 50–648.

Mandamus is not the proper remedy for compelling a clerk to issue execution on a judgment, there being a plain, speedy and adequate remedy by application to the court or judge for an order for such execution: *Pickell v. Owen*, 66–485.

An action on an officer's bond for damages for failure to perform an official duty is not such speedy and adequate remedy as to prevent resort to *mandamus* to compel the performance of the duty: *Prescott v. Gonser*, 34–175.

4613. In whose name. 3377. The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the district [county] attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought. [R., § 3761.]

Party aggrieved: The order is granted on the petition of a private party aggrieved: *Harwood v. Case*, 37–692.

Therefore, *held*, that under the act allowing townships to vote a tax to aid in the construction of railroads the company could not, by

mandamus, compel a treasurer to collect the tax until it showed itself entitled to receive the tax and the whole amount thereof: *Ibid.*

Where a writ of *mandamus* was sued for to compel a mayor to issue a license to the applicant, and the city, while the suit was in progress, repealed the ordinance authorizing the issuance of the license, *held*, that the action for *mandamus* could no longer be prosecuted: *Cutcomp v. Utt*, 60–156.

Mandamus will not be granted on the petition of a private person in a matter in which it does not appear that he has any interest: *State ex rel. v. County Judge*, 2–280.

In a matter of public right any citizen may be a relator in an action for a *mandamus*: *State ex rel. v. County Judge*, 7–186.

A private citizen may maintain an action against the directors of a school district to compel action upon a petition to have part of a district township attached to an independent district for school purposes: *Hightower v. Overhaulser*, 65–347.

Electors of a precinct, the returns of which are thrown out by a canvassing board, are proper parties to bring action of *mandamus* against the board to compel the canvassing of such returns: *State ex rel. v. Bailey*, 7–390.

The publisher of a newspaper has no such personal interest in the action of the board of supervisors or a county officer authorized to make publication in a newspaper as to compel by *mandamus* the selection of his paper for that purpose: *Welch v. Board of Supervisors*, 23–199.

Where the question is one of public right, and the object is to procure the enforcement of a public duty, a private citizen cannot have the duty enforced on the ground that failure to enforce it results in private injury to him, but only when injury to the public is shown: *Crane v. Chicago & N. W. R. Co.*, 74–330.

Against partnership by member thereof: The common-law rule that a party in his individual capacity cannot bring an action against a partnership, board of trustees, or other body of which he is a member, does not apply to this proceeding: *Cooper v. Nelson*, 38–440.

Tax payer's right to intervene: In an action against an officer to compel the performance of a legal duty in the levying of a tax, a tax payer cannot intervene on the ground that the tax would be void when levied: *Harwood v. Quinby*, 44–385.

4614. Petition. 3378. The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the nonperformance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray an order of mandamus commanding the defendant to fulfill such duty. [R., § 3762.]

As to the interest which a private individual must show in order to enable him to maintain an action to compel the opening of a highway, see *Moon v. Cort*, 43–503; *State ex rel. v. County Judge*, 2–280.

A party cannot have relief by *mandamus* without making the showing required by the statute: *Scripture v. Burns*, 59–70.

4615. Other pleadings. 3379. The pleadings and other proceedings in any action in which a mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party as in an ordinary action for the recovery of damages. [R., § 3766.]

Demurrer: Where the facts stated in an application for *mandamus* do not entitle the plaintiff to the relief asked, a demurrer and not a motion to dismiss is the proper remedy: *Meyer v. Dubuque County*, 43–592.

A demurrer in this action must specify the ground of objection to the pleading attacked as in other actions at law: *District T'p v. Independent Dist.*, 72–687.

Jurisdiction: An objection to the jurisdiction which relates to the character and residence of parties comes too late when first made after judgment and then can only be urged on error. If made and improperly overruled, it would be valid and binding until reversed on writ of error: *Ex parte Holman*, 28–88.

Continuance: An action for *mandamus* may be continued until the acts required are performed: *Palmer v. Jones*, 49–405.

So where a city council is directed by *mandumus* to levy a tax not exceeding the limit of taxation to pay off a judgment against the city, the order may direct that, in case the amount realized is not sufficient to pay off the judgment, an additional tax for that purpose shall be levied for subsequent years: *Coy v. City Council*, 17–1.

Nunc pro tunc entry on journal: Where a writ of *mandamus* issued without any order of the court having been entered on the journal record of the clerk, but a note of it was entered on the clerk's and judge's dockets, *held*, that the court on motion would allow the judgment to be entered *nunc pro tunc*: *Supervisors v. Durant*, 9 Wall., 736.

4616. Injunction may issue, when; joinder. 3380. When the action is brought by a private person, it may be joined with a cause of action for such an injunction as may be obtained by ordinary proceedings, or with the

causes of action specified in section three thousand three hundred and seventy-five [§ 4611], but no other joinder, and no counter-claim shall be allowed. [R., § 4181.]

4617. Peremptory order. 3381. When the plaintiff recovers judgment, the court may include therein a peremptory order of mandamus, directed to the defendant, commanding him forthwith to perform the duty to be enforced, together with a money judgment for damages and costs, upon which an ordinary execution may issue. [R., § 3768.]

The writ of *mandamus* can now only issue after judgment, and not as an original or intermediate process: *Wright v. Connor*, 34-240.

Where a writ was directed to a board of canvassers, *held*, that it was not necessarily erroneous, although one of the former members had become *functus officio: State ex rel. v. Bailey*, 7-390.

The proceeding under a writ of *mandamus* to compel a recanvass of votes at an election does not, in all cases, determine the ultimate right. It may still be necessary after a recanvass to resort to *quo warranto* or an injunction for a contest of election: *State ex rel. v. County Judge*, 7-186.

A peremptory writ of *mandamus* should issue to an officer in his individual name and not merely by the name of his office: *State ex rel. v. Smith*, 9-334.

A writ of *mandamus* compelling the mayor and aldermen of the city of Davenport to levy a tax is properly directed, although the corporate name, by which the charter provides that the city shall sue and be sued, is the "City of Davenport:" *Mayor v. Lord*, 9 Wall., 409.

A writ of *mandamus* directing payment of certain orders by the treasurer of a school district, without description of the orders by numbers or amounts, is defective: *State ex rel. v. District T'p*, 11-155.

4618. Return. 3382. The order shall simply command the performance of the duty, shall be directed to the party and not the sheriff, and may be issued in term or vacation, and returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or judge, either with or without terms. [R., § 3769.]

It is not proper to grant a writ of *mandamus* commanding a performance beyond the powers of defendant. But if the defendant has wrongfully put it out of his power to do the act he may be liable in damages: *Rice v. Walker*, 44-458.

To make return of a writ of *mandamus* to collect a tax properly responsive to the writ, all the facts should be alleged and the amount collected thereunder stated, so that the court can determine the excuse of the officer in case of failure to execute the mandate, and also whether the amount of the judgment has been realized. A return merely stating that a levy has been made to pay this and other claims is erroneous: *Benbow v. Iowa City*, 7 Wall., 313.

The return of a marshal may be amended to show that the writ was exhibited to each of the supervisors at the time of the service—this being a matter of common practice: *Supervisors v. Durant*, 9 Wall., 736.

4619. Performance by another. 3383. The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done, may be done by the plaintiff or some other person appointed by the court at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution. [R., § 3770.]

4620. Temporary orders. 3384. During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damage or injury to the plaintiff until the case is decided. [R., § 3771.]

4621. Security. 3385. When the state is a party, it may appeal without security. [R., § 3772.]

CHAPTER 9.

OF INJUNCTIONS.

4622. Grounds for. 3386. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress. [R., §§ 3773, 3778; C., '51, § 2180.]

In actions at law: Where an injunction is asked in an action at law as here contemplated, it is not necessary for a party to bring himself within the rules and usages of a court of equity in granting such relief: *Hall v. Crouse*, 14–487.

To entitle plaintiff to an injunction under such statutory provision, he need not allege that he will sustain an irreparable injury if the injunction is not granted, or that defendant is insolvent: *Mills v. Hamilton*, 49–105.

The fact that the action is improperly brought in equity, when it should have been brought at law, will not prevent plaintiff having the relief here provided for: *Ibid.*

A petition for injunction in ordinary proceedings must show a continuance or repetition of the injury: *Berger v. Armstrong*, 41–447.

The injunction may be granted before the determination of the case in which it is asked, the other party of course being heard: *Ewell v. Greenwood*, 26–377.

Where a defendant had sold to plaintiff the good-will of a business, and obligated himself under a penalty not to prosecute the same business in the same place for a limited time, *held*, that the only remedy for a breach of the agreement not to prosecute the business was an action for the penalty, and that an injunction could not be had under the statutory provision last above referred to, to restrain defendant from violating his contract: *Stafford v. Shortreed*, 62–524.

Such statutory provision does not confer upon a court of law in such proceedings either general or special chancery powers, nor clothe it with power to grant any other relief or remedy not before possessed, except that of an injunction: *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 475.

Jurisdiction: The authority to allow an injunction is an incident of chancery jurisdiction and can only be exercised by courts clothed with general chancery powers or by virtue of legislative enactment: *Cummings v. Des Moines, W. & S. W. R. Co.*, 36–173.

To restrain trespass; adequate remedy at law: An injunction ought not to be granted to restrain a mere trespasser, the party injured in such cases having an adequate remedy at law: *Wilson v. Hughell*, Mor., 461.

Where, after judgment in plaintiff's favor in an action for possession of real property, in which plaintiff's right to the property is fully adjudicated, and the issuance and service of a writ of assistance, by virtue of which defendant is put out of possession, he again takes possession of the property, plaintiff may have an injunction to prevent defendant from continuing to hold possession in disobedience of the judgment and process: *Ten Eyck v. Sjoburg*, 68–625.

Threatened injury: A court of equity will interfere by injunction to protect a right only where there is apparent danger that the right will be invaded: *Trulock v. Merle*, 72–510.

Injunction will not be allowed against a threatened trespass, where it does not appear but that plaintiff has a full, complete and adequate remedy at law for any and all trespasses which may be committed, and especially is this true where the statute offers triple damages for any injuries inflicted by such trespass and makes the same criminal: *Cowles v. Shaw*, 2–496.

To preserve a right: A court of equity will ordinarily interfere by injunction to preserve or continue a right until the termination of the litigation upon the result of which the right itself depends: *Teabout v. Jaffray*, 74–28.

Insolvency: To authorize the interference of a court of equity by injunction to prevent trespass upon real estate, there must be some distinct ground of equitable jurisdiction, such as the insolvency of defendant, the prevention of waste or irreparable injury, or a multiplicity of suits: *Council Bluffs v. Stewart*, 51–385.

Where defendant in an action for trespass which is being continued is insolvent, an injunction to restrain the commission thereof may be properly issued: *Gibbs v. McFadden*, 39–371.

In the absence of a motion for more specific statement, an allegation in the petition that defendant is proof against execution is sufficient without more specific averment of the fact of insolvency: *Burroughs v. Saterlee*, 67–396.

Irreparable injury: If the injury threatened be irreparable, chancery will interfere by

injunction. Therefore, *held*, that a petition which alleged that threatened illegal acts of a road supervisor in throwing down a fence to open a highway would cause irreparable injury showed ground for relief in equity: *Bolton v. McShane*, 67–207.

A district township may have an injunction to restrain another district township from removing a school-house from the territory of the former. It is not limited to an action at law for the trespass: *District T'p v. District T'p*, 54–115.

Injunction is an extraordinary remedy, to be granted only when the party is likely to suffer some irreparable injury against which he has no other speedy or adequate remedy. Therefore, *held*, that an injunction should not be granted to restrain a street railway company, having the right to do so in the charter from the city, from laying its track on a street, although it was claimed that it was using a certain kind of rail or was building according to a certain gauge which would render its track a nuisance, there being no requirement as to the kind of rail nor the gauge to be used: *Waterloo v. Waterloo Street R. Co.*, 71–193.

To restrain opening or obstructing highway: Where a road supervisor has served notice to have a road opened as an official act by virtue of proceedings in which it is claimed that a highway has been established, the owner of property which would be trespassed upon in opening the road may maintain an action for injunction to restrain the contemplated trespass before any actual trespass upon his land is committed: *Morgan v. Miller*, 59–481.

Equity will interfere by injunction to restrain road supervisors and others from removing or interfering with fences, hedges, watercourses and the like in the discharge of their official duty. Relief in such cases is not based upon the ground of the irreparable character of the injury and the insolvency of defendant: *Bolton v. McShane*, 67–207.

An injunction will not lie to restrain a party from obstructing or inclosing a street or highway when it is in such condition that it cannot be used for that purpose: *Prince v. McCoy*, 40–533.

A party who will suffer no injury except in common with the public by reason of the obstruction of a highway will not be entitled to an injunction to restrain such obstruction: *Ibid.*

Obstruction of navigable stream: Where the riparian owner shows that the filling up of the banks of a navigable stream beyond high-water mark will occasion him special damages different in degree or kind from such as will be sustained by the public, he may maintain an injunction to prevent such injury: *Musser v. Hershey*, 42–356.

To prevent ejectment suits: The rule of the common law, on account of which it was held that an injunction might be granted in equity to restrain the prosecution of actions of ejectment, when the title had been properly determined between the parties, no longer exists, and an injunction will not be allowed for the purpose of restraining a second suit to which a previous adjudication might be pleaded as a bar: *Gray v. Coan*, 36–296.

A suit to enjoin the prosecution of an action to recover real property on the ground that a deed in defendant's chain of title has been lost is allowed. In such case he has no adequate remedy at law: *Butch v. Lash*, 4–215.

To restrain taking private property for public use: An injunction will not be allowed to restrain a party from committing an injury by an attempt to take private property under pretense of legal authority for a highway, it not appearing that any authority to do so actually exists, unless it appears that such party is insolvent and unable to respond to an action at law for damages, or that the injury would be such that it could not be adequately compensated in money: *Dinwiddie v. Roberts*, 1 G. Gr., 363.

After the assessment of damages for right of way of a railway has been made, the land owner may enjoin the further use of his premises by the company until the damages are paid: *Richards v. Des Moines Valley R. Co.*, 18–259; *Hibbs v. Chicago & S. W. R. Co.*, 39–340.

Where one of the purposes for which the condemnation proceedings were ostensibly had was within the provisions of the statute, and the ground of complaint was that defendant sought to defraud plaintiff by proceeding under the statute ostensibly for a proper purpose, when the real and only purpose was to procure land for a use for which property could not be condemned, *held*, that the proceedings might be enjoined: *Forbes v. Delashmutt*, 68–164.

As the right of appeal is given in proceedings for condemning right of way, the party to such proceedings cannot by injunction take advantage of irregularities therein. The remedy by appeal is exclusive: *Phillips v. Watson*, 63–28.

Vacation of streets; certiorari: Injunction will not be granted to restrain the vacation of streets by a city council, there being a complete remedy by *certiorari*: *Stubenrauch v. Neyenesch*, 54–567.

To restrain enforcement of illegal taxes: An injunction will lie to restrain the sale of personal property levied on to satisfy a tax illegally levied. Replevin would not be a full remedy: *Spencer v. Wheaton*, 14–38.

Injunction is the proper remedy to restrain the levy and collection of an illegal tax on shares of stock in a national bank: *Olmstead v. Board of Supervisors*, 24–33.

A resident and tax payer of a school district may maintain a suit to enjoin the collection of a tax levied without authority of law: *Williams v. Peinny*, 25–436.

An injunction is the proper remedy to restrain the collection of a tax which is not only erroneous, but void: *Standard Coal Co. v. Independent Dist.*, 73–304.

The jurisdiction of equity to restrain the enforcement of an illegal tax has been too long recognized and too frequently resorted to in this state to be now made a matter of serious question: *Zorger v. Township of Rapids*, 36–175: *Brandiff v. Harrison County*, 50–164.

An injunction is not the proper remedy against an erroneous or excessive assessment; the tax payer should apply to the board of equalization; but *aliter* if the law authoriz-

ing the tax is unconstitutional, or the levy is without authority or jurisdiction: *Macklot v. Davenport*, 17–379.

That a tax is merely irregular, for instance, by reason of property which should be included with the realty in an aggregate valuation being separately assessed as personalty, is not a ground for enjoining the collection of the tax. Such error should be corrected by application to the board of equalization: *Wilson v. Cass County*, 69–147.

In an action to enjoin the collection of an illegal tax, a number of persons having separate interests, but equally interested in the relief, may join as plaintiffs: *Brandirff v. Harrison County*, 50–164.

And in such case, one or more parties thus interested may maintain an action for the benefit of the others having a like interest. (Overruling *Fleming v. Mershon*, 36–413): *Ibid.* And see *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

Residents and tax payers of an independent district may join in an action to declare taxes levied therein for school purposes to be void: *Wilkinson v. Van Orman*, 70–230.

Two or more owners of distinct pieces of land cannot join in an action to restrain the levy and enforcement of a municipal tax upon their property on the ground that their land is so situated as not to be subject to the levy of such taxes: *Lewis v. Eshleman*, 57–663.

Where a tax in aid of a railroad was declared defeated by the judges of the election, but the township clerk improperly certified in regular form to the board of supervisors that the proposition was carried, and the board thereupon levied the tax, *held* that, as the tax was not voted, its collection might be restrained by injunction, and *certiorari* was not an available remedy: *Cattell v. Lowry*, 45–478.

To restrain official action: A citizen and tax payer may maintain an action to enjoin the issuance by the county auditor of a warrant in payment of a refund of taxes illegally ordered by the board of supervisors. The determination by the board of the legality of such a refunding is not an adjudication which must be attacked only upon appeal or by *certiorari: Hospers v. Wyatt*, 63–264.

Citizens and tax payers of a county may maintain an injunction against a county official to prevent the erection of a county courthouse at an improper place: *Rice v. Smith*, 9–570.

Where it appeared that the officers of a school district were about to accept a schoolhouse which did not comply with the terms of the contract for its construction and was much less valuable than provided by such contract, *held*, that an injunction might be granted against such officers at the suit of tax payers to prevent the acceptance of such building: *Carthan v. Lang*, 69–384.

A tax payer cannot by injunction restrain officers of the county in the performance of their duties, even though irregular, where it does not appear that their action is such as to be prejudicial to him: *Sperry v. Kretchner*, 65–525.

A party seeking an injunction to restrain the execution of a tax deed upon property must show that he has an interest in such property entitling him to such relief: *Johnson v. Brett*, 64–162.

A court of equity may interfere by injunction to prevent a conveyance by a municipal corporation of lands held by it for public purposes. Although such conveyance, being inconsistent with the purposes for which it is held, might be void, yet it may be enjoined to prevent the title from passing into the hands of various grantees, by reason of which parties seeking to restrain the improper use of the land might be driven to a multiplicity of suits: *Cook v. Burlington*, 30–94.

An officer may be made a party to restrain him in the discharge of official duties, where the discharge of his duties will be the means of consummating or aiding fraudulent purposes or of working oppression or injustice, although the officer is guilty of no wrong or unlawful purpose. But costs will not ordinarily be adjudged against him: *Palo Alto Banking, etc., Co. v. Mahar*, 65–74.

So *held* in an action to which the county recorder was made a party defendant and in which it was sought to enjoin him from recording certain conveyances which it was alleged were being executed in pursuance of a fraudulent confederation to defraud plaintiff of his title: *Ibid.*

Legislative action of the state or of a municipal corporation within the scope of its powers cannot be restrained by injunction, even though the threatened act, if passed, would be unconstitutional and void: *Des Moines Gas Co. v. Des Moines*, 44–505.

Injunction will not be granted at the suit of a tax payer to restrain a city from making a contract for lighting by electricity, even if such contract, if performed, might involve indebtedness beyond the constitutional limit: *Searle v. Abraham*, 73–507.

In regard to elections: A citizen of a county is authorized, as plaintiff, to prosecute an action for an injunction to restrain improper action of officers when counting votes on the question as to removing the county seat: *Collins v. Ripley*, 8–129.

In an injunction proceeding the validity of an election to remove a county seat may be tried: *Sweatt v. Faville*, 23–321.

Where an election as to change of county seat had been ordered by the board of supervisors, made upon a petition and notice therefor, and the vote was favorable to the change, *held*, that those opposing such change had no cause for equitable relief justifying an injunction, the order for the vote being conclusive until set aside by *certiorari: Bennett v. Hetherington*, 41–142.

It is doubtful whether any court has the power or jurisdiction to enjoin an election to be held by the people pursuant to public law: *Lamb v. Burlington, C. R. & M. R. Co.*, 39–333.

Right to public office: Action by original bill for an injunction is not the proper method for trying the right to a public office or franchise. The remedy by information in *quo warranto* should be adopted. But it would seem that a temporary injunction might be granted as an auxiliary remedy in such case: *Cochran v. McCleary*, 22–75.

An action in equity for an injunction is not

the proper method to determine which of two persons has the right to teach a school and who is the legal sub-director in the district township: *District T'p v. Barrett*, 47-110.

To restrain proceedings at law: Equity will not interfere by injunction to restrain the prosecution of an action at law where it does not appear that plaintiff is insolvent or that there is any ground for a discovery, or that the facts upon which relief is sought cannot be made as fully available in an action at law as in equity: *Smith v. Short*, 11-523.

It is not the province of equity to interfere where there is a complete remedy at law, and especially when it is sought to restrain an action at law pending a hearing in equity: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57-249.

A court of equity will enjoin proceedings in an action of forcible entry and detainer only where a certain and manifest irreparable injury will result unless its restraining power is exerted: *Crawford v. Paine*, 19-172.

Where parties are both residents of the state, the one may invoke the aid of a court of equity of the state to prevent the other from prosecuting an action in the courts of another state which will result in injury and fraud. Such jurisdiction is founded upon authority vested in courts of equity over persons within their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and which are contrary to equity and good conscience: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70-746.

Where plaintiff was under contract entitled to a conveyance of a right of way, *held*, that it was proper in an action for specific performance thereof to ask an injunction to restrain defendant from proceedings to have damages for the right of way assessed by a jury: *Chicago & S. W. R. Co. v. Swinney*, 38-182.

A court of equity cannot by injunction interfere with criminal proceedings in a court of law: *Suess v. Noble*, 31 Fed. Rep., 855.

Where an injunction has been granted restraining plaintiff in an action pending in the same court from dismissing such action, the supreme court will not, on appeal in the latter action, allow the parties to dismiss the case in violation of such injunction: *Dubuque Branch of State Bank v Rhomberg*, 37-664.

To restrain enforcement of judgment: A court of equity has authority to enjoin proceedings to enforce a judgment which is void for want of jurisdiction: *Connell v. Stelson*, 33-147.

Injunction may be granted to restrain enforcement of a judgment at law rendered without notice to the defendant therein, and upon a claim against which he had a good defense: *Givens v. Campbell*, 20-79.

A party seeking to enjoin the enforcement of a judgment at law must show that he has a defense to the action, or make such a case as to satisfy the court that if a new trial is had a different result will be obtained: *Way v. Lamb*, 15-79.

The enforcement of a judgment at law will not be restrained by injunction where it is not shown that the judgment is unjust or oppressive, or in other words that there would be a good defense to the claim if the judgment should be set aside. A court of equity will not set aside a judgment and open up the litigation until it appears that the result will be other or different from that already reached: *Taggart v. Wood*, 20-236.

A court of equity will not interfere by injunction to restrain the enforcement of a judgment on a ground which might have been urged as a matter of defense in the action on which the judgment was recovered: *Faulkner v. Campbell*, Mor., 148.

To authorize a party to relief against a judgment at law, and to pay an execution thereon, it must appear that it is against conscience to execute such judgment, and also that the injured party could not have availed himself of the same facts at or before the trial, and that there was no fault or negligence on his part: *Kreichbaum v. Bridges*, 1-14; *Shricker v. Field*, 9-366.

Matters antecedent to the bringing of the action in which the judgment was recovered which is sought to be enjoined, which matters might have been interposed as a defense in such action, cannot be made the basis of a suit in equity to enjoin the judgment: *Lamb v. Drew*, 20-15.

In a motion to enjoin the enforcement of a judgment the court cannot go behind the judgment to determine the regularity of the proceedings: *Hampson v. Weare*, 4-13.

In the absence of fraud, accident or mistake, equity cannot interfere to restrain the enforcement of a judgment at law, although it be wrong, unjust or inequitable: *Finch v. Hollinger*, 47-173.

Equity will not enjoin the collection of a judgment at law where the legal remedy is full, ample and complete, unless possibly there has been fraud, accident or surprise, without fault or negligence on the part of the complaining party: *Freeman v. Hart*, 61-525.

Held, that a judgment defendant could not have the enforcement of the judgment enjoined on the ground that he had a claim against the assignee of the judgment, who was his attorney in the action in which the judgment was recovered, for negligence in defending such action, it not appearing that the attorney was insolvent. Under such circumstances there is no such relation of trust or confidence as to entitle the judgment debtor to relief: *Baker v. Ryan*, 67-708.

Where the provisions of a judgment were that it should be paid in a town order at the expiration of a certain time, and before that time execution was issued, and, when the time expired, the order was not tendered, and afterwards, without any offer to perform, an injunction was asked against such execution, *held*, that plaintiff was not entitled to relief by reason of his failure to tender the order: *Anamosa v. Wurzbacher*, 37-25.

Where a judgment was rendered by default upon agreement that it should be satisfied only out of certain specified property, *held*, that an injunction was properly granted in an action by the debtor to restrain its enforcement against other property than that agreed upon: *Montgomery v. Gibbs*, 40-652.

An action to enjoin the enforcement of a

judgment should be brought against the officer who is proceeding to enforce the judgment: *Death v. Bank of Pittsburg*, 1-382.

To restrain sale on execution: Injunction will be granted to prevent the sale on execution of real property, when such property does not belong to the judgment debtor and the sale would cast a cloud upon the title: *Key City Gas Light Co. v. Munsell*, 19-305.

But a sale will not be enjoined if the judgment is a lien upon the property, although it is junior to other liens: *Wiedner v. Thompson*, 66-283.

To restrain enforcement of chattel mortgage: As the purchaser at foreclosure sale can acquire title only to such property as is covered by the mortgage, an action cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which, it is claimed, is not covered by such senior mortgage: *Rankin v. Rankin*, 67-322.

To restrain nuisance: Courts of equity have general jurisdiction to entertain an action to abate a nuisance, and, although such jurisdiction has generally been exercised only in actions where property rights of the plaintiff are affected, yet it is competent for the legislature to extend this jurisdiction to cases where no property rights of the plaintiff as distinct from the general public are involved, and to authorize a suit to abate a nuisance to be brought by any citizen of the county: *Littleton v. Fritz*, 65-488.

So *held* under § 2384, authorizing a suit in equity by a citizen of the county to enjoin the unlawful sale of intoxicating liquors: *Ibid.*

The fact that the act enjoined is one which is by statute made a criminal one will not prevent a court of equity having jurisdiction to abate it by injunction: *Ibid.*

Further as to what may be enjoined as a nuisance, see § 4567 and notes.

To restrain conveyances, attachments, etc.: Where real property standing in the name of a person not a defendant is attached, as having been conveyed by defendant to defraud creditors, an action for an injunction may be maintained against the grantee in such fraudulent conveyance to prevent alienation of the property by him to an innocent purchaser, until the determination of the attachment suit: *Joseph v. McGill*, 52-127.

A creditor who has not yet recovered a judgment cannot have an injunction to restrain the debtor from disposing of his property: *Buchanan v. Marsh*, 17-494.

A mortgagee, although he has not recovered judgment, may maintain an action for injunction to prevent a judicial sale of the mortgaged premises on the ground that it is fraudulently intended to defeat his rights, but a general creditor not yet having recovered judgment could not do so: *Brigham v. White*, 44-677.

One who has conveyed property by a warranty deed has no such interest therein that he can maintain injunction against the threatened sale thereof under a subsequent judgment, under which it is sought to subject the property on the ground that the conveyance was in fraud of creditors: *Small v. Somerville*, 58-362.

The grantee may, under proper circumstances, maintain an action for injunction to restrain his grantor and others from prosecuting a fraudulent confederation to convey the property so as to defeat his title: *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

In an injunction to restrain a sale by the trustee under a mortgage containing a power of attorney, where it did not appear that there was fraud or mistake, or that plaintiff would sustain an irreparable injury by such sale, and it was shown that plaintiff was aware of the condition of the title of which he complained at the time of taking the conveyance in part payment for which the mortgage was given, *held*, that there was no ground for an injunction: *Crocker v. Robertson*, 8-404.

Equity may, at the suit of the grantee of real property by a warranty deed, restrain the transfer of notes given for the purchase money where it appears that there was a breach of warranty as to a portion of the property. But such restraint will extend only to such amount as is necessary to make good to the grantee the damage resulting from the breach of warranty: *McDunn v. Des Moines*, 34-467.

Where property claimed by plaintiff was seized on attachment issued against a third person, and was replevied from the officer by plaintiff and taken into possession of plaintiff, *held*, that he could not have an injunction to restrain the levy of other attachments by other parties against such third person upon the same property: *Patterson v. Seaton*, 64-115.

To restrain payment of county warrant: An injunction restraining payment of a county warrant cannot operate to defeat a recovery upon such warrant negotiated before the injunction suit was commenced: *McCormick v. Grundy County*, 24-382.

To restrain sale of partnership property: Where plaintiff as administratrix of a deceased partner showed in her petition that the defendants, the copartners of her intestate, were insolvent and were disposing of the firm property and appropriating it to their own use, and that unless defendants were restrained by injunction there was danger of the property and assets of the firm being wholly lost, *held*, that there was a proper case for an injunction restraining defendants from disposing of the partnership property: *Fletcher v. Vandusen*, 52-448.

4623. Temporary or permanent. 3387. In any of the cases mentioned in the preceding section, the injunction may either be a part of the judgment rendered in the action or it may, if proper grounds therefor are shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction. [R., § 3775; C., '51, § 2191.]

4624. Temporary, when allowed. 3388. Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is en-

titled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff; or where, during litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

An affidavit to the petition to the effect that the contents thereof are true, as the affiant believes, constitutes a sufficient verification: *Kelley v. Briggs*, 58–332.

If an amended pleading in an action for injunction is not sworn to, the temporary injunction may be dissolved on that ground, but it will be error to dismiss the action and proceed to personal judgment: *Porter v. Moffett*, Mor., 108; *S. C.*, Mor., 153.

Although an injunction be improperly issued on account of defects in the petition, yet if these defects are corrected by amendment the injunction should not be dissolved: *Sweatt v. Faville*, 23–321; *Des Moines Nav. & R. Co. v. Carpenter*, 27–487.

And this is true even though the amendment is made after the motion to dissolve is filed: *Crawford v. Paine*, 19–172.

A temporary injunction will not be issued where the facts stated in the petition, if proved, would not entitle the party to relief: *Zorger v. Township of Rapids*, 36–175.

In a suit brought under § 2384, to enjoin illegal sale of intoxicating liquors, a temporary injunction may be granted as in any other case: *Littleton v. Fritz*, 65–488. And see notes to that section.

4625. By whom granted. 3389. A temporary injunction may be granted:

1. By the court or judge thereof in which the action is pending or is to be brought;

2. By any judge of the district [or circuit] court of such district;

3. By any judge of the supreme, or a judge of any other district [or circuit] court.

But in cases where an action is pending, and it is applied for to affect the subject-matter of such action, it can only be granted by the court, or judge thereof, in which such action is pending. Nor shall it be granted by any judge mentioned in the second subdivision hereof, unless it satisfactorily appears by affidavit that the court or judge thereof in which the action is brought, cannot, for want of time, sickness, or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. Nor shall it be granted by any judge mentioned in the third subdivision hereof, unless it be made satisfactorily to appear to such judge, by affidavit, that the application therefor cannot, for some sufficient reason, be made to either of the courts or judges mentioned in the first or second subdivision of this section.

A judge may act under this section during term time, while the court is not actually in session, as well as in vacation between terms: *Thompson v. Benepe*, 67–79.

Although the granting as well as the refusal of a temporary injunction rests much in the discretion of the court, and such discretion will not be controlled except where there is a manifest abuse or mistake of the law, yet where an appeal was taken from an order granting a preliminary injunction involving a simple question of law upon undisputed facts, *held*, that the question would be determined on appeal and not postponed to final hearing: *Fuson v. Connecticut General L. Ins. Co.*, 53–609.

A party cannot, by appealing from an order denying a temporary injunction and executing a *supersedeas* bond, have the benefit of such temporary injunction: *Troupe v. Eade*, 42–552.

Affidavits in resistance of an application for a temporary injunction are merely evidence which do not become a part of the record, unless preserved by bill of exceptions: *Hart v. Foley*, 67–407.

A temporary injunction issued in vacation is not dissolved by failure to procure an additional order therefor at the next term of court: *Curtis v. Crane*, 38–459.

An injunction relating to property held under attachment, where the attachment is the gist of the proceeding, must be brought in the same court where the attachment suit is pending: *Cooney v. Moroney*, 45–292.

A federal court will not, by temporary injunction, restrain proceedings in a state court in a criminal case, even though proceedings for its removal to the federal court have been taken: *Wagner v. Drake*, 31 Fed. Rep., 849.

4626. Notice to defendant who has answered. 3390. An injunction shall not be granted against a defendant who has answered, unless he has had notice of the application.

4627. Notice in other cases. 3391. An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined.

Section applied: *District T'p v. Barrett*, 47-110.

This section *held* not applicable where one district township sought to restrain another from removing school-houses from the territory of the former: *District T'p v. District T'p*, 54-115.

4628. Refusal by court conclusive. 3392. No injunction shall be granted by a judge, after the application therefor has been overruled by the court; nor by a court or judge when it has been refused by the court or judge thereof in which the action is brought. A judge refusing an injunction, shall, if requested by either party, give him a certificate thereof.

4629. Motion to dissolve. 3393. The defendant may move to dissolve the injunction, either before or after the filing of the answer. [R., § 3790; C., '51, § 2206.]

4630. Issued by clerk. 3394. If the order is made by the court, the clerk shall make an entry thereof in the court record, and issue the order accordingly. If made in vacation, the judge must indorse said order upon the petition. [R., § 3776; C., '51, § 2192.]

This provision that the order for a temporary injunction shall be indorsed upon the petition is not mandatory, and the fact that it is made upon a separate piece of paper will not render subsequent proceedings thereunder void: *Jordan v. Circuit Court*, 69-177.

4631. Bond. 3395. In the cases contemplated in the preceding sections, the order of allowance must direct the injunction to issue only after the filing of a bond in the office of the clerk of the proper court, in a penalty to be therein fixed, with sureties to be approved by such clerk, and conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction. [R., § 3777; C., '51, § 2193.]

Additional bond: Under statute, as well as by rules of equity practice, it is competent for the court, in case the litigation wherein the injunction has been granted shall be protracted, to require an additional bond or further security to meet such contingency: *Crawford v. Paine*, 19-172.

Action on the bond for damages: The bond contemplated by statute in case of a temporary injunction is to cover such damages as may be adjudged against the obligors in an action brought thereon. The amount of damages cannot be adjudged in the original action. No such issue can be joined therein: *Fountain v. West*, 68-380.

A party can be damaged by an injunction only in case he is prevented by it from exercising or enjoying some right or privilege which he desired or was entitled to enjoy; and where an injunction was sought for the purpose of restraining the negotiation of a promissory note, and defendants by their answer negatived the allegation that they were about to negotiate the note, *held*, that no damage was shown to have accrued to them by reason of the granting of the injunction: *Bank of Monroe v. Gifford*, 70-580.

Attorneys' fees: In an action on the bond, reasonable compensation for legal services in securing a dissolution of the injunction may be recovered; but not attorneys' fees for services in defending the entire suit: *Behrens v. McKenzie*, 23-333; *Langworthy v. McKelvey*, 25-48.

Where an action was brought to have certain taxes declared illegal and void, and a temporary injunction was granted restraining their collection, but no steps were taken to have such injunction dissolved before final hearing, when it was dissolved, *held* that, the injunction being merely auxiliary, defendant was not entitled in an action on the injunction bond to recover attorneys' fees: *Carroll County v. Iowa R. Land Co.*, 53-685.

If the injunction is dissolved after hearing on the merits, and this is all there is in the case, counsel fees might be recovered. Such recovery is not confined to cases where the injunction is dissolved on motion: *Langworthy v. McKelvey*, 25-48.

Where the motion to dissolve is made in good faith and affidavits filed in support thereof, but the court declines to pass upon it until final hearing, when the injunction is dis-

solved after hearing upon the merits, counsel fees for preparation of motion, etc., may be recovered in suit upon the bond: *Wallace v. York*, 45–81; *Fountain v. West*, 68–380.

An allowance of attorneys' fees for time spent in drawing useless affidavits would be improper: *Ellwood Mfg. Co. v. Rankin*, 70–403.

Fees for the services of an attorney in a case in the supreme court after the dissolution of the injunction should not be allowed: *Ibid.*

Where an injunction is the only relief sought, and dissolution is procured only upon final hearing, attorneys' fees should, in an action on the bond, be allowed for defending in the entire action: *Reece v. Northway*, 58–187.

An attorney's fee may be recovered where the injunction is dissolved on motion, and also where it is dissolved on final hearing, if it is the only relief sought. It may also be allowed in case of partial dissolution or modification, where such is the relief sought in the motion, but not where the motion is to dissolve as an entirety and is only partially sustained or a modification is granted: *Ford v. Loomis*, 62–586.

Dismissal of action: In an action on an injunction bond given to stay execution on a judgment, where it was alleged that an action for injunction had been dismissed, *held*, that the entry on the judgment calendar, "dismissed as per stipulation," was not sufficient evidence as to that fact in the absence of a showing as to what that stipulation was: *Towle v. Leacox*, 59–42.

Other damages: Where real estate depreciates in value during the time that sale thereof is prevented by injunction proceedings, there is no presumption that the owner, if not prevented, would have sold before depreciation and saved himself from loss, and damages are not recoverable for loss of sale unless it is made to appear that there was a *bona fide* application on the part of some person to buy, and that the sale was lost by reason of the injunction: *Reece v. Northway*, 58–187.

Failure to allow plaintiff nominal damages in an action brought upon an injunction bond will not be ground for reversal if no actual damages are shown: *Boardman v. Willard*, 73–20.

In an action to recover damages for having wrongfully enjoined a sale under execution, *held*, that the costs made under the execution enjoined would be presumed to have been included in the amount for which the subsequent execution was issued, and that the cost of the judgment would be the only damage recoverable for delay in the sale: *Johnston v. Moser*, 72–654.

Defendant having a lot of unburned brick which were damaged by rain while an injunction was in force restraining him from carrying on the manufacture of such brick on the premises, *held*, that the writ of injunction as issued did not prevent him from taking steps to protect the brick from the rain, and if he was negligent in that respect he could not recover for damages sustained thereby: *Behrens v. McKenzie*, 23–333.

Defense; insanity: A bond given in an injunction proceeding is in the nature of an executed rather than an executory contract, and the fact that the one signing the bond and enjoying the benefit of the writ was insane at the time of signing it will constitute no defense to an action on the bond, if it appears that his insanity was not known to the opposite party: *Ibid.*

Summary damages should not be allowed on dissolution of an injunction unless they are such as are the immediate and necessary result of the allowance of the writ and depend simply upon computation for their determination, as the allowance of interest when the payment of money is restrained. In other cases the party should be left to his remedy by an action: *Taylor v. Brownfield*, 41–264.

Bond construed: In a particular case, *held*, that the bond rendered the obligor liable only for costs of the proceeding and not for other damages which accrued: *Gifford v. Mohr*, 47–279.

Right of action accrues on the bond at the final determination of the injunction suit, and not at the previous dissolution of the temporary injunction: *Bank of Monroe v. Gifford*, 65–648.

Where the action is to enjoin the sale of a particular piece of property under a judgment, the bond need not be for twice the amount of the judgment: *Hardin v. White*, 63–633.

4632. Condition of bond when to restrain judgment.

3396. When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the suit must be brought in the county and court in which such action is pending, or the judgment or order was obtained. The bond must also in that case be further conditioned to pay such judgment, or comply with such final order if the injunction is not made perpetual, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined. [R., § 3778; C., '51, § 2179.]

Where it is sought to restrain the sale of property on execution under a judgment, on the ground that the judgment is void, the suit must be brought in the county and court where the judgment was obtained: *Anderson v. Hall*, 48–346; *Bennett v. Hanchett*, 49–71; *Grattan v. Matteson*, 51–622.

This provision is applicable in case of special as well as of general execution: *Lockwood v. Kitteringham*, 42–257.

It seems, however, that it would not apply where it should be sought to enjoin the sale of property not belonging to defendant in execution, but belonging to a third person who seeks the injunction: *Ibid.*

Where the object of the action is to declare a judgment or final order of a court invalid, action must be brought in the court where the judgment or order was obtained; but where it is sought to enjoin the enforcement of a

judgment because of some matter which has arisen since the judgment was rendered, and not on the ground that it should never have been entered, or that it is invalid, or that it should not be enforced, the action need not be brought in the court where the judgment was recovered, but may be brought in the county of defendant's residence: *Baker v. Ryan*, 67-708.

An action to set aside a sheriff's sale and deed on the ground that the property was exempt as a homestead may be brought in a different court from that in which the judgment was rendered: *Visek v. Doolittle*, 60-602.

When a transcript of a judgment before a justice of the peace is filed in the office of the clerk of the circuit court, it becomes a judgment of that court, and a suit to enjoin proceedings thereon must be brought in that court: *Anderson v. Hall*, 48-346.

If the action is brought in the wrong county the court acquires no jurisdiction even by consent, and the action cannot be removed to the proper county: *Ibid.*

Where an execution issuing from the supreme court is sought to be enjoined, the action may properly be brought in the court of any county where it is sought to enforce such execution: *Davis v. Bonar*, 15-171; *Massie v. Mann*, 17-131.

4633. Penalty. 3397. The penalty of the bond must be fixed by the court or judge who makes the order, and must be doubly sufficient to cover any probable amount of liability to be thereby incurred. [R., § 3779; C., '51, § 2195.]

4634. Defendant to show cause. 3398. The court or judge before granting the writ, may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted. [R., § 3781; C., '51, § 2197.]

VACATION OF.

4635. Application for dissolution. 3399. If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of the court, apply to the judge who made the order to vacate or modify the same; or the application may be made to the judge of the court in which the action is pending. [R., § 3782; C., '51, § 2198; 14 G. A., ch. 112.]

4636. Notice; showing. 3400. Such application must be with notice to the plaintiff, and may rest upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits. In the latter case the plaintiff may fortify his application by counter-affidavits, and have reasonable time therefor. [R., § 3783; C., '51, § 2199.]

Upon answer: Where the facts alleged in the petition as a ground for the injunction are plainly, directly and fully denied by the answer, the injunction may be dissolved upon the answer alone: *Shricker v. Field*, 9-366; *Anderson v. Reed*, 11-177; *Stevens v. Myers*, 11-183; *Taylor v. Dickinson*, 15-483; *Des Moines Nav. & R. Co. v. Carpenter*, 27-487; *Ingraham v. Chicago, D. & M. R. Co.*, 34-249; *Russell v. Wilson*, 37-377.

In a particular case, *held*, that the equities of the petition were sufficiently denied in the answer to warrant a dissolution: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

Where defendant bases his motion to dissolve the temporary injunction on his answer alone the plaintiff may resist the dissolution by affidavits in support of his petition although no affidavits are offered by defendant: *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

An answer which does not fully meet the equities set up in the petition will not justify the dissolution of a temporary injunction, although it may be sufficient to support a judgment for defendant on the final trial: *Trotter v. Paunley*, 39-203.

Where one material allegation of a petition for injunction to restrain the collection of a judgment was not denied by the answer, *held*, that the temporary injunction should not have been dissolved, but should have been continued to the final hearing: *Gates v. Ballou*, 54-485.

Where plaintiff sought to enjoin the enforcement of a judgment, alleging that large payments had been made thereon which had not been credited, and that fact was not denied in the answer, *held*, that the temporary injunction should have been dissolved only as to that part of the injunction not alleged to have been paid, and as to the other part it should have been continued to the hearing: *Marsh v. Mead*, 57-535.

To warrant the dissolution upon answer alone, the answer must be upon personal knowledge, and of such character as to entitle it to as much credit as the averments of the bill. If its statements are such as to leave the mind of the court in reasonable doubt as to whether the equities are sufficiently answered, the injunction ought not to be dissolved: *Sinnett v. Moles*, 38-25; *Fargo v. Ames*, 45-494.

Even where all the equities of the bill are denied by the answer, it does not follow as a matter of course that the injunction will be dissolved. Its dissolution or continuance rests very much in the sound discretion of the court, to be governed by the nature of the case: *Shricker v. Field*, 9-366.

An injunction should not be dissolved with-

out proof, on an answer which admits the allegations of the petition and seeks to avoid their effect by pleading affirmative matter: *Ibid.; Judd v. Hatch*, 31-491; *Fargo v. Ames*, 45-494; *Mills v. Hamilton*, 49-105: *Huskins v. McElroy*, 62-508; *Hayes v. Billings*, 69-387.

Upon the hearing of a motion to dissolve an injunction the plaintiff may file an amended petition, and if it states a good cause for an injunction, not overborne by the adverse showing, the injunction should be continued: *Crawford v. Paine*, 19-172.

Where the final relief sought will be ineffectual if the temporary injunction is dissolved, it will be continued to the final hearing, even though the equities of the bill are fully denied in the answer: *Joseph v. McGill*, 52-127.

Where fraud is the gravamen of a petition, or it is apparent that by dissolution a party will lose all benefit to accrue from final success, the court may refuse to dissolve the injunction until final hearing: *Sinnett v. Moles*, 38-25; *Stewart v. Johnston*, 44-435; *Brigham v. White*, 44-677; *Fargo v. Ames*, 45-494; *Johnston v. Chicago, M. & St. P. R. Co.*, 58-537.

The general rule is that where all the material allegations of the petition for an injunction are fully and satisfactorily denied in the answer, upon the personal knowledge of the defendant, the preliminary injunction, if one has been allowed, will be dissolved. There are some exceptions to this rule, and one of them is where the gravamen of the petition is fraud: *Walker v. Stone*, 70-103.

The ruling of the court continuing a preliminary injunction to the hearing is largely a matter of discretion, and not to be reversed unless such discretion has been abused: *Ibid.*

Where there was no showing that the continuance of the injunction to the hearing would result in any substantial injury to defendant, and it appeared that the dissolution might materially injure plaintiff, *held*, that a refusal of the court to dissolve the injunction would not be reversed on appeal: *Kelley v. Briggs*, 58-332.

An injunction restraining the taking of private property for public use until compensation is made should not be dissolved while the question as to the right to compensation is pending and undetermined: *Trustees of Iowa College v. Davenport*, 7-213; *Conolly v. Griswold*, 7-416.

It being provided by statute that an injunction to restrain a nuisance can only be granted upon reasonable notice of the time and place of application to the party to be enjoined, *held*, that an injunction for that purpose, having been granted without notice, should be set aside on motion, and that an appearance to move to dissolve, accompanied by answer to the petition in the case, was not a waiver of the right to have such dissolution: *Hughes v. Eckerson*, 55-641.

While an injunction should not be dissolved until after answer by defendant, this rule has no application where the party failing to answer is a merely nominal party: *Shricker v. Field*, 9-366.

Where it appeared that there had been no unreasonable delay in the service of the notice after the granting of the writ, *held*, that a motion to dissolve for want of notice was properly overruled, when made after service; also, that appearance waived any objection to the form or sufficiency of such notice: *Sweatt v. Faville*, 23-321.

As to curing defects by amendment, to prevent dissolution, see notes to § 4624.

An injunction cannot be dissolved on the ground that the service of the writ precedes the acquisition of jurisdiction of the person by appearance when the original notice is defective: *District T'p v. District T'p*, 54-115.

Where the writ of temporary injunction is broader than the petition, the remedy is not by motion for dissolution, but for modification of the writ: *Ford v. Loomis*, 62-586.

Upon motion to dissolve, the opposite party is not entitled, as a matter of course, to a continuance: *Taylor v. Dickinson*, 15-483.

The renewal of a motion already filed in another court to dissolve the injunction is not a second motion within the prohibition of the statute: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

It may be that, upon a dissolution, damages which are the immediate and necessary result of the allowance of the writ, and which depend simply upon computation for their determination, may be recovered by a summary proceeding; but damages consequential in their nature, as expenses, attorneys' fees, etc., can only be recovered in an independent action: *Taylor v. Brownfield*, 41-264.

Sustaining a motion to dissolve a temporary injunction which has been granted *ex parte* upon a showing then made does not bar the right to a perpetual injunction upon full proof at the final hearing: *Fisher v. Beard*, 40-625.

The dissolution of the injunction does not necessarily operate to dismiss the bill: *Russell v. Wilson*, 37-377; *Massie v. Mann*, 17-131; *Walters v. Fredericks*, 11-181.

While the continuance or dissolution of an injunction rests in the sound discretion of the court originally passing upon the question, yet this is a legal discretion, and if based upon sufficient grounds will be reversed on appeal: *Sinnett v. Moles*, 38-25; *Stewart v. Johnston*, 44-435.

Appeal from order of dissolution: After the dissolution of a temporary injunction it cannot be restored on appeal, although another might be granted if the case has not proceeded to a hearing, and if the granting of another such injunction would be of any use: *Ellwood Mfg. Co. v. Rankin*, 70-403.

4637. Dissolution. 3401. The judge may thereupon decide the matter at once, unless some good cause for delay is shown. But the vacation of the order shall not prevent the cause from proceeding if anything be left to proceed upon. [R., § 3784; C., '51, § 2200.]

The dissolution of the injunction does not operate to dismiss the action: See notes to preceding section.

4638. Only one motion. 3402. Only one motion to dissolve or modify an injunction upon the whole case shall be allowed. [R., § 3793.]

VIOLATION OF.

4639. Punished. 3403. Any judge of the supreme, district, [or circuit] court, being furnished with an authenticated copy of the injunction, and also with satisfactory proof that such injunction has been violated, shall issue his precept to the sheriff of the county where the violation of the injunction occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach said defendant, and bring him forthwith before the same or some other judge, at a place to be stated in said precept. [R., § 3785; C., '51, § 2201.]

Where a party is in court and hears an order for the injunction pronounced, he is as much bound thereby as if he had actually been served with the writ: *Milne v. Van Buskirk*, 9-558.

So long as an injunction remains in force the party bound thereby must obey it: *Langworthy v. McKelvey*, 25-48.

In seeking to punish a party for the violation of an injunction it must be taken in the form in which it was looked at by the court rendering it: *Lamb v. Burlington, C. R. & M. R. Co.*, 39-333.

Proof of a violation of the injunction should usually be made by affidavit: *State v. Myers*, 44-580.

Contempt of court in violating an injunction should be dealt with as other contempts. The proceedings are merely incidental to the original proceeding and there is no appeal: *First Cong. Church v. Muscatine*, 2-69.

Any error in the injunction proceeding in granting an injunction without proper evidence cannot be raised by way of defense to a proceeding for contempt in violating such injunction: *Jordan v. Circuit Court*, 69-177.

The fact that the order allowing an injunction is not indorsed on the petition, but is entered on a separate piece of paper, will not prevent a violation of such injunction being a contempt: *Ibid.*

A party is liable for all damages resulting from a refusal on his part to obey the mandate of an injunction granted against him: *Benson v. Connors*, 63-670.

A judge may in vacation make an order imposing a fine and imprisonment for contempt in violating an injunction. The judge being authorized by statute to perform such judicial act in vacation, his act when so done has the force and effect of an act done by the court: *McLane v. Granger*, 74-152.

4640. Contempt purged. 3404. If, when thus produced, he files his affidavit denying or sufficiently excusing the contempt charged, he shall be released, and the affidavit shall be filed with the clerk of the court for presentation. [R., § 3786; C., '51, § 2202.]

4641. Bond required. 3405. But if he fail to do so, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction, which bond shall be filed with the clerk. [R., § 3787; C., '51, § 2203.]

4642. Committed to jail. 3406. If he fail to give such security, he may be committed to the jail of the county where the proceedings are pending until the next term of the court. [R., § 3788; C., '51, § 2204.]

4643. Contempt punished. 3407. If the security be given, the court at the next term shall act upon the case and punish the contempt in the usual mode. [R., § 3789; C., '51, § 2205.

See notes to § 4639. As to violation of injunction in liquor cases, see §§ 2384, 2387.

CHAPTER 10

OF SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION.

4644. Agreed statement of facts. 3408. Parties to a question in difference which might be the subject of a civil action, may, without action, present an agreed statement of the facts thereof to any court having jurisdiction of the subject-matter. [R., § 3408; C., '51, § 1843.]

Pleadings are not necessary in such a case: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

4645. Affidavit. 3409. It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. [R., § 3409; C., '51, § 1844.]

This provision is jurisdictional, and in the absence of compliance therewith a court cannot take cognizance of the case: *Keeline v. Council Bluffs*, 62-450.

4646. Judgment. 3410. The court shall thereupon hear and determine the case, and render judgment thereon as if an action were pending. [R., § 3410; C., '51, § 1845.]

4647. Record. 3411. The statement, the submission, and the judgment, shall constitute the record. [R., § 3411.]

4648. How enforced. 3412. The judgment shall be with costs, and it may be enforced, and shall be subject to review, in the same manner as if it had been rendered in an action, unless otherwise provided for in the submission. [R., § 3412.]

4649. Submission of cause pending. 3413. The same may be also done at any time before trial in any action then pending, subject to the same requirements and attended by the same results as in a case without action, and such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide also for any lien had by any attachment, and for any property in the custody of the law, else such lien and such legal custody will be held waived. [R., § 3413.]

Where pending the trial of a cause the facts were agreed upon by the parties "to save expense and to simplify the issue" upon which the court should render judgment, *held*, that it was the duty of the court to give such judgment, whether legal or equitable, as the facts agreed upon should be deemed to warrant or require: *Logan v. Hall*, 19-491.

Where a party has submitted a cause upon an agreed statement of facts, the court should enter such judgment as to his rights under the facts agreed upon as will establish the respective rights of the parties: *Kraft v. James*, 64-159.

4650. Judgment. 3414. The parties may, if they think fit, enter into an agreement in writing, that upon the judgment of the court being given in the affirmative or negative of the questions of law raised by such special case, particular property therein described, or a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be delivered to and vested in one of the parties by the other, or in case of money, shall be paid by one of such parties to the other of them, either with or without costs of the action, and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed or ascertained, with or without costs, as the case may be. [R., § 3414.]

4651. Costs. 3415. In case no agreement shall be entered into as to the costs of such action, the same shall follow the event, and be recovered by the successful party. [R., § 3415.]

CHAPTER 11.

OF ARBITRATIONS.

4652. What controversies. 3416. All controversies which might be the subject of civil action, may be submitted to the decision of one or more arbitrators, as hereafter provided. [R., § 3675; C., '51, § 2098.]

Under statute any "civil action" may be submitted to arbitration, and in this term is included everything except those cases which come under the criminal jurisdiction of the

court. Therefore an equitable cause of action is subject to submission: *Tomlinson v. Hammond*, 8-40.

The question whether or not an alleged nuisance should be abated may be submitted to arbitration without the submission of any claim for damages: *Richards v. Holt*, 61-529.

4653. Written agreement. 3417. The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject-matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted, the names of the arbitrators and court by which the judgment on their award is to be rendered. [R., §§ 3676, 3677; C., '51, §§ 2099, 2100; 9 G. A., ch. 174, § 5.]

Method of submission: The subject-matter of the award must be definitely specified: *Woodward v. Atwater*, 3-61.

Under the statutory provision as to submission the arbitrators must be named in the agreement in order that the parties may have a judgment on the award: *McKnight v. McCullough*, 21-111.

If the submission is not acknowledged as required by statute, the award cannot be received as made under a statutory submission, although it may be good at common law, and an action maintained thereon: *Fink v. Fink*, 8-313.

If submission is by order of court, an acknowledgment is not necessary: *Ibid.*

The same degree of particularity is not required in the acknowledgment of an agreement of submission as is required in case of an instrument conveying real property: *McKnight v. McCullough*, 21-111.

An agreement for submission must contain a provision for judgment by some court upon the award. Without this it will not be such a submission as contemplated by statute, though it may be binding at common law as a settlement; but, in such cases, the result cannot be treated as an award under the statute: *Love v. Burns*, 35-150.

Where submission of arbitration between a school district and its treasurer covered "the money alleged to be due and owing" by the treasurer of the district, *held*, that such submission properly covered money due for several years, including some for which there ought to have been previous settlement: *District T'p v. Rankin*, 70-65.

The submission to arbitration in a particular case *held* to be sufficiently certain: *Donican v. Mulry*, 69-583.

A party in interest cannot be bound by an agreement to arbitrate made by other parties in interest without his authority: *Sweney v. Davidson*, 68-386.

A corporation may submit controversies to arbitration although no such express power is conferred by its charter. Courts are disposed to encourage settlement by arbitration: *District T'p v. Rankin*, 70-65.

The parties may agree that judgment on the award shall be rendered by a justice of the peace, and, if so, he will have jurisdiction, provided the amount is such as to bring the case within his cognizance: *Van Horn v. Bellar*, 20-255; *King v. Hampton*, 4 G. Gr., 401; *Whitis v. Culver*, 25-30.

Where it was provided in the agreement that judgment should be rendered "by any court having jurisdiction," and judgment was rendered by the district court of the county where both parties resided, *held*, that as such court was the only one which (at that time) had jurisdiction, the agreement was sufficient to warrant such judgment: *McKnight v. McCullough*, 21-111.

Common-law submission: The statutory provisions as to the method of submission, etc., must be followed if the parties desire judgment upon the award; but a submission and award may be good as at common law between the parties although these provisions are not observed, as, for instance, where the submission is in parol. An award so made may be enforced by action thereon, and may be set up as a defense to an action brought for the subject-matter therein settled: *Conger v. Dean*, 3-463; *Foust v. Hastings*, 66-522.

Parties may bind themselves by an agreement to submit a controversy to arbitration in a manner different from that required by statute, and if the submission and award are sufficiently certain to constitute a bar to a subsequent action for the same matter the award will be upheld: *Zook v. Spray*, 38-273.

A common-law submission to arbitration is always construed most liberally and with a view of effecting the purpose of the parties to it, even though it does not comply with the statutory requirements: *McKinnis v. Freeman*, 38-364.

To defeat a recovery on an award under a common-law submission, it is necessary for defendant to impeach the award in some proper manner: *Foust v. Hastings*, 66-522.

4654. What submitted. 3418. The submission may be of some particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides. [R., § 3678; C., '51, § 2101.]

4655. Action pending. 3419. A submission to arbitration of the subject-matter of a suit, may also be made by an order of court, upon agreement of parties after suit is commenced. [R., § 3679; C., '51, § 2102.]

In case of submission by order of court, upon agreement of parties, the pleadings constitute the submission, and an agreement that judgment may be rendered on the award is not necessary. The court does not lose its control of the matter, and may render judgment upon the award, or may set it aside, in whole or in part: *Schohmer v. Lynch*, 11-461.

A submission of matters involved in a pending suit may be made by agreement of parties without an order of court: *Higgins v. Kinneady*, 20–474.

The term "suit," used in the statutory provisions as to submitting pending proceeding, is broader than the term "action," and a special proceeding may, by order of court, be submitted to arbitrators by agreement of parties: *Marion v. Ganby*, 68–142.

Submission of a pending suit may be made without any instrument in writing. The statutory provision requiring a written agreement, signed and acknowledged, is applicable to controversies in which no action has been commenced: *Ibid.*

4656. Procedure. 3420. All the rules prescribed by law in cases of referees, are applicable to arbitrators except as herein otherwise expressed, or except as otherwise agreed upon by the parties. [R., § 3680; C., '51, § 2103.]

Unless the submission provides otherwise, or a consent to a majority award is in a proper manner shown, all the arbitrators must concur in the award: *Richards v. Holt*, 61–529.

Where an agreement for submission provided that the award might be made by the arbitrators or any two of them, and after the award had been made and set aside a resubmission was ordered by the court, *held*, that if, before such resubmission, one of the arbitrators resigned, a submission for a finding by the two remaining arbitrators would not be valid, and that the agreement must be construed as contemplating a submission to three arbitrators: *Cary v. Bailey*, 55–60.

The finding of arbitrators upon a hearing of which one party had no notice and at which he was not present nor represented will not be binding upon him, though the instrument under which the arbitration is had does not expressly provide that the parties are to have notice or be heard: *Dormoy v. Knower*, 55–722.

The parties may, by agreement, determine the rules that shall govern the arbitrators, as that the award of the majority shall be binding: *Thompson v. Blanchard*, 2–44.

It need not appear affirmatively from the return that the witnesses were examined under oath, nor, it seems, that the arbitrators were sworn: *Tomlinson v. Hammond*, 8–40.

The arbitrators are not required, like referees, to make separate return of facts found and conclusions of law thereon: *McKnight v. McCullough*, 21–111.

4657. Revocation. 3421. Neither party shall have the power to revoke the submission without the consent of the other. [R., § 3681; C., '51, § 2104.]

4658. Neglect to appear. 3422. If either party neglect to appear before the arbitrators after due notice, except in case of sickness, they may, nevertheless, proceed to hear and determine the cause upon the evidence which is produced before them. [R., § 3682; C., '51, § 2105.]

4659. Time for award. 3423. If the time within which the award is to be made is fixed in the submission, no award made after that time shall have any legal effect, unless made upon a recommitment of the matter by the court to which it is reported. [R., § 3683; C., '51, § 2106.]

4660. If not fixed. 3424. If the time of filing the award is not fixed in the submission, it must be filed within one year from the time such submission is signed and acknowledged, unless by mutual consent the time is prolonged. [R., § 3684; C., '51, § 2107.]

4661. Award; how made. 3425. The award must be in writing, and shall be delivered by one of the arbitrators to the court designated in the agreement, or it may be inclosed and sealed by them and transmitted to the court, and not opened until the court so orders. [R., § 3685; C., '51, § 2108.]

Return of award: Although the award is not transmitted to the court in the method required by statute, yet it will be sufficient if it is delivered by one of the arbitrators to the clerk, and all chance for prejudice from the irregularity is expressly rebutted: *Higgins v. Kinneady*, 20–474.

A delivery of the award to the clerk in person in vacation *held* sufficient: *McKnight v. McCullough*, 21–111.

Where the affidavit of one of the arbitrators filed as required by statute did not give the names of the parties to the controversy, but by mistake gave the names of the other arbitrators as the persons by whom he had been appointed, etc., *held*, that the notary taking such affidavit might be allowed to testify that it was properly sworn to, and that the names of the arbitrators had been inserted by mistake in place of the names of the parties: *Higgins v. Kinneady*, 20–474.

Clerical defects working no prejudice should not invalidate the proceedings: *Ibid.*

An affidavit of arbitration made and filed after the making of the award, and in pursuance of agreement between the parties that it might be so done, *held* sufficient: *Ogden v. Forney*, 33–205.

The arbitrators need not return separate findings of facts and conclusions of law: See notes to § 4656.

Sufficiency: Where the award, under the submission of a controversy as to the amount due to a municipal corporation from its treas-

urer, stated the amount of his deficiency, *held*, that while it might have made a more detailed statement of the account, the finding would not be open to objection on the ground of uncertainty: *District T'p v. Rankin*, 70-65.

Validity; presumptions: Every presumption is in favor of the correctness of the determination of the arbitrators: *Tomlinson v. Hammond*, 8-40.

Where no mistake or injustice in the award is shown it will be upheld: *Struthers v. Clark*, 40-508.

Impeachment: The award may be impeached by proof that matters were considered by the arbitrators which were not submitted, or that they have committed material errors or mistakes to the prejudice of either party, or have omitted to consider matters submitted, or on account of fraud: *Thompson v. Blanchard*, 2-44.

Proof is admissible to show that no evidence was given to the arbitrators upon a particular subject, the burden being upon the party seeking to impeach the arbitration to satisfy the jury of any mistake of the arbitrators, and also that he was prejudiced thereby: *Ibid.*

The award may be impeached by showing that the arbitrators did not pass upon questions embraced in the submission and essential to determine the rights of the parties: *Sharp v. Woodbury*, 18-195; *Mississippi & M. R. Co. v. Sioux City & St. P. R. Co.*, 49-604.

In an action upon an award good at common law, but not made under a statutory submission, the fact that the arbitrators have considered matters not submitted, or have committed such mistakes as prejudice either party, or have omitted to consider matters which were submitted, may be shown for the purpose of impeaching the award: *Love v. Burns*, 35-150.

It is competent to introduce evidence to show that one of the arbitrators intrusted with the award for delivery to the court discovered a mistake in it before delivery and thereupon refused to deliver it: *Shulte v. Hennessy*, 40-352.

Effect: Where an agreement for submission to arbitration provided that the award should be made within thirty days, and it was afterwards made and set aside by mutual consent, and an action at law was commenced after the expiration of the thirty days, no further steps having been taken under the submission by either party, *held*, that the submission would not bar the action, and it was not incumbent upon the party bringing the action to first apply to have the arbitrators act, or others appointed, and a new award made: *Simplot v. Simplot*, 14-449.

An award cannot be relied upon unless pleaded: *Dougherty v. Stewart*, 43-648.

Civil liability of arbitrators: Arbitrators act in a judicial capacity, and cannot be held liable for damages for an award alleged to have been made fraudulently and corruptly, if within their jurisdiction: *Jones v. Brown*, 54-74.

Where an award was filed in defiance of an injunction, *held*, that it must be presumed that it was disregarded and worked no prejudice, and that an action for damages against the arbitrators would not lie: *Ibid.*

The fact that the award is valueless by reason of wilful misconduct of the arbitrators may be shown for the purpose of defeating their claim for compensation for services: *Bever v. Brown*, 56-565.

HEARING IN COURT.

4662. Hearing in court. 3426. The cause shall be entered on the docket of the court at the term to which the award is returned, and shall be called up and acted upon in its order. But the court may require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award. [R., § 3686; C., '51, § 2109.]

4663. Rejection; rehearing. 3427. The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties. [R., § 3687; C., '51, § 2110.]

Power of court over: As to the power of a court over an award there is a material difference between the cases where the reference is under a statute provision or is made by a rule of court, and those where it is solely by an agreement of the parties as at common law. In the latter case the arbitrators constitute a tribunal created by the parties themselves, and the courts have but little authority over them. Nearly all the authority which does exist in regard to them is in courts of equity: *Burroughs v. David*, 7-154.

Therefore, *held*, that allegations of fraud of the opposite party in not making a full and true exhibit of the matters relating to the arbitration on the hearing before the arbitrators could not be considered in an action on the arbitration bond: *Ibid.*

As the justice has no authority to try the case upon its merits, but only to render judgment on the award, or reject it and recommit it for a new hearing, no trial upon the merits can be had on an appeal from the action of the justice: *Whitis v. Culver*, 25-30.

Setting aside: To entitle a party to have an award set aside on the ground of mistake, he must not only clearly show a mistake, and that he was prejudiced thereby, but also that if it had not occurred the award would have been different: *Tomlinson v. Tomlinson*, 3-575; *Gorham v. Millard*, 50-554.

Although an award can only be set aside for mistake, partiality, or fraud in the arbitration, yet, to constitute such conduct, evil intention is not a necessary ingredient; and where one of the parties was informed by one of the ar-

bitrators that no testimony upon a certain question would be received, and afterwards such testimony was received on the other side, *held*, that the award should be set aside: *Sullivan v. Frink*, 3-66.

An award should not be set aside for newly discovered evidence which is merely cumulative: *McDaniels v. Van Fosen*, 11-195.

The action of arbitrators in awarding costs to the successful party should not be interfered with unless a clear abuse of discretion is shown: *Ratliff v. Mann*, 5-423.

The court cannot change the award as to the taxation of costs. Its only authority is to recommit if improper: *Landreth v. Bass*, 12-606.

Resubmission: The award should only be rejected for want of jurisdiction in the arbitrators, but it should be recommitted for any reason which would justify the granting of a new trial after verdict: *Depew v. Davis*, 2 G. Gr., 260.

Upon recommitment the arbitrators need not be again sworn, nor need the award upon such commitment show that they were sworn in the first instance: *Tomlinson v. Hammond*, 8-40.

Disqualification or misconduct of arbitrators: Where a contract of lease provided that the rents should be determined by an appraisal of the property by three persons, of whom each should appoint one, and the two thus chosen should select the third, *held*, that such contract implied that the persons to be selected should be indifferent between the parties, and that it appearing that the appraiser appointed by one of the parties was a brother and confidential agent of such party, which fact was unknown to the other, the appraisal was void: *Pool v. Hennessy*, 59-192.

Where it appeared that one of the arbitrators procured the signature of another by representing that the other would sign it, which was not done, and such arbitrator was persistent in signing the award, although counsel had not been heard in argument and before the case was finally submitted, and when it appeared that plaintiff desired to introduce further evidence, and that such arbitrator was on unfriendly terms with plaintiff, *held*, that such arbitrator was not a proper person to act, and that a resubmission of the matter to the same arbitrators was error. In such case the award should have been rejected and the parties left to their ordinary remedies: *Brown v. Harper*, 54-546.

Setting aside in equity: Where a new school district had been organized from a part of the territory of an old one, and the two boards, upon failure to agree to the division of assets and liabilities, had appointed arbitrators as required by § 2821, *held*, that a court of equity might entertain jurisdiction to set aside an award of such arbitrators for gross errors in computation: *District Tp v. District Tp*, 54-286.

4664. Force and effect of award. 3428. When the award has been adopted, it shall be filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly. [R., § 3688; C., '51, § 2111.]

The court has no authority to change the award by adding interest thereto. It should enter judgment on the award according to its terms, unless it appears that the award is inequitable, or that the arbitrators abused their discretion in apportioning the costs: *District Tp v. Independent Dist.*, 60-141.

Where the agreement of submission specifies the court wherein the award is to be filed, this sufficiently indicates the court wherein the judgment is to be rendered: *Ibid.*

As to what court may be given jurisdiction to render judgment, see notes to § 4653.

4665. Appeal. 3429. When an appeal is brought on such judgment, copies of the submission and award, together with all affidavits, shall be returned to the supreme court. [R., § 3689; C., '51, § 2112.]

Appeal: An appeal will not lie from the judgment of a justice of the peace on an award. Any error committed by him in rejecting or recommitting an award, or failure to do so, may be reviewed on writ of error: *Whitis v. Culver*, 25-30.

An appeal will lie from an order resubmitting a cause to arbitrators: *Brown v. Harper*, 54-546.

The acts of the court in sustaining a motion to set aside the award cannot be reviewed where the record does not show upon what facts the court acted: *Hamble v. Owen*, 20-70.

4666. Costs. 3430. If there is no provision in the submission respecting costs, the arbitrators may award them in their discretion. [R., § 3690; C., '51, § 2113.]

4667. Rights saved. 3431. Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award. [R., § 3692; C., '51, § 2115.]

TRIBUNALS OF VOLUNTARY ARBITRATION.

4668. How established. 21 G. A., ch. 20, § 1. The district court of each county, or a judge thereof in vacation, shall have the power, and upon

the presentation of a petition, or of the agreement hereinafter named, it shall be the duty of said court, or a judge thereof in vacation, to issue in the form hereinafter named, a license or authority for the establishment within and for each county of tribunals for voluntary arbitration and settlement of disputes between employers and employed in the manufacturing, mechanical, or mining industries.

4669. Petition or agreement for. 21 G. A., ch. 20, § 2. The said petition or agreement shall be substantially in the form hereinafter given and the petition shall be signed by at least twenty persons employed as workmen, and by four or more separate firms, individuals, or corporations within the county, or by at least four employers, each of whom shall employ at least five workmen, or by the representative of a firm, corporation or individual employing not less than twenty men in their trade or industry; *provided*, that at the time the petition is presented, the judge before whom said petition is presented, may, upon motion require testimony to be taken as to the representative character of said petitioners, and if it appears that said petitioners do not represent the will of a majority, or at least one-half of each party to the dispute, the license for the establishment of said tribunal may be denied, or may make such other order in this behalf as to him shall seem fair to both sides.

4670. License to issue; record. 21 G. A., ch. 20, § 3. If the said petition shall be signed by the requisite number of both employers and workmen, and be in proper form and contain the names of the persons to compose the tribunal, being an equal number of employers and workmen, the judge shall forthwith cause to be issued a license substantially in the form hereinafter given, authorizing the existence of such tribunal and fixing the time and place of the first meeting thereof, and an entry of the license so granted shall be made upon the journal of the district court of the county in which the petition originated.

4671. Jurisdiction; continuance. 21 G. A., ch. 20, § 4. Said tribunal shall continue in existence for one year from date of the license creating it, and may take jurisdiction of any dispute between employers and workmen in any mechanical, manufacturing, or mining industry, or business, who shall have petitioned for the tribunal, or have been represented in the petition therefor, or who may submit their disputes in writing to such tribunal for decision. Vacancies occurring in the membership of the tribunal shall be filled by the judge or court that licensed said tribunal, from three names, presented by the members of the tribunal remaining in that class, in which the vacancies occur. The removal of any member to an adjoining county, shall not cause a vacancy in either the tribunal or post of umpire. Disputes occurring in one county may be referred to a tribunal already existing in an adjoining county. The place of umpire in any of said tribunals and vacancies occurring in such place, shall only be filled by the mutual choice of the whole of the representatives, of both employers and workmen constituting the tribunal, immediately upon the organization of the same, and the umpire shall be called upon to act after disagreement is manifested in the tribunal by failure during three meetings held and full discussion had. His award shall be final and conclusive upon such matters only as are submitted to him in writing and signed by the whole of the members of the tribunal, or by parties submitting the same.

4672. Organization. 21 G. A., ch. 20, § 5. The said tribunal shall consist of not less than two employers or their representatives, and two workmen or their representatives. The exact number which shall in each case constitute the tribunal, shall be inserted in the petition or agreement, and they shall be named in the license issued. The said tribunal, when convened shall be organized by the selection of one of their members as chairman and one as secretary, who shall be chosen by a majority of the members, or if such ma-

jority cannot be had after two votes, then by secret ballot, or by lot, as they prefer.

4673. Place of meeting; compensation; expenses. 21 G. A., ch. 20, § 6. The members of the tribunal shall receive no compensation for their services from the city or county, but the expenses of the tribunal, other than fuel, light and the use of the room and furniture, may be paid by voluntary subscription, which the tribunal is authorized to receive and expend for such purposes. The sessions of said tribunal shall be held at the county seat of the county where the petition for the same was presented, and a room in the courthouse or elsewhere for the use of said tribunal shall be provided by the county board of supervisors.

4674. Proceedings. 21 G. A., ch. 20, § 7. When no umpire is acting, the chairman of the tribunal shall have power to administer oaths to all witnesses who may be produced, and a majority of said tribunal may provide for the examination and investigation of books, documents and accounts pertaining to the matters in hearing before the tribunal, and belonging to either party to the dispute; *provided*, that the tribunal may unanimously direct that instead of producing books, papers and accounts before the tribunal, an accountant agreed upon by the entire tribunal may be appointed to examine such books, papers and accounts, and such accountant shall be sworn to well and truly examine such books, documents and accounts, as may be presented to him, and to report the results of such examination in writing to said tribunal. Before such examination, the information desired and required by the tribunal shall be plainly stated in writing, and presented to said accountant, which statement shall be signed by the members of said tribunal, or by a majority of each class thereof. Attorneys at law or other agents of either party to the dispute, shall not be permitted to appear or take part in any of the proceedings of the tribunal, or before the umpire.

4675. Umpire. 21 G. A., ch. 20, § 8. When the umpire is acting he shall preside and he shall have all the power of the chairman of the tribunal, and his determination upon all questions of evidence, or other questions in conducting the inquiries there pending, shall be final. Committees of the tribunal consisting of an equal number of each class may be constituted to examine into any question in dispute between employers and workmen which may have been referred to said committee by the tribunal, and such committee may hear, and settle the same finally, when it can be done by a unanimous vote; otherwise the same shall be reported to the full tribunal, and be there heard as if the question had not been referred. The said tribunal in connection with the said umpire shall have power to make or ordain and enforce rules for the government of the body when in session to enable the business to be proceeded with, in order, and to fix its sessions and adjournments, but such rules shall not conflict with this statute, nor with any of the provisions of the constitution, and laws of Iowa.

4676. Question defined; award. 21 G. A., ch. 20, § 9. Before the umpire shall proceed to act, the question or questions in dispute shall be plainly defined in writing and signed by the members of the tribunal, or a majority thereof of each class, or by the parties submitting the same, and such writing shall contain the submission of the decision thereof to the umpire by name, and shall provide that his decision thereon, after hearing shall be final. The umpire shall be sworn to impartially decide all questions that may be submitted to him during his term of office. The submission and his award may be made in the form hereinafter given, and said umpire must make his award within ten days from the time the question or questions in dispute are submitted to him. Said award shall be made to the tribunal; and if the award is for a specific sum of money, said award may be made a matter of record by filing a

copy thereof in the district court of the county wherein the tribunal is in session. When so entered of record it shall be final and conclusive, and the proper court may, on motion of any one interested enter judgment thereon; and when the award is for a specific sum of money may issue final and other process to enforce the same.

4677. Form of petition. 21 G. A., ch. 20, § 10. The form of the joint petition or agreement praying for a tribunal under this act shall be as follows:

To the District Court of —— County, (or to a judge thereof as the case may be): The subscribers hereto being the number, and having the qualification required in this proceeding, being desirous of establishing a tribunal of voluntary arbitration for the settlement of disputes in the (here name the branch of industry), trade, and having agreed upon A, B, C, D, and E representing the employers, and G, H, I, J, and K representing the workmen, as members of said tribunal, who each are qualified to act thereon, pray that a license for a tribunal in the —— trade may be issued to said persons named above.

EMPLOYERS.	NAMES.	RESIDENCE.	WORKS.	NUMBER EMPLOYED.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

EMPLOYEES.	NAMES.	RESIDENCE.	BY WHOM EMPLOYED.
.....	.....	.....	.....
.....	.....	.....	.....

4678. Form of license. 21 G. A., ch. 20, § 11. The license to be issued upon such petition may be as follows:

STATE OF IOWA, } ss.
—— County. }

Whereas, The joint petition, and agreement of four employers (or representatives of a firm or corporation or individual employing twenty men as the case may be), and twenty workmen have been presented to this court (or if to a judge in vacation so state) praying the creation of a tribunal, of voluntary arbitration for the settlement of disputes in the workman trade within this county and naming A, B, C, D, and E representing the employers, and G, H, I, J, and K representing the workmen. Now in pursuance of the statute for such case made, and provided said named persons are hereby licensed, and authorized to be, and exist as a tribunal of voluntary arbitration for the settlement of disputes between employers, and workmen for the period of one year from this date, and they shall meet, and organize on the —— day of ——, A. D. ——, at ——.

Signed this —— day of ——, A. D. ——.

—— ——,
Clerk of the —— District Court of —— County.

4679. Form of submission. 21 G. A., ch. 20, § 12. When it becomes necessary to submit a matter in controversy to the umpire it may be in form as follows:

We A, B, C, D, and E representing employers, and G, H, I, J, and K representing workmen composing a tribunal of voluntary arbitration hereby submit, and refer unto the umpirage of L (the umpire of the tribunal of the ——

trade) the following subject-matter, viz.: (Here state full, and clear the matter submitted), and we hereby agree that his decision and determination upon the same shall be binding upon us, and final, and conclusive upon the question thus submitted, and we pledge ourselves to abide by, and carry out the decision of the umpire when made.

Witness our names this —— day of ——, A. D. ——.

(Signatures) ——— ———.
——— ———.
——— ———.

4680. Award in writing. 21 G. A., ch. 20, § 13. The umpire shall make his award in writing to the tribunal, stating distinctly his decisions on the subject-matter submitted, and when the award is for a specific sum of money, the umpire shall forward a copy of the same to the clerk of the proper court.

CHAPTER 12.

OF ACTIONS AGAINST BOATS OR RAFTS.

4681. Against boats. 3432. In an action brought against the owners of any boat to recover any debt contracted by such owner, or by the master, agent, clerk, or consignee thereof, for supplies furnished, or for labor done, in, about, or on such boat, or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any of the persons aforementioned, or to recover injuries to persons or property by such boat, or the officers or the crew thereof, done in connection with the business of such boat, a warrant may issue for the seizure of such boat, as hereinafter provided. [R., § 3693; C., '51, § 2116.]

State jurisdiction: The jurisdiction of federal courts of admiralty is exclusive of the jurisdiction of the state court to entertain a proceeding *in rem* against a boat on a cause of action cognizable in admiralty, and corresponding provisions of the Revision, assuming to confer such jurisdiction upon the state courts, are unavailing for that purpose. (Overruling *Trevor v. Steamboat Ad. Hine*, 17-349): *The Hine v. Trevor*, 4 Wall., 555; *Walters v. Steamboat Mollie Dozier*, 24-192.

Petition: Under the provisions of the Revision, *held*, that the petition in such a proceeding *in rem* need not aver that the boat was within the jurisdiction of the state at the time suit was commenced. It is the service of the warrant that brings the property within the jurisdiction of the court. If the contract for the breach of which action is brought is violated within the waters of this state, and the boat is seized under warrant properly issued, the court will have jurisdiction although such contract was made elsewhere: *Baker v. Steamboat Milwaukee*, 14-214.

What charges enforcible: Under the provisions of Code of '51, which made certain charges a lien against the boat, *held*, that the seizure and sale of the boat under the laws of another state did not divest it of such lien: *Haight v. Steamboat Henrietta*, 4-472; *Ogden v. Ogden*, 13-176.

Also, *held*, that the boat was liable for money collected from consignments of goods for freight due a railroad company from whom the goods were received to be forwarded to their destination, and that such transaction was a "contract relative to the transportation of" freight: *Chicago, B. & Q. R. Co. v. Steamboat Woodsides*, 10-465.

The use of a barge may constitute a supply for which a claim against the boat may be enforced in such proceedings: *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398.

It is sufficient to allege that the contract was made with the boat: *West v. Barge Lady Franklin*, 2-522.

Under the provisions of Code of '51, *held*, that the remedy intended was not designed solely for the benefit of the party furnishing the supplies, but that a lien could be transferred by assignment and enforced by the transferee: *Strother v. Steamboat Hamburg*, 11-59.

Jurisdiction: A warrant and seizure of a boat thereunder is essential to confer jurisdiction upon the court. The proceeding is one *in rem: Ham v. Steamboat Hamburg*, 2-460.

4682. Petition and warrant. 3433. The original petition must be in writing, sworn to and filed with the clerk or the justice of the peace, who

shall thereupon issue a warrant to the proper officer, commanding him to seize the boat, its apparel, tackle, furniture, and appendages, and detain the same until released by due course of law. [R., § 3701; C., '51, § 2121.]

4683. Warrant issued on Sunday. 3434. And the warrant may be issued on Sunday, if the plaintiff, his agent or attorney, shall state in his petition and swear thereto, that it would be unsafe to delay proceedings till Monday. [R., § 3702.]

4684. Service of notice. 3435. It shall be sufficient service of the original notice in such an action, to serve it on the defendant, or on the master, agent, clerk or consignee of such boat; and if none of them can be found, the notice may be served by posting up a copy thereof on some conspicuous part of the boat. The warrant shall be served according to the direction it contains. [R., § 3703; C., '51, § 2122.]

4685. By whom served. 3436. Any constable or marshal of any corporate town may serve and execute the warrant provided for in said section, whether the same issue from the office of the clerk of the district [or circuit] court, or of a justice. [R., § 3704.]

4686. Who may appear for boat. 3437. Any person interested in the boat may appear for the defendant by himself, his agent or attorney, and conduct the defense of the suit, and no continuance shall be granted to the plaintiff while the boat is held in custody. [R., § 3705; C., '51, § 2123.]

4687. Discharge by giving bond. 3438. The boat may be discharged at any time before final judgment, by the giving a bond with sureties, to be approved by the officer serving the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with the costs. [R., § 3706; C., '51, § 2124.]

A formal entry of discharge under the bond is not necessary to render the principal and sureties liable thereon. Nor need the bond be formally approved if it is accepted by the officer and the boat released: *White v. Tisdale*, 12–75.

4688. Special execution. 3439. If judgment be rendered for the plaintiff before the boat is thus discharged, a special execution shall be issued against it. If it have been previously discharged, the execution shall issue against the principal and sureties in the bond without further proceedings. [R., § 3707; C., '51, § 2125.]

A judgment may be rendered against the boat, and at the same time against the sureties on a bond on which the boat has been discharged: *Ogden v. Ogden*, 13–176.

4689. What first sold. 3440. The officer may sell any of the furniture or appendages of the boat, if by so doing he can satisfy the demand. If he sell the boat itself, he must sell it to the bidder who will advance the amount required to satisfy the execution, for the lowest fractional share of the boat, unless the person appearing for the boat desire a different and equally convenient mode of sale. [R., § 3708; C., '51, § 2126.]

4690. Fractional share sold. 3441. If a fractional share of the boat be thus sold the purchaser shall hold such share or interest jointly with the other owners. [R., § 3709; C., '51, § 2127.]

4691. Appeal. 3442. If an appeal be taken by the defendant before the boat is discharged as above provided, the appeal bond, if one be filed, will have the same effect in discharging the boat as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner. [R., § 3710; C., '51, § 2128.]

4692. Saving clause. 3443. Nothing herein contained is intended to affect the rights of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted. [R., § 3711; C., '51, § 2129.]

4693. Petition. 3444. In actions commenced in accordance with the provisions of this chapter, it is sufficient to allege the contract to have been made with the boat itself. [R., § 3712; C., '51, § 2130.]

Section applied: *West v. Barge Lady Franklin*, 2-522.

RAFTS.

4694. Liability of. 3445. Any raft found in the waters of this state, shall be liable for all debts contracted by the owner, agent, clerk, or pilot thereof, on account of work done or services rendered for such raft. [R., § 3698.]

Under the provision of this section that any raft found in the waters of the state shall be liable for all debts contracted by the owner, agent, clerk or pilot thereof on account of work done or service rendered for such raft the lien referred to will attach under a contract with the pilot, although between him and the owner there is an agreement that the former shall bear all the expenses: *Hanson v. Hiles*, 34-350.

4695. Lien. 3446. Claims growing out of either of the above causes shall be liens upon the raft, its tackle, and appendages, for the term of twenty days from the time the right of action therefor accrued. [R., § 3699.]

4696. Action against raft. 3447. The action may be brought directly against the raft, and the same rules shall govern, and the same process shall be had in such action, as are in this chapter prescribed for actions against owners of boats. [R., § 3700.]

4697. Appearance; what deemed. 3448. The execution by or for the owner of such boat or raft, of a bond, whereby possession of the same is obtained or retained by him, shall be an appearance of such owner as a defendant to the action. [R., § 4130.]

CHAPTER 13.

OF HABEAS CORPUS.

4698. Petition. 3449. The petition for the writ of habeas corpus must be sworn to, and must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom, and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown, describing them with as much particularity as practicable;
2. The cause or pretense of such restraint, according to the best information of the applicant; and if it be by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;
3. It must state that the restraint is illegal, and wherein;
4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;
5. It must also state whether application for the writ has been before made to, and refused by, any court or judge, and if such application has been made, a copy of the petition in that case, with the reasons for the refusal thereto appended, must be produced, or satisfactory reasons given for the failure to do so. [R., § 3801; C., '51, § 2213.]

Civil proceeding: A *habeas corpus* proceeding is civil, not criminal, and should be instituted in the name of the person restrained, as plaintiff: *State v. Collins*, 54-441.

Who deemed plaintiff: The person restrained is to be regarded as the petitioner or plaintiff: *Ibid.*; *Thompson v. Oglesby*, 42-598; *Rivers v. Mitchell*, 57-193.

Jurisdiction: Where the allegations of the petition are sufficient to authorize the writ, the judge acquires jurisdiction of the parties and the subject-matter, and an order made by him will not be void, but at most voidable, and subject only to attack in a direct proceeding: *Shaw v. McHenry*, 52-182.

Right to office: If the officer issuing the writ under which the prisoner is restrained acted under color of office, the question whether he is such officer *de jure* cannot be raised in a *habeas corpus* proceeding, but *aliter* if he is a mere usurper without color of office. The right to an office cannot be contested in this proceeding: *Ex parte Strahl*, 16-369.

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

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

In extradition proceedings: The court may, on *habeas corpus*, inquire into the sufficiency of the evidence to support a requisition under the provisions as to extradition. The determination of the governor as to the sufficiency of the evidence is not conclusive: *Jones v. Leonard*, 50-106.

Custody of child: Proceedings by *habeas corpus* for the custody of a child are not criminal in their nature. The action should be in the name of the person alleged to be illegally restrained, and not in that of the state, and in case of failure to secure the discharge the costs should not be taxed to the county: *State v. Collins*, 54-441.

And see notes to §§ 3432 and 3433.

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57-193.

4699. By whom presented. 3450. The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ. [R., § 3802; C., '51, § 2214.]

4700. Writ. 3451. The writ of habeas corpus may be allowed by the supreme, district, [or circuit] court, or by any judge of either of those courts, and may be served in any part of the state. [R., § 3803; C., '51, § 2215.]

4701. Application; to whom made. 3452. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court, or a judge thereof. [R., § 3805; C., '51, § 2217.]

The person to be deemed the applicant is the one whose liberty is restrained and not the one by whom the petition may be presented on behalf of such person, if it is presented by another than the person restrained: *Thompson v. Oglesby*, 42-598.

If the proceeding is for the recovery of the custody of a child, it may be brought in any county wherein the sworn petition states that the child is to be found: *Rivers v. Mitchell*, 57-193.

4702. Writ refused. 3453. If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse to allow the writ. [R., § 3806; C., '51, § 2218.]

4703. Reasons indorsed. 3454. If the writ is disallowed, the court or judge shall cause the reasons of said disallowance to be appended to the petition and returned to the person applying for the writ. [R., § 3809; C., '51, § 2221.]

WRIT ALLOWED.

4704. Form of writ. 3455. But if the petition show a sufficient ground for relief, and is in accordance with the foregoing requirements, the writ shall be allowed, and may be substantially as follows:

THE STATE OF IOWA,

To the sheriff of, etc., [or to A—— B——. as the case may be.]

You are hereby commanded to have the body of C—— D——, by you unlawfully detained, as is alleged, before the court [or before me, or before E—— F——, judge, etc., as the case may be] at ——, on ——, [or immediately after being served with this writ], to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises. [R., § 3807; C., '51, § 2219.]

4705. How issued. 3456. When the writ is allowed by a court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, subscribing his name thereto without any seal. [R., § 3868; C., '51, § 2220.]

4706. Penalty for refusing. 3457. Any judge, whether acting individually or as a member of the court, who wrongfully and wilfully refuses such allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars. [R., § 3810; C., '51, § 2222.]

4707. On judge's own motion. 3458. Whenever any court or judge authorized to grant this writ, has evidence, from a judicial proceeding before them, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue or cause to be issued, the writ as aforesaid, though no application be made therefor. [R., § 3811; C., '51, § 2223.]

4708. County attorney notified. 3459. The court or officer allowing the writ, must cause the district [county] attorney of the proper county to be informed of the issuing of the writ, and of the time and place, where and when it is made returnable. [R., § 3828; C., '51, § 2240.]

Attorney to represent state: Where notice of the proceeding has not been given to the district attorney the court has no authority to appoint an attorney to represent the state and render the county liable for his fees: *Miller v. Buena Vista County*, 68-711.

SERVICE.

4709. By whom. 3460. The writ may be served by the sheriff, or by any other person appointed for that purpose, in writing, by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a non-performance of his duty, as though he were the sheriff. [R., § 3812; C., '51, § 2224.]

4710. Mode. 3461. The proper mode of service is by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service. [R., § 3813; C., '51, § 2225.]

4711. Defendant not found. 3462. If the defendant cannot be found, or if he have not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody, in the same manner and with the same effect as though he had been made defendant therein. [R., § 3814, C., '51, § 2226.]

4712. Power of officer. 3463. If the defendant conceal himself, or refuse admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county or the state, after the service of the writ as aforesaid, the sheriff, or the person who is attempting to serve, or who has served the writ as above contemplated, is authorized to arrest the defendant, and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable. [R., § 3815; C., '51, § 2227.]

4713. Arrest. 3464. In order to make such arrest, the sheriff or other person having the writ, possesses the same power as is given to a sheriff for the arrest of a person charged with a felony. [R., § 3816; C., '51, § 2228.]

4714. Plaintiff taken. 3465. If the plaintiff can be found and if no one appear to have the charge or custody of him, the person having the writ may take him into custody, and make return accordingly. And to get possession of the plaintiff's person in such cases, he possesses the same power as is given by the last section for the arrest of the defendant. [R., § 3817; C., '51, § 2229.]

4715. Want of form. 3466. The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defend-

ant, provided enough is stated to show the meaning and intent of the writ. [R., § 3822; C., '51, § 2234.]

4716. Penalty for eluding. 3467. If the defendant attempt to elude the service of the writ of habeas corpus, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars. And any person knowingly aiding or abetting in any such act, shall be subject to the like punishment. [R., § 3841; C., '51, § 2253.]

4717. Refusal to give copy of process. 3468. An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody, to any person who demands such copy, and tenders the fees therefor, shall forfeit two hundred dollars to the person so detained. [R., § 3842; C., '51, § 2254.]

PRECEPT.

4718. When to issue. 3469. The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings as above authorized, may issue a precept to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge. [R., § 3818; C., '51, § 2230.]

4719. Evidence. 3470. When the evidence aforesaid is farther sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the precept must also contain an order for the arrest of the defendant. [R., § 3819; C., '51, § 2231.]

4720. How served. 3471. The officer or person to whom the precept is directed, must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued. [R., § 3820; C., '51, § 2232.]

4721. Examination. 3472. The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case. [R., § 3821; C., '51, § 2233.]

PLEADINGS — TRIAL — JUDGMENT.

4722. Presumption. 3473. Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description or to another person. [R., § 3823; C., '51, § 2235.]

4723. Appearance. 3474. Service being made in any of the modes hereinbefore provided, the defendant must appear at the proper time and answer the said petition, but no verification shall be required to the answer. [R., §§ 3824, 4182; C., '51, § 2236.]

4724. Body of plaintiff. 3475. He must also bring up the body of the plaintiff, or show good cause for not doing so. [R., § 3825; C., '51, § 2237.]

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57-193.

4725. Penalty. 3476. A wilful failure to comply with the above requisitions, renders the defendant liable to be attached for contempt, and to be imprisoned till a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved. [R., § 3826; C., '51, § 2238.]

4726. Attachment. 3477. Such attachment may be served by the sheriff, or any other person thereto authorized by the judge, who shall also be empowered to bring up the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases. [R., § 3827; C., '51, § 2239.]

4727. Answer. 3478. The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so, the cause thereof. [R., § 3829; C., '51, § 2241.]

4728. Transfer of plaintiff. 3479. If he has transferred him to another person, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor. [R., § 3830; C., '51, § 2242.]

4729. Copy of process. 3480. If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed. [R., § 3831; C., '51, § 2243.]

4730. Demur or reply. 3481. The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court. [R., § 3832; C., '51, § 2244.]

Method of trial: The trial is to be as in ordinary proceedings: *Drumb v. Keen*, 47-435.

Appeal: Therefore, upon appeal, the case will not be tried *de novo: Shaw v. Nachtwey*, 43-653.

The finding of the lower court as to the facts will have the effect of a verdict of the jury as in other cases by ordinary proceeding: *Drumb v. Keen*, 47-435; *Jennings v. Jennings*, 56-288; *Bonnett v. Bonnett*, 61-199; *Fouts v. Pierce*, 64-71.

The supreme court will reverse the action of the lower court as to its finding of facts only where such finding is manifestly unsupported by the evidence: *Kline v. Kline*, 57-386; *Jenkins v. Clark*, 71-552.

But the court may review the correctness of the action of the lower court as based upon its finding of facts: *Shaw v. Nachtwey*, 43-653.

The officer against whom the action is brought has, it would seem, sufficient interest to be allowed to appeal: *Jackson v. Boyd*, 53-536.

The taking of an appeal from an order of discharge and filing a *supersedeas* bond does not stay the order of discharge: *State v. Kirkpatrick*, 54-373.

Action of a judge may be appealed from: See § 4394.

4731. Commitment questioned. 3482. Such replication may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge in connection with any other testimony which may then be produced. [R., § 3833; C., '51, § 2245.]

The fact that the person arrested and brought before a committing magistrate waives preliminary examination does not debar him from the privilege of introducing evidence in a *habeas corpus* proceeding to question the sufficiency of the testimony to warrant his commitment: *Cowell v. Patterson*, 49-514.

It is not competent for plaintiff seeking to be released by *habeas corpus* from commitment on preliminary examination to state in his petition the substance of the evidence before the committing magistrate, and, by having defendant admit the correctness of such evidence, thereby make up the case which is to be presented to the court: *State ex rel. v. Rosencrans*, 65-382.

4732. Action of grand jury. 3483. But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner. [R., § 3834; C., '51, § 2246.]

Where prisoner is held under indictment: An indictment is presumptive evidence of the guilt of the prisoner, and, if it is for a capital offense, bail may be denied when applied for by *habeas corpus*. The court cannot be required in such cases to look behind the indictment and consider the evidence on which it was found: *Hight v. United States*, Mor., 407.

In case of contempt: Imprisonment for disobedience of an order of court which is erroneous only and not void cannot be in-

quired into by *habeas corpus: Ex parte Grace*, 12-208.

One court will not interfere by *habeas corpus* with proceedings in another court to punish a party for contempt, unless such proceedings are so grossly irregular as to be void: *Ex parte Holman*, 28-88; *Robb v. McDonald*, 29-350.

The supreme court cannot in a *habeas corpus* proceeding review an order of imprisonment for contempt and reverse it, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law that it was not a contempt: *State ex rel. v. Seaton*, 61-563.

After conviction by a court having jurisdiction, though such conviction be irregular or erroneous, the party is not entitled to the writ, and this is true of a conviction before a magistrate; and where the defendant was found guilty before the proper police magistrate of a city for violation of an ordinance of such city, and sentenced to imprisonment, *held*, that he could not be released on the ground that the ordinance under which he was convicted was invalid: *Platt v. Harrison*, 6-79.

Proceedings in another court having jurisdiction of the subject-matter and the person cannot be inquired into or corrected by a *habeas corpus* proceeding: *Ex parte Holman*, 28-88; *Zelle v. McHenry*, 51-572.

A judgment which is authorized by law, rendered in a court having jurisdiction, cannot be questioned by *habeas corpus*. Therefore, *held*, that a judgment of the lower court could not be attacked by *habeas corpus* on the ground that the judge had refused a change of venue and a jury trial: *Zelle v. McHenry*, 51-572.

The order of a judge having jurisdiction of the parties and the subject-matter, not being void, but, at most, voidable, cannot be set aside or evaded in a *habeas corpus* proceeding before another court or judge: *Shaw v. McHenry*, 52-182.

Habeas corpus cannot be invoked for the purpose of obtaining relief for mere errors and irregularities in the action of the court. Where the person has had a trial as to whether he was guilty of the crime for which he is imprisoned, the question of whether he committed the crime cannot be again determined upon *habeas corpus*, nor can an erroneous taxation of costs be questioned in that manner: *State v. Orton*, 67-554.

An attack by *habeas corpus* upon the validity of a judgment is of a collateral character, and cannot be sustained unless the judgment is void: *Turney v. Barr*, 38 N. W. Rep., 550.

Proceedings in federal court: A state court cannot, on *habeas corpus*, release a person held in custody by the United States marshal by order of a federal court: *Ex parte Holman*, 28-88.

4733. Discharge. 3484. If no sufficient legal cause of detention is shown the plaintiff must be discharged. [R., § 3835; C., '51, § 2247.]

The provisions of § 4134 as to certain orders of a judge made in vacation, that they shall be in force only during vacation and the first two days of the ensuing term of court, does not apply to the order in a *habeas corpus* proceeding made during vacation: *Shaw v. McHenry*, 52-182.

When an order of discharge is made, no further proceedings are to be had: *State v. Kirkpatrick*, 54-373.

Costs: Where defendant is successful it is not proper to tax the costs to the county, nor to the person restrained where the application is made by another for his release, and it does not appear that the proceedings were brought by his consent. Whether they should be taxed to the person instituting the proceedings, *quære: State v. Collins*, 54-441.

4734. Irregularity of commitment. 3485. Although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them, that he ought to be held to bail, or committed either for the offense charged, or any other, the order may be made accordingly. [R., § 3836; C., '51, § 2248.]

A defect in the warrant of commitment will not entitle the prisoner to discharge if the court or jury is satisfied from the evidence that the prisoner ought to be committed for the offense charged, or any other, and in such case the prisoner should be remanded into custody and a proper order made in relation to the case. *Jackson v. Boyd*, 53-536.

4735. Bail increased or diminished. 3486. The plaintiff may also, in any case, be committed, let to bail, or his bail be mitigated or increased, as justice may require. [R., § 3837; C., '51, § 2249.]

4736. Defendant retained in custody. 3487. Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose. [R., § 3838; C., '51, § 2250.]

4737. Right to be present waived. 3488. The plaintiff, in writing, or his attorney, may waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ will in such cases be modified accordingly. [R., § 3839; C., '51, § 2251.]

4738. Disobeying order. 3489. Disobedience to any order of discharge subjects the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience. [R., § 3840; C., '51, § 2252.]

4739. Papers filed with clerk. 3490. When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a brief memorandum thereof shall be entered by the clerk upon his judgment docket. [R., § 3843; C., '51, § 2253.]

CHAPTER 14.

OF CONTEMPTS.

4740. What deemed. 3491. The following acts or omissions are deemed to be contempts, and are punishable as such by any of the courts of this state, or by any judicial officer acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;
2. Any wilful disturbance calculated to interrupt the due course of its official proceedings;
3. Illegal resistance to any order or process made or issued by it;
4. Disobedience to any subpœna issued by it and duly served, or refusing to be sworn, or to answer as a witness;
5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending;
6. Any other act or omission specially declared a contempt by law. [R., § 2688; C., '51, § 1598.]

Jurisdiction: In the absence of statute, each court of record is the sole and final judge in matters of contempt with reference to its proceedings: *First Cong. Church v. Muscatine*, 2-69.

The visiting committee of an insane hospital has no authority under the Code to punish a witness for contempt for refusing to testify when summoned before it: *Brown v. Davidson*, 59-461.

Nature of proceeding: The proceeding to punish a contempt of process is merely incidental to, and, to a great extent, independent of, the original proceeding in which it may be invoked. It is in its nature criminal: *First Cong. Church v. Muscatine*, 2-69.

An action for contempt is a criminal action, and if in the federal courts the United States is a party thereto: *Durant v. Supervisors*, Woolworth, 377.

Contempt of court: Contemptuous or insolent behavior as here contemplated must be toward the court while it is engaged in judicial duty, and such behavior must tend to impair the respect due to its authority in order that such acts may be punishable as contempt: *Dunham v. State*, 6-245.

If by general rule, or by special rule made as to some cause on trial, a publication of the testimony pending the investigation has been prohibited, a wilful violation of such rule might amount to contempt on the ground that it would be a resistance to the rule thus made, and especially if the rule itself declared such act a contempt: *Ibid.*

It would seem that the provisions of the Code must be regarded as a limitation upon the power of courts to punish for any other contempts than those therein specified: *Ibid.*

The publication of newspaper comments upon the decision of a court when the case is disposed of and the decision announced are not punishable as contempt: *Ibid.*

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

Argument by attorney: After the decision of the court has been made the time for argument in reference thereto has passed, and an attorney cannot, except by asking and obtaining leave, further argue the question or deny the statements of the court with refer-

ence to the facts involved in such determination: *Russell v. French*, 67–102.

Violation of injunction: The writ of injunction, for the violation of which the proceedings are instituted, need not be filed in the proceeding: *Jordan v. Circuit Court*, 69–177.

While the provision for a fine of $500 for violation of an injunction prohibiting the sale of intoxicating liquors is extraordinary in amount, it is not in that respect unconstitutional: *Ibid.*

Attachment for contempt is the proper mode of enforcing obedience to a continuing order in the nature of a mandatory injunction: *State v. Baldwin*, 57–266.

In replevin: The judge is authorized in vacation to punish as contempt an unlawful obstruction or hindrance to an order for the taking of property: *State v. Myers*, 44–580.

In mandamus: Where a writ of *mandamus* to collect a tax is disobeyed by the board of supervisors, but one action for contempt is allowed against them, and that a joint action. If the board are severally proceeded against, the actions may be consolidated so long as the act charged is disobedience of the same writ of *mandamus: Durant v. Supervisors*, Woolworth, 377.

Action against receiver: It is contempt to bring an action in a state court against a receiver appointed by a federal court without first obtaining leave of the court appointing the receiver. It is immaterial whether the property is thereby disturbed or not: *Thompson v. Scott*, 4 Dillon, 508.

Refusal to make affidavit: A witness may be punished for contempt in refusing to make an affidavit, and to answer questions as provided by §§ 4943, 4944, and the fact that the affidavit desired would not be legally admissible in the proceeding in which it is sought is no excuse for such refusal: *Robb v. McDonald*, 29–330; *State ex rel. v. Seaton*, 61–563.

Refusal to disclose property: See § 4374.

Attachment of witness: A party cannot take advantage of the refusal of the court to attach a witness for contempt who refuses to produce evidence: *Manning v. Perkins*, 16–71.

4741. In courts of record. 3492. In addition to the above, any court of record may punish the following acts or omissions as contempts:

1. Failure to testify before a grand jury, when lawfully required to do so;
2. Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority;
3. Misbehavior as a juror, by improperly conversing with a party, or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court;
4. Disobedience by an inferior tribunal, magistrate, or officer, to any lawful judgment, order, or process of a superior court, or proceeding in any matter contrary to law, after it has been removed from such tribunal, magistrate, or officer. [R., § 2689; C., '51, § 1599.]

4742. How punished. 3493. The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars. [R., § 2690; C., '51, § 1600.]

The court cannot punish an attorney for contempt by revoking or suspending his license. That can only be done in the manner provided by § 295 *et seq.: State v. Start*, 7–499.

Nor can it, by summary proceeding for contempt, compel a party to deliver to the sheriff a key or property claimed by another: *S. C.*, 7–501.

A judge may, in vacation, impose the same punishment for contempt as if he were acting in court: *State v. Myers*, 44–580.

The judge or court imposing a fine for contempt may direct imprisonment of defendant until such fine be paid; the extent of imprisonment being limited by the directions of § 5894: *Ibid.*

A party who is in contempt has no right to be heard in defense of the action in which the contempt has been adjudged, but failure to pay money awarded as temporary alimony for which judgment has been entered does not constitute contempt in this respect: *Baily v. Baily*, 69–77.

A proceeding for contempt for violating an order of injunction issued in an equity case may be prosecuted in a court of equity. The same court must inflict the punishment for contempt in which the order violated is granted: *Manderscheid v. District Court*, 69–240.

It is proper to conduct the proceedings for contempt under the title of the cause out of which the contempt arises: *Ibid.*

Any irregularity in serving a rule to show cause against punishment for contempt will be waived by the appearance of the party: *Ibid.*

A party charged with contempt has not a right to a jury trial although the act charged also constitutes a crime. The punishment for the contempt is not a punishment of the act as a crime, and the crime may be separately punished: *Ibid.*

In a proceeding against an attorney for contempt the accusation should specify the manner in which he was disrespectful to the court. If it was done by insulting language, the words used by the accused should be given; if by disrespectful acts, those acts should be described so that the accused may know what words or acts he is required to meet. In a

particular case, *held*, that the charge of contempt "in disobeying the orders of your Honor while engaged in your official capacity" was not sufficiently specific: *Perry v. State*, 3 G. Gr., 550.

In such case the finding or judgment should specify the particular charge or charges upon which the attorney's guilt is pronounced: *Ibid.*

4743. Imprisonment. 3494. But if the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment. [R., § 2691; C., '51, § 1601.]

4744. When affidavit necessary. 3495. Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises. [R., § 2692; C., '51, § 1602.]

The affidavit here required need not show that affiant has personal knowledge of the facts: *Jordan v. Circuit Court*, 69-177.

4745. Notice to show cause. 3496. Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved. [R., § 2693; C., '51, § 1603.]

Arrest: While it is true that proceedings to punish for contempt are in a certain sense of a criminal nature, they are not governed by the code of criminal procedure, but by a special statute, and under such provisions it is sufficient to serve a rule upon defendant to show cause against the punishment, and the court is not bound to secure the arrest of defendant and his personal presence before proceeding against him: *Jordan v. Circuit Court*, 69-177.

Where the proper order had been served upon defendant, *held*, that the court might proceed to take evidence, although defendant was not present personally or by counsel: *Ibid.*

A warrant may be made returnable on a certain day, which may be at a subsequent term, and it may direct the arrest of a person in contempt, in vacation, and provide for his release on bail: *State v. Archer*, 48-310.

Excuse or explanation: Where a reasonable time is asked to prepare a written explanation it should be granted: *State v. Duffy*, 15-425.

Upon a proceeding for an alleged contempt in failing to obey an order of court, defendant may by answer show that there was no contempt in fact by reason of the impossibility of performing the required act. He is not required to proceed by appeal or otherwise for a modification of the original order: *Hogue v. Hayes*, 53-377.

A party cannot, in a proceeding for contempt for disobedience to a judicial order rendered by a court having jurisdiction, call in question the correctness of the order itself. The only legitimate inquiry in such case is, did the court have jurisdiction, and did it make an order which has been violated: *State v. Baldwin*, 57-266.

It is improper to punish for contempt, even when committed in the presence of the court, without giving the offending party opportunity to make a written explanation of his conduct under oath for the purpose of excusing the contempt or reducing the punishment, and such reasonable opportunity must be given before the party is adjudged guilty of contempt and punishment therefor is inflicted. When the court deems that a contempt of its authority has been committed in its presence, the attention of accused should be called thereto and a reasonable time fixed within which he may make the written explanation contemplated by the statute. He should not be called upon to do so on the instant when the accusation is made, unless the emergency is more than ordinarily great: *Russell v. French*, 67-102.

Where the statement of an administrator, required by order of court to pay over money received by him as such, shows the receipt of such money, but does not show its disbursement upon lawful claims, he does not purge himself of contempt by showing that he has disbursed the money upon claims not lawfully presented and allowed, and that he has no money of his own with which to satisfy the claim against him: *Wise v. Chaney*, 67-73.

Hearing: Where it is complained that after appearance of defendant in answer to a citation to show cause the case is set down for hearing at such time as not to allow defendant sufficient opportunity to prepare therefor, he should make a special showing for postponement: *Jordan v. Circuit Court*, 69-177.

Contempt proceedings cannot be tried by jury; but as to the doing of the act, *quære: McDonnell v. Henderson*, 74-619.

4746. Testimony reduced to writing. 3497. Where the action of the court is founded upon evidence given by others, such evidence must be in writ-

ing, and be filed and preserved, and if the court act upon their own knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record. [R., § 2694; C., '51, § 1604.]

These provisions apply to all proceedings for contempt, including those for refusing to deliver property under a writ of replevin (§ 4463): *State v. Myers*, 44-580.

An order entering a fine for contempt will be reversed when a statement of facts, upon which the order is founded, is not entered on the record in a case where the court acts upon its own knowledge: *State v. Utley*, 13-593; *Skiff v. State*, 2-550; *State v. Dougherty*, 32-261.

Where neither the record nor the warrant of commitment shows upon what evidence or facts an order of commitment is based, nor whether the same were within the knowledge of the court, the order will be reversed on *certiorari: State v. Folsom*, 34-583.

Although a failure of the judge to file and preserve a statement of the facts on which the order of contempt is founded will render the contempt invalid, yet where the transcript of the examination of a witness showing the questions asked, and the refusal to answer was filed by the judge with his certificate, *held*, that it constituted a sufficient compliance with the requirements of the statute, although the transcript was made afterwards by a short-hand writer from notes taken at the time: *Lutz v. Aylesworth*, 66-629.

As to examination of witnesses in proceedings for contempt of injunction in liquor cases, see § 2387.

In a proceeding for contempt for publishing false, scandalous and defamatory articles in relation to the judge of the court, it is proper to hear testimony of witnesses as to the meaning and intent of the articles, and whether the same in their opinion referred to or meant the court or the judge thereof: *Henry v. Ellis*, 49-205.

The writ of injunction for the violation of which the proceedings are instituted need not be filed in the proceeding: *Jordan v. Circuit Court*, 69-177.

4747. Warrant; statement of. 3498. When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court, or was proved by witnesses. [R., § 2695; C., '51, § 1605.]

In a particular case, *held*, that the warrant of commitment for violating an injunction sufficiently recited the facts and circumstances on which the court acted in making the order: *Goetz v. Stutsman*, 73-693.

See, also, notes to preceding section.

4748. Certiorari. 3499. No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari. [R., § 2696; C., '51, § 1606.]

This special provision controls the general provision as to appeals, and extends to contempts by disobedience of injunction as well as other process: *First Cong. Church v. Muscatine*, 2-69.

Section applied: *Dunham v. State*, 6-245.

4749. No bar to indictment. 3500. The punishment for a contempt constitutes no bar to an indictment; but if the offender is indicted and convicted for the same offense, the court in passing sentence must take into consideration the punishment before inflicted. [R., § 2697; C., '51, § 1607.]

4750. "Court" defined. 3501. Any officer authorized to punish for contempt, is a court within the meaning of this chapter. [R., § 2698; C., '51, § 1608.]

CHAPTER 15.

OF CHANGING NAMES.

4751. By courts. 3502. The district [or circuit] court has power to change the names of persons in the following manner: [R., § 3844; C., '51, § 2256.]

4752. Petition. 3503. The applicant for such change must file his petition verified by his oath, stating that he is a resident of the county and has for one year then last past, been an actual resident of the state. It must also give a description of his person, stating his age, height, the color of his hair

and eyes, the place of his birth, and who were his parents. [R., § 3845; C., '51, § 2257.]

4753. Order. 3504. An order of the court shall thereupon be made and entered of record, giving a description of the applicant as set forth in the petition, the new name given, the time at which the change shall take effect, which shall not be less than thirty days thereafter, and directing in what newspaper of general circulation in the county, notice of such change shall be published. [R., § 3846; C., '51, § 2258.]

4754. Publication. 3505. Previous to the time thus prescribed for the taking effect of such change, the applicant shall cause notice thereof to be published for four successive weeks in the newspaper directed by the court. [R., § 3847; C., '51, § 2259.]

4755. Proof filed. 3506. The ordinary proof of such publication being filed in the office of the clerk of the court, shall be by him filed for preservation, and on the day fixed by the court as aforesaid the change shall be complete. [R., § 3848; C., '51, § 2260.]

TITLE XXI.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

4756. Jurisdiction. 3507. The jurisdiction of justices of the peace, when not specially restricted, is co-extensive with their respective counties; but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand five hundred and thirteen of this chapter [§ 4762]. [R., § 3849; C., '51, § 2261.]

Limited: Justices of the peace having no powers except as given them by statute possess only limited jurisdiction, and their official acts, to be valid, must be in accordance with the provisions of statute: *Cook v. United States*, 1 G. Gr., 39.

Must appear: In a court of inferior jurisdiction such as that of a justice of the peace, the record must show the facts which confer the jurisdiction or his judgment is void: *Goodrich v. Brown*, 30–291.

Action against resident of another county; consent: A justice does not acquire jurisdiction over an action against a resident of another county, even though he appear and proceed to trial without objection: *Chapman v. Morgan*, 2 G. Gr., 374; *Boyer v. Moore*, 42–544; *McMeans v. Cameron*, 51–691.

A failure to raise this objection before the justice of the peace before whom the action is properly brought does not prevent a party from raising it on appeal: *McMeans v. Cameron*, 51–691.

Service within township: The justice does not acquire jurisdiction by notice served in the township where suit is brought, upon a resident of another county, and a judgment rendered thereon is void. Defendant is not required to appear and plead, suggesting want of jurisdiction: *Hamilton v. Millhouse*, 46–74.

Attachment: If the suit is for money against an actual resident of another county, the fact that an attachment is sought against property in the county in which suit is brought will not confer jurisdiction: *Gates v. Wagner*, 46–355.

What constitutes residence in the county: A resident of one county went with his family to another county to reside there temporarily, boarding at a hotel while building a school-house under a contract, with intention of returning to his former home when the work was completed. *Held*, that he did not become a resident of the latter county so as to give a justice of the peace of that county jurisdiction in an action against him: *Bradley v. Fraser*, 54–289.

It is actual and not legal residence that is contemplated by the statute. The fact that defendant's domicile is in another county than that in which suit is brought does not prove that he is an actual resident of such other county, though that may be his legal residence. Therefore, *held*, that a contractor upon a railroad who had resided in another county for seven years, and was absent from that county only for the purpose of constructing such railroad, and expected to return to that county as soon as the job upon which he was at work should be completed, was not an actual resident of such other county within the meaning of this section, it appearing that he was living and keeping house with his family during the time that he was performing his contract in the county where suit was brought: *Fitzgerald v. Arel*, 63–104.

A person may be engaged in business in a county and personally present superintending it, and yet not be an actual resident of the county: *Fitzgerald v. Grimmell*, 64–261.

Suits against copartners: Where suit is brought before a justice of the peace against two persons jointly, as partners, and one of such partners is resident of another county, the justice of the peace acquires no jurisdiction as to such partner by service upon him in the county of his residence. The justice may acquire jurisdiction to render judgment against the firm by service upon the resident partner, but not as against the non-resident partner individually: *Ebersole v. Ware*, 59–663.

And see notes to § 3790.

Actions against corporations: See notes to §§ 3787 and 3789.

4757. Amount in controversy. 3508. Within the prescribed limit it extends to all civil cases, except cases by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties, it may be extended to any amount not exceeding three hundred dollars. [R., § 3850; C., '51, § 2262.]

No equitable jurisdiction: A justice has no equitable jurisdiction: *David v. Ryan*, 47–642, 646.

Therefore, *held*, that where an action was brought before a justice upon a note blank as to amount, the plaintiff could not, on appeal, ask a reformation of the note and judgment thereon as reformed, for the reason that he thereby sought to introduce an equitable cause of action which could not be tried before a justice: *Hollen v. Davis*, 59–444.

Jurisdiction not exclusive: The jurisdiction of justices over cases where the amount does not exceed one hundred dollars is not exclusive: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 593; *Chapman v. Morgan*, 2 G. Gr., 374.

Amount in controversy; claim: The amount claimed, and not the amount appearing to be due on the instrument in suit, is the criterion for jurisdiction: *Stone v. Murphy*, 2–35.

Determined by pleadings, not by judgment: If the amount in controversy, as shown by the pleadings, exceeds one hundred dollars, the justice has no jurisdiction even to render judgment for one hundred dollars or less: *Gillett v. Richards*, 46–652.

Where the notice shows that the claim is for more than one hundred dollars, defendant may properly disregard it, and nothing can afterwards be done by the plaintiff by which the justice can acquire jurisdiction; and in such a case, *held*, that if such defendant appeared and demurred to the jurisdiction, the plaintiff could not give the justice jurisdiction by filing his petition for an amount within the jurisdiction of the justice: *Hynds v. Fay*, 70–433.

Where the amount claimed by the plaintiff is such as to bring the case within the jurisdiction of a justice of the peace. the fact that he erroneously renders judgment for an amount in excess of his jurisdiction will not render his judgment void, and the excess may be remitted: *Reed v. Shum*, 63–378.

Account: In an action on account for a balance within the jurisdiction of a justice, the entire account is in controversy, although the recovery cannot exceed the amount claimed: *Hall v. Biever*, Mor., 113.

Attorney's fee: The amount of attorney's fee provided for in the note is not to be taken into consideration in determining the amount in controversy, the attorney's fee being part of the costs: *Spiesberger v. Thomas*, 59–606.

Counter-claim: In determining the amount in controversy it is not proper to add together the amounts of the original claim and of a counter-claim: *Madison v. Spitznogle*, 58–369.

Interest included: Where the claim stated in the notice was for one hundred dollars with interest and costs, *held*, that such a statement entitled plaintiff to interest on the amount demanded from the time of commencement of suit, and therefore the amount claimed was over one hundred dollars, and the justice had no jurisdiction: *Galley v. Tama County*, 40–49.

Determined by petition: But where the petition claimed one hundred dollars, and the notice stated that that amount was claimed, but also stated that unless defendant appeared, etc., judgment would be rendered "for the whole amount with interest and costs," *held*, that the amount claimed did not exceed one hundred dollars, and the justice had jurisdiction: *Moran v. Murphy*, 49–68.

Consent to jurisdiction beyond one hundred dollars: A clause in a note giving a justice of the peace jurisdiction in an action thereon to the amount of three hundred dollars will entitle plaintiff to bring action thereon before any justice who, but for the amount in controversy, would have had jurisdiction without such clause. The execution of such note and its acceptance by payee constitute a sufficient consent to give the justice jurisdiction: *Marshalltown Bank v. Kennedy*, 53–357.

Where a note dated and payable at Des Moines recited that judgment might be taken thereon "before any justice in said county,' the only county mentioned therein being that of the maker's residence, Dallas county, *held*, that the specification did not operate to give a justice of the peace in Polk county, before whom action was properly brought, jurisdiction of the case to an amount in excess of the amount of one hundred dollars: *Brown v. Davis*, 59–641.

Attorney's fee: Where the claim was for three hundred dollars, on a promissory note with attorney's fees, it being stipulated in such note that a justice of the peace should have jurisdiction thereof, *held*, that the claim as to attorneys' fees was merely descriptive of the note and did not make the amount in controversy greater than three hundred dollars: *Long v. Loughran*, 41–543.

It is the fact of consent which gives the justice jurisdiction where the amount in controversy exceeds one hundred dollars, and if such fact exists, his judgment for more than that amount will be valid even though no record of the fact of consent appears: *Schlisman v. Webber*, 65–114.

In an attachment proceeding the amount in controversy is the claim plaintiff seeks to enforce, and not the value of the attached property: *Hoppe v. Byers*, 39–573.

Garnishment: If the judgment is for an amount within the jurisdiction of the justice, he may, in a proper proceeding, render judgment against a garnishee for the entire amount due under such judgment, although, by reason of costs, the judgment against the garnishee exceeds the sum for which the justice may render judgment in an original action. The proceeding by garnishment is merely auxiliary to the original judgment and follows it as an incident for its enforcement: *Gillett v. Richards*, 46–652; *Hodge v. Ruggles*, 36–42.

A justice of the peace, who has jurisdiction of the indebtedness which is sought to be recovered by reason of consent of parties, where the amount in controversy exceeds one hundred dollars, has also jurisdiction of an attachment proceeding auxiliary thereto, although there is no consent to jurisdiction for more than one hundred dollars as to the attachment: *Houghton v. Bauer*, 70–314.

WHERE SUITS MAY BE BROUGHT.

4758. Where parties reside. 3509. Suits may in all cases be brought in the township where the plaintiff or defendant, or one of several defendants, resides. [R., § 3851; C., '51, § 2263; 12 G. A., ch. 149.]

A trial had before the proper justice, but taking place outside of his township, by consent of parties, *held* not to be void for want of jurisdiction: *Rogers v. Loop*, 51–41.

That a suit before a justice is brought in the wrong township is not ground for change of venue. Such fact should be pleaded in abatement. Whether a motion to dismiss would be proper in such case, *quære: Meunch v. Breitenbach*, 41–527.

4759. Where served. 3510. They may also be brought in any other township of the same county, if actual service on one or more of the defendants is made in such township. [R., § 3852; C., '51, § 2264.]

Defendant may be sued in any township where service is obtained on him, provided he be a resident of the county: *Klingel v. Palmer*, 42–166.

Service of notice upon defendant in his own township will not give the justice jurisdiction of defendant in an action brought in another township of the same county, but the justice having jurisdiction of the subject-matter may acquire jurisdiction of defendant by appearance: *Auspach v. Ferguson*, 71–144.

4760. To recover personal property; attachment. 3511. Actions to recover personal property, and suits commenced by attachment, may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county. [R., § 3853; C., '51, § 2265.]

In such cases the jurisdiction of a justice is not limited to the township in which the defendant resides, or in which the property may be found, but is co-extensive with the county: *Leversee v. Reynolds*, 13–310; *Biddle v. Allender*, 14–410.

The justice has jurisdiction throughout the county without regard to the particular township in which the parties reside or the property is situated. (Overruling *Meunch v. Breitenbach*, 41–527): *Knowles v. Picket*, 46–503.

But the justice does not have jurisdiction of an action for the recovery of money against a resident of another county, although an attachment is sought in such action against property in the county where suit is brought: *Gates v. Wagner*, 46–355.

Removal of property from county: These provisions relate to the location of the property at the time the case is commenced, and not at the time it is seized under the writ. The removal of the property from the county after the commencement of the action, but before seizure, will not defeat the jurisdiction of the justice or the right to levy on the property: *Craft v. Franks*, 34–504.

4761. Non-resident. 3512. If none of the defendants reside in the state, suit may be commenced in any county and township wherein either of the defendants may be found. [R., § 3854; C., '51, § 2266.]

4762. Contracts in writing. 3513. On written contracts, stipulating for payment at a particular place, suit may be brought in the township where the payment was agreed to be made. [R., § 3855; C., '51, § 2267.]

A justice may entertain jurisdiction in a suit upon a written contract stipulating for payment in his township, although the defendant be a resident of another county, and not served within the township where the suit is brought: *Klingel v. Palmer*, 42–166; *Baker v. Jamison*, 73–698.

For similar provisions as to courts of record, see § 3786.

4763. In adjoining township. 3514. If there is no justice in the proper township qualified or able to try the suit, it may be commenced in any adjoining township in the same county. [R., § 3856; C., '51, § 2268.]

JUSTICE'S DOCKET.

4764. What entered upon. 3515. Every justice of the peace shall keep a docket in which shall be entered, in continuous order, with the proper date to each act done:

1. The title to each cause;

2. A brief statement of the nature and amount of the plaintiff's demand, and defendant's counter-claim, if any, giving date to each where dates exist;

3. The issuing of the process, and the return thereof;
4. The appearance of the respective parties;
5. Every adjournment, stating at whose instance and for what time;
6. The trial, and whether by the justice or by a jury;
7. The verdict and judgment;
8. The execution, to whom delivered, the renewals, if any, and the amount of debt, damages, and costs indorsed thereon;
9. The taking and allowance of an appeal, if any;
10. The giving a transcript for filing in the clerk's office, or for counterclaim, if one is given;
11. A note of all motions made, and whether refused or granted. [R., § 3857; C., '51, § 2269.]

The provision of ¶ 3 is directory, and the failure to note the return of an execution, before judgment against a garnishee garnished thereunder, cannot be taken advantage of by the garnishee to reverse a judgment against him: *Houston v. Walcott*, 1-86. Also, *held*, that failure of the justice to note in his docket the return of notice would not affect his jurisdiction: *Bridges v. Arnold*, 37-221.

The last subdivision does not refer to motions made on the trial to exclude evidence. Objections to evidence, and rulings thereon, need not be entered on the docket: *Miller v. O'Neal*, 9-446.

An entry in the docket in the taking the allowance of the appeal, being an entry required to be made, will prevail over the entry on an appeal bond as to the date of filing and approving the same where the two are in conflict: *Moore v. Manser*, 9-47.

SUITS — HOW BROUGHT.

4765. Parties; proceedings. 3516. The parties to the action may be the same as in the circuit [district] court, and all the proceedings prescribed for that court, so far as the same are applicable and not herein changed, shall be pursued in justices' courts. The powers of the court are only as herein enumerated. [R., § 3858; C., '51, § 2270.]

A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph Mfg. Co. v. Harrington*, 53-380.

The provisions of § 4084 for retrial of actions where service is by publication are, under this section, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

The last sentence of the section refers to title 21 of the Code, and not to the Code as a whole: *Fitzgerald v. Grimmell*, 64-261.

4766. Appearance; notice. 3517. Actions in justices' courts are commenced by voluntary appearance or by notice. [R., § 3859; C., '51, § 2271.]

Voluntary appearance gives the justice jurisdiction as to the party without any service of notice whatever: *Acres v. Hancock*, 4-568.

The appearance waives any defect in the notice: *Houston v. Walcott*, 1-86.

Appearance by motions for continuance and for change of venue waives objection to the notice or service: *Shaffer v. Trimble*, 2 G. Gr., 464.

Special appearance to object to sufficiency of service of notice confers jurisdiction: *Church v. Crossman*, 49-444.

An appearance to cross-examine witnesses, even though general appearance is disclaimed, will confer jurisdiction: *Rahn v. Greer*, 37-627.

Where the attorney of defendant was present at the time set for trial and asked to look at the papers, and told the justice that he had no jurisdiction or authority to try the case, *held*, that these acts did not constitute an appearance giving the justice jurisdiction: *Holmes v. Hull*, 48-177.

As to appearance by agent, see § 4773.

Where the justice has not jurisdiction of the subject-matter, voluntary appearance will not confer jurisdiction; for instance, where defendant is a resident of another county: *McMeans v. Cameron*, 51-691; *Boyer v. Moore*, 42-544; *Chapman v. Morgan*, 2 G. Gr., 374.

4767. Petition not necessary. 3518. When by notice, no petition need be filed, except where the petition must be sworn to, but the notice must state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him. [R., § 3860; C., '51, § 2272.]

When the cause of action is such that it must be sworn to, the petition need not be filed until the return day. An original notice alone is sufficient to commence the action: *Duffy v. Dale*, 42-215.

A technical setting forth of the cause of ac-

tion is not demanded, but a notice stating it in general terms, if sufficient to apprise the defendant of the nature of the claim against him, is all that is required: *Fauble v. Stewart*, 35-379.

Where the cause of action stated in the notice was "$40 damages in the sale of oxen," plaintiff was allowed to prove and recover upon a warranty made in such sale; and it was held that the notice sufficiently set forth such cause of action: *Dilley v. Nusum*, 17-238.

Where the claim was upon a written instrument of guaranty of a promissory note, and the notice stated the claim as upon "a promissory note," *held*, that the notice was sufficient: *Francis v. Bentley*, 50-59.

Where the notice of suit in the justice's court set out the cause of action as a claim for a certain sum with interest, etc., etc., and the petition filed on the return day claimed to recover the same sum, with interest, etc., upon a bond signed by defendant as surety, *held*, that the petition was not based upon a different cause of action from that stated in the notice: *Winneshiek County v. Humpal*, 61-172.

Under notice of a claim for money due for "damages for the illegal and wrongful taking and detention" of property, "and as damages for the detention thereof," *held*, that plaintiff could recover the value of property wrongfully taken: *Paden v. Griffith*, 12-272.

As to defective notice, see § 4771.

Technical precision in pleading is not required, see notes to § 4779.

4768. Notice to whom. 3519. It must be addressed to the defendant by name, but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff, or the justice before whom it is returnable. [R., § 3861; C., '51, § 2273.]

As to unknown defendants, see § 3762.

4769. State amount; time and place. 3520. It must state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer at the time and place therein fixed. [R., § 3862; C., '51, § 2274.]

The notice should state the hour when defendant is required to appear, and where the notice fixed the time as "11 o'clock M.," *held*, that it was *not* sufficient: *Hodges v. Brett*, 4 G. Gr., 345.

A notice in which the return day is left blank is of no validity: *Phinney v. Donahue*, 67-192.

In stating the place it is not essential that the notice give the township of the justice: *Johnson v. Dodge*, 19-106.

4770. Limit of time. 3521. The time thus fixed in the notice must not be more than fifteen days from the date, and the notice must be served not less than five days previous to the trial. [R., § 3863; C., '51, § 2275.]

Where the notice was served less than five days previous to trial, *held*, that judgment thereon was erroneous, but not void. Judgment on a defective or insufficient notice can only be attacked by appeal and not collaterally: *Shea v. Quintin*, 30-53; *Ballinger v. Tarbell*, 16-491.

4771. Service and return. 3522. The service and return thereto must be made in the same manner as in the circuit [district] court, except that no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to. [R., § 3864; C., '51, § 2276.]

A defective notice, if service is properly had, does not affect the jurisdiction of the court nor the validity of the proceeding. If the justice err in holding the notice sufficient, advantage thereof must be taken on appeal if at all: *Dougherty v. McManus*, 36-657.

Error in rendering judgment on a defective notice or insufficient service cannot be corrected by writ of error unless a motion to set aside the judgment is first made before the justice: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

If the justice has no jurisdiction by reason of entire want of notice, the defendant need not move for correction of the error in rendering judgment against him, but may, if he knows of the judgment in time, have the error corrected by writ of error, or may afterward bring an independent action to set it aside: *Holmes v. Hull*, 48-177.

The officer's return is the best evidence of the service of notice and is not overcome by failure to enter the fact of return of service on his docket: *Bridges v. Arnold*, 37-221.

The determination by the justice of the peace of the sufficiency of the evidence of service cannot be collaterally attacked: *Baker v. Jamison*, 73-98.

The notice is not "process," and may, under some circumstances, be served out of the county, although it is provided that process from a justice's court cannot issue into another county (§ 4881): *Klingel v. Palmer*, 42-166.

4772. Defendant may pay officer. 3523. The defendant may at any time pay to the officer having the process, or to the justice of the peace, the

amount of the claim, together with the costs which have then accrued, and thereupon the proceedings shall cease. [R., § 3865; C., '51, § 2277.]

APPEARANCE OF PARTIES.

4773. Agent's authority. 3524. An agent appearing for another may be required by the justice to show his authority, if written, or prove it by his own oath or otherwise, if verbal. [R., § 3866; C., '51, § 2278.]

A service of original notice upon the agent will not constitute service upon the principal, though the agent may bind the principal by appearance: *Brown v. Newman*, 13-546.

4774. One hour given. 3525. The parties in all cases are entitled to one hour in which to appear after the time fixed for appearance, and neither party is bound to wait longer for the other. [R., § 3867; C., '51, § 2279.]

A judgment rendered against defendant before the expiration of the hour allowed by statute for appearance, though erroneous, is not void, and cannot be attacked in a collateral proceeding: *Central Iowa R. Co. v. Piersol*, 65-498.

Where the record of a judgment by default recited that it was entered after the expiration of the hour allowed, *held*, that the record was conclusive in that respect, and could not be impeached by affidavits that the hour had not expired: *Cory v. King*, 49-365.

4775. Postponement. 3526. Upon the return day, if the justice be actually engaged in other official business, he may postpone proceedings in the case until such business is finished. [R., § 3868; C., '51, § 2280.]

4776. Adjournment by justice. 3527. If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury be demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments. [R., § 3869; C., '51, § 2281.]

4777. Adjournment on showing. 3528. In case of the absence of witnesses, either party at his own cost may obtain an adjournment not exceeding sixty days, by filing an affidavit like that required to obtain a continuance in the circuit [district] court for the like cause. [R., § 3870; C., '51, § 2282.]

A continuance by consent to an indefinite time will not enable one party to obtain judgment by default against the other without notice to the other as to the time when the cause is again set for trial: *Rowley v. Baugh*, 33-201.

After the death of a party before trial, a continuance may be granted to allow an administrator to be appointed, so that he may be made party: *Caughlin v. Blake*, 55-634.

4778. Condition of. 3529. Either party applying for an adjournment, must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken to be used on the trial of the cause. [R., § 3871; C., '51, § 2283.]

4779. Pleadings. 3530. The pleadings must be substantially the same as in the circuit [district] court. They may be written or oral. If oral, they must in substance be written down by the justice in his docket, and sworn to when such verification is necessary. [R., § 3872; C., '51, § 2284.]

Technical exactness and nicety in pleading are not required before a justice of the peace: *Wright v. Phillips*, 2 G. Gr., 191; *Taylor v. Barber*, 2 G. Gr., 350; *Packer v. Cockayne*, 3 G. Gr., 111; *Burton v. Hill*, 4 G. Gr., 379; *Hall v. Monahan*, 1-554; *Greff v. Blake*, 16-222; *Root v. Illinois Cent. R. Co.*, 29-102.

Technical rules of pleading which prevail in courts of record are not applicable to proceedings in justices' courts: *Francis v. Bentley*, 50-59.

The same technical precision is not required in stating a cause of action or defense: *Finch v. Central R. of Iowa*, 42-304.

What sufficient: If the cause of action is stated in general terms, with sufficient certainty to apprise the defendant of the nature of plaintiff's demand, it is sufficient: *Shea v. Livingston*, 32-158.

Great liberality of construction should be indulged in relation to such pleadings: *Blake v. Graves*, 18-312; *Emerick v. Clemens*, 26-332.

In an action before a justice on account the charges were set forth as follows: "To dental work," "extracting teeth, etc.," the date of each, with the amount thereof, being set opposite each charge. *Held* to be a sufficiently specific statement: *Brownell v. Smith*, 13-287.

Formal errors and irregularities are to be disregarded on appeal: See § 4839.

Variance: Where the pleadings are oral, or even where they are written, exact corre-

spondence in the proof is not required: *West v. Moody*, 33-137.

Variance between the evidence and the statement of the cause of action on the justice's docket should not be held fatal on appeal: *Rife v. Pierson*, 2 G. Gr., 129.

In a case originating before a justice, where full and formal pleadings are not required, a judgment will not be reversed because evidence is introduced that finds no support in a specific allegation of the pleadings, where both parties have covered the point in their evidence without objection: *Miller v. Cassady*, 25-323.

Under a general allegation, in an action against a carrier, of the loss of a trunk, *held*, that plaintiff might prove whatever was necessary to establish such loss: *Byers v. Lessees of Des Moines Valley R. Co.*, 21-54.

Objections to pleadings: If the plaintiff fails to state his cause of action in a sufficiently clear manner, the objection should then be taken, if at all, and cannot be made when the evidence is offered to sustain it: *Delany v. Reade*, 4-292.

Substantial requirements: But pleadings are required to be substantially the same as in the district court, and therefore it was held error, even in a trial before a justice, to admit evidence of defect in the proper execution of an instrument under a denial of indebtedness thereon: *Glidden v. Higbee*, 31-379.

Oral pleading: The requirement that an oral pleading be written down by the justice in his docket is merely directory, and a failure to comply therewith should not be allowed to prejudice a party so pleading: *West v. Moody*, 33-137.

It is not necessary that the justice should set out the claim with the particularity required in a formal petition: *Stone v. Murphy*, 2-35.

In writing down defendant's oral plea the justice should state the substance of the defense relied on, and not what he infers was meant thereby: *Jordan v. Quick*, 11-9.

On appeal, the transcript of the justice's docket, where the plaintiff's claim has been orally stated, must show the amount and nature of plaintiff's demand: *Sears v. Tubbs*, 4 G. Gr., 409.

If the cause of action is sufficiently entered upon the docket the loss of the original notice will be immaterial: *Shawg v. Bruce*, 3-324.

Style of plaintiffs: Where plaintiffs were designated in the notice as "heirs at law" of the payee of the note sued on, *held*, that they did not sue as heirs, and if they did it was immaterial: *King v. Gottschalk*, 21-512.

Bill of particulars: In an action before a justice on an account, plaintiff must, when demanded, furnish a bill of particulars, or name the items so that the justice can enter them on his docket: *McKenney v. Hopkins*, 20-495.

Substitution of administrator upon death of party: Upon the death of defendant after commencement of suit and before return day, the administrator may be substituted and the cause may be continued by one or more adjournments until an administrator can be appointed: *Caughlin v. Blake*, 55-634.

Denial presumed: Where, on appeal, it appears that a trial was had before the justice on the merits, a denial of plaintiff's right to recover will be presumed to have been made although it does not appear of record: *Sinnamon v. Melbourn*, 4 G. Gr., 309; *Heath v. Coltenback*, 5-490; *Hall v. Denise*, 6-534; *Clark v. Barnes*, 7-6; *Weimer v. Linhard*, 12-359; *Richman v. Brown*, 25-33.

But where the entry of the justice indicates that there was no denial of a set-off, it should be regarded as admitted: *Brock v. Manatt*, 5-270.

4780. Counter-claim. 3531. A counter-claim must be made, if at all, at the time the answer is put in. [R., § 3873; C., '51, § 2285.]

In order that a counter-claim may be properly interposed so as to defeat plaintiff's right to dismiss the action, it must be set up in a written answer filed, or must be stated to the justice and the substance thereof entered on his docket: *Kuhn v. Bone*, 10-392.

4781. Written instruments. 3532. The original, or a copy of all written instruments upon which a cause of action or counter-claim is founded, must be filed with the claim founded thereon, or a sufficient reason given for not doing so. [R., § 3874; C., '51, § 2286.]

The failure of the justice to mark an instrument as filed will not prejudice the rights of the party filing it: *Stone v. Murphy*, 2-35.

Nor prevent its being admitted in evidence in a trial on appeal: *Eggleston v. Collis*, 10-554.

4782. Change of place of trial. 3533. Either party, before the trial is commenced, may have the place of trial changed, upon filing an affidavit that the justice is prejudiced against him, or is a near relation to the other party, or is a material witness for the affiant, or that the affiant cannot obtain justice before him; but no more than one change shall be allowed to each party, unless the justice to whom the case shall be transmitted is related to either party by consanguinity or affinity within the fourth degree, or is a witness, or has been an attorney employed in the action, in either of which events, a second change may be allowed to the same party. [R., § 3875; 14 G. A., ch. 127.]

It is not error to refuse a change after the trial is commenced: *McKenney v. Hopkins*, 20-495.

Where there was one trial in which the jury disagreed, and the cause was continued; and before the second trial an affidavit was filed asking a change, on the ground that the justice was a material witness for affiant, *held*, that the application was made in time: *Marshall v. Kinney*, 1-580.

The change must be granted where a motion and affidavit are filed complying with the requirements of the statute: *Berner v. Frazier*, 8-77.

As to another justice acting, see § 4879.

The fact that suit is brought in the wrong county is not a ground for change of venue to the right county: *Post v. Brownell*, 36-497.

Nor is the fact that suit is brought in the wrong township a ground for such change; the objection is to be raised by plea in abatement: *Meunch v. Breitenbach*, 41-527.

4783. Next nearest justice. 3534. When said change is allowed, said justice shall transmit all the original papers in said case, and a transcript of his proceedings to the next nearest justice in the township, if there be any, if not, to the next nearest justice in his county, and said justice shall proceed to try said case, and if he cannot try the same immediately, he shall then fix a time therefor, of which all parties shall take notice. [R., § 3876.]

Although the justice from whom the change is taken commit an error in sending the case to a justice who is not the nearest one in the county to whom it might be sent, yet the justice to whom the case is thus sent cannot review such decision, and will have jurisdiction, and his action cannot be collaterally attacked: *Tennis v. Anderson*, 55-625.

It is necessary that the justice granting a change shall designate by name the next justice to whom the case is sent. This is a judicial determination, and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice, the change of venue is not complete and no other justice can acquire jurisdiction: *Bremner v. Hallowell*, 59-433.

4784. Title to real property. 3535. If the title to real property be put in issue by the pleadings, supported by affidavit, or shall manifestly appear from the proof on the trial of the issue, the justice shall, without further proceedings, certify the cause and papers, with transcript of his docket showing the reason of such transfer, to the circuit [district] court, where the same shall be tried on the merits. No cause so transferred shall be dismissed because the justice erred in transferring the same. [R., §§ 3877-8; C., '51, §§ 2287-8.]

That title cannot be determined in action of forcible entry and detainer, see § 4869.

4785. Other causes severed. 3536. But when a case is thus transferred, or dismissed on account of the title to land being involved, if there are other causes of action not necessarily connected, they may be severed and the latter tried before the justice. [R., § 3879; C., '51, § 2289.]

THE TRIAL.

4786. Demand for jury. 3537. Unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice. [R., § 3880; C., '51, § 2290.]

For a reasonable time after the filing of defendant's answer plaintiff has the right to demand a jury trial: *Hall v. Chicago, B. & Q. R. Co.*, 65-258.

4787. Dismissal of action. 3538. If the plaintiff fails to appear by himself, his agent or attorney, on the return day, or at any other time fixed for the trial, the justice shall dismiss the case and render judgment against him for costs, except in the case provided in the next section. [R., § 3881; C., '51, § 2291.]

If plaintiff appears before decision on a motion for nonsuit on account of his non-appearance, the motion should be overruled: *Wright v. Philips*, 2 G. Gr., 191.

4788. Written instrument filed. 3539. When the suit is founded on an instrument of writing, purporting to have been executed by the defendant, in which the demand of the plaintiff is liquidated, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the

justice previous to the day for appearance, he may proceed with the cause whether the plaintiff appear or not. [R., § 3882; C., '51, § 2292.]

A nonsuit for failure of plaintiff to appear should not be entered where the action is upon a written instrument which has been filed with the justice prior to appearance day, as authorized by law: *Jewett v. McLelland*, 3 G. Gr., 568.

4789. Default in such case. 3540. In the case provided for in the last section, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim. [R., § 3883; C., '51, § 2293.]

4790. Default in other cases. 3541. But if, where the plaintiff's claim is not founded on such written instrument, the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice. [R., § 3884; C., '51, § 2294.]

4791. Counter-claim. 3542. In the cases contemplated in the last two sections, if the defendant has previously filed a counter-claim, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, the justice shall allow such counter-claim in the same manner as though the defendant had appeared, and shall render judgment accordingly. [R., § 3885; C., '51, § 2295.]

4792. Judgment set aside. 3543. Judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor can show a satisfactory excuse. [R., § 3886; C., '51, § 2296.]

This section applies only to cases where there has been personal service. In case of judgment upon service by publication, § 4084 is applicable: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

A judgment by default cannot be set aside on a showing, supported by affidavits, that the justice entered judgment by default before a particular time of day. The recitals of the judgment are conclusive upon that point: *Cory v. King*, 49-365.

Where defendant appears and demands a jury, and judgment is rendered against him for want of an answer, such judgment is not by default in such sense that it can be set aside on motion, as provided for in case of judgment by default: *Rhodes v. De Bow*, 5-260.

So, where defendant appeared and answered, but did not appear at time of trial, and judgment was rendered against him, *held*, that it was not a judgment by default: *Douglass v. Langdon*, 29-245.

No notice to the opposite party of a motion to set aside default is necessary: *Stivers v. Thompson*, 15-1; *Park v. Ratcliffe*, 42-42.

As to what is a satisfactory excuse, much is left to the discretion of the justice: *Stivers v. Thompson*, 15-1.

A judgment of a justice will not be reversed on writ of error for error in rendering default, which might have been corrected by motion under this section, when no such motion was made before the justice; § 4397 is applicable in such case: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

4793. New trial. 3544. In such cases a new day shall be fixed for trial, and notice thereof given to the other party or his agent. [R., § 3887; C., '51, § 2297.]

4794. Costs. 3545. Such orders shall be made in relation to the additional costs thereby created as the justice shall think equitable. [R., § 3888; C., '51, § 2298.]

An order of the justice, upon setting aside default, that it be at the cost of defendant, *held* correct: *Stivers v. Thompson*, 15-1.

4795. Execution recalled. 3546. Any execution which may in the meantime have been issued, shall be recalled in the same manner as in cases of appeal. [R., § 3889; C., '51, § 2299.]

4796. Jury summoned. 3547. If a jury trial be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the circuit [district] court. [R., § 3890; C., '51, § 2301; 9 G. A., ch. 174, § 6.]

4797. Number of jurors. 3548. The jury shall consist of six jurors, unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges and no more. Any deficiency in their number, arising from any cause, may be supplied by summoning others in the manner above directed. [R., § 3891; C., '51, § 2302.]

4798. Discharge of jury. 3549. The justice may discharge the jury, when satisfied that they cannot agree, and shall immediately issue a new precept for summoning another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree. [R., § 3892; C., '51, § 2303.]

4799. Motion in arrest. 3550. No motion in arrest of judgment, or to set aside a verdict, can be entertained by a justice of the peace. [R., § 3893; C., '51, § 2304.]

Instructions: A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph Mfg. Co. v. Harrington*, 53-380.

Where it appeared upon writ of error to the circuit court that the justice had given instructions to the jury, *held*, that the cause should have been remanded for new trial, although the giving of instructions was not urged as error: *Ibid.*

Taking case from jury: Where a jury is called in a case before a justice, and duly impaneled, the justice cannot take the case from the jury. His only power is to discharge the jury if they fail to agree: *Hunt v. Farmers' Ins. Co.*, 74-231.

Setting aside verdict; new trial: A justice of the peace has no authority to set aside a verdict of the jury: *Dupont v. Downing*, 6-172.

Nor to grant a new trial: *Helmich v. Johnson*, Mor., 89.

The justice has no power to set aside the verdict or to arrest the judgment, when the verdict is rendered. He has no discretion in the matter, but is required absolutely to enter judgment for the amount thereof, and in so doing he performs a merely clerical duty: *Atkinson v. Chicago & N. W. R. Co.*, 70-68.

Retaxing costs: The justice cannot entertain a motion after judgment to retax costs: *Miller v. Haley*, 66-260.

4800. Verdict. 3551. The verdict of the jury must be general. But where there are several plaintiffs or defendants, the verdict may be for or against one or more of them. [R., § 3894; C., '51, § 2305.]

In an action for balance due for the purchase of property, it is error to render judgment on a verdict of the jury "for the plaintiff" without an assessment of damages: *Bartle v. Plane*, 68-227.

If the verdict returned by the jury is incorrect in form, the justice may advise the jurors as to the proper form, and direct a new verdict in that form to be rendered: *Wright v. Phillips*, 2 G. Gr., 191.

JUDGMENT AND PROCEEDINGS INCIDENT THERETO.

4801. Judgment. 3552. In cases of dismissal, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, the same shall be done within three days after the cause is submitted to the justice for final action. [R., § 3895; C., '51, § 2306.]

When to be entered: A judgment on the verdict of a jury should be entered up forthwith; and where there was a delay of sixty days in entering judgment, *held*, that the judgment so entered was void: *Harper v. Albee*, 10-389.

Such judgment might be reversed on a writ of error, but cannot be appealed from: *Ibid.*; *Brown v. Scott*, 2 G. Gr., 454; *Guthrie v. Humphrey*, 7-23.

"Forthwith" means within a reasonable time; and *held* that, where a confession was made on Saturday night before a justice and entered up Monday morning, it was in time; and that even when there is unreasonable delay, the judgment would, as between the parties, be voidable, but not void: *Burchett v. Casady*, 13-342.

Where a verdict was rendered at 10:30 P. M. on one day and judgment entered on the docket at 11 A. M. the next day, it was held that the statute was sufficiently complied with: *Davis v. Simma*, 14-154.

Entry upon the docket constitutes the rendition of the judgment: *Brown v. Scott*, 2 G. Gr., 454.

Form: A justice in rendering judgment need follow no particular form: *Stowers v. Milledge*, 1-150; *Barrett v. Garragan*, 16-47; *Church v. Crossman*, 41-373.

An entry reciting, "after hearing all the testimony on both sides it is believed that the plaintiff is entitled to seventy-five dollars debt," etc., *held* sufficient to constitute a judgment: *Stowers v. Milledge*, 1-150.

Where the transcript of the judgment of a

justice of the peace showed the time, place, parties, matter in dispute and the result, *held*, that it showed all the requisites of a valid judgment: *Church v. Crossman*, 41-373.

Where the time, place, parties, matter in dispute and the result were so concisely and clearly stated as to be unmistakable, *held*, that the entry was sufficient: *Barrett v. Garragan*, 16-47.

Entries in particular cases, irregular in form, *held* sufficient: *Moore v. Manser*, 9-47; *Lavalle v. Badgly*, 33-155.

Presumptions: In a collateral proceeding liberal rules are recognized in relation to judgments of justices of the peace: *Williams v. Brown*, 28-247.

4802. In excess of jurisdiction. 3553. If the sum found for either party exceed the jurisdiction of the justice, such party may remit the excess and take judgment for the residue, but he can never afterward sue for the amount so remitted. [R., § 3896; C., '51, § 2307.]

4803. Dismissal. 3554. Instead of so remitting the excess, the party obtaining such verdict may elect to have judgment dismissing the action, in which case the plaintiff shall pay the costs. [R., § 3897; C., '51, § 2308.]

[The word "plaintiff" in the last line is "said parties" in the original rolls, but as the Revision and the Code commissioners' report each have the section as herein given, the word "plaintiff" is retained as in the printed Code, "said parties" being probably a clerical error corrected by the editor.]

4804. Mutual judgments. 3555. Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other. [R., § 3898; C., '51, § 2309.]

4805. Course pursued. 3556. When rendered by the same court, the same course shall be pursued as is prescribed in the circuit [district] court. [R., § 3899; C., '51, § 2310.]

4806. By different justices. 3557. If the judgment proposed to be set off was rendered by another justice, the party offering it must obtain a transcript thereof, with a certificate of the justice who rendered it indorsed thereon, stating that no appeal has been taken, and that the transcript was obtained for the purpose of being used as a counter-claim in that case. [R., § 3900; C., '51, § 2311.]

4807. Time. 3558. Such transcript shall not be given until the time for taking an appeal has elapsed. [R., § 3901; C., '51, § 2312.]

4808. Docket entry. 3559. The justice so giving a transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed. [R., § 3902; C., '51, § 2313.]

4809. Execution for balance. 3560. Such transcript being presented to the justice who has rendered a judgment between the same parties as aforesaid, if execution has not been issued on the judgment rendered by him, he shall strike a balance between the judgments and issue execution for such balance. [R., § 3903; C., '51, § 2314.]

4810. Execution on transcript. 3561. If execution has already issued, the justice shall also issue execution on the transcript filed with him, and deliver it to the same officer who has the other execution. [R., § 3904; C., '51, § 2315.]

4811. Executions set off. 3562. Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance accordingly. [R., § 3905; C., '51, § 2316.]

4812. Costs. 3563. The above rules as to counter-claim are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceeding in the circuit [district] court. [R., § 3906; C., '51, § 2317.]

4813. Transcript filed. 3564. When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the

papers of the case in which it is to be so used, and the proper entry made in the justice's docket. [R., § 3907: C., '51, § 2318.]

4814. Refusal to allow set-off. 3565. If the justice refuses the judgment as a set-off, he shall so certify on the transcript, and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be had by him in the same manner as though no transcript had been certified by him. [R., § 3908; C., '51, § 2319.]

4815. Judgment by confession. 3566. A judgment by confession without action, may be entered by a justice of the peace for an amount within his jurisdiction, and the provisions of law regulating judgments by confession in courts of record, shall, as far as applicable, apply to confessions of judgment before a justice of the peace, and the justice shall enter such judgments on his docket, and may issue execution thereon as in other cases. [R., §§ 3397, 3401; C., '51, §§ 1837, 1841.]

FILING TRANSCRIPTS IN THE CLERK'S OFFICE.

4816. May be done when. 3567. The party obtaining a judgment in a justice's court for more than ten dollars, may cause a transcript thereof to be certified to the office of the clerk of the circuit [district] court in the county. [R., § 3909; C., '51, § 2320.]

A transcript of a judgment before a justice can only be filed and become a lien in the county where rendered. To make it a lien in another county, a transcript must be taken to such county from the judgment as filed in the clerk's office in the county where rendered: *Blaney v. Hanks*, 14-400.

The filing of a transcript does not prevent the prosecution of an appeal or writ of error: *Wilson v. Robinson*, 61-357.

4817. Manner and effect. 3568. The clerk shall forthwith file such transcript, and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects, as to its effect and mode of enforcement, as a judgment rendered in the circuit [district] court as of that date. And no execution can thereafter be issued by the justice on the judgment. [R., § 3910; C., '51, § 2321.]

Execution on the judgment so filed may be issued at any time within twenty years: *McCoy v. Cox*, 54-595.

EXECUTIONS AND PROCEEDINGS THEREON.

4818. When and by whom issued. 3569. Executions for the enforcement of judgments in a justice's court, may be issued as provided in this chapter, at any time within ten years from the entry of the judgment, but not afterward. [R., § 3911; C., '51, § 2322.]

This section, extending the time within which execution may issue on the judgment beyond that provided in the Revision, is applicable to cases in which the time allowed under the Revision had not expired when the Code was enacted, but not to cases where such time had expired: *Woods v. Haviland*, 59-476.

In general, see § 4258 and notes.

4819. Form. 3570. Such execution shall be against the goods and chattels of the defendant therein, and shall be directed to any constable of the county. [R., § 3912; C., '51, § 2323.]

An execution specifying who recovered the judgment and against whom it was recovered, but not reciting formally the names of the parties to the action, *held* sufficient: *Williams v. Brown*, 28-247.

Immatured crops cannot be levied upon and sold on execution as personal property: *Ellithorpe v. Reidesil*, 71-315.

4820. Return. 3571. It must be dated on the day on which it is issued, and made returnable within thirty days thereafter. [R., § 3913; C., '51, § 2324.]

4821. Renewable. 3572. If not satisfied when returned, it may be renewed from time to time by an indorsement thereon to that effect, signed by the justice, and dated of the date of such renewal. [R., § 3914; C., '51, § 2325.]

4822. For thirty days. 3573. Such indorsement must state the amount paid on such execution, and shall continue the execution in full force for thirty days from the date of renewal. [R., § 3915; C., '51, § 2326.]

4823. Property sold. 3574. Property levied on before such renewal, may be retained by the officer and sold after renewal. [R., § 3916; C., '51, § 2327.]

A sale after the expiration of the execution under which levy is made, and without renewal as here contemplated, will be valid: *Walton v. Wray*, 54–531.

APPEALS.

4824. When allowed. 3575; 18 G. A., ch. 163. Any person aggrieved by the final judgment of a justice, may appeal therefrom to the circuit [district] court in the county. But no appeal shall be allowed in any case when the amount in controversy does not exceed twenty-five dollars. [R., § 3917; C., '51, § 2328.]

Right of appeal: Whenever, in any case, there is final judgment before a justice, the right of appeal is given, unless denied by express provision or necessary implication. So *held* in an action against a defendant for violation of a city ordinance under a charter giving justices jurisdiction in such cases: *Dubuque v. Rebman*, 1-444.

But if the justice exercises a new jurisdiction created by statute, in which the proceedings are summary and different from the common law, *certiorari* and not appeal is the proper method of review: *Ibid.*

Only after judgment: A party cannot appeal from the verdict of a jury. There must first be a judgment by the justice upon such verdict: *Kimble v. Riggin*, 2 G. Gr., 245; *Brown v. Scott*, 2 G. Gr., 454; *Guthrie v. Humphrey*, 7-23.

From judgment by default: An appeal may be taken from a judgment by default: *Butler v. Heeb*, 38-429.

From nonsuit: An appeal may be taken from a judgment of nonsuit on the evidence: *Gilson v. Johnson*, 4-463.

The dismissal of action against a garnishee may be reviewed by appeal: *Hodge v. Ruggles*, 36-42.

From judgment upon the evidence: If the final judgment of the justice upon the evidence is wrong, the proper remedy is by appeal and not by writ of error: *Lane v. Goldsmith*, 23-240.

Errors of law committed in proceedings which end in final judgment, and which affect the merits of the controversy, may be reviewed on appeal unless waived: *Belding v. Torrence*, 39-516.

The right of appeal exists whether the judgment complained of, if final, is one of law or fact: *Griffin v. Moss*, 3-261.

Judgments not final: An error of the justice in entertaining jurisdiction where there is no notice, and rendering judgment on default, should be corrected by writ of error and not by appeal: *Craine v. Fulton*, 10-457.

So an error of the justice in refusing to entertain jurisdiction and dismissing the case cannot be reviewed by appeal: *Belding v. Torrence*, 39-516.

Where the justice dismisses the action for failure of plaintiff to appear, and renders judgment against him for costs, the plaintiff is not thereby precluded from recovering in another action, and therefore the judgment is not final and can be reviewed only on writ of error. No appeal can be taken in such case: *Stricker v. Holtz*, 50-291.

Error in ruling on a demurrer cannot be reviewed on appeal, as the appeal brings up the case for trial on the merits, and waives all such errors or irregularities: *Leftwick v. Thornton*, 18-56.

Judgment on an award cannot be reviewed on appeal, as the result would be to try the case anew instead of passing only upon the validity of the award: *Whitis v. Culver*, 25-30.

As between appeal and writ of error, see, also, § 4846.

Amount in controversy: This limitation of the right of appeal to cases in which the amount in controversy exceeds twenty-five dollars is not unconstitutional as depriving the party of a trial before a common-law jury in such cases. The constitution authorizes the legislature to provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal: *Higgins v. Farmers' Ins. Co.*, 60-50.

Where the defendant makes a tender which is not accepted, the amount in controversy is the difference between the amount claimed and the amount tendered, and if that does not exceed twenty-five dollars no appeal is allowed: *Young v. McWaid*, 57-101.

In determining the amount in controversy under this section the costs taxed up by the justice of the peace will not be taken into consideration: *Curran v. Excelsior Coal Co.*, 63-94.

Where plaintiff claimed less than twenty-five dollars in his account, and defendant set up, not by way of counter-claim, but as a de-

fense, the payment of more than twenty-five dollars to plaintiff on the indebtedness, *held*, that the amount in controversy was what was claimed and not what defendant alleged that he had paid: *Boyle v. Wilcox*, 59–466.

Where the amount claimed by plaintiff is more than twenty-five dollars and he recovers less than that amount, and defendant appeals, the amount in controversy is that claimed by plaintiff, and not that for which judgment is rendered, for plaintiff may, on appeal, if he establishes his right thereto, recover the whole amount of his claim: *Lundak v. Chicago & N. W. R. Co.*, 65–473.

The question whether the amount in controversy between the parties exceeds twenty-five dollars is to be determined from the pleadings. Whenever one of the parties to the litigation has asserted a claim or demand in his pleadings upon which he asks relief against his adversary, which the other party denies, a controversy exists between them as to such claim or demand, and it is immaterial that upon the trial of the appeal the party asserting such demand does not introduce evidence to substantiate it, or is able to prove but a portion of it. Such failure of evidence will not justify the dismissal of the appeal where the amount stated in the pleadings is sufficient: *Sterner v. Wilson*, 68–714.

Where plaintiff's cause of action was for less than twenty-five dollars, but defendant interposed a counter-claim for more than that amount, and judgment was rendered against plaintiff for costs and he appealed, *held*, that as the appeal brought up the whole controversy for trial anew, the amount of the counter-claim was involved and the appeal was proper: *Perry v. Conger*, 65–588.

If the party in whose favor judgment is rendered for more than twenty-five dollars remits the excess over that amount the opposite party cannot appeal: *Milner v. Gross*, 66–252.

Where plaintiff on a claim for one hundred dollars recovers less than twenty-five dollars he may, before appeal is taken, remit all claim for more than twenty-five dollars, and thus prevent appeal: *Bateman v. Sisson*, 70–518; *Vorwald v. Marshall*, 71–576.

As to dismissal of appeal where the amount in controversy is not sufficient, see notes to § 4839.

As to what is deemed the amount in controversy in other cases, see §§ 4757 and 4402 and notes.

Waiver of right to appeal: A party may by agreement, before or after the judgment is rendered, relinquish or waive his right of appeal from such judgment. (Overruling *Clark v. Gibson*, Mor., 328): *Lyon v. Sanders*, 3 G. Gr., 332.

A party cannot appeal from a judgment entered before a justice of the peace by his consent: *Stever v. Heald*, 61–709.

The filing of the transcript in the clerk's office does not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61–357.

Waiver of error: Any error in the ruling upon an incidental motion is waived by answering and proceeding in the case: *Rahn v. Greer*, 37–627.

Error in dismissing an action upon refusal to give security for costs is waived by commencing a new suit on the same cause of action: *Gordon v. Ellison*, 9–317.

Withdrawal, abandonment or dismissal of appeal: A party may withdraw his appeal, at least with the acquiescence of the other party: *McKeever v. Horine*, 12–227.

After giving of notice and bond, but before filing of transcript, the appellant may withdraw his appeal and move before the justice to have the judgment set aside: *Park v. Ratcliffe*, 42–42.

Where the steps for an appeal were taken before the justice, but it was not prosecuted for four years, *held*, that appellant could not object to his property being subjected to the payment of the judgment: *Warder v. Rivers*, 64–412.

A party may be allowed to dismiss his appeal in the court to which it is taken: *Harper v. Albee*, 10–389; *Goodenow v. Perry*, 12–350.

A party has the same right to dismiss his appeal as to dismiss any other action: *Harris v. Laird*, 25–143.

Motion before justice to correct error: Where the party prejudiced by the error of the justice might have it corrected on motion before the justice, he cannot maintain a writ of error to correct the error until he has made such motion and it has been overruled: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

But if the justice has no jurisdiction the party prejudiced need take no steps before the justice to remedy the error in assuming jurisdiction, but may proceed by writ of error, or, if he does not know of the judgment in time for that, may maintain an independent action to set the judgment aside: *Holmes v. Hull*, 48–177.

Party to appeal: It is only parties to the action that have a right to appeal. A surety on a replevin bond cannot appeal from a judgment against his principal, and relitigate his principal's claim to the property: *Crites v. Littleton*, 23–205.

Appeals to superior court: See § 769 and notes.

4825. Time. 3576. The appeal must be taken and perfected within twenty days after the rendition of the judgment. [R., § 3918; C., '51, § 2329.]

An appeal is not perfected until the bond is filed and the sureties approved: *Brown v. Beesett*, 13–185: *McKeever v. Horine*, 12–227.

An appeal taken after the lapse of twenty days is in effect no appeal, and the case should be stricken from the docket of the circuit court. In such case the court has no jurisdiction to render any judgment except for costs: *Martin v. Croker*, 62–328.

When the method of taking an appeal provided by the next section is pursued, the appeal must be perfected within twenty days as in other cases: *McBrearty v. Dyer*, 6–528.

The appeal is not effected by a writ or process, but by notice, an appeal bond and a certified transcript of the proceedings: *May v. Wilson*, 20–117.

4826. By clerk. 3577. If within twenty days the appellant is prepared to take his appeal, and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the circuit [district] court of the county for the allowance of his appeal. [R., § 3919; C., '51, § 2330.]

4827. How secured. 3578. Such application shall be founded on an affidavit, stating the amount and nature of the judgment, and the time of the rendition thereof, as nearly as practicable, and the reason why he thus applies. [R., § 3920; C., '51, § 2331.]

4828. Action of clerk. 3579. The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice. [R., § 3921; C., '51, § 2332.]

4829. Form of bond. 3580. The appeal shall in no case be allowed until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

The undersigned acknowledge ourselves indebted to —— —— in the sum of —— dollars, upon the following condition: Whereas —— —— has appealed from the judgment of —— ——, a justice of the peace, in an action between —— —— as plaintiff and —— —— defendant.

Now, if said appellant pays whatever amount is legally adjudged against him in the further progress of this cause, then this bond to be void.

Approved,
E—— F——, justice.

A—— B——, principal.
C—— D——, surety.

If the judgment be affirmed, or if on a new trial the appellee recovers, or if the appeal be withdrawn or dismissed, judgment shall be rendered against the principal and surety in said bond. [R., § 3922; C., '51, § 2333.]

The bond: A bond equivalent in form to that given in the statute and substantially complying with its requirements is sufficient: *Moore v. Manser*, 9–47.

Where the bond is not, in form or substance, such as is required by statute, it is error to enter up judgment thereon against the sureties, as authorized by statute when the bond is in the form prescribed: *Wilson v. Knight*, 3 G. Gr., 126.

Any defect in the bond may be cured by tendering a sufficient bond in the court to which the appeal is taken (such case being within the general provisions of § 326, as to defective bonds): *Brock v. Manati*, 1–128.

The justice is not entitled to any fee for approving an appeal bond which is prepared by the attorney and handed him ready for approval: *McKay v. Maloy*, 53–33.

The justice may refuse to approve the bond unless the surety justifies as here required, and may require the surety to himself make affidavit as to his qualification: *Lane v. Goldsmith*, 23–240.

As to judgment against sureties, see § 4843.

4830. Proceedings suspended. 3581. Upon the appeal being taken in accordance with the foregoing provisions, all farther proceedings in the cause by him shall be suspended. [R., § 3923; C., '51, § 2334.]

On failure to file transcript the appeal may be regarded as abandoned and the execution may issue: *Goodman v. Allen*, 72–616.

Further as to abandonment, see notes to § 4824.

4831. If execution issued. 3582. If, in the meantime, an execution has been issued, the justice shall give the appellant a certificate that the appeal has been allowed. Upon that certificate being presented to the constable, he shall cease farther action, and release any property that may have been taken in execution. [R., § 3924; C., '51, § 2335.]

4832. Papers filed. 3583. Upon the taking of any appeal, the justice shall file in the office of the clerk of the circuit [district] court, all the original

papers relating to the suit, with a transcript of all the entries in his docket. [R., § 3925; C., '51, § 2336.]

Whenever the transcript and papers from the justice are filed in the office of the clerk of the court to which appeal is taken, the cause is to be deemed in that court: *Holloway v. Baker*, 6-52.

Notes or other evidences of indebtedness, claimed to be those on which the action before the justice was based, and not certified by the justice with his record, are not to be received in evidence on the appeal unless marked filed by the justice or otherwise identified as the same as those used in the trial of the case before the justice. Otherwise the identity of the cause of action tried on appeal with that tried before the justice would not appear: *Graft v. Diltz*, 2 G. Gr., 570.

The certificate of an ex-justice in relation to proceedings had before him while in office is not entitled to legal consideration: *Brown v. Scott*, 2 G. Gr., 454.

An amended transcript sent up by the justice within the time for filing transcript should be considered: *Smith v. Snodgrass*, 4 G. Gr., 282.

The justice is not required to pay the clerk's fee for the filing of the transcript in the circuit court, and therefore cannot demand prepayment to him of such fee before filing his transcript in the clerk's office: *McKay v. Maloy*, 53-33.

The term "filed" as used in this section and the following means simply deposited in the clerk's office. Failure of the clerk to minute it as filed on the appearance docket will not defeat such filing: *Harrison v. Clifton*, 75-636.

Amendment of pleadings, see notes to § 4839.

4833. Deemed in court. 3584. Upon the return of the justice being filed in the office of the clerk, the cause will be deemed in the circuit [district] court. [R., § 3926; C., '51, § 2337.]

Where the appellant refused to pay the filing fee, and afterwards the transcript was lost so that the clerk could not file it when the fee was afterwards tendered, and no substitute was procured, *held*, that appellant must be considered to have abandoned his appeal: *Goodman v. Allen*, 72-616.

Notice not essential to jurisdiction, see notes to § 4837.

Dismissal of appeal, see notes to § 4824.

4834. Return amended. 3585. The circuit [district] court may, by rule, compel the justice to allow an appeal, or to make or amend his return according to law. [R., § 3927; C., '51, § 2338.]

Where a party fails to take the proper steps to compel the furnishing of a perfect transcript, he cannot take advantage of such defect for judgment on appeal: *Whitmore v. Divilbis*, 10-68.

Application to the court to which the appeal is taken, to require a more complete transcript, should not be refused if made in due time: *Atwater v. Woodward*, 4 G. Gr., 431.

4835. Mistakes corrected. 3586. Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the circuit [district] court may correct the mistake or supply the omission, or direct the justice to do so. [R., § 3928; C., '51, § 2339.]

Correction of justice's record may be made by the court to which the appeal is taken, if a mistake or omission therein is unquestionably established, in order that the case may be fully tried on the issues presented before the justice: *Cooper v. Woodrow*, 3-189.

The court may hear evidence explaining a mistake or showing an omission in the justice's record: *Brown v. Beesett*, 13-185.

4836. Return, when made. 3587. If an appeal is allowed ten days before the next term of the circuit [district] court, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause. [R., § 3929; C., '51, § 2340.]

Should be filed for regular term: The "next" term of court at which the transcript should be filed is the next regular term. The return should not be made to a special term: *Coon v. Matthews*, 10-290.

Trial term: Unless ten days intervene between the taking of the appeal and the commencement of the next term, neither party can be required to go to trial at that term: *Seeberger v. Miller*, 20-428.

The rule as to the trial term is the same as in case of original actions in the same court: *Mediken v. Mason*, 10-406.

Dismissal or affirmance for failure to file transcript: Failure of the justice to file his transcript at the proper term is not sufficient ground for an affirmance of the judgment: *Fisher v. Harber*, 10-293.

If the appellant fails to have a transcript filed it may be filed by appellee, and he may then have the appeal dismissed or the judgment affirmed: *Holloway v. Baker*, 6-52.

The neglect of the justice to make the return in the proper time is not a ground for dismissing the appeal: *Whitcomb v. Holloway*, 4 G. Gr., 311. And see *Whitehead v. Thorp*, 22-425.

Under a rule of court allowing appellee to pay the filing fee and have the appeal docketed and the judgment of the justice affirmed, upon a failure of appellant, after taking the appeal, to pay the fee and cause the case to be docketed, the appellee is not entitled to such affirmance where the clerk dockets the case without having required the fee in advance from appellant: *Squires v. Millett*, 31-169.

If the default or omission in paying the docket fee in such cases is remedied before the opposite party has suffered any detriment or made objection on that account, a motion for affirmance should not afterwards be allowed on that ground: *Hinman v. Weiser*, 9-561; *Robertson v. Eldora R., etc., Co.*, 27-245.

So an offer of appellant to pay the fee before the ruling of the court on the motion to affirm would render it improper to sustain the motion: *Squires v. Millett*, 31-169.

But where the rule of court required payment of docket fee by appellant by the morning of the second day, and the motion to affirm was made on the third day and determined on the ninth day, *held*, that an offer on the last-named day by appellant to pay the fee, without showing a good excuse for not having sooner paid it, would not render an order of affirmance made on such motion erroneous: *State v. Glass*, 9-325.

So, where the rule required payment of the docket fee at the beginning of the term, *held*, that an order of affirmance in pursuance of such rule, made several days after the beginning of the term, should not be set aside on motion, no excuse for the delay being made to appear: *Heald v. House*, 39-198.

It is erroneous to affirm under such a rule on account of non-payment of filing fee, where the appeal is taken only seven days before the term, ten days being required to make the appeal triable at the next term: *Seeberger v. Miller*, 20-428.

Where the rule of court provides for affirmance upon the filing of the transcript by appellee in case of appellant's failure to file it, a dismissal should not be granted on such ground, especially if appellee has not filed the transcript: *Heiserman v. Rush*, 22-240.

While under rule of court an appeal may be dismissed by a stated time in default of payment of the docket fee by appellant, an additional penalty cannot be imposed for such failure: *Baude v. Orten*, 4 G. Gr., 351.

4837. Notice of appeal. 3588. If an appeal is not allowed on the day on which judgment is rendered, written notice thereof must be served on the appellee or his agent, at least ten days before the term of the court to which the cause is returnable, provided there be ten days intervening, or the suit, on motion of the appellee, shall be continued at the cost of the appellant. [R., § 3930; C., '51, § 2341.]

Notice is not essential to give the court to which the appeal is taken jurisdiction, but failure to give proper notice simply entitles the appellee to a continuance: *Bond v. Davis*, 37-163.

Service of notice of appeal on appellee is not necessary if the appeal is allowed and perfected on the day on which judgment is rendered: *Holloway v. Baker*, 6-52.

Appearance waives notice: The appearance of an appellee in the court to which the appeal is taken will amount to a waiver of any irregularity or defect in the taking of the appeal, provided the court has jurisdiction of the subject-matter: *Wilgus v. Gettings*, 19-82.

Notice or appearance must be shown: Where it does not appear affirmatively that proper notice of appeal was given, or that appellee appeared, judgment should not be rendered against the appellee: *Quillan v. Windsor*, 6-396; *McCormick v. Bishop*, 3 G. Gr., 99.

4838. How served. 3589. Such notice may be served like the original notice, and if the appellee or his agent have no place of residence in the county, it may be served by being left with the justice. [R., § 3931; C., '51, § 2342.]

4839. Effect of appeal. 3590. An appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities, and illegalities are to be disregarded under such circumstances, if the cause might have been prosecuted in the circuit [district] court. [R., § 3932; C., '51, § 2343.]

Method of trial; what questions considered: As an appeal brings up the case for hearing upon the merits, defects in the service of the original notice are not material: *Graves v. Heaton*, 11-169.

Technical errors of pleading are to be disregarded: *King v. Gottschalk*, 21-512.

Error in overruling a demurrer is waived by the appeal and the case is to be tried on its merits; advantage of such an error can be taken only by writ of error, if at all: *Leftwick v. Thornton*, 18-56.

Where the justice improperly sustained a demurrer to an answer, *held*, that such action should be disregarded and evidence under the answer admitted: *Oleson v. Hendrickson*, 12-222.

A variance between the petition and the original notice as to the facts of plaintiff's cause of action cannot be raised on appeal: *Frink v. Whicher*, 4 G. Gr., 382.

Objections to depositions other than for incompetency or irrelevancy should not be regarded unless made in the justice's court: *Alverson v. Bell*, 13-308.

If the cause of action before the justice is stated in different forms and a recovery is had in one form, an appeal brings up the whole

case for trial on the merits and not merely the right to recover in the particular form which was upheld below. *Edwards v. Tidlock*, 37–244.

Upon an appeal by defendant from a judgment against him for a part of plaintiff's claim in the justice's court, the plaintiff may, if he shows himself entitled thereto, recover a larger sum than that recovered before the justice: *Lundak v. Chicago & N. W. R. Co.*, 65–473.

Where, upon a demurrer being sustained in the justice's court to plaintiff's petition, such petition was amended and plaintiff recovered thereon, but on appeal the plaintiff withdrew his amendment and a trial was had on the merits and plaintiff again recovered, *held*, that defendant was not entitled to arrest judgment on the ground that there was no issue, that objection not having been made until after verdict: *Kinney v. Tompkins*, 54–240.

Jurisdiction of court: An appeal from the judgment of the justice on a cause which he had no jurisdiction over the subject-matter (as where the defendant is a resident of another county) does not give the court jurisdiction in the case, even though it might properly have been originally brought in that court: *McMeans v. Cameron*, 31–391.

So, also, where the amount in controversy is in excess of that of which the justice may take jurisdiction: *Galley v. Tama County*, 40–49.

The same point was ruled without discussion in *Chapman v. Morgan*, 2 G. Gr., 317.

Appearance on appeal as conferring jurisdiction: Where the subject-matter of the appeal is one over which the court to which the appeal is taken has jurisdiction, the appearance of the party against whom the appeal is taken will confer jurisdiction on such court to try the case, although there was no judgment in the justice's court from which an appeal could be taken: *Dargo th v. Thompson*, 1–243. To the contrary: *Kemble v. Liggin*, 2 G. Gr., 215.

Appearance on the appeal cures want of jurisdiction or defect of notice, having been served: *Dicks v. Henson*, 4 G. Gr., 297.

Amount in controversy on the appeal is the amount claimed by the pleadings, and not the amount of the judgment before the justice: *Nichols v. Wood*, 66–320.

Plaintiff cannot recover, in addition to the amount claimed by the pleadings, interest on the judgment rendered by the justice: *Hays v. Chicago, B. & Q. R. Co.*, 64–593.

Dismissal of action: If a cause properly commenced before a justice is tried without authority by another justice the cause should not be dismissed on appeal, but the unwarranted action disregarded: *Ely v. Dillon*, 21–47.

Judgment against sureties on bond, see § 4843 and notes.

Affirmance for failure of appellant to appear: If the appellant fails to appear the court may affirm the judgment of the justice: *Wright v. Clark*, 2 G. Gr., 86; *Taylor v. Barber*, 2 G. Gr., 350.

Presumption as to issues: If it appears there was a trial on the merits a denial of plaintiff's cause of action will be presumed, if no issue appears on the pleadings: See notes to § 4779.

Amendment of the pleadings: A party cannot in the court to which the appeal is taken, file new or amended pleadings as matter of right, but he may be allowed to do so upon proper terms after showing sufficient excuse for the omission to file the same in the justice's court: *Jones v. Hudson*, 21–79, *Stanton v. Warren*, 31–45, *Warren v. Scott*, 32–32, *Pray v. Cooper*, 31–211.

Leave to file amendments, even upon cause shown, is a matter of discretion: *Griswold v. Bowman*, 40–307.

In the absence of any showing of facts or circumstances requiring that a party be given permission to file an amendment, *held* not an abuse of discretion to refuse leave to do so: *Pickerd v. Snell*, 35–80.

The necessity of showing excuse may be waived by agreement of the parties: *Warren v. Scott*, 32–32.

The discretion of the court in allowing an amendment will not be interfered with unless it is clear that prejudice has resulted: *Dunlon v. Thornton*, 15–214.

The allowing of an amendment correcting the name of the partner bringing as plaintiff, *held* not erroneous: *Adair v. Zang*, 41–536.

In order to secure a trial of the appeal upon the very merits of the case, errors or insufficiencies in the pleadings should be allowed to be cured by amendment: *Clow v. Murphy*, 52–695.

4840. New demand. 3591. No new demand or counter-claim can be introduced into a case after it comes into the circuit [district] court, unless by mutual consent. [R., § 3933; C., '51, § 2344.]

A new cause of action or defense, of which the justice would not have had jurisdiction, cannot be set up on appeal: as, for instance, a claim for equitable relief: *Hollon v. Davis*, 59–444.

Nor can a claim for rescission of a contract be thus set up: *Grinnell v. Bowman*, 49–307.

Although the statute forbids any new demand or counter-claim being set up on the appeal, defendant may file an amended answer setting up the defense of payment. Such matter does not constitute a new demand or a counter-claim: *St. Louis Type Foundry v. Sudes*, 60–525.

4841. Appellant pay costs. 3592. The appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed. [R., § 3934; C., '51, § 2345.]

There is no ground for apportionment of costs if the judgment is less favorable than that before the justice: *Best v. Dean*, 8-519.

But this section is only applicable to an appeal by the party who recovers the judgment before the justice: *Ibid.*; *Howder v. Overholser*, 48-365.

Where the appeal was by defendant from a judgment against him before the justice, and on the appeal plaintiff recovered on only a part of several items of demand included in the first judgment, *held*, that the case was a proper one for apportionment of costs: *Howder v. Overholser*, 48-365.

The fact that judgment on appeal by the party recovering judgment before the justice is only enough greater in amount than that recovered before the justice to cover accrued interest thereon will not render the judgment more favorable to appellant in such sense as to entitle him to recover costs: *Trace v. Filkins*, 10-553.

4842. When appellee to pay. 3593. If the judgment below is against the appellant, he may proffer to pay a certain amount, with costs, and if the final amount recovered be less favorable to the appellee than such proffer, he shall pay costs of appeal. [R., § 3935; C., '51, § 2246.]

If the party against whom judgment is rendered by the justice appeals therefrom, and desires to avoid the costs of appeal in the event that appellee recovers on appeal a less amount, he (appellant) must proffer to pay a certain sum, and accrued costs, and then, if the judgment for appellee on appeal is for less than the amount proffered, the costs of the appeal will fall upon appellee: *Best v. Dean*, 8-519.

The proffer must be of a certain amount *with costs*: otherwise the appellee, if he recover judgment on appeal, is entitled to judgment for the entire costs, although he did not recover more than the amount proffered: *Powell v. Western Stage Co.*, 2-50.

These provisions do not restrict the statutory provisions as to an offer to confess judgment (§ 4109): *Watts v. Lamberton*, 39-272.

4843. Sureties. 3594. Any judgment in the circuit [district] court against the appellant shall be entered up against him and his sureties jointly. [R., § 3936; C., '51, § 2247.]

Judgment against sureties on the appeal bond should be limited to the amount of the bond: *Perry v. Denson*, 1 G. Gr., 467.

Although it is error in the court to enter up judgment against the appellant for a greater sum than the penalty of the bond, yet such a judgment would not be void for want of jurisdiction: *Freeman v. Hart*, 61-525.

If the appeal is dismissed because the amount in controversy is insufficient to warrant an appeal, judgment may be rendered against appellant and the sureties on the bond for the amount of the judgment in the court below and the costs of appeal: *Prescott v. Bacon*, 61-702.

Surety may appeal: A surety against whom judgment is rendered on the appeal bond has such an interest in the judgment that if erroneous he may move for its correction or for a new trial, or may appeal therefrom: *Freeman v. Hart*, 61-525

4844. Damages. 3595. If an appeal is taken for delay, the circuit [district] court shall award such damages, not exceeding ten per cent. on the amount of the judgment below, as may seem right. [R., § 3937; C., '51, § 2248.]

4845. Appeal from default. 3596. If the appeal is taken from a judgment by default, the defendant may file in the circuit [district] court, and the plaintiff reply thereto, any pleadings necessary to properly set forth any defense he may have to the action. In such case, the costs of the trial before the justice shall be taxed to the defendant.

This provision extends to defaults for want of appearance as well as to defaults for failure to plead: *McFarland v. Lowry*, 40-467.

It is the absolute right of the party appealing from a judgment against him by default to file an answer on appeal, and in the absence of any rule or special order of court with reference to the time for filing such pleading, he may do so at any time before the case is reached for trial: *Harty v. Des Moines & M. R. Co.*, 54-327.

But before the adoption of this section the defendant could not, in such cases, as matter of right, file an answer interposing a defense without showing some reason or excuse for not having answered before the justice: *Ruddick v. Vail*, 7-44; *Crane v. Fulton*, 10-457; *Leftwick v. Thornton*, 18-56.

As to filing new pleadings in other cases, see notes to § 4839.

In case of an appeal by a defendant from a judgment against him by default before the justice, if defendant does not appear nor interpose a defense in the court to which the appeal is taken, the judgment may be affirmed on plaintiff's motion: *Atkins v. McCready*, 8-214.

In such case defendant may appear and cross-examine witnesses in the same manner as in case of default in ordinary cases in such court. But if he makes no appearance the judgment of the justice may be affirmed without again introducing the evidence: *Harty v. Des Moines & M. R. Co.*, 54-327.

In the absence of any general rule of court to the contrary, such cases cannot be disposed

of, even on failure of the party appealing to appear, until reached for trial on the regular call of the docket: *Ibid.*

Where defendant in default in the justice court does not offer to file any answer until after the case is reached for trial, the court may properly refuse to allow such answer to be filed, the provisions of § 3842 being applicable: *McDowell v. Booth*, 72-141.

On appearance without interposing a defense the defendant in default before the justice may contest the amount of plaintiff's recovery, but not his right to recover: *Leftwick v. Thornton*, 18-56.

WRITS OF ERROR.

4846. When allowed. 3597. Any person aggrieved by an erroneous decision in a matter of law, or other illegality in the proceedings of a justice of the peace, may remove the same, or so much thereof as is necessary, into the circuit [district] court for correction. [R., § 3938; C., '51, § 2349.]

Decisions of justices upon matters of law are reviewable upon writ of error; and where the decision of the justice is final and does not affect the right of the plaintiff to recover in another action, but is upon a question affecting the jurisdiction of the justice, the capacity of the parties to sue or be sued, etc., is to be viewed on writ of error and not upon appeal: *Belding v. Torrence*, 39-516.

This is a proper remedy where a justice errs by refusing to take jurisdiction: *Ibid.*

Or where he improperly takes jurisdiction, or renders judgment by default: *Craine v. Fulton*, 10-457.

Error of the justice in overruling a demurrer should be taken advantage of by writ of error. It would be waived by appeal: *Leftwick v. Thornton*, 18-56.

The action of the justice in rejecting or recommitting an award, or refusing to do so, may be reviewed by writ of error: *Whitis v. Culver*, 25-30.

Where the right of plaintiff to exemplary damages was not raised by motion or demurrer, but the case was submitted to the jury, *held*, that the defendant could not, by writ of error, call in question the judgment entered by the justice on the verdict of the jury, on the ground that it allowed exemplary damages: *Atkinson v. Chicago & N. W. R. Co.*, 70-68.

As to when appeal is the proper remedy, see § 4824 and notes.

A writ of error brings up for review only such questions as were raised in the justice's court. The question of the jurisdiction of the justice not being raised in that court cannot be raised on an appeal to the supreme court: *Edwards v. Cosgro*, 71-296.

The fact that the party recovering the judgment files a transcript thereof in the clerk's office does not prevent the judgment being reviewed by writ of error: *Wilson v. Robinson*, 61-257.

There is no provision for writ of error from a justice in criminal cases. Appeal is the only method of review: See § 6095 and notes.

4847. Affidavit. 3598. The basis of the proceedings is an affidavit filed in the office of the clerk, setting forth the errors complained of, and must be filed in the same time, and the notice must be the same as in case of appeal. [R., § 3939; C., '51, § 2350.]

Affidavit for the writ: The affidavit may be made by the attorney of the party asking the writ, when he shows himself sufficiently acquainted with the facts to make the necessary statements: *Dixon v. Brophey*, 29-460.

The affidavit need not show that the party resisted the decision of the justice of which he complains, or excepted thereto, or that he applied to the justice to correct it: *Ibid.*

The affidavit required to obtain a writ of error must be signed by the affiant. It is not sufficient that it be sworn to without signing: *Crenshaw v. Taylor*, 70-386.

Dismissal for insufficiency of affidavit: Where the statements of error made in the affidavit are insufficient and do not show error, the proceeding may be dismissed on motion before the hearing of the case: *Elliott v. Mitchell*, 3 G. Gr., 237.

Notice: A proceeding by writ of error without notice to the appellee cannot be entertained: *Sprote v. Marshall*, 4 G. Gr., 344.

The hearing is upon the return, and not the affidavit: See notes to § 4849.

4848. Writ. 3599. The clerk shall thereupon issue an order commanding the justice to certify the record and proceedings so far as they relate to the facts stated in the affidavit. [R., § 3940; C., '51, § 2351.]

Where it does not appear to whom the writ was directed it will be presumed it was directed to the proper justice if he makes return thereto: *Sayles v. Deluhrey*, 64-109.

A mere failure to issue the writ of error *held* not to render subsequent proceedings erroneous, the return having been properly made by the justice, in answer to the affidavit for the writ: *Rhodes v. De Bow*, 5-260.

4849. Copy served; return. 3600. A copy of the affidavit shall accompany the order, and be served upon the justice, who shall, with the least practicable delay, make the return required. [R., § 3941; C., '51, § 2352.]

The justice should not only certify matters appearing of record by the entries upon his docket, or a bill of exceptions, but any other proceeding stated in the affidavit for the writ, and may be required to certify as to objections made to evidence, and as to the evidence received, so far as it is within his recollection, although not preserved by bill of exceptions; but this is only for the purpose of enabling the court to determine as to the correctness of rulings upon objections to evidence, etc., and not for the purpose of trying again questions of fact, which can only be done on appeal: *Miller v. O'Neal*, 9-446.

It is upon the return of the justice, and not upon the affidavit, that the question of error is to be determined: *Stone v. Murphy*, 2-35; *Lane v. Goldsmith*, 23-240.

If the return of the justice does not show the error complained of, the affidavit on which the writ is procured amounts to nothing for that purpose: *Vance v. Kirfman*, 20-13.

The justice of the peace is only required to show in his return such matters as are rendered necessary by the affidavit for the writ: *Spiesberger v. Thomas*, 59-606.

4850. Proceedings stayed. 3601. All proceedings in the justice court subsequent to judgment, may be stayed by a bond, entered into like that required in cases of appeals, and on which judgment shall be entered against the principal and surety in like manner and under like circumstances. [R., § 3942; C., '51, § 2353.]

While no bond is required in case of the prosecution of a writ of error, yet if one is not given the judgment of the justice may be enforced notwithstanding the writ of error, and even though a judgment in the circuit court on the writ of error is superseded by a bond given on appeal to the supreme court: *Thomas v. Nicklas*, 58-49; *Pellersells v. Allen*, 56-717.

Failure to file *supersedeas* bond does not prevent writ of error: *Wilson v. Robinson*, 61-357.

4851. Amended return. 3602. The circuit [district] court may compel an amended return when the first is not full and complete. [R., § 3943; C., '51, § 2354.]

Where the facts are reasonably apparent from the return, it is not error to refuse to order a further return to correct a mere clerical error: *Olin v. Chicago, M. & St. P. R. Co.*, 61-250.

4852. Judgment. 3603. The circuit [district] court may render final judgment, or it may remand the cause to the justice for a new trial, or such further proceedings as shall be deemed proper, and may prescribe the notice necessary to bring the parties again before the justice. [R., § 3944; C., '51, § 2355.]

The question to be determined is whether the justice erred in the particular decision complained of in the affidavit for the writ of error: *Hays v. Gorby*, 3-203; *State v. Nichols*, 5-413.

The court will not, on the writ of error, review the findings of the justice as to questions of fact. Appeal is the proper remedy: *Taylor v. Rockwell*, 10-530; *State v. Roney*, 37-30.

And this is true although all the evidence before the justice is set out in a bill of exceptions: *Lane v. Goldsmith*, 23-240.

The court can render final judgment only where no trial is necessary. If there must be a new trial, the case should be sent back to the justice. The court has no authority to retain and try the case itself: *Swan v. Bournes*, 47-501.

On a writ of error from a judgment of a justice of the peace upon a verdict which did not properly specify the amount of recovery, *held*, that upon determination that the judgment was erroneous, the cause should have been remanded to the justice and the court could not render judgment: *Bartle v. Plane*, 68-227.

There may be cases where the final judgment should be rendered in the district court after the determination of the writ of error: *Logan v. Samsel*, 74-87.

Under statutory provisions as to appeals similar to those now regulating writs of error, *held*, that upon reversal of the action of the justice it was not proper to order a new trial in the court in which the appeal was decided: *Davis v. Curtis*, 2 G. Gr., 575.

Though the justice may not have had jurisdiction, yet upon the removal to the circuit court, that court obtains jurisdiction, and its judgment is not void, although erroneous: *Finch v. Hollinger*, 47-173, 176.

The judgment of a justice should not be reversed on writ of error for any error which might have been corrected by the justice on motion, unless such motion is made and overruled: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

If, after the application for and service of the writ, but before the hearing, the opposite party causes the judgment to be modified so as to correct the error, no objection to such modification being made, the judgment should not be reversed on the hearing, although the party making the modification might be required to pay the costs of the proceeding by writ of error: *Rahn v. Greer*, 37-627.

4853. Restitution. 3604. If the circuit [district] court render a final judgment, reversing the judgment of the justice of the peace after such judg-

ment has been collected in whole or in part, it may award restitution with interest and issue execution accordingly, or it may remand the cause to the justice for this purpose. [R., § 3945; C., '51, § 2356.]

RECOVERY OF PERSONAL PROPERTY — ATTACHMENT.

4854. Action to recover personal property. 3605. The proceedings to gain possession of personal property wrongfully withheld, will be the same as are prescribed in such cases in the circuit [district] court, except as modified in this chapter. [R., § 3946; C., '51, § 2357.]

4855. Attachments. 3606. Attachments are not allowable in justices' courts, if the sum claimed is less than five dollars. And if more is claimed and less recovered, the plaintiff shall pay all the costs of the proceedings so far as they relate to the attachment. [R., § 3947; C., '51, § 2358.]

For less than five dollars: Although attachments are not allowable in justices' courts if the sum claimed is less than five dollars, yet in such an action the judgment may be for less than five dollars, and the fact that it is will not necessarily render the attaching plaintiff liable on his bond: *Bradham v. McCall*, 2 G. Gr., 214.

4856. Garnishee. 3607. The constable has the same power to administer an oath to the garnishee and to take his answer, as is given to the sheriff in cases of attachment in the circuit [district] court. [R., § 3948; C., '51, § 2360.]

4857. Appearance. 3608. Garnishees may be required to appear and answer at the time fixed for the appearance of the parties to the action. [R., § 3949; C., '51, § 2361.]

The justice having jurisdiction of the subject-matter and the defendant may render judgment against a garnishee who has answered, although he be a resident of another county: *Smith v. Dickson*, 58-444.

A justice acquires no jurisdiction in a garnishment proceeding by reason of service of notice of garnishment in another county: *Gage v. Maschmeyer*, 72-656.

4858. Against absentees. 3609. When an attachment or order for the delivery of property has been issued by any justice of the peace in any action, and it shall be found that the defendant is absent so that personal service cannot be had, the justice, upon the return day, unless the defendant appear, shall make an order fixing the day for the trial, not less than sixty days thereafter and requiring notice to be given by any constable as provided in the next section. [R., § 3950.]

4859. Notice by posting. 3610. Upon such order being made, at least sixty days' notice of the pendency of such action shall be given by posting up written or printed notices in three public places in the township where the action was commenced, and such notices shall have the effect of a service by publication in the circuit [district] court, and the justice shall proceed to hear the cause upon the day specified for that purpose; but no bond shall be required of the plaintiff after judgment as may be in the circuit [district] court. [R., § 3951.]

That the notice so posted does not state the township in which the action is pending will not invalidate the judgment: *Johnson v. Dodge*, 19-106.

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

4860. Action for. 3611. A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force, or intimidation, or fraud, or stealth, entered upon the prior actual possession of another in real property, and detains the same;

2. Where a lessee holds over after the termination, or contrary to the terms of his lease;

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale, in either of which cases, such title shall be clearly and concisely set forth in the defendant's pleading [R., § 3952; C., '51, § 2362. 9 G. A., ch. 174, § 7.]

Threats sufficient to induce fear of violent entry under corresponding provision, although personal violence was not threatened *Harrow v Baker*, 2 C. Gr. 201

A tenant holding over after the expiration of his lease does not become a tenant at will, entitled to thirty days notice to terminate such tenancy, but is entitled to only the three days' notice to quit *Kellogg v Groves*, 53-59

Fraud in the execution of a lease under which defendant holds possession cannot be set up by him in justification of holding over after the expiration of such lease *Simons v Marshall*, 3 G. Gr., 502

The term of property sold under execution can be put out of possession by the provisions of this section after the purchaser's right to possession under his deed becomes complete, notwithstanding growing crops which are not yet matured, they having been sowed or planted with knowledge that the right to possession would terminate before the time of harvesting the same *Wheeler v. Wade*, 67-612

Possessor, the question involved in the action is the fact of possession alone and not the right to possession. A person in wrongful possession himself liable to this action by entering on his premises by force from one such, even when he has the right to immediate possession *Stephens v McCoy*, 56-659, *Emsley v. Bennett*, 31-15

The action may be brought by a trespasser who has had possession against the real owner who has forcibly and illegally turned him out of possession *Lorimer v Lewis*, No., 53

The right of a tenant to possession under a contract of lease until which he has not had actual possession, cannot be litigated in this action *Krumweid v Schroder*, 57-500

Where a tenant holds possession of enclosed ground and such possession may be protected by this action, yet it covers all cases of actual possession, and does not require possession merely constructive such possession it is not necessary that the premises be inhabited, fenced or built upon *Lacy v Long*, 4 Zab.

Section considered *Jordan v Wade*, 53-647

As to question of title, see 4 Zab. and notes

4861. Rent in arrear. 3612 The mere non-payment of rent by the time stipulated in the lease does not enable a plaintiff to resort to this action unless expressly so stipulated in the lease [R., § 3953, C., '51, § 2363.]

4862. Who may bring. 3613 The legal representative of a person who might have been plaintiff if alive, may bring this suit after his death [R., § 3954, C., '51, § 2364.]

By legal representatives is meant the executor or administrator. The right of the latter to bring such action exists with a statutory enactment *Beezly v Burgen*, 15-192

4863. Notice to quit. 3614 Before suit can be brought in any except the first of the above classes, three days notice to quit must be given to the defendant in writing [R., § 3955, C., '51, § 2365.]

Under particular facts, *held*, that defendant went into possession as assignee of an unexpired lease and not by tenancy and was therefore at the expiration of the lease, entitled to three days notice to quit *Gifford v King*, 54-525

Proof of service of such notice by affidavit of a person not an officer, in the manner provided for service of original notices by private persons is not sufficient to entitle the notice to be received in evidence without further proof. The notice is not one in an action, but one which forms the basis of a private right and must be proved as any other matter *in pais. Hollingsworth v Sutton*, 24-

The fact that, instead of serving the three days notice to quit service is made of thirty days notice to terminate a tenancy, which is not authorized by § 190, the latter being one in which no such thirty days notice is necessary, will not render the proceedings under such notice after the expiration of thirty days from the service thereof, void and without jurisdiction but will be an irregularity only *Shuver v Klinkenberg*, 67-544

4864. Petition. 3615 The petition must be in writing and sworn to [R., § 3956, C., '51, § 2366.]

A petition conforming in its averments to the requirements of the statute is sufficient *Simons v Marshall*, 3 G. Gr., 502

4865. Where brought. 3616 The proceedings may be had before a justice of the peace of the township where the premises are situated, or if

there is no justice therein able or qualified to act, they may be brought before some justice in any adjoining township. They shall be governed by the same rules as other cases before justices of the peace except as herein modified. [R., § 3957; C., '51, § 2367.]

Jurisdiction of the action: A justice of the peace alone has original jurisdiction in such proceedings, and therefore, when an appeal is taken from his judgment, the appellate court should try the case as made before the justice and not allow it to be changed and entirely new issues made: *Dicks v. Hatch*, 10-380.

The district court can acquire no jurisdiction in such cases, not even by stipulation of the parties: *Easton v. Fleming*, 51-305.

The allowance on appeal of an amendment to the petition more particularly describing the property, but not in any way changing the issue, *held* not ground for reversal: *Kuhn v. Kuhn*, 70-682.

4866. Time for appearance. 3617. The time for appearance and pleading must not be less than two, nor more than six days from the time the notice is served on the defendant. [R., § 3958; C., '51, § 2368.]

The fact that the notice is served nine days before the time fixed for appearance instead of two to six days as here provided will not deprive the court of jurisdiction nor render its proceedings void. The notice will be defective only: *Shuver v. Klinkenberg*, 67-544.

4867. Adjournment. 3618. No adjournment shall be made for more than ten days, nor to any other place except by consent of parties. [R., § 3959; C., '51, § 2369.]

4868. Judgment. 3619. If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an order of removal shall issue accordingly, to which shall be added a clause commanding the officer to levy the costs as in ordinary cases. [R., § 3960; C., '51, § 2370.]

4869. Title not investigated. 3620. The question of title cannot be investigated in this action. And nothing herein contained prevents a party from suing for a trespass, or from testing the right of property in any other manner. [R., § 3961; C., '51, § 2371.]

The party who has been in possession cannot make use of such action instead of an action of right in order to have the right of possession determined: *Settle v. Henson*, Mor., 111.

Where defendant sets up a paramount title, or the question of title is otherwise involved, the action cannot be maintained: *Bosworth v. Farrenholtz*, 4 G. Gr., 440. But see §§ 4784-5.

Where the petition stated the title of plaintiff for the purpose of showing that defendant was a tenant holding over after the termination of a tenancy at will, *held*, that it did not thereby appear that title was involved: *Jordan v. Walker*, 52-647.

Where defendant denied plaintiff's title, and averred title in himself, such answer not being in any way responsive to the petition, and the averment being a mere conclusion of law, *held*, that no question of title was thereby raised: *Jordan v. Walker*, 56-686.

Where plaintiff alleged entry by defendant by fraud and stealth, and defendant, denying entry by fraud and stealth, alleged that he had entered and was in possession with permission of plaintiff under a contract of purchase, *held*, that this allegation did not raise a question of title, but was in effect a mere denial of plaintiff's allegations: *Oleson v. Hendrickson*, 12-222.

Proof of title is not admissible for the purpose of showing constructive possession in the absence of other evidence of possession: *Stephens v. McCloy*, 36-659.

See, also, § 4784.

4870. Bar. 3621. Thirty days' peaceable and uninterrupted possession with the knowledge of the plaintiff after the cause of action accrued, is a bar to this proceeding. [R., § 3962; C., '51, § 2372.]

Neither the good faith with which the defendant went into possession, nor the fact that he made improvements on the property, are material under this section, nor sufficient to constitute a defense in the absence of the kind and length of possession contemplated: *Fultz v. Black*, 3-569.

4871. No joinder. 3622. An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counter-claim. [R., § 3963; C., '51, § 2373.]

4872. Order for removal. 3623. The order for removal can be executed only in the day-time. [R., § 3964; C., '51, § 2374.]

4873. Effect of appeal or writ of error. 15 G. A., ch. 41. An appeal or writ of error, taken in the usual way, if the proper security is given, suspends the execution for costs, and may, with the consent of the plaintiff, prevent the warrant of removal from being executed, but not otherwise. [R., § 3965; C., '51, § 2375.]

Issuance and execution of an order of removal, after judgment for plaintiff in such an action, should not be enjoined on the averment that defendant intends to appeal. Whether after appeal is taken he might have such injunction upon a showing that he will sustain irreparable injury, *quære: Curd v. Farrar*, 47-504.

4874. Restitution. 3624. The circuit [district] court, on the trial of the appeal, may issue an order of removal or restitution as the case may require. [R., § 3966; C., '51, § 2376.]

The fact that plaintiff has prosecuted to judgment a second action of forcible entry and detainer constitutes a waiver of his right to appeal in a former action for the same purpose in which he has been defeated: *Liebuck v. Stahle*, 66-749.

GENERAL PROVISIONS.

4875. Official papers to successor. 3625. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets, as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor. [R., § 3967; C., '51, § 2377.]

4876. Or county auditor. 3626. If his office becomes vacant by death, removal from the township, or otherwise, before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, to be by him turned over to the successor of the justice when elected and qualified. [R., § 3968; C., '51, § 2378.]

4877. Successor may issue execution. 3627. The justice with whom the docket of his predecessor is thus deposited, may issue execution on or give a transcript of any judgment there entered, in the same manner and with like effect as the justice who rendered the judgment might have done; and in case of the death, absence, or inability to act of any justice, or in case of the vacation of the office of any justice from any cause, then in such case, execution may be issued from the docket of said justice or transcript given therefrom, by any other justice in said township with like effect as might have been done by the justice who rendered the judgment. [R., § 3969; C., '51, § 2379; 13 G. A., ch. 188.]

The certificate of an ex-justice in relation to proceedings had before him while in office is not entitled to legal consideration: *Brown v. Scott*, 2 G. Gr., 454.

4878. Successor; how determined. 3628. When two or more justices are equally entitled to be deemed the successor in office of any justice as aforesaid, the county auditor shall determine by lot which is the successor, and certify accordingly; such certificate shall be in duplicate, one copy of which shall be filed in the office of such auditor, and the other given to such successor. [R., §§ 3970-1; C., '51, §§ 2380-1.]

4879. Interchange. 3629. In case of sickness or other disability, or necessary absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may, at his request, attend and transact the business for him without any transfer to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no

such interchanging of official service had taken place. [R., § 3972; C., '51, § 2382.]

Whether another justice of the county can act at the request of the one before whom the suit is brought, but who, by reason of relations with one of the parties, deems that it would be improper for him to try the case, *doubted: Ely v. Dillon*, 21-47.

4880. Special constables. 3630. Any justice of the peace may, in writing, specially depute any person of suitable age to perform any particular duty properly devolving upon a constable, and for that particular purpose he shall be subject to the same obligations and receive the same fees. If such person be appointed to serve an attachment, execution, or order, for the delivery of property, he shall, before levying upon such property, execute a bond to the state of Iowa in a penal sum of not less than two hundred dollars, to be fixed by the justice, with one or more freeholders as sureties, to be approved by and filed with the justice making the appointment, and the usual official oath shall be indorsed thereon and signed. For any breach of such bond, any person injured thereby may bring suit thereon in his own name, and recover the same damages as upon a constable's bond in like cases. [R., § 3973; 9 G. A., ch. 174, § 8.]

A special constable appointed under this section is not a peace officer within the meaning of § 5491. The appointment may be to perform a particular duty, but it cannot be general, as to assist peace officers to seize liquors: *Foster v. Clinton County*, 51-541.

4881. No process. 3631. No process can issue from a justice's court into another county, except when specially authorized. [R., § 3974; C., '51, § 2384.]

"Process," as here used, does not include original notices, which may be served out of the county in some cases: *Klingel v. Palmer*, 42-166.

4882. Sheriff and constable. 3632. The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the circuit [district] court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court. [R., § 3975; C., '51, § 2385.]

4883. Justice his own clerk. 3633. The justice may be regarded as his own clerk and perform the duty of both judge and clerk. [R., § 3976; C., '51, § 2386.]

4884. Successor to renew execution. 3634. When the term of office of a justice of the peace for any cause expires, his successor may issue execution, or renew execution in the same manner and under the same circumstances as the former justice might have done if his term of office had not expired. [R., § 3977; C., '51, § 2387.]

4885. Board of supervisors furnish docket. 3635. The board of supervisors of each county shall furnish to each justice of the peace of such county, a well-bound blank record book of not less than four quires, with index, suitable for a docket, upon the certificate of such justice that the same is necessary for the business of the office. [11 G. A., ch. 53.]

TITLE XXII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

4886. Who competent; defendant in criminal case. 3636; 17 G. A., ch. 168, § 1. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial, refer to the fact that the defendant did not testify in his own behalf; and should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial. [R., § 3978; C., '51, § 2388.]

This section, in so far as it limits witnesses to human beings "of sufficient capacity to understand the obligation of an oath," is not in conflict with Const., art. 1, § 4, such qualification being assumed therein: and where a little girl of less than nine years of age was not allowed to testify, it not appearing what other inquiry was made as to her capacity, the supreme court refused to interfere: *Kilburn v. Mullen*, 22-498.

A person of sufficient capacity to understand the obligation of an oath is a competent witness in any case, unless he is included in some of the exceptions in the statute: *State v. Reinsbarger*, 71-746.

As to defendant in a criminal prosecution being a witness, see § 5954.

As to reference by prosecuting attorney to defendant's failure to testify being ground for new trial, see § 5874.

4887. Credibility. 3637. Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility. [R., § 3979; C., '51, § 2389.]

As affected by religious belief: Lack of belief in God, or future conscious existence, does not render a witness incompetent, nor does it render incompetent a party's dying declaration; but proof of such fact is admissible to lessen the credibility of his testimony or of such declaration: *State v. Elliott*, 45-486.

The fact that a witness does not believe in a God, and that He will reward or punish us according to our deserts, may be shown as affecting the credibility of the witness, but it is erroneous to confine the evidence to a belief in future rewards and punishments: *Searcy v. Miller*, 57-613.

The facts as to belief are not to be brought out by cross-examination, but by proof of declarations, etc.: *Ibid.*

A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinions on matters of religious faith for the purpose of affecting his credibility by showing that he does not believe in a future conscious state of existence: *Dedric v. Hopson*, 62-562.

As affected by mental condition: The credibility of a witness may be impeached by showing an abnormal condition of the mind, caused by disease or habits which impair the memory: *Alleman v. Stepp*, 52-626.

The fact that a witness was under the influence of liquor at the time of the occurrence with reference to which he testifies will not destroy the credibility of his testimony with reference thereto, although it will undoubtedly impair it, and if he is corroborated as to the occurrences, or his recollection appears distinct and clear, he may be entitled to belief: *State v. Castello*, 62-404.

Suppression of facts: Failure of a party as a witness to give a full and fair statement of matters involved in the issues of the case may be regarded as affecting the credibility of his testimony. Intentional suppression of facts is to be regarded in the same light as false statement of facts of like bearing: *Lee v. Cresco*, 47-499.

Interest: See notes to next section.

Credibility as affected by interest in criminal cases, see notes to § 5954.

4888. Interest. 3638. No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter. [R., § 3980.]

Under our statute the interest of a witness does not disqualify him, but can only be shown for the purpose of lessening his credibility, but the rules relating to the admissibility of evidence showing the interest of the witness are the same as at common law: *Erickson v. Bell*, 53-627.

Therefore, *held*, in accordance with the rule of the common law, that testimony to establish declarations of a witness, to the effect that he is interested in the event of the suit, is not admissible: *Ibid.*

Interest of a witness in behalf of one of the parties should be considered as affecting his credibility and for no other purpose: *Holloway v. Griffith*, 32-409.

The jury may properly be instructed to consider the interest of a witness, his hopes and fears, etc.; and in an action against a railway, *held*, that such instruction was not erroneous as tending to reflect upon the credibility of railroad employees: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

Held proper on cross-examination to show that the witness was a bondsman for the party by whom he was called, that fact being one proper to be considered by the jury in determining what weight and credit ought to be given to his testimony: *State v. Calkins*, 73-128.

4889. When one party is deceased. 3639. No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence. [R., § 3982.]

Constitutionality: This section is not unconstitutional as in violation of the provision of Const., art. 1, § 4, with relation to competency of witnesses. Under the constitutional provision it is still competent for the legislature to declare that interest in the event of a suit shall or shall not disqualify the witness: *Karney v. Paisley*, 13-89; *Donnell v. Braden*, 70-551.

To what actions the provision is applicable: The disqualification provided for in this section is not limited to actions brought by an executor, assignee or guardian, but applies also in actions against such parties. It extends, however, only to cases where the witness is examined as against such executor, assignee or guardian, and not to cases where he is examined by such party: *Leasman v. Nicholson*, 59-259.

This section is applicable to a controversy between the heirs of deceased: *Neas v. Neas*, 61-641.

Where an administrator, though a party, was not a necessary party, and the suit was dismissed as to him, *held*, that the testimony of plaintiff as to a personal transaction between himself and decedent was competent: *Campbell v. Mayes*, 38-9.

The section is not applicable in an action against an administrator *de bonis non* where the transaction as to which the witness is called to testify was with a prior administrator since deceased: *Dunne v. Deery*, 40-251.

In a controversy between creditors as to which was entitled to property in the hands of an administrator, who was joined as a party defendant, *held*, that the case was not one in which such administrator was a party, so as to prevent one of the creditors who was a party to the suit from testifying as to transactions with decedent: *Gordon v. Kennedy*, 36-167.

Who excluded as parties: This section excludes as to certain matters the testimony, first, of *parties* to the action, and, secondly, of *persons interested therein;* that a party is shown not to have any interest in the matter will not render him competent: *Williams v. Barrett*, 52-637.

The testimony of a party to an action brought by an heir or administrator and relating to a personal communication between himself and deceased is not competent, although such party has no interest in common with the other defendants against such heir or administrator: *Burton v. Baldwin*, 61-283.

Where one of the parties defendant in an action by an administrator had entered into a stipulation for judgment against him to a particular amount, *held*, that he was no longer a party to the action in such sense as to be disqualified from testifying under the section, although judgment had not yet been formally rendered: *Couger v. Bean*, 58-321.

What interests sufficient to disqualify: The interest of an administrator no longer

disqualifies him from testifying in an action to which he is a party. But if the adverse party is an executor, so as to bring the case within the statutory provision heretofore given, the administrator cannot testify: *Schmid v. Kreismer*, 31–479.

The interest which disqualifies must be a legal certain and immediate interest. If it be a doubtful one, the objection goes to the credibility of the witness: *Birge v. Rhinehart*, 36–369.

The true test of such interest is that the witness will either gain or lose by the direct, legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency: *Wormley v. Hamburg*, 40–22.

The interest contemplated as sufficient to exclude a witness is such as would, at common law, disqualify him. Where the witness has equal interest on both sides, he will not be disqualified: *Goddard v. Leffingwell*, 40–249.

The interest sufficient to disqualify must be present, certain and vested. It will not be sufficient that at a prior time the witness might have been the holder of an equitable interest in the property in controversy: *Zerbe v. Reigart*, 42–229.

In an action by an administrator against a person to recover property of the estate wrongfully appropriated, an heir of decedent who would be entitled to a distributive share of the estate not required for the payment of debts is an interested witness unless it appears that the estate is insolvent: *Ivers v. Ivers*, 61–721.

In such case a mere disclaimer by the witness of any interest in the estate will not render him competent, as such disclaimer will not operate to release his interest: *Ibid.*

In an action by the widow and administratrix of a deceased person to recover from the heirs property claimed to belong to the estate, testimony of the heirs as to a gift to them of the property by deceased during his life-time is not admissible: *Samson v. Samson*, 67–253.

In such case, *held*, that the husband of one of the heirs, who was present during the transaction, and, at his wife's request, joined with her in an undertaking to make payments to her father in consideration of the property received, was not a competent witness as to the transaction: *Ibid.*

But the wife of one of the heirs, who was present at the time of the transaction with such heir, but was not a party to such transaction, *held* a competent witness: *Ibid.*

In an action by a person claiming as heir against defendants claiming title to property of deceased through a sheriff's sale, *held*, that one of such defendants was not a competent witness as to a personal transaction with deceased tending to show an abandonment of the homestead right in the property sold: *Baker v. Jamison*, 73–698.

In an action by a corporation against the executor of the decedent, *held*, that a stockholder of plaintiff could not be allowed to testify as to a contract between plaintiff and deceased: *First Nat. Bank v. Owen*, 52–107.

The statute is not to be construed as applicable only to witnesses who are interested in favor of the party introducing them: *Donnell v. Braden*, 70–551.

A person whose liabilities would not be affected by the result of the action, *held* not incompetent to testify under this section: *Fuller v. Lendrum*, 58–353.

Under a corresponding provision (Rev., § 3982), which excluded the evidence of the adverse party in a suit by or against an executor, as to facts transpiring before decedent's death, *held*, that the payee of the note in controversy, who had transferred it to the plaintiff as a good faith purchaser before maturity, had no interest in an action brought thereon against the administrator of the maker of the note such as to disqualify him from testifying: *Burroughs v. McLain*, 37–189.

The facts in a particular case *held* not to show any interest on the part of a witness disqualifying him to testify as to admissions made to him by deceased: *Bixley v. Wormley*, 44–347.

What deemed personal transactions: It is only as to personal transactions between himself and deceased that a party is prohibited from testifying: *Sypher v. Savery*, 39–258, 264; *Haverly v. Alcott*, 57–171.

The payment of a note to the deceased is a personal transaction within the meaning of this section: *Williams v. Brown*, 45–102. So is the delivery of a deed from witness to decedent: *Wood v. Brolliar*, 40–591.

The evidence of the wife of a party to the note to prove that he executed the note as surety would be inadmissible: *Auchampaugh v. Schmidt*, 72–656.

In an action against an administrator on a note claimed to have been given by decedent to plaintiff for labor performed by plaintiff's wife for deceased, *held*, that testimony of the wife respecting the amount of labor performed by her for deceased was not admissible: *Ashworth v. Grubbs*, 47–353.

Where it is sought to recover against an administrator for work done, etc., with the knowledge or assent of deceased, in such way as to raise an implied promise, the party seeking to recover cannot give evidence of the work done: *Peck v. McKean*, 45–18; *Smith v. Johnson*, 45–308; *Wilson v. Wilson*, 52–44.

Where a child seeks to recover compensation from the estate of a deceased parent for services rendered under express agreement for compensation, such child cannot be allowed to give evidence as to the kind or character of the work done, as such evidence would tend to prove a contract between herself and parent: *Cowan v. Musgrave*, 73–384.

In an action by the wife of deceased upon a note executed to her in a settlement between deceased and defendant, *held*, that evidence of defendant as to what occurred at the time of such settlement was not admissible: *Wilcox v. Jackson*, 51–208.

Where plaintiff proposed to prove upon his own testimony, in an action against an administrator for services alleged to have been rendered decedent under contract, that he had never received payment for such servies, *held*, that the evidence was properly rejected: *Van Sandt v. Cramer*, 60–424.

In a suit against the wife in respect to the

homestead for the purpose of enforcing a claim under a conveyance of the same in which she joined with the husband, her testimony as to what was said to her by her husband at the time of the conveyance, he being since deceased, is not admissible: *Palmer v. Palmer*, 62–204.

Where a defendant, in an action by an executor on a note, attempted to show that such note was not the property of deceased, but of a third person, for whom deceased acted as agent, for the purpose of rendering admissible evidence by defendant of payment made to deceased on such note, *held*, that such evidence of payment was not to be received until defendant had satisfied the court of the relation of agency as claimed: *Williams v. Brown*, 45–102.

The testimony of an heir is not incompetent as to conversations which he heard between deceased and defendant: *Sweezey v. Collins*, 40–540.

The personal transactions and communications which, under this section, may not be testified to by the wife are those had between her and the deceased personally. She is not incompetent to testify thereto if had between the deceased and her husband; therefore, *held*, that she might testify in regard to conversations between her husband and deceased as to which she was a mere listener: *Johnson v. Johnson*, 52–586.

The section does not forbid testimony as to personal transactions and communications between deceased and another person than the witness. The personal transaction or communication must be had with the witness in order to make his testimony inadmissible: *Lines v. Lines*, 54–600.

This section does not prevent one party to a suit testifying to a conversation between the deceased and a co-party: *Smith v. James*, 72–515.

In an action by an administrator, *held*, that defendant was not incompetent as a witness to testify as to the payment of money to a third person upon a lien as to which deceased appeared also to have made payment, the transaction being with the third person and not with deceased: *Wormley v. Hambury*, 46–144.

The doing of certain acts in the presence of deceased, not depending for their value as evidence upon his presence, *held* not to be a personal transaction with him in such sense as to prevent the wife of the party from testifying in respect thereto: *Dougherty v. Deeney*, 41–19.

In an action by an administrator against defendant to recover a subscription alleged to have been paid by deceased to trustees and by said trustees to defendant, *held*, that defendant was a competent witness as to the transaction between himself and such trustees: *Sypher v. Savery*, 39–258.

That a party defendant, in an action by an administrator, after stating that he signed the note sued on in his own house, was allowed to state who were in the house at that time, was held not error under this section: *Conger v. Bean*, 58–321.

In an action by an administrator on a note executed to intestate, the party executing the note is not precluded from testifying as to the date on which the note was actually made: *Barlow v. Buckingham*, 68–169.

Acts and conduct of legatees in a will towards testator do not constitute a personal transaction between legatee and testator as to which the legatees cannot be called to testify in a proceeding to probate the will: *Parsons v. Parsons*, 66–754.

The husband of the legatee under the will is a competent witness to testify as to the mental condition of testator. Such condition does not relate to a personal transaction within the meaning of this section: *Severin v. Zack*, 55–28.

It is not necessary that the testator should proclaim or state to the subscribing witnesses to his will that the instrument is his will. And it is wholly unnecessary that there should be any personal transaction between the testator and the subscribing witnesses: *Bates v. Officer*, 70–343.

In particular cases, *held*, that the facts testified to by witness did not involve a transaction between the witness and decedent within the meaning of the section: *Mayes v. Turley*, 60–407; *Miller v. Dayton*, 57–425.

In rebuttal: A plaintiff coming within the terms of this section cannot testify as to personal transactions between himself and deceased, even to rebut the testimony of decedent's widow: *Canaday v. Johnson*, 40–587.

Removal of prohibition by testimony of administrator, heir, etc.: The prohibition prescribed in this section does not extend to any transaction as to which the administrator has been examined in his own behalf: *Ivers v. Ivers*, 61–721.

In an action by a husband against the heirs of his deceased wife to set aside a conveyance made by him to her during her life-time, *held*, that the fact that defendant was introduced as a witness would only remove the prohibition against the testimony of plaintiff with reference to such transactions as were testified to by defendant: *Wood v. Brolliar*, 40–591.

The fact that the executor or administrator testifies as to one transaction does not entitle the opposite party to testify in reference to other transactions with the decedent: *Luehrsmann v. Hoings*, 60–708.

The contestants of a will, in an action to probate the same, having testified only as to their relations with deceased, *held*, that it was not competent for one of the proponents to testify as to matters proposed to be proved by him: *Sisters of Visitation v. Glass*, 45–154.

The statute contemplates that when the administrator or other representative of the deceased testifies as to a personal transaction and describes it, then a party may also testify in relation thereto and give his version of the transaction; but the fact that the administrator refers to a personal transaction as possible does not open the way for the admission of such testimony: *In re Estate of Edwards*, 58–41.

When the executor testifies in his own behalf, but not as to a personal transaction, and his testimony is not adverse to the opposite party, the fact of his being a witness does not remove the prohibition as to personal transactions: *Ibid.*

Where the administrator testifies as to trans-

actions between defendant and deceased raising an implied promise or obligation on the part of defendant to pay, defendant may testify as to what the real arrangement was in relation thereto: *Bailey v. Keyes*, 52-90.

Where a deposition is incompetent by reason of the interest of one of the parties to the suit, and the action is afterwards dismissed as to that party, it will become competent as to the others. The common-law rule as to the competency of a witness, by which his deposition, if incompetent on account of interest at the time it was taken, will always remain incompetent, will not apply: *Campbell v. Mayes*, 38-9.

But if the testimony of the witness is incompetent, when taken, by reason of his being a party, it is not admissible although at the time it is offered the *status* of the witness has changed and he is no longer a party: *Burton v. Baldwin*, 61-283.

The objection under this section is not to the competency of the witness but to the competency of the testimony: *Ibid.*

Under previous statutory provisions (Rev., § 3982, which differed materially from the present section), the administrator of a decedent was not incompetent as a witness to testify in an action brought by him to recover from another possession of property of such decedent: *Bradley v. Kavanagh*, 12-273.

So in a proceeding against an estate to enforce a claim the administrator was held competent: *Stiles v. Botkin's Estate*, 30-60.

The widow of decedent was held not incompetent to testify in an action against the administrator of decedent to recover compensation for support furnished to such widow during the life-time of such decedent: *Romans v. Hay's Adm'r*, 12-270.

And therefore defendant in a replevin suit for goods taken on attachment was not placed in such a position by the death of the plaintiff in the attachment suit that he became incompetent as a witness: *Bevan v. Hayden*, 13-122.

Where an action was pending against a defendant, who subsequently died, and whose administrator was then substituted, *held*, that a deposition of plaintiff taken before defendant's death was not admissible in evidence: *Quick v. Brooks*, 29-484.

Also *held*, that the statute was not applicable to a case where the person deceased was merely a trustee and the person beneficially interested was living: *Watson v. Russell*, 18-79.

The fact that matters sought to be proved by a witness who is defendant in a suit brought against him as surviving partner for contribution, by the administrator of his deceased partner, are connected with transactions of the firm, and that the surviving member is a witness, cannot have effect to annul the statutory provisions with reference to such testimony: *Hosmer v. Burke*, 26-353.

In an action between a surviving member of a partnership and a creditor of a deceased member, *held*, that defendant was not incompetent to testify as to a personal transaction between him and such deceased member: *Brown v. Allen*, 35-306.

In an action by an assignee in bankruptcy of a surviving partner against a supposed debtor of the firm, *held*, that defendant was not prohibited from testifying as to personal transactions with the deceased partner: *Ruddick v. Otis*, 33-402.

Where in an action against an executor the only question was as to the amount of money contained in an express package which never reached the deceased, the testimony of plaintiff was competent to prove the amount of money contained in such package when deposited by him in the express office, such evidence, for the specific purpose for which it was offered, being competent from the necessity of the case: *Sykes v Bates*, 26-521.

In an action against the executor of a deceased person, *held*, that the wife of plaintiff was not incompetent, the exclusion of the wife as a witness against her husband not having been made on the ground of interest: *Wendeling v. Besser*, 31-248.

Parties who were competent witnesses at common law in the cases referred to in the statutory provision are not rendered incompetent by it: *Cummins v. Hull's Adm'r*, 35-253.

And therefore evidence of a party to facts and circumstances relating to the loss of a paper was held receivable as preliminary proof in order to warrant secondary proof of its contents: *Keech v. Cowles*, 34-259.

The statutory provisions *held* not to operate to exclude the testimony of a party who was made a competent witness by statute, as to prove usury in a contract: *Rinehart v. Buckingham*, 34-409.

4890. Depositions taken conditionally. 3640. Any person may have his own deposition, or that of any other person, read and used as evidence in all cases where his evidence would be incompetent by the provisions of the preceding section, by causing such deposition to be taken, either before or after suit brought, during the life-time or sanity of the person against whom, his executor, heir, or other representative, the same is to be used; *provided*, such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after suit brought, such deposition may be taken in the usual manner; if before, then the same may be taken *de bene esse*, as provided by law.

4891. Husband and wife. 3641; 15 G. A., ch. 33. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action

or proceeding one against the other; but they may in all civil and criminal cases be witnesses for each other. [R., § 3983; C., '51, § 2391.]

Where husband and wife are joint defendants, the wife may be called to testify for plaintiff. In such case she is not a witness against her husband, within the meaning of this section: *Richards v. Burden*, 31–305.

A wife, summoned as garnishee in an action against her husband, is not exempt from answering interrogatories touching her indebtedness to him. The subjection of such indebtedness to the payment of claims against him cannot be regarded as against his interests: *Thompson v. Silvers*, 59–670.

In an action against a wife to subject property conveyed to her by her husband to the payment of his debts, the husband is not a competent witness to testify, for the purpose of defeating such conveyance, that he was insolvent at the time the conveyance was made. There is no warrant for engrafting upon the statute the rule that the husband may be allowed to testify against his wife if his testimony is against himself also: *Stephenson v. Cook*, 64–265.

The husband or wife, as the case may be, is a competent witness against the other in a prosecution for adultery: *State v. Bennett*, 31–24; *State v. Hazen*, 39–648.

In a prosecution for adultery the wife is a competent witness to prove the marriage: *State v. Hazen*, 39–648. Also in bigamy, which is a crime by the one against the other within the meaning of the statutory provision: *State v. Sloan*, 55–217; *State v. Hughes*, 58–165.

Statements of the wife showing the guilt of her husband of a crime with which he is charged may be proved for the purpose of impeaching her evidence in his favor, but not as independent evidence: *State v. Davis*, 74–578.

The wife of one of two defendants charged with the commission of a crime, who are tried separately, is a competent witness for the state as against the other defendant, she not being examined as to any communication made by her husband to her: *State v. Rainsbarger*, 71–746.

Under Rev., § 3983, which prohibited the husband or wife being witnesses for or against each other, except in criminal cases, *held*, that this was a privilege which rested with the other party to the marriage relation, and might be waived by such party under Rev., § 3986 (see last clause of § 4893), and was not intended for the benefit of the opposite party in the suit: *Russ v. Steamboat War Eagle*, 14–363; *Blake v. Graves*, 18–312 (explaining *Karney v. Paisley*, 13–89).

The objection that the wife was a witness against her husband before the grand jury, upon the finding of an indictment, cannot be raised for the first time after conviction upon such indictment: *State v. Houston*, 50–212.

Testifying for or against herself and the heirs, by a widow, after the death of the husband, is not the same as testifying for or against the husband if alive, nor is her evidence as to a conversation had between plaintiff and her husband inadmissible on the ground of confidential communications between herself and husband: *Pratt v. Delavan*, 17–307.

This section and the following must be read together. In order to render the testimony of a husband or wife incompetent under this section the marriage relation must exist at the time the husband or wife is offered as a witness: *Parcell v. McReynolds*, 71–623.

As to admissibility of evidence of wife in criminal prosecutions against her husband, and as to her credibility in such cases, see notes to § 5954.

An objection to the husband or wife, when called as a witness against the other, is an objection to the competency of such witness and should be taken at the time when the witness is sworn or it is proposed to examine such witness and not afterward. If the objection is not interposed until after the close of the examination, it will be deemed waived: *Watson v. Riskamire*, 45–231.

4892. Communications between husband and wife. 3642. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted. [R., § 3984; C., '51, § 2392.]

A transfer of a claim from husband to wife is not a communication within the meaning of this section: *Hanks v. Van Garder*, 59–179.

Exclamations made by the wife upon the killing of her son by her husband, *held* not communications between husband and wife within the meaning of this section: *State v. Middleham*, 62–150.

4893. Professional confidence. 3643. No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred. [R., §§ 3985–6; C., '51, §§ 2393–4.]

Between physician and patient: As it may be lawful under some circumstances to produce a miscarriage, a communication by a woman to a physician in relation to such mat-

ter will be privileged in the absence of a showing that it was not for a lawful purpose: *Guptill v. Verback*, 58-98.

Statements by a person injured, as to the cause of the injury, made to the physician called to treat him, in response to a question by the physician as to how the injury occurred, are privileged, and cannot be disclosed by the physician to whom they were made: *Raymond v. Burlington, C. R. & N. R. Co.*, 65-152.

It would manifestly violate the spirit of the statutory provision as to privileged communications to permit a physician to disclose a communication made in his presence to his partner: *Ibid.*

Between attorney and client: Statements made in the presence of an attorney will not necessarily be considered as privileged communications as to which he may not testify: *Shaffer v. Mink*, 60-754.

Although communications between attorney and client may not be testified to by the attorney or his clerk, others in whose presence such communications are made are not forbidden nor excused from testifying as to them: *State v. Sterrett*, 68-76.

Previous threats against the life of a party, for whose murder defendant was on trial, made to an attorney whom defendant was consulting in regard to a civil suit against such party, *held* not to be a privileged communication: *State v. Mewherter*, 46-88.

In a garnishment proceeding against an attorney, *held*, that his relations to his client would not excuse him from answering to whom and under what conditions he had paid over money of his client sought to be reached by the garnishment: *Williams v. Young*, 46-140.

A communication to one supposed to be an attorney, but who was not such at the time, but was studying and was soon after admitted, *held* not privileged: *Sample v. Frost*, 10-266.

That a person to whom communications were made was an acting magistrate and usually did the business of defendant, and frequently gave him advice and counsel, *held* not sufficient to make a communication to such person privileged: *Pierson v. Steertz*, Mor., 136.

An attorney is competent to testify where it appears that he was not the attorney of the party with reference to any matters about which he testifies, and that no information respecting such matters was obtained from him through the confidential relation of attorney and client: *Reinhart v. Johnson*, 62-255.

A party to a suit, who is also a witness, cannot be called on to state a confidential communication made to his attorney: *Barker v. Kuhn*, 38-392.

4894. Public officers. 3644. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure. [R., § 3987; C., '51, § 2395.]

4895. Judge competent. 3645. The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such case it is in his discretion to order the trial to be postponed or suspended and to take place before another judge. [R., § 4005; C., '51, § 2408.]

4896. Civil liability. 3646. No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability. [R., § 3988; C., '51, § 2396.]

4897. Criminating questions. 3647. But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer except as provided in the next section. [R., § 3989; C., '51, § 2397.]

It is not alone left to the witness to determine whether the answer would tend to criminate him. While he is not required to explain how the answer would criminate him, the court may determine whether the answer can directly or indirectly have that effect: *State v. Duffy*, 15-425.

Where it is apparent to the court that the answer to the question could not criminate the witness he may be compelled to answer: *Richman v. State*, 2 G. Gr., 532.

Under the facts of a particular case, *held*, that the witness could not be required to answer: *Printz v. Cheeney*, 11-469.

Plaintiff in an action for seduction may refuse to answer as a witness whether she has had previous illicit intercourse with other men, as the matter sought to be elicited would subject her to public ignominy: *Brown v. Kingsley*, 38-220.

Where a witness who has taken advantage of his privilege is afterwards prosecuted, the fact that he so refused to testify cannot be given in evidence against him: *State v. Bailey*, 54-414.

The fact that it is the duty of a peace officer to file information for violation of liquor law known to him will not make the question whether he knows of any place where such liquors are sold criminating: *Hunt v. McCalla*, 20-20.

If witness waives his privilege and testifies as to matter tending to criminate him, he must testify in all respects relative to the matter material to the issue: *State v. Fay*, 43-651.

An employee cannot refuse to answer questions on the ground that answers thereto would tend to criminate his employer, and this is the rule also where the employer is a corporation: *United States Express Co. v. Henderson*, 69-40.

Where cross-interrogatories propounded under a commission to take a deposition ask the witness whether or not he has committed

a crime, and remain unanswered, the party propounding them has no right to have them read, and the fact of their being unanswered brought to the attention of the jury: *Slocum v. Knosby*, 70–75.

4898. Previous conviction. 3648. A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof. [R., § 3990; C., '51, § 2398.]

It is not proper to ask a witness whether he has ever been convicted of a crime. The statute allows such question only as to previous conviction of felony: *Hanners v. McClelland*, 74–318

4899. Moral character. 3649. The general moral character of a witness may be proved for the purpose of testing his credibility. [R., § 3991.]

Under the common-law rule, the moral character of a witness could not be shown, but only his reputation for want of truth and veracity. The object of this section is to change this rule, and therefore the general *reputation* may be now shown, but not the witness' *character* as known to the witness, independent of his reputation: *State v. Egan*, 59–636.

But a question as to the general moral character of the witness in the community in which he resides is proper as calling for his general reputation: *State v. Froelick*, 70–213. And see *State v. Hart*, 67–142.

A man's reputation for truth and veracity is what is said of him in the community in which he lives: *Dance v. McBride*, 43–624.

Evidence as to the reputation of witness "among the business men with whom he deals" is inadmissible: *Bays v. Herring*, 51–286.

It is competent for a witness, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character: and in a particular case, *held*, that certain language of the court indicating that evidence of this kind was the best evidence of good reputation was erroneous, yet that such error was, under the circumstances, without prejudice: *State v. Nelson*, 58–208.

Proof of a specific vice, as want of chastity, is not competent for the purpose of discrediting the competency of a witness: *Kilburn v. Mullen*, 22–498.

The witness cannot be supported by showing that he was not guilty of specific immorality in connection with equivocal circumstances which he states as having given him a bad repute: *State v. Woodworth*, 65–141.

A person cannot be said to have a good moral character when he has a bad reputation as to a particular vice: *Ibid.*

The fact of assault and battery cannot be shown as bearing upon the question of moral character: *Kitteringham v. Dance*, 58–632.

A witness cannot be asked whether he was not successfully impeached in the trial of another case: *State v. Wooderd*, 20–541.

The fact of dishonesty in a particular transaction will not destroy the evidence of a witness: *Wilson v. Patrick*, 34–362.

Held not proper, under this section, to ask a witness who has admitted that he has been guilty of horse-stealing, how long he has been engaged therein; such fact would have no bearing upon the moral character of the witness: *State v. McIntire*, 58–572.

Where defendant in a criminal prosecution becomes a witness on his own behalf, evidence tending to show that his moral character is bad is admissible, as in the case of any other witness: *State v. Kirkpatrick*, 63–554.

The truthfulness of a witness is always presumed, and evidence is not admissible for the purpose of establishing his credibility, as, for instance, that he has held public office, etc., where no attempt to impeach him has been made: *Walter v. Chicago, D. & M. R. Co.*, 39–33.

Where the effort is made to impeach a witness by proof of contradictory statements, it is not competent to support his evidence by proof of general good moral character or reputation for truth and veracity: *State v. Archer*, 73–320.

Under § 5954, this section is applicable equally in criminal cases: and where one of two co-defendants is called to testify for the other, he may be impeached as any other witness: *State v. Hardin*, 46–623.

4900. Whole of a writing or conversation. 3650. When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing, is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood or to explain the same, may also be given in evidence. [R., § 3992; C., '51, § 2399.]

The whole of the act, declaration or conversation may be given in evidence by one party when another has introduced a part: *Courtright v. Deeds*, 37–503.

The other act or declaration contemplated by this section must be something which is necessary to make the previous or subsequent act or declaration fully understood, or to explain it. It is not all that a party may have said at other times in regard to the matter in

controversy which may be thus introduced: *Dougherty v. Posegate*, 3-88. And see *Williams v. Donaldson*, 8-108.

Where a subject is introduced in the examination of a witness, and a part of the facts shown, the opposite party may inquire as to all the facts on the same subject: *Jones v. Hopkins*, 32-503.

A letter in reply to a letter which is admitted in evidence is also admissible as a part of the same communication: *Burlington, C. R. & N. R. Co. v. Sherwood*, 62-309.

Where a letter contains distinct statements of facts which cannot be misunderstood if read alone, one is admissible without the other: *Brayley v. Ross*, 33-505.

Parol evidence of the contents of a lost letter necessary to make another letter "fully understood" is admissible: *Collins v. Bane*, 34-385, 389.

If part of an account in an account book is relied on, the whole must be received: *Veiths v. Hagge*, 8-163, 189.

Where part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other: *Gaddis v. Lord*, 10-141; *Hess v. Wilcox*, 58-380.

Proof of statements made in connection with a plea of guilty in a criminal case is not admissible in a civil case where the fact of such plea of guilty may be shown: *Root v. Sturdivant*, 70-55.

Where, on the trial of a criminal action, one declaration of defendant was admitted, but subsequent declarations were offered, but refused, such action will not be held erroneous, unless it affirmatively appear that such subsequent declarations were necessary to explain the first, or make it fully understood: *State v. Vance*, 17-138.

Statements as to what third persons said, which would be mere hearsay evidence, are not admissible even to get the whole of a conversation before the jury: *Sims v. Moore*, 61-128.

The rule of this section does not apply so as to allow a party to the rest of a conversation a part of which he has himself shown in evidence: *State v. Elliott*, 15-73.

The fact that the witness did not hear all the conversation will not render him incompetent to testify as to what he did hear, but will only go to the credibility of such testimony: *Mays v. Deaver*, 1-216; *State v. Elliott*, 15-72.

Detached conversations *held* not sufficiently connected to allow the introduction of the second as necessary to explain the first: *Williams v. Donaldson*, 8-108.

4901. Writing and printing. 3651. When an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent. [R., § 3993; C., '51, § 2400.]

4902. Understanding of parties. 3652. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. [R., § 3994; C., '51, § 2401.]

This section only applies to instruments which arise out of and are the expression of the agreement of two minds: *Pierson v. Armstrong*, 1-282, 287.

Section applied: *Snow v. Flannery*, 10-318; *Stout v. Fire Ins. Co.*, 12-371, 380; *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119, 127; *Thompson v. Locke*, 65-429.

If the language used by and known to the parties to the contract is ambiguous or fairly admits of more than one construction, that meaning is to be given it in which it is understood by the other party, whether the party so acting has reason to believe it was so understood by the other party or not: *Minnesota Linseed Oil Co. v. Montague*, 65-67.

This section does not authorize the introduction of parol evidence to vary the written contract by showing that the intent of the parties was different from that implied in the words used therein: *Walker v. Manning*, 6-519.

4903. Historical and scientific works. 3653. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest. [R., § 3995; C., '51, § 2402.]

The books and maps which are admissible under this section are such as are published for circulation among the people generally. They must be printed or otherwise published, so that the presumption will follow that their contents will be or may be generally known. A record filed in a public office is not such a publication as is here contemplated: *Heinrichs v. Terrell*, 65-25.

To render a map or plat admissible under this section it must be public, and must be shown to be the work of a disinterested person: *Pfotzer v. Mullaney*, 30-197.

A city map, purporting to have been made by the city engineer, and proved to have been re-organized and used by the city as substantially correct, is admissible in evidence: *Nolser v. Chicago, B & Q. R. Co.*, 73-268.

The herd-book of a particular breed of cattle is receivable in evidence under this section: *Kuhns v. Chicago, M. & St. P. R. Co.*, 65-528.

But without proof that a herd-book offered in evidence is recognized as correct by cattle dealers, and that the animal referred to is the same as the one herein entered, the herd-book is inadmissible: *Crawford v. Williams*, 48-247.

Standard medical books are admissible as evidence of the author's opinions as to

methods of medical skill or practice: *Bowman v. Woods*, 1 G. Gr., 441.

The statutory provision as to medical books does not render inadmissible in evidence that which was before admissible, and standard medical authorities are not therefore the best evidence of what they teach or whether they differ. The testimony of experts is admissible on such points and also as to what are standard authorities, etc.: *Brodhead v. Wiltse*, 35-429.

A statement in a medical work that bears upon the question at issue in a case is not to be excluded on account of indefiniteness: *Quackenbush v. Chicago & N. W. R. Co.*, 73-458.

4904. Subscribing witness. 3654. When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence. [R., § 3996; C., '51, § 2403.]

Section applied: *Ballinger v. Davis*, 29-512.

4905. Handwriting. 3655. Evidence respecting handwriting may be given by comparison made by experts, or by the jury, with writings of the same person which are proved to be genuine. [R., § 3997; C., '51, § 2404.]

Comparison: The writing with which comparison is made must be proved to be genuine by testimony of witnesses who saw the party write it, or by the party's admission, when not offered by him, or in some such a positive manner. The genuineness of the standard cannot be proved by a witness who has seen the party write generally. The standard, however, need not be a writing connected with the case: *Hyde v. Woolfolk*, 1-159.

A paper offered in evidence for the mere purpose of furnishing the jury a standard of comparison is admissible only where no collateral issue can be raised concerning it; that is, when the paper is conceded to be genuine, or is such that the other party is estopped to deny it, or belongs to the witness, who was himself previously acquainted with the party's handwriting, and exhibits the paper in confirmation and explanation of his own testimony: *Wilson v. Irish*, 62-260.

The genuineness of the writing made the basis of the comparison, called the standard writing, should be proved by direct and positive evidence. A writing cannot be thus used when its genuineness rests only upon evidence based upon comparison with other writing claimed to be genuine: *Winch v. Norman*, 65-186.

The party whose handwriting it is sought to prove may, on his behalf, offer in evidence writings of his own proved to be genuine, and is not to be limited to such writings as were made before the issue as to genuineness of handwriting was raised. Therefore, *held*, that defendant might offer in evidence his signature to his answer in the case: *Singer Mfg. Co. v. McFarland*, 53-540.

An instrument purporting to be executed by the party whose signature is in question, and duly acknowledged, is not admissible in proof of handwriting. It might be properly executed and acknowledged, although the signature were in the handwriting of another: *Hyde v. Woolfolk*, 1-159.

On appeal in an equitable action, triable *de novo*, the supreme court will make a comparison of the writings: *Morris v. Sargent*, 18-90. And see *Baker v. Mygatt*, 14-131.

But in an action by ordinary proceeding, the determination of the court upon the genuineness of a signature is, upon appeal, entitled to the same consideration as the verdict of a jury: *Lay v. Wissman*, 36-305.

Evidence of the genuineness of the party's signature on a hotel register *held* admissible for the purpose of proving by comparison the genuineness of a signature in question, although such evidence also tended to contradict the testimony of the party that he had not been at the place where such registry was claimed to have been made: *State v. Calkins*, 73-128.

Expert testimony: The opinion of an ordinary witness, formed upon comparison of the writings alone, is not admissible. No one but an expert can be allowed to give an opinion formed upon such comparison; but to be an expert in regard to handwriting the witness need not be a man of any particular calling: *Hyde v. Woolfolk*, 1-159; *Mixer v. Bennett*, 70-329.

The competency of the witnesses in a particular case, *held* to be sufficiently shown: *Ibid.*

The mere fact that a person is clerk of the courts will not entitle him to testify as an expert in regard to handwriting: *Winch v. Norman*, 65-186.

Weight of expert testimony based on comparison: Expert testimony as to the genuineness of a signature, based upon comparison of handwriting, is of the lowest order, and ought not to be allowed to overthrow positive and direct evidence of credible witnesses who testify from personal knowledge: *Borland v. Walrath*, 33-130.

Expert testimony as to handwriting is of the lowest order and of the most unsatisfactory character: *Whitaker v. Parker*, 42-585.

4906. Private writing. 3656. Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without farther proof. [R., § 4000; C., '51, § 2407.]

To render an instrument admissible under this section it must appear, if the instrument was a mutual one, that it was so executed as to be binding upon both parties, and an acknowledgment by one will not be sufficient: *Chicago, B. & Q. R. Co. v. Lewis*, 53–101.

And see § 4909 and notes.

4907. Entries by deceased person. 3657. The entries and other writings of a person deceased, made at or near the time of the transaction and in a position to know the facts therein stated, are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law. [R., § 3998; C., '51, § 2405.]

Against interest: Verbal declarations of one deceased, against his pecuniary interest, in relation to facts of which he is immediately and personally cognizant, and made under circumstances excluding a probable motive to falsify, are admissible as evidence in an action against third persons: *Mahaska County v. Ingalls*, 16–81.

Entries in books made by a person who is deceased are admissible as evidence when clearly against his interest. Whether they must be made at or near the time of the transactions entered, *quære*. But they are inadmissible to prove the absence of other entries, when the omission would be favorable to the party making the entries: *State v. Wooderd*, 20–531.

Where entries are offered as being against the interest of the party making them, such interest should be made clearly to appear: *Ibid.*

The jury may be told that testimony of this kind, though competent, yet as the right of cross-examination does not exist, is not highly favored by the law: *Ibid.*

Declarations of a deceased witness against his interest are receivable in evidence: *Scott County v. Fluke*, 34–317.

Therefore in an action against a county treasurer, *held*, that the admissions of an assistant employed by the board of supervisors and for whom the treasurer was not responsible, to the effect that the misappropriation of funds was due to his own defalcation, were admissible: *Ibid.*

But declarations of a deceased witness not against his interest are not receivable, although they directly tend to contradict declarations made by him against his interest: *Wilson v. Patrick*, 34–362; *Wescott v. Wescott*, 75–628.

Entries in books of account made by third persons are only admissible where it is shown that the party making them is dead and that the entries are against his interest: *Sypher v. Savery*, 39–258.

Dying declarations are admissible as such only in case of homicide, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the declaration. They are not admissible in an action by an heir to prove that property conveyed to him by the ancestor making the declarations was not by way of advancement: *Middleton v. Middleton*, 31–151.

Declarations of a living witness who is competent and within the reach of process are hearsay and not admissible: *Hutchinson v. Watkins*, 17–475.

Family records: An entry by a deceased parent in the family Bible as to the date of birth or death of an individual is admissible as the declaration of the parent making the entry, but it must appear that such parent is dead: *Greenleaf v. Dubuque & S. C. R. Co.*, 30–301.

BOOKS OF ACCOUNT.

4908. When admissible. 3658. Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. The books must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

2. It must be shown by the party's oath or otherwise that they are his books of original entries;

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof;

4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made. [R., § 3999; C., '51, § 2406.]

To prove charges in ordinary course of business: Books of accounts are admissible to prove charges by one party against the other, made in the ordinary course of business,

and for no other purpose: *Veiths v. Hagge*, 8-163.

The party offering the books must prove what his ordinary course of business is: *Ibid.; Karr v. Stivers*, 34-123.

And in a particular case, *held*, that in the absence of any explanation as to what the ordinary course of dealing of the parties was, certain entries did not appear to be made in the usual course of business: *Karr v. Stivers*, 34-123.

Books of original entry are not admissible for the purpose of proving payment or loans of money unless that comes within the ordinary business of the party in whose behalf the books are kept: *Veiths v. Hagge*, 8-163; *Young v. Jones*, 8-219; *Sloan v. Ault*, 8-229; *Snell v. Eckerson*, 8-284; *Cummins v. Hull's Adm'r*, 35-253.

Such books are therefore inadmissible to prove a special agreement, or delivery of goods under such agreement, or to prove delivery of goods to a third person, or an agreement to pay a balance due from other parties: *Lyman v. Bechtel*, 55-437.

But if the payment or loan of money constitutes, in any just sense, the ordinary business of the party, and the charges are made in the ordinary course of business, they may be proved by the books of account: *Veiths v. Hagge*, 8-163; *Young v. Jones*, 8-219; *Orcutt v. Hanson*, 70-604.

The business of keeping a retail store is not generally such business as to justify the introduction of the books of account kept therein to prove charges for money loaned: *Veiths v. Hagge*, 8-163; *Sloan v. Ault*, 8-229.

Proof of a course of business between the parties, of lending and charging in a book of account, will not be sufficient to make such book admissible in evidence: *Veiths v. Hagge*, 8-163.

Admissible in other cases: Books of account are admissible in behalf of a party who made the entries therein, upon the ground of necessity, and upon the presumption that unless they be received there will be a total failure of proof. They are receivable, therefore, as to the daily sale and barter of merchandise and other commodities, the performance of services and the letting of articles to hire, circumstances so frequent in succession, and generally so trivial in their individual amount, that the procuring of formal proof would not compensate for the time bestowed: *Karr v. Stivers*, 34-123.

Where charges for stone purchased from plaintiff were not made at the time the stone was taken, but were made as soon as defendant notified him how many had been taken, *held*, that a satisfactory reason was thus shown for not making the entries at the time of the transaction: *Anderson v. Ames*, 6-486.

Whole account admissible: However, when a defendant avails himself of credits shown by a book account in his favor, he cannot object to the account being used to show charges against him. The whole account must be taken together: *Veiths v. Hagge*, 8-163.

Parol evidence not admissible to vary: Parol evidence of the party making the entries is not admissible for the purpose of explaining the language used by him. The book of account when admitted becomes written evidence and speaks for itself: *Cummins v. Hull's Adm'r*, 35-253.

Where the cause of action is founded upon transactions embraced in books of account of one of the parties, the adverse party is not bound to rely upon such books of account, but may introduce other evidence as to the transaction, and such other evidence, although entirely oral, will not be secondary: *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

It is not permissible to substitute evidence as to the contents of the book for the book itself: *Churchill v. Fulliam*, 8-45.

Copies: The books of account must themselves be produced on the trial, and it is not competent to prove their contents by attaching copies to a deposition: *Peck v. Parchen*, 52-46.

Copies of books of account which would themselves be admissible in evidence are not competent: *Halstead v. Cuppy*, 67-600; *Creswell v. Slack*, 68-110.

A receipt the best evidence: Where the books show that a receipt was given for money, it is the best evidence and must be produced or accounted for: *Sloan v. Ault*, 8-229.

Showing account barred: Even though the books show the account sought to be proved by them to be barred by the statute of limitations, they are still admissible in evidence for the purpose of laying the foundations for showing defendant's written admission or promise removing the bar, or for showing from defendant's testimony that the cause of action still subsists: *Thorn v. Moore*, 21-285.

Not admissible to prove agreement: The entry of a contract or agreement made by the party in his own book is not receivable in evidence. So *held* in case of a memorandum or stock book in which purchases of stock, etc., were noted: *Hart v. Livingston*, 29-217; *Whisler v. Drake*, 35-103.

Must be books of original entry: Where it appeared that a certain book was used as a mere memorandum book from which an entry of charges against parties in what was called the sales book was made, *held*, that the sales book was the book receivable in evidence as the book of original entry and not the memorandum book: *Hancock v. Hintrager*, 60-374.

Where it appeared that as the party's books were kept the ledger was not a book of original entries, but the party testified that a particular entry in the ledger was there made originally and not by transfer from any other book, *held*, that such fact did not render the ledger admissible in evidence to prove such item: *Fitzgerald v. McCarty*, 55-702.

Preliminary proof: In general, no party other than the one making the entries is competent to make the supplementary oath necessary for the admission of the book: *Karr v. Stivers*, 34-123.

Time-books, kept by officers or employees of defendant, *held* properly excluded when offered in evidence without being supported by testimony of those who kept them as to their correctness: *Ford v. St. Louis, K. & N. W. R. Co.*, 54-723.

Where books of account were introduced in

evidence containing entries by different persons, *held*, that they were admissible as to entries made by persons who were called as witnesses and gave the requisite statutory evidence in relation thereto, although not as to entries not thus proven: *Herriott v. Kersey*, 69-111.

When a witness refers to books of account in aid of his statements, the books are competent to show a mistake in his testimony; and in such case formal proof is not necessary: *Davenport v. Cummings*, 15-219.

Credibility: The preliminary proof being made, the question of the admissibility of books in evidence is for the court; the degree of credit given them, and the question of whether the charges are in the ordinary course of business, are to be determined by the jury: *Veiths v. Hagge*, 8-163; *Young v. Jones*, 8-219.

When the proper preliminary proof is made the books should be received in evidence, and any objection on account of discrepancies, etc., affecting their credibility only, should be left to the jury: *Eyre v. Cook*, 9-185.

INSTRUMENTS AFFECTING REAL PROPERTY.

4909. Evidence. 3659. Every instrument in writing affecting real estate, which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence without farther proof. [R., § 4001; C., '51, § 1227.]

The certificate of acknowledgment is *prima facie* evidence of the fact of acknowledgment, but not conclusive, and may be overcome by other evidence, the burden of proof being upon the party seeking to rebut the effect of the certificate: *Morris v. Sargent*, 18-90.

The right to contradict the certificate exists, for instance, when fraud is supposed in obtaining the acknowledgment, or when the certificate is alleged to be false, and it is proposed to show that the deed was never acknowledged: *Tatum v. Goforth*, 9-247.

But it is not contemplated that a defective certificate is to be supplied or made good by other evidence: *O'Farrell v. Simplot*, 4-381.

The deed, such as here contemplated, being in the custody of the grantee, will be presumed to have been delivered, and being in writing will import a consideration, and these facts need not be proved before offering the instrument in evidence: *Wolverton v. Collins*, 34-238.

Recitals in an instrument which is admissible by reason of acknowledgment are *prima facie* evidence of the facts recited: *Beal v. Blair*, 33-318.

A deed which is not properly acknowledged may still be received in evidence: *Gould v. Woodward*, 4 G. Gr., 82.

An instrument, such as here described, is not evidence of the handwriting of the person by whom it purports to be signed: *Hyde v. Woolfolk*, 1-159.

Where proof is made of the loss or inability to produce the original deed the record thereof may be introduced in evidence without evidence of the execution of such deed: *Carter v. Davidson*, 70-45.

As to acknowledgments, in general, see §§ 3128-3138.

4910. Record or certified copy. 3660. The record of such instrument, or a duly authenticated copy thereof, is competent evidence whenever by the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. And in such case it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment that the same is made under his hand and seal of office, and the records show by a scroll or otherwise that there was such a seal, which will be presumptive evidence that the official seal was attached to the original certificate. [R., § 4002; C., '51, § 1228.]

Proof of loss of original: The record of such instrument is not admissible as evidence unless it is shown that the original is lost or does not belong to the party wishing to use the same or is not within his control: *Williams v. Heath*, 22-519; *Ackley v. Sexton*, 24-320; *Courtright v. Deeds*, 37-503; *Jaffray v. Thompson*, 65-322; *State v. Penny*, 70-190.

What sufficient showing as to inability to produce: Where it is not shown that the instrument is lost, the party desiring to introduce a copy thereof should show both that it does not belong to him and that it is not under his control; but it will not be considered to be within his control merely from the fact that he may compel its production by a subpœna *duces tecum*: *McNichols v. Wilson*, 42-385.

In a criminal prosecution where the introduction of a mortgage in evidence became material in behalf of the state, *held*, that the testimony of the prosecuting witness, that he did not have possession of the original instrument, was not sufficient showing to authorize the admission of secondary evidence: *State v. Penny*, 70-190.

Where it was testified by the attorney of a party that the party offering in evidence the record of a deed did not have the original deed and that he could obtain no knowledge as to where it was, *held*, that the record should have been admitted: *Olleman v. Kelgore*, 52-38.

Where an agent of the party who alone had held possession of the papers, which had never been in the hands of the party himself, testified to the loss, *held*, that the showing was sufficient: *Corbin v. Beebee*, 36-336.

Where a party offering in evidence a deed proved that application had been made to a person who ought to have had the deed, and search had been made among papers among which it probably would have been found, without success, *held*, that secondary evidence was properly admitted: *Laird v. Kilbourne*, 70-83.

It does not follow that deeds belong to a grantee simply because they are executed to his grantor. They may contain a description of many other tracts of land owned by such grantor or his other grantees: *McNichols v. Wilson*, 42-385.

Where it appeared that the original was part of the files of a case in the supreme court and could have been readily procured, *held*, that a copy was not admissible in evidence: *Byington v. Oaks*, 32-488.

But where a deed had been introduced in evidence in a case in another county and was in the hands of the court there, *held*, that it was sufficiently shown not to be in the possession or under the control of the party: *Ingle v. Jones*, 43-286.

Proof of delivery: The provisions of statute as to the admissibility of the record of an instrument in evidence do not dispense with the necessity of proof of delivery of the original in cases where such proof would be necessary, if the original itself were introduced: *Foley v. Howard*, 8-56.

Land patent: This section does not apply to a record copy of a patent of lands from the United States: *Curtis v. Hunting*, 6-536. But see § 4913.

4911. Retrospective. 3661. The provisions of the preceding section are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded. [R., § 4003; C., '51, § 1229.]

4912. Not conclusive. 3662. Neither the certificate, nor the record, nor the transcript thereof, is conclusive evidence of the facts therein stated. [R., § 4004; C., '51, § 1230.]

See notes to § 4909.

UNITED STATES AND STATE PATENTS.

4913. When deemed of record; copies. 16 G. A., ch. 10. United States and state patents for lands in this state, that have been or hereafter may be recorded in the recorder's office of the county in which the lands are situated, shall be deemed matters of record, and certified copies thereof, under the hand of the recorder, may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office. In order to entitle said patents to be recorded, no acknowledgment, as required by chapter six of the code, shall be necessary.

STATUTE OF FRAUDS.

4914. Written evidence. 3663. Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent. [R., § 4006; C., '51, § 2409.]

Effect of the statute: Although the English statute of frauds provides "that no action shall be brought," while ours provides that "no evidence, etc., is competent," the effect is the same in both cases; and English and American authorities upon the construction of the former are applicable to the latter: *Westheimer v. Peacock*, 2-528.

The contract itself is not void, but may be subsequently revived so as to become binding: *Berryhill v. Jones*, 35-335.

What sufficiently in writing: A resolution of a board of supervisors is sufficient written evidence of a contract by them to convey real estate to enable the vendee to enforce the same: *Grimes v. Hamilton County*, 37-290.

The written evidence need not be contained in one paper, nor need the papers be contemporaneous; and parol evidence may be received to connect or explain them. In case of a sale of land at auction, the notice of sale containing the terms, etc., the plat upon which the name of defendant as purchaser, with price, etc., was entered by the clerk of the sale, and a letter signed by defendant declining to have anything further to do with the property, were held sufficient, with parol evidence, to comply with the requirements of the statute: *Lee v. Mahoney*, 9-344.

Auctioneer; administrator: Neither party can be the other's agent for the purpose of signing the writing sufficient to bind such other party; and while an auctioneer, having no interest except as such, may sign such writing and thereby bind both parties, yet where the auctioneer is an administrator making a sale under direction of the court, he has

such interest as to render him incompetent to bind a purchaser to the contract: *Wingate v. Herschauer*, 42–506.

Writing not delivered: A writing signed by defendant and kept in his possession without delivery is not available to take a case out of the statute: *Steele v. Fife*, 48–99.

Oral testimony: Verbal testimony is not admissible to supply any defects or omissions in the written evidence which is relied upon to take a case out of the statute of frauds; and where telegrams were relied upon as constituting a written contract, the language of which was unintelligible unless aided by extrinsic evidence, *held*, that the evidence was not sufficiently proven: *Watt v. Wisconsin Cranberry Co.*, 63–730.

The written evidence of a contract cannot be aided or added to by parol testimony: *Vaughn v. Smith*, 58–553.

Whether a contract within the statute of frauds may be proved by parol evidence of the contents of lost writings, which, if in existence, would be competent for that purpose, *quære: Elwell v. Walker*, 52–256.

Where the promise to pay the debt of another is sufficiently evidenced in writing, parol evidence to show that the debt has not been paid is admissible although it also bears upon the question of the promise: *Harbert v. Skinner*, 37–208.

If the party sought to be charged has in writing admitted the contract, this is sufficient to take the case out of the statute, no matter to whom the writing may have been addressed: *Warfield v. Wisconsin Cranberry Co.*, 63–312.

How objection raised: The objection that a contract is within the statute of frauds, and therefore that any parol evidence thereof is inadmissible, cannot be raised, unless the objection is made in the pleadings or when the evidence is offered: *Holt v. Brown*, 63–319.

When parol evidence of a contract within the statute of frauds is introduced upon trial without objection, it cannot afterwards be objected to upon appeal: *Crossen v. White*, 19–109.

Executed contract: Although a promise by one party to be individually responsible for the debts of another would be within the statute, yet if such a promise has been performed the objection of the statute cannot be enforced: *Putnam v. Swinney*, 63–383.

Order of introduction of evidence: Parties are not restricted as to the order of the introduction of evidence, and evidence of a sale which is within the statute of frauds may first be introduced, to be afterward followed by proof of partial performance, taking the case out of the statute: *Campbell v. Ormsby*, 65–518.

Relief in equity: Equity will not relieve against the statute of frauds for the mere purpose of preventing the repudiation of a contract actually entered into which is in violation of such statute, but may relieve against the repudiation of such contract where an innocent party has been misled to his injury. The attempted fraud against which equity will relieve consists not merely in refusing to do what the party has agreed to do, but in deceiving the other out of his property: *Burden v. Sheridan*, 36–125.

4915. What contracts. 3664. Such contracts embrace:

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid;

2. Those made in consideration of marriage;

3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate;

4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;

5. Those that are not to be performed within one year from the making thereof. [R., § 4007; C., '51, § 2410.]

Sale; delivery: The delivery of goods under an oral contract of sale to a common carrier (not designated by the purchaser) in the usual course of transportation is sufficient to render a parol contract for the sale of chattels binding: *Bullock v. Stcherge*, 4 McCrary, 184.

A parol contract creating a lien upon personal property equally with one for the sale of such property is made binding by delivery: *Brown v Allen*, 35–306.

Sufficiency of delivery in particular cases discussed: *Marsh v. Bird*, 31–599; *Brown v. Wade*, 42–647.

In consideration of marriage: Where it is attempted, by letters, to prove a contract to convey real estate, in consideration of marriage, the letters should show a distinct proposition that, in consideration of the marriage, the one party would convey such real estate, and an acceptance of the proposition by the other party in as broad and distinct terms as it was made: *Elwell v. Walker*, 52–256.

Answering for debt or default of another: Where a father agreed to be answerable for his son's debts in consideration of a forbearance to sue the son, *held* that, in the absence of a release of the liability as against the son, the agreement so to pay the debt could not be enforced, although the forbearance to sue might constitute a consideration: *Westheimer v. Peacock*, 2–528.

An agreement upon certain contingencies to step into the place of another and assume his obligations is within the statute and cannot be established by parol: *Kauffman v. Harstock*, 31–472.

A contract to indemnify another, and hold him harmless against anticipated loss, cannot be established by parol: *Ibid.*

Where goods were furnished one party and charged to him upon agreement of another to

pay for them, *held*, that the agreement of the latter must be regarded as collateral and within the statute of frauds: *Langdon v. Richardson*, 58-610.

Where the plaintiff, who had been a laborer in the employ of a subcontractor, alleged that the defendant, who was the main contractor, had orally agreed to pay the claim due to the plaintiff from the subcontractor if the plaintiff would refrain from filing a mechanic's lien, and plaintiff alleged that he had thereupon delayed filing such lien, but it did not appear that he had by reason of such agreement lost his lien, nor released the subcontractor, *held*, that the promise of the principal contractor was a promise to answer for the debt of another, which must be in writing: *Vaughn v. Smith*, 65-579.

Under the facts in a particular case, *held*, that an agreement sued upon amounted to an undertaking to answer for the debt of another: *Beerkle v. Edwards*, 55-750.

An oral acceptance can be enforced only where, by reason of having funds in his hands or otherwise, the payment by the acceptor will be the payment of his own debt; otherwise the oral acceptance will be within the statute of frauds: *Walton v. Mandeville*, 56-597.

Where the main purpose of the promisor is not to answer for another, but to subserve some purpose of his own, the promise is not within the statute of frauds, although in form it may be a promise to pay another's debt, and although, incidentally, the performance of it may have the effect of extinguishing the liability of another: *Mills v. Brown*, 11-314; *Johnson v. Knapp*, 36-616.

Where an obligation is an original undertaking by a party, entered into for his own benefit, it is not to be deemed within the statute of frauds: *Clinton Nat. Bank v. Studemann*, 74-104.

A promise by one of several co-parties to another co-party to pay a share of the cost of an appeal to be taken by the latter, it appearing that the party making such promise expected to derive some benefit from the appeal, *held* not to be a promise made to answer for the debt of another: *Wilson v. Smith*, 73-429.

The fact that the discharge of a person's own duly contracted debt will also operate to discharge the debt of another does not bring the obligation to discharge such debt within the statute of frauds: *Chamberlin v. Ingalls*, 38-300.

An agreement by A., B. and C. that A. shall pay the amount of the indebtedness which he owes B. to C., to apply on an indebtedness from B. to C., is not within the statute of frauds: *Lester v. Bowman*, 39-611.

An absolute promise by a party to assume and pay the indebtedness of another is not within the statute of frauds, but it must be shown to be supported by a consideration: *Bumford v. Purcell*, 4 G. Gr., 488.

Where the purchaser of a boat entered into an agreement with the holder of a lien thereon to pay the amount of the lien, *held*, that the undertaking was not to answer for the debt or default of another: *Barker v. Guilliam*, 5-510.

In an action against a bank upon certain bank-bills of an insolvent bank, in which recovery from defendant for the value of such bills was sought on the ground that they had been taken on the strength of its representations as to their validity, *held*, that the cause of action was not within the statute of frauds: *Tarbell v. Stevens*, 7-163.

An agreement by a vendee to pay off a mortgage upon the property purchased makes the indebtedness his own and is not within the statute of frauds: *Bowen v. Kurtz*, 37-239.

Where defendant purchased lands of one V., agreeing to pay a debt owing from V. to plaintiff out of the purchase money, *held*, that the agreement was not within the statute of frauds and might be enforced by plaintiff against defendant: *Morrison v. Hogue*, 49-574.

Held, also, that a contract between defendant, plaintiff and said V., that defendant should pay V.'s debt to plaintiff out of the price of such land and in consideration of the release of an attachment upon the land, was not within the statute: *Ibid.*

Where one of two persons whose names were affixed to a promissory note, although claiming that the signature of his name thereto was a forgery, assured the holder that the note would be paid, *held*, that such promise was one to answer for the default of another person and was not binding, not being in writing: *Smith v. Tramel*, 68-488.

An oral promise to pay the debt of another, which should be in writing, cannot constitute an estoppel so as to be binding: *Ibid.*

Where property was delivered upon the faith of a promise by the surety to sign the note therefor, *held*, that such promise was not within the statute: *Van Riper v. Baker*, 44-450.

Held, that if a loan was made to three, one only receiving the money, the others would be bound, although their promise was not in writing: *Dee v. Downs*, 50-310.

Where one agrees to execute a note as surety for another, such agreement is a promise to answer for the debt of that other and is within the statute of frauds, and cannot be enforced unless the agreement is in writing. It differs from a case where the party receives a benefit from the agreement: *Dee v. Downs*, 57-589.

Where the promise to answer for the debt of another is made upon a new and original consideration, it is not within the statute: *Johnson v. Knapp*, 36-616; *Blair Town Lot, etc., Co. v. Walker*, 39-406; *Lamb v. Tucker*, 42-118.

An agreement by an incoming partner to become liable for the debts of the firm in consideration of the property acquired by the purchase is not within the statute of frauds, and the creditors may recover thereon: *Poole v. Hintrager*, 60-180.

The parol promise of a new firm to pay the debts of a firm to whose business they succeed is within the statute of frauds, and is not binding unless in writing, or unless the promise by the new firm is made by all the members thereof and amounts to a novation of the debt, merging it and extinguishing all liability under the old debt: *Sternburg v. Callanan*, 14-251.

Transfer of interest in land: A verbal contract for the sale of land in consideration

of services to be performed and cash to be paid is within the statute of frauds, if possession is not taken and no part of the services are performed or the cash paid: *Morgan v. McLaren*, 4 G. Gr., 536.

An agreement to procure a conveyance of land is not within the statute: *Bannon v. Bean*, 9-395.

So *held* in case of an agreement to foreclose a mortgage and sell the property and authorize the sheriff's deed to be made to another party, or to buy the property in at the sale and then make a deed: *Cooley v. Osborne*, 50-526.

A parol promise made by a judgment debtor after execution sale, that he would make a deed to the purchaser correcting a mistake in the sheriff's deed, *held* to be within the statute of frauds: *Butcher v. Buchanan*, 17-81.

A contract for the sale of improvements on public lands where the party selling has no title to the land itself is not a contract for the sale of an interest in the real property: *Zickafosse v. Hulick*, Mor., 175.

Where the person having a legal title to land suffers another to go on with improvements, in the expectation of a conveyance raised in him by the acts, encouragement or assurance of the owner, the transaction may be taken out of the statute of frauds: *McCoy v. Hughes*, 1 G. Gr., 370.

A parol agreement to relinquish interest in real property in consideration of the discharge of indebtedness would seem to be valid: *Hotchkiss v. Cox*, 47-655.

Fraud and undue influence in the procurement of a deed may be shown by parol evidence, notwithstanding the statute of frauds: *Day v. Lown*, 51-364.

Where land was sold with the agreement that, in case of resale by the vendee, the vendor should receive as additional compensation one-half the excess received by vendee above the amount paid vendor, *held*, that under the agreement no interest in the land was retained by vendor, which it was necessary under the statute of frauds to have evidenced in writing: *Miller v. Kendig*, 55-174.

A parol license to mine premises, under which the licensee enters into and holds possession, and which is established also by the licensor's testimony, is valid under the statute of frauds, but it would be otherwise if possession was not taken under and by virtue of the license: *Anderson v. Simpson*, 21-399.

A parol mining license is not absolutely void, but is only voidable. If the owner of the soil desires to revoke such license he should refund the expenses incurred in improvements, or give such reasonable notice as would enable the occupant to secure the products contemplated for his labor and improvements: *Bush v. Sullivan*, 3 G. Gr., 344.

An agreement between parties to be copartners in all their undertakings, and tenants in common in all real estate acquired, is within the statute of frauds: *Thorn v. Thorn*, 11-146.

A parol agreement to enter into a partnership for the purpose of dealing in real estate does not come within the provision as to contracts for the creation or transfer of an interest in land, and need not be evidenced in writing: *Richards v. Grinnell*, 63-44.

Parol evidence is admissible to show that a conveyance to two individuals was intended to be for the benefit of the partnership, and not to create in them a tenancy in common: *Paige v. Paige*, 71-318.

A contract of partnership for the purchase and sale of land is not a contract for the creation or transfer of interest in lands within the statute of frauds: *Pennybacker v. Leary*, 65-220.

Where the owner of land was prevented from making redemption from a tax sale upon promise of the tax purchaser to convey after a tax deed was executed, *held*, that the agreement, though in parol, was not within the statute of frauds: *Judd v. Mosely*, 30-423.

A deed signed with the wife's name by the husband is within the statute of frauds as to her interest: *Morris v. Sargent*, 18-90.

A parol ratification of a conveyance of real property will not render it valid nor estop a party from disclaiming it: *Hubbard v. German Catholic Congregation*, 34-31.

Where a wife receives the purchase money of property conveyed by her husband, in the conveyance of which she does not join to relinquish her dower interest, she may, in consideration of the money received, make an oral contract relinquishing her dower interest in such property: *Dunlap v. Thomas*, 69-358.

If a sale of land is within the statute of frauds when made, the fact that one of the parties places himself in a condition in which he is able to perform the contract on his part will not take it out of the operation of the statute: *Wilson v. Chicago, R. I. & P. R. Co.*, 41-443.

An express trust not evidenced in writing cannot be enforced against the trustee. The mere refusal of the trustee to perform the contract, and his denial of its existence, will not authorize a court of chancery to enforce the contract: *McClain v. McClain*, 57-167.

Where property was conveyed to a trustee to be converted into money and the entire proceeds paid out as directed by the grantor, without any advantage to accrue to the trustee, *held*, that an agreement by the trustee as to the disposal of the proceeds was within the statute of frauds and should have been in writing: *McGinness v. Barton*, 71-644.

A resulting trust arising from the furnishing of funds by one party, with which real estate is purchased by another in his own name, is not within the statute of frauds, but may be established by parol: *Nelson v. Worrall*, 20-469.

But such implied trust cannot be established by parol, where the party claiming it did not actually advance the purchase money: *Burden v. Sheridan*, 36-125.

Parol evidence is admissible to establish a resulting trust in an entry of government lands by one for another: *Sullivan v. McLenans*, 2-437.

It is not necessary, in such case, to show that the money was advanced at the time: *Bryant v. Hendricks*, 5-256.

A party cannot be allowed to show by parol that land purchased by him and conveyed to another was intended as a gift to him, or that

it was purchased for his use: *Holland v. Hensley*, 4–222.

Further as to trusts, see § 3105 and notes.

Parol leases: In the exception as to leases it is the term of the lease that is referred to, and not the time from the making thereof within which it is to be performed. Verbal leases for a year are good although made to commence *in futuro: Sobey v. Brisbee*, 20–105; *Jones v. Marcy*, 49–188.

As to possession under parol lease, see notes to next section.

Contracts not to be performed within a year: In order to be within the clause of the statute relating to contracts not to be performed within a year, the contract itself must show from the nature of its subject-matter, by its express terms, or by necessary implication, that its performance within a year is forbidden. It is not sufficient to bring it within the statute that the parties manifestly intended to occupy more than a year in its performance: *Blair Town Lot, etc., Co. v. Walker*, 39–406.

A contract for services to be paid for upon the death of the person to whom the services are to be rendered is not within the statute of frauds: *Riddle v. Backus*, 38–81.

Contracts here referred to are such as are not to be performed within a year on either side: *Smalley v. Greene*, 52–241.

Such provision does not apply to contracts for the creation or transfer of an interest in lands: *Sobey v. Brisbee*, 20–105.

4916. Exceptions. 3665. The provision of the first subdivision of the preceding section, does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery; but labor, skill, or money, are necessarily to be expended in producing or procuring the same; nor do those of the fourth subdivision of said section apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance, which, by the law heretofore in force, would have taken a case out of the statute of frauds. [R., § 4008; C., '51, § 2411.]

Where labor or money are to be expended: In case of a sale of personal property the fact that the goods are to be shipped by express from one place to another at an expense does not bring the case within the exception; such is not a case where "labor, skill or money are necessary to be expended," etc.: *Partridge v. Wilsey*, 8–459.

The facts taking a contract out of the statute of frauds may exist and be proved outside the contract itself. In a contract for a sale of hogs, *held*, that proof that at the time it was made the hogs were not owned by the vendor, but that labor, skill or money would be necessary to procure them, would be sufficient: *Bennett v. Nye*, 4 G. Gr., 410.

A parol contract for a lien on personal property, where the property is not owned by the vendor at the time of the sale, but is still to be purchased by him, is not within the statute of frauds: *Brown v. Allen*, 35–306.

Taking and holding possession: A sale or gift of real estate is, under our statute, just as complete and perfect when made by parol and followed by possession under it, with the consent of the vendor, as if it were made in writing: *Hughes v. Lindsey*, 31–329.

A sale of real estate in parol, accompanied with possession, is valid: *Chamberlin v. Robertson*, 31–408; *Tuttle v. Becker*, 47–486.

But it must appear that the possession was taken under the contract and with the knowledge of the other party: *Carrolls v. Cox*, 15–455.

The mere continuance in possession by a tenant is not sufficient to render valid a verbal contract: *Mahana v. Blunt*, 20–142.

A license to mine is valid, though resting wholly in parol, if possession is taken and held thereunder with actual consent of the licensor: *Anderson v. Simpson*, 21–399.

The fact that one of the members of a partnership withdraws from the management of the business, under a contract to sell his interest to his partner, leaving such partner in possession of the property and the business, does not show that the latter has taken and held possession under and by virtue of the contract so as to take the case out of the statute of frauds: *Wilmer v. Farris*, 40–309.

A parol contract for the exchange of land accompanied by delivery of actual possession of land exchanged in accordance with the contract is valid: *Baldwin v. Thompson*, 15–504.

An oral agreement rescinding a contract of sale to a person in possession may be established by evidence showing that the party in possession thereof held as tenant instead of owner, paying rent, etc., in accordance with the terms of such oral agreement: *Barton v. Smith*, 66–75.

Where acts of possession relied upon to show partial performance are of doubtful character, and may have been done with other views than as a part performance of the agreement, they do not take the case out of the statute; but where the acts are undisputed, and the sole question is whether they are done in the performance of the contract as claimed by one party, or of another contract as claimed by the other party, then the question as to what the contract was under which they were done must be established by a preponderance of the evidence: *Sweeney v. O'Hora*, 43–34.

Where a contract is taken out of the statute of frauds by part performance by one of the parties, by taking possession of the property conveyed, the contract may be enforced by the other party, as well as by the one who has partly performed: *Ibid.*

Where the defendant had no title to the land at the time he put plaintiff in possession, but

represented that he had title and afterward procured a conveyance, *held*, that he was estopped from setting up the fact that such representations were fraudulent: *Renkin v. Hill*, 49–270.

The taking and holding possession under a verbal assignment of a lease, *held* not to take the contract of assignment out of the statute of frauds: *Hunt v. Coe*, 15–197.

A verbal lease for five years, under which lessee is in possession, is valid: *Nordyke & Marmon Co. v. Hawkeye Woolen Mills Co.*, 53–521.

Part performance: If a party seeks to take a case out of the statute of frauds on the ground of a part performance, it is indispensable that the parol contract, agreement or gift should be established by clear, unequivocal and definite testimony: *Williamson v. Williamson*, 4–279.

Execution of a deed, payment of the purchase money, or part of it, and possession of the premises, are sufficient to constitute part performance of a parol contract to convey and take it out of the statute of frauds: *Trayer v. Reeder*, 45–272.

Proof of part performance of a contract of lease for the term of more than a year will not take such contract out of the statute: *Hunt v. Coe*, 15–197.

To take a case out of the operation of the statute of frauds on the ground of part performance, it is indispensable that the acts done should be referable exclusively to the contract; but a preponderance of evidence alone is sufficient to show that fact: *Sweeney v. O'Hora*, 43–34; *York v. Wallace*, 48–305.

Where property was delivered by plaintiff to defendant under the agreement that defendant was to pay plaintiff $100 each year during the latter's life, *held*, that it was partially performed and not within the statute: *Saum v. Saum*, 49–704.

Where it is agreed to pay for services in land the party rendering the services may recover the value of the land under an oral contract: *Bonnon's Estate v. Urlon*, 3 G. Gr., 228.

If an oral assignment of a judgment is made in consideration of services to be rendered in obtaining such judgment, and the services are thereafter rendered, the assignment will thereby be taken out of the statute of frauds: *Howe v. Jones*, 57–130.

A parol contract for the sale of land accompanied by a payment of part of the purchase money makes, under the statute, a valid agreement, even although there was a prior written memorandum which could not be introduced in evidence because unstamped: *Sykes v. Bates*, 26–251.

Facts considered and *held* not to prove a delivery of notes in payment of the purchase money for real estate, or such an execution of the verbal contract of sale as to take the case out of the statute of frauds: *Auter v. Miller*, 18–405.

Where a sum of money in bank-bills was deposited with the vendor as part payment of a contract, full payment of which was to be made by the vendee in coin, and the bills were afterwards returned to the vendee for the purpose of enabling him to secure the coin and make full payment, and the contract was never fulfilled by the vendee, *held*, that the vendor could not maintain an action to recover the value of the bills thus returned to the vendee: *Jones v. Taylor*, 1 G. Gr., 434.

There is great doubt as to whether the mere agreement that an indebtedness from the seller to the buyer shall go on the sale as a part of the purchase money will constitute part payment: *Brown v. Wade*, 42–647.

Where exchange of horses was agreed upon, and as a part of the consideration it was agreed that a debt from one party to the other should be extinguished, *held*, that the extinguishing of the indebtedness took place at once and constituted a part performance sufficient to take the contract out of the statute of frauds, although the actual change of possession of the horses did not take place at that time: *Peake v. Conlan*, 43–297.

The term "purchase money" as used in the statute means the consideration. Where such consideration was the conveyance to the vendor by the vendee of another piece of property, *held*, that proof that such conveyance was executed would take the case out of the statute of frauds: *Devin v. Himer*, 29–297.

So where the consideration for a contract to convey land was the performance of services, *held*, that proof of performance of such services would take the case out of the statute: *Stem v. Nysonger*, 69–512.

4917. When not denied in the pleadings. 3666. The above regulations relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it. [R., § 4009; C., '51, § 2412.]

If the contract is not denied in the answer of defendant it is to be enforced against him, although in such answer he may expressly insist upon the benefit of the statute: *Auter v. Muller*, 18–405.

In a particular case, *held*, that a denial in the answer was sufficient to prevent the enforcement of the contract alleged in the petition, and which was within the statute of frauds: *Mahana v. Blunt*, 20–142.

4918. Party made witness. 3667. Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence. [R., § 4010; C., '51, § 2413.]

Where a party seeking to enforce a contract which should be in writing intends to rely upon the evidence of the party making it, he should so state in his petition, otherwise it will be subject to demurrer: *Babcock v. Meek*, 45–137.

If plaintiff relies on the testimony of defendant to establish the contract, he cannot contradict or supplement such testimony by that of other witnesses. The testimony of defendant is conclusive: *Auter v. Miller*, 18–405; *Thorn v. Moore*, 21–285.

Nor can plaintiff introduce other evidence to impeach defendant's credibility: *Hunt v. Coe*, 15–197.

The provision allowing the opposite party to be called to establish a contract which should be in writing does not apply to the testimony of the agent of such party. His testimony cannot be received for that purpose: *Burnside v. Rawson*, 37–639.

In a particular case, *held*, that the contract sued upon was sufficiently established by the evidence of one of the defendants to entitle the plaintiff to recover against the defendants thereon, although it was within the statute of frauds and not in writing: *Dewey v. Life*, 60–361.

If the testimony of the party called as a witness establishes the oral contract, then such contract is as well proven under the statute of frauds as if it had been in writing. Whether such testimony of the party is sufficient to prove the contract is a question of fact for the jury and should not be taken away from them by an instruction: *Byerlee v. Mendel*, 39–382.

Where the evidence of defendant clearly established an oral contract to convey land, *held*, that the contract might be enforced: *Smith v. Phelps*, 32–537.

PROTEST.

4919. Certificate of notary. 3668. The usual protest of a notary public without proof of his signature or notarial seal, is prima facie evidence of what it recites concerning the dishonor and notice of a bill of exchange or promissory note, and a copy from his record, properly certified to by him, shall receive such faith and credit as it is entitled to by the law and custom of merchants. [R., §§ 199, 4011; C., '51, § 2414.]

The certificate of protest is only evidence of notice when it recites that notice was given: *Sather v. Rogers*, 10–231; *Thorp v. Craig*, 10–461.

It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser: *Bradshaw v. Hedge*, 10–402.

But a certificate of protest stating that the notary notified the indorsers is sufficient although it does not show that the residences of the several parties are at the places to which the notices were addressed: *Fuller v. Dingman*, 41–506.

It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein, nor need the certificate, in words, formally refer to the seal: *Jones v. Berryhill*, 25–289.

If the certificate states that notices of protest properly addressed were deposited in the postoffice, it will be presumed that the postage was prepaid: *Brooks v. Day*, 11–46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice: *Wamsley v. Rivers*, 34–463.

The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent: *Chatham Bank v. Allison*, 15–357.

The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial: *Rindskoff v. Malone*, 9–540.

The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him: *State v. Reidel*, 26–430.

PROCEEDINGS OF OFFICERS AND INFERIOR COURTS.

4920. Presumption. 3669. The future proceedings of all officers, and of all courts of limited and inferior jurisdiction within this state shall, like those of a general and superior jurisdiction, be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared. [R., § 4120; C., '51, § 2512.]

Presumption as to regularity of official acts: Every legal presumption should be entertained that an officer has done his duty: *Cole v. Porter*, 4 G. Gr., 510; *Goodrich v. Beaman*, 37–563.

Such presumption will be entertained in the absence of any showing to the contrary: *Budd v. Durall*, 36–315; *Spitler v. Schofield*, 43–571.

Where it is the duty of an officer to do an act, it must be presumed that such duty has

been performed: *In re Estate of Edwards*, 58–431.

There is a presumption that those charged with public trusts act honestly and in good faith: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

An act of an officer which may have been within his official powers will be presumed to have been within such powers in the absence of all evidence to the contrary: *Winneshiek County v. Maynard*, 44–15; *Babcock v. Wolf*, 70–676.

Official acts, even though ministerial in their nature, must be regarded as *prima facie* correct: *Smith v. District T'p*, 42–522.

There is a legal presumption in favor of the due execution of papers emanating from a public office: *French v. Reel*, 61–143.

Where the return of an officer on a writ of attachment showed a levy upon property, but did not state that the property was that of defendant, *held*, that the presumption of regularity would obtain in favor of such return: *Rowan v. Lamb*, 4 G. Gr., 468.

A court will not presume that an officer in the service of process failed to discharge a plain duty imposed upon him by law, nor infer facts inconsistent with the return of the writ, in order to divest rights acquired under it, or defeat the judgment of a court of competent jurisdiction: *Pursley v. Hays*, 22–310.

Where a person in authority is required to do a certain act which could not be omitted without a neglect of duty, the performance of it will be presumed unless the contrary is proved: *Dollarhide v. Board of Commissioners*, 1 G. Gr., 158.

Therefore, where it was required by statute that commissioners for a particular purpose should be sworn, *held*, that although in this respect compliance with the statute did not appear in the report of such commissioners, it would be presumed that the law was complied with: *Ibid.*

It must be presumed that the officers of the court in any particular matter performed their duty unless the contrary appears. Therefore, *held*, that where the trial of a criminal case was had at a special term of the court, it would be presumed that notice of the holding of such term, as required by law, had been given: *Harriman v. State*, 2 G. Gr., 270.

Where the venue of an affidavit does not appear it will be presumed that the justice of the peace signing it administered the oath in the county in which he was authorized to act: *Snell v. Eckerson*, 8–284.

This section applies to a proceeding of the board of supervisors in establishing a highway: *McBurney v. Graves*, 66–314.

Where the tribunal determines that the essential steps to give it jurisdiction have been taken, and makes that determination a matter of record, the statute raises the presumption in favor of the correctness of the determination, but it does not raise the presumption in favor of the jurisdiction of the tribunal in the absence of any determination by it that it had jurisdiction: *Ibid.*

Section applied: *State v. Lanc*, 26–223; *Lees v. Wetmore*, 58–170.

Acts of justice of the peace: It may be presumed in favor of the judgment of a justice of the peace that acts which are shown to have been done were done in such order as was necessary in order that the jurisdiction should be properly exercised: *Hodge v. Ruggles*, 36–42; *Church v. Crossman*, 49–444.

While it may be that the decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown, yet where the assumption upon which the decision is based appears, and the decision is thereby shown to be erroneous, the presumption in favor of the justice's jurisdiction is thereby rebutted: *Brown v. Daris*, 59–641.

Jurisdiction having once been acquired by a justice of the peace, the presumption is that it continues to judgment, in the absence of a showing to the contrary: *Moore v. Reeves*, 47–30.

Therefore where judgment was rendered against a garnishee on his answer more than three days after it was filed, *held*, that it would be presumed that the case was properly continued to the day judgment was rendered: *Ibid.*

Where a justice has acquired jurisdiction, subsequent proceedings are deemed regular and cannot be collaterally assailed. Therefore, *held*, that a recital on the justice's docket of continuance by agreement could not be contradicted by affidavits denying such agreement: *Caughlin v. Blake*, 55–634.

So, also, the recitals of the justice's record as to the time in the day at which default is entered is conclusive as against collateral attack: *Cory v. King*, 49–365.

The correctness of a judgment as to a question arising in a case of which the justice has jurisdiction cannot be questioned in an action by *scire facias* on the judgment: *Haggarty v. Burr*, 22–219.

Where it appears that the justice has rendered a judgment for more than one hundred dollars, as he may do by the consent of the parties, it not being required that such consent shall appear of record, it will be presumed in favor of the judgment that it exists: *Schlisman v. Webber*, 65–114.

RECORDS OF ANOTHER COURT.

4921. In same county. 3670. The records and papers properly filed in a cause in either the district [or circuit] court of a county, are equally evidence in the other court. Depositions taken for either court may be used in the other with the same effect, subject to like objection, as if taken in such court. [12 G. A., ch. 86, § 9.]

HOW TESTIMONY IS TO BE PROCURED.

4922. Clerks to issue subpœnas. 3671. The clerks of the several courts shall, on application of any person having a cause or any matter pend-

ing in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When a subpœna is not served by the sheriff, coroner, or constable, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed. [R., § 4012.]

4923. To whom directed; duces tecum. 3672. The subpœna shall be directed to the person therein named, requiring him to attend at a particular time or place to testify as a witness, and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence. [R., § 4013; C., '51, § 2415.]

4924. How far compelled to attend. 3673. Witnesses in civil cases cannot be compelled to attend the district [or circuit] court out of the state where they are served, nor at a distance of more than seventy miles from the place of their residence, or from that where they are served with a subpœna, unless within the same county. No other subpœna but that from the district [or circuit] court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county. [R., § 4014; C., '51, § 2416.]

The limitation as to the distance beyond which witnesses cannot be required to attend upon subpœna in a civil case does not apply to garnishees, who may be compelled to attend from any distance within the state: *Westphal v. Clark*, 42–371.

4925. Fees in advance. 3674. Witnesses are entitled to receive in advance, if demanded, their traveling fees to and from the court, together with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid they are not compelled to attend or remain as witnesses. [R., § 4015; C., '51, § 2417.]

By appearing, a witness waives the right to demand mileage before testifying: *Stockberger v. Lindsey*, 65–471.

4926. Contempt. 3675. For a failure to obey a valid subpœna, without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of contempt of court. He is also liable to the party by whom he was subpœnaed for all consequences of such delinquency, together with fifty dollars additional damages. [R., § 4016; C., '51, § 2418.]

4927. Proceedings for. 3676. Before a witness is thus liable for a contempt for not apppearing, he must be served personally with the process, by reading it to him, and by leaving a copy thereof with him, if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him, if required; or it must appear that a copy of the subpœna, if left at his usual place of residence, came into his hands, together with the said fees and traveling expenses above mentioned. [R., § 4017; C., '51, § 2419.]

4928. Serving subpœna. 3677. If a witness conceal himself, or in any other manner attempt to avoid being personally served with a subpœna, any sheriff or constable having the subpœna, may use all necessary and proper means to serve the same, and for that purpose may break into any building or other place where the witness is to be found, having first made known his business and demanded admission. [R., § 4018; C., '51, § 2420.]

4929. Prisoner. 3678. A person confined in any prison in this state, may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any

county in the state; but in all other cases his examination must be by a deposition. [R., § 4019.]

Defendant in a criminal action has no absolute right to demand the personal attendance of a convict in the penitentiary or county prison, under an order of court, but the exercise of the power of the court to require the production of such prisoner is discretionary: *State v. Kennedy*, 20-372.

4930. Deposition of. 3679. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the depositions. [R., § 4020.]

PROCURING DEPOSITIONS.

4931. Powers of officer. 3680. When by the laws of any other state or country, testimony may be taken in this state to be used in the courts of such state or country, and also in all cases herein provided for taking depositions, the persons authorized to take such depositions have power to issue subpœnas and compel obedience thereto, to administer oaths, and to do any other act of a court which is necessary for the accomplishment of the purpose for which they are acting. [R., § 4021; C., '51, § 2477.]

4932. Subpœnas. 3681. Subpœnas issued by them are valid to the same extent as those emanating from a justice's court, and may be served and returned in the same manner. [R., § 4022; C., '51, § 2478.]

4933. Officers to serve. 3682. Any sheriff or constable, when called upon for that purpose, shall serve such subpœnas and make return thereof. [R., § 4023; C., '51, § 2479.]

4934. When party fails to obey subpœna. 3683. In addition to the above remedies, if a party to a suit in his own right, on being duly subpœnaed, fail to appear and give testimony, the other party may, at his option, have a continuance of the cause as in cases of other witnesses, and at the cost of the delinquent. [R., § 4024; C., '51, § 2480.]

4935. Pleading taken true, or continuance. 3684. Or if he shows by his own testimony or otherwise, that he could not have a full personal knowledge of the transaction, the court may order his pleading to be taken as true; such order, however, is subject to be reconsidered during the term of the court, upon satisfactory reasons being shown for such delinquency. [R., § 4025; C., '51, § 2481.]

The pleading is not to be taken as true unless the court upon application make an order to that effect: *Hay v. Frazier*, 49-454.

PRODUCTION OF BOOKS AND PAPERS.

4936. How procured. 3685. The district [or circuit] court may, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them. [R., § 4026; C., '51, § 2423.]

The granting of the rule requiring the party to produce papers lies in the discretion of the court: *Sheldon v. Mickel*, 40-19; *Allison v. Vaughan*, 40-421.

Delay or negligence in asking for the rule might be sufficient ground for refusing to grant it: *Ibid.*

A party cannot be required to produce a document without having notice of such requirement and a reasonable time for its production: *Greenough v. Sheldon*, 9-503.

The agent of a telegraph company may be required to produce messages: *Woods v. Miller*, 65-168.

4937. Petition; rule. 3686. The petition for that purpose must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party

against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deems such rule expedient and proper. [R., § 4027; C., '51, § 2424.]

4938. Failure to obey. 3687. On failure to obey the rule, or show sufficient cause for such failure, the same consequences shall ensue as if the party had failed to appear and testify when subpœnaed by the party now calling for the books and papers. [R., § 4028; C., '51, § 2425.]

4939. Writing called for by one party. 3688. Though a writing called for by one party is by the other produced, the party thus calling for it is not obliged to use it as evidence in the case. [R., § 4029; C., '51, § 2426.]

DOCUMENTARY EVIDENCE.

4940. Affidavit. 3689. An affidavit is a written declaration under oath, made without notice to the adverse party. [R., § 4030.]

This clearly implies that an affidavit should be signed by the affiant: *Crenshaw v. Taylor*, 70-386.

The jurat or certificate need not state the name of the person signing or swearing to the affidavit: *Stone v. Miller*, 60-243.

It is not necessary that the jurat expressly show that the person sworn is the person who subscribed to the affidavit. A jurat in the following form, "subscribed in my presence and sworn to before me," giving the date, *held* sufficient: *Stoddard v. Sloan*, 65-680.

The signature to a jurat by an officer writing his name with the designation, "Notary Public," is sufficient without adding the name of the county in and for which he is a notary. The court will take judicial notice of the fact that he is a notary for that county: *Ibid.*

Where an affidavit is headed with the name of the state and county, and the signature of the notary is authenticated with a seal, such signature is sufficient if it contains the name of the notary with the addition "Notary Public," without stating the state or county for which he is notary: *Stone v. Miller*, 60-243.

Where the venue of the affidavit is not indicated, it will be presumed that the oath was administered within the county in which the justice of the peace administering it had jurisdiction, that being the county in which the action was pending and in which the pleading was filed: *Snell v. Eckerson*, 8-284.

Although, in the caption, the affidavit is entitled of one county, while it appears to have been sworn to before a notary public in another county, the presumption is that the notary public took the affidavit within his own jurisdiction, and the caption will not be sufficient to show that it was sworn to without such jurisdiction: *Goodnow v. Litchfield*, 67-691.

Where an affidavit offered in evidence is authenticated by the signature and seal of a notary public, but the jurat does not refer to the seal, the notary may amend the jurat: *Hallett v. Chicago & N. W. R. Co.*, 22-259.

4941. Before whom made. 3690. An affidavit may be made within or without this state before any person authorized to administer oaths. [R., § 4035.]

[The word "oaths," in the second line, is "them" in the original rolls, but is here retained as printed in the Code, as probably inserted by the editor by way of correction.]

4942. Out of the state. 3691. Affidavits taken out of the state before any judge or clerk of a court of record, or before a notary public, or a commissioner appointed by the governor of this state to take acknowledgment of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state. [R., § 4036; C., '51, § 2475.]

The fact that the officer before whom an affidavit is made, out of the state, is authorized to administer oaths may be established *aliunde*: *Levy v. Wilson*, 43-605.

While the laws of other states will be presumed to be the same as the laws of this state, requiring the seal of the notary to have engraved thereon the name of his state, yet where the court receives and acts upon an affidavit for change of venue sworn to before a notary public of another state, whose seal does not bear the name of his state, it will be presumed that some showing was made that the seal was such as required by the laws of the state where the jurat was executed: *Goodnow v. Litchfield*, 67-691.

4943. How compelled. 3692. When a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition,

stating the object for which he desires the affidavit. [R., § 4038; C., '51, § 2480.]

4944. Subpœna issued. 3693. If such officer is satisfied that the object is legal and proper, he shall issue his subpœna to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used instead of an ordinary affidavit. [R., § 4039; C., '51, § 2481.]

The party subpœnaed cannot be excused from making the affidavit or answering the questions propounded on the ground that the affidavit desired would not be legally admissible in proceedings for which it is sought. Neither the officer before whom the witness is brought, nor the witness himself, is allowed to determine that question in advance, and a failure to respond to the subpœna or to answer when brought before the officer may be punished as a contempt: *Robb v. McDonald*, 29-330.

A justice of the peace to whom such application is made has full power to pass upon the question of the legality or propriety of the affidavit sought, and is not without jurisdiction to issue a subpœna to compel such affidavit, though as a matter of law it appears on the face of the petition therefor that it could not, when taken, have any legal use. An order of the justice of the peace imprisoning a witness for contempt in refusing to make the affidavit when properly required will not be inquired into by the supreme court in a *habeas corpus* proceeding: *State ex rel. v. Seaton*, 61-563.

But this section is not applicable where the affidavit is sought merely for information. The use for which the affidavit or deposition may be taken is manifestly a legal use as evidence, and the officer should not issue a subpœna where the affidavit required is not ostensibly for such legal use; and if ostensibly for such use, the officer should still be satisfied that it is desired for such use in fact. Therefore, where the affidavit was sought, not for use in a pending proceeding, but to procure information for the purpose of commencing an action, *held*, that the witness committed for contempt in refusing to obey the subpœna should have been discharged on *habeas corpus*: *Dudley v. McCord*, 65-671.

4945. Notice. 3694. The officer thus applied to may, in his discretion, require notice of the taking of such affidavit or deposition to be given to any other person interested in the subject-mater, and allow him to be present and cross-examine such witness. [R., § 4040; C., '51, § 2482.]

4946. Witness produced. 3695. The court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may, if deemed proper, require the witness to be brought before some proper officer and subjected to cross-interrogatories by the opposite party. [R., § 4041; C., '51, § 2483.]

Similar provision, see § 4123.

4947. Signature and seal; presumption. 3696. The signature and seal of such of the officers herein authorized to take depositions or affidavits as have a seal, and the simple signature of such as have no seal, are presumptive evidence of the genuineness of such signature as well as of the official capacity of the officer, except as herein otherwise declared. [R., § 4037; C., '51, § 2476.]

4948. Publications; how proved. 3697. Publications required by law to be made in a newspaper, may be proved by the affidavit of any person having knowledge of the fact, specifying the times when, and the paper in which, the publication was made. But such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication [R., § 4042; C., '51, § 2427.]

As to proof of publication of original notice, see § 3835 and notes.

4949. Posting up papers. 3698. The posting up or service of any notice or other paper required by law, may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up. [R., § 4043; C., '51, § 2428.]

See *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

4950. Other facts. 3699. Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit. [R., § 4044; C., '51, § 2429.]

4951. How perpetuated. 3700. Such proof so made may be perpetuated and preserved for future use, by filing the papers above mentioned in the office of the clerk of the circuit [district] court. And the original affidavit appended to the notice or paper, if there be one, and if not, the affidavit by itself, is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient. [R., § 4045; C., '51, § 2430.]

MAPS, PLATS, RECORDS, ENTRIES.

4952. Field-notes and plats. 3701. A copy of the field-notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation. [R., § 4046; C., '51, § 2431.]

4953. Copies of record and entries. 3702. Duly certified copies of all records and entries, or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record or papers so filed. [R., § 4047; C., '51, § 2432.]

In an action for a breach of warranty in a deed for land purchased as swamp, *held*, that a certified abstract from the United States land office was admissible in evidence to show that the land in question was not certified as swamp, and to throw upon defendant the burden of proving that the land had passed under the swamp grant: *Shorthill v. Ferguson*, 44-249.

Under the provisions of a railroad land grant authorizing the selection of indemnity lands, and an act of congress providing that in such case lists of the land certified by the commissioner of the general land office should be regarded as conveying the fee-simple title, *held*, that a duly certified copy of the original certified lists of selections under the grant, on file in the office of the commissioner of the general land office, was properly admitted in evidence: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

Where letters were on file in the state land office which would be themselves admissible in evidence, *held*, that they might be proven by copies certified by the register: *Bellows v. Todd*, 34-18, 26.

A certified copy of a paper in a public office, but which is of such nature that it is not authorized by law to be kept there, is not receivable in evidence: *Morrison v. Coad*, 49-571.

Parol evidence is not competent to correct a mistake in a duly certified copy of a record: *Monk v. Corbin*, 58-503.

A copy of a public document, or what purports to be such copy, found in the custody of a public officer, is not admissible in evidence under the rule admitting public documents, unless it be properly authenticated or proved to be correct: *Pfotzer v. Mullaney*, 30-197.

As to certified copies of recorded instruments, see § 4910 and notes.

The certificate of the custodian of a record stating its contents is not admissible in proof thereof. Neither will such certificate be received as evidence of the contents of a lost or destroyed record; nor can facts which are required to be of record, but which have been omitted, be proved by the certificate of the officer required to keep such record: *Goodrich v. Conrad*, 24-254.

The auditor's plat-book, made up from records in the recorder's office, is not admissible in evidence as a duly certified copy of the records of conveyances, to establish the title of the party whose name is entered thereon: *Heinrichs v. Terrell*, 65-25.

The reports of the register of the state land office are not receivable in evidence: *Gordon v. Bucknell*, 38-438.

4954. Books of original entries. 3703. The recorder in each of the several counties in this state, shall cause to be procured a book, entitled "copies of original entries," to be kept as a record in his office, in which shall be copied a list of the original entries of land within his county, with name of the person or persons entering the same and the date of such entry, for which he shall receive a reasonable compensation, to be audited and allowed by the board of supervisors of his county. [R., § 4048.]

4955. Copies of. 3704. Said book, containing a copy of such entries, when compared with the originals, and certified to as true copies by the reg-

ister of the land office at which such original entries were made, shall be deemed a matter of record, and certified copies thereof under the hand of said recorder may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office. [R., § 4049.]

4956. Additional entries. 3705. Said recorder shall, from time to time, as he may deem it necessary, procure in the same manner copies of any additional entries, under the same restrictions and with like effect until all the lands in his county shall have been entered, and certified copies of the entries thereof procured. [R., § 4050.]

4957. Officer to give copies. 3706. Every officer having the custody of a public record or writing is bound to give any person, on demand, a certified copy thereof on payment of the legal fees therefor. [R., § 4051; C., '51, § 2433.]

4958. Maps, etc., in office of surveyor-general. 3707. Copies of all maps, official letters, and other documents in the office of the surveyor-general of the United States, when certified to by that officer according to law, shall be received by the courts of this state as presumptive evidence of the existence of the originals and that said copies are copies of the original, notwithstanding such maps, official letters, or other papers, may themselves be copied. [R., § 4052.]

4959. Certificate as to loss of paper. 3708. The certificate of a public officer that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts. [R., § 4053; C., '51, § 2434.]

4960. Duplicate receipt of receiver of land office. 3709. The usual duplicate receipt of the receiver of any land office, or if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent. [R., § 4054; C., '51, § 2435.]

This section *held* applicable to the receiver of the Des Moines river land office: *Stone v. McMahan*, 4 G. Gr., 72.

4961. Certificate of register. 3710. The certificate of the register or receiver of any land office of the United States as to the entry of land within his district, shall be presumptive evidence of title in the person entering to the real estate therein named. [R., § 4055.]

This section relates to the remedy and applies to all actions in the courts of the state whether the land is situated in the state or not: *Pierson v. Reed*, 56-257.

Where the statute requires an officer to make a statement or certificate in writing, such writing is competent evidence of the fact stated or certified: *Clark v. Polk County*, 19-248.

4962. Signature presumed genuine. 3711. In the cases contemplated in the last seven sections, the signature of the officer shall be presumed to be genuine, until the contrary is shown. [R., § 4056; C., '51, § 2436.]

JUDICIAL RECORD.

4963. Of this state or federal courts. 3712. A judicial record of this state, or of any of the federal courts of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. [R., § 4057; C., '51, § 2437.]

It is not necessary to account for the original before introducing a copy: *Dupont v. Downing*, 6-173.

The record of a judgment is sufficiently authenticated if the certificate of the clerk identifies the transcript to be a true copy, and

there is a further certificate of the presiding judge that such attestation is in due form of law: *Lewis v. Sutliff*, 2 G. Gr., 186.

Where a party relies upon a prior adjudication, he should introduce in evidence not only a copy of the judgment but also a copy of the pleadings: *Campbell v. Ayers*, 6-339.

A copy of the record of the judgment properly authenticated is competent evidence without proof of the official character of the person rendering the judgment: *Railroad Bank v. Evans*, 32-202.

4964. Of another state. 3713. That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law. [R., § 4058; C., '51, § 2438.]

The certificate of a judge, whether the presiding officer of the court or not, to the attestation by the clerk, is sufficient: *Simons v. Cook*, 29-324.

The certificate of the judge is conclusive that the attestation of the record is in due form, and if it appears to be made by a deputy in the name of the principal, it is conclusive as to the authority of the deputy to make such certificate: *Greasons v. Davis*, 9-219; *Young v. Thayer*, 1 G. Gr., 196.

Parol evidence may be received to show the practice and usage in the courts of another state, and whether a record conforms thereto, and its effect: *Greasons v. Davis*, 9-219.

Where a foreign judgment is introduced in evidence on the trial in the court below, and it appears not to be sufficiently formal and authoritative as a judgment on its face to authorize a recovery upon it, the presumption will be on appeal that it was supported by proper evidence to entitle it to faith and credit, unless the contrary appears by affirmative showing: *Clemmer v. Cooper*, 24-185.

The method prescribed by act of congress for authenticating a judicial record is not exclusive of that which a state may adopt with reference to such authentication in its own courts: *Latterett v. Cook*, 1-1.

A certificate of the clerk of the circuit court of West Virginia, stating that he was the successor of the clerk of the county court of Virginia in which the judgment was rendered before the formation of the state of West Virginia, *held* competent evidence of that fact and of the existence of the judgment: *Darrah v. Watson*, 36-116.

The attestation of the copy of the record in another state must be according to the form used in the state from which the record comes: *Roop v. Clark*, 4 G. Gr., 294.

Attestation of a foreign judgment in the name of the clerk by a deputy, together with the presiding judge's certificate of the official character of such clerk and deputy, and that the certificate is in due form of law, *held* sufficient: *Young v. Thayer*, 1 G. Gr., 196.

4965. Of a justice of the peace. 3714. The official certificate of a justice of the peace of any of the United States to any judgment and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment. [R., § 4059; C., '51, § 2439.]

The certificate of the clerk should show that the justice of the peace was a justice within the same county, and also that he was an acting justice of the peace at the time of signing the certificate: *Guesdorf v. Gleason*, 10-495.

The certificate of a retired justice of the peace in relation to his former official proceedings has no more weight than that of a mere stranger: *Brown v. Scott*, 2 G. Gr., 454.

The successor in office of a retired justice is the proper person to make the certificate here contemplated as to any of the official proceedings of his predecessor shown by the records in his office, and the certificate of the clerk of a court that the justice is an acting justice and his signature genuine is sufficient: *Railroad Bank v. Evans*, 32-202.

Where in the body of a certificate of a justice of the peace he states his official character, the failure to affix his official designation to the signature of the certificate will not affect its validity: *Ibid.*

The admission in evidence of the transcript from the docket of a justice of the peace in a foreign state, *held* not error where such transcript was embraced in the certified copy of proceedings in the court of common pleas where the judgment sued on was rendered on appeal: *Clemmer v. Cooper*, 24-185.

The provisions of the statutes of the United States as to the mode in which the judicial proceedings of a state may be authenticated so as to be given effect in other states refer only to courts of general jurisdiction and not to those of inferior jurisdiction, such as justices of the peace: *Gay v. Lloyd*, 1 G. Gr., 78.

4966. Of a foreign country. 3715. Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows:

1. By the official attestation of the clerk or officer in whose custody such records are legally kept; and,

2. By the certificate of one of the judges or magistrates of such court, that

the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine; and,

3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court. [R., § 4060; C., '51, § 2440.]

EXECUTIVE AND LEGISLATIVE RECORD.

4967. Executive acts. 3716. Acts of the executive of the United States, or of this or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislatures of those governments respectively, or by either branch thereof. [R., § 4061; C., '51, § 2441.]

4968. Proceedings of legislature. 3717. The proceedings of the legislature of this or any other state of the Union, or the United States, or of any foreign government, are proved by the journals of those bodies respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which proceeding was had, or by a copy purporting to have been printed by their order. [R., § 4062; C., '51, § 2442.]

The journals of the respective houses of the general assembly are competent evidence to show the proceedings of such houses: *Kœhler v. Hill*, 60-543.

The original acts of the general assembly, deposited with the secretary of state, as provided by law, are the ultimate proof of the statutes, whatever errors there may be in the printed copies of such statutes. The court will inform itself and take judicial notice of the true reading of the statutes as thus shown: *Clare v. State*, 5-509: commented upon in *State v. Donehey*, 8-396.

The acts thus deposited are the bills which receive the signatures of the officers, etc., and behind them it is impossible for any court to go for the purpose of ascertaining what the law is: *Duncombe v. Prindle*, 12-1.

The enrolled bill, duly signed and filed in the office of the secretary of state, is at least presumptive evidence of its due enactment, and the court will take judicial notice of what appears from such record to be the law. The fact that the journal of one of the houses of the legislature fails to show that the statute passed such house will not be sufficient to overcome such presumption: *Jordan v. Circuit Court*, 69-177.

4969. Printed copies of the statutes. 3718. Printed copies of the statute laws of this or any other of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws. [R., § 4063; C., '51, § 2443.]

Printed copies of the statute laws of a state purporting to have been published under its authority are admissible as evidence of such laws: *Webster v. Rees*, 23-269.

But the method here provided does not exclude other methods, such as producing copies duly authenticated under the seal of the state: *Latterell v. Cook*, 1-1.

The testimony of witnesses, however, would not be admissible to prove the statutes of another state: *Ibid.*

Parol evidence of a witness familiar with the laws of another state is not admissible for the purpose of showing the powers of a notary public under the statutes of that state: *State v. Cross*, 68-180.

Parol evidence of a person familiar with the practice in other states may be received to show that certain books are commonly received by the courts of that state as evidence of the statute laws thereof: *Greasons v. Davis*, 9-219.

Courts do not take judicial notice of the statutes of another state. If a party relies upon such statutes, he must plead them as any other fact; and it will not be sufficient to refer to them by their title or date of approval, nor by stating what are their general provisions and requirements: *Carey v. Cincinnati & C. R. Co.*, 5-357; *Taylor v. Runyan*, 9-522.

The presumption is that the laws of a foreign state are the same as our own. If it is claimed that they are different from our own, that fact must be averred and proved: *Bean v. Briggs*, 4-464: *Crafts v. Clark*, 31-77; *S. C.*, 38-237; *Sayre v. Wheeler*, 31-112; *Sayre v. Wheeler*, 32-559: *Stephens v. Williams*, 46-540; *Church v. Crossman*, 49-444; *Webster v. Hunter*, 50-215; *Neese v. Farmers' Ins. Co.*, 55-604; *Hadley v. Gregory*, 57-157.

In a prosecution for bigamy, evidence of a marriage in another state which is sufficient in form to be valid under the laws of this state will be sufficient, the statutes of the state where the marriage was celebrated being presumed to be the same as those of this state in the absence of proof to the contrary: *State v. Nadal*, 69-478.

The presumption is that the rule of law on a particular question is the same in another state as in this state: *Leiber v. Union Pacific R. Co.*, 49-688.

4970. Written law; unwritten law. 3719. The public seal of the state or county affixed to a copy of the written law or other public writing, is also admissible as evidence of such law or writing respectively. The unwritten laws of any other state or government may be proved as facts by parol evidence, and also by the books of reports of cases adjudged in their courts. [R., § 4064; C., '51, § 2444.]

4971. Ordinances of any city or town. 3720. The printed copies of the ordinances of any municipal corporation published by its authority, and transcripts of any ordinances or of any act or proceeding of a municipal corporation recorded in any book, or entries on any minutes or journals kept under the direction of such municipal corporation, and certified by its clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes, or journals would be received and with as much effect. The clerk shall furnish such transcripts, and he shall be entitled to charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court. [R., § 1076.]

[The provisions of this section are by § 908 made applicable to cities under special charter.]

In a proceeding under a city ordinance it is competent to prove publication thereof by introducing the original ordinance with a certificate of the clerk that it was regularly enacted and published as required. Such evidence is original, not secondary: *Des Moines v. Casady*, 21-570.

Evidence in a particular case *held* sufficient to identify a certain book as the ordinance book of a city: *Ottumwa v. Schaub*, 52-515.

Entries in a record book of a board of directors of a district township, *held* sufficiently verified in a particular case: *Cooper v. Nelson*, 38-440.

As to courts taking judicial notice of city ordinances, see notes to § 662.

DEPOSITIONS.

4972. When taken and by whom. 3721. After the commencement of a civil action or other civil proceeding, if a witness resides within this state but in a different county from the place of trial, or is about to go beyond the reach of a subpœna, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony, may, whenever he deems it expedient, take his deposition in writing before any person having authority to administer oaths; and if the action is by equitable proceedings and to be tried on written evidence, then, without any other reason therefor, either party may so take the deposition of any witness. [R., § 4065; C., '51, § 2445.]

Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50-128.

Where a deposition is taken upon notice, and the adverse party appears and does not object to the want of statutory ground, the objection for want of such ground for taking the deposition may be deemed waived, but the deposition of a witness or the transcript of his evidence, taken in short-hand on a former trial, is not admissible in a law action without some statutory ground for taking his deposition appears or such objection is waived: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-37.

That the grounds must appear in the deposition, see § 4994 and notes.

As to introduction of depositions when taken, see § 5002 and notes.

4973. Notice. 3722. Reasonable notice of the name of a witness and the time and place when and where the same will be taken, must be given to the opposite party; but if notices are given in the same case by the same party, and of the taking of depositions at different places upon the same day, they shall be invalid; and no party shall be required to take depositions on

the day of the general election, or on the fourth day of July. [R., § 4066; C., '51, § 2446; 13 G. A., ch. 167, § 34.]

Where the notice stated the place for taking the deposition as the office of "Squire Moore," and the certificate showed that it was taken at the office of "Enos Moore," *held*, that the notice was insufficient in that respect, and the deposition was properly suppressed: *McClintock v. Crick*, 4–453.

Objection to the sufficiency of the notice is waived by appearing and cross-examining the witness: *Nevan v. Roup*, 8–207.

Where a party to an action dies after notice is served to take depositions, but before they are taken, they are illegal and should be stricken from the files on motion: *Kershman v. Suchela*, 59–93.

Parties who have been properly served with notice of the taking of a deposition cannot object to it because other parties were not notified: *Glenn v. Glenn*, 17–498.

Stating name of witness: The name of the witness whose testimony is to be taken should be stated in the notice: *Pilmer v. Branch of State Bank*, 16–321.

If there is a material difference between the name of the witness as given in the notice and that of the person whose deposition is taken, the deposition may be suppressed on motion: *Strayer v. Wilson*, 54–565.

Where an agreement was made to take the deposition of *S. M. Kinne*, and the deposition of Sally E. McKinne was taken, *held*, that it was properly suppressed upon motion: *Glenn v. Gleason*, 61–28.

4974. On commission. 3723. The deposition of a witness residing out of the county, may be taken before one or more commissioners on written interrogatories. [R., § 4067; C., '51, § 2447.]

If the witness resides out of the county, but within the state, his deposition may be taken either on commission or on notice; if he resides out of the state, it can only be on commission; if within the county, it must be by notice: *Fabian v. Davis*, 5–456.

If the witness resides out of the state, but his deposition can be taken within the county where suit is pending, it may be taken on notice, and need not be by commission: *Anderson v. Easton*, 16–56.

4975. Commissioner selected. 3724. The party wishing to take such deposition may select any of the officers mentioned in the next section as such commissioners, or the parties may agree upon, or the court appoint in the commission, any other individual for that purpose. [R., § 4068; C., '51, § 2448.]

[The word "party," in the first line, is erroneously printed "officer" in the Code.]

4976. Who may act. 3725. The clerk, or any judge of any court of record, or any commissioners appointed by the governor of this state to take acknowledgment of deeds in another state, or any notary public, or any consul or consular agent of the United States, may be selected and appointed by the party such commissioner, either by the name of office of such officer, or by his individual name and official style, and the name of the court of which such constituted commissioner is clerk or judge, and the name of the state and county; or, if without the United States and Canada, the name of the state and town or city in which such commissioner of deeds, notary, or consul or consular agent resides, must be stated in the notice and in the commission issued. [R., § 4069; C., '51, § 2449.]

A commission directed to "any notary public within and for" any certain county and state is sufficient to comply with the requirements of the statute: *Sheriff v. Hull*, 37–174.

In a commission to take a deposition in the United States or Canada it is sufficient to name the county and state in which the commissioner resides. It is not necessary to name the city or town: *Lyon v. Barrows*, 13–428.

A mistake in the title of the court of which the commissioner was clerk, and in the name of such clerk, *held* fatal: *Jones v. Smith*, 6–229.

Where the commission was directed to the "clerk of the district court of Morgan county," etc., and the deposition was taken and certified by the "clerk of the court of common pleas" of that county, *held*, that the deposition should have been suppressed: *Plummer v. Roads*, 4–587.

But if it were made to appear in any sufficient manner that there was no district court such as that mentioned in the notice, and that the court of common pleas was a court of the same character and jurisdiction, the objection to the deposition would not be sufficient: *Ibid.*

Where a commission to take depositions was directed "To any notary public in and for the county of Baltimore, the state of Maryland," and the depositions were taken by a person designating himself as "a notary public of the state of Maryland, duly commissioned and qualified, residing in the city of Baltimore and the state of Maryland," *held*, that the depositions should be excluded, and that parol evidence was not admissible to show that notaries public in the city of Baltimore were notaries for the whole state: *State v. Cross*, 68–180.

It is not proper to select and direct a com-

mission in the alternative to several of the officers mentioned by statute: *Levally v. Harmon's Adm'r*, 20-533.

If a notary before whom depositions are taken is such an officer *de facto*, they cannot be suppressed on the ground that he had not properly qualified and was not such officer *de jure*: *Keeney v. Leas*, 14-464.

4977. Qualification. 3726. None of the above named officers are permitted to take the depositions aforesaid, by virtue of a commission directed to him merely as such officer, unless within the limits to which his official jurisdiction extends. [R., § 4070; C., '51, § 2450.]

4978. Notice; action before a justice. 3727. Reasonable notice must be given the adverse party of a time when a commission will be sued out of the office of the clerk of the court in which the action is pending; if such action is in an inferior court, then from the office of the clerk of the circuit [district] court, for taking the deposition of the witness, naming him, which notice must be accompanied with a copy of the interrogatories to be asked such witness. [R., §§ 4071, 4092; C., '51, §§ 2450, 2465.]

As to notice, see notes to § 4973.

4979. Cross-interrogatories. 3728. At or before the time thus fixed, the opposite party may file cross-interrogatories. If cross-interrogatories are not filed, the clerk shall file the following:

1. Are you directly or indirectly interested in this action? and if interested, explain the interest you have;

2. Are all your statements in the foregoing answers made from your personal knowledge? and if not, do your answers show what are made from your personal knowledge, and what are from information, and the source of that information? if not, now show what is from information, and give its source;

3. State everything you know concerning the subject of this action, favorable to either party. [R., § 4072; C., '51, § 2452.]

4980. Rules. 3729. Subject to the regulations herein contained, the court may establish farther rules for taking depositions and all other acts connected therewith. [R., § 4077; C., '51, § 2454.]

NOTICE — SERVICE OF.

4981. Reasonable notice. 3730. The notice hereinbefore mentioned, is at least, when served on the attorney, ten days, and when served on the party within the county, five days; if served on the party anywhere else, the notice shall be that required under other similar circumstances in the service of an original notice; and when depositions are to be taken in pursuance of the first of the above methods, one day in addition must be allowed for every thirty miles' travel from the place where the notice is served, to that where the depositions are to be taken. No party shall be required to take depositions when the court is in actual session. [R., § 4073; C., '51, § 2453.]

When service is on a party, the additional days for the distance of travel as provided by statute are to be added to the five days; and, in all cases, in computing the time, the first day is to be excluded, and the last included: *Richardson v. Burlington & M. R. R. Co.*, 8-260.

The five days' notice referred to by statute is not intended to mean five clear days: *Bonney v. Cocke*, 61-303.

Where it does not appear that any travel is necessary from the place where the party lives or the place where notice is served to the place where the deposition is to be taken, it should not be suppressed for insufficiency of notice on account of want of allowance for time of travel: *Adams v. Peck*, 4-551.

The provisions of this section, with reference to the time of notice, relate to the county in which the depositions are to be taken and not to the county in which the action is pending: *Kennedy v. Rosier*, 71-671.

4982. How served. 3731. The notice, or notice and copy of interrogatories, may be served by the same persons on the same persons, in the same manner, and may be returned, and the return shall be authenticated in the same way, as should be an original notice in the same cause when served other than by publication. [R., § 4074.]

4983. On attorney. 3732. It may also be served personally on any attorney of the adverse party of record in the cause. [R., § 4075.]

4984. By filing in clerk's office. 3733. Whenever the adverse party has been notified by publication only, and has not appeared, he shall be deemed served with the notice, or the notice and interrogatories, by the filing of the same with the clerk in the cause. [R., § 4076.]

Depositions taken upon such notice as here provided are admissible on a retrial of the cause after default is set aside, as provided in § 4084. The fact that such depositions were taken without any cross-examination by defendant will not exclude them: *Watson v. Russell*, 18–79.

MANNER OF TAKING DEPOSITIONS.

4985. Commission; form of. 3734. The commission issues in the name of the court and under its seal. It must be signed by the clerk, and need contain nothing but the authority conferred upon the commissioner, instructions to guide him, and a statement of the cause and court in which the testimony is to be used, and a copy of the interrogatories on each side appended. [R., § 4078; C., '51, § 2455.]

It is not essential that the notice and interrogatories be on file in the clerk's office on the day fixed for the commission to issue. The opposite party having been served with a copy of the interrogatories, the filing of the original interrogatories is not necessary to enable him to file his cross-interrogatories. A delay of seven days in issuing a commission after the date fixed in the notice, *held* not such a defect as to warrant the exclusion of the deposition when taken: *Bonney v. Cocke*, 61–303.

If it be shown that the commission is issued by the clerk, under the seal of the court, it will be presumed to have issued by authority of the court, which, for all practical purposes, is the same as if it had issued in its name: *Plummer v. Roads*, 4–587.

As to the effect of unimportant deviations, see § 4992 and notes.

4986. How taken. 3735. The person before whom any of the depositions above contemplated are taken, must cause the interrogatories propounded, whether written or oral, to be written out, and the answers thereto to be inserted immediately underneath the respective questions. The answers must be in the language, as nearly as practicable, of the witness, if either party requires it. The whole being read over by or to the witness, must be by him subscribed and sworn to in the usual manner. [R., § 4079.]

A deposition in which the questions and answers were written out by the attorney of one of the parties was held to have been properly suppressed, where it appeared that the opposite party was not present and did not consent thereto: *Hurst v. Larpin*, 21–484.

Where the notice stated that the deposition would be taken between the hours of 9 o'clock A. M. and 6 P. M., and it was in fact completed and the witness was gone before 1 A. M., at which time the attorney for the opposite party was present to examine the witness, *held*, that it was receivable in evidence, no showing of bad faith or improper conduct being made, and it not appearing what the opposite party expected to prove by his cross-examination: *Scharfenburg v. Bishop*, 35–60.

4987. Exhibits appended. 3736. All exhibits produced before the person taking the deposition or proved or referred to by any witness, or correct copies thereof, must be appended to the depositions and returned with them, unless sufficient reasons be shown for not so doing. [R., § 4080; C., '51, § 2457.]

A deposition should not be suppressed because of failure to attach as exhibits certain deeds and notes incidentally referred to by the witness, but not in his control or forming the basis of the action, and about the contents of which there is no dispute: *Lyon v. Barrows*, 13–428.

A witness may embody in his deposition, by way of exhibit, answers made in another deposition, although the opposite party was not a party to the taking of such other deposition: *Bixby v. Carskaddon*, 63–164

4988. Certificate. 3737. The person taking the deposition shall attach his certificate thereto, stating that it was subscribed and sworn to by the deponent at the time and place therein mentioned. The whole, including the commission and interrogatories, when any such were issued, must then be

sealed up and returned to the clerk of the proper county by mail, unless some other mode be agreed upon between the parties. [R., § 4081; C., '51, § 2458.]

The certificate of the officer must show that the requirements of the statute with relation to the taking of depositions, such as, for instance, that the deposition has been read to the witness before signing, have been complied with; and *held*, that a certificate merely showing the fact of signing and swearing, and the time and place thereof, was not sufficient: *Ball v. Sykes*, 70-525.

The person executing the commission and making a return of his doings should appear to be the person commissioned, and should so appear of record from the certificate appended to and returned with the commission; but where the commission was issued to *Fred. R——*, and the certificate was signed *F. A. R——*, *held*, that the presumption that the commission was sent to the person named therein, and the certificate signed by a name which might be that of the person to whom it was sent, were sufficient to show that the commission was properly executed; also *held*, that the re-issuance of the commission on an order of the court, in order that the proper return might be made, was not error, no prejudice being shown: *Byington v. Moore*, 62 470.

Where it appears from the caption of a deposition that it was taken before the proper officer, in the proper county, and that the witness was first duly sworn, and from the certificate that the deposition was read over by said witness, and subscribed and sworn to by said deponent therein, it sufficiently appears that the statute has been complied with: *Vaughn v. Smith*, 58-553.

The officer taking the deposition may, if his certificate is defective in not showing facts essential to render the deposition receivable in evidence, return an amended certificate, which, in the absence of any showing or complaint that it does not state the facts, may be accepted as true, and this may be done even after the filing of a motion to suppress the deposition for the defects in the first certificate: *McKinley v. Chicago & N. W. R. Co.*, 44-314.

The notary's certificate should be authenticated with his seal: *Stephens v. Williams*, 46-540.

4989. Neither party to be present. 3738. Where a deposition is taken upon interrogatories, neither party, nor his agent or attorney, shall be present at the examination of a witness, unless both parties are present or represented by an agent or attorney, and the certificate shall state such fact if party or agent is present. [R., § 4082.]

Where the statutory provision, that neither a party nor his agent nor attorney shall be present at the examination of a witness whose deposition is taken upon written interrogatories unless both parties are present or represented, has been violated, prejudice will be presumed to result therefrom, at least in the absence of a showing to the contrary: *Sheriff v. Hull*, 37-174.

4990. Opened; custody. 3739. The depositions when thus returned, must be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees, but must not allow them to be taken from his office previous to the next term of the court, unless by the mutual written consent of the parties. [R., § 4083; C., '51, § 2459.]

Failure of the clerk to make entry on the appearance docket of the fact of filing a deposition will not prevent its being introduced in evidence: *Byington v. Moore*, 62-470.

Where depositions were allowed to be taken out in violation of such provision, but for an honest purpose, and the violation was merely technical and without prejudice, *held*, that the subsequent admission of the deposition in evidence was not sufficient error to warrant a reversal: *Wolverton v. Ellis*, 18-413.

It is not a ground for suppression of a deposition that it has been taken from the clerk's office by the attorney of the opposite party during the next term of court after filing: *Hogaboom v. Price*, 53-703.

A deposition taken by one party may be introduced in evidence by the other: See notes to § 5002.

4991. Returned by mail. 3740. The depositions when thus returned by mail, must be directed to the clerk of the court. They shall state on the outside of the envelope the title of the cause in which they are to be used. [R., § 4084; C., '51, § 2460.]

4992. Unimportant deviations. 3741. Unimportant deviations from any of the above directions, shall not cause the depositions to be excluded where no substantial prejudice could be wrought to the opposite party by such deviation. [R., § 4085; C., '51, § 2461.]

A mistake merely clerical in the date named in the caption, *held* not sufficient to exclude the deposition; but a mistake in the commission as to the title of the court of which the

commissioner was clerk, and in the name of the clerk, *held* fatal: *Jones v. Smith*, 6-229.

The fact that the notice and commission stated the name of the witness in full, while the deposition only set out the initials of his first name, *held* not sufficient to justify the suppression of the deposition: *Grimes v. Martin*, 10-347.

As to sufficiency of commission, etc., see § 4985 and notes.

4993. Authentication of. 3742. Where depositions are directed to be taken before a judge or justice of the peace, merely by his name of office, the return must contain an authentication by the clerk of the proper court, under his seal of office, verifying the fact that the person who took the deposition is really such officer. [R., § 4086; C., '51, § 2462.]

4994. Deposition to show reason for taking. 3743. The deposition in each of the above cases must show that the witness is a non-resident of the county, or such other fact as renders the taking of the deposition legal, and no such deposition shall be read on the trial, if, at the time, the witness himself is produced in court. [R., § 4087; C., '51, § 2463.]

Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50-128.

If the deposition shows that the witness is a non-resident, that is sufficient, although the witness states that he expects to be present at the trial; and unless he is actually present the deposition should not be excluded: *Nevan v. Roup*, 8-207.

Where the ransom given for taking a deposition was that the witness did not expect to be able to attend the next term of court, but the cause did not come on for trial until the second term of court after the deposition was taken, *held*, that it was improper to admit such deposition in evidence without a showing of some reason why witness was not present at the trial: *Sax v. Davis*, 71-406.

4995. In justice's court. 3744. Depositions taken to be used in a justice's court, shall be transferred to the court to which the cause is appealed, and used on the trial of such appeal in the same manner as if regularly taken therein. [R., § 4093; C., '51, § 2466.]

Objections to depositions other than for incompetency or irrelevancy should be made in the justice's court, and should not be sustained if made for the first time on appeal: *Alverson v. Bell*, 13-308.

PERPETUATING TESTIMONY.

4996. Manner. 3745. The testimony of a witness may be perpetuated in the following manner. [R., § 4094.]

4997. Petition; statements. 3746. The applicant shall file in the office of the clerk of the district [or circuit] court, a petition, to be verified, in which shall be set forth specially, the subject-matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be the plaintiff. [R., § 4095.]

Where, in a proceeding to perpetuate testimony, the petition stated the name of the person interested as the "C., B. & Q. R. R. Co.," *held*, that it was not a sufficient designation of the corporation whose name was the "Chicago, Burlington and Quincy Railroad Company" so as to render the evidence taken in such proceeding afterwards admissible as against such corporation: *Accola v. Chicago, B. & Q. R. Co.*, 70-185.

4998. Order of court or judge. 3747. The court, or the judge thereof, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination; how long the parties interested shall be notified thereof, and the manner in which they shall be notified. [R., § 4096.]

4999. Cross-interrogatories. 3748. When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross-interrogatories where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs. [R., § 4097.]

5000. Before whom taken. 3749. Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court in which the petition is filed. [R., § 4098.]

5001. Court or judge to approve. 3750. The court or judge, if satisfied that the depositions have been properly taken and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required; but such depositions shall be subjected to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action. [R., § 4099.]

[The word "taken," in the last line, is erroneously printed "therein" in the printed Code.]

EXCEPTIONS TO DEPOSITIONS.

5002. Notice of filing; exceptions. 3751; 17 G. A., ch. 26. The clerk shall, forthwith, after filing depositions in his office, issue a notice of the filing of such depositions, reciting therein the title of the cause, names of witnesses, and the date of filing such depositions, and serve the same upon the attorneys of the parties in the action therein recited. Said notice shall be deemed duly served, when the clerk shall have deposited copies of the same in the postoffice at the place where such cause is pending for trial, duly directed to the postoffice address of the respective attorneys for the parties in such action, which notice shall be so mailed by the clerk on the day he filed such deposition; and if the postoffice address of any of the attorneys of the parties is unknown to the clerk, he shall then deposit said notice, addressed to such attorney or attorneys, at the postoffice where such cause is then pending for trial. No exceptions to depositions other than for incompetency or irrelevancy shall be regarded, unless made by motion filed by the morning of the second day of the first term held after the depositions have been filed by the clerk; *provided*, such depositions have been filed three days prior thereto. If the depositions are afterwards received during such term, such motion shall be filed by the morning of the third day after such depositions are filed. All motions to suppress depositions must be filed before the cause is reached for trial.

Objections: An objection that a question propounded to the witness on the taking of his deposition is leading cannot be taken after the deposition is returned into court and offered in evidence. It should be made when the deposition is taken: *Keeney v. Chilis*, 4 G. Gr., 416; *Mumma v. McKee*, 10–107.

The better rule is to require that objections to the form of interrogatories proposed, where the deposition is to be taken by commission, should be made before the commission issues: *Jones v. Smith*, 6–229.

Motions to suppress depositions are to be made before the commencement of the trial: *Frazier v. Smith*, 10–591; *Bays v. Herring*, 51–286.

Such requirement as to time for filing exceptions is applicable to the objection that

questions in the deposition are improper or do not call for the best evidence: *Nelson v. Chicago, R. I. & P. R. Co.*, 38-564.

This requirement is applicable to a motion to suppress a portion of a deposition on the ground that it is not proper cross-examination. The mere noting of the objection on the deposition at the time it is taken is not sufficient: *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25.

This statutory provision *held* applicable to an objection that the statutory cross-interrogatories were not answered in a deposition taken upon commission, and also where it was objected that copies of notes referred to in the answers were not attached: *Harris Mfg. Co. v. Marsh*, 49-11.

An entry in the notice book of the court purporting to show the filing of depositions which are not actually filed will not limit the time of filing motion to suppress such depositions; and such motion may be made after the case has been called for trial where the depositions have not previously been filed: *Accola v. Chicago, B. & Q. R. Co.*, 70-185.

An objection to a deposition for defect in the notice, first interposed when it is offered in evidence on the trial, will not be regarded, although exception was taken to the notice before the commission issued: *Pilmer v. Branch of State Bank*, 16-321.

Where the attorney, on the day that the cause was called for trial, asked time in which to file objections, and it appeared that the depositions had been on file more than thirty-six hours, and it did not appear but that the attorney had had knowledge of such fact, *held*, that his application was properly overruled: *Byington v. Moore*, 62-470.

Objection to the admissibility of the evidence of a witness who is incompetent, as where a husband or wife is called to testify against the other, should be made at the time the witness is called, and is too late if not interposed until the end of the deposition or when it is offered to be read in evidence on the trial: *Watson v. Riskamire*, 45-231; *Greedy v. McGee*, 55-759.

Where, as soon as it was apparent in the course of taking a deposition that certain testimony therein was incompetent, the opposite party moved to strike such testimony out, and had such motion entered by the notary taking the deposition, *held*, that the objection was taken in time and might be considered: *Leather v. Ross*, 74-630.

An objection to the competency of the deposition, where the witness is claimed to be incompetent because the action is by an administrator, made at the time of the trial, cannot be considered where the same deposition has been received in a previous trial in the same case without objection: *McMillan v. Burlington & M. R. R. Co.*, 56-421.

An objection to testimony on the ground that it relates to a personal transaction between the witness and decedent in an action by or against an administrator is an objection to competency, and therefore not within the statutory provision requiring that objections other than for incompetency or irrelevancy shall be made on the second day of the first term after the deposition is filed: *Burton v. Baldwin*, 61-283.

The objection that the witness, although examined before a notary public in this state, is not a resident of this state, must be deemed waived if not taken when the residence of the witness is first disclosed; and where the counsel for the adverse party has been present and interposed no objection to the taking of the deposition until it has been signed, the objection cannot be maintained: *Burrows v. Stryker*, 47-477.

Objection to a part of the deposition on the ground that it is not proper cross-examination is too late if not made until the deposition is offered in evidence: *Bixby v. Carskaddon*, 63-164.

Where exceptions to questions and answers were filed with the notary taking the deposition, but it did not appear that the same were brought to the attention of the court within the time required by statute, *held*, that they could not afterwards be relied upon: *Neimeyer v. Cass County Bank*, 42-124.

Where a deposition is taken for use in a justice's court, objections thereto other than for incompetency or irrelevancy should be made in the justice's court, and cannot be made for the first time when the case is tried on appeal: *Alverson v. Bell*, 13-308.

An objection relating to the legality of the proof at the time it is offered cannot be required to be made at the time of taking the deposition: *Horseman v. Todhunter*, 12-230.

Exclusion of depositions: The mere fact that depositions in an equity case are filed after the time within which by order of the court the party has been required to file them is not sufficient ground for striking them from the files in the trial of the case: *Sweet v. Brown*, 61-669.

It will not constitute reversible error that a deposition is received which is taken after the time allowed to the party for taking depositions, when it appears that additional time was also allowed to the other party for the same purpose: *Gardner v. Trenary*, 65-646.

A deposition should not be excluded unless objection is made thereto: *Crick v. McClintic*, 4 G. Gr., 290.

A general objection to a deposition, a portion of which is properly admissible, is insufficient: *Whitaker v. Sigler*, 44-419.

The overruling of a motion to suppress a deposition is error without prejudice where the witness testifies in person on the trial and such testimony is more favorable to the party complaining than that contained in the deposition: *Curry v. Allen*, 60-387.

Striking out portion of deposition: The court cannot, upon motion, strike out a portion of an interrogatory in a deposition, leaving the answer standing: *Pelamourges v. Clark*, 9-1.

A question and answer in a deposition should not be suppressed entirely where they are proper as to one matter referred to therein, but embrace something which is improper: *Adae v. Zangs*, 41-536.

Matters stated in answers to interrogatories in a deposition *held* to be such as not called for by the question and therefore subject to be stricken out on motion: *Hendricks v. Wallis*, 7-224.

The rule requiring an answer to be respon-

sive to the interrogatory should be substantially enforced: *McCarver v. Nealey*, 1 G. Gr., 360.

Introduction of deposition: A deposition need not be introduced by the party taking it, but the other party may introduce it if he so desire: *Hale v. Gibbs*, 43-380; *Wheeler v. Smith*, 13-564; *Pelamourges v. Clark*, 9-1, 16; *Crick v. McClintic*, 4 G. Gr., 290.

Depositions properly taken may be introduced by either party for the purpose of establishing any material point in the case: *Brown v. Byam*, 65-374.

A stipulation that a deposition when taken shall be receivable in evidence upon the trial of any case pending in the court named, between the same parties, will render a deposition taken in one such case admissible in any other: *Holmes v. Budd*, 11-186.

The party on whose behalf a deposition has been taken cannot read a portion thereof and omit other portions. The entire deposition, so far as competent and pertinent, should be read or none: *Kilbourne v. Jennings*, 40-473.

A deposition taken by a party is under his control, and, although he cannot withdraw it from the files, he can withhold it at pleasure, or any part of it, but the opposite party may introduce it in evidence if he sees fit, or a portion thereof not introduced by the party taking it: *Hale v. Gibbs*, 43-380.

It is not error to allow a party to read a portion of the deposition of the opposite party, taken by him, where it contains an admission: *Van Horn v. Smith*, 59-142.

One party may introduce a deposition taken by his adversary, but which such adversary declines to introduce. If the witness has been examined as to different transactions, a party introducing the deposition may introduce such portions of it as touch one or more portions of the transaction, and decline to introduce it as to others. But he cannot be permitted to introduce a portion of it as to any given subject while declining to introduce all that the witness has said upon that subject: *Citizens' Bank v. Rhutasel*, 67-316.

Depositions taken in a former action may be introduced in a subsequent action between the same parties without notice that such depositions will be offered in the subsequent action: *Shaul v. Brown*, 28-37.

Depositions taken in one action may be used in a subsequent action between the privies of the parties to the former action: *Atkins v. Anderson*, 63-739.

But a party should not be permitted to use depositions upon the trial of one cause which have been taken in another without having filed them in the cause for which he proposes to use them or obtained leave before the commencement of the trial to so use them. Otherwise the opposite party would not have the opportunity which the statute contemplates of taking exception to such depositions: *Searle v. Richardson*, 67-170.

5003. Hearing. 3752. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions before the commencement of the trial. [R., § 4090; 10 G. A., ch. 85, § 4.]

5004. Errors waived. 3753. Errors of the court in its decision upon exception to depositions are waived, unless excepted to. [R., § 4091.]

5005. Costs. 3754. In all cases of taking depositions as hereinbefore provided, the costs thereof must be paid in the first place by the party at whose instance they are taken, subject like other costs to be taxed against the failing party in the suit. [R., § 4100; C., '51, § 2474.]

TITLE XXIII.

OF COMPENSATION OF OFFICERS.

CHAPTER 1.

OF STATE AND DISTRICT OFFICERS.

5006. Governor and secretary. 3755; 21 G. A., ch. 118, § 1. The salary of the governor shall be three thousand dollars per annum; and the salary of the private secretary of the governor fifteen hundred dollars per annum. [R., § 41; C., '51, § 37; 10 G. A., ch. 85, § 95; 13 G. A., ch. 112, § 1.]

5007. Secretary of state and deputy. 3756; 21 G. A., ch. 118, § 2; 21 G. A., ch. 125. The salary of the secretary of state shall be twenty-two hundred dollars per annum; and the salary of the deputy secretary of state shall be fifteen hundred dollars per annum. The secretary of state shall collect the following fees:

For each commission to commissioners in other states, three dollars.

For each commission to notaries public, one dollar and twenty-five cents.

For certificate, with seal attached, one dollar.

For a copy of any law or record, upon the request of any private person or corporation, for every hundred words. ten cents.

For filing articles of incorporation other than those of a public character, five dollars, and for recording the same for every hundred words or fraction thereof fifteen cents; and upon payment of the fees above provided, the secretary of state shall upon request issue a certificate under the seal of his office setting forth the fact of such filing. [R., §§ 58, 4133; C., '51, §§ 42, 2524; Ex. S., 9 G. A., ch. 19, § 4; 13 G. A., ch. 44, § 13; ch. 112, §§ 2, 3; Joint Res., 12 G. A., No. 21.]

5008. Auditor and deputy. 3757; 21 G. A., ch. 118, § 3. The salary of the auditor of state shall be twenty-two hundred dollars per annum; and the salary of the deputy auditor of state shall be fifteen hundred dollars per annum; and the auditor shall collect fees as provided in chapters on insurance. [R., § 70; C., '51, § 49; Ex. S., 9 G. A., ch. 19, § 4; 13 G. A., ch. 112, §§ 2, 3.]

5009. Treasurer and deputy. 3758; 21 G. A., ch. 118, § 4. The salary of the treasurer of state shall be twenty-two hundred dollars per annum; and the salary of the deputy treasurer of state fifteen hundred dollars per annum. [R., § 82; C., '51, § 61; 12 G. A., ch. 168.]

5010. Register state land office and deputy. 3759. The salary of the register of the state land office shall be twenty-two hundred dollars per annum; and the salary of the deputy register of the state land office twelve hundred dollars per annum. Such register shall also collect such fees as is provided in chapter five, title two of part one of this code. [Ex. S., 9 G. A., ch. 19, § 4; 12 G. A., ch. 169.]

5011. Same. 17 G. A., ch. 73, § 1. The salary of the register of the state land office shall be two thousand dollars per annum, and the salary of his deputy shall be one thousand dollars per annum, and said salaries shall be compensation in full for all services required by law of said register and his deputy; and no additional allowance for clerk hire, contingencies, or for any

other purpose connected with the business of said office, except the necessary stationery, shall be made.

[The office of register of the land office is abolished by § 114, and the salary of the clerk who performs his duties is provided for in § 113.]

5012. 17 G. A., ch. 73, § 2. All acts and parts of acts inconsistent herewith are hereby repealed.

5013. Superintendent public instruction and deputy. 3760; 21 G. A., ch. 118, § 5. The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum; and the salary of the deputy superintendent of public instruction, fifteen hundred dollars per annum. [Ex. S., 9 G. A., ch. 19, § 4; 10 G. A., ch. 52, § 12.]

5014. Traveling expenses of superintendent. 22 G. A., ch. 109, § 1. For the expense of traveling required by section fifteen hundred and seventy-seven of the code of 1873 [§ 2590], the superintendent of public instruction shall receive two hundred and fifty dollars per annum or so much thereof as may be necessary, for which warrants shall be drawn on his order by the auditor of state upon the presentation of a verified statement of expenses incurred for the same.

5015. 22 G. A., ch. 109, § 2. All acts or parts of acts inconsistent herewith are hereby repealed.

[Sec. 3761, as to salary of adjutant-general, is superseded by the provisions of § 1565.]

5016. State librarian. 3762; 17 G. A., ch. 75; 20 G. A., ch. 191, § 4. The salary of the state librarian shall be twelve hundred dollars per annum payable as salaries of other state officers, and there is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of twelve hundred dollars annually, for the payment of said salary.

[As to salaries of assistant librarians and messenger, see § 3062.]

5017. Superintendent of weights and measures. 3763. The salary of the state superintendent of weights and measures shall be fifty dollars per annum. [9 G. A., ch. 82, § 15.]

5018. Deputies. 21 G. A., ch. 118, § 7. The compensation of fifteen hundred dollars per annum shall be in full for all compensation to such deputy state officers, and all fees received by or paid to any deputy state officers by virtue of their official positions shall be turned into the state treasury. They shall receive no other compensation from the state for any services whatever while acting as such deputy, *provided further* that no clerk appointed by the auditor or his deputy, the treasurer or his deputy, the secretary of state or his deputy or by the executive council or the governor shall receive directly or indirectly a greater sum than fifteen hundred dollars per annum for such services as such clerk.

PUBLIC PRINTER AND BINDER

Sections 3764 to 3768 are repealed. See § 136*a*.

5019. Prices for printing. 22 G. A., ch. 82, § 23. The state printer shall be paid the following prices for all work done for the state in an acceptable manner, as hereinbefore provided and no more.

(*a*) For composition on laws, journals, reports, circulars and all other printed matter, except blanks, fifty cents per thousand "ems" and seventy cents per thousand for figure work when figures are arranged in columns and three or more justifications are required, and ninety cents per thousand "ems" for rule and figure work. *Provided*, plain indexes such as those of the statutes of this state shall be reckoned as ordinary composition.

(*b*) For book press work the compensation shall be two dollars and fifty cents for the first one thousand impressions of sixteen pages and one dollar

and fifty cents per thousand for each additional one thousand impressions from the same form. If in finishing a job of press work it shall be necessary to print an eight-page form the compensation shall be the same as for a sixteen-page form, and if there shall not be one thousand impressions in any one book form the compensation shall be the same as for one thousand. No extra charge shall be allowed for dry pressing of sheets which shall be done in all cases when so directed by the secretary of state.

(*c*) For printing blanks on one side of a sheet of folio post or larger paper two dollars and fifty cents for the first one hundred impressions, and seventy-five cents per hundred for each additional one hundred impressions up to five hundred; each additional hundred above five hundred, forty cents per one hundred. On paper smaller than folio post two dollars for first one hundred impressions and fifty cents per one hundred for each additional one hundred impressions up to five hundred, each additional one hundred, thirty cents. Where both sides of a blank can be printed at once only one impression shall be paid for. *Provided*, that when the blank contains over one thousand ems of composition, pica or smaller measure, such additional composition shall be paid for as provided in subdivision (*a*) of this section, and when such matter must be adjusted to ruled lines thirty per cent. additional shall be allowed on the composition therefor. When two or more blanks or jobs are printed at the same time on the same slant, they shall be counted as a single impression.

5020. No constructive charges. 22 G. A., ch. 82, § 24. No constructive charges of any kind shall be allowed the state printer. And he shall be allowed only for press work done and type actually set up and imposed, or for paper actually printed, and he shall fill [file] with the secretary of state a copy of each job of work, on which each item of charge is made at the time of rendering his account. Before the secretary can issue him the receipt contemplated by this act, the actual number of "ems" and number of impressions of press work in each job shall be specified with a statement that the law has been strictly complied with, and that no constructive charges are embraced in his account, as rendered, which statement shall be verified by the affidavit of the state printer. Where type set for messages or documents shall be used twice, the state printer shall have pay for the same but once, but he shall be allowed one dollar and fifty cents for re-imposing each sixteen-page form where it is to be used a second time.

5021. Prices for binding. 22 G. A., ch. 82, § 25. The state binder shall be paid the following prices for all work done for the state in an acceptable manner as hereinbefore provided:

(*a*) For folding and trimming all documents, not stitched, ten cents per hundred copies.

(*b*) For folding, trimming and stitching documents not covered, fifteen cents per one hundred copies.

(*c*) For folding, stitching and binding in paper covers all messages, reports, documents, not exceeding one sheet allowing sixteen pages for a sheet, one dollar and twenty-five cents per one hundred copies of sixteen pages or less, and for each additional sheet of sixteen pages or less twenty-five cents per one hundred copies the cover to be counted as one sheet.

(*d*) For folding, sewing, and binding in paper covers the journals of the two houses eighteen cents per copy.

(*e*) For folding, sewing, and binding in muslin or cases with gilt letters same style as agricultural report for the year 1886, twenty-five cents per copy for a volume of four hundred pages or less and for additional one hundred pages or fraction thereof four cents.

(*f*) For folding, sewing and binding in half sheep, with gilt letters for title same style as the Iowa documents for 1886, forty cents per copy for each vol-

ume of four hundred pages or less and four cents for each additional hundred pages or fraction thereof.

(*g*) For folding, stitching and binding the acts and resolutions of each general assembly in board with muslin backs and paper sides, same as laws of 1886, eleven cents per copy.

(*h*) For folding, sewing and binding in law sheep same style as the report of the supreme court fifty-five cents per copy, for each volume of four hundred pages, or less, and four cents for each additional one hundred pages or fraction thereof.

(*i*) For ruling he shall be allowed the sum of seventy-five cents per hour for time actually employed.

5022. Certificate for part of work. 22 G. A., ch. 82, § 26. At any time during the progress of the printing or binding of the laws, or the journals of either house, or any other work amounting to more than one hundred pages the secretary of state may issue his certificate for one-half the value of the work thus far done, to be ascertained by said secretary, and upon said certificate being presented to the auditor of state, he shall draw his warrant for the amount therein named.

5023. Saving clause. 22 G. A., ch. 82, § 42. Nothing in this act shall be so construed as will in any manner affect the compensation of the present state printer and binder during the unexpired term of their offices.

SUPREME JUDGES — ATTORNEY-GENERAL — CLERK.

5024. Judges of supreme court. 3769; 18 G. A., ch. 27. The salary of each judge of the supreme court shall be four thousand dollars per annum. [Ex. S., 9 G. A., ch. 19, § 3; 11 G. A., ch. 57, § 2; 13 G. A., ch. 112, § 4; 12 G. A., ch. 27, § 5; 14 G. A., ch. 37, § 5.]

5025. Attorney-general. 3770; 21 G. A., ch. 172. The salary of the attorney-general shall be fifteen hundred dollars, per annum, and whenever he is required by the duties of his office, or by directions of the governor or general assembly, to attend any of the courts of this state, or any federal courts of this or any other state, he shall receive in addition to his salary, five dollars for each day he attends such courts, and the same mileage in going to and from such courts, as is allowed members of the general assembly, for attending sessions thereof, to be computed by the nearest practicable route. [11 G. A., ch. 67; 12 G. A., ch. 53, § 1.]

5026. Clerk of supreme court and deputy; fees. 3771; 17 G. A., ch. 74, § 1; 19 G. A., ch. 117, § 2; 21 G. A., ch. 118, § 6. The salary of the clerk of the supreme court shall be twenty-two hundred dollars per annum; and the salary of the deputy clerk of the supreme court shall be fifteen hundred dollars per annum.

The clerk shall collect the following fees, and account for them as provided in section three thousand seven hundred and seventy-eight of the code [§ 5030], and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars;

Upon entering judgment when the cause has been tried on its merits, two dollars;

Upon each continuance, one dollar;

Upon issuing each execution, one dollar and twenty-five cents;

Upon entering satisfaction of each judgment, fifty cents;

Upon each writ, rule or order to be served upon any person not in court, twenty-five cents;

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion, or any record made at the request of

any person, for each one hundred words, ten cents. [R., §§ 2919, 4134–5; C., '51, §§ 2525–6; 12 G. A., ch. 27, § 5; 14 G. A., ch. 37, § 5.]

[Sec. 3772, as to fees of clerk of supreme court in criminal cases, is repealed by 17 G. A., ch. 74, § 2.]

5027. Execution for fees of clerk. 3773. If any of the foregoing fees of the clerk are not paid in advance, execution may issue therefor, except where the fees are payable by a county or the state.

DISTRICT OFFICERS.

[Sec. 3774, as to salary of district judges, is superseded by § 244.]
[Sec. 3775, as to compensation of district attorneys, is repealed by § 279.]

5028. In case of conviction. 3776. In cases of conviction, the fees contemplated in the preceding section shall be taxed against the defendant, and when collected paid into the county treasury. [10 G. A., ch. 38, § 2.]

[Since the repeal of the preceding section, this one is evidently of no effect. Sec. 277, as to compensation of county attorney, does not allow him fees.]

5029. Short-hand reporters. 3777; 18 G. A., ch. 195, § 2. Short-hand reporters shall receive compensation as follows: For each day actually in attendance in court under the order of the judge, such sum as may be fixed by the judge not exceeding six dollars per day, to be audited and paid by the county upon the certificate of the judge of the court, but the judge shall not order the attendance of said reporter, except during that part of the term when in his judgment the reporting of testimony will be required, and he shall discharge said reporter from farther attendance at each term as soon as in his judgment the reporting of testimony will not be farther required for such term; and for making transcripts of his original notes, for each one hundred words, six cents; but where such transcripts are desired in any civil case, the fees therefor shall be paid by the party desiring the same, and the amount allowed such reporter for reporting testimony in any case shall, in all instances, except where the defendant in a criminal case is acquitted, be taxed as a part of the costs in the case; *provided*, that when the defendant in any criminal cause, who shall have perfected an appeal from a judgment against him, presents to the judge satisfactory proof by affidavit or otherwise, that he is unable to pay for such transcript, the court, if in the opinion of the judge justice will be thereby promoted, may order said transcript to be made at the expense of the county; and the original *notice* [notes] of any testimony taken in any case shall be filed in the office of the clerk of the court and become a part of the record in said case, and said notes or any transcript thereof duly certified by the reporter of said court, shall be admissible in any case in which the same are material and competent to the issue therein, with the same force and effect as depositions, and subject to the same objections, so far as applicable; and said original notes, or the transcript thereof or any part thereof, may be referred to in any bill of exceptions, and when duly transcribed and certified, shall be inserted therein on appeal; and upon demand of any person for a duly certified transcript of any designated portion of the original notes of testimony in any case, it shall be the duty of said reporter to transcribe the portion so designated, and duly certify the same upon payment of fees therefor; *provided*, that when the reporter taking the notes in any case in court has ceased to be the official short-hand reporter of that court, any transcript by him made therefrom and duly certified by him under oath, as a full, true and complete transcript of said notes, shall have the same force and effect as though certified in the same manner by the official short-hand reporter of said court. [14 G. A., ch. 99, §§ 2, 3.]

The reporter's transcript of the evidence on a former trial is not admissible in a law action without a showing of reason for not producing the witness himself. The transcript cannot be

received except under circumstances which would make the deposition of the witness admissible upon statutory grounds: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-37.

A transcript of the evidence on a former trial cannot be read without any showing of the absence of witnesses, or of inability to produce the original documents, and without notice to the other party: *Case v. Blood*, 71-632.

Where it appeared that a witness whose testimony had been taken on a former trial was out of the state and absent without the fault of the party desiring to call such witness or his counsel, *held*, that the report of his testimony on a former trial was admissible; also *held*, that the rule with reference to notice for taking depositions had no application to the introduction of the transcript in evidence, but if any notice of its proposed introduction was necessary the five days' notice given in this case was sufficient: *Fleming v. Shenandoah*, 71-456.

As to making the evidence of record by the short-hand report thereof, see notes to §§ 3949, 4041, 4042, 4414.

As to short-hand reporters in superior courts, see §§ 785, 786.

5030. Accounting for fees. 3778. The secretary of state, auditor of state, and register of the state land office, shall keep an accurate and particular account of all fees received by them, which shall be verified by affidavit, and rendered monthly to the treasurer of state, and they shall pay the amounts thus received to such treasurer at the end of each month. [13 G. A., ch. 112, § 8.]

5031. Judge's salary not increased. 3779. During the term for which any judge may have been elected or appointed, his salary shall not be increased by this chapter, except that any judge elected to fill a vacancy shall receive the salary herein provided. [Same, § 6.]

5032. Salaries paid monthly. 3780. The salaries of all officers mentioned in this chapter shall be paid in monthly instalments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided in this chapter. [Same, § 7.]

CHAPTER 2.

OF COUNTY AND TOWNSHIP OFFICERS.

5033. Clerk of district court. 3781. The clerk of the district [or circuit] court shall be entitled to charge and receive the following fees:

For filing any petition, appeal, or writ of error, and docketing the same, one dollar and fifty cents;

For every attachment, fifty cents;

For every cause tried by jury, one dollar and fifty cents;

For every cause tried by the court, seventy-five cents;

For every equity cause, one dollar and fifty cents;

For each injunction, or other extraordinary process or order, one dollar;

For all causes continued on application of a party by affidavit, fifty cents;

For all other continuances, fifteen cents;

For entering any final judgment or decree, seventy-five cents;

For taxing costs, fifty cents;

For issuing execution or other process after judgment or decree, fifty cents;

For filing and properly entering and indorsing each mechanic's lien, the same to be taxed as other costs in case a suit is brought thereon, one dollar;

For certificate and seal, fifty cents;

For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents;

For entering any rule or order, twenty-five cents;

For issuing writ or order, not including subpœnas, fifty cents;

For issuing commission to take depositions, fifty cents;

For entering sheriff's sale of real estate, fifty cents;

For entering judgment by confession, one dollar;

For entering satisfaction of any judgment, twenty-five cents;

For all copies of record or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;

For taking and approving a bond and sureties thereon, fifty cents;

For declaration of intentions by an alien to become a citizen, twenty-five cents;

For all services on naturalization of aliens, including oaths and certificate, fifty cents;

In criminal cases, and in all causes in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county;

For making out transcripts in criminal cases appealed to the supreme court, when the defendant is unable to pay, for each one hundred words, ten cents, to be paid by the county. [R., §§ 430, 1852, 4136, 4140-1; C., '51, §§ 2531-2; 13 G. A., ch. 68.]

[Additional compensation is allowed by § 248.]

Entering an order for change of venue entitles the clerk to a fee which must be paid before such change can take place: *Stryker v. Rivers*, 47-108.

The clerk cannot charge a fee for services required to be performed by him for which no specific fee is allowed: *Sprout v. Kelly*, 37-44.

The clerk is entitled to receive the fees provided for by statute, no matter when they are collected. Until collected the fees remain a charge in favor of the clerk, as compensation for the work for which they are charged: *Peet v. White*, 43-400.

Compensation allowed to the clerk is to be in full of all official services, and includes any sum allowed for probate business, but the clerk is to be given in addition such reasonable allowance for deputy hire as the pressure of business of his office demands: *Washington County v. Jones*, 45-260.

It appearing that the clerk had received from the county compensation on the idea that he should not be allowed fees which might be collected after the expiration of his office, *held*, that he had no right thereafter to uncollected fees: *Ibid.*

Previous statutes as to compensation of clerk construed and applied in a particular case: *Ibid.*

Under previous statutory provisions as to compensation, *held*, that all fees of every kind in excess of the fixed salary, and any additional amount allowed by the board of supervisors, was to be paid over by the clerk to the county: *Boone County v. Wilson*, 38-372.

By § 5039 the fees and charges for the service in the settlement of an estate are limited to a gross sum, and those provisions will control as against the charges allowed by this section: *Packer's Estate v. Corlett*, 71-249.

A clerk is not entitled to the fees provided in §§ 5039 and 5088. He is only entitled to the fees and compensation provided in this section, unless the board otherwise directs and allows. For extra services in completing, correcting and re-arranging the records of the office, upon taking charge thereof, he is not entitled to any additional compensation. No fee is provided for issuing jurors' certificates, directed to the auditor, showing the amount of fees which the juror is entitled to for his services: *Palo Alto County v. Burlingame*, 71-201.

The fact that upon one settlement with the board the clerk is allowed to retain fees to which he is not entitled will not estop the board from refusing to allow similar fees in the settlement as to a subsequent period: *Ibid.*

5034. Pensions and bounties. 3782. The clerks of the district court shall certify under the seal of such court, to all applications and other papers requiring the certificate and seal of a court of record to procure pensions, bounties, and back pay for soldiers or other persons entitled thereto, whenever requested by the applicant, his agent, or attorney, and such clerk shall be entitled to the sum of ten cents only for such service. [10 G. A., ch. 88.]

5035. In probate matters. 3783. There shall be such compensation paid such clerk for his services in probate matters out of the fees collected by him for probate business, as the board of supervisors may allow. [12 G. A., ch. 134, § 1.]

5036. Limitation of compensation; deputies. 3784; 18 G. A., ch. 184, § 1; 22 G. A., ch. 36, § 2. The total amount of compensation of such clerk for all official services shall not exceed the sum of eleven hundred dollars per

annum, in counties having a population not exceeding ten thousand; the sum of thirteen hundred dollars per annum in counties having a population in excess of ten thousand, but not exceeding twenty thousand; nor the sum of fifteen hundred dollars per annum in counties having a population in excess of twenty thousand, but not exceeding thirty thousand. If the fees collected by the clerk in any county in any one year shall exceed the sums aforestated, the excess shall be paid into the county treasury for the use of the county fund. In case the aggregate amount of fees so received by the clerk in any one year is less than the limit of his compensation as herein fixed, and such amount is deemed inadequate compensation by the board of supervisors, they may allow such additional amount as they may deem just and proper, within the limits herein prescribed. When in the judgment of the board of supervisors it is necessary to the proper discharge of the duties of the office, said board may, upon application of the clerk, authorize said clerk to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed. *Provided, however*, that in all counties having a population of twenty-five thousand and not over thirty-six thousand as shown by the last state census, where the board of supervisors find it necessary to have a deputy clerk, deputy treasurer and deputy auditor, there shall be allowed as compensation to such deputy clerk, deputy treasurer, and deputy auditor, for their service, a sum equal to not more than two-thirds the salary or compensation of the county clerk, county treasurer and county auditor of such county, respectively, as the board of supervisors may direct; *provided*, that in counties having a population in excess of forty thousand, the court, upon application of the clerk, may authorize said clerk to appoint, subject to the approval of the board of supervisors, not more than three deputies and one or more clerks, and determine in its order the number of such deputies and clerks. *Provided*, that in counties having a population in excess of thirty thousand, but not to exceed forty thousand, the board of supervisors may allow such compensation to the clerk, deputies and clerks as they may deem just and proper, but that the sum total of such compensation allowed shall not exceed twenty-five hundred dollars; and *provided further*, that in counties having a population in excess of forty thousand, the board of supervisors may allow such compensation to the said clerk, deputy and clerks, as they may deem just and proper, but the total compensation shall not exceed the fees received by such clerk, or the sum of five thousand dollars, if such fees be less than said sum; *provided further*, that in any county having a population of over thirty thousand and under forty thousand, and which is within a judicial district in which the circuit has been divided, the board of supervisors, if they find it necessary, may employ an additional deputy or clerk for duties in connection with the probate records, at a compensation not exceeding six hundred dollars per annum. *Provided further*, that in each county having two county seats, the compensation of clerk of courts, including the amount paid his deputies and clerks, shall not exceed three thousand dollars, in any one year, any excess of fees collected to be paid into the county treasury as above provided. [R., § 4327; 10 G. A., ch. 68.]

The limitation contained in this section applies to the compensation of the clerk for all official services: he is not entitled to receive, in excess of the limit here imposed, the fees as commissioner of insanity specified in § 5102: *Moore v. Mahaska County*, 61–177. Further, see notes to § 5033.

5037. Report to supervisors; fees collected. 3785. The clerk of the district court, as such [and as clerk of the circuit court] shall report to the board of supervisors of his county at each regular session, a full and complete statement of the amount of fees received by him, which shall be verified by the affidavit of such clerk. [R., § 431.]

5038. Unclaimed witness fees. 3786; 19 G. A., ch. 151. The clerk of the district [and circuit] courts shall, on the first Monday in January and July

of each year, pay into the county treasury for the use of the county all fees of whatever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts thereof, giving the title of the cause and style of the court in which the same was pending, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively. [R., §§ 353-6.]

5039. For marriage licenses and fees in probate matters. 3787. There shall be paid the clerk of the circuit [district] court the following fees:

For issuing marriage licenses, one dollar:

For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars;

Where such value is between three and five thousand dollars, five dollars;

Where such value is between five and seven thousand dollars, eight dollars;

Where the value exceeds eight thousand dollars, ten dollars;

And in addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents;

All of which fees shall be paid into the county treasury. [R., § 436; 9 G. A., ch. 71, § 4; ch. 137; 12 G. A., ch. 86, § 15.]

See notes to §§ 5033 and 5036.

SHERIFF.

[Secs. 3788 and 3789 were repealed by 18 G. A., ch. 115.]

5040. 19 G. A., ch. 94, § 1. Chapter one hundred and fifteen, laws of the eighteenth general assembly, relating to compensation of sheriffs, is hereby repealed and the following enacted in lieu thereof:

5041. Attending supreme court. 19 G. A., ch. 94, § 2. The sheriff is entitled to receive the following fees:—For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day.

5042. Serving notice. 19 G. A., ch. 94, § 3. For serving a notice and making a return thereof, for the first person served, fifty cents, and for each additional person twenty-five cents.

5043. Serving warrant. 19 G. A., ch. 94, § 4. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant as sworn to by the sheriff. If service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable.

5044. Serving subpœna. 19 G. A., ch. 94, § 5. For serving and returning a subpœna, for each person, twenty cents.

5045. Summoning jury. 19 G. A., ch. 94, § 6. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service.

5046. Summoning jury to assess damages. 19 G. A., ch. 94, § 7. For summoning a jury to assess the damages to the owners of lands taken for

public improvements, and attending to them, five dollars per day. There shall be nothing in this section so construed that will allow any sheriff to make separate charges for different assessments, provided they can be done by the same set of appraisers and completed in one day of ten hours.

5047. Serving execution, attachment, order or injunction. 19 G. A., ch. 94, § 8. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars.

5048. Collecting money. 19 G. A., ch. 94, § 9. For collecting and paying over money: On the first five hundred dollars or fraction thereof, two per cent.; and on excess over five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.

5049. Executing deed or bill of sale. 19 G. A., ch. 94, § 10. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property, one dollar.

5050. Inventory of property levied on. 19 G. A., ch. 94, § 11. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour.

5051. Making copies. 19 G. A., ch. 94, § 12. For copy of paper required by law, made by him, for each one hundred words, ten cents.

5052. Mileage. 19 G. A., ch. 94, § 13. Mileage in all cases required by law, going and returning, per mile, five cents.

5053. Taking bond. 19 G. A., ch. 94, § 14. For taking each bond required by law, twenty-five cents.

5054. Commitment or discharge. 19 G. A., ch. 94, § 15. Each commitment to jail, twenty-five cents; discharge from same, twenty-five cents.

5055. Receiving prisoner. 19 G. A., ch. 94, § 16. For receiving a prisoner on surrender by bail, fifty cents.

5056. Boarding prisoner. 19 G. A., ch. 94, § 17. For boarding a prisoner, a compensation to be fixed by the board of supervisors, not less than fifty cents per day.

5057. Waiting on prisoners. 19 G. A., ch. 94, § 18. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors.

5058. Attending with prisoner. 19 G. A., ch. 94, § 19. For attending before any judge with a prisoner, one dollar per day.

5059. Attending sale. 19 G. A., ch. 94, § 20. For attending sale of property, for each day, one dollar.

5060. Conveying convict, prisoner or insane person. 19 G. A., ch. 94, § 21. The sheriff, for conveying one or more convicts to either of the penitentiaries of this state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to the reform school in the state, shall be allowed, as full compensation therefor, his necessary traveling expenses, actually paid by him, including board and railroad fare for himself and such convicts, insane, or other prisoners, or any other necessary expenses, and in addition thereto forty cents per hour for the time necessarily employed in going to and returning from said prisons, asylums, or reform schools, to be certified by the oath or affidavit of such sheriff, accompanied by the proper vouchers to the board of supervisors of the county where the convictions took place. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors.

5061. Dwelling for jailer. 19 G. A., ch. 94, § 22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors.

5062. Annual salary. 19 G. A., ch. 94, § 23. The sheriff is also entitled, for attending district [and circuit] courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars; and the sheriff shall make a full report to the board of supervisors at their January meeting of each year, showing the full amount of fees received by him for the previous year in pursuance of this act.

5063. 19 G. A., ch. 94, § 24. All acts and parts of acts in conflict with this act are hereby repealed.

In general: The compensation of the sheriff is fees, and he cannot claim a *quantum meruit* for his services: *Wapello County v. Monroe County*, 39–349.

These fees, together with the salary provided by statute, are in full of all services, and the sheriff cannot make extra charge for guarding and waiting on prisoners: *Grubb v. Louisa County*, 40–314.

The provisions as to various items of charge considered: *Bringolf v. Polk County*, 41–554.

Jury to assess damages: The sheriff is allowed but one fee for summoning a jury to assess the damages to owners of land taken for works of internal improvement. He may not claim a separate fee for each tract when only one jury is summoned: *Robb v. Albia, K. & D. M. R. Co.*, 44–440.

Warrant of arrest: Where two or more defendants are jointly indicted, they may be arrested on a joint warrant or several warrants, and the sheriff's fee will be for serving one warrant or several, as the case may be: *State v. Hunter*, 33–361.

Serving warrant: The provision as to serving warrant applies to a warrant for seizing intoxicating liquors, and repeals the provisions of § 5083 so far as they relate to compensation of sheriffs: *Painter v. Polk County*, 70–596.

Attending with prisoner: The sheriff is not entitled to compensation for attending the court with the prisoner, but only for such attendance before the judge not at a regular term of court: *Ibid.*

Notices: Where a person not an officer serves notices, etc., his charges cannot be taxed as costs: *Conway v. McGregor & M. R. R. Co.*, 43–32.

Sheriff's sale: As to sheriff's fee in case of purchase of property by plaintiff in execution, see *Gilman v. Des Moines Valley R. Co.*, 42–495.

The sheriff is entitled to a percentage upon the amount of a sheriff's sale of real estate, where the judgment plaintiff is purchaser and the amount of the bid is not paid to the sheriff but credited on the judgment: *Litchfield v. Ashford*, 70–393.

Keeping jail: The sheriff has charge of the county jail and is required to perform the duties of jailer. He may appoint a deputy to act in such capacity; but such jailer cannot recover compensation from the county: *McDonald v. Woodbury County*, 48–404.

Keeping attached property: The sheriff is individually responsible to a person employed by him to take care of attached property, and any claim for necessary expenses of keeping such property is to be presented by the sheriff and not by the person employed by him for that purpose: *Rowley v. Painter*, 69–432.

Mileage: A sheriff is entitled to mileage for actual travel and no more. When only one trip is necessary to bring several prisoners from the penitentiary and return them, he should only charge mileage for one prisoner: *Barnes v. Marion County*, 54–482.

For service of subpœnas on the same witnesses in several state cases, made in one trip, the sheriff is entitled to mileage for but one trip: *Redfield v. Shelby County*, 64–11.

The route of travel referred to in the previous statute as fixing the amount of mileage to be allowed for conveying prisoners, etc., *held* to be the route usually traveled by persons pursuing a journey between the given points; and *held*, that where the usual and speediest route was by rail, the sheriff might convey the prisoner in that way and charge mileage for the distance traveled, although there was a shorter route by highway: *Maynard v. Cedar County*, 51–430.

A sheriff is not entitled to mileage for conveying a prisoner from the county jail to the court room, where it does not appear but that the two places are in the same building: *Bringolf v. Polk County*, 41–554.

Where a sheriff was entitled by statute to fees and mileage for attending the prisoner before the court or judge when required, *held*, that for attendance before the court with five prisoners at the same time and for the same purpose he was entitled to but one fee and mileage for one prisoner: *Ibid.*

The same fees should be allowed for conveying a prisoner to the reform school as for conveying a convict to the penitentiary: *Ibid.*

Under Code, § 3788, as it originally stood, allowing the sheriff, in full compensation for conveying each convict to the penitentiary, sixteen cents for each mile traveled, to be computed from the county seat by the most direct route of travel, *held*, that the sheriff was entitled to that rate of mileage for each mile traveled on the journey going and returning: *Harding v. Montgomery County*, 55–41.

But such compensation was in full of all services, and the sheriff could not charge car fare and hotel bills in addition to the mileage thus allowed: *Ibid.*

The allowance made by that section for conveying an insane person to an asylum was held

applicable only where the person conveyed had been adjudged insane under statutory provisions: *Ibid.*

Copy fees: Under statutes providing for service of subpœnas by delivering a copy, and that the sheriff shall have fees for copies of papers required by law when made by him, *held*, that he is entitled to the copy fee in addition to the fee for service, where the copy was made by him: *Bringolf v. Polk County*, 41-554.

In computing compensation for copies of subpœnas the sheriff should be allowed ten cents for each one hundred words or any number less than one hundred; twenty cents for any number greater than one hundred and less than two hundred, and so on: *Painter v. Polk County*, 70-596.

Serving execution, fee for, under previous statute, see *Bell v. Weddington*, 54-561.

Salary: The board of supervisors may properly fix the amount of the sheriff's annual salary at the beginning of his term, and the rendering of the service on the faith of such action will constitute a contract binding upon the county: *Holmes v. Lucas County*, 53-211.

Bailiffs: Where a bailiff is appointed and performs services for which fees are allowed by law, such bailiff becomes entitled to the fees, which must be taken into account in fixing the compensation to be allowed him by the board of supervisors: *Bringolf v. Polk County*, 41-554.

Mistake as to fees: Where a sheriff had presented his claim for certain services which had been allowed by the party and paid, *held*, that he could not afterward recover additional compensation for the same services, although in his original claim he had not asked all that the law allowed him for such services: *Harding v. Montgomery County*, 55-41.

Where the board of supervisors had, by reason of erroneous certificates of the clerk, paid fees and costs to the sheriff in some cases twice or thrice over, *held*, that the county might recover back the money as paid by mistake: *Holmes v. Lucas County*, 53-211.

Contract as to fees: An agreement by a sheriff to accept a fixed sum in lieu of legal fees for services to be performed will be null and void as against public policy and against the provisions of statute, whether the sum to be paid be greater or less than the legal fees: *Gilman v. Des Moines Valley R. Co.*, 40-200.

5064. In criminal causes. 3790. In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor, and paid out of the county treasury. [R., § 4146; C., '51, § 2537.]

This section applies only to sheriffs' fees, and does not render the county liable for costs of printing abstract and argument on appeal by defendant to the supreme court, although on such appeal the judgment against defendant be reversed: *Red v. Polk County*, 56-98; *State v. Rainsbarger*, 74-540.

This section does not render the county liable for costs in a bastardy proceeding, such proceeding being civil, and not criminal: *McAndrew v. Madison County*, 67-54.

Under the provision of Rev. Stats. of '43, *held*, that counties were liable for costs in a criminal case in which a *nolle prosequi* was entered, or in which an indictment was quashed, or judgment entered for defendant on demurrer: *Bonney v. Van Buren County*, 2 G. Gr., 230.

COUNTY SUPERVISORS.

5065. Members of board of supervisors. 3791; 19 G. A., ch. 159; 21 G. A., ch. 15. The members of the board of supervisors shall each receive four dollars for each day actually in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session but employed on committee service, and six cents per mile for every mile traveled in going to and from the regular and adjourned sessions of the board and in going to and from the place of performing committee service: *Provided*, that in counties having a population, as shown by the last preceding census, of ten thousand or less, they shall not receive compensation for session service for more than twenty days in one year; and in counties having a population of more than ten thousand, but less than twenty-three thousand, for more than thirty-five days of such service in one year; and in counties having a population of twenty-three thousand or over, for more than forty days of such service in one year, and in counties having a population of forty thousand or over, not more than fifty days in one year. [12 G. A., ch. 10; 13 G. A., ch. 14, § 4.]

RECORDER — TREASURER.

5066. Recorder. 3792. The recorder shall be entitled to charge and receive the following fees:

For recording each instrument containing four hundred words, fifty cents; For every additional hundred words, or fraction thereof, ten cents. [R., § 4143; C., '51, § 2534.]

5067. Treasurer. 3793; 17 G. A., ch. 122, § 3; 18 G. A., ch. 184, § 2. Each county treasurer shall receive for his services the following compensation: Three-fourths of one per cent. of all money collected by him as taxes due any incorporated city or town, to be paid out of the same;

2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;

3. For each certificate of purchase issued for land sold for non-payment of taxes, twenty cents;

4. For paying money into the state treasury when required by law, or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent. on the amount so paid, which allowance shall be paid by the county.

5. When the aggregate amount of compensation allowed by this and the next section exceeds twelve hundred dollars in any one year in counties where taxes are collected by township collectors, or fifteen hundred dollars in counties having no township collectors, the excess shall be paid into the county treasury, but when, in the judgment of the board of supervisors, it is necessary for the proper discharge of the duties of the office, said board may, upon application of the treasurer, authorize said treasurer to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed; *provided*, that in counties where population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars in any case, and the board shall not allow to exceed three hundred dollars clerk hire in such counties; *and provided*, that in counties having more than thirty thousand population, the board of supervisors may grant such additional compensation for treasurer, deputy or clerk hire as they may deem just and proper. [R., § 777; 10 G. A., ch. 129, § 6; 11 G. A., ch. 75; 13 G. A., ch. 166.]

An attempt of the board of supervisors to make an allowance to the treasurer greater than authorized by statute cannot be construed into an allowance to the extent to which an allowance is authorized: *Griffin v. Clay County*, 63-413.

While in making up the amount of the treasurer's compensation the three per cent. of taxes collected is to be computed on all tax funds, including railroad aid taxes, yet this section does not authorize the deduction from such taxes of such per cent. for collection: *Merrill v. Marshall County*, 74-24

5068. Information as to taxes due. 3794. The county treasurer shall, if applied to by letter, inclosing thirty cents value in postage stamps, asking for information of the amount of taxes upon any specified parcel or parcels of land in his county, answer the same correctly by mail, giving direct answers to all the inquiries in such letter respecting the amount and interest of the unpaid taxes as the same appears from the tax books in his office. If the total of such land specified in any one letter exceeds three hundred and twenty acres, then such treasurer is not bound to answer such letter unless it contains, besides the thirty cents above provided, ten cents in addition for every one hundred and sixty acres when the total acres specified in such letter exceed the said three hundred and twenty acres; but the aggregate fees thus charged shall in no case exceed the sum of fifty cents; and upon the return to such treasurer of the letter or a copy thereof so sent by him, with the amount due as shown by such letter, such treasurer shall pay such taxes and return a receipt therefor by mail. [9 G. A., ch. 168, § 1.]

5069. Penalty for failure. 3795. Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater com-

pensation for the service mentioned in the preceding section than is therein provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action in any court having jurisdiction. [Same, § 2.]

5070. Accounting for money. 3796. The county treasurer shall enter in a book kept for that purpose, all moneys received by him for services rendered, designating for what the same was received, and shall render an account verified by affidavit to the board of supervisors at each session thereof, stating fully all money so received and from what source derived, and any excess to which he would be entitled under the preceding section over and above the sum therein limited shall be paid into the county treasury. [10 G. A., ch. 129, § 9.]

AUDITOR.

5071. Fees. 3797. The county auditor shall be entitled to charge and receive the following fees:

For recording each bond required to be by him recorded, fifty cents;

For transfers made in the transfer books, for each deed, twenty-five cents;

For issuing certificate of redemption of land sold for taxes, twenty-five cents;

For each certificate issued by the treasurer for lands sold for non-payment of taxes, fifteen cents. [R., § 777; 9 G. A., ch. 25, § 3.]

5072. Limit of compensation; deputy. 3798; 18 G. A., ch. 184, § 3. The total compensation of the auditor, in any one year, shall not exceed the sum of twelve hundred dollars, inclusive of fees, but when, in the judgment of the board of supervisors, it is necessary for the proper discharge of the duties of the office, said board may, upon application of the auditor, authorize said auditor to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum; *provided*, that in counties of more than twenty-five thousand population, the board of supervisors may grant such additional compensation to the auditor, deputy, or clerks, as they deem it just and proper. [12 G. A., ch. 160, § 6; 9 G. A., ch. 5, §§ 4, 5.]

Where a county auditor during one term received, by reason of the action of the board, a certain amount, with the stipulation that the fees of the office should be applied thereon; and upon re-election applied for increase of salary and was allowed a smaller sum, nothing being said as to fees, *held*, that under the latter allowance he was entitled to the fees in addition to the salary allowed: *Madison County v. Holliday*, 43-251.

The county is under no legal obligation to reimburse the auditor an amount paid out by him for services of a deputy: *Benton v. Decatur Co.*, 36-504.

5073. Population determined by census. 18 G. A., ch. 184, § 4. It shall be the duty of the board of supervisors, in fixing the compensation of the officers as provided in this act, to take the latest state or national official census as their guide in so doing.

5074. Account of fees; report. 18 G. A., ch. 184, § 5. It is hereby made the duty of the county auditor, the county treasurer, and the clerk of the district [and circuit] courts, in each county of the state, to keep a complete and accurate account of all the fees charged and collected by them as now provided by law; which account shall be made and kept as a permanent record of the office; and it is hereby made the further duty of each of the officers therein specified, to make a report of such fees to the board of supervisors at each regular session of said board, verified by oath or affirmation, a summary of which shall be spread upon the minutes of said board and made a part of the record. If any officers shall neglect or refuse to make such report, as required by this section, it shall be the duty of the board to employ an expert to examine the books, papers and accounts of such officer and to make such report, the expense therefor being charged to the delinquent officer and collectible upon his official bond.

CORONER — SURVEYOR.

5075. Coroner. 3799. The coroner is entitled to charge and receive the following fees:

For a view of each body and taking and returning an inquest on same, five dollars;

For a view of each body and examination without inquest, three dollars;

For issuing subpœna, warrant, or order for a jury, twenty-five cents;

For each mile traveled to and returning from an examination or inquest, ten cents;

Which fees shall be paid out of the county treasury when they cannot be obtained from the estate of the deceased;

For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner. [R., § 4148; C., '51, § 2539.]

5076. Surveyor. 3800; 16 G. A., ch. 25. The county surveyor is entitled to charge and receive the following fees:

For each day's service actually performed in traveling to and from the place where any survey is to be made, and for making the same and return thereof, four dollars;

For certified copy of the plat or field-notes, fifty cents. [R., § 4155; C., '51, § 2546; 11 G. A., ch. 109.]

NOTARIES PUBLIC.

5077. Fees. 3801. Notaries public shall be entitled to charge and receive the following fees:

For every protest of a bill or note, seventy-five cents;

For registering any protest, fifty cents;

For being present at a demand, tender, or deposit, and noting the same, fifty cents;

For administering an oath, five cents;

For certifying to the same under his official seal, twenty-five cents;

For certificate under seal, twenty-five cents;

For other services, the same fees as are allowed justices of the peace for similar services. [R., § 4151; C., '51, § 2542.]

SEALERS AND INSPECTORS.

5078. Sealer of weights and measures. 3802. Each sealer of weights and measures shall receive the following fees:

For sealing and marking every beam, ten cents;

For sealing and marking measures of extension at the rate of ten cents per yard, not to exceed fifty cents for any one measure;

For sealing and marking every weight, five cents;

For sealing and marking liquid and dry measures, five cents for each measure.

He shall also be entitled to a reasonable compensation for making weights and measures conform to the standards in his possession. [9 G. A., ch. 82, § 23.]

5079. Inspector of lumber and shingles. 3803. The inspector of lumber and shingles shall receive:

For inspecting and measuring lumber, for each thousand feet, board measure, fifteen cents;

For inspecting shingles, for each thousand, fifteen cents. [R., § 1913.]

JUSTICES OF THE PEACE.

5080. Fees. 3804. Justices of the peace shall be entitled to charge and receive the following fees:

For docketing each case in any action, except in garnishment proceedings, fifty cents;

For issuing each original notice, fifty cents;

For issuing attachment or order for the delivery of property, twenty-five cents;

For drawing and approving bond when required in any case, fifty cents;

For entering judgment by confession after the suit brought, fifty cents;

For entering judgment by confession not on suit brought, one dollar;

For entering judgment by default, or on a plea of guilty, fifty cents;

For entering judgment when contested, fifty cents;

For additional when a jury is called, one dollar;

For issuing venire for jury, twenty-five cents;

For each subpœna in civil cause, when demanded, twenty-five cents;

For each oath or affirmation, except in proceedings connected with suits before him, five cents;

For each continuance at the request of either party, fifty cents;

For setting aside each judgment by default, fifty cents;

For each information and affidavit, fifty cents;

For each execution, renewal of execution, or warrant of any kind, fifty cents;

For each bond or recognition, fifty cents;

For each mittimus or order of discharge, fifty cents;

For each official certificate or acknowledgment, twenty-five cents;

For making and certifying transcript, fifty cents;

For trial of all causes, civil or criminal, for each six hours or fraction thereof, one dollar;

For all money collected and paid over without suit, five per cent.; and for all money collected and paid over after suit brought without judgment, two per cent., which shall be added to the costs. [14 G. A., ch. 134.]

In default cases, where plaintiff is required to prove up his claim before getting judgment, the justice is entitled to both a trial fee and a fee for entering judgment: *Shaw v. Kendig*, 57–390.

The justice is not entitled to the fee "for drawing and approving a bond when required in any case," when the bond is prepared by an attorney and handed to the justice merely to be approved and filed: *McKay v. Maloy*, 53–33.

The justice cannot collect from the debtor the fees provided for collection of money without suit. Such compensation is not costs, but fees to be recovered from the party demanding the service: *Pennington v. Beedy*, 50–85.

A contract whereby a justice agrees to accept a less or a greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of the statutory mode for the collection of his fees, is contrary to public policy and void: *Hawkeye Ins. Co. v. Brainard*, 72–130.

CONSTABLES.

5081. Fees. 3805. Constables shall be entitled to charge and receive the following fees:

For serving any notice or civil process on each person named therein, fifty cents;

For copy thereof when required, ten cents;

For serving attachment or order for the delivery of property, fifty cents;

For traveling fees, going and returning, per mile, five cents;

For summoning a jury, including mileage, one dollar;

For attending the same on trial, for each calendar day, one dollar;

For serving execution, besides mileage, fifty cents;

For advertising and selling property, seventy-five cents;

For advertising without selling, twenty-five cents;
For return of execution when no levy is made, ten cents;
For serving each subpœna, besides mileage, fifteen cents;
For posting up each notice required by law, fifteen cents;
For serving each warrant of any kind, seventy-five cents;
For attending each trial in a criminal case, for each calendar day, one dollar;
For serving each mittimus or order of release, besides mileage, thirty cents;
For all money collected on execution and paid over except costs, five per cent., which shall constitute part of the costs. [14 G. A., ch. 134.]

Fees of a constable for serving an original notice of suit in a court of record may be taxed up as costs: *Du Boise v. Babcock*, 42-233.

5082. In criminal cases. 3806. The fees contemplated in the two preceding sections, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit. [14 G. A., ch. 134.]

There is no provision for the compensation of the mayor of a city exercising the powers of a justice: See § 692 and notes.

In the absence of any statute, the successor of the justice who is entitled to fees in state cases is not authorized to collect such fees for him. They constitute a personal claim in his favor against the county: *Labour v. Polk County*, 70-568.

5083. Officers seizing intoxicating liquors. 3807. A constable or other officer who serves any warrant for the seizure of intoxicating liquors shall be allowed:
For such service, one dollar;
For the removal and custody of such liquor, his reasonable expenses;
For the destruction of such liquor under the order of the court, his reasonable expenses and one dollar;
For posting and leaving notices in such cases, one dollar. [R., § 1570.]

As to fees of sheriff in such cases, see notes following § 5063.

TOWNSHIP TRUSTEES.

5084. Fees. 3808; 16 G. A., ch. 35. The township trustees shall receive:
For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, to each trustee, two dollars;
For each day engaged in assessing damages done by trespassing animals, one dollar per day each, to be paid as are other costs in such cases;
But when acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury.
When acting as fence viewers, or in locating any ditch or drain, or in any other case where provision is not made for their payment out of the county treasury, their fees shall be two dollars per day each, and in the first instance be paid by the party requiring their services, and they shall append to the report of their proceedings a statement thereof and therein shall direct who shall pay said fees and in what sums respectively, and the party having so advanced any such fees may have his action therefor against the party so awarded to pay the same, unless, within ten days after demand by the party entitled, the same shall be reimbursed to him. [R., § 4156; C., '51, § 2548.]

TOWNSHIP CLERK — ASSESSOR.

5085. Township clerk. 3809; 16 G. A., ch. 61. The township clerk shall receive:
For each day of eight hours necessarily engaged in official business, where

no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars;

For all money coming into his hands by virtue of his office, aside from money received from his predecessor in office, five per cent.;

For filing each application for a drain or ditch, fifty cents;

For recording each person's mark or brand for animals, twenty-five cents;

For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation in such cases as the board of supervisors may deem reasonable and allow. [R., §§ 909, 911; 9 G. A., ch. 90.]

5086. Assessors. 3810. Each township assessor shall receive for each day of eight hours necessarily engaged in the discharge of his official duties, to be paid out of the county treasury, two dollars. [R., § 730; 9 G. A., ch. 173, § 3.]

CHAPTER 3.

OF WITNESSES, JURORS, AND SPECIAL CASES.

5087. Jurors. 3811. Jurors shall receive the following fees:

For each day's service or attendance in courts of record, two dollars, and for each mile traveled from his residence to the place of trial, the sum of ten cents;

For each day's service before a justice of the peace, one dollar.

No mileage shall be allowed jurors before justices, nor talesmen.

Jurors' fees in justice's courts shall be taxed as part of the costs.

Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days' attendance and mileage to which each one is entitled. [R., § 4154; C., '51, § 2545; 9 G. A., ch. 15, §§ 2, 3; 10 G. A., ch. 92.]

Where a case before a justice of the peace is commenced in one week and extends into the next, Sunday should not be computed in the number of days of service: *Anson v. Dwight*, 18-241.

The clerk is not entitled to any fees for drawing such certificates: *Palo Alto County v. Burlingame*, 71-201.

5088. Fees taxed as costs. 3812; 15 G. A., ch. 32; 16 G. A., ch. 39. For every case tried in a court of record by jury, there shall be taxed as a part of the costs as a jury fee the sum of six dollars, which shall be collected as other costs and paid into the county treasury by the clerk, who shall report the same to the board of supervisors at each regular session thereof, who shall cause the same to be charged to the treasurer. [9 G. A., ch. 15, § 4.]

The provision requiring a party to pay a jury fee, or increasing the jury fee, is not in conflict with Const., art. 1, § 9: *Adae v. Zangs*, 11-536, 542; *Little v. McGuire*, 43-447; *Steele v. Central R. of Iowa*, 43-109; *State v. Verwayne*, 44-621.

Although a trial occupy but part of a day, if there is no other jury trial on the same day a full day's jury fee should be charged up. What should be the rule when there is more than one jury trial on the same day, *quære*: *State v. Verwayne*, 44-621.

This provision for charging litigants with part of the expense of jury trials is not intended to limit the amount to be paid by a county from which change of venue in a criminal case is taken for the fees of jurors in the trial of such case; and recovery may be had for the entire jury fee, and not simply for the portion authorized to be taxed as costs in the case: *Jones County v. Linn County*, 68-63.

The clerk is not entitled to the fees provided for in this section: *Palo Alto County v. Burlingame*, 71-201.

5089. Commissioners to appraise property. 3813. Every appraiser or commissioner appointed or selected to appraise the damages caused by taking private property for public use, shall receive the same compensation as jurors in courts of record, but when called to appraise property taken on

judicial process, they shall receive twenty-five cents per hour. [R., § 4158; C., '51, § 2550.]

5090. Witnesses. 3814; 16 G. A., ch. 62. Witnesses in any court of record, except in the police courts, shall receive for each day's attendance, one dollar and twenty-five cents; in the police courts, witnesses shall receive for each day's attendance, the same fees and mileage as are allowed before justices of the peace;

Before a justice of the peace, fifty cents for each day;

Mileage for actual travel per mile each way, five cents.

An attorney, juror, or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance.

Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; *provided*, that such additional compensation so fixed shall not exceed four dollars per day while so employed.

For attending before the grand or trial jury, or court, in criminal cases, where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of the services to which they are entitled. [R., § 4153; C., '51, § 2544.]

A witness summoned to attend in several state cases is entitled to compensation for his actual attendance in all the cases, but cannot recover fees for each separate case, where he is required to attend in more than one at the same time: *Hardin v. Polk County*, 39–661.

A rule of court providing that witnesses subpœnaed in cases between different parties should draw but one *per diem* was upheld in a particular case: *Meffert v. Dubuque, B. & M. R. Co.*, 34–430.

A witness for the prosecution who comes from another state at the request of the prosecution, and testifies in a case in which defendant is adjudged not guilty, should be compensated by the county for his mileage outside of as well as within the state, but such mileage cannot be taxed as costs: *Westfall v. Madison County*, 62–427.

A witness is not entitled to fees for the time during which he is confined in jail on commitment by a magistrate for failure to give security to appear as a witness for the state in a criminal prosecution: *Markwell v. Warren County*, 53–422.

Where a justice of the peace dismisses a criminal prosecution for failure of the prosecuting witness to appear, the costs, including witness fees, may properly be taxed to the county: *Cassidy v. Palo Alto County*, 58–125; unless the justice has ground for taxing them against the prosecuting witness as provided in § 6089: *Palo Alto County v. Moncrief*, 58–131.

Where the county fails to pay costs properly taxed against it, action may be brought against it therefor: *Cassidy v. Palo Alto County*, 58–125.

Under the Code of '51 there was no provision giving a witness summoned for defendant in a criminal prosecution the right of claiming witness fees from the county treasurer, and in such case it was held that he must look to the party summoning him for his fees: *Donnelly v. Johnson County*, 7–419.

As to fees for defendant's witnesses in criminal prosecutions, see, also, § 5095.

A witness is entitled to fees from the county for attendance in a criminal case on a preliminary examination before a justice: *Johnson County v. Porter*, 4 G. Gr., 79.

A justice of the peace has no power to issue a subpœna for a witness upon a preliminary examination until an information has been filed by him or the defendant has been arrested without warrant and brought before him, and the witness attending in response to such subpœna cannot recover fees from the county. The witness is bound to know at his peril whether the justice of the peace has power to issue the subpœna or not: *Warnstaff v. Louisa County*, 76–585.

To entitle a party to fees as an expert it must be shown that he was called as such, and to testify to an opinion founded on his special study and experience: *Snyder v. Iowa City*, 40–646.

5091. Unclaimed witness fees. 3815; 19 G. A., ch. 151, § 1. Each justice of the peace shall, on the first Monday of January and July, each year, pay into the county treasury, for the use of the county, all fees of whatsoever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts

therefor, giving the title of the cause, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.

5092. Statement of unclaimed fees. 19 G. A., ch. 151, § 2. Each county treasurer shall make a certified statement of all unclaimed fees in his hands at the time of the taking effect of this act, showing the title of the cause, style of the court, name of the individual, and the amount to which each one is entitled, and file the same with the county auditor, who shall charge the treasurer in the county fund with the aggregate amount so certified, and place the same on the proper record as a claim allowed, and issue county orders therefor upon demand by the parties entitled thereto.

5093. Penalty for failure. 3816. Any failure to pay over to the county treasurer witness fees as contemplated by this title, is a misdemeanor, and shall be prosecuted as provided by law. [R., § 352.]

5094. Witness fees paid by party or county. 3817. When the county or any party has paid the fees of any witness, and the same is afterward collected from the adverse party, the person or county so paying the same shall, upon the production of the receipt of such witness or other satisfactory evidence, be entitled to such fee, whether it be in the hands of the justice or clerk, or has been paid into the county treasury. [9 G. A., ch. 165.]

5095. Fees in criminal cases. 3818; 18 G. A., ch. 207. In no criminal case shall witnesses for the defense be subpœnaed at the expense of the county, except upon order of the court or judge before whom the case is pending, then only upon a satisfactory showing that the witnesses are material and necessary for the defense; and the board of supervisors shall in no case audit or allow any claims for witness fees for the defendant in criminal cases except upon order or judgment of court or judge thereof, and such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require. [12 G. A., ch. 141.]

The county is not liable for the fees of defendant's witnesses in a criminal case before a justice of the peace unless they have been subpœnaed upon order of the justice as thus provided: *Kennedy v. Delaware County*, 59-123.

This provision in regard to requiring the court to make an order for subpœnaing witnesses for defendant does not affect the right of a witness not subpœnaed to his fees, if he attends as a witness in the trial of the case, and his evidence is material for the defense: *Jones County v. Linn County*, 68-63.

It is not necessary under this provision, in order to authorize a district judge to order the payment of witness fees to witnesses who have attended and testified for defendant without being subpœnaed, that such an order should be made upon a showing or application by the accused: *Ibid.*

An order of the judge can be made when judgment is finally entered or when such order is made or action had as disposes of the case: *Ibid.*

Held not error to refuse an order for all the witnesses asked for defendant upon the showing made in a particular case: *State v. Benge*, 61-658.

5096. Other fees. 3819. Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents;

For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents;

For making out a transcript of any public papers or records under his control, for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents. [R., § 4132; C., '51, § 2523.]

5097. Conveying prisoner to jail. 3820. Every officer or person who shall arrest any person with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed to charge as fees, which shall be collectible the same as other fees in criminal cases, besides the fees allowed by law, whatever sums such officer or person shall actually and necessarily pay for carriage hire in so conveying such person to jail. [13 G. A., ch. 175; 14 G. A., ch. 97.]

5098. Taking up estrays. 3821. Any person taking up any estray horse, mule, jack or jenny, fifty cents;

For every head of neat cattle, twenty-five cents;

For all other kinds of animals, fifteen cents.

For appointing the appraisers, making the necessary entry, certificate, and return, the justice shall receive fifty cents. [9 G. A., ch. 102, §§ 22, 23.]

5099. Trespassing animals. 3822. In all cases where services shall be performed by any officer or other person in respect to estrays or trespassing animals, the following fees or compensation shall be allowed: To the justice of the peace for administering the oath to the taker-up or finder, making an entry thereof, with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the district court, fifty cents; to the clerk for taking proof of the ownership of the property and granting certificate of the same, twenty-five cents; for registering each certificate transmitted to him by the justice as aforesaid, ten cents; for advertisements, including the newspaper publication, fifty cents; to the sheriff on account of sales made by him in pursuance of chapter three, of title eleven, four per cent. on the amount; to the constable, for each warrant served on appraisers, twenty-five cents; to each appraiser, twenty-five cents; all which said costs and charges, with the exception of the justice's for granting a certificate of ownership, and the sheriff's commission, shall be paid by the taker-up to the person entitled thereto, whenever the service shall be performed; the printer of the county paper for publishing the notice shall receive the price of his published or ordinary advertising rates; in all cases where it shall be necessary to make publication in a newspaper, the taker-up or finder, as the case may be, shall be required to deposit with the clerk of the district court, a sum of money sufficient to pay the same, previous to the publication thereof; all which costs and charges shall be reimbursed to the taker-up or finder in all cases where restitution of the property shall be made to the owner, or the same shall be delivered to the sheriff to be sold, or where money or bank-notes shall be paid into the county treasury, in addition to the reward to which such person may be entitled for such taking up or finding as aforesaid. [R., § 1520; 14 G. A., ch. 20, § 4.]

5100. Publishing estray notices. 3823. The public printer shall receive for each estray notice published, a sum agreed upon by the secretary of state, not, however, exceeding thirty cents for each insertion; and when the appraised value of the estray exceeds fifteen dollars, the finder shall pay the justice a sum sufficient to pay the clerk's fee, postage, and the cost of publishing such notice. If more than one animal is taken up at the same time, they shall be included in one entry and advertisement, and no additional fees shall be required or allowed in such case, and said clerk shall subscribe for one copy of such paper, to be paid for out of the county treasury, which paper shall be filed and preserved in the office of said clerk. [9 G. A., ch. 102, §§ 9, 10, 14.]

5101. Laying out public highways. 3824. The following fees shall be paid persons engaged in laying out and changing highways:

Commissioners for each day, two dollars;

Surveyor for each day, four dollars;

Chain carriers, markers, and other assistants, for each day, one dollar and fifty cents.

If the highway extends into more than one county, such expenses when so adjudged shall be paid by the several counties in proportion to the length of time occupied on the highway in each county. [R., §§ 872, 877.]

5102. Commissioners of insanity. 3825. The commissioners of insanity shall be allowed at the rate of three dollars per day each, for all the time actually employed in the duties of their office. They shall also be allowed their necessary and actual expenses, not including charges for board. The clerk, in addition to what he is entitled to as commissioner, shall be allowed one-half as much more for making the required record entries in all cases of inquest and of meetings of the board for any purpose, and for the filing of any papers required to be filed. He shall also be allowed twenty-five cents for each notice or process given or issued under seal as herein required. The examining physician shall be entitled to the same compensation as a commissioner, and to mileage at the rate of five cents per mile each way. The sheriff shall be allowed for his personal services in conveying a patient to the hospital and returning therefrom, at the rate of three dollars per day for the time necessary and actually employed, and mileage the same as is allowed him in other cases, and for other services the same fees as for like services in other cases. Witnesses shall be entitled to the same fees as witnesses in the circuit [district] court. The compensation and expenses provided for above, shall be allowed and paid out of the county treasury in the usual manner. Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expenses thereof are needed in advance, they shall estimate the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff, and on such estimate, certified by the clerk, the auditor of the county shall issue an order on the county treasurer for the amount as estimated in favor of the sheriff or other person intrusted with the execution of such warrant; the sheriff or other person executing such warrant, shall accompany his return with a statement of the expenses incurred, and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commissioners order the return of a patient, compensation and expenses shall be in like manner allowed. [12 G. A., ch. 179, §§ 14, 15; 13 G. A., ch. 109, § 48.]

As to clerk's fees under this section, see note to § 5036.

5103. Visiting committee. 3826. The visiting committee shall be allowed five dollars per day for the time taken in visiting the hospital for the insane, and mileage at the rate of five cents per mile each way. The disbursing officer of each hospital for the insane shall pay the per diem and mileage allowed such visiting committee, and each member of such visiting committee shall certify under oath to such disbursing officer, the number of days he has served and the number of miles traveled. [14 G. A., ch. 91, § 9.]

[This section is modified by the provisions of the section following.]

5104. Trustees; visiting committees; regents. 17 G. A., ch. 92, § 1; 22 G. A., ch. 77, § 2. The trustees of state institutions, members of visiting committees to the hospitals for the insane and regents of the state university shall receive as their compensation four dollars per day for each and every day actually employed in the discharge of their duties, and the actual and necessary expenses incurred while so engaged; but in no case shall the amount allowed for expenses exceed five cents per mile by the nearest traveled route necessarily traveled in such business.

5105. Length of time. 17 G. A., ch. 92, § 2. This act shall not be construed to allow trustees to receive compensation for a longer time than is now permitted by law.

5106. 17 G. A., ch. 92, § 3. All acts and parts of acts inconsistent with this act are hereby repealed.

5107. Messengers for election returns. 3827. Messengers sent for the returns of elections, shall be paid ten cents a mile going and returning, to be audited and paid from the state or county treasury, as the case may be. [R., § 529; C., '51, § 296.]

5108. Solemnizing marriages. 3828. Any person authorized to solemnize marriage, is entitled to charge two dollars for officiating in each case, and making return thereof. [R., § 4159; C., '51, § 2551.]

5109. Defending criminals. 3829; 17 G. A., ch. 91. An attorney appointed by a court to defend a person indicted for any offense, is entitled to receive from the county treasury the following fees:

For a case of murder, twenty-five dollars;

For felony, ten dollars;

For misdemeanor, five dollars;

Any attorney selected by a peace officer, for appearing and prosecuting before a justice of the peace a prosecution for selling intoxicating liquors, five dollars. [R., §§ 1578, 4168; C., '51, § 2561.]

An attorney appointed by the court to defend a pauper prisoner may maintain action against the county for compensation for such services although under the statute no provision for such compensation is made. (Overruling *Whicher v. Cedar County*, 1 G. Gr., 217): *Hall v. Washington County*, 2 G. Gr., 473.

The provisions of this section limiting the amount which an attorney shall receive in such cases are not unconstitutional: *Samuels v. Dubuque County*, 13-536.

The county is not liable for fees of attorney appearing before a justice of the peace in a prosecution for illegal sale of intoxicating liquors, unless he was selected for that duty by the peace officer filing the information (under § 2408): *Blair v. Dubuque County*, 27-181; *Foster v. Clinton County*, 51-541.

The peace officers contemplated in that section do not include a special constable appointed under the provisions of § 4880: *Foster v. Clinton County*, 51-541.

A peace officer authorized under § 2408 to select an attorney to prosecute violations of the intoxicating liquor law may select another attorney than the county attorney, and the attorney thus selected will be entitled to the fees herein authorized: *Work v. Wapello County*, 73-357.

Where several violations are charged in the same information or indictment, the attorney is entitled to the fee for only one prosecution. *Schulte v. Keokuk County*, 74-292.

5110. Change of venue, or appeal. 3830. An attorney cannot in such case be compelled to follow a case to another county or into the supreme court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices above allowed. [R., § 4169; C., '51, § 2562.]

No duty is hereby imposed upon an attorney appointed to defend a criminal to present the case to the supreme court, but if, in the exercise of his discretion, he does appear there, the statute provides a compensation shall be paid him by the county. The amount of such compensation is not to be what his services would have been reasonably worth in case he had been employed by the county, but an enlarged compensation, graded on a scale corresponding to the prices fixed for a trial in the district court. Therefore, *held* that an allowance of twenty-five dollars for arguing the case in the supreme court was proper: *Baylies v. Polk County*, 58-557.

5111. One attorney. 3831. Only one attorney in any one case shall receive the compensation above contemplated, nor is he entitled to this compensation until he files his affidavit that he has not, directly or indirectly, received any compensation for such services from any source. [R., § 4170; C., '51, § 2563.]

This section must be complied with. It is not sufficient that the affidavit states the claim is just and true: *Ryce v. Mitchell County*, 65-447.

5112. Publication of legal notices. 3832. In all cases where publication of legal notices of any kind are required or allowed by law, the person or officer desiring such publication shall not be required to pay more than one dollar per square of ten lines of brevier type, or its equivalent, for the first insertion, and fifty cents per square for each subsequent insertion; and any person desiring such publication, who shall have tendered such notice to the editor, proprietor, or person conducting some newspaper, published weekly or oftener in such county, having the largest circulation, and has offered to pay for the publication of the same at the rate herein named, and in case the publication of such notice is refused at the price above fixed, then the officer or person desiring such publication shall procure the insertion of such notice in the newspaper nearest the county seat of such county having a general circulation that will publish such notice at the rate herein provided; which publication shall in all respects have the same effect in law and equity as if such notice had been published in the county where such action was commenced or sale is to take place. And in all cases of publication of notices in connection with commencement of actions in court, or sales upon execution, the plaintiff may designate the newspaper published within the county in which such notice shall be published. [10 G. A., ch. 115, § 1.]

The plaintiff has the right to designate the newspaper in which publication of original notices or notices of execution sales shall be made; § 427 is not applicable to such cases: *Herriman v. Moore*, 49-171.

5113. Printing delinquent tax list. 3833. The compensation for printing the delinquent tax list, shall be at a rate not exceeding twenty cents for each tract of real property advertised for sale; and in case there is no newspaper published in the county where such lands lie then the treasurer shall cause the publication to be made in the nearest newspaper having a circulation in such county, *provided* that no newspaper shall be considered as one of general circulation unless it has two hundred regular weekly subscribers. [Same, § 2.]

5114. Arbitrators and referees. 3834. The compensation of arbitrators shall be, for each day actually and necessarily spent in the discharge of their duty, two dollars, or such other sum as may be agreed upon by the parties in interest. The fees of referees acting under a submission made by or agreed to by the parties in a case pending in a court of record, shall be fixed by the court or judge and taxed as a part of the costs in the case. [R., § 3691; C., '51, § 2114.]

[The words following "judge," at the end of the section, are not in the original. They are retained as in the printed Code, as having probably been inserted by the editor.]

5115. Depositions. 3835. Any officer or person taking depositions is authorized to charge therefor at the rate of ten cents per hundred words, exclusive of the certificate. [R., § 4160; C., '51, § 2552.]

5116. Receipt for fees paid. 3836. Every person charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items and the date of each. [R., 4157; C., '51, § 2549.]

5117. When fees payable. 3837. When no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented if required. [R., § 4164; C., '51, § 2557.]

Where an attorney in a case requires services, his client, and not the attorney, is liable therefor: *Doughty v. Paige*, 48-483.

If a justice of the peace has prepared and certified a transcript on appeal he cannot be required to deposit it with the clerk until his fees therefor are paid: *McKay v. Maloy*, 53-33. To the same effect as to clerk of court of record, see *Dickerson v. Shelby*, 2 G. Gr., 460.

5118. Setting up advertisements. 3838. In all cases where an officer in the discharge of his duty is required to set up an advertisement, he shall, when not otherwise provided, be allowed twenty-five cents, and if an advertisement is required to be published in a newspaper, the money therefor shall be paid by the party and may be taxed in the bill of costs. [R., § 4165; C., '51, § 2558.]

5119. Table of fees. 3839. Every officer entitled to fees, shall keep posted up in his office a fair table thereof on pain of forfeiture of two dollars per day, for the benefit of the county, for each day he fails to keep such tables of fees thus posted up. [R., § 4166; C., '51, § 2559.]

5120. Higher fees. 3840. Any officer who wilfully takes higher or other fees than are allowed by law, is guilty of a misdemeanor, and may be fined therefor a sum not less than ten nor more than fifty dollars. [R., § 4167; C., '51, § 2560.]

Any contract for higher fees than those provided, or for an amount which might prove to be higher, would be void: *Gilman v. Des Moines Valley R. Co.*, 40-200.

5121. Recovery from county where crime committed. 3841. Where costs are paid by a county other than the one where the offense was committed, the amount of such costs shall be deemed a charge in favor of such county, and against the one in which the offense was committed, and may be recovered by action in any court having jurisdiction. [9 G. A., ch. 66, § 2.]

This section simply provides that when costs are paid by the county where the trial is had they shall be charged to the county where the indictment is found. It does not determine for what costs the county shall be liable: *State v. Rainsbarger*, 74-539.

The provisions of § 5088, as to taxing jury fees, do not affect the amount of recovery under this section: *Jones County v. Linn County*, 68-63.

This section applies in case of change of venue, and probably in case of preliminary examination, but is not applicable where one county (under § 5544) takes jurisdiction of a crime committed in an adjoining county but within five hundred yards of the boundary between them: *Floyd County v. Cerro Gordo County*, 47-186.

5122. Fees paid in advance; fee bill. 3842. No officer or other person mentioned in this title, is entitled to any of the fees mentioned herein in advance, where the same grows out of any criminal prosecution. But in all other cases, except where the fees or compensation is payable by the state or county, or when the orders, judgments, or decrees of courts or justices of the peace are to be entered or performed, or their writs executed, the officer performing any of the services named in this chapter, is entitled to his fees in advance if he demand them. After the expiration of sixty days from the rendition of a final judgment not appealed, removed, or reversed, the clerk of the court or a justice of the peace in whose office the judgment is entered, may, and on demand of any party entitled to any part thereof, shall issue a fee bill for all costs of such judgment, which shall have the same force and effect as an execution issued by such officer, and shall be served and executed in the same manner. [Same, § 1.]

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in § 4145. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *McConkey v. Chapman*, 58-281.

5123. Fees payable by state or county. 3843. In all cases where fees or compensation as distinguished from a certain and fixed salary, are, by the provisions of this title to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid, until a particular account has been filed in the auditor's office of the county or state,

verified by affidavit, and showing clearly for what services such fees or compensation are claimed, and when the same was rendered.

A claim for the fees of a justice of the peace, in state cases, must be verified by himself. The successor of the justice entitled to the fees cannot make the certificate and verification required by § 5082: *Labour v. Polk County*, 70–568.

5124. Offices, fuel and stationery. 3844. The board of supervisors shall furnish the clerk of the district [and circuit] court, sheriff, recorder, treasurer, auditor, and county superintendent, with offices at the county seat, together with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices; but in no case shall any of such officers be permitted to occupy an office also occupied by a practicing attorney.

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 1.

OF OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

5125. Treason. 3845. Whoever is guilty of treason, by levying war against the state, or adhering to its enemies, giving them aid and comfort, shall be punished by imprisonment for life at hard labor in the state penitentiary. Treason is not a bailable offense. [R., § 4188; C., '51, § 2565; 14 G. A., ch. 136.]

5126. Misprision of treason. 3846. If any person have knowledge of the commission of the crime of treason against the state and conceal the same, and not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprision of treason, and shall be fined not exceeding one thousand dollars, or be imprisoned in the penitentiary not exceeding three years nor less than one year. [R., § 4189; C., '51, § 2566.]

5127. Evidence. 3847. No person can be convicted of the crime of treason, unless on the evidence of two witnesses to the same overt act, or on confession in open court. [R., § 4190; C., '51, § 2567.]

CHAPTER 2.

OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

5128. Murder. 3848. Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. [R., § 4191; C., '51, § 2568.]

Human being; infant unborn: An infant in the womb is not a human being within the meaning of this section; certainly not before it is quick: *Abrams v. Foshee*, 3-274. An infant does not become possessed of independent life in such sense as to be subject of homicide until independent circulation has been established: *State v. Winthrop*, 43-519.

It is not necessary that an indictment for murder should allege that the deceased was a human being: *State v. Stanley*, 33-526, 531.

Malice aforethought: In murder of either degree there must be malice aforethought, express or implied: *State v. Johnson*, 8-525; *Fouts v. State*, 4 G. Gr., 500.

Malice aforethought is essential to the crime of murder, but it is not necessary that it should have existed for any considerable length of time. It is sufficient if it existed for any length of time before the commission of the act: *State v. Decklotts*, 19-447; *State v. Hockett*, 70-442; *State v. Sopher*, 70-494.

Malice inferred: Malice may, as at common law, be implied in case of homicide from any act unlawful and dangerous in its nature, unjustifiably committed. Therefore *held*, that, independently of § 5163, death caused in an unlawful attempt to procure an abortion was murder in the second degree: *State v. Moore*, 25-128.

Persons conspiring to do an unlawful act which is a trespass only will be guilty of murder only when death results in the prosecution of the design; but if the unlawful act be a felony, or more than a trespass, death resulting will be murder in all, although it happen beside the original design: *State v. Shelledy*, 8-477, 505.

Use of deadly weapon: The malice implied by the use of a deadly weapon is malice aforethought, such as will sustain a conviction for murder. Malice may be inferred from the deliberate, violent use of a deadly weapon: *State v. Zeibart*, 40-169.

When a man assaults another or uses upon another a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life: *State v. Sullivan*, 51-142; *State v. Hockett*, 70-442.

But it is error to charge the jury that malice is proved by the selection and use of a deadly weapon in a deadly manner without legal excuse. Such fact merely raises a presumption of malice subject to be rebutted: *State v. Townsend*, 66-741; *State v. Perigo*, 70-657.

An instrument may or may not be a deadly weapon, depending upon the manner in which it is used: and in a particular case, *held*, that a stick of wood might be found to be a deadly weapon: *State v. Brown*, 67-289.

The fact that deceased was in a feeble condition, so that a blow of less force caused his death than would have been required to take the life of a healthy man, even if that fact is not known to the assailant, will not constitute a defense: *State v. Castello*, 62-404.

Where it appeared that defendant sought a meeting with deceased at which the act was committed by the use of a revolver, *held*, that his having used a revolver tended to indicate that defendant sought the meeting with the intent to take the life of deceased: *State v. Jones*, 64-349.

An instruction that malice would be implied from the unlawful and intentional use of a dangerous or deadly weapon in such manner that the natural consequence of the act would be to destroy the life of another, *held* not erroneous where there was no evidence that the killing was accidental or upon provocation: *State v. Rainsbarger*, 71-746.

Previous fight: The fact that there was a fight before the act of defendant was committed resulting in homicide will not necessarily show that he did not act with malice aforethought: *State v. Dillon*, 74-653.

Death from wound: If death ensues from a wound given in malice, not in its nature mortal, but which being neglected or mismanaged causes death, this will not excuse the person who gave it, and he will be held to have caused the death, unless he can make it clearly and certainly appear that the maltreatment of the wound or the misconduct of the person wounded, and not the wound itself, was the sole cause of the death: *State v. Morphy*, 33-270.

From poison: Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of the poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 61-629.

Malpractice of physician: A person who assumes to act as a physician in good faith, with good motives and honest intentions, however erroneous the course of treatment he adopts, is not to be held criminally liable if death results from such treatment: *State v. Schulz*, 55-628.

Acceleration of death: An act which accelerates death may constitute homicide even though the person dying would have soon died from other causes: *State v. Smith*, 73-32.

Resisting officer: In a prosecution for murder in resisting an officer, the official character of the officer need not be shown by record evidence. It is sufficient if it is shown that he was acting as officer *de facto: State v. Zeibart*, 40-169.

Indictment: It is not necessary that an indictment for murder should specifically charge, as at common law, that the defendant murdered the deceased. The use of other words of the same import will be sufficient: *State v. O'Niel*, 23-272.

Although the indictment must charge that the killing was done with malice aforethought, it is not essential that these identical words be used. It is sufficient if words are used of the same import, or if it clearly appears from the language used that malice aforethought is charged, or can, without doubt, be implied: *State v. Thurman*, 66-693.

Therefore, where the indictment charged murder in the second degree, committed by the administration of drugs and the use of an instrument for the purpose of procuring an abortion, and charged these acts as maliciously done, and with the specific intent to produce an abortion, *held*, that malice aforethought was sufficiently charged: *Ibid.*

In an indictment for murder under our statute it is necessary to charge that the homicide was done with malice aforethought: *State v. Newberry*, 26-467.

Words used in the indictment in a particular case, *held* to be equivalent to the expression "malice aforethought:" *State v. Neeley*, 20-108.

In an indictment for murder it is sufficient to aver that the wound was inflicted on the person of deceased, that his death was caused by it, and that the act was within the jurisdiction of the court. The wound need not be more particularly described: *Nash v. State*, 2 G. Gr., 286.

Evidence: What the defendant said and did several hours after the commission of homicide cannot be shown unless it is claimed that the evidence tends to prove insanity, and if it is so claimed such claim ought to be stated: *State v. Hockett*, 70-442.

Evidence tending to show the character of a mob, and what they contemplated accomplishing, is admissible in the prosecution of one of the number for murder committed in carrying out the plan: *State v. McCahill*, 72-111.

5129. First degree. 3849; 17 G. A., ch. 165, § 1; 18 G. A., ch. 2, § 1. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death or imprisonment for life, at hard labor, in the state penitentiary, as determined by the jury, or by the court if the defendant pleads guilty. [R., § 4192; C., '51, § 2569; 14 G. A., ch. 136.]

What constitutes: The distinctive peculiarity of murder in the first degree, as defined by statute, is that it must be accompanied with the premeditated intention to take life. The killing must be premeditated. Wherever, then, in case of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree. If there is not a specific intention to take life, it is murder in the second degree: *State v. Gillick*, 7-287, 311; *State v. Johnson*, 8-525.

An intention to take life may be presumed from the use of a deadly weapon in a manner in which death would most likely ensue, and proof of such a killing is primary evidence that it is wilful, deliberate and premeditated: *Ibid.*

Premeditation implies more than deliberation. It means to meditate and deliberate before concluding to do the deed; not only to wilfully take life, but to predetermine, to contrive by previous meditation; but no specific time is required for premeditation or deliberation: *State v. Johnson*, 8-525.

The intent must have preceded the killing long enough to admit of premeditation and deliberation. They need not have existed for any particular length of time if previously formed and continuing until the killing: *State v. Soper*, 70-494; *State v. Hockett*, 70-442.

It is not sufficient to charge murder in the first degree that the indictment alleges the killing as wilful and premeditated only: *State v. Boyle*, 28-522.

The indictment must charge that the *killing* was wilful, deliberate and premeditated. The allegation that the assault was so will not suffice: *State v. Knouse*, 29-118; *State v. Thompson*, 31-393.

So, an indictment charging that the assault was wilful, deliberate and premeditated, and that the blow from which deceased died was wilful, deliberate and premeditated, but not charging that it was dealt for the purpose of killing, or that the killing itself was wilful, does not charge murder in the first degree: *State v. McCormick*, 27-402; *State v. Watkins*, 27-415.

The facts to bring the case within the first degree of murder must be set out. Naming the offense in the introductory and closing portions of the indictment as murder in the first degree will not cure the defect. An indictment which would be sufficient at common law for murder is not necessarily sufficient to charge murder in the first degree under the statute: *Ibid.*

Under an indictment for murder in the first degree, as wilful, deliberate and premeditated, evidence is admissible that the crime was committed in the perpetration of robbery: *State v. Johnson*, 72-393.

To constitute the crime of murder in the first degree it is essential that the killing be done with malice aforethought, that it be done wilfully, and also that it be done deliberately and premeditatedly; but if it is charged and proven that the wounds were inflicted with specific intent to kill, and also that they were inflicted deliberately and premeditatedly, it is not necessary that it be charged and proven that the intent to kill was deliberate and premeditated: *State v. Shelton*, 64-333; *State v. Perigo*, 70-657.

A wilful killing is simply an intentional killing, and nothing more is necessary to make the killing wilful except the intended result of the act. It is not necessary, therefore, to charge that the killing was wilful where it is charged that the act causing the homicide was done with the specific intent to kill and murder: *State v. Townsend*, 66-741.

It is not necessary in charging murder in the first degree to use the precise language of the statute. It is sufficient if the words used are fully equivalent: *Ibid.*

The fact that the killing is wilful does not make it murder in the first degree, and an indictment charging wilful killing with malice aforethought would be good as an indictment for murder, but not for murder in the first degree: *State v. Keasling*, 74-528.

An indictment charging an assault with intent to kill, wilfully, etc., and that defendant did thereby, wilfully, etc., inflict a mortal wound of which the deceased then and there did die, sufficiently alleges murder in the first degree although there is no averment that the killing was done wilfully, etc.: *State v. Stanley*, 33-526.

Proof of design to kill at the time of killing

would show malice aforethought, but would not show premeditation or deliberation: *Fouts v. State*, 4 G. Gr., 500.

The proof of killing, without more, does not raise the presumption that such killing was wilful, deliberate and premeditated: *State v. McCormick*, 27-402.

Whether, in case the killing is committed in the perpetration or intent to perpetrate some of the felonies mentioned by the statute, it should be charged as wilful, deliberate and premeditated, *quære: Ibid.*

Indictment: The jury cannot find the defendant guilty of murder in the first degree when the indictment is only sufficient to charge defendant with murder in the second degree: *Fouts v. State*, 4 G. Gr., 500.

It is prejudicial error to put a party on trial for murder in the first degree under an indictment charging only murder in the second degree, although the party is only convicted of the lesser offense: *State v. Boyle*, 28-522; *State v. Knouse*, 29-118.

Where, on an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *State v. McCormick*, 27-402.

But where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *State v. Watkins*, 27-415.

Poison: Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 61-629.

Lying in wait: The expression "lying in wait," used in the statute in defining murder in the first degree, means lying in ambush or concealment: *State v. Cross*, 68-180.

Evidence: In a particular case, *held*, that the evidence, although circumstantial, was sufficient to sustain a conviction for murder in the first degree: *State v. Stanley*, 33-526.

Included crime: The crime of manslaughter is necessarily included in that of murder, and upon the trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury: *State v. Clemons*, 51-274; *State v. Glyndon*, 51-463.

Punishment: The provision that the jury may determine whether the punishment for murder in the first degree shall be capital is not unconstitutional: *State v. Hockett*, 70-442.

Further see notes to §§ 5128, 5130, 5131 and 5155.

5130. Second degree. 3850. Whoever commits murder otherwise than is set forth in the preceding section, is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term not less than ten years. [R., § 4193; C., '51, § 2570.]

A specific intention to kill is not essential to constitute murder at common law, nor, under our statute, to constitute murder in the second degree: *State v. Decklotts*, 19-447; *State v. Morphy*, 35-270; *State v. Mewherter*, 46-88.

An allegation that defendant caused death by acts intended to produce miscarriage, when not necessary to save life, sufficiently charges murder in the second degree: *State v. Leeper*, 70-748.

Evidence *held* not sufficient to support a verdict of murder in the second degree: *State v. Havercamp*, 54-350.

Neither deliberation nor premeditation is an essential element of the crime of murder in the second degree, or of assault with intent to commit murder: *State v. Keasling*, 74-528.

5131. Degree; how determined. 3851. Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and by their verdict ascertain, whether he be guilty of murder of the first or second degree; but if such defendant be convicted upon his own confession in open court, the court must proceed by the examination of witnesses to determine the degree of murder, and award sentence accordingly. [R., § 4194; C., '51, § 2571.]

In case of a plea of guilty the record should show that the witnesses were examined by the court and the degree of the crime thus fixed: *McCauley v. United States*, Mor., 486.

A defendant cannot be found guilty of murder in the first degree when the indictment is only sufficient to charge murder in the second degree: *Fouts v. State*, 4 G. Gr., 500.

Where the jury, upon the trial of an indictment for murder in the first degree, found defendant "guilty as charged in the indictment," *held*, that such verdict was fatally defective as not sufficiently ascertaining the degree of the offense: *State v. Moran*, 7-236.

The jury, if they do not find defendant guilty of murder in either degree, may, under § 5851, convict him of manslaughter: *Gordon v. State*, 3-410.

Where defendant was charged with committing murder in the perpetration of robbery and burglary, and the verdict of the jury was "guilty as charged in the indictment," *held*, that this was a sufficient finding of the degree of the crime and was a conviction of murder in the first degree: *State v. Weese*, 53-92.

And see notes to § 5129.

5132. Jury to fix punishment. 17 G. A., ch. 165, § 2; 18 G. A., ch. 2, § 2. Upon trial of an indictment for murder, the jury, if they find the defendant guilty of murder in the first degree, must designate in their verdict whether he shall be punished by death, or imprisonment for life at hard labor in the penitentiary. But if such defendant be convicted upon a plea of "guilty," the court shall designate whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary.

The provisions of this section are not in conflict with article 5, §§ 1–5, of the state constitution, vesting the judicial power in certain courts consisting of certain judges: *State v. Hockett*, 70–442.

A verdict of imprisonment for life is sufficient without specifying "at hard labor:" *State v. Trout*, 74–545

5133. Judgment and execution. 17 G. A., ch. 165, § 3; 18 G. A., ch. 2, § 3. Whenever the court or jury shall designate that a defendant shall be punished by death, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant, against whom judgment of death has been pronounced, shall be imprisoned in the penitentiary of the state.

5134. Papers sent governor. 17 G. A., ch. 165, § 4. Immediately after the entry of the judgment of death, the court rendering such judgment must transmit by mail to the governor of the state, a copy of the indictment, plea, verdict, judgment, and of the testimony in the case.

5135. Warrant of execution. 17 G. A., ch. 165, § 5. When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed and execute accordingly, and no other warrant or authority is necessary to require or justify the execution.

5136. Reprieve. 17 G. A., ch. 165, § 6. The only officer[s] who shall have power to reprieve or suspend the execution of a judgment of death, are the governor and the sheriff, as provided in the next section, unless in case of an appeal to the supreme court, as provided in section eighteen of this act [§ 5048].

5137. Insanity or pregnancy. 17 G. A., ch. 165, § 7. When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, to be drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity *of* [or] pregnancy of the defendant and a true inquisition return, and they shall examine the defendant and hear any evidence that may be presented, and by written inquisition, signed by each of them, find as to the insanity or pregnancy, and unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution. But if the inquisition find the defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the governor.

5138. Subsequent warrant. 17 G. A., ch. 165, § 8. Whenever a judgment of death has not been executed on the day appointed by the court therefor, from any cause whatever, the governor, by a warrant under his hand and the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

5139. Time and manner of execution. 17 G. A., ch. 165, § 9. A judgment of death must be executed by the sheriff on the day fixed in the judgment, between sunrise and sunset, by hanging the defendant by the neck until he is dead.

5140. Place of execution. 17 G. A., ch. 165, § 10. A judgment of death must be executed within the walls of the jail of the county in which the judgment was rendered, or within a yard or inclosure adjoining thereto, unless as provided in the next two sections.

5141. In another county. 17 G. A., ch. 165, § 11. If there be no jail in the county in which the judgment was rendered, or if it becomes unfit or unsafe for the confinement of prisoners, or be destroyed by fire or otherwise, and the jail of any other county has been legally designated for the imprisonment of the defendant until the day fixed for his execution, the judgment must be executed within the walls of the jail of the county so designated, or within a yard or inclosure adjoining the same, and by the sheriff of such county.

5142. Two jails. 17 G. A., ch. 165, § 12. If there be two or more jails or prisons in the same county, a judgment of death shall be executed within the walls of either of such jails or prisons, or within an inclosure adjoining thereto, as the court rendering such judgment shall therein direct.

5143. Witnesses at execution. 17 G. A., ch. 165, § 13. The sheriff executing a judgment of death, must, at least three clear days before inflicting the punishment of death, notify the judge of the district court of his county, the district [county] attorney, the clerk of the district court, together with two physicians and twelve respectable citizens of his county, to be selected by him and the sheriff of the county in which the trial was had and the offense committed (if it be in a different county), to be present as witnesses of such execution. He must also at the request of the defendant permit one or more ministers of the gospel, whom the defendant shall name, and any of his relations to attend the execution, and also such magistrates, peace officers, and guards as the sheriff shall deem proper, but no person other than those mentioned in this section can be present at the execution, nor shall any person under age be permitted to witness the same.

5144. Certificate of sheriff and judges. 17 G. A., ch. 165, § 14. The sheriff or his deputy executing the judgment of death, and the judges attending the execution must prepare and sign with their name of office, a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and must cause the certificate to be signed by the public officers, and at least twelve persons not relations of the defendant who witnessed the execution.

5145. Filed and published. 17 G. A., ch. 165, § 15. The sheriff or his deputy executing such judgment of death, must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and a copy thereof to be published in a newspaper printed at the capital of the state, and in one, if any, published in his county.

5146. Stay of execution by appeal. 17 G. A., ch. 165, § 16. An appeal by the defendant to the supreme court from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody to abide the judgment on the appeal.

5147. Proceedings on appeal. 17 G. A., ch. 165, § 17. When an appeal is taken from a judgment of death it shall be the duty of the clerk of the district court in which the judgment was rendered to give forthwith to the defendant, his agent, or attorney, a certificate under his hand and the seal of the county, stating that an appeal has been taken in the case, and the sheriff or other officer having the custody of the defendant, must upon the delivery of such certificate to him refrain from the infliction of the punishment of death upon the defendant, and retain him in custody to abide the judgment of the appeal.

5148. Proceedings on affirmance. 17 G. A., ch. 165, § 18. When a judgment of death has been affirmed, the supreme court must cause a copy of

the entry of judgment to be remitted to the governor, to the end that a warrant of the execution may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that fixed by the judgment of the district court. The officer receiving the same shall execute the warrant of the governor as therein directed and shall report his action both to the governor and the district court which rendered the original judgment. If for any cause the execution does not take place on the day appointed by the governor, the governor may from time to time appoint another day for the execution until the judgment is carried into effect.

5149. Pending indictments. 17 G. A., ch. 165, § 19. All indictments pending in any court of this state for any crime committed in violation of said section three thousand eight hundred and forty-nine of the code [§ 5129], shall be prosecuted to final judgment, and all crimes that have been committed in violation of said section shall be subject to indictment, trial and punishment in the same manner as they would have been had said section not been repealed.

5150. 17 G. A., ch. 165, § 20. All acts and parts of acts inconsistent with this act are hereby repealed.

5151. Killing in duel. 3852. Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, whereof death ensues, is guilty of murder of the first degree, and shall be punished accordingly. [R., § 4195; C., '51, § 2572.]

5152. Fighting or challenging to duel. 3853. Any person who fights a duel with deadly weapons, or is present at the fighting of such duel as aid, second, or surgeon, or advises, encourages, or promotes such duel, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand dollars nor less than four hundred dollars, and imprisoned in the penitentiary not more than three years nor less than one year. [R., § 4196; C., '51, § 2573.]

5153. Accepting challenge. 3854. Any person who accepts such challenge, or who consents to act as a second, aid, or surgeon on such acceptance, or who advises, encourages, or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section. [R., § 4197; C., '51, § 2574.]

5154. Posting for not accepting. 3855. If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another for not fighting a duel, or for not sending or accepting a challenge, he shall be fined not exceeding three hundred dollars nor less than one hundred dollars, and shall be imprisoned in the county jail not more than six months nor less than two months. [R., § 4198; C., '51, § 2575.]

5155. Manslaughter. 3856. Any person guilty of the crime of manslaughter, shall be punished by imprisonment in the penitentiary not exceeding eight years, and by fine not exceeding one thousand dollars. [R., § 4199; C., '51, § 2576.]

What constitutes: Manslaughter is not a degree of murder, but a distinct offense, included, however, in the crime of murder: *State v. White*, 45–325, 327; and under an indictment for murder a defendant may be convicted of manslaughter: See notes to § 5129.

The common-law definition of manslaughter has not been changed by our statute: *State v. Shelledy*, 8–477; *State v. Moore*, 25–128.

The offense defined: *State v. Abarr*, 39–185; *State v. Spangler*, 40–365; *State v. Hockett*, 70–442.

Homicide committed otherwise than wilfully, deliberately, and with premeditation, may be manslaughter or murder in the second degree, depending upon the absence or presence of malice: *State v. Spangler*, 40–365.

A homicide committed in sudden passion or

heat of blood, without premeditation and without malice, is not murder in the second degree, but manslaughter: *Ibid.; State v. Deckloths*, 19–447.

Provocation: Great provocation may reduce a homicide to manslaughter, but can never render it justifiable or excusable: *State v. Vance*, 17–138.

Mere words will not constitute sufficient provocation to reduce a homicide to manslaughter. *Held*, also, that the fact that deceased had been criminally intimate with defendant's wife's sister was not sufficient: *State v. Hockett*, 70–442.

Intent: Lawful and peaceful intentions will not excuse an unlawful homicide by subsequent violence, though they might bear upon the degree of the homicide. If the conviction is for manslaughter the previous intent is immaterial: *State v. Castello*, 62–404.

Punishment for manslaughter in a particular case, where the facts indicated on the part of defendant an entire recklessness of the consequences in the unnecessary use of a dangerous weapon in self-defense, *held* not excessive: *State v. Fiztsimmons*, 63–656.

Where it appeared that defendant pointed a loaded gun at deceased under circumstances not justifying killing, and deceased seized it to prevent injury, and it was discharged in the struggle without any purpose on the part of defendant. *held*, that the latter would be guilty of manslaughter, and the circumstances of the case would not wholly excuse the homicide, but might be regarded by the court in fixing punishment. But *held* that if the gun was pointed under circumstances in which it might have been lawfully discharged, defendant would be guilty of no offense: *State v. Benham*, 23–154.

Negligence: The careless use of a dangerous and deadly weapon, whereby a person is killed, constitutes manslaughter, although no harm is intended: *State v. Hardie*, 47–647.

Where one by his negligence contributes to the death of another he is guilty of manslaughter, and it is no defense that the death of deceased was caused by the negligence of others as well as that of the defendant: *State v. Shelledy*, 8–477, 507.

Indictment: In an indictment for manslaughter in exposing a newly-born child, causing its death, *held*, that it was not necessary to allege that defendant was in duty bound to provide for and protect the child, or that the child was unable to help itself: *State v. Behm*, 72–533.

Instruction as to other crime: In a trial for manslaughter it is not necessary to define the crime of murder in either degree, nor is it necessary to define any included crime where it appears that defendant admits the killing but seeks to justify and excuse it. But if there is any evidence sustaining the claim that the blow was accidental, the law in relation to accidental killing should be given to the jury: *State v. Hartzell*, 58–520.

As to instructions with reference to manslaughter on trial for murder, see notes to § 5129.

5156. Maiming or disfiguring. 3857. If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut, slit, or tear off an ear; cut, bite, slit, or mutilate the nose or lip; cut off or disable a limb or any member of another person, he shall be punished by imprisonment in the penitentiary not more than five years, and by fine not exceeding one thousand dollars nor less than one hundred dollars. [R., § 4200; C., '51, § 2577.]

The offense of maiming and disfiguring necessarily includes an assault and battery, within the meaning of § 5851: *Benham v. State*, 1–542.

While a specific intent to disfigure is an essential element of the crime, yet such intent may be inferred or presumed if the act is done deliberately and the disfigurement is reasonably to be apprehended as the natural and probable consequence of the act: *State v. Jones*, 70–505.

Where an assault is made with intention of committing a bodily injury which will constitute a disfigurement no other intention to disfigure need be proven: *State v. Clark*, 69–196.

5157. Robbery. 3858. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense as is provided in the following two sections. [R., § 4201; C., '51, § 2578.]

What constitutes: To constitute robbery there must be *animus furandi;* compelling the payment of money which is due, by threats of violence, is not robbery, but is an offense under § 5170: *State v. Hollyway*, 41–200.

The means used to put in fear need not be such as would put in fear one used to the ways of the world: *State v. Carr*, 43–418.

A sudden snatching from the hand of another is sufficient force and violence to constitute robbery: *Ibid.*

The crime of robbery includes all the elements of larceny from the person, defined in § 5211, with the addition of the element of violence or putting in fear, and the fact that the evidence shows the crime to be robbery will not render erroneous a conviction under that section: *State v. Graff*, 66–482.

The property taken need not be in the actual possession or presence of the person robbed. It is sufficient if it is so in his possession or under his control that violence or putting in fear is the means used to take it. So *held*, where a robber by violence extorted from the

owner information of the place where valuables were kept in another room of the house, and, leaving her bound, went and took the property: *State v. Calhoun*, 72-432.

Indictment: An indictment for robbery need not in express terms charge an assault; if it charge putting in bodily fear and danger of life it will be sufficient in this respect, the charge of an assault being thereby necessarily implied: *State v. Brewer*, 53-735.

An indictment stating that defendant, with force, etc., and by putting in fear, etc., "did take, steal and carry away from the said," etc., is not sufficient to charge this offense. It should charge a taking, etc., from the person: *State v. Leighton*, 56-595.

An indictment charging that defendant made an assault upon the person named, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of" said person, etc., *held* sufficient to charge robbery: *State v. Kegan*, 62-106.

Evidence that a person was robbed of a certain number of dollars in gold pieces of specified denominations and also of a certain number of dollars in silver coin, *held* sufficient to show that the person was robbed of gold and silver coins of denominations mentioned in the indictment: *State v. Helvin*, 65-289.

5158. Armed. 3859. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery present and so armed, he shall be punished by imprisonment in the penitentiary for a term not exceeding twenty years nor less than ten years. [R., § 4202; C., '51, § 2579.]

The question whether a cord used by the robber to bind the person robbed was a dangerous weapon may be left to the jury: *State v. Calhoun*, 72-432.

5159. Otherwise. 3860. If such offender commit the robbery otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two years. [R., § 4203; C., '51, § 2580.]

5160. Rape. 3861; 21 G. A., ch. 114, § 1. If any person ravish and carnally know any female of the age of thirteen years or more, by force and against her will, or carnally know and abuse any female child under the age of thirteen years, he shall be punished by imprisonment in the penitentiary for life or any term of years. [R., § 4204; C., '51, § 2581.]

What constitutes: The force necessary on the one hand, and the resistance required on the other, to constitute the crime, depend upon the relative mental and physical strength of the parties and the circumstances surrounding them: *State v. Tarr*, 28-397.

Where a female was imbecile, and the prisoner, knowing such fact (which might be inferred from his having had some conversation with her), used some force, and there was nothing to indicate consent on her part, *held*, that the act would be considered to have been against her will, and that in such case actual opposition or dissent need not be shown: *Ibid.*

It seems that a defendant might, under the statutory definition, be convicted of the crime of rape, committed upon a woman so destitute of mind that she was incapable of consent, without proof of any resistance on her part, notwithstanding the provisions of § 5162: *State v. Atherton*, 50-189.

Under this section the criminal knowledge and abuse of a female child under the age of ten [now thirteen] years is rape, and an assault with intent to commit such crime is an assault with intent to commit rape. The fact that defendant does not know that the child is under that age will be immaterial: *State v. Newton*, 44-45.

Where it does not appear that active resistance was made, the age of prosecutrix is important to be considered. If, though over the age of consent, she is still very young, with mind not enlightened upon the nature of the act, this consideration should lead the jury to demand a less clear opposition than if she were older and more intelligent. Consent involves submission, but submission does not necessarily involve consent; and while in most cases such submission of the adult female would imply consent, yet the mere submission of a young and uninformed female in the hands of a strong man cannot be taken to show consent: *State v. Cross*, 12-66.

Where a female over the age specified is presumed capable of giving consent, yet the fact that a female over that age lacked puberal development may be considered in support of her claim that she did not understand the nature of the intended act: *State v. McCaffrey*, 63-479.

Two or more may be jointly indicted for the crime, one being the principal and the other accessories: *State v. Comstock*, 46-265.

The crime of rape necessarily includes both a simple assault, and an assault with intent to commit the crime, within the meaning of § 5851: *State v. Vinsant*, 49-241; *State v. Peters*, 56-263.

On a trial for rape defendant may be convicted of an assault with intent to commit the crime, and even though consent is shown at the time of the commission of the act, it may be shown to have been absent at the

time of the commission of the assault: *State v. Cross*, 12-66; *State v. Atherton*, 50-189.

In a particular case, *held*, that an instruction as to the effect of duress was properly given: *State v. Ward*, 73-532.

Indictment: The sex of the person injured in a particular case *held* to sufficiently appear from the language of the indictment, although not specifically alleged: *State v. Hussey*, 7-409.

The indictment in a particular case *held* to sufficiently indicate the person ravished: *State v. Pennell*, 56-29.

Evidence: It is not necessary to establish the non-consent or force by proof of outcries or of a struggle, nor need actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all the circumstances, the requisite facts are shown: *State v. Tarr*, 28-397.

The absence of any marks of violence, or of outcries, etc., at the time, may be considered as against the evidence of prosecutrix: *State v. Tomlinson*, 11-401.

Absence of such outcries and complaints tends strongly to rebut the hypothesis of guilt, but is not conclusive, and the age, etc., of prosecutrix is to be considered: *State v. Cross*, 12-66.

The better rule is to admonish the jury as to the difficulty of disproving the charge, and call their attention to the fact whether outcry was made at the time: *State v. Hagerman*, 47-151.

The fact of prosecutrix making complaint is proper evidence, but the particulars of such complaint are not: *State v. Richards*, 33-420.

But the evidence as to complaints need not be limited necessarily to the fact of complaint being made. It may extend to showing what the person made complaint of: *State v. Mitchell*, 68-116.

The particular facts stated by the prosecutrix are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after an attempt to impeach it: *State v. Clark*, 69-294.

Therefore, *held*, that a letter written by prosecutrix, relating the circumstances of the alleged crime, was not admissible: *Ibid.*

Evidence that bruises were found upon prosecutrix two and one-half or three weeks after the alleged injury, *held* properly admitted. The length of time that had elapsed would be for the jury as affecting the credibility of the evidence, but would not render it incompetent: *State v. McLaughlin*, 44-82.

Proof of another crime of the same character committed at a different time upon or against another person and having no connection with the crime charged is not admissible. So *held* in a prosecution for assault with intent to commit rape as to evidence of similar assaults at previous times upon other persons; but *held*, that proof of previous assaults on prosecutrix was admissible to show intent: *State v. Walters*, 45-389.

Evidence as to reputation of prosecutrix for want of chastity should be limited to such reputation before the alleged crime was committed, the claim of the defendant being that the act was with the consent of the prosecutrix: *State v. Ward*, 73-532.

In a prosecution for rape, *held*, that statements of prosecutrix made on the same day on which the crime was charged to have been committed, that she had had criminal intercourse with defendant and would have it again, were admissible in evidence as tending to show the character of prosecutrix and her feelings toward defendant: *State v. Cook*, 65-560.

Evidence considered, and *held* insufficient to justify conviction for the crime: *State v. Tomlinson*, 11-401.

Corroboration required, see § 5958 and notes.

Included crimes: Assault and battery is not necessarily included in the crime of rape: *State v. McDevitt*, 69-549.

Assault: As to assault with intent to commit rape, see § 5172 and notes.

5161. Compelling to marry. 3862. If any person take any woman unlawfully and against her will, and by force, menace, or duress, compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years. [R., § 4205.]

No particular amount of force is necessary to constitute the offense of defilement under this section, and it was probably intended to cover cases in which there is no force, excepting that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will; but it contemplates at least an act against the will. The defendant is not required to show an affirmative act of consent to make out a defense: *Pollard v. State*, 2-567.

5162. Carnal knowledge. 3863. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall, upon conviction, be punished as provided in the section relating to ravishment. [R., § 4206; C., '51, § 2583.]

See notes to § 5160.

5163. Producing miscarriage of pregnant woman. 3864; 19 G. A., ch. 19. If any person, with intent to produce the miscarriage of any pregnant woman, wilfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the state prison for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars. [R., § 4221.]

Abortion is the act of miscarriage and producing young before the natural time or before the fœtus is perfectly formed. It is not within the definition of murder and is not criminal unless expressly made so by the statute: *Abrams v. Foshee*, 3-274.

It is not necessary to constitute the crime that the woman should be quick with child, nor, providing there is criminal intent, is it necessary that the substance administered should be such as would produce a miscarriage: *State v. Fitzgerald*, 49-260.

The crime is committed in the county where the drug or other substance is administered, and not where the miscarriage actually takes place; § 5543 does not apply: *State v. Hollenbeck*, 36-112.

It is not a crime under this section for a woman to procure an abortion on herself: *Hatfield v. Gano*, 15-177.

Where death is caused in the procurement of an abortion, it is error to instruct the jury that defendant in a prosecution for causing such death may be convicted of manslaughter. He will be guilty of murder in the second degree or nothing: *State v. Moore*, 25-128.

An indictment alleging that certain acts were done with the design and intention to produce a miscarriage, which it is averred was not necessary to save the life of the woman, is sufficient to charge murder in second degree: *State v. Leeper*, 70-748.

Evidence in a particular case *held* sufficient to sustain a conviction under this section: *State v. Montgomery*, 71-630.

As to civil liability for commission of abortion, see *Kansz v. Ryan*, 51-232.

5164. Enticing female child for prostitution. 3865; 21 G. A., ch. 114, § 2. If any person take or entice away any unmarried female, under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, for the purpose of prostitution, he shall, upon conviction, be punished by imprisonment in the penitentiary for not more than three years, or by fine of not more than one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4207; C., '51, § 2584.]

The fact that defendant believed, and had good reason to believe, that the female was over the age specified, constitutes no defense if she was in fact under that age: *State v. Ruhl*, 8-447. (And as to similar point see *State v. Newton*, 44-45.)

If the parents are dead and no guardian has been appointed the persons with whom the female resides as a member of the family, and who have her wholly under their care and protection, would have "the legal charge of her person" within the meaning of the section: *Ibid.*

It is not sufficient to constitute an offense under this section that the accused entice away the female for his own carnal enjoyment, and such enjoyment would not constitute prostitution: *Ibid.*

As to corroboration of the evidence of prosecutrix, see § 5958.

5165. Enticing away child. 3866; 21 G. A., ch. 114, § 3. If any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of fourteen years, with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. [R., § 4208; C., '51, § 2585.]

5166. Seduction. 3867. If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4209; C., '51, § 2586.]

What constitutes: Mere unlawful sexual commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person. But the allegations in the indictment in a particular case, of representations as to the innocence of the act and promises of presents, etc., *held* sufficient on demurrer: *State v. Fitzgerald*, 63-268.

To "debauch" implies to "have carnal

knowledge of" (*arguendo*): *Wood v. Mathews*, 47–409.

Where the evidence fails to show artifice, promise, flattery, deception, or the like, it will not be sufficient to sustain a conviction: *State v. Crawford*, 34–40.

A woman who, without promise of marriage, yields to the embraces of a man who avowedly visits her for that purpose, and threatens to cease visiting her if she refuses to comply with his desires, cannot recover for seduction: *Baird v. Boehner*, 72–318.

An indictment charging that defendant seduced and debauched, etc., etc., is sufficient without charging the facts as to the means made use of to accomplish such end: *State v. Curran*, 51–112: *State v. Conkright*, 58–338.

Evidence: The exact amount or kind of seductive arts necessary to establish the offense cannot be defined. Every case must depend upon its own peculiar circumstances, together with the conditions in life, advantages, age and intelligence of the parties: *State v. Higdon*, 32–262.

It is not necessary that the false promises or seductive arts be reasonable in their character and likely to have been relied upon by the prosecutrix; but the fact that they were extraordinary and made by a person who, to the knowledge of the prosecutrix, was not capable of performing them, should be considered by the jury in determining whether they were sufficient: *State v. Groome*, 10–308.

The fact that false promises of marriage were made at the time with intent to break them would be immaterial. Such false promises of marriage would be sufficient: *State v. Prizer*, 49–531.

To warrant a conviction of defendant upon the evidence of prosecutrix there should not be any strained construction put upon her language in order to sustain the verdict. It is to be expected that she should, so far as possible, shield herself and cast the blame upon defendant. Therefore, in a particular case, a conviction was reversed on the ground that the evidence of prosecutrix did not, by fair and reasonable construction, show any arts, false promises, etc.: *State v. Haven*, 43–181.

Where, in a prosecution for seduction, prosecutrix testified that she resisted, and defendant overcame such resistance by force, *held*, that the court should have instructed the jury that, if they found such to be the fact, defendant was entitled to an acquittal, the crime under such facts being rape, and not seduction: *State v. Lewis*, 48–578.

In a particular case, *held*, that it sufficiently appeared from the evidence that prosecutrix was an unmarried woman: also that the seductive arts were such as were sufficient to constitute the crime, being promises to marry, etc.: also, that the corroboration was sufficient: *State v. Heatherton*, 60–175.

Evidence of an offer by prosecutrix, after the commencement of the prosecution, to settle for a sum of money, *held* not admissible: *State v. Dedrick*, 51–467.

Where it appeared that defendant was a suitor of the prosecutrix before and for some time after the illicit intercourse, *held*, that his conduct during the entire time might be inquired into in determining whether her consent was gained by seductive means: *State v. Curran*, 51–112.

As to corroboration required, see § 5958 and notes.

Previously chaste character of prosecutrix: The word character as used in the statute defining the crime as the seduction of any unmarried woman "of previously chaste character" is used in its true sense as distinguished from reputation, but a female may be of unchaste character without being guilty of any act of sexual intercourse. Obscenity of language, indecency of conduct and undue familiarity with men may serve to indicate the true character. It is for the jury to decide, under all the circumstances, as to the character of the prosecutrix: *Andre v. State*, 5–389; *Boak v. State*, 5–430.

A female who has been unchaste may reform and acquire a chaste character, such as is referred to in the statute: *State v. Carron*, 18–372.

Evidence that prosecutrix has a bad reputation for chastity is not admissible, but evidence that her reputation in that respect is good may be received in rebuttal of evidence tending to prove acts of lewdness: *State v. Prizer*, 49–531; *State v. Shean*, 32–88.

Proof of unchaste conduct on the part of prosecutrix just prior to the alleged seduction would entitle defendant to acquittal; therefore, an instruction that proof of such conduct should be considered against prosecutrix *held* erroneous, in that it did not go far enough in stating the effect of such conduct: *State v. Carr*, 60–453.

Where the woman is examined as a witness to prove the seduction, she may, on cross-examination, be asked as to matters which would show a want of chastity previous to such seduction. The question of chastity is directly in issue: *State v. Sutherland*, 30–570.

Instruction as to effect of proof of improper liberties allowed to others than defendant prior to the alleged crime, *held* misleading, in that the meaning of such term was left ambiguous: *State v. Carr*, 60–453.

Evidence of improper conduct of prosecutrix occurring eight years before the trial, and when she was but fourteen years of age, *held* properly excluded: *State v. Dunn*, 53–526.

Previously chaste character is not essential in a civil action by an unmarried female for seduction: See § 3760 and notes.

Presumption: The previous chaste character of the prosecutrix is presumed, and the *onus* is upon defendant to overcome such presumption by preponderance of evidence: *State v. Wells*, 48–671; *State v. Higdon*, 32–262; *Andre v. State*, 5–389.

Such presumption may be rebutted by proven or admitted facts or circumstances in the case: *State v. Bowman*, 45–418.

The presumption in favor of the chastity of the prosecutrix is not a presumption against the innocence of defendant. He is presumed innocent of the fact, but the presumption is also entertained in favor of the rectitude of her character: *Andre v. State*, 5–389.

An instruction that the presumption of chastity might be overcome by proof of wantonness or indiscretion indicating an unchaste character, but which made no reference to

other matters which might indicate unchastity, *held* not erroneous where there was no evidence of other facts indicating unchastity: *State v. Bell*, 49-440.

As to presumption of chastity in a civil action for damages and evidence to overcome it, see *West v. Druff*, 55-335.

Only the previous character is put in issue, and all evidence of improper conduct after the time of seduction should be excluded: *State v. Wells*, 48-671.

Questions as to chastity must clearly refer to a time previous to the seduction: *State v. Deitrick*, 51-467.

Previously chaste character is not essential in a civil action by a parent for seduction of a minor daughter: *Updegraff v. Bennett*, 8-72.

5167. Marriage a bar. 3868. If, before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense. [R., § 4210; C., '51, § 2587.]

Such a marriage is encouraged by the law, and contracts entered into in contemplation thereof are not invalid as being made under duress, and will be upheld: *Armstrong v. Lester*, 43-159.

5168. Kidnapping. 3869. If any person wilfully and without lawful authority, forcibly or secretly confine or imprison any other person within this state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in this state against his will, or to cause such person to be sent out of this state against his will, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine and imprisonment at the discretion of the court. [R., § 4211; C., '51, § 2588.]

5169. Exposing child. 3870. If the father and mother of any child under the age of six years, or any person to whom such child has been intrusted or confided, expose such child in any highway, street, field, house, or outhouse, or in any other place with intent wholly to abandon it, he or she, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years. [R., § 4212; C., '51, § 2589.]

"Father *and* mother" construed to mean "father *or* mother." Either parent alone may commit the crime: *State v. Smith*, 46-670, 672.

5170. Malicious threats to extort. 3871. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the penitentiary not more than two years or by a fine not exceeding five hundred dollars. [R., § 4213; C., '51, § 2590.]

Extortion and pecuniary advantage are not necessary ingredients of this offense. An indictment charging defendant with maliciously threatening, etc., with intent "to compel the person, etc., to do an act against his will," is sufficient: *State v. Young*, 26-122.

An indictment charging defendant with verbally threatening to kill and murder two certain persons, with intent, etc., *held* sufficient without setting out the threatening words used; also *held* that a threat to kill *two* persons constituted but one offense: *State v. O'Mally*, 48-501.

In the absence of a felonious intent it is not robbery to compel, by means of threats of personal violence, the payment of money; but such an act is an offense under this section: *State v. Hollyway*, 41-200.

5171. Assault with intent to murder. 3872. If any person assault another with intent to commit murder, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 4214; C., '51, § 2591.]

In an indictment for an assault with intent to commit an offense it is not necessary to make all the averments required in an indictment for the offense itself. Therefore, *held* not necessary in charging an assault with intent to murder to charge that the assault was made with malice aforethought: *State v. Newberry*, 26-467.

An assault with intent to commit murder does not admit of different degrees, since the intent is the gist of the offense, but it necessarily includes a simple assault: *State v. Jarvis*, 21-44.

And a defendant indicted under this section may be convicted of that offense: *State v. Shepard*, 10-126.

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and a party may be convicted of the former offense under an indictment charging the latter, as provided by § 5851: *State v. White*, 45-325 (overruling *S. C.*, 41-316); *State v. Schele*, 52-608; *State v. Connor*, 59-357.

In a particular case, *held*, that the evidence was sufficient to show that the assault was made with premeditation and intent to kill: *State v. Brown*, 67-289.

The facts in a prosecution for assault with intent to commit murder, *held* sufficient to show that the punishment inflicted was excessive and sentence was modified accordingly: *State v. Doering*, 48-650.

Evidence in a particular case *held* sufficient to show defendant guilty as accessory to an assault with intent to murder: *State v. Mower*, 68-61.

The essential elements of the crime of assault with intent to commit murder are the assault, the specific intent to kill, and the malice aforethought. It is not necessary that the indictment charge deliberation or premeditation as required for first degree of murder: *State v. Keasling*, 74-528.

And where the verdict of the jury is not supported by evidence of malice aforethought the court may sentence defendant for assault with intent to commit manslaughter: *Ibid.*

5172. With intent to commit rape. 3873. If any person assault a female with intent to commit a rape, he shall be punished by imprisonment in the penitentiary not exceeding twenty years. [R., § 4215; C., '51, § 2592.]

What constitutes: It must appear that the intent of defendant was to gratify his passions, notwithstanding any possible resistance prosecutrix should make: *State v. Cross*, 12-66; *State v. Hagerman*, 47-151.

The intent to commit the crime of rape necessarily includes an attempt to overcome the resistance of the woman and accomplish the connection by force; and to establish assault with intent to commit rape, the evidence must show that the assault was made with the intent to use whatever degree of force might be necessary to overcome the resistance and accomplish the object: *State v. Canada*, 68-397; *State v. Kendall*, 73-255.

Assault with intent to commit rape does not necessarily include assault and battery: *State v. McDevitt*, 69-549.

Defendant may be found guilty of an assault with intent to commit, etc., although at the time of accomplishing the act there was such consent as to deprive the act of the character of rape: *State v. Cross*, 12-66; *State v. Atherton*, 50-189.

Assault with intent to carnally know a child under the age fixed by § 5160, is an assault with intent to commit rape, and in such case it is not necessary to prove that defendant knew the fact as to the age of the child. Proof of that fact itself is sufficient: *State v. Newton*, 44-45. And upon a similar point, see *State v. Ruhl*, 8-447.

Evidence: In a prosecution for this crime the conduct of the parties towards each other, both before and after the alleged offense, may be shown in evidence: *Mallett v. Beale*, 66-70.

Facts in a particular case *held* sufficient to show the intent with which the assault was committed: *State v. McIntire*, 66-339.

Evidence of intoxication is admissible for the purpose of showing absence of intent in such a case: *State v. Donovan*, 61-369.

The jury should be told that if they find from the evidence that defendant was so drunk as to be incapable of an intent to ravish the prosecutrix they should find him not guilty: *Ibid.*

There is no legal presumption that any offense or any specific result is intended by a man chasing a woman: *Ibid.*

Under the facts of a particular case, a new trial was granted for the insufficiency and unsatisfactory nature of corroborating testimony, and for want of proper instructions as to the effect of a jest as indicating criminal intent: *State v. Warner*, 25-200.

Whether the provisions of § 5958, requiring corroboration of evidence of the injured party in a prosecution for rape, are applicable in an assault with an intent to commit rape, *quære: State v. McIntire*, 66-339.

5173. With intent to maim, rob, steal, etc. 3874. If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court. [R., § 4216; C., '51, § 2593.]

One who intentionally bites off a person's ear is guilty of an assault with intent to disfigure, and not merely with intent to injure: *State v. Clark*, 69-196.

5174. Great bodily injury. 3875. If any person assault another with intent to inflict a great bodily injury, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars. [R., § 4217; C., '51, § 2594.]

This crime is sufficiently charged in an information which accuses defendant of an assault and battery, alleging that defendant wilfully and maliciously struck and beat the person injured with intent of doing him great bodily injury: *State v. Carpenter*, 23-506.

An indictment charging an assault and battery with intent to inflict great bodily injury does not charge more than one offense. The battery is simply an aggravation: *Cokely v. State*, 4-477.

When the felonious intent is shown, that which would be an assault if unaccompanied with such intent will be such when thus accompanied: *State v. Malcolm*, 8-413.

Under an indictment for this offense defendant may be convicted of a simple assault, as provided in § 5851: *Orton v. State*, 4 G. Gr., 140.

A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, but it cannot be definitely defined. The question whether the injury inflicted in a particular case constitutes a great bodily injury is for the jury: *State v. Gillett*, 56-459.

Where a person makes an assault on another and inflicts upon him an injury of a more grave and serious character than an ordinary battery, the presumption is warranted that he intended to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury: *Ibid.*

While a person is presumed to have intended all consequences which are to be ordinarily apprehended as the result of his act, yet expert evidence is not admissible to show what results might have been apprehended by a physician of skill and experience as likely to result from such an assault: *Fleming v. Hull*, 73-598.

5175. With intent to commit any felony. 3876. If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. [R., § 4218; C., '51, § 2595.]

Under this section an assault with intent to commit manslaughter may be punished: *State v. White*, 45-325.

To convict of assault with intent to commit murder the evidence should show that defendant's act was unlawful, that it was committed with intent to take life, and that it was with malice aforethought. If the evidence as to malice aforethought is not sufficient to support the verdict of the jury, the court may, on motion for new trial, sentence defendant for assault with intent to commit manslaughter: *State v. Keasling*, 74-528.

5176. Mingle poison with food, etc. 3877. If any person mingle any poison with any food, drink, or medicine, with intent to kill or injure any human being, or wilfully poison any spring, well, cistern, or reservoir of water, he shall be punished by imprisonment in the penitentiary not exceeding ten years and by fine not exceeding one thousand dollars. [R., § 4219; C., '51, § 2596.]

5177. Assault and battery. 3878. Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [R., § 4220; C., '51, § 2597.]

Assault; what constitutes: To constitute an assault it is not necessary that defendant should have been in such position as to inflict injury on the person assaulted with the weapon used, provided it appears that he intended and endeavored to inflict such injury and had means and ability to do so, and was only prevented from doing so by the interference of others: *State v. Malcolm*, 8-413.

It is an assault to present an unloaded gun or pistol at another in a manner calculated to terrify the person aimed at, if the latter does not know or has no reason to believe that the weapon is not loaded: *State v. Shepard*, 10-126.

An indictment charging that defendant did make an assault with a certain dangerous weapon, to wit, a gun with which he was armed, etc., but not alleging that the gun was loaded, nor the manner of using it, nor that it was pointed or discharged, *held* sufficient to charge an assault: *Ibid.*

An assault may be committed without doing any personal injury: *State v. Myers*, 19-517.

Assault and battery: The statute merely prescribes the punishment for the offenses of assault, and assault and battery, and leaves them to be defined by the common law: *State v. Twogood*, 7-252.

It constitutes assault and battery to forcibly and violently take property claimed under chattel mortgage from the person in possession thereof, where it is necessary, in order to effect the purpose, to inflict personal injury: *State v. Boynton*, 75-753.

Justification: Angry words are no justification for an assault and battery. Neither is it unlawful for a party to forbid an angry person coming upon the former's premises: *Thompson v. Mumma*, 21-65.

The fact that an officer has levied upon property exempt from seizure is no justification for an assault: *Cokely v. State*, 4-477.

In a prosecution for an assault it is not proper to ask the prosecuting witness whether he had not at a previous time struck the defendant: *State v. Montgomery*, 65-483.

How charged: Information charging defendant with inhumanly beating his own child sufficiently charges the offense of assault and

battery; but the name of the person on whom the offense was committed should be given: *State v. Bitman*, 13–485.

An information for assault and battery is sufficient which charges violent beating, wounding, etc., without alleging that such acts were done in anger and in a wilful manner, and with the purpose to hurt and inflict corporal injury: *State v. Boynton*, 75–753.

As to assault included in other crimes, see notes to § 5851.

5178. Carrying concealed weapons. 3879. If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days; *provided*, that this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests.

The intent or purpose with which the weapon is carried is not an element of the offense, nor is it required that it be carried with defendant's knowledge, or wilfully, that is, with set purpose. The obvious purpose is to forbid the carrying of weapons on the person with the knowledge of the accused that the weapon was so carried, and that it was a weapon. If the weapon was carried through restraint, or ignorance, or for any innocent or lawful purpose, such fact may be shown by the defense; it need not be negatived in the indictment: *State v. Williams*, 70–52.

CHAPTER 3.

OFFENSES AGAINST PROPERTY.

5179. Burning inhabited dwelling in night-time. 3880. If any person wilfully or maliciously burn in the night-time, the inhabited building, boat, or vessel of another, or wilfully and maliciously set fire to any other building, boat, or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the night-time, he shall be punished by imprisonment in the penitentiary for life or any term of years. [R., § 4222; C., '51, § 2598.]

5180. In day-time. 3881. If any person wilfully or maliciously burn in the day-time the inhabited building, boat, or vessel of another, or any building, boat, or vessel adjoining thereto; or wilfully and maliciously set fire to any building, boat, or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the day-time; or in the day-time wilfully and maliciously set fire to any building, boat, or vessel owned by himself or another, by the burning of which any such inhabited building, boat, or vessel is burnt in the night-time, he shall be punished by imprisonment in the penitentiary for a term not exceeding thirty years. [R., § 4223; C., '51, § 2598.]

[The last word of this section, in the original rolls, is "days" instead of "years," but as the Revision and the Code commissioners' report each have the section as here given, the word "years" is retained as in the printed Code, the substitution of "days" in the original being evidently a mistake corrected by the editor. It admits, however, of serious doubt whether the strict language of the original would not govern in such case.]

5181. Burning uninhabited dwelling, etc., in night-time. 3882. If any person wilfully and maliciously burn in the night-time, any uninhabited dwelling-house, boat, or vessel belonging to another, or any court-house, jail, college, church or any building erected for public use, or any other building, boat or vessel, by the burning whereof any building, boat, or vessel mentioned in this section is burnt in the night-time, he shall be punished by imprisonment in the penitentiary not exceeding twenty years. [R., § 4224; C., '51, § 2600.]

5182. In the day-time. 3883. If any person wilfully and maliciously burn in the day-time any building, boat, or vessel mentioned in the preceding

section, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years. [R., § 4225; C., '51, § 2601.]

5183. Burning mills, locks, dams, depots, etc. 3884. If any person wilfully and maliciously burn, either in the night or day-time, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, outhouse, or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam, or flume, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 4226; C., '51, § 2602.]

An indictment charging defendant with burning a certain "building, etc., *called a barn*," *held* sufficient, though in fact the building was not a barn but only a shed: *State v. Smith*, 28-565.

5184. Setting fire with intent to burn. 3885. If any person set fire to any building, boat, or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat, or vessel to be burnt, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4227; C., '51, § 2603.]

An averment that defendant set fire to certain material in the store of a person named is not sustained by proof that he set fire to such material in a building owned by such person but in a room occupied by a tenant as a store: *State v. Tennery*, 9-436.

But in such case an averment that the fire was applied in a room within the store building of such person, *held* proper: *Ibid.*

Where defendant set a lighted candle in hay and other combustible material, with intent to burn a barn, but neither the barn nor the material was ignited or burned, *held* that, nevertheless, he was guilty under this section. The lighting of the candle was "setting fire, etc., to any material:" *State v. Johnson*, 19-230.

5185. Burning or destroying lumber, fences, grain, etc. 3886. If any person wilfully and maliciously burn, or otherwise destroy or injure any pile or parcel of wood, boards, timber, or lumber, or any fence, bars, or gate, or any grain, hay, or other vegetable product severed from the soil, or any standing tree, grain, grass, or other standing product of the soil, the property of another, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4228; C., '51, § 2604.]

5186. Liability of married woman. 3887. The preceding sections of this chapter, severally, extend to a married woman who commits either of these offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband. [R., § 4229; C., '51, § 2605.]

5187. Burning to injure insurers. 3888. If any person wilfully burn any building, goods, wares, merchandise, or other chattels which are insured against loss or damage by fire, or wilfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of such property or not, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 4230; C., '51, § 2606.]

5188. Setting out fire. 3889; 17 G. A., ch. 55. If any person wilfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any inclosed or cultivated field, or any highway, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment in the discretion of the court. [R., § 4231; C., '51, § 2607.]

Under this section, *held*, that a party was liable for damages resulting to others, only where he set the fire out wilfully or without using the proper caution: *Conn v. May*, 36-241, and cases cited. And see notes to following section.

Under statute somewhat similar to this, but providing that the party setting out a fire

should be liable for damages sustained, *held*, that he would not be liable where he had not willingly or maliciously permitted or suffered the fire to pass over his premises so as to injure another: *De France v. Spencer*, 2 G. Gr., 462; *Hanlon v. Ingram*, 3–81.

5189. Allowing fire to escape. 3890. If any person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, between the first day of September in any year and the first day of May following, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [9 G. A., ch. 53.]

Setting out fire in a cultivated field is not within the scope of this section: *Brunell v. Hopkins*, 42–429. (But see, now, the previous section as amended.)

Under this section a party is absolutely liable for all damages resulting from the act prohibited, without regard to the question of negligence: *Conn v. May*, 36–241. See note to preceding section.

5190. Burglary. 3891. If any person break and enter any dwelling-house in the night-time, with intent to commit any public offense; or, after having entered with such intent, break any such dwelling-house in the night-time, he shall be deemed guilty of burglary, and shall be punished according to the aggravation of the offense as is provided in the next two sections. [R., § 4232; C., '51, § 2608.]

Breaking: The pushing open of a closed door is a sufficient breaking within the meaning of the law to constitute burglary: *State v. Reid*, 20–413.

Indictment: An indictment charging burglary in breaking and entering a house described as the property of a man whose wife owned the legal title, the property being occupied as a homestead, *held* proper, the possession being in the person named, as head of the family: *State v. Short*, 54–392.

When the indictment charged that the building broken and entered was the property of H., *held*, that proof that H. was in possession as tenant was sufficient proof of ownership: *State v. Golden*, 49–48.

Burglary is an offense against the possession. At common law the ownership was required to be laid in the tenant or person in possession, and this rule is not changed by any provision of statute, although, under § 5687, it would probably be immaterial whether the possession was laid in the land owner or the tenant if the offense was in other respects sufficiently described: *State v. Rivers*, 68–611.

In a prosecution for burglary it is material only to prove that the person named in the indictment as owner was in occupancy and possession of the building: *State v. Teeter*, 69–717.

It is not necessary that the indictment for burglary should allege that some one was in the house at the time of the commission of the crime: *State v. Reid*, 20–413.

It is not necessary that the indictment show that goods, wares and merchandise were kept for use, sale or deposit in the building; nor is it necessary that the indictment set out the names of the dwellers in the house. An erroneous allegation as to the ownership of the building is not material when the crime is in other respects described with sufficient definiteness: *State v. Emmons*, 72–265.

Time: In an indictment for burglary, *held*, that an allegation of breaking and entering on a certain day, in the night-time of said day, constituted a sufficient allegation that the offense was committed in the night-time: *State v. Ruby*, 61–86.

The heinousness of the crime committed in the night-time is deemed much greater than when committed in the day-time: *State v. Frahm*, 73–355.

Intent: An indictment charging a breaking and entering with intent to commit larceny is sufficient without averring that the intention was to steal property of a greater value than twenty dollars: *State v. Jones*, 10–206.

The fact that an indictment for burglary does not charge the breaking and entry as "burglarious" does not render the indictment bad. The breaking and entering with the required intent constitute the crime: *State v. Short*, 54–392.

The intent being made a necessary element in the crime here defined, intoxication may be weighed by the jury in considering whether such intent existed: *State v. Bell*, 29–316.

Evidence: Proof of a larceny committed after the breaking and entering is admissible as showing the intent with which the breaking and entry were committed: *State v. Golden*, 49–48.

The fact of the breaking and entry may be considered in determining the intent with which the breaking and entry were committed, in connection with the other circumstances of the case: *State v. Teeter*, 69–717.

The possession of goods recently stolen in connection with the commission of a burglary is not of itself sufficient evidence upon which to find defendant guilty of the burglary: *State v. Shaffer*, 59–290; *State v. Tilton*, 63–117.

But such possession, in connection with other evidence of guilty conduct, such as the possession of burglarious tools, etc., is *prima facie* evidence of guilt, sufficient to convict: *State v. Reid*, 20–413.

The mere possession of goods stolen from the building in which the burglary is alleged to

have been committed does not have the same tendency to connect the person found in the possession of such goods with the burglary as it does with the larceny, and is not *prima facie* evidence of guilt of the burglary; but when it is shown that the two offenses were committed at the same time, and by the same person, the fact of the possession of goods stolen at that time from the building has necessarily the same tendency to prove the person in possession thereof guilty of burglary as of the larceny: *State v. Rivers*, 68–611; *State v. Frahm*, 73–355.

Compound offense: The two offenses of breaking and entering with intent to commit larceny, and the crime of larceny alone, cannot be committed by the same act so as to constitute a compound offense under § 5685: *State v. Ridley*, 48–370: *State v. Rhodes*, 48–702: *State v. McFarland*, 49–99.

Under an indictment which charges both the felonious breaking and entering, and larceny, the latter charge may be disregarded and trial and conviction had under the former: *State v. Hayden*, 45–11; *State v. Shaffer*, 59–290.

See further as to compound offenses, etc., § 5685 and notes.

5191. Being armed or assaulting a person. 3892. If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so armed himself after having entered such dwelling-house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be punished by imprisonment in the penitentiary for life or any term of years. [R., § 4233; C., '51, § 2609.]

The portion of an indictment charging assault with intent to murder may be dismissed and defendant tried for burglary alone: *State v. Struble*, 71–11.

5192. When not armed. 3893. If such offender commit such burglary otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding twenty years. [R., § 4234; C., '51, § 2610.]

5193. Possession of burglar's tools. 15 G. A., ch. 13, § 1. If any person shall be found, having in his possession at any time any burglar tools or implements, with intent to commit the crime of burglary, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, and it shall be the duty of the court before whom such conviction is had to retain possession of such burglar tools or implements, to be used in evidence in any court in which said person is tried.

5194. Other breakings and enterings. 3894. If any person with intent to commit any public offense, in the day-time break and enter, or in the night-time enter without breaking, any dwelling-house; or at any time break and enter any office, shop, store, warehouse, railroad car, boat, or vessel, or any buildings in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one hundred dollars and imprisonment in the county jail not more than one year. [R., § 4235; C., '51, § 2611; 13 G. A., ch. 185.]

One who receives the stolen goods is not an accomplice in the crime of breaking and entering here defined: *State v. Hayden*, 45–11.

The crime of entering a dwelling-house in the night-time with intent to commit a public offense is included in that of burglary, under the provisions of § 5851, so that under an indictment for the latter offense a defendant may be convicted of the former: *State v. Maxwell*, 42–208.

The offense is against the owner of the building, and his name, and not that of the owner of goods, etc., therein, which the accused intended to steal, should be given in the indictment. If the name of such owner is not known it should be so stated: *State v. Morrisey*, 22–158.

While the offense defined by this section is similar to that of burglary, defined by § 5190, an indictment which describes the house as a place "in which goods were kept for use, sale and deposit," sufficiently specifies that the offense charged is one under this section, and not under the other: *State v. Franks*, 64–39.

Possession of burglarious tools within a few hours after the commission of the crime may be proven as tending to connect defendant with the crime, and such evidence is admissible for that purpose although it shows in itself a distinct substantive offense: *Ibid.*

5195. Attempting to break and enter. 18 G. A., ch. 11, § 1. If any person, with intent to commit any public offense, shall attempt to break and enter any dwelling-house, at any time, or to enter any dwelling-house in the

night-time without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale or deposit, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not more than one year.

5196. Selling or concealing mortgaged property. 3895. If any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell or in any manner dispose of the property covered by such mortgage without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and be punished accordingly. [R., § 4236.]

An indictment under this section should aver that the mortgage remains unsatisfied: *State v. Gustafson*, 50-194.

The consent of the mortgagee here contemplated, while it prevents the act from being a crime, does not constitute a waiver of his lien on the property: *Oswald v. Hayes*, 42-104, 106.

Where a mortgage of personal property provided that, if the mortgagor removed it from the county, the mortgagee might take possession of and sell it, *held*, that a mere removal from the county would constitute no offense under this section, and a subsequent concealment or sale would not be an offense in the county where the mortgage was executed; but it seems the offense would be committed in the county from which the property was thus subsequently taken for the purpose of concealment and sale: *State v. Julien*, 48-445.

A subsequent mortgage of the same property by the mortgagor is not void under this statutory provision: *Tootle v. Taylor*, 64-629.

It is the selling of mortgaged property without the consent of the *then* holder of the mortgage that is made criminal. Consent of the mortgagor, given before the execution of the mortgage, that the mortgaged property may be sold, may, however, constitute a continuing consent, at least until the act consented to could properly be done, and may prevent an act in accordance with such consent from being criminal. The rule as to the inadmissibility of parol evidence to contradict a written contract is not applicable in such case. If the consent is such, in whatever way it may be given, that the seller honestly believes that he is authorized to sell the property, his honest act cannot be converted into a criminal one by the rules of evidence: *Walker v. Camp*, 69-741.

It is not criminal to purchase mortgaged chattels: *McDonald v. Norton*, 72-652.

5197. Driving away stock. 3896. If any person knowingly or wilfully drive off, or suffer or permit to be driven off, any horned or other stock of another to a distance exceeding three miles from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense. [9 G. A., ch. 34, §§ 1, 2; 12 G. A., ch. 108; 14 G. A., ch. 88.]

To authorize a recovery under this section for damages suffered it is necessary to allege and prove that defendant had knowledge of the fact that the animal had entered his drove and was being taken away: *Chamberlain v. Gage*, 20-303.

5198. Stealing or knocking off fruit in day-time. 3897. If any person maliciously or mischievously enter the inclosure of another, with intent to knock off, pick, destroy, or carry away; or having lawfully entered, do afterwards wrongfully knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or any other fruit or flower of any tree, shrub, bush, or vine, he shall be punished, for the first offense, by a fine not less than five dollars nor exceeding one hundred dollars, with the costs of conviction, or by imprisonment in the county jail not exceeding thirty days; and should any person be found guilty of a second violation hereof, he shall be fined not less than ten dollars and costs of conviction, or imprisonment as above provided. [9 G. A., ch. 120; 12 G. A., ch. 74, § 1.]

5199. Same in night-time. 3898. If any person maliciously or mischievously enter the inclosure of another in the night-time and knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or other fruit or flower of any tree, shrub, bush, or vine; or, if any person hav-

ing entered the inclosure of another in the night-time, with the intent to knock off, pick, destroy, or carry away any fruit or flower as aforesaid be actually found therein, he shall, on conviction thereof, be punished by a fine not less than twenty-five nor to exceed one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days. [12 G. A., ch. 74, § 2.]

A party has no right to prevent a trespass of this kind by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring-gun: *Hooker v. Miller*, 37–613.

5200. Destroying or injuring fruit trees. 3899. If any person maliciously or mischievously bruise, break, pull up, cut down, carry away, destroy, or in anywise injure any fruit or ornamental tree, shrub, or vine, growing or standing on the land of another, he shall be punished by a fine not less than ten nor exceeding one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days. [Same, § 4.]

5201. Disturbing stock. 3900. Any person who knowingly discharges fire-arms of any description within, or in the immediate vicinity of, any inclosure where cattle, hogs, or sheep are being fed for the purpose of fattening the same; or any person who enters such inclosure with fire-arms, or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner or the person having control thereof to enter said premises, shall be guilty of a misdemeanor. [14 G. A., ch. 14, § 1.]

[Sec. 3901 is repealed by § 2496*a*.]

INTERFERENCE WITH RAILWAYS.

5202. Shooting or throwing at train. 16 G. A., ch. 148, § 1. If any person shall throw any stone, or other substance of any nature whatever, or shall present or discharge any gun, pistol, or other fire-arm at any railroad train, car, or locomotive engine he shall be deemed guilty of a misdemeanor and be punished accordingly.

5203. Jumping off cars in motion. 16 G. A., ch. 148, § 2. If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, shall get upon, or off, any locomotive engine, or car of any railroad company while said engine or car is in motion, or elsewhere than at the established depots of such company, or who shall get upon, cling to, or otherwise attach himself to any such engine or car, for the purpose of riding upon the same, intending to jump therefrom, when such engine or car is in motion, he shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

Where the recovery for injury received while getting off of a train while in motion is sought to be defeated on the ground that such act was unlawful and constituted contributory negligence, plaintiff may, under allegation of freedom from contributory negligence, prove that the act was with the consent of the conductor: *Raben v. Central Iowa R. Co.*, 74–732.

5204. Uncoupling locomotive or cars. 19 G. A., ch. 112, § 1. If any person shall wilfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any manner aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or both, at the discretion of the court.

5205. Seizing or running locomotive. 19 G. A., ch. 112, § 2. If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage, or other car attached thereto, and run the same upon

any railroad, or shall aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding ten years, or by fine not exceeding two thousand dollars, or both, at the discretion of the court.

5206. Wrongfully running hand-car. 19 G. A., ch. 112, § 3. If any person shall, without permission from the proper authority, wrongfully take or run any hand-car upon any railroad in this state, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, at the discretion of the court: *Provided*, that if by such unlawful use of any hand-car any locomotive or car is thrown from the track, or a collision produced, or any person injured thereby, he shall, on conviction, be imprisoned in the penitentiary for a term of not more than five years; and *provided further*, that if by reason of such unlawful use of any hand-car any person is killed, such person so offending shall be deemed guilty of manslaughter.

5207. Interference with air-brake or bell-rope; arrest. 19 G. A., ch. 112, § 4. If any person not an employee upon the railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, [he] shall be subject to the penalty provided in section three of this act [§ 5206] for the unlawful running of a hand-car on any railroad; and any conductor or brakeman on a railroad train shall have power to arrest such person so offending and deliver him to some peace officer on the line of the railroad.

CHAPTER 4.

LARCENY AND RECEIVING STOLEN GOODS.

5208. Larceny defined. 3902. If any person steal, take, and carry away of the property of another, any money, goods, or chattels; any writ, process, or public record; any bond, bank-note, promissory note, bill of exchange, or other bill, order, or certificate; or any book of accounts respecting money, goods, or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished, or diminished, he is guilty of larceny, and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. [R., § 4237; C., '51, § 2212.]

Felonious taking: To constitute larceny the property must have been feloniously taken from the owner without his consent, or obtained by false representations, etc. If given by the owner to the defendant by virtue of his employment as agent, servant, or otherwise, and afterwards converted, the offense is embezzlement: *Ennis v. State*, 3 G. Gr., 67.

A felonious taking is a taking without color of right or excuse for the act, and it may safely be said that there was no color of right or excuse if the defendant knew that he had no authority to take the property, and with this knowledge he knowingly carried it away and converted it to his own use: *State v. Rivers*, 60-381.

A taking from the person is not necessary to constitute larceny (a special penalty therefor being provided in § 5211); and picking up money dropped by another, with unlawful intent, and converting the same to one's own use without the knowledge of the owner, is sufficient to constitute the offense: *State v. Pratt*, 20-267.

If the original possession of the property was innocent a subsequent conversion will not constitute larceny: *State v. Wood*, 46-116.

Where an auctioneer employed to sell im-

pounded animals sold one of them as his own, and it was taken away by the purchaser, *held*, that there was sufficient taking to constitute larceny on the part of the person selling: *State v. Hunt*, 45-673.

A pledgee has such special property in the thing pledged that a taking from him by the pledgor may be larceny: *Bruley v. Rose*, 57-651.

Intent: Taking property into possession with intent to appropriate it is larceny, although the property is afterward let go, the latter fact being proper to be considered by the jury in determining the intent with which possession was taken: *Georgia v. Kepford*, 45-48.

To warrant a conviction for larceny the prosecution should show that possession was taken with the intent then existing in the mind of defendant to steal the property. Such intent, however, may be shown by subsequent acts and conduct: *State v. Wood*, 46-116.

If one sell or dispose of the property of another under the well founded, though erroneous, belief that he is authorized so to do, he is not guilty of larceny: *State v. Barrackmore*, 47-684.

The act of an employee in giving away the employer's property, although without authority, may not necessarily constitute larceny, if the circumstances are such as to negative a criminal intent: *Mielenz v. Quasdorf*, 68-726.

In a prosecution for larceny of two colts, *held*, that evidence that the sale of the colts by a former owner to the prosecutor was a mere sham, and that they had afterward been sold by such former owner to defendant, should have been admitted: *State v. Waltz*, 52-227.

A pretended claim that money taken is due for services will not constitute a defense if it appears from the circumstances that such claim was a sham and that defendant intended to fraudulently appropriate the money: *State v. Bond*, 8-540.

Where defendant offered to prove by one at whose house he stopped that his acts were such as to show that it was not his intention to steal the property, *held*, that such offer was too indefinite and the evidence was properly excluded: *State v. Hart*, 29-268.

Lost property: To render the finding or conversion of lost property larceny, it must be shown that the person so finding and converting knew the owner of the property: *State v. Taylor*, 25-273.

The crime of larceny as to lost property consists in the original taking and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. The omission to take the steps required by statute for the finding of the owner will not render the party guilty of larceny, if the owner was not known at the time of the taking: *State v. Dean*, 49-73.

If one picks up a pocket-book which has been dropped from the pocket of the owner, and with an unlawful intent converts it to his own use without the knowledge of the owner, he is guilty of larceny: *State v. Pratt*, 20-267.

Ownership: In an indictment for larceny of chattels in which a person has a special property or which he holds in trust, the ownership may be laid in either the general owner or the one having the special property: *State v. Mullen*, 30-203.

The ownership of property need not be shown to have been in the party from whom it was taken, if it was in his possession: *State v. Stanley*, 48-221.

In the case of larceny of property in the possession of a receiver, the indictment may properly lay the ownership of the property in the receiver: *State v. Rivers*, 60-381.

From possession of officer: Larceny from a receiver in possession of property is not from the possession of an officer in such sense as to constitute that specific crime as defined by statute: *Ibid.*

As intoxicating liquors seized by an officer on a warrant for their forfeiture are not subject to replevin, it would be a crime under the statute providing for the taking of goods from an officer to take possession of them under such a writ: *State v. Harris*, 38-242.

What property subject to larceny: A raccoon is not subject to larceny: *Warren v. State*, 1 G. Gr., 106.

Intoxicating liquors, although kept for sale contrary to law, are subject of larceny: *State v. May*, 20-305.

"Money" and "bank-notes" are subjects of larceny: *State v. Carr*, 43-418.

Indictment; description of notes or bills: An indictment describing money and notes as "gold and silver coin" and "Clark's Exchange Bank bills of the value of," etc., *held* sufficient: *Munson v. State*, 4 G. Gr., 483.

So, also, an indictment *held* sufficient which charged the taking of "a promissory note for the payment of money, commonly called a bank-note, purporting, etc., of the value of," etc.: *State v. Bond*, 8-540.

So also one charging the larceny of "$180 in bank-notes, usually known and described as greenbacks:" *State v. Hockenberry*, 30-504.

So *held*, also, where the property was described as bank-bills of the amount and value of, etc., "the number and denomination of which are to the jury unknown:" *State v. Hoppe*, 39-468.

It is not required that, in an indictment for larceny of an instrument in writing, the property shall be more particularly described than any other stolen property; therefore, *held*, that an indictment charging that defendant took, etc., a bill of exchange, to wit, an order for the payment of money (describing it), and of the value of $20.97, was sufficient: *State v. Pierson*, 59-271.

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *Ibid.*

Indictment for larceny from a bank, describing the property as seven one hundred dollar notes, of the value and denomination of one hundred dollars each, consisting of national bank notes, national currency notes, called greenbacks, and all of the aggregate value of seven hundred dollars, *held* sufficient as to description: *State v. Graham*, 65-617.

Evidence: A pertinent, well-connected chain of circumstances, showing that certain

money found is the same as that taken from the prosecutor, is sufficient evidence of larceny of such money from him, although he cannot identify any of the particular bills: *State v. Hoppe*, 39-468.

In a particular case, *held*, that the evidence was sufficient to identify the bills found on the person of defendant to be the same as those charged to have been stolen from the prosecutor, the general appearance, manner of folding and denomination of the bills being the same: *State v. Buckley*, 60-471.

Proof that defendant charged with the larceny of bank-notes, and in whose possession notes resembling those stolen were found soon after the larceny, had money of the same denomination some two or three months before the larceny was committed, would not be admissible in behalf of defendant: *State v. Graham*, 65-617.

Proof of the denomination, etc., of bills being made, it will be presumed that they were genuine: *State v. Pratt*, 20-267.

Evidence in particular cases *held* sufficient to sustain a conviction for larceny: *State v. Lillard*, 59-479; *State v. Day*, 60-100.

Corpus delicti: Where the evidence in a prosecution for larceny showed that the horse charged to have been stolen was put into the stable at night and was gone the next morning, *held*, that the *corpus delicti* was sufficiently proven: *State v. Rodman*, 62-456.

Circumstantial: In a prosecution for larceny, *held* proper to instruct the jury that the evidence to establish the facts necessary to convict the defendant may be direct or circumstantial, or partly direct and partly circumstantial; direct, as by persons who saw the act; or circumstantial, as by evidence of facts from which the guilt of defendants may be fairly presumed: *State v. Brady*, 27-126.

Proof of non-consent: The rule requiring the production of the best evidence of which the nature of the case admits would require the introduction of the owner of the stolen goods to prove his non-consent to the taking except in cases where the property is stolen from a bailee, or some other person holding possession thereof, or where it is impossible to produce the evidence of the owner: *State v. Osborne*, 28-9.

Recent possession of stolen property: Possession of the stolen property immediately after a larceny is presumptive proof that the party so in possession is guilty of the larceny: *State v Brady*, 27-126; *State v. Golden*, 49-48.

Such presumption is sufficient to convict unless rebutted: *State v. Hessians*, 50-135.

Recent possession of stolen property, unexplained, is evidence of guilt: *Johnson v. Miller*, 63-529.

But such possession is presumptive proof only after the stealing has been proved: *State v. Taylor*, 25-273.

The possession must be recent in order that it shall be admissible in evidence to prove the guilt of the accused: *Warren v. State*, 1 G. Gr., 106.

What is to be deemed recent possession depends very much on the character of the goods stolen. If they are such as to pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they are of a class of property which circulates more slowly or is rarely transmitted: *State v. Walker*, 41-217.

There may be cases where the possession is so long after the commission of the crime that the court will refuse to submit the question to the jury, deciding as a matter of law that the possession is not recent, but in all other cases the question is one of fact: *Ibid.*

In a particular case, *held*, that an instruction directing the jury that, as a matter of law, proof of possession of part of the stolen goods four months after the commission of the crime was recent possession, from which a strong presumption of guilt arose, unless such possession was satisfactorily explained, was erroneous: *Ibid.*

The admission of defendant that ten months previous to the time the property is found in his possession he had no such property does not show the possession of the property to be recent in such sense as to throw upon him the burden of explaining such possession: *State v. Wallace*, 47-660.

The fact that stolen property is found in defendant's place of business will not alone raise the presumption of guilt, there being other inmates of the place. But if defendant admits the possession of the property and seeks to prove that it was not the property stolen, the evidence may properly be submitted to the jury: *State v. Griffin*, 71-372.

Where a stolen horse when found, soon after the larceny, was being ridden by a traveling companion of the defendant, *held*, that evidence of such fact was a circumstance tending to prove defendant's guilt, and sufficient to warrant his conviction: *State v. Pennyman*, 68-216.

It seems that where the party in whose possession recently stolen goods are found claims to have bought them of a real person, naming him, or of the thief, when there was no previous acquaintance or evidence of collusion, such explanation must be negatived by the state; but an explanation by such party that he bought of a stranger is not sufficient to oblige the state to disprove the statement before the presumption of guilt will arise: *State v. Brown*, 25-561.

The person charged with larceny may explain his possession of stolen property by showing what was said to him at the time he acquired possession: *State v. Jordan*, 69-506.

Evidence of recent possession of stolen property and falsity of explanations made thereof, *held* sufficient in a particular case to warrant a conviction: *State v. Hallett*, 63-259.

While the presumption of guilt from recent possession, being recognized by the law, may be termed a presumption of law, it may also be termed a presumption of fact, as implying that from such fact the law will raise a presumption: *State v. Kelly*, 57-644.

The presumption arising from the recent possession of stolen goods may be overcome by testimony establishing facts inconsistent with guilt. Good character may serve in some cases to overcome such presumption: *Ibid.*; *State v. Richart*, 57-245.

Where the prosecution relies upon possession by defendant of recently stolen property,

the defendant is not required to overthrow such presumption by a preponderance of evidence of the honesty of such possession. Evidence sufficient to raise a reasonable doubt in his favor is sufficient: *State v. Richart*, 57–245; *State v. Emerson*, 48–172.

In such cases it is sufficient to authorize an acquittal if the evidence is such as to raise a reasonable doubt whether defendant honestly came into possession of the stolen goods. An instruction that the jury should acquit if the evidence left it reasonably doubtful whether defendant acquired the possession by theft, *held* correct: *State v. Peterson*, 67–564.

Unexplained possession by the defendant of recently stolen property is a circumstance against him, and will justify conviction unless there is such evidence of good character or other circumstances as to raise a reasonable doubt of guilt, or, if an explanation has been made, the jury should be instructed to acquit if the explanation is enough to raise a reasonable doubt: *State v. Kirkpatrick*, 72–500.

In a particular case, *held*, that the method of finding the goods at a place not in the dwelling-house of the defendant, and under circumstances indicating a knowledge on the part of others as to their location, were sufficient to prevent the recent possession relied upon from being satisfactory evidence of guilt: *Warren v. State*, 1 G. Gr., 106.

If the jury fail to find from the evidence that defendant was in any manner engaged in the larceny of the property they should acquit, although he has failed to show that he came honestly into possession: *State v. Jones*, 33–9.

The fact that recent possession of stolen property has not been explained in a manner consistent with defendant's innocence will not in itself necessarily establish his guilt: *State v. Jordan*, 69–506.

Possession of other stolen property than that for the larceny of which defendant was on trial, *held* admissible, not as showing the commission of another crime, but as contradicting the explanation made by defendant as to the possession by him of the property stolen in the commission of the larceny for which he is on trial: *State v. Ditton*, 48–677.

Recent possession of property acquired by breaking into a store-room, if not explained, raises the presumption that the breaking and entering were with intent to commit larceny: *State v. Golden*, 49–48.

To warrant conviction of defendant on proof of subsequent possession of the stolen property the identity of the property should be satisfactorily established: *State v. Osborne*, 45–425.

That the explanation of the possession of recently stolen property will require an acquittal, so far as the evidence of guilt consists in such recent possession, if it raises a reasonable doubt of defendant's guilt, see notes to § 5813.

See further, as to presumption from possession of stolen property, cases cited under § 5210.

Grand and petit larceny: There are not two degrees in the crime of larceny, but only in the punishment; and a conviction for larceny bars a subsequent prosecution for grand larceny: *State v. Murray*, 55–530.

So, also, a conviction for petit larceny bars a prosecution for larceny from the person under § 5211: *State v. Gleason*, 56–203.

Under an indictment for larceny of property of greater value than twenty dollars defendant may be convicted upon proof of a larceny of part of the property less than twenty dollars in value. The offense is the same: *State v. Hessian*, 58–68.

In a trial upon an indictment for larceny charging the value of the property as exceeding twenty dollars, it is not necessary to instruct the jury as to the difference in the degrees of the offense of larceny. They should merely be instructed to find the value of the property: *Ibid.*

The finding of the jury that the value of the property did not exceed twenty dollars will not deprive the court of jurisdiction, under an indictment for larceny, to impose the proper sentence for the lesser offense, although larceny of goods less than twenty dollars in value is a misdemeanor exclusively cognizable before a justice of the peace: *State v. Church*, 8–252; *State v. Stingley*, 10–488.

And see notes to Const., art. I, § 11.

Where the jury are in reasonable doubt as to whether the value of the property stolen exceeds twenty dollars in value they should only convict of the lesser crime: *State v. Wood*, 46–116.

Value of property stolen: The verdict on an indictment for larceny should fix the value of the property stolen, so that the court may know of which degree of the offense the defendant is convicted. If the verdict does not so fix the value a new trial should be awarded: *Ray v. State*, 1 G. Gr., 316.

Such new trial will not be unlawful as putting the defendant twice in jeopardy (Const., art. I, § 12): *State v. Redman*, 17–329.

The jury should be instructed to assess the value of the property at what it would bring in the market, and not at what it was worth to the owner: *State v. Smith*, 48–595.

The fact that the value of the property was over twenty dollars, as well as the stealing itself, must be made out beyond a reasonable doubt to warrant a conviction of the higher offense. A preponderance of evidence alone will not be sufficient: *State v. Wood*, 46–116.

The jury should be instructed that if they are not satisfied beyond reasonable doubt that the value of the property stolen exceeds twenty dollars they should convict of only the lower degree: *State v. McCarty*, 73–51.

The question whether the offense is to be tried as a felony or a misdemeanor is to be determined by the value of the property as stated in the indictment or information, and not by the value as found by the trial jury: *State v. Church*, 8–252.

It is error to instruct the jury that the question is as to the value of the property to the owner. The true rule is the real value of the property in the market: *State v. Smith*, 48–595.

Where the testimony as to the value is conflicting, the supreme court will not reverse the case unless there is such want of evidence in support of the verdict as to give rise to the presumption that it was not the result of an

honest and intelligent exercise of judgment by the jury: *State v. Scott*, 48-597.

Recovery of stolen property: Where stolen property is sold to a third person and afterwards retaken from him by the owner, he may recover the price paid in an action against the seller, even though the seller has not been convicted of the larceny: *Barton v. Faherty*, 3 G. Gr., 327.

Venue: Where property is stolen within the jurisdiction of another state and brought within this state, the offense is punishable as larceny in this state in any county into which the stolen goods are taken, on the principle that the continued possession of property stolen is in itself larceny. Every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense: *State v. Bennett*, 14-479.

In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods: *State v. Lillard*, 59-479.

5209. In night-time in house, store, boat, etc. 3903; 15 G. A., ch. 11. If any person in the night-time commit larceny in any dwelling-house, store, or any public or private building, or in any boat, vessel, or water-craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen does not exceed twenty dollars, by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4238; C., '51, § 2613.]

An acquittal of larceny from a dwelling-house in the night-time prevents a subsequent prosecution for robbery in the same transaction, as each includes the crime of larceny: *State v. Mikesell*, 70-176.

And see notes to following section.

5210. Same in day-time. 3904; 15 G. A., ch. 11. If any person in the day-time commit larceny as specified in the preceding section, and the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed twenty dollars, by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4239; C., '51, § 2614.]

The provisions of this and the preceding section merely point out certain circumstances which are an aggravation of the offense of larceny, and will subject the offender to a severer penalty. The facts of the time and place of the commission affect only the degree of punishment which shall be imposed upon the offender: *State v. Elsham*, 70-531.

Larceny from a dwelling-house in the night-time and in the day-time are not different offenses; but each differs from simple larceny only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *Ibid.*

Where defendant was indicted for stealing personal property of less than twenty dollars in value from a dwelling-house in the day-time, *held*, that the offense was one within the jurisdiction of the district court: *State v. Dawson*, 17-584.

The possession of goods recently stolen by breaking into a store-room, if not explained, raises the presumption that the party in possession thereof committed the breaking with intent to commit larceny. Such possession is competent as tending to prove the guilty intent: *State v. Golden*, 49-48; and as to the presumption from such possession in cases of larceny, see notes to § 5208.

5211. From building on fire or from the person. 3905. If any person commit the crime of larceny by stealing from any building on fire; or by stealing any property removed in consequence of an alarm caused by fire; or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years. [R., § 4240; C., '51, § 2615.]

A former conviction or acquittal, before a justice of the peace, of the crime of larceny, is a bar to an indictment under this section for stealing from the person, when based on the same act. The latter is larceny and nothing more: *State v. Gleason*, 56-203.

The crime of larceny from the person is included in the crime of robbery, defined in § 5157, and an indictment for the former offense is sustained by evidence which establishes the latter: *State v. Graff*, 66-482.

5212. Falsely personating. 3906. If any person falsely personate or represent another and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to con-

vert the same to his own use, he is guilty of larceny, and shall be punished accordingly. [R., § 4241; C., '51, § 2616.]

This section abrogates the common-law rule that a trespass is necessary to constitute larceny. The cases provided for here would not be larceny at common law: *State v. Brown*, 25–561.

Representations made by acts or declarations intended to induce the belief that the person making them is some one else may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Goble*, 60–447.

5213. Appropriating found property. 3907. If any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly. [R., § 4242; C., '51, § 2617.]

To render finding or conversion of lost property larceny, it must be shown that the person so finding and converting knew the owner of the property: *State v. Taylor*, 25–273.

The crime consists in the original taking, and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. An omission to take the steps specified in § 2350 *et seq.* will not render the party guilty under this section, where the owner was not known at the time of the taking: *State v. Dean*, 49–73.

If one picks up a pocket-book which has been dropped from the pocket of the owner, and with an unlawful intent converts it to his own use without the knowledge of the owner, he is guilty of larceny: *State v. Pratt*, 20–267.

The fact that money which is claimed to have been found is returned when demanded will not show that there was not intent to convert, sufficient to constitute larceny. The question whether the finder knew the owner and intended to appropriate the property is for the jury: *State v. Bolander*, 71–706.

See further notes to § 5208.

5214. Embezzlement by public officers. 3908. If any state, county, township, school, or municipal officer, or officer of any state institution, or other public officer within the state, charged with the collection, safe keeping, transfer, or disbursement of public money, fails or refuses to keep in any place of deposit that may be provided by law for keeping such money, until the same is withdrawn therefrom upon warrants issued by the proper officer, or deposits such money in any other place than in such safe, or unlawfully converts to his own use in any way whatever, or use by way of investment in any kind of property, or loan without the authority of law any portion of the public money intrusted to him for collection, safe keeping, transfer or disbursement, or converts to his own use any money that may come into his hands by virtue of his office, shall be guilty of embezzlement to the amount of so much of said money as is thus taken, converted, invested, used, loaned, or unaccounted for, and, upon conviction thereof, he shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled; and, moreover, is forever after disqualified from holding any office under the laws or constitution of this state. [R., §§ 806, 807, 4243; C., '51, § 2618.]

The offense here defined is different from the offenses described in §§ 1399, 1400. The latter sections contemplate cases where no loss results, but this one refers to cases where the money is unaccounted for; and to sustain this construction the word "or" preceding the words "unaccounted for" will be construed "and." An indictment under this section should charge that the money is "unaccounted for:" *State v. Brandt*, 41–593.

A deputy state treasurer is an officer within the meaning of this section, and may be indicted for embezzlement: *Ibid.*, 606.

Conversion is established by showing demand and refusal, unless a sufficient excuse is shown for such refusal: *State v. Bryan*, 40–379.

One who has acted *de facto* as a public officer cannot deny that he is such an officer when indicted for malfeasance: *State v. Stone*, 40–547.

To constitute the offense here defined the money must have been both misapplied and lost, and the crime consists only in converting, using or loaning so much of the public money intrusted to the officer for safe keeping as is taken and unaccounted for: *State v. Parsons*, 54–405.

It being provided that the boards of directors of independent school districts shall elect a treasurer, *held*, that a indictment against such treasurer, designating him as "treasurer of the board of directors of the independent school district of," etc., was sufficient: *Ibid.*

The fact that the officers of a municipal

corporation loaned the public funds in violation of the statute does not prevent the same being recovered in an action by the corporation against the person to whom they were so loaned or his surety: *District T'p v. Calvin*, 59–189.

A county treasurer prosecuted for embezzlement may show that the defalcation took place at such time that the prosecution is barred by the statute of limitations, although, by fraudulent statements to the board of supervisors, he made it appear subsequently to such actual defalcation that he had on hand the necessary balance and that his accounts were correct. The rule of estoppel applicable in a civil action against the treasurer cannot be enforced in a criminal prosecution: *State v. Hutchinson*, 60–478.

5215. Other embezzlement. 3909; 21 G. A., ch. 30. If any officer, agent, clerk or servant of any incorporated company, or voluntary association, or if any clerk, agent or servant of any private person, or of any copartnership except persons under the age of sixteen years, or if any attorney-at-law, collector or other person, who in any manner receives or collects money or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secrete with intent to embezzle and convert to his own use without the consent of his employer, master, or the owner of the money or goods collected, or received any money or property of another, or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney-at-law, collector, or other person which has come to his possession or under his care in any manner whatsoever, he shall be deemed guilty of larceny and punished accordingly. And in a prosecution for such crime it shall be no defense that such officer, agent, clerk, servant, collector, attorney-at-law, or other person was entitled to a commission or compensation out of such money or property as compensation or commission for collecting or receiving the same, for or on behalf of the owner thereof. *Provided*, it shall be no embezzlement on the part of such agent, clerk, servant, attorney-at-law, collector, or other person to retain his reasonable compensation or collection fee, for collecting or receiving the same; but this proviso shall not authorize or warrant an attorney-at-law to retain any money or property as compensation, or as money and property on which he has an attorney's lien after the filing of a bond as provided for in section two hundred and sixteen of the code [§ 294]. No offense committed before the taking effect of this act shall be affected by the repeal of section three thousand nine hundred and nine of the code.

To constitute the crime here defined there must exist the relation of master and servant, or employer and employee, and the property stolen or converted must have been received by virtue of such employment: *State v. Johnson*, 49–141.

"Money or property," as here used, includes bills of exchange, etc. The crime defined is similar to that of larceny, and covers cases where, by reason of the trust reposed in defendant, the act would not be larceny at common law. Whatever would be property under one section would be under the other: *State v. Orwig*, 24–102.

Where the taking is not *animo furandi*, but the property is delivered to the defendant voluntarily while he is in the employ of the owner, and afterwards is appropriated by him, the crime is not larceny but embezzlement: *Ennis v. State*, 3 G. Gr., 67.

The crime of embezzlement embraces all the elements of larceny except the actual taking of the property or money embezzled: *State v. Baldwin*, 70–180.

The clause "without the consent of his employer" applies to embezzling and converting as well as to taking and secreting. That fact is a necessary element of the offense here defined and should be charged in the indictment: *State v. Foster*, 11–291.

Where the owner of a watch delivered it to another under an agreement that the latter was to trade it for a wagon and receive a certain sum as compensation for his services, *held*, that the relation between the parties was such that the wrongful conversion by the person intrusted with the watch constituted embezzlement: *State v. Foster*, 37–404.

Conversion may be shown either by direct proof of the fact of conversion or by proof of demand and refusal, but mere proof of the receipt of funds and failure to account therefor on demand, while sufficient to establish embezzlement by a public officer, under § 5214, is not sufficient to show embezzlement by an agent or servant: *State v. Bryan*, 40–379.

Where an agent, in order to make his books balance and cover up deficiencies on account of sums of money before appropriated to his own use, reported certain sums as unpaid which were in fact received by him, *held*, that he was guilty of embezzling such sums: *Bowman v. Brown*, 52–437.

Under this section an agent of a corporation may be guilty of embezzlement, although un-

der the age of sixteen years: *State v. Goode*, 68-593.

And an agent may be guilty of embezzling his employer's money, either by actual conversion or by secreting the same with intent to convert: *Ibid.*

It is not necessary to allege the particular nature or character of the employment, but it is sufficient to aver generally that defendant was in the employment of the person named, as his clerk, without specifying particularly the employment. The words "such employment" in the latter part of the section relate to the general character of the employment rather than the particular business in which the accused was engaged when he received the money or property into his possession: *State v. Jamison*, 74-602.

5216. Same by carriers or persons intrusted. 3910. If any carrier or other person to whom any money, goods or other property, which may be the subject of larceny, has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny and shall be punished accordingly. [R., § 4245; C., '51, § 2620.]

The offense here defined can only be committed upon property which "has been delivered to be carried for hire:" *State v. Stoller*, 38-321.

5217. Receiving stolen goods. 3911. If any person buy, receive, or aid in concealing any stolen money, goods, or any property, the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall be punished, when the value of the property so bought, received, or concealed by him exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year; and when the value of the property so bought, received, or concealed by him does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [R., § 4246; C., '51, § 2621; 9 G. A., ch. 121.]

Merely assisting the defendant by giving him his breakfast and feed for stolen horses, knowing that they were stolen, *held* not sufficient to warrant a conviction of this offense. The accused must have aided in concealing or hiding the property: *Upton v. State*, 5-465.

The fact of aiding in concealing stolen goods, knowing them to be stolen, necessarily implies a felonious intent: *State v. Turner*, 19-144.

The crime here defined may be committed as to property procured by burglary or robbery as well as by larceny: *Ibid.; State v. Lane*, 68-384.

To receive stolen property, with knowledge of the theft, is sufficient to constitute the crime: *State v. Lane*, 68-384.

Evidence in a particular case *held* sufficient to support a verdict for receiving and aiding in concealing, although no physical possession of the goods by defendant was shown: *State v. St. Clair*, 17-149.

Defendant's explanations in a particular case as to how he came into possession of the property being conflicting and unsatisfactory, a verdict of guilty of receiving stolen goods was held proper: *State v. Mayer*, 45-698.

5218. Same on second conviction. 3912. If any person after having been convicted of the offense of buying, receiving, or aiding in the concealment of stolen money, goods, or any property, the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense; or if any person at the same term of court is convicted of three distinct acts of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished as provided in the preceding section. [R., § 4248; C., '51, § 2623.]

Under Revision, § 4247, which provided that if a person previously convicted of larceny committed another larceny, or was convicted therefor, or was at the same term of court convicted of three distinct larcenies, he should be deemed a common and notorious thief and be punished by imprisonment in the penitentiary for not less than three years, *held*, that the punishment there prescribed should be inflicted when the facts authorizing it appeared on the trial of the accused for larceny; that the section did not describe a distinct crime,

and did not contemplate that the indictment need state the facts necessary to make the accused "a common and notorious thief," or charge him with being such: *State v. Riley*, 28-547.

[This section is identical with Revision, § 4248, but there the "preceding section" was Revision. § 4247, which is not inserted in the Code; consequently the punishment under the "preceding section" as here provided is very different from that contemplated in the section where it originally stood.]

5219. Receiver convicted without principal. 3913. In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver nor to prove on the trial thereof that the person who stole, robbed, or took the property has been convicted. [R., § 4249; C., '51, § 2624.]

5220. Measure of value of stolen goods. 3914. If the property stolen consist of any bank-note, bond, bill, covenant, bill of exchange, draft, order, or receipt, or any evidence of debt whatever; or any public security, or any instrument whereby any demand, right, or obligation may be assigned, transferred, created, increased, released, extinguished, or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen. [R., § 4250; C., '51, § 2625.]

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *State v. Pierson*, 59-271.

Indictment for larceny from a bank, describing the property as seven one hundred dollar notes, of the value and denomination of one hundred dollars each, consisting of national bank notes, and national currency notes, called greenbacks, and all of the aggregate value of seven hundred dollars, *held* sufficient: *State v. Graham*, 65-617.

For other cases as to the description, in the indictment for larceny, of notes and bills alleged to have been stolen, see § 5208.

5221. Taking goods from officer. 3915. If any person knowingly and without authority of law, take, carry away, secrete, or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and rightfully held by such officer by virtue of execution, writ of attachment, or other legal process issued under the laws of Iowa, he shall be deemed guilty of larceny, and shall be punished, when the value of the property so taken, carried away, secreted, or destroyed, exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than one year; and when the value of the same does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not more than thirty days. [R., § 4251.]

Intoxicating liquors seized on a warrant issued on information for their forfeiture (under § 2401) are not subject to replevin, and to take them from a proper officer under such writ would be an unlawful act under this section: *State v. Harris*, 38-242.

A receiver does not hold property under what is denominated a legal process issuing out of any court, and he is not an officer within the meaning of this section. Therefore it is proper to charge the wrongful taking of property from him as larceny, laying the ownership of the property in the receiver: *State v. Rivers*, 60-381.

5222. Deposited by officer for safe keeping. 3916. The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping, to be returned for the purpose of being disposed of on legal process, shall be deemed to be the possession and custody of the officer having or depositing the same, and entitled to the custody thereof, and in a prosecution under the preceding section, the property taken, carried away, secreted, or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense. [R., § 4252.]

CHAPTER 5.

FORGERY AND COUNTERFEITING.

5223. Forgery defined. 3917. If any person with intent to defraud, falsely make, alter, forge, or counterfeit any public record, or any process issued or purporting to be issued by any competent court, magistrate, or officer, or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance, discharge, or accountable receipt for money, or other valuable thing; or any acceptance of any bill of exchange, or order; or any indorsement, or assignment of any bill of exchange, promissory note, or order, or of any debt or contract; or any instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be punished by imprisonment in the penitentiary not more than ten years. [R., § 4253; C., '51, § 2626.]

Forgery defined: Forgery is the feloniously making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability: *State v. Johnson*, 26–407; *State v. Thompson*, 19–299.

In a prosecution for forgery in altering a receipt, the fact that defendant could not reap any personal advantage from the alteration is not a defense; the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery: *State v. Wooderd*, 20–541.

The criminal intent, inferred from forging an instrument and using it in support of a claim, cannot be negatived by proof that the claim is a just one: *Ibid.*

It would constitute forgery to falsely sign a person's name to a mortgage, although such person is not owner of the property described therein, if the mortgage contains covenants which would create pecuniary liability on the part of the maker: *State v. Jamison*, 74–613.

It is not necessary to aver the genuineness or validity of the instrument forged. The essence of the crime consists in the doing of the act with intent to defraud. If the writing is invalid on its face it cannot be the subject of forgery, but it may be if the invalidity must be made out from extrinsic facts. *State v. Pierce*, 8–231; *State v. Johnson*, 26–407.

In order to constitute forgery it is not necessary that the signature of the instrument be fair, a fraudulent alteration, making the instrument such as was not signed by the maker, is sufficient: *Caulkins v. Whisler*, 29–495.

Alteration of an undated receipt by affixing a date thereto, so as to make it appear as a receipt for a subsequent account, is sufficient to constitute forgery: *State v. Maxwell*, 47–454.

The detaching of a condition from an instrument, by which it is converted from a non-negotiable to a negotiable instrument, *held* to constitute forgery: *State v. Stratton*, 27–420.

Where the defendant counterfeited the certificate of a justice of the peace as to the presentation and destruction of gopher scalps, for which a bounty is allowed by § 2287, *held*, that the act was sufficient to constitute forgery: *State v. Johnson*, 26–407.

The act of one who is intrusted with the making of an instrument, and who fraudulently makes a promissory note which is voluntarily signed by the other party, is not such a fraudulent making of the note as to constitute forgery: *Douglass v. Matting*, 29–498.

Where the indictment charged the forgery of an instrument signed by "Wright and Whaley," and the instrument when offered in evidence appeared to be signed "Wright Whaley," and it also appeared that this signature was an attempted signature of "Wright and Whaley," *held*, that the instrument was properly admissible: *State v. Nichols*, 38–110.

To constitute forgery of a bill of exchange or order it is not necessary that it contain the name of a payee or drawee. It is sufficient that it purports to create a liability against the person signing it: *State v. Baumon*, 52–68.

In a prosecution for forgery, *held*, that a particular instrument therein set forth sufficiently purported to create a liability against the person whose name was written thereto: *Ibid.*

The alteration of an unsigned indorsement, on the back of a note, of money paid, will not constitute forgery, where it does not appear but that such indorsement was a mere private memorandum made by the holder and not intended as a receipt: *State v. Davis*, 53–252.

A forwarding of a forged application for insurance by an insurance agent for the purpose of procuring the commission due to him upon

such application, *held* to constitute forgery although the company refused to issue a policy upon such application: *Fountain v. Smith*, 70-282.

An indictment alleging in substance that the defendant falsely and feloniously, and with intent to defraud, made a negotiable promissory note, describing it and setting out a copy, is sufficient to charge the crime: *State v. Stuart*, 61-203.

The instrument should be set forth in the indictment, or some excuse for not doing so should be shown, but no technical form of words is necessary: *State v. Johnson*, 26-407.

The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *State v. Maxwell*, 47-454.

Forgery, and uttering and publishing as true a forged instrument, are distinct offenses, and an indictment charging both is bad for duplicity. (Overruling *State v. Nichols*, 38-110): *State v. McCormack*, 56-585.

It is not necessary that the indictment allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67-142.

Evidence: On a trial for the forgery of receipts, it is competent to show the payment of the indebtedness receipted for: *State v. Woodard*, 20-541.

While proof of another act of forgery or uttering forged paper may be introduced, it is doubtful whether it ought not to be confined to a case where the former transaction was with reference to paper of the identical character of that involved in the act charged: *State v. Saunders*, 68-370.

When such other transaction is sought to be shown in evidence, it must appear that in the transaction a crime was committed: *Ibid.*

And it is necessary that the other instrument referred to must be produced or its absence accounted for: *Ibid.*; *State v. Breckenridge*, 67-204.

That defendant, on the trial of a civil cause in the county of his residence, produced the forged instrument which he is charged with forging, may be considered by the jury as tending to show that the forgery was committed in that county: *State v. Thompson*, 19-299.

Where the defendant is charged with forging an indorsement on the back of an order purporting to be drawn by one bank on another, proof of the existence of the bank is not required. Nor is it necessary to aver the genuineness or validity of the instrument forged: *State v. Pierce*, 8-231.

Where there was a variance between the allegations of the indictment and the proof as to the date of the instrument set out in an indictment for forgery, but it was such as could not have misled defendant to his prejudice, *held*, that the variance was immaterial: *State v. Blanchard*, 74-628.

5224. Uttering forged instrument. 3918. If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be punished by imprisonment in the penitentiary not more than fifteen years and fined not exceeding one thousand dollars. [R., § 4254; C., '51, § 2627.]

The fact that defendant, in uttering a forged note, falsely represented himself to be the payee of the note, is sufficient evidence of intent without other evidence that he had knowledge of the forgery: *State v. Williams*, 66-573.

To justify a conviction for passing a forged instrument, the jury must find beyond a reasonable doubt that defendant had knowledge of the forgery: *Ibid.*

It is not necessary that the indictment allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67-142.

See, further, notes to preceding section.

5225. Forgery of public securities. 3919. If any person with intent to defraud, falsely make, utter, forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money or other property issued or purporting to be issued by authority of this state, or any other of the United States; or any indorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be punished by imprisonment in the penitentiary not more than twenty years nor less than five years. [R., § 4255; C., '51, § 2628.]

5226. Counterfeiting. 3920. If any person make, alter, forge, or counterfeit any bank-bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4246; C., '51, § 2629.]

5227. Having counterfeit in possession. 3921. If any person has in his possession any forged, counterfeited, or altered bank-bill, promissory note,

draft, or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be so forged, counterfeited or altered, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4257; C., '51, § 2630.]

Intent to defraud any person or corporation need not be averred (§ 5698), nor need it be alleged that the intent to defraud was "felonious" or "wilful." The language of the statute is sufficient: *State v. Callendine*, 8-288.

The description of the bank-bills in a particular case *held* insufficient, and *held*, also, that a copy of such bills should have been set out in the indictment: *Ibid.*

5228. Uttering counterfeit securities. 3922. If any person utter or pass, or tender in payment as true, any false, altered, forged, or counterfeited note, certificate, state bond, warrant, or other instrument of public security, or any bank-bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized as heretofore mentioned, knowing the same to be false, altered, forged, or counterfeited, with the intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4258; C., '51, § 2631.]

An indictment charging the accused with uttering, passing and tendering in payment, etc., is not bad as charging more than one offense: *State v. Barrett*, 8-536.

It is not necessary, in such case, to charge an intent to defraud any particular person: *Ibid.; State v. Newland*, 7-242.

But if the name and incorporation of the bank intended to be defrauded is mentioned, it must be proved as stated: *State v. Newland*, 7-242.

But proof of the incorporation by reputation is sufficient (§ 5240): *Ibid.; State v. Barrett*, 8-536.

5229. Second conviction. 3923. If any person, having been convicted of the offenses described in the preceding section, afterward be convicted of a like offense; or if any person at the same term of the court is convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not less than two years, nor more than ten years. [R., § 4259; C., '51, § 2632.]

5230. Making tools for counterfeiting. 3924. If any person engrave, make, or mend, or begin to engrave, make, or mend any plate, block, press, or other tool, instrument, or implement; or make or provide any paper or other materials adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant, or other instrument of public security for money or other property of this state, or any other of the United States; or any bank-bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument or implement, paper or other material adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false and forged certificates, notes, bonds, warrants, public securities, or evidences of debt, shall be punished by imprisonment in the penitentiary for not more than five years nor less than two years. [R., § 4260; C., '51, § 2633.]

5231. Counterfeiting coin. 3925. If any person forge or counterfeit any gold or silver coin current by law or usage within this state, and if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished by imprisonment in the

penitentiary not more than ten years nor less than one year. [R., § 4261; C., '51, § 2634.]

On the trial of an indictment under this section it should be proved that the accused had in his possession "five or more pieces" to make out the offense defined: *State v. Pepper*, 11-347.

The word "and," occurring in the second line of this section, construed to mean "or," and *held*, that either of the acts described would constitute the offense; also, that an indictment charging both of them would charge but one offense, and would therefore not be open to the objection of duplicity: *State v. Myers*, 10-448.

So, if the counterfeiting and the having in possession with intent, etc., be charged in different counts, the indictment will not be bad if both counts refer to the same transaction: *State v. McPherson*, 9-53.

The possession, as contemplated here, may consist in having the counterfeit coin deposited in a secret place within the knowledge and control of the accused: *State v. Washburn*, 11-245.

It is not necessary to charge that the coin was counterfeited in a similitude to the current coin of the United States, or that it was of any value: *State v. Williams*, 8-533.

The counterfeiting of coin of the United States may be punished under this section; the jurisdiction of the federal courts over such offense is not exclusive: *State v. McPherson*, 9-53.

5232. Uttering or having in possession counterfeit coin. 3926. Any person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in the preceding section, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes, or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [R., § 4262; C., '51, § 2635.]

In an indictment for the uttering of counterfeit money the name of the person injured must appear, if known, and if not known such fact must be stated. The provision that no indictment shall be quashed if an indictable offense is named therein does not apply to such defect: *Buckley v. State*, 2 G. Gr., 162.

5233. Connecting parts or altering. 3927. If any person fraudulently connect together different parts of several genuine bank-bills, notes, or other instruments in writing, so as to produce one instrument; or alter any note or instrument in writing in a matter that is material, with intent to defraud, the same shall be deemed forgery in like manner as if such bill or note or other instrument had been forged and counterfeited, and the offender shall be punished accordingly. [R., § 4263; C., '51, § 2636.]

5234. Affixing fictitious signatures. 3928. If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing, purporting to be a note, draft or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed. Every person guilty of this offense shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not more than one year. [R., § 4264; C., '51, § 2637.]

5235. Obliteration of records or instruments. 3929. The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter, with the intent to defraud, shall be deemed forgery, and the offender shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [R., § 4265; C., '51, § 2638.]

5236. Second and third convictions. 3930. If any person having been convicted of either of the offenses mentioned in the preceding section be afterwards convicted of a like offense; or if any person at the same term of

court, be convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than three years. [R., § 4266; C., '51, § 2639.]

5237. Having instruments for counterfeiting. 3931. If any person cast, stamp, engrave, make, or mend, or have in his possession any mould, die, press, or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned with intent to use the same, or permit the same to be used for that purpose, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4267; C., '51, § 2640.]

5238. Counterfeiting foreign coin. 3932. If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 4268; C., '51, § 2641.]

5239. Forging or counterfeiting seals. 3933. Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of this state; or the seal of any public office authorized by law; or the seal of any court, corporation, city, or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal with intent to defraud, shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 4269; C., '51, § 2642.]

5240. Existence of corporation proved by reputation. 3934. On the trial of any person for forging or counterfeiting any bill, note, or any other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing, or attempting to pass; or having in possession the same with intent to utter or pass such bill, note, or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof, but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit. [R., § 4270; C., '51, § 2643.]

This section is equally applicable to the charge of falsely indorsing a note or bill, etc.: *State v. Pierce*, 8-231.

In an indictment for uttering and passing counterfeit bills, etc., it is not necessary to charge an intent to defraud any particular person: *State v. Barrett*, 8-536; *State v. Newland*, 7-242.

But if the incorporation of the bank intended to be defrauded is mentioned, it must be proved as stated: *State v. Newland*, 7-242.

But under this section proof of that fact by reputation is sufficient: *Ibid.*

5241. Counterfeiting brands or stamps. 3935. If any person with intent to defraud, falsely make, forge, or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine with intent to defraud, he shall be punished by imprisonment in the penitentiary not exceeding ten years. [R., § 1911.]

See § 3249.

CHAPTER 6.

OFFENSES AGAINST PUBLIC JUSTICE.

5242. Perjury. 3936. If any person on oath or affirmation, lawfully administered, wilfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof;

or before any tribunal or officer created by law; or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall be punished, if the perjury was committed on the trial of a capital crime, by imprisonment in the penitentiary for life or any term not less than ten years; and if committed in any other case, by imprisonment in the penitentiary not more than ten years nor less than two years. [R., § 4271; C., '51, § 2644.]

What constitutes: The matter falsely sworn to must be material, and its materiality must be established by the evidence, and cannot be left to presumption or inference: *State v. Aikens*, 32-403.

Falsely swearing in an affidavit for continuance that a witness is absent from the county will constitute perjury, and it cannot be said that the oath is not material to the issues in the case: *State v. Shupe*, 16-36.

Held, that a defendant, who, under Revision, § 2742 (providing that a claim barred by the statute of limitations might be established by the testimony of the opposite party), was called by plaintiff as a witness for the purpose of establishing a claim by own testimony, and who testified falsely, might be punished for perjury: *State v. Voght*, 27-117.

Under the provisions of the bankruptcy act requiring a schedule to be sworn to, and providing that false swearing should prevent the applicant's discharge, and also providing that he might be examined, and for false swearing in such examination should be deemed guilty of perjury, *held*, that mere false swearing in the schedule would not constitute perjury: *United States v. Dickey*, Mor., 412.

Indictment: The materiality of the false testimony must be shown by averment in the indictment, but this may be done either by express averment or the statement of such facts as show its materiality: *State v. Cunningham*, 66-94.

In an indictment for perjury in making a false return to the assessor under oath, it must be averred, not only that certain property was withheld from the statement, but also that such property was assessable within the township within which the assessor was authorized to act: *Ibid.*

Indictment for false statement in a schedule sworn to in a proceeding in bankruptcy should state wherein such statement is false and incorrect: *United States v. Morgan*, Mor., 341.

In an indictment for perjury it is not necessary nor usual to aver that the court trying the case in which the perjury was committed had jurisdiction of such acts. It is sufficient to aver that the issue was duly joined in such court which came on for trial in due form of law: *State v. Newton*, 1 G. Gr., 160.

Under § 5697 it is sufficient to set forth the substance of the offense charged and before what court the oath was taken, averring such court to have full power to administer the same, etc.: *Ibid.*

An indictment charging perjury in testifying before a grand jury, and alleging that they were investigating a specified charge against a party named; that they had authority to investigate such charge, and that the matters sworn to by the defendant (particularly stated and their falsity charged) were material in that investigation, *held* sufficient. It is not necessary in such a case to allege that the party charged with the offense under investigation by the grand jury was or was not guilty thereof: *State v. Schill*, 27-263.

It is sufficient to charge that defendant was duly sworn before a court having authority, etc., and it is not necessary to allege that the oath was administered by any one: *State v. O'Hagan*, 38-504.

But an indictment not averring that the court or person before whom the oath was taken had authority to administer the same is not sufficient: *State v. Nickerson*, 46-447.

An indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it: *State v. Phippen*, 62-54.

Therefore where the indictment charged that the oath was administered by a certain person as an officer, but at a time which by law was prior to the time when he was authorized to enter upon the discharge of his duties, *held*, that the indictment was subject to demurrer: *Ibid.*

It is necessary to aver the jurisdiction and authority of the officer before whom the oath was taken to administer the oath, but this may be done by express averment that the officer had such right, or by setting out such facts as make it judicially appear. Under the averment that he was authorized and empowered by law to administer the oath, the facts essential to his jurisdiction and authority may be shown: *State v. Cunningham*, 66-94.

An indictment for perjury need not charge that the prisoner knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *State v. Raymond*, 20-582.

Variance: Where the indictment charged that defendant testified that he saw M. enter upon premises of "Jason P." and saw him "getting and carrying away" corn therefrom, while the negative averment was that defendant did not see M. enter the premises of said "Joseph P." nor see him "gather and carry away" said corn, *held*, that the substitution of Joseph for Jason was clearly a clerical error, not affecting the substantial rights of the party, and that the effect of "gather" was, in the connection used, the equivalent of the word "getting:" *Ibid.*

Knowledge: Under a statute defining perjury as "wilfully and corruptly deposing, affirming or declaring any matter to be fact knowing the same to be false, or denying any matter to be fact knowing the same to be true," *held*, that an indictment was not sufficient which omitted to charge such knowledge: *State v. Morse*, 1 G. Gr., 503.

It should be clearly and distinctly averred in the indictment that defendant swore "falsely," that word being used in the statutory definition: *State v. Nickerson*, 46-447.

An indictment for perjury which charged that defendant at a certain time testified to certain matters whereas he "did know" they were false, *held*, by fair construction, to charge knowledge at the time defendant testified and to be sufficient in that respect: *State v. Wood*, 17-18.

Advice of counsel: In a prosecution for perjury, it being material to determine whether the testimony given was wilfully false, the fact that advice of counsel was taken by defendant as to the facts about which he testified is material: *State v. McKinney*, 42-205.

Evidence: It is not necessary that there be two witnesses to the giving of testimony upon which the perjury is assigned, but only as to its falsity: *State v. Wood*, 17-18.

The evidence of one witness as to the falsity of the matter sworn to, supported by evidence of strong corroborating circumstances, is sufficient to warrant a conviction: *State v. Raymond*, 20-582.

While the jury cannot consider any other perjury than that assigned in the indictment for the purpose of determining defendant's guilt as to such other perjury, yet when the evidence thereof is legitimately brought out, and relates to the subject-matter of the perjury charged, it may be considered in determining defendant's corrupt intent: *Ibid.*

5243. Subornation of. 3937. If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in the preceding section. [R., § 4272; C., '51, § 2645.]

5244. Attempt to suborn. 3938. If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. [R., § 4273; C., '51, § 2646.]

5245. Bribery of public officers. 3939. If any person give, offer, or promise to any executive or judicial officer or member of the general assembly after his election or appointment, and either before or after he has been qualified or has taken his seat, any valuable consideration, gratuity, service, or benefit whatever, with intent to influence his act, vote, opinion, or judgment in any matter, question, cause, or proceeding which may be pending or which may legally come or be brought before him in his official capacity, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not more than one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4274; C., '51, § 2647.]

5246. Acceptance of bribes by officers. 3940. If any executive or judicial officer, or member of the general assembly, accept any valuable consideration, gratuity, service, or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member under the agreement or with the understanding that his vote, opinion, decision, or judgment, shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is, or may by law be, brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year. [R., § 4275; C., '51, § 2648.]

5247. Disqualification. 3941. Every person who is convicted under either of the two preceding sections of this chapter, shall forever afterward be disqualified from holding any office under the laws or constitution of this state. [R., § 4276; C., '51, § 2649.]

5248. Corrupt solicitation of places of trust. 3942. If any person, directly or indirectly, give, offer, or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such other person to procure for him by his interest, influence, or any other means whatever any place of trust within this state, he shall be punished by fine not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year. [R., § 4277; C., '51, § 2650.]

5249. Acceptance of such rewards. 3943. If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office or place of trust within this state for any person, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4278; C., '51, § 2651.]

5250. Bribery of jurors, referees, etc. 3944. If any person give, offer, or promise any valuable consideration or gratuity whatever, to any one summoned, appointed, or sworn as a juror; or appointed or chosen arbitrator, or umpire, or referee; or to any master in chancery; or appraiser of real or personal estate; or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest, or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4279; C., '51, § 2652.]

5251. Acceptance of bribes by such persons. 3945. If any person summoned, appointed, or sworn as a juror; or appointed arbitrator, umpire, or referee; or master in chancery; or auditor; or appraiser as aforesaid, take or receive any valuable consideration, or gratuity whatever to give his verdict, award, or report in favor of any particular party, in a matter for the hearing or decision of which such person has been summoned, appointed, or chosen as aforesaid, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4280; C., '51, § 2653.]

5252. Attempt to corrupt such persons. 3946. If any person attempt to improperly influence any juror in any civil or criminal cause, or any one drawn, or summoned, or appointed, or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in, or to be brought before the court for which such juror has been drawn, summoned, appointed, or sworn; or for the hearing and decision of which such arbitrator or referee has been chosen or appointed, he shall be punished by a fine not exceeding five hundred dollars, and by imprisonment in the county jail not more than six months. [R., § 4281; C., '51, § 2654.]

5253. Jurors acting corruptly. 3947. If any person drawn, summoned, or sworn, as a juror, make any promise or agreement to give a verdict for or against any person in any civil or criminal cause, or corruptly receive any paper, evidence, or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding three months. [R., § 4282; C., '51, § 2655.]

5254. Sheriff and other officers receiving bribes. 3948; 20 G. A., ch. 123. If any sheriff, deputy sheriff, constable, marshal, deputy marshal, policeman or any police officer of any city or town, or coroner, receive from a defendant, or any other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison; or for postponing, delaying, or neglecting the sale of property on execution; or for omitting or delaying to perform any other duty pertaining to his office, he shall be punished by a fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or by both fine and imprisonment at the discretion of the court. [R., § 4283; C., '51, § 2656.]

5255. Officers not to accept valuable considerations. 22 G. A., ch. 83, § 1. If any state, county, township, city, school or other municipal officer, not mentioned in section 3940 or 3948 of the code of Iowa of 1873 [§ 5246 or § 5254], at any time after his election or appointment to such office, shall, directly or indirectly, accept any valuable consideration, gratuity, service, or benefit whatever, or the promise thereof, other than the compensation allowed said officer by law, conditioned upon said officer doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority, to give or procure for any person public employment, or conditioned upon said officer refraining from doing or performing any of the foregoing acts or things enumerated, such officer shall upon conviction thereof, be punished by imprisonment in the penitentiary for any term of time, not exceeding two years, or in the county jail not exceeding one year, or fines in any sum not less than twenty or more than three hundred dollars.

5256. Penalty for offering bribes. 22 G. A., ch. 83, § 2. If any person directly or indirectly, give, offer or promise, or conspire with others to give, offer, or promise to any officer, contemplated in the foregoing section, after said officer's election or appointment to office any valuable consideration, gratuity, service or benefit whatever with a view or for the purpose of corruptly influencing said officer's official acts or votes, such person shall be imprisoned in the penitentiary for any term of time not exceeding two years, or in the county jail not exceeding one year, or be fined in any sum not exceeding three hundred dollars, or less then [than] twenty dollars.

5257. Refusing to execute process. 3949. If any officer authorized to serve process wilfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with, or convicted of, any public offense; or wilfully delay or omit to execute such process, whereby such person escape, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court. [R., § 4284; C., '51, § 2657.]

5258. Extortion. 3950. If any person corruptly and wilfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles, or attended more days than he has actually traveled or attended, he shall be punished by fine not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months. [R., § 4285; C., '51, § 2658.]

5259. Compounding felonies. 3951. If any person having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, take any money or valuable consideration, or gratuity, or any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be punished by imprisonment in the penitentiary not more than six years, or by fine not exceeding one thousand dollars. [R., § 4286; C., '51, § 2659.]

A contract entered into for the compounding of a felony is void, and the law will not afford either party thereto affirmative relief: *Allison v. Hess*, 28-388. And an instrument based upon an agreement not to prosecute for a felony is void: *Peed v. McKee*, 42-689.

The defendant in a criminal prosecution, being convicted, executed certain notes to the prosecuting witness and her attorney, to be delivered if the prosecutrix should sign an application for defendant's pardon, or if, upon appeal and reversal of the case, defendant should be acquitted or discharged. And it was also agreed that a civil action by the prosecutrix for damages should be discontinued. *Held*, that the agreement for the deliv-

ery of the note was void as against public policy, as tending to stifle the prosecution of crime: *Haines v. Lewis*, 54-301.

Evidence in a particular case *held* not sufficient to show that a contract was entered into for the purpose of compromising a felony: *Malli v. Willett*, 57-705.

If a person corruptly exacts a consideration from another for an agreement not to prosecute, he is guilty under this section, although he took such consideration for the benefit of another: *State v. Ruthven*, 58-121.

The fact that a person guilty of a crime under this and the following section is an officer, coming within the provisions of § 5254, does not exempt him from the higher punishment prescribed in this section: *Ibid.*

5260. Compounding lesser felonies. 3952. If any person having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years, is guilty of the offense described in the preceding section, he shall be punished by imprisonment in the county jail not more than one year, and by fine not exceeding four hundred dollars. [R., § 4287; C., '51, § 2660.]

5261. Suffering prisoner to escape. 3953. If any jailor or other officer voluntarily suffer any prisoner in his custody upon a charge or conviction of a felony punishable by imprisonment for life, to escape, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than one year. [R., § 4288; C., '51, § 2661.]

5262. Same. 3954. If any jailor or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be punished by imprisonment in the penitentiary not more than eight years, or by fine not more than one thousand dollars. [R., § 4289; C., '51, § 2662.]

5263. Same. 3955. If any jailor or other officer suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be punished by fine not exceeding one thousand dollars, and by imprisonment in the penitentiary not exceeding five years. [R., § 4290; C., '51, § 2663.]

5264. Assisting prisoner to escape. 3956. If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4291; C., '51, § 2664.]

5265. Same. 3957. Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement charged with or convicted of any criminal offense other than a felony in an attempt to escape, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms, or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment at the discretion of the court. [R., § 4292; C., '51, § 2665.]

5266. Same from officer. 3958. Every person who aids or assists any prisoner in escaping, or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer or person who has the lawful charge of such prisoner upon any criminal charge, shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary not exceeding five years. [R., § 4293; C., '51, § 2666.]

Assisting a prisoner to escape from an officer having him in charge under a warrant issued by a magistrate under § 5497, for threatening to commit a public offense, is within the meaning of this section. Whether the prisoner had in fact threatened to commit the offense as charged in the warrant is immaterial: *State v. Bates*, 23-96.

5267. Prisoner escaping from county jail. 3959. If any person confined in a county jail upon any conviction for a criminal offense, break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars. [R., § 4295; C., '51, § 2668.]

5268. Resisting execution of process. 3960. If any person knowingly and wilfully resist or oppose any officer of this state, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and wilfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment at the discretion of the court. [R., § 4296; C., '51, § 2669; 12 G. A., ch. 150.]

It is no defense that the process is irregular or defective, if it is one that the magistrate has authority to issue: *State v. Foster*, 10-435.

It will be presumed that the officer was proceeding to execute the process in a proper manner, and the indictment need not set forth the acts showing that he complied with the requisites of the statute: *State v. Freeman*, 8-428.

The officers here contemplated are those only who are authorized to execute legal writs, orders, etc., and resistance to a road supervisor engaged in removing obstructions from a public road in his district is not within this section: *State v. Putnam*, 35-561.

Under Revision, § 4296, before its amendment, it was held that to resist a peace officer making an arrest without a warrant was not an offense under this statute: *State v. Lovell*, 23-304.

A receiver properly appointed and directed by the court to take possession of property is an officer within the meaning of this section, and resistance to him in an attempt to take such possession is a crime under this provision: *State v. Rivers*, 66-653.

One who resists an officer in making arrest of another cannot justify such resistance on the ground that the person to be arrested was not guilty: *Montgomery v. Sutton*, 67-497.

5269. Refusing to assist officer. 3961. If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, wilfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars. [R., § 4297; C., '51, § 2670.]

5270. Falsely assuming to be officer. 3962. If any person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner, or constable, and take upon himself to act as such or require any one to aid or assist him in any matter pertaining to the duty of any such officer, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars. [R., § 4298; C., '51, § 2671.]

Where a constable who was re-elected proceeded to perform the duties of his office without qualifying anew as required by § 1156, *held*, that he was not falsely assuming to be an officer under this section: *State v. Bates*, 23-96.

5271. Exercising office without authority or under color. 3963. If any person take upon himself to exercise or officiate in any office or place of authority in this state, without being legally authorized; or if any person by color of his office, wilfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail not more than one year; or by both fine and imprisonment. [R., § 4299; C., '51, § 2672.]

A constable may be guilty of the offense here defined: *State v. Bevans*, 37-178.

5272. Stirring up quarrels. 3964. If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law, encourage, excite, or stir up any suit, quarrel, or controversy between two or

more persons, with intent to injure such person or persons, he shall be punished by fine not exceeding five hundred dollars; and shall be answerable to the party injured in treble damages. [R., § 4300; C., '51, § 2673.]

5273. Neglect of duty by public officers. 3965. When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor. [R., § 4301; C., '51, § 2674.]

5274. Misdemeanors. 3966. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor. [R., § 4302; C., '51, § 2675.]

Supervisors violating the provisions of § 402, ¶ 24, by voting to erect a public building without submitting the question to vote, in a case where such submission is required, are guilty, under this section, of a misdemeanor: *State v. Conlee*, 25-237.

5275. Punishment for. 3967. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. [R., § 4303; C., '51, § 2676.]

5276. False entries and returns. 3968. If any public officer fraudulently make or give false entries, or false returns, or false certificates of receipts in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court. [R., § 4304; C., '51, § 2677.]

[In the original rolls, between what are §§ 5266 and 5267, occurs a section which is not in the printed Code, but is substantially the same as this, except as to punishment. It reads as follows:

"If any public officer fraudulently make or give false entries, or false returns, or false certificates or receipts, where entries, returns, certificates or receipts are authorized by law, he shall be punished by fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding five years."]

A county auditor who gives a false certificate of the receipt by the treasurer of a certain sum in payment of interest upon a school-fund note is guilty under this section, although the auditor is authorized to issue in case of such payment a receipt and not a certificate: *State v. Morse*, 52-509.

It is not necessary in charging this offense to charge an intent to defraud any particular person: *Ibid.*

5277. Oppression by officers. 3969. If any judge or other officer by color of his office, wilfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not less than five nor more than thirty days, and be liable to the injured party for any damage sustained by him in consequence thereof. [R., §§ 4305-6.]

5278. Officers failing to pay over fees. 3970. If any justice of the peace, clerk of the district or other court, county recorder, or any other officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect, or refuse to pay over as prescribed, or as may hereafter be prescribed by law, all such fees and fines, he shall be deemed guilty of a misdemeanor, besides being liable in a civil action for the amount of such fines and fees as he may have thus illegally withheld or appropriated. [R., § 4308.]

5279. Making false entries in relation to fees. 3971. If any justice of the peace, clerk of the district or other court which is now or may hereafter be established, county recorder or other officer, who by law is authorized or required to keep a court docket, or who is or may be required to keep an account of fees or fines, and to pay over, or in any way account for the same,

shall in any manner falsify such docket or account, or shall fail, neglect, or refuse to make an entry upon such docket or account, of such fees and fines, as are required to be paid over according to law, such justice of the peace, clerk of the district court, or clerk of any other court, county recorder and other officer shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense. [R., § 4309.]

5280. Officers misappropriating fees. 3972. Any justice of the peace, clerk of the district or of any other court which is or may be established, county recorder, or other officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had, and each and every person so found guilty shall be punished by a fine not exceeding three hundred dollars nor less than ten dollars, or imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. [R., § 4310.]

5281. Report of fees. 3973. All officers required by the provisions of this code to collect and pay over fines and fees, shall, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed and the amount of fines and fees collected, together with the vouchers for the payment of all sums by him collected to the proper officer required to keep the same. [R., § 4314.]

5282. Same by clerks, mayors and justices. 3974. The clerks of the several courts of this state, except of the supreme court, and all mayors of incorporated towns and cities, and justices of the peace, shall, on the first Monday of January of each year, make a report in writing to the board of supervisors of their respective counties, of all forfeited recognizances in their several offices; of all fines, penalties, and forfeitures imposed in their respective courts, and which by law go into the county treasury for the benefit of the school fund; in what cause or proceedings, when, for what purpose, against whom, and for what amount rendered; whether said fines, penalties, forfeitures and recognizances have been paid, remitted, canceled, or otherwise satisfied; if so, when, how, and in what manner; if not paid, remitted, canceled, or otherwise satisfied, what steps have been taken to enforce the collection thereof, and the prospect of such collection. Such report must be verified under oath, to the effect that the same is full, true, and complete of the matters therein contained, and of all things required by this section to be reported; and any officer failing so to do shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be fined in any sum not less than one hundred dollars. [9 G. A., ch. 29; 14 G. A., ch. 58.]

5283. Notary public improperly acting. 3975. If any notary public exercise the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, and shall also be removed from office by the governor. [R., § 210.]

5284. Failure to take official oath. 3976. If any officer or person wilfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer showing the expenditure of all public moneys with proper vouchers therefor by the time required by law,

he shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both at the discretion of the court. [R., §§ 216, 2184.]

CHAPTER 7.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

5285. Injuries to beasts. 3977. If any person maliciously kill, maim, or disfigure any horse, cattle, or other domestic beast of another; or maliciously administer poison to any such animals; or expose any poisonous substance with intent that the same should be taken by them, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding three hundred dollars. [R., § 4318; C., '51, § 2678.]

An indictment alleging the malicious killing of a sow, *held* sufficient; and *held* that it was not necessary to allege and prove that a hog is a "domestic beast:" *State v. Enslow*, 10–115.

An indictment charging the maiming and disfiguring of an animal is not bad for duplicity; any one or all of the acts here mentioned may be charged in the same indictment, and the proof need only cover so much of the allegation as constitutes a complete offense. To constitute the offense of disfiguring, the disfigurement need not be permanent or great: *State v. Harris*, 11–414.

While mere wanton injury to an animal without malice against any person may not be sufficient to constitute the offense of malicious injury to animals, yet, though the owner may be unknown, if the act is done maliciously for the purpose and with the intent of injuring such person, it is sufficient: *State v. Linde*, 54–139; *State v. Williamson*, 68–351.

The infliction of a wilful and wanton injury upon an animal is evidence that the act is malicious both as to the animal and the owner: *State v. Williamson*, 68–351.

5286. To dams, locks, mills, machinery, etc. 3978. If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be punished by imprisonment in the county jail not exceeding one year and by fine not exceeding five hundred dollars. [R., § 4319; C., '51, § 2679.]

A similar provision in a former statute *held* not to take away the common-law right of a person injured by the erection of a mill-dam to abate it as a private nuisance: *State v. Moffelt*, 1 G. Gr., 247.

5287. To bridges, railways, highways, etc. 3979. If any person maliciously injure, remove, or destroy any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure, or destroy any telegraph post, or in any way cut, break, or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4320; C., '51, § 2680.]

Where a highway is duly laid out, the fact that it is not yet traveled will not prevent the act of obstructing it from being criminal: *Harrow v. State*, 1 G. Gr., 439.

Error in the description of the highway, so long as its identity is not doubtful, will not vitiate a conviction for obstructing it: *Ibid.*

A party obstructing a highway, by fence or otherwise, may be punished under the provisions of § 5470, although the road supervisor might, under other provisions of the statute, rightfully remove the obstruction: *State v. Berry*, 12–58.

Under an indictment for obstructing a "county road," a road established by statute only can be shown. Evidence of a highway by use or prescription is not admissible: *State v. Snyder*, 25–208.

In prosecutions for obstructing a public highway the state is not confined to documentary proof of the establishment thereof, but may show the highway by proof of consent and user, and the fact that the highway is not of statutory width will be no defense: *State v. Robinson*, 28-514.

A party failing to remove a fence, where a newly established highway crosses his land, is not liable to indictment for obstructing a highway, at least until after reasonable notice by the supervisor to remove the same: *State v. Ratliff*, 32-186.

Malice is not a necessary element of the offense of obstructing a highway; intent is only important to show whether it was wilful or merely accidental: *State v. Gould*, 40-372.

It is not a punishable offense to obstruct a highway which, by reason of natural obstacles, cannot be used by the public: *State v. Shinkle*, 40-131.

But if part of the line of road is traveled, it would not excuse a party who obstructs it that another part was impassable as laid out: *State v. McGee*, 40-595.

Platform scales erected in a public street for private business may be removed by order of the city council: *Emerson v. Babcock*, 66-257.

As a railroad company is allowed, under § 1930, to temporarily obstruct a highway for the purpose of constructing its track, an allegation in an indictment showing such obstruction will not be sufficient to charge a crime, without averments showing a violation of the provisions of that section of the statute: *State v. Chicago, B. & P. R. Co.*, 63-708.

See further as to obstruction of highways, § 5470 and notes.

In a prosecution for obstructing the track of a railway it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *State v. Clemens*, 38-257.

As to railroads, see § 5298 and notes.

5288. Setting loose or injuring rafts and boats. 3980. If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person so injured double the amount of damages by him thereby sustained to be recovered in an action at law. [R., § 4321; C., '51, § 2681.]

5289. Injuring trees and breaking down fences. 3981. If any person maliciously cut down, injure, or destroy any fruit or ornamental trees or other tree, vine, or shrub of another, standing or growing for ornament or use; or maliciously break down, mar, deface, or injure any fence, hedge, or ditch inclosing lands belonging to another; or throw down or open any gate or bars not his own or under his charge and leave them open, whereby an injury is done to another; or maliciously injure, destroy, or sever from the land of another any produce thereof or anything attached thereto, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding one hundred dollars, or by both imprisonment and fine at the discretion of the court. [R., § 4322; C., '51, § 2682.]

5290. Injuring monuments, mile-stones, sign-boards, etc. 3982. If any person maliciously take down, injure, or remove any monument erected, or any tree marked as a boundary of any tract of land, city, or town lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary, or injure or deface any mile-stone, post, or guide-board erected on any public way; or remove, deface, or injure any sign-board; or break or remove any lamp or lamp-post, or extinguish any lamp on any bridge, way, street, or passage, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court. [R., § 2343; C., '51, § 2683.]

[The word "or," in the third line, is erroneously printed "on" in the Code.]

5291. Trespass by digging, cutting, carrying away, etc. 3983. If any person wilfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore, or any other ore or metal; or by taking and carrying from such land any grass, hay, corn,

grain, fruit or other vegetables; or carrying away from any wharf, street, or landing-place, any goods whatever in which he has no interest, he shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court. If in any case the value of the property so cut down, carried away, or otherwise taken shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [R., § 4324; C., '51, § 2684; 11 G. A., ch. 28.]

A person may be punished for the crime of malicious trespass committed in cutting and carrying away timber from school land, although the title to the land is still in the United States: *Chalfont v. United States*, Mor., 214.

The name of the owner of the land upon which the trespass is charged to have been committed should be set out in the indictment, or, if unknown, the indictment should so state: *State v. McConkey*, 20-574.

An indictment for cutting down and destroying standing timber upon the land of another is not sustained by proof of carrying away wood being on such land. The two acts as here specified are distinct: *Ibid.*

Under Rev., § 4324, differing from this section, it was held that the value of the property need not be found: *State v. Gigher*, 23-318.

A party has no right to prevent malicious trespass by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring-gun: *Hooker v. Miller*, 37-613.

5292. On gardens, orchards, etc. 3984. If any person wilfully commit any trespass by entering upon the garden, orchard, or improved land of another, with intent to take, carry away, destroy, or injure the trees, shrubs, grain, grass, hay, fruit, or vegetables there being, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days. [R., § 4325; C., '51, § 2685.]

5293. Injuries to buildings and fixtures. 3985. If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or wilfully and maliciously destroy, injure, or secrete any goods, chattels, or valuable papers of another, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, and is liable to the party injured in a sum equal to three times the value of the property so destroyed or injured in a civil action. [R., § 4326; C., '51, § 2686.]

An indictment charging in one count that accused "injured and defaced" a building is not objectionable on the ground of duplicity. The clauses in this section being disjunctive, either one or all the acts here specified may be charged in one count and constitute the same offense: *State v. Hockenberry*, 11-269.

Malicious injury to a church building is punishable under this section, and it is sufficient to aver ownership in the trustees, as such, without setting out the character of their title: *State v. Brant*, 14-180.

5294. Defacing public buildings. 3986. If any person wilfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, school-house, court-house, or other public building; or wilfully injure or deface the same, or any wall or fence inclosing the same, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days. [R., § 4327; C., '51, § 2687.]

5295. Defacing and destroying proclamations, notices, etc. 3987. If any person intentionally deface, obliterate, tear down, or destroy in whole or in part, any transcript, or extract from or of any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [R., § 4328; C., '51, § 2688.]

5296. Taking property for boat or vessel. 3988. If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft, take any cord wood or any other species of property from the

owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months. [R., § 4329; C., '51, § 2689.]

5297. Injuries to monuments of state boundary. 3989. If any person wilfully dig up, pull down, break, or destroy, or in any other manner injure or remove any of the cast-iron pillars or other evidences planted and fixed, or which may hereafter be planted or fixed, in and along any part of the boundaries of this state, he may be indicted therefor, and, upon conviction before any court having competent jurisdiction, shall be punished by fine not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the penitentiary for a term not less than six months, or by both such fine and imprisonment at the discretion of the court. [R., § 4330; C., '51, § 2690.]

5298. Placing obstructions on railways. 3990. If any person or persons shall wilfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years. [R., § 4331.]

It being found that defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied: *State v. Hessenkamp*, 17–25.

The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it, or had violated the covenants of its contract with respect thereto, would be no defense in an action under this section: *Ibid.*

In a prosecution for obstructing the track of a railway, it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *State v. Clemens*, 38–257.

See, also, § 5287 and notes.

5299. Breaking levees. 3991. If any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within this state, such person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4332.]

5300. Obstructing public ditches or drains. 3992. If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall, upon conviction, be compelled to remove said obstructions and be fined not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days at the discretion of the court. [9 G. A., ch. 135.]

5301. Obstructing or defacing roads. 15 G. A., ch. 17. If any person without authority or permission from the proper road supervisor, shall in any manner obstruct, deface, or injure any public road or highway, by breaking up, plowing, or digging within the boundary lines thereof, he shall upon conviction be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment in the county jail not more than thirty days, at the discretion of the court.

No one has a right to make a material change in a highway inconsistent with the plans of the road supervisor. To do so will constitute a defacing of the highway within the meaning of this section. The judgment of the supervisor must govern as to the proper plan: *State v. Hunter*, 68–447.

CHAPTER 8.

OFFENSES AGAINST THE RIGHT OF SUFFRAGE.

5302. Bribery of electors. 3993. If any person offer or give a bribe to any elector for the purpose of influencing his vote at any election authorized by law; and if any elector entitled to vote at such election receives such bribe, he shall be punished by fine not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court. [R., § 4333.]

It does not constitute bribery at an election to relocate a county seat for persons interested in the location at a particular place to agree to give certain facilities for the convenience of the whole county, such as offering a building for courts and officers, conveying real estate to the county, paying money toward the erection of a bridge, subscribing toward a high school, etc.: *Dishon v. Smith*, 10-212; *Hawes v. Miller*, 56-395.

A promise by a candidate to pay into the public treasury, if elected, a part or all of his compensation, is an offer of a bribe to electors, and disqualifies the person making it, if elected, for holding the office: *Carrothers v. Russell*, 53-346.

Giving or offering a bribe to an elector is a ground for contesting an election: See § 1158 and note.

5303. Voting more than once. 3994. If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year. [R., § 4334; C., '51, § 2692.]

5304. When not qualified. 3995. If any person knowing himself not to be qualified, vote at any election authorized by law, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months. [R., § 4335; C., '51, § 2693.]

In an indictment for this offense it is not necessary to show that the election was held by the proper and legal officers, or to state the manner in which defendant was disqualified: *State v. Douglass*, 7-413.

5305. Non-resident of county. 3996. If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year. [R., § 4336; C., '51, § 2694.]

5306. Not a resident of the state for six months. 3997. If any person wilfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the place where, and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year. [R., § 4337; C., '51, § 2695.]

It is no defense under this section that defendant consulted others (not persons learned in the law) as to his right to vote, and was advised that he was qualified: *State v. Sheeley*, 15-404.

Voting in a township other than that of the voter's residence is an offense under this section, and it is not necessary to charge or prove that accused voted for or against any one. The casting of a ballot being proved, it would be presumed that it designated the name of some person for some office: *State v. Minnick*, 15-123.

5307. Counseling to vote when not qualified. 3998. If any person procure, aid, assist, counsel, or advise another to give his vote, knowing that such person is disqualified, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, and by imprisonment in the county jail not exceeding one year. [R., § 4338; C., '51, § 2696.]

5308. Inducing to vote by false representation. 3999. If any person furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not exceeding one thousand dollars nor less than one hundred dollars. [R., § 4339; C., '51, § 2697.]

5309. Preventing from voting by force or threats. 4000. If any person unlawfully and by force, or threats of force, prevent or endeavor to prevent, an elector from giving his vote at any public election in this state, he shall be punished by imprisonment in the county jail not exceeding six months, and a fine not more than two hundred dollars. [R., § 4340; C., '51, § 2698.]

5310. Bribing clerks, judges, etc. 4001. If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done, or omitted to be done, contrary to his official duty in relation to such election, he shall be punished by fine not exceeding seven hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4341; C., '51, § 2699.]

5311. Procuring vote by influence or threats. 4002. If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors at any election, for himself, or for or against any candidate by means of violence, threats of violence, or threats of withdrawing custom, or dealing in business or trade, or enforcing the payment of debts, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by his means, he shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than one year. [R., § 4342; C., '51, § 2700.]

5312. Judges or clerks making false entries, etc. 4003. If any judge or clerk of any election authorized by law, knowingly make or consent to any false entry on the list of voters, or poll-books; or put into the ballot-box, or permit to be so put in, any ballot not given by a voter; or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4343; C., '51, § 2701.]

5313. Illegally receiving or rejecting votes. 4004. When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge wilfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be punished by fine not exceeding two hundred dollars nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months. [R., § 4344; C., '51, § 2702.]

5314. Misconduct to avoid election. 4005. If any judge, clerk, or executive officer designedly omit to do any official act required by law; or designedly do any illegal act in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township or district, be lost, or the electors thereof be deprived of their suffrage at such election; or designedly do any act which renders such election void, he shall be fined not less than one hundred dollars, nor more than one thousand

dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court. [R., § 4345; C., '51, § 2703.]

5315. Not returning poll-books. 4006. If any judge, clerk, or messenger, after having been deputed by the judges of the election to carry the poll-books of such election to the place where by law they are to be canvassed, wilfully or negligently fail to deliver such poll-books within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be punished by fine not exceeding five hundred dollars, nor less than fifty dollars. [R., § 4346; C., '51, § 2704.]

5316. Improper registry. 4007. Any person who shall cause his name to be registered, knowing that he is not or will not become a qualified voter in the township where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, aiding, or abetting any person in either of said acts, shall be deemed guilty of a felony, and punished for each offense by imprisonment in the state prison not less than one year. [12 G. A., ch. 171, § 10.]

CHAPTER 9.

OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

5317. Adultery. 4008. Every person who commits the crime of adultery, shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife. [R., § 4347; C., '51, § 2705.]

Void divorce: Where a decree of divorce is void for want of jurisdiction it will not bar a prosecution for adultery: *State v. Fleak*, 54-429.

Where a husband procured a divorce and remarried, but subsequently the decree of divorce was set aside and declared void at the suit of the wife, under title 19, chapter 1, of Code, on the ground that it was procured by fraud, *held*, that the divorce was no defense in a prosecution for adultery committed in cohabiting with the second wife: *State v. Whitcomb*, 52-85.

An erroneous belief of the validity of a divorce will not constitute a defense in a prosecution for adultery committed in a second marriage: *Ibid.*

Connection by force: The act may constitute adultery as to the man, although as to the woman it is effected by force and against her will: *State v. Donovan*, 61-278.

To constitute adultery on the part of the man the consent of the woman need not be established. If willingly done on his part the crime is complete: *State v. Sanders*, 30-582.

Commencement of prosecution by husband or wife: It is sufficient if the prosecution is *commenced* by the husband or wife. It may be continued without further co-operation on the part of such party: *State v. Baldy*, 17-39.

Where the wife instituted the proceedings before an examining magistrate, in which the defendant was held to answer, but did not appear before the grand jury or otherwise in the further prosecution of the case, *held*, that the prosecution was sufficiently commenced upon the complaint of the wife: *State v. Dingee*, 17-232.

An unmarried person may be guilty of the crime of adultery, and complaint against such person may be made by the husband or wife of the married party, although such married party is not prosecuted: *State v. Wilson*, 22-364.

The appearance of the wife before the grand jury, in response to a subpœna, and giving testimony against the husband without intending to prefer a charge, but supposing she was required to do so, would not constitute a complaint by the wife: *State v. Donovan*, 61-278; *State v. Stout*, 71-343.

The prosecution may be sufficiently commenced by the husband or wife, either by making complaint before the grand jury or by filing a preliminary information before a magistrate. If commenced by filing information it is not necessary that the husband or

wife appear further in the proceedings. It is not necessary that the name of the husband or wife be indorsed on the indictment as private prosecutor: *State v. Briggs*, 68-416.

The words "husband or wife," as used in this section, refer to and mean the spouse of the person charged with the offense: *Bush v. Workman*, 64-205.

An averment in the indictment that the prosecution was commenced by the husband or wife is not conclusive, and, if not so commenced, advantage of that fact may be taken by defendant: *State v. Roth*, 17-336.

It is essential that the state prove that the prosecution was so commenced. An averment in the indictment will not be presumptive proof thereof: *State v. Henke*, 58-457.

The allegation that the prosecution was so commenced must be proven by the state like other material averments of the indictment, and is to be determined by the jury upon the evidence given at the trial, and not by the court on affidavits upon a motion to dismiss the prosecution: *State v. Briggs*, 68-416.

The fact that the prosecution is commenced by the husband or wife does not enter into or constitute any of the facts which go to make up the crime, and therefore, although such fact must be proven, it is not necessary that it be established beyond a reasonable doubt: *State v. Donovan*, 61-278.

Failure to instruct the jury as to the necessity of the prosecution being so commenced is not error, where that fact appears without dispute in the evidence and such instruction is not asked by the defendant: *State v. Hazen*, 39-648.

Indictment: As any act of adultery committed between the parties within the statutory period of limitation might be proven under an indictment charging one such act, the allegation in the indictment of other acts committed on divers other days may be rejected as surplusage, and the indictment will not be bad: *State v. Briggs*, 68-416.

The better practice is to indict the parties guilty of adultery separately, although they may be indicted jointly: *State v. Dingee*, 17-232.

Evidence: The provision that the prosecution can be commenced only by the husband or wife leads to the inference that the offense is a crime by the husband or wife against the other rather than against society in general, and upon such prosecution the one may be a witness against the other under § 4891: *State v. Bennett*, 31-24; *State v. Hazen*, 39-648.

In a prosecution for adultery, record proof of marriage is not indispensable. It may be established by the testimony of the husband or wife: *State v. Wilson*, 22-364.

Admissions of defendant as to the fact of marriage, when voluntary, and not of the character of confessions exacted by improper inducements, are admissible as evidence of the marriage: *State v. Sanders*, 30-582.

Admissions of the woman with whom the husband is charged to have committed the crime are not competent evidence: *State v. McGuire*, 50-153.

The provisions of § 5319, as to the presumption arising from absence, in the case of a prosecution for bigamy, do not apply as against a defendant in a prosecution for adultery to establish the validity of his marriage with a wife who had previously been married: *State v. Henke*, 58-457.

Different acts: Where but one act of adultery is charged and evidence as to different acts is introduced, but the prosecution after the close of the evidence elects to rely upon one particular act referred to in the evidence, such election withdraws from the jury the evidence as to the other acts and cures any errors which may have been committed in admitting evidence with reference thereto: *State v. Donovan*, 61-278.

Evidence of other acts of adultery committed between the same parties prior to the statutory period of limitation or in another county than that in which the indictment is found are admissible to show the disposition of the parties, and may be taken, in connection with opportunity to commit the crime within the statutory period and within the jurisdiction of the court, as evidence that the crime was then committed: *State v. Briggs*, 68-416.

5318. Bigamy. 4009. If any person who has a former husband or wife living, marry another person, or continue to cohabit with such second husband or wife in this state, he or she, except in the cases mentioned in the following section, is guilty of bigamy and shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. [R., § 4348; C., '51, § 2706.]

Continuing to cohabit within the state after a bigamous marriage is a crime under this section, whether the marriage was consummated within or without the state: *State v. Sloan*, 55-217; *State v. Nadal*, 69-478.

Defendant may be prosecuted for continuing to cohabit within the state, although a prosecution for the bigamous marriage is barred: *State v. Sloan*, 55-217.

Venue: The prosecution may be had in any county where the defendant unlawfully cohabits with a second wife, although the marriage was consummated in another county: *State v. Hughes*, 58-165.

Indictment: An indictment for this crime, stating that the date of the lawful marriage was to the grand jury unknown, that it took place in Illinois, and that at the time of the second marriage the former marriage relation still existed, *held* sufficient as against the objections, first, that it did not state the date of the first marriage; second, that it did not state that such marriage was lawful and valid by the laws of Illinois; third, that it did not appear that the lawful wife was still living at the date of the second marriage: *Ibid.*

An indictment under this section need not

negative the exceptions contained in the next section: *State v. Williams*, 20–98.

Evidence: The testimony of a witness who saw the marriage is sufficient without record evidence thereof: *Ibid.*; *State v. Hughes*, 58–165.

While admissions of marriage or cohabitation will not authorize conviction, yet when the evidence shows a long recognition by defendant of the woman as his wife, and actual marriage, proof of admission of marriage and cohabitation may be shown: *State v. Nadal*, 69–478.

The testimony of either husband or wife, together with proof of continued cohabitation as husband and wife, raises such a presumption of an actual legal fact as to make it incumbent upon the defendant to rebut such presumption: *Ibid.*

In a prosecution for cohabiting in this state after a void marriage in another state, it is not necessary to prove the marriage to have been in accordance with the laws of such state, if it would have been sufficient under the laws of this state, there being no evidence that the laws of such state are different from those of this state: *Ibid.*

Under an indictment alleging the celebration of the void marriage at a particular place, evidence will be sufficient which shows the celebration of the marriage anywhere within the same state: *Ibid.*

In a prosecution for cohabiting with a second wife, evidence of the bigamous marriage in another county is proper, not to show a crime in that county, but to fix the nature of the subsequent cohabitation: *State v. Hughes*, 58–165.

It seems that the fact that defendant acted under reputable legal advice in contracting the second marriage would be no defense: *Ibid.*

The crime is one by the husband or wife against the other within the scope of § 4891, allowing the husband or wife to be a witness against the other: *State v. Sloan*, 55–217; *State v. Hughes*, 58–165.

In a prosecution for bigamy, evidence of lewdness on the part of the injured party is incompetent: *State v. Nadal*, 69–478.

5319. Exceptions. 4010. The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony. [R., § 4349; C., '51, § 2707.]

The provisions of this section, as to presumption arising from absence, do not apply as against a defendant, in a prosecution for adultery, to establish the validity of his marriage with a woman who had previously been married: *State v. Henke*, 58–457.

5320. Knowingly marrying husband or wife. 4011. Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4350; C., '51, § 2708.]

5321. Lewdness. 4012. If any man or woman not being married to each other lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and designedly make any open and indecent, or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars. [R., § 4351; C., '51, § 2709.]

Acts of private incontinence are not sufficient to constitute the offense here described: *State v. Marvin*, 12–499.

An indictment under this section should charge that the parties were not married to each other: *State v. Clinch*, 8–401.

Evidence that defendant in a prosecution for lewdness had a wife and children whom he had deserted, *held* admissible: *State v. Lyon*, 10–340.

Occasional acts of sexual intercourse in a secret manner between parties living in the relationship of master and servant may not be sufficient alone to constitute the crime of lewdness. But such acts and the birth of a child may be shown as tending with other circumstances to prove that the parties were in fact living together as husband and wife: *State v. Kirkpatrick*, 63–554.

5322. Keeping house of ill-fame. 4013; 20 G. A., ch. 142, § 1. If any person keeps a house of ill-fame, resorted to for the purpose of prostitution or

lewdness, such person shall be punished by imprisonment in the penitentiary not less than six months nor more than five years. [R., § 4352; C., '51, § 2710.]

What constitutes prostitution: It is for the jury to say what acts are, under the circumstances, sufficient to render a person a prostitute, and it is not for the court to instruct as to what sexual intercourse is or is not sufficient to establish the fact: *State v. Rice*, 56-431.

Keeping house of ill-fame: An indictment against a person for keeping a house of ill-fame is sufficient if it charges the offense as committed within the county. The house need not be more specifically described: *State v. Shaw*, 35-575.

If the facts constituting an offense under this section be properly charged in the indictment, the fact that the term nuisance is used to designate it will not invalidate the indictment nor make it an indictment for the offense defined in § 5472: *State v. Shaw*, 35-575.

The offense here defined is distinct from that defined in § 5472, in that, in the latter case, it must be "to the disturbance of others:" *State v. Odell*, 42-75; *State v. Alderman*, 40-375.

Evidence that the owner of a house kept as a house of ill-fame by the tenant was in the habit of spending a part of his time there, *held* insufficient to show that such owner was guilty as a keeper of such house: *State v. Pearsall*, 43-630.

Instructions to the effect that evidence showing that defendant was keeping a house and using it as his own, and exercising such control over it as men usually have over their own houses, will authorize the jury to find that defendant kept the house, and that the jury might find that defendant had knowledge of the character of the house and assented thereto, from the publicity of the lewd conduct carried on there and the public reports of its ill-fame, and his knowledge of such reports, as well as his personal conduct and his conversation with inmates and visitors, *held* proper: *State v. Wells*, 46-662.

A previous conviction under an indictment charging only an offense under § 5472 will not warrant a sentence, on conviction under this section as it stood before amendment, of imprisonment in the penitentiary for a second conviction: *State v. Holmes*, 56-588.

The character of the house and of those frequenting it may be fixed by reputation, but the fact that defendant is the keeper of such a house cannot be proven by evidence of common reputation as to his character: *State v. Head*, 7-411.

As to keeping of house of ill-fame being a nuisance, see § 5472 and notes.

5323. Lease rendered void. 4014. When the lessee of a dwelling-house is convicted of keeping the same as a house of ill-fame, the lease or contract for letting such house is, at the option of the lessor, void, and such lessor may thereupon have the like remedy to recover possession as against a tenant holding over after the expiration of his term. [R., § 4353; C., '51, § 2711.]

5324. Leasing house for such purpose. 4015. If any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months. [R., § 4354; C., '51, § 2712.]

The acts here described constitute but one offense, and an indictment charging both of them is not bad for duplicity: *State v. Abrahams*, 6-117.

To render the defendant guilty of *knowingly permitting* the use, something more must be shown than his mere inactivity or failure to take steps to prevent such illegal use. Some act or declaration showing an affirmative assent must be shown: *Ibid.; Abrahams v. State*, 4-541.

The state may prove the bad character of the house by evidence of the bad character of the persons resorting thereto, and of the inmates thereof; but the general reputation of the house itself should be excluded: *State v. Lyon*, 39-379.

To charge a person with letting a house for purposes of prostitution is slander *per se*: *Halley v. Gregg*, 74-563

5325. Enticing to house of ill-fame. 4016; 20 G. A., ch. 142, § 2. If any person entice back into a life of shame any person who has heretofore been guilty of the crime of prostitution, or who shall inveigle or entice any female before reputed virtuous to a house of ill-fame, or knowingly conceal or assist or abet in concealing such female, so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not less than three nor more than ten years. [R., § 4355; C., '51, § 2713.]

5326. Penalty for prostitution. 20 G. A., ch. 142, § 3. If any person for the purpose of prostitution or lewdness resorts to, uses, occupies or inhabits any house of ill-fame or place kept for such purpose, or if any person be found at any hotel, boarding-house, cigar store or other place leading a life of prostitution and lewdness, such person shall be punished by imprisonment in the penitentiary not more than five years.

5327. Evidence. 20 G. A., ch. 142, § 4. The state, upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept, and such evidence shall be competent for such purpose.

This section is not unconstitutional as depriving accused of liberty or property without due process of law. In order to render defendant punishable it must be established not only that the house in question is a house of ill-fame, but also that it is resorted to for the purpose of prostitution or lewdness, and it is as to the character of the house that the evidence of reputation is made admissible: *State v. Haberle*, 72-138.

5328. Violating sepulchre and exposure of dead bodies. 4017. If any person, without lawful authority, wilfully dig up, disinter, remove or carry away any human body, or the remains thereof, from its place of interment: or aid, assist, encourage, incite or procure the same to be done or attempted; or wilfully receive, conceal, or dispose of any such human body, or the remains thereof; or if any person, with the intent to commit any of the aforesaid acts, partially performs the same; or if any person wilfully and unnecessarily, and in an improper manner, indecently expose, throw away, or abandon any human body, or the remains thereof, in any public place, or in any river, stream, pond, or other place, every such offender shall be punished by imprisonment in the penitentiary not more than two years, or by fine not exceeding twenty-five hundred dollars, or by both fine and imprisonment. [R., § 4356; C., '51, § 2714.]

[A substitute for the original section, 18 G. A., ch. 182, § 2. The change consists in more fully specifying the acts punished and in increasing the punishment.]

Evidence that a body is disinterred during the night-time secretly, and is concealed, is evidence tending to show that it was disinterred for an unlawful purpose: *State v. Pugsley*, 75-742.

5329. Bodies for medical purposes. 4018; 20 G. A., ch. 195. Any coroner or undertaker, or the superintendent or managing officer of any public asylum, hospital, poor-house or penitentiary shall deliver to any medical college or school or any physician in this state for the purpose of medical and surgical study, the body or remains of any deceased person except when such body has been interred, but no such body shall be so delivered without the consent of the relatives or friends of such deceased person if any such are known, nor when such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any person is so delivered and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains having knowledge that any of the foregoing provisions have been violated shall upon conviction thereof be punished as provided in the foregoing section. [14 G. A., ch. 82, §§ 1, 4.]

5330. Burial after dissection. 4019. The person receiving such body as contemplated in the preceding section, shall decently bury the remains thereof after such body shall have been used as aforesaid, and in case of a failure to so do such person shall be deemed guilty of a misdemeanor, and punished by fine not less than ten nor more than fifty dollars. [Same, § 2.]

5331. Record kept. 18 G. A., ch. 182, § 3. Any physician receiving the body or remains of a deceased person for the purpose of medical or surgical

study; and any professor or person in charge of a medical college or school at which such body or remains are received for such purpose, shall, in a suitable book, make or cause to be made a legible record of the time when, the name and description of the person from whom, and the place where such body or remains were received, and whether or not such body or remains when so received was inclosed in any box, cask or other receptacle, and, if so inclosed, shall record a description of such box, cask or receptacle, sufficient to identify the same, together with the shipping marks or directions, if any, on same; and also a description of such body or remains, including the length, weight and sex of same, the apparent age of the person at the time of death, color of hair, or beard if any, and any and all marks or scars on such body by which same might be identified, and whether or not such body when so received was mutilated so as to prevent identification of same. And such physician, professor or person, shall keep the said record, and on demand exhibit same, as also any and all such bodies or remains of deceased persons then in his charge, for the inspection of any sheriff or his deputy: *provided*, such record shall not be required one year or more after such body was received. Any physician or professor or teacher in a medical college or school who uses or allows or permits others under his or her control or charge to use the body or remains of a deceased person for the purpose of medical or surgical study without the record as aforesaid having been first made; or on demand being made by the sheriff or his deputy as aforesaid, shall refuse and fail to exhibit any such record or body in his charge or under his control to such officer for his inspection, shall be guilty of a misdemeanor, and upon conviction be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

5332. Remains, how used. 4020. The remains of any person received as aforesaid, shall be used for the purpose of medical and surgical study alone, and in this state only, and whoever shall use such remains for any other purpose, or shall remove the same beyond the limits of this state, or in any manner traffic therein, shall be deemed guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding one year in the county jail. [14 G. A., ch. 182, § 3.]

5333. Injuring monuments, tombstones, etc. 4021. If any person wilfully destroy or injure any tomb, grave-stone, monument, or other thing placed or designated as a memorial of the dead; or any fence, railing, or other thing placed about the same; or any place inclosed for the burial of the dead; or wilfully destroy, injure or remove any tree, shrub, or plant within such inclosure, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment. [R., § 4357; C., '51, § 2715.]

5334. Obscene books, pictures, etc. 4022. If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed paper containing obscene language or obscene prints, pictures, or descriptions manifestly tending to corrupt the morals of youth; or introduce into any family, school, or place of education; or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation; or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [R., § 4359; C., '51, § 2717.]

5335. Obscene literature; articles of immoral use. 21 G. A., ch. 177, § 1. Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away, any obscene, lewd, indecent, or lascivi-

ous book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, model, cast, or any instrument, or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion, or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, hand-bill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly, or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased or otherwise obtained or made, shall, on conviction thereof, shall be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both such fine and imprisonment at the discretion of the court.

5336. Circulating through the mail. 21 G. A., ch. 177, § 2. Whoever deposits in any postoffice within this state, or places in charge of any person to be carried or conveyed, any of the articles or things named in section one, of this act [§ 5335], or any circular, hand-bill, card, advertisement, book, pamphlet or notice of any kind, giving information, directly or indirectly, when, how, where, or by what means any of the articles or things mentioned in section one, of this act [§ 5335], can be purchased or obtained, or knowingly or wilfully receives the same to carry or convey, or knowingly carries or conveys the same in any manner, except in the United States mail, shall, upon conviction, be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both fined and imprisoned at the discretion of the court.

5337. Printing or publishing. 21 G. A., ch. 177, § 3. Whoever prints or publishes or causes to be printed or published in any newspaper published or circulated in this state any advertisement of medicine, drug, nostrum, or apparatus for the cure of private or venereal diseases, or shall circulate or distribute any newspaper containing such an advertisement or notice mentioned in this section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

5338. Giving obscene literature to minors. 21 G. A., ch. 177, § 4. Whoever sells, lends, gives away, or shows, or has in his possession with or without intent to sell, give away, or show to any minor child, any book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibits upon any street or highway, or any place within the view, or which may be within the view of any minor child, any of the above described books, papers, or pictures, or uses or employs any minor child to give away, sell, or distribute, or who, having the care, custody, or control of any minor child, permits such child to sell, give away, or distribute any such books, papers, or pictures above described, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than five hundred dollars nor less than fifty dollars, or be imprisoned not more than six months in the county jail, or both fined and imprisoned at the discretion of the court.

5339. Warrants for search or seizure. 21 G. A., ch. 177, § 5. All magistrates and police judges in this state are authorized, on due complaint, supported by oath or affirmation, of one or more persons, to issue a warrant directed to the sheriff of the county within which such complaint shall be made, or to any constable or police officer within said county, directing him or them, or any of them, to search for, seize, and take possession of such books, papers, circulars, articles, and things named in section one of this act

[§ 5335], and said magistrate or police judge shall deliver personally or shall transmit, inclosed and under seal, specimens thereof to the prosecuting attorney of his county, and shall deposit within the county jail of his county or other secure place as to him shall seem meet, inclosed and under seal, the remainder thereof, and shall, upon the conviction of the person or persons offending under the provisions of this act, forthwith, in the presence of the person or persons upon whose complaint the said seizure or arrest was made, if he or they shall elect to be present, destroy, or cause to be destroyed, the remainder thereof so seized as aforesaid, and shall cause to be entered upon the record of his court the fact of such destruction.

5340. Exceptions. 21 G. A., ch. 177, § 6. Nothing in this act shall be construed to affect teaching in regularly chartered medical colleges; or the publication or use of standard medical books, or the practice of regular practitioners of medicine, or druggists in their regular business; or the possession by artists of models in the necessary line of their art.

5341. 21 G. A., ch. 177, § 7. All acts inconsistent with this [act] are hereby repealed.

5342. Disturbing worshiping congregations or other assemblies. 4023. If any person wilfully disturb or disquiet any assembly of persons met for religious worship, by profane discourse or rude and indecent behavior, or by making a noise either within the place of worship or so near as to disturb the order and solemnity of the assembly, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. If any person or persons unlawfully or wilfully disturb or interrupt any school, school meeting, teachers' institute, lyceum, literary society, or any other lawful assembly of persons being in the peace of the state, such person or persons shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [R., § 4360; C., '51, § 2718; 9 G. A., ch. 146.]

5343. Selling near camp-meeting. 4024. If any person within one mile from the place where any religious society is collected together for religious worship in any field or woodland, expose to sale or gift any spirituous or other liquors, or any article of merchandise, or any provisions or other article of traffic, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [R., § 4361; C., '51, § 2719.]

5344. Exceptions. 4025. The preceding section does not apply to tavern or grocery keepers exercising their calling or business in the places mentioned in their licenses, if they have such; nor to any distillers or manufacturers or others in the prosecution of their ordinary calling or business, so as to prevent them from vending or exposing to sale the articles above prohibited at their place of residence; nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles, on complying with the regulations of such religious assembly and with the laws of the state. [R., § 4362; C., '51, § 2720.]

5345. Keeping gambling-houses. 4026. If any person keep a house, shop, or place resorted to for the purpose of gambling; or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, or other game, for money or other thing, such offender shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or be both fined and imprisoned. In a prosecution under this section, any person who has the charge of or attends to any such house, shop, or place, may be deemed the keeper thereof. [R., § 4363; C., '51, § 2721.]

What constitutes: To constitute gambling as here contemplated, it is not necessary that the money or "other thing" should be "put up." Playing at a game with the understanding that the loser shall pay for the drinks around, which arrangement is carried out, is sufficient: *State v. Maurer*, 7–406; *State v. Cooster*, 10–453; *State v. Leicht*, 17–28; *State v. Bishel*, 39–42.

The offense of keeping a gambling-house is as complete if the house is kept for one day as if kept for a year. It does not consist in causing or continuing a public nuisance, as contemplated in § 5472: *State v. Crogan*, 8–523.

It is not necessary that the place occupied be generally or habitually resorted to, if it is kept for that purpose. One act of gambling, as well as many, will complete the offense: *State v. Cooster*, 10–453.

An indictment against a tavern-keeper for suffering gaming in violation of statute need not state the names of the persons who played nor the sums of money for which they played, nor the property lost or won: *Romp v. State*, 3 G. Gr., 276.

A charge that defendant keeps a house resorted to, sufficiently charges intent and knowledge, and still more does the charge that he permits, etc., gambling, imply knowledge: *State v. Cure*, 7–479.

And an indictment charging that accused, being the keeper of a house resorted to for the purpose of gambling, knowingly and unlawfully did permit, etc., *held* sufficient, although it would have been better to have expressly charged that the house was under the control of accused: *State v. Middleton*, 11–246.

The "keeping," etc., and the "permitting," etc., constitute one and the same offense, and an indictment charging them both in separate counts is not objectionable on the ground of duplicity: *State v. Cooster*, 10–453.

An indictment substantially charging that defendant did keep a house, etc., in which he did permit divers persons, to the jurors unknown, to play at cards, etc., for money, cigars, beer and other things, *held* sufficient: *State v. Kaufman*, 59–273.

See, further, notes to § 5347.

5346. Search-warrant against. 4027. If any person make oath before a justice of the peace that he has probable cause to suspect, and does suspect that any house, building, or place, naming the house or place and the occupant, is unlawfully used as a common gaming-house, or place for the purpose of gaming for money or other property, and that persons resort to the same for that purpose, whether they be known to the complainant or not, such justice may issue his warrant for the purpose of searching such house or building for all such implements or gambling devices mentioned in the preceding section, and for the apprehension of the occupant or keeper of said house or building; and after such search, seizure, and arrest, the said implements and keeper shall be carried before such justice of the peace to be dealt with as provided by law. And any gambling device brought before the justice may be destroyed by him, and an entry thereof shall be made upon his docket. [R., § 4364; C., '51, § 2722.]

5347. Gaming and betting. 4028. If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [R., § 4365; C., '51, § 2723.]

Playing at billiards or "pin-pool" with the agreement or understanding that the losing party shall pay for the game, is gambling: *State v. Book*, 41–550; *State v. Miller*, 53–154.

Whether the game played is one of skill or one of chance is immaterial under this section: *State v. Miller*, 53–154.

But playing at cards for recreation or amusement is not prohibited: *State v. Leicht*, 17–28.

The offering by an agricultural society of a premium to the winner at a horse-race held under its authority does not constitute an offense under this section: *Delier v. Plymouth County Ag'l Society*, 57–481.

5348. Gaming contracts void. 4029. All promises, agreements, notes, bills, bonds, or other contracts, mortgages, or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or bet, at or upon any game of any kind or on any wager, are absolutely void and of no effect. [R., § 4366; C., '51, § 2724.]

Wager: A wager contract based upon the result of an election is void as against public policy: *David v. Ransom*, 1 G. Gr., 383.

Where, in pursuance of a contract previously made between the parties to a wager, plaintiff delivered to the successful party an article and charged it to the other party to the wager, *held*, that he could not recover from the person so charged the value of the article furnished: *Ibid.*

But *held*, that a request by the party charged, and subsequent to the determination of the wager, to deliver the article to the successful party, would render him liable if de-

livery was made in pursuance of such request: *Ibid.*

Recovery of money: Money lost on a wager and paid over cannot be recovered back: *Thrift v. Redman*, 13–25.

Recovery from stakeholder: A party depositing money or other property with a stakeholder as a wager may recover it back before it is paid over to the winner: *Shannon v. Baumer*, 10–210.

An action may be maintained against a stakeholder who has paid over to the winning party money placed in his hands as a wager after he has been notified by the loser not to do so: *Adkins v. Flemming*, 29–122.

Where a promissory note for an amount greater than the wager was deposited with a stakeholder, and by him turned over to the winner, who appropriated it to his own use, *held*, that the original owner might recover from such winner the excess of the value of the note over the amount of the wager: *Shaw v. Gardiner*, 30–111.

A demand upon the stakeholder by one of the parties to the wager for the entire amount in his hands, on the ground that he is successful in the wager, is not a revocation of the wager so as to entitle him to recover from such stakeholder the amount deposited by him, and afterwards paid over in pursuance of the result of the wager to the opposite party: *Okerson v. Crittenden*, 62–297.

Action upon wagering contract: Action cannot be maintained upon a note showing upon its face that it was given in a betting transaction: *Sipe v. Finarty*, 6–394.

And even if the note is given upon an apparent consideration the agreement between the parties may be such as to make it clearly a wagering contract: *Craig v. Andrews*, 7–17.

Contracts and negotiable instruments of the character here described are void, even in the hands of an innocent purchaser, before maturity: *Ibid.*; *Traders' Bank v. Alsop*, 64–97.

Where one, in behalf of himself and others, deposited a sum as a wager, *held* that, in an action to recover such sum from the stakeholder, he could only recover the amount actually belonging to him, the contract being absolutely void and plaintiff having therefore no authority to sue for the others thereunder: *Toney v. Snyder*, 50–73.

Options: To invalidate a contract on the ground of the illegality of the transaction, as being a gambling or option contract, it must be shown that on the part of both parties the transaction was with the knowledge and purpose that no actual delivery of the property which was the subject of the sale should be made. If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon: *Murry v. Ocheltree*, 59–435.

Certain instructions to the effect that instruments purporting to convey the title to grain were void because they were issued to pay losses which might be suffered in the purchase of commodities, wherein it was not the purpose or intention of either of the parties that the purchase or sale should be consummated by the delivery or receipt of the article purchased or sold, but on the contrary it was the purpose of all the parties that the same should be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement, *held* correct: *Lowe v. Young*, 59–364.

The option contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered: *Gregory v. Wattowa*, 58–711.

When the parties to an executory contract for the sale of property intend that there shall be no delivery thereof, but that the transaction shall be settled by the payment of the difference between the contract price and the market price of the commodity at the time fixed, the contract is void: *First Nat. Bank v. Oskaloosa Packing Co.*, 66–41.

If the agent through whom the purchase is made knows that the transaction is an option contract, he cannot recover money advanced by him to one of the parties for the purpose of carrying on the transaction: *Ibid.*

While contracts for the sale and delivery of grain in the future, which are virtually bets in relation to the future price of grain, are of a purely gambling and criminal character, and, where their true character is known, the courts should hold them void, yet contracts for future delivery are, to some extent, a necessity, and they are as legitimate as any other, and that, too, though the parties may contemplate a possibility of settlement by the payment of differences. The real intention of the parties must determine the character of the transaction, and in arriving at the intention the court must be governed by the evidence and not by conjectures based upon its knowledge of other contracts: *Tomblin v. Callen*, 69–229.

A dealer in grain may sell and agree to deliver at some future time that which he has not, but which he expects to go into the market and buy: *Douglas v. Smith*, 74–468.

5349. Dealing in options; bucket-shops. 20 G. A., ch. 93, § 1. It shall be unlawful for any corporation, association or society, person, or persons to keep within this state any store, office or other place, wherein is conducted or permitted the pretended buying or selling of grain, pork, lard, or any mercantile or agricultural products on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without this state; and the keeping of all such places is hereby prohibited; and it shall be unlawful for any person, corporation, association or society, within this state, to make or enter into any contract, or pretended contract, such as is above stated and referred to, and all such contracts are hereby pro-

hibited; the intention of this act being to prevent and prohibit within this state the business now engaged in and conducted in places commonly known and designated as bucket-shops. *Provided*, however, that this act shall not apply to or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract.

5350. Penalty. 20 G. A., ch. 93, § 2. Any person whether acting individually or as a member of any copartnership, corporation, association or society, guilty of violating any of the provisions of this act [§ 5349] shall upon conviction thereof be adjudged to pay a fine for each offense of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or be both fined and imprisoned at the discretion of the court.

5351. Incest. 4030. If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son; or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year. [R., §§ 4337-9.]

The marriage of persons sustaining to each other any of the degrees of relationship here specified is incest. Carnal knowledge in such case need not be alleged or shown: *State v. Schaunhurst*, 34-547.

The words brother and sister, as here used, refer to illegitimate as well as legitimate children of the same parents: *Ibid.*

To constitute incest the parties must have carnal knowledge *of each other*. A woman who is ravished cannot be said to have carnal knowledge of the man. Connection between persons within the prohibited degrees, consummated by force, is rape and not incest: *State v. Thomas*, 53-214.

Under a statute providing that brother and sister who, being of the age of sixteen years or upwards, should have sexual intercourse together, having a knowledge of their consanguinity, should be guilty of incest. *held*, that it was essential, in order to constitute the crime, that both parties be over the age specified: *United States v. Hiler*, Mor., 330.

Evidence: The register of marriages is sufficient evidence of the incestuous marriage (§ 3388): *State v. Schaunhurst*, 34-547.

Admissions and declarations of the parties are also admissible to show the fact of marriage: *Ibid.*

5352. Cruelty to animals. 4031. If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill, or overdrive any animal; or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather; or cruelly drive or work the same when unfit for labor; or cruelly abandon the same; or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [R., § 4058; C., '51, § 2716; 13 G. A., ch. 176, §§ 1, 2.]

5353. By railways, when transporting. 4032. No railway company in this state, in the carrying or transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water, and feeding, for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their con-

tinous confinement beyond twenty-eight hours, except upon contingencies hereinbefore stated; and animals unloaded for rest, water, and feeding, under the provisions of this section, shall be properly fed, watered, and sheltered during such rest by the owners or persons in custody thereof, or in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this section. Any railway company, owner, or custodian of such animals who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for, and forfeit and pay a penalty of not less than one hundred and not greater than five hundred dollars. But when such animals shall be carried in cars in which they shall and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply. [13 G. A., ch. 176, § 3.]

5354. Keeping cock-pits and fighting dogs, bears, etc. 4033. If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog, or cock fight, or a fight between any other creature, he shall be deemed guilty of a misdemeanor. [Same, § 7.]

5355. Impounding animals without food or water. 4034. If any person impound or confine, or cause to be impounded or confined in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be deemed guilty of a misdemeanor. [Same, § 8.]

CHAPTER 10.

OFFENSES AGAINST PUBLIC HEALTH.

5356. Selling unwholesome provisions. 4035. If any person knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [R., § 4371; C., '51, § 2725.]

5357. Adulterating food or liquor. 4036. If any person fraudulently adulterate for the purpose of sale, any substance intended for food, or any wine, spirituous or malt liquor, or other liquor intended for drinking, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars, and the article so adulterated shall be forfeited and destroyed. [R., § 4372; C., '51, § 2726.]

5358. Drugs or medicines. 4037. If any person fraudulently adulterate, for the purpose of sale, any drug or medicine in such manner as to lessen the efficacy, or change the operation of such drugs or medicines, or to make them injurious to health; or sell them knowing that they are thus adulterated, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, and such adulterated drugs and medicines shall be forfeited and destroyed. [R., § 4373; C., '51, § 2727.]

5359. Labeling poisons. 4038. If any apothecary, druggist, or other person, sell and deliver any arsenic, corrosive sublimate, prussic acid, or any poisonous liquid or substance, without having the word "poison," and the true

name thereof written or printed upon a label attached to the vial, box, or parcel containing the same, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. Any person who may dispose of at retail any poisonous substance or liquid to any one, for any purpose, is hereby required to enter in a book, to be kept by such apothecary, druggist, or other person so disposing, the name of the poison, when bought, by whom, and for what purpose; and if the person who calls for such poison is not personally known to the vendor, then such person shall be identified by some one known to the vendor, whose name shall also be entered in such book. Any failure to comply with the requirements of this provision shall subject the party so failing to imprisonment in the county jail not more than thirty days, or to a fine not exceeding one hundred dollars. [R., § 4374; C., '51, § 2728; 10 G. A., ch. 110.]

See, also, § 2531.

5360. Spreading infectious disease. 4039; 20 G. A., ch. 102. If any person innoculate himself or any other person, or suffer himself to be innoculated with the small-pox within this state, or come within the state with the intent to cause the prevalence or spread of this infectious disease, he shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. Or, if any person shall place, or put, or aid, or abet, in placing or putting any person upon any railroad car, steamboat, or other public conveyance knowing such persons to be infected with diphtheria, small-pox, or scarlet fever, he shall be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than thirty days. [R., § 4375; C., '51, § 2729.]

5361. Selling drugged liquors. 4040. If any person wilfully sell, or keep for sale, intoxicating, malt, or vinous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years. [R., § 4376.]

5362. Throwing dead animals in stream, spring, etc. 4041. If any person throw, or cause to be thrown, any dead animal into any river, well, spring, cistern, reservoir, stream, or pond, he shall be punished by imprisonment in the county jail not less than ten nor more than thirty days, or by fine not less than five nor more than one hundred dollars. [10 G. A., ch. 18.]

5363. Adulterated milk, cheese, or butter. 4042. If any person knowingly sell to another, or knowingly deliver or bring to be manufactured to any cheese or butter manufactory in this state, any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as "skimmed milk," or shall keep back any part of milk known as "strippings" with intent to defraud, or shall knowingly sell the milk, the product of a diseased animal or animals, or shall knowingly use any poisonous or deleterious material in the manufacture of cheese or butter, he shall, upon conviction thereof, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and be liable in double the amount of damages to the person or persons, firm, association, or corporation, upon whom such fraud shall be committed. [13 G. A., ch. 156.]

ADULTERATION OF FOOD, DRINK AND MEDICINE.

5364. Adulteration prohibited. 19 G. A., ch. 170, § 1. No person shall mix, color, stain, or powder, or order or permit any other person to mix, color, stain, or powder any article of food with any ingredient or material so as to

render the article injurious to health, with the intent that the same may be sold, and no person shall sell or offer for sale any such article so mixed, colored, stained, or powdered.

5365. With intent to sell. 19 G. A., ch. 170, § 2. No person shall, except for the purpose of compounding in the necessary preparation of medicine, mix, color, stain, or powder, or permit any other person to mix, color, stain, or powder any drug or medicine with any ingredients or materials, so as to affect injuriously the quality or potency of such drug or medicine, with the intent to sell the same, or shall offer for sale any such drug or medicine so mixed, colored, stained, or powdered.

5366. Adulterating for profit; notice. 19 G. A., ch. 170, § 3. No person shall mix, color, stain, or powder any article of food, drink, or medicine, or any article which enters into the composition of food, drink, or medicine, with any other ingredient or material, whether injurious to health or not, for the purpose of gain or profit, or sell or offer for sale the same, or order or permit any other person to sell or offer for sale any article so mixed, colored, stained, or powdered, unless the same be so manufactured, used or sold, or offered for sale, under its true and appropriate name, and notice that the same is mixed or impure is marked, printed, or stamped upon each package, roll, parcel, or vessel containing the same, so as to be and remain at all times readily visible, or unless the person purchasing the same is fully informed by the seller of the true names of the ingredients (if other than such as are known by the common name thereof) of such articles of food, drink, or medicine, at the time of making the sale thereof or offering to sell the same: *Provided*, nothing in this section shall prevent the use of harmless coloring material used in coloring butter and cheese.

5367. Glucose; skimmed-milk cheese; oleomargarine. 19 G. A., ch. 170, § 4. No person shall mix any glucose or grape sugar with syrup or sugar intended for human food; and any cheese manufactured from skimmed milk, or from milk that is partly skimmed, shall be branded as skimmed-milk cheese, when the same is offered for sale; or any oleomargarine, suine, beef-fat, lard or any other foreign substance with any butter or cheese intended for human food; or shall mix or mingle any glucose, grape sugar, or oleomargarine with any article without distinctly marking, stamping, or labeling the article or the package containing the same with the true and appropriate name of such article, and the percentage in which glucose or grape sugar, oleomargarine, or suine enters into its composition. Nor shall any person sell, or offer for sale; or permit to be sold, or offered for sale, any such food, into the composition of which glucose or grape sugar, oleomargarine, or suine has entered, without at the same time informing the buyer of the fact and the proportion in which glucose or grape sugar, oleomargarine, or suine has entered into the composition.

[As to imitation butter and cheese, see further §§ 2503–2518.]

5368. Penalty. 19 G. A., ch. 170, § 5. Any person or persons convicted of violating any provisions of any of the foregoing sections of this act [§§ 5364–5367] shall, for the first offense, be fined not less than ten dollars nor more than fifty dollars. For the second offense they shall be fined not less than twenty-five [dollars] nor more than one hundred dollars, or confined in the county jail not more than thirty days. And for the third and all subsequent offenses they shall be fined *not to exceed* [not less than] five hundred dollars, nor more than one thousand dollars, and imprisonment in the state prison not less than one year nor more than five years.

5369. 19 G. A., ch. 170, § 6. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

FRAUD IN LARD.

5370. From diseased hogs. 18 G. A., ch. 137, § 1. All persons or associations who shall engage in the business of selling lard rendered from swine that have died of hog cholera, or other diseases, shall, before selling or offering to sell any such lard, plainly stamp, print, or write upon the cask, barrel, or other vessel containing such lard, the words "Lard from hogs which have died of disease," or if sold without such cask, barrel, or other receptacles, the purchaser shall be informed that the lard is from hogs which have died from disease.

5371. Penalty. 18 G. A., ch. 137, § 2. For a violation of the provisions of the foregoing section, the vendor shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

5372. Compound lard. 22 G. A., ch. 79, § 1. No manufacturer or other person or persons shall sell, deliver, prepare, put up, expose or offer for sale any lard or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine in any tierce, bucket, pail, package or other vessel or wrapper, or under any label bearing the words "pure," "refined," "family," or either of said words alone or in combination with other words of like import, unless every tierce, bucket, pail, package or other vessel, wrapper or label, in or under which said article is sold, delivered, prepared, put up, exposed or offered for sale bears on the top or outer side thereof, in letters not less than one-half inch in length and plainly exposed to view, the words "Compound Lard," and the name and proportion in pound and fractional parts thereof of each ingredient contained therein.

5373. Penalty. 22 G. A., ch. 79, § 2. Any person who violates any provision hereof shall be deemed guilty of a misdemeanor for each violation, and upon conviction thereof shall be fined for the first offense not less than twenty dollars nor more than fifty dollars, and every subsequent offense under this act shall be fined not less than fifty dollars nor more than one hundred dollars.

FRAUD IN CANNED FOOD.

5374. Label. 21 G. A., ch. 174, § 1. It shall hereafter be unlawful in this state for any packer of or dealer in hermetically sealed, canned or preserved fruits, vegetables, or other articles of food to knowingly offer such canned or preserved articles for sale for consumption in this state after October first, 1886, unless the cans or jars which contain the same shall bear the name, address and place of business of the person, firm or corporation that canned or packed the articles so offered, or the name of the wholesale dealer in this state who sells or offers the same for sale; together in all cases with the name of the state, city, town or village, where the same were packed, plainly printed thereon, preceded by the words "Packed at," such name, address and place of business shall be plainly printed on the label, together with a mark or term indicating clearly the grade or quality of the articles contained therein.

5375. Soaked goods. 21 G. A., ch. 174, § 2. All packers of and dealers in soaked goods or goods put up from products dried or cured before canning shall, in addition to complying with provisions of section one of this act [§ 5374], cause to be plainly branded on the face of the label in good legible type, one-half of an inch in height and three-eighths of an inch in width the word "soaked."

5376. Exemptions. 21 G. A., ch. 174, § 3. All goods packed prior to the passage of this act are exempted from the provisions of this act.

5377. Penalty; board of health. 21 G. A., ch. 174, § 4. Any packer or dealer who shall violate any of the provisions of this act [§§ 5374–5379],

shall be deemed guilty of a misdemeanor and punished by a fine of not more than fifty dollars for each offense in the case of retail dealers, and in case of wholesale dealers and packers by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense. The term "packer" and "dealer," as used in this act, shall be deemed to include any firm or corporation doing bnsiness as a dealer in or packer of the articles mentioned in this act. It shall be the duty of any board of health in this state, cognizant of any violation of this act, to inform the district attorney, whose duty it shall be to institute proceedings against any person who is charged with a violation of the provisions of this act, and in case of conviction shall receive twenty-five per cent. of the fines actually collected, which shall be in addition to any salary he may now receive under the law.

5378. Exceptions. 21 G. A., ch. 174, § 5. The provisions of this act [§§ 5374–5379] shall not apply to canned or condensed milk or cream.

5379. Takes effect. 21 G. A., ch. 174, § 6. This act [§§ 5374–5379] shall take effect October first, eighteen hundred and eighty-six.

CHAPTER 11.

OFFENSES AGAINST PUBLIC POLICY.

5380. Lotteries and lottery tickets. 4043. If any person make, or aid in making or establishing any lottery in this state; or advertise or make public any scheme for any such lottery; or advertise or offer for sale any ticket or part of a ticket in any lottery; or sell, negotiate, dispose of, purchase, or receive the same; or have in his possession any ticket or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceding one hundred dollars, or by both fine and imprisonment at the discretion of the court. [R., § 4377; C., '51, § 2730.]

The disposal of lands by a scheme in which parties were to buy tickets and draw therefor, *held* a lottery, and a contract of purchase thus entered into was held void: *Guenther v. Dewein*, 11–133.

5381. Disposing of liquors to Indians or intoxicated persons. 4044. If any person give, sell, or dispose of, any spirituous or intoxicating drinks to any Indian within this state, or to any person who is intoxicated, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court. [R., § 4378; C., '51, § 2735.]

5382. Allowing minors in billiard-rooms, saloons, etc. 15 G. A., ch. 59, § 1. It shall be unlawful for any person who keeps a billiard-hall, beer-saloon, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, saloon, or alley, to permit any minor or minors to remain in such hall, saloon, or alley, or to take part in any of the games known as billiards, nine or ten pins.

5383. Penalty. 15 G. A., ch. 59, § 2. For a violation of the provisions of the foregoing section the offender shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

Under this act it is the duty of saloon-keepers not only not to permit, but to prevent, minors remaining in their saloons, and the same duty is imposed on their employees. If the keeper or employee fails to take proper measures to prevent, he is to be deemed to

permit it, and the liability will not depend upon the knowledge of the keeper or his employee of the fact that the person is a minor: *State v. Probasco*, 62-400.

5384. Selling fire-arms to minors. 20 G. A., ch. 78, § 1. It shall be unlawful for any person to knowingly sell, present or give any pistol, revolver or toy pistol to any minor.

5385. Penalty. 20 G. A., ch. 78, § 2. Any violation of this act [§§ 5384, 5385] shall be punishable by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail of not less than ten nor more than thirty days.

5386. Civil rights. 20 G. A., ch. 105, § 1. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theaters and other places of amusement; subject only to the conditions and limitations established by law, and applicable alike to every person.

5387. Penalty for violating. 20 G. A., ch. 105, § 2. Any person who shall violate the foregoing section by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in said section, or by aiding or inciting such denial, shall, for each offense, be deemed guilty of a misdemeanor.

An indictment under this statute should allege not only a refusal to grant equal accommodations, but absence of any good reason therefor: *State v. Hall*, 72-525.

Before the enactment of this statute it was *held* that the refusal of the owner of a skating rink to permit any particular person, as, for instance, a person of color, to enter and enjoy the privileges of his rink, did not give rise to a cause of action in behalf of the person thus denied, although the rink was kept open as a place of public amusement, it not being shown that the business of operating it was carried on under a license or privilege granted by the state, or the municipal corporation in which it was conducted, or that it was in any manner regulated or governed by any of the police regulations of the city: *Bowlin v. Lyon*, 67-536.

5388. Bringing paupers into state. 4045. If any person knowingly bring within this state any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be punished by fine not exceeding five hundred dollars and stand charged with his support. [R., § 4379; C., '51, § 2736.]

5389. Transacting business without license. 4046. If any person carry on or transact any business or occupation without license therefor, when such license is required by any law of this state, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. [R., § 4380; C., '51, § 2737.]

5390. Circulation of foreign bank-notes. 4047. If any person pay out, or offer to pay, or in any manner put in circulation, or offer to put in circulation, any bank-note, bill, or other instrument intended to circulate as money issued or purporting to be issued by any bank, individual, or corporation elsewhere than in this state, excepting treasury notes, notes of any bank organized under the law of the United States, any other description of currency issued by the authority of congress, or notes of the branches of the state bank of Iowa, he shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court having jurisdiction, be fined the sum of five dollars for each note, bill, or other instrument as aforesaid so paid out or offered to be paid out, put in circulation or offered to be put in circulation. In prosecutions under this section it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue the notes; but it shall be sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank-notes issued out of this state; and the proof

may be made as if the particulars were alleged; and any number of offenses may be included in the same prosecution, provided that where the total fines alleged shall not exceed one hundred dollars, the offense shall be cognizable and may be tried before a justice of the peace and other co ordinate jurisdictions; and when the total fines alleged exceed one hundred dollars, it shall be within the jurisdiction of the district court. [10 G. A., ch. 53.]

Under ch. 147 of Code of '51, providing a penalty for issuing any bills, etc., to be put in circulation as money, held, that a deed given *to secure the issuance of such notes was void: Reynolds v. Nichols,* 12–398.

[Secs. 4048, 4049, 4050 and 4051 are repealed by the following section.]

5391. 17 G. A., ch. 156, § 1. Sections 4048, 4049, 4050, and 4051 of the code, chapter 69 of the public laws of the fifteenth general assembly, and chapter 122 of the laws of the sixteenth general assembly are repealed and the following enacted in lieu thereof.

5392. Killing of certain game at certain seasons punished. 17 G. A., ch. 156, § 2; 18 G. A., ch. 193; 20 G. A., ch. 67. It shall be unlawful for any person within the state to shoot or kill any pinnated grouse or prairie chicken, between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first day of January and the first day of October; any wild duck, goose, or brant, between the first day of May and the fifteenth day of August; or any wild deer, elk or fawn, between the first day of January and the first day of September.

5393. Killing for traffic. 17 G. A., ch. 156, § 3; 18 G. A., ch. 193, § 2. It shall be unlawful for any person, at any time, or at any place within this state, to shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, ruffed grouse or pheasant; or for any one person to shoot or kill during any one day, more than twenty-five of either kind of said named birds; or for any one person, firm, or corporation, to have more than twenty-five of either kind of said named birds in his or their possession at any one time, unless lawfully received for transportation; or to catch or take, or attempt to catch or take, with any trap, snare or net, any of the birds or animals named in section two of this act [§ 5392], or in any manner wilfully to destroy the eggs or nests of any of the birds hereby intended to be protected from destruction.

5394. Trapping beaver. 17 G. A., ch. 156, § 4. It shall be unlawful for any person to kill, trap, or ensnare, any beaver, mink, otter, or muskrat, between the first day of April and the first day of November, except where such killing, trapping, or snaring may be for the protection of private property.

5395. Having in possession. 17 G. A., ch. 156, § 5. It shall be unlawful for any person, company, or corporation, to buy or sell, or have in possession, any of the birds or animals named in section two of this act [§ 5392] during the period when the killing of such bird or animal is prohibited by said section two, except during the first five days of such prohibited period; and the having in possession by any person, company, or corporation of any such birds or animals during such prohibited period, except during the first five days thereof, shall be deemed *prima facie* evidence of a violation of this act [§§ 5391–5402].

5396. Shipping out of state. 17 G. A., ch. 156, § 6. It shall be unlawful for any person, company, or corporation at any time to ship, take, or carry out of this state any of the birds or animals named in section two of this act [§ 5392]; but it shall be lawful for any person to ship to any person within

this state, any game birds named in said section two, not to exceed one dozen in number in any one day, during the period when by this act [§§ 5391–5402] the killing of such birds is not prohibited: *Provided*, he shall first make an affidavit before some person authorized to administer oaths, that said birds have not been unlawfully killed, bought, sold, or had in possession, are not being shipped for sale or profit, giving the name and postoffice address of the person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, indorsed, "A true copy of the original," by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of this act [§§ 5391–5402]. Any person swearing falsely to any material fact of said affidavit, shall be guilty of perjury, and punished accordingly.

5397. Penalty. 17 G. A., ch. 156, § 7. If any person shall kill, trap, ensnare, buy, sell, ship, or have in possession, or ship, take, or carry out of the state, contrary to the provisions of this act [§§ 5391–5402], any of the birds or animals named in this act, or shall wilfully destroy any eggs or nests of birds named in this act, shall be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat; twenty-five dollars for each wild deer, elk, or fawn, and ten dollars for each nest or the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecution are sooner paid.

5398. Penalty against carrier. 17 G. A., ch. 156, § 8. If any railway, express company, or other common carrier, or any of their agents or servants, knowingly receive any of the above-mentioned birds or animals for transportation or other purpose, during the periods hereinbefore limited and prohibited, or at any other time except in the manner provided in section six of this act [§ 5396], they shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

5399. Using swivel-gun or poison. 17 G. A., ch. 156, § 9. If any person shall shoot or kill any wild duck, goose, or brant, with any swivel-gun or any kind of gun except such as is commonly shot from the shoulder; or shall use medicated or poisoned food to capture or kill any of the birds named in this act [§§ 5391–5402], he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined twenty-five dollars for each offense, and shall stand committed to the county jail for thirty days, unless such fine and the costs of prosecution are sooner paid.

5400. Where prosecution brought. 17 G. A., ch. 156, § 10. Prosecutions for violations of this act [§§ 5391–5402] may be brought either in the county in which the offense was committed or in any other county where the person, company, or corporation complained of has had or has in his or their possession any birds or animals herein named, bought, sold, killed, trapped or ensnared, in violation of any of the provisions of this act.

5401. Attorney to manage prosecution; fee. 17 G. A., ch. 156, § 11. In all prosecutions under this act [§§ 5391–5402] the court before whom the same is brought shall appoint some attorney-at-law for the purpose of managing the prosecution of the cause, and such attorney shall be entitled to a fee of ten dollars in each and every case in which he is so appointed, and the person filing an information under this act shall, in case of conviction, be entitled to a fee equal to one-half of the amount of the fine imposed on each conviction,

and both the fee of such attorney and the informant shall be taxed as costs in the case against the person convicted. *Provided*, that the county shall in no case be held liable for said attorney's fee or penalty.

5402. 17 G. A., ch. 156, § 12. All acts and parts of acts inconsistent with this act are hereby repealed.

[Secs. 4052 and 4053 are repealed by 15 G. A., ch. 50, § 10.]

5403. Obstructing passage of fish; fishing with seine or net. 15 G. A., ch. 50, § 6; 16 G. A., ch. 70, § 3. No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds, or lakes of this state, any dam, seine, weir, fish-dam, or other obstruction, in such manner as to prevent the free passage of fish up or down through such water-courses, unless otherwise ordered by the commissioner; and from and after the passage of this act [§§ 5403, 5404] it shall be unlawful for any person to use any seine or net for the purpose of catching fish, except minnows, that are natives of the waters of the state: *provided*, always, that it shall be lawful for the fish commissioner to take fish in any of the public waters at any time and by any method, for the purpose of propagation or for the purpose of exchanging with fish commissioners of other states or of the United States. Nothing in this section shall be so construed as to prohibit the erection of dams for manufacturing purposes, as now provided by law.

5404. Penalty. 15 G. A., ch. 50, § 7; 16 G. A., ch. 70, § 3. Any person found guilty of a violation of the provisions of section six of this act [§ 5403], shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and for the second, or any subsequent offense, not less than twenty dollars, and shall stand committed until such fine be paid.

[Provisions somewhat similar are found in §§ 2310, 2311.]

5405. Trapping fish. 4054; 15 G. A., ch. 50, § 10. Any person who shall go upon the premises of any person or corporation, whether inclosed or not, and shall be found seeking to take, by any means whatsoever, except a hook and line, any fish, shall be deemed guilty of trespass, and may be prosecuted in the name of the state of Iowa by any person in possession of said premises, before any justice of the peace, or other court of competent jurisdiction, and fined in any sum not less than five nor more than fifty dollars. [9 G. A., ch. 4, § 4; 14 G. A., ch. 54, § 3.]

5406. Spearing season. 20 G. A., ch. 9, § 1. No person shall take by spearing with a gaff, spear or other device any fish from any of the permanent lakes or ponds or outlets or inlets thereto within the state of Iowa, between the first day of November and the thirty-first day of May next following.

5407. Unlawful vending. 20 G. A., ch. 9, § 2. It shall be unlawful for any person, company, or corporation, knowingly to buy or sell, or offer for sale, or have in his or their possession, any fish which shall have been taken from any of the permanent lakes or ponds, or outlets or inlets thereto within this state by spearing with gaff, spear or other device between the first day of November and the thirty-first day of May next following. And any person who may draw from the water any game fish such as pike, bass, and the like when seining for minnows for bait, shall return the same without injury under the penalties of this act [§§ 5406–5411].

5408. Penalty. 20 G. A., ch. 9, § 3. Any person found guilty of a violation of any of the provisions of this act [§§ 5406–5411] shall upon conviction before any magistrate be fined not less than five dollars nor more than twenty dollars for the first offense, and for the second or any subsequent offense not

less than twenty dollars nor more than one hundred dollars, and shall stand committed until such fine be paid.

5409. Place of action. 20 G. A., ch. 9, § 4. Prosecution for violations of this act [§§ 5406–5411] may be brought and maintained in any county in which offense was committed or in any county where the person, company, or corporation against whom complaint is made, has or has had or has bought or sold or offered for sale any fish which were taken by spearing in violation of this act.

5410. Prosecutor appointed; fees. 20 G. A., ch. 9, § 5. In all prosecutions under this act [§§ 5406–5411], the court before whom the same is brought, or in which it shall be prosecuted, shall appoint an attorney for the prosecution of the case, and such attorney and the person filing the information under this act shall each be entitled to a fee of five dollars for each and every conviction, which fees of such attorney and informant shall be taxed as costs in the case against the person or persons so convicted, and any fish found in the possession of any person, company or corporation in violation of the provision of this act may be seized and sold for the purpose of paying the costs in the case, but in no case under this act [§§ 5406–5411] shall any county be liable for the fees of such attorney or informant.

5411. Spearing on one's own premises. 20 G. A., ch. 9, § 6. Nothing in this act [§§ 5406–5411] shall prevent any person from taking fish of his own propagation or from waters wholly within his own land, to which there is no natural outlet through which the fish pass up or down.

5412. Bringing diseased sheep into the state. 4055. If the owner of sheep, or any person having the same in charge, knowingly import or drive into this state sheep having any contagious disease; or turn out or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway, or uninclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not less than fifty dollars nor more than one hundred dollars. [9 G. A., ch. 35, §§ 1, 2.]

A contract for the sale of sheep having contagious diseases cannot be enforced against the purchaser, even when he knew of such disease before purchasing. The statute is intended, not for the protection of the purchaser only, but of the public. *Held*, however, that the statute would not apply where the seller did not know that the disease with which the sheep were afflicted was contagious, and that in such case the contract could be enforced: *Caldwell v. Bridal*, 48–15.

5413. Bringing in diseased horses, mules, etc. 4056. If any person knowingly import or bring within this state, any horse, mule, or ass, affected by the diseases known as nasal gleet, glanders, or button-farcey, or suffer the same to run at large upon any common, highway, or uninclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule, or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars; and in default of payment shall be imprisoned for any period not to exceed twelve months, or by both fine and imprisonment at the discretion of the court. [11 G. A., ch. 10, §§ 1, 2.]

5414. Diseased horses, mules, etc., running at large. 4057. If any horse, mule, or ass, reasonably supposed to be diseased with nasal gleet, glanders, or button-farcey, be found running at large without any known owner, it shall be lawful for the finder thereof to take such horse, mule, or ass, so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful

for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury. [Same, § 5.]

See § 2283.

5415. Hog cholera. 21 G. A., ch. 79, § 1; 22 G. A., ch. 67. All traffic in swine which have died with the swine plague or hog cholera or from other infectious or contagious diseases within the state is hereby prohibited and it shall be unlawful for any person to haul in any vehicle or public conveyance any dead hogs which have so died or are known to be affected with such disease, upon any public road or highway or upon any inclosure other than that upon which said hogs have died. It shall also be unlawful for any person, negligently or wilfully to allow his hogs or those under his control, infested with hog cholera or other plague or contagious disease, to escape his control or run at large.

5416. Burning or burying. 21 G. A., ch. 79, § 2. Any person having in his possession swine which have died from the swine plague, hog cholera or other infectious disease shall within a reasonable time cause the same to be burned or buried to a depth of at least thirty inches so as to prevent the spread of the disease.

5417. Penalty. 21 G. A., ch. 79, § 3. Any person violating or failing to comply with any provisions of this act [§§ 5415, 5416] shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not less than five dollars nor more than one hundred dollars at the discretion of the court.

5418. Diseased cattle. 4058; 21 G. A., ch. 156, § 2. Any person or persons driving any cattle into this state, or any agent, servant, or employee of any railroad or other corporation who shall carry, transport, or ship any cattle into this state, or any railroad company, or other corporation or person who shall carry, ship or deliver any cattle into this state, or the owners, controllers, lessees, or agents or employees of any stock yards, receiving into such stock yards or in any other inclosures for the detention of cattle in transit, or shipment, or reshipment or sale, any cattle brought or shipped in any manner into this state which at the time they were either driven, brought, shipped, or transported into this state, were in such condition as to infect with or to communicate to other cattle, pleuro-pneumonia, or splenitic or Texas fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months, in the discretion of the court. [12 G. A., ch. 185, §§ 1, 3, 4.]

5419. Action for damages. 4059; 21 G. A., ch. 156, § 3. Any person who shall be injured or damaged by any of the acts of the persons named in section four thousand and fifty-eight [§ 5418], and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employees or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding nor said civil action, in any stage of the same be a bar to a conviction or to a recovery in the other. [Same, §§ 2, 4.]

The repeal and re-enactment of this section without a special saving clause did not (under § 49, subd. 1) release liability for penalties already incurred: *Kemmish v. Ball,* 30 Fed. Rep., 759.

5420. Diseased hop roots or cuttings. 4060. If any person use, transplant, or cultivate, or bring into this state for the purpose of using, planting, cultivating, or selling, any hop roots, plants, or cuttings, which may be diseased in any manner, or infected with lice or vermin of any kind, or which

may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice, or vermin of a contagious character, he shall be fined not less than ten nor more than one hundred dollars, and imprisoned not less than five nor more than twenty days. [12 G. A., ch. 195, §§ 1, 2.]

5421. Seizure and destruction of diseased plants. 4061. If complaint is made before a justice of the peace by one or more responsible persons, that they have good reason to believe that hop roots have been introduced into, or are being cultivated in the city or township where they reside in violation of this act, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until suit has been brought against the person or persons so offending, and the cause determined; and in case it is found that the said plants, roots, or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom suit is brought will order the said roots, plants or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants, or cuttings; and in no case will he allow them to be planted or delivered to a third party, until the fact is established that they are not infected with any vermin or disease of a contagious character. [Same, § 3.]

5422. Canada thistles. 4062. If any person or corporation, after having been notified in writing of the presence of Canada thistles on any lands owned or occupied by such person or corporation; or if any highway supervisor, after having been notified in writing of the presence of Canada thistles on the highway under his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation, or highway supervisor, shall be deemed guilty of a misdemeanor and be punished accordingly. [12 G. A., ch. 143; 13 G. A., ch. 177.]

5423. Killing birds. 4063; 22 G. A., ch. 103, § 3. If any person kill, trap, ensnare, or in any manner destroy any of the birds of this state, excepting birds of prey, the migratory aquatic birds, English sparrows, and those which are useful for food, and the killing of which at certain seasons of the year is now permitted by law, or in any manner destroy the eggs of such birds as are hereby intended to be protected from destruction, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five nor more than twenty-five dollars. But persons killing birds for scientific purposes, or for preservation in museums and cabinets, shall be exempt from the penalties of this section, upon making satisfactory proof of the purposes for which they have killed any such bird or birds. [13 G. A., ch. 74.]

5424. Peace officer to file information. 22 G. A., ch. 103, § 1. It shall be the duty of every peace officer who may have knowledge of any violation of the provisions of section four thousand and sixty-three of the code [§ 5423] to immediately file an information against the person so violating said provisions before some justice of the peace having jurisdiction of said offense and to cause the arrest of such person and to immediately give the county attorney all information within his knowledge concerning such violation.

5425. Neglect of duty. 22 G. A., ch. 103, § 2. Any peace officer who may have knowledge of any violation of the provisions of said section four thousand and sixty-three [§ 5423] and shall fail and neglect to perform his duty as herein specified shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than two nor more than ten dollars.

5426. Boxing tumbling-rods of threshing machines. 4064; 15 G. A., ch. 38. If any person run any threshing machine in this state, without having the two lengths of tumbling-rods next the machine, together with the knuckles or joints and jacks of the tumbling-rods, safely boxed and secured

while the machine is running, he shall be deemed guilty of a misdemeanor and be punished by fine of not less than ten nor more than fifty dollars for every day or part of a day he shall violate this section; and any person who shall, knowingly, permit either his own grain, or any that may be in his possession or under his control, to be threshed by a machine the rods, knuckles, or joints of which are not boxed in accordance with the requirements of this section, shall be liable to a like fine as that prescribed for the person running such machine, both of which fines may be recovered in an action brought before any court of competent jurisdiction. [11 G. A., ch. 135, §§ 1, 2; 12 G. A., ch. 45.]

This section does not make defendant absolutely liable. Proof of running a threshing machine not secured as here required establishes negligence, but the rule still applies that contributory negligence on the part of the person injured will defeat a recovery: *Reynolds v. Hindman*, 32–146.

A person injured through a violation of this provision has a right of action, and it is sufficient to allege the violation as the basis of the right to recover, and as constituting the negligence complained of: *Messenger v. Pate*, 42–443.

Where a contract was made for threshing to be done with a machine not boxed, etc., as here required, *held*, that the contract was void, and that such fact was a good defense in an action for services rendered thereunder: *Dillon v. Allen*, 46–299.

5427. Steam-boilers. 15 G. A., ch. 14, § 1. It shall be the duty of any person ow[n]ing or operating steam-boilers in this state to provide such boilers with steam-gauge, safety-valve, and water-gauge and keep the same in good order.

5428. Penalty for neglect. 15 G. A., ch. 14, § 2. Any person neglecting to comply with the provisions of this act [§ 5427] shall be deemed guilty of a misdemeanor and shall be punished by fine not less than fifty nor more than five hundred dollars.

5429. Blacklisting employees. 22 G. A., ch. 57, § 1. If any person, agent, company or corporation, after having discharged any employee from his or its service shall prevent or attempt to prevent by word or writing of any kind such discharged employee from obtaining employment with any other person, company or corporation, except by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent or corporation, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars nor less than one hundred dollars, and such person, agent, company or corporation shall be liable in penal damages to such discharged person to be recovered by civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing in writing any other person, company or corporation setting forth a truthful statement of the reasons for such discharge.

5430. Same by agents. 22 G. A., ch. 57, § 2. If any railway company, any other company or partnership or corporation in this state shall authorize or allow any of its or their agents to blacklist any discharged employees or attempt by word or writing or any other means whatever to prevent such discharged employee or any employee who may have voluntarily left said company's service from obtaining employment with any other person or company except as provided for in section one hereof [§ 5429], such company or copartnership shall be liable in treble damages to such employee so prevented from obtaining employment, to be recovered by him by a civil action.

CHAPTER 12.

OFFENSES AGAINST THE PUBLIC PEACE.

5431. Affray. 4065. If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place to the disturbance of others, they are guilty of an affray, and shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars. [R., § 4386; C., '51, § 2738.]

5432. Unlawful assembly. 4066. When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of an unlawful assembly, and every such offender shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. [R., § 4387; C., '51, § 2739.]

5433. Riot. 4067. When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of a riot, and every such offender shall be punished as is provided in the preceding section. [R., § 4388; C., '51, § 2740.]

In order to constitute a riot it is necessary that the persons implicated shall be actually engaged in some physical act of violence: *Scott v. United States*, Mor., 142.

5434. Conviction. 4068. Any person guilty of unlawfully assembling, or of a riot, may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein. [R., § 4389; C., '51, § 2741.]

5435. Exciting disturbance. 4069. If any person make or excite any disturbance in any tavern, store, or grocery, or at any election, or public meeting, or in any other place where the citizens are peaceably and lawfully assembled, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [R., § 4390; C., '51, § 2742.]

5436. Injuring houses, boats, etc. 4070. If any person or persons unlawfully or riotously assembled, pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling-house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained, in an action at law. [R., § 4391; C., '51, § 2743.]

5437. Racing or fast driving on highways. 4071. Any person who shall be guilty of racing horses, or driving upon the public highway in a manner likely to endanger the persons or lives of others, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

5438. Breach of Sabbath. 4072. If any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire-arms, fishing, horse-racing, dancing, or in any manner disturbing any worshiping assembly, or pri-

vate family; or in buying or selling property of any kind, or in any labor, the work of necessity and charity only excepted, every person so offending shall, on conviction, be fined in a sum not more than five dollars nor less than one dollar, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the jail of said county until the said fine, together with the costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling, or families emigrating, from pursuing their journey, or keepers of toll-bridges, toll-gates, and ferrymen from attending the same. [R., §§ 4392-3.]

An express or implied contract for sale of property, made on Sunday, where the parties are not embraced within the exceptions of this section, will not be enforced by the courts: *Watrous v. Blair*, 32-58, 61; *Pike v. King*, 16-49.

Vendee of property sold on Sunday may retain it without paying the price agreed upon. The law will leave the parties where it finds them: *Pike v. King*, 16-49; *Kinney v. McDermot*, 55-674.

If the contract is to pay for property bought and sold on Sunday, the plaintiff cannot recover the value aside from the contract: *Pike v. King*, 16-49.

A vendee obtaining possession of property under a Sunday contract may maintain replevin for such property when subsequently taken from him by the vendor by force: *Kinney v. McDermot*, 55-674.

The execution of a note on Sunday is within the prohibition of this section, and such note is, as against the maker, void in the hands of the payee or his assignees. And in this respect the laws of another state where the note was executed will be presumed to be the same as those of this state: *Sayre v. Wheeler*, 31-112; *S. C.*, 32-559.

The burden of proving that a contract made on Sunday is within one of the exceptions of this section is upon the party claiming under the exemption, which is in the nature of a proviso: *Ibid.*

A note signed on Sunday, but not, in fact, delivered until Monday, is not void: *Bell v. Mahin*, 69-408.

The defense that a contract is void because made on Sunday must be specially pleaded: *Riech v. Bolch*, 68-526.

It does not follow that where the contract only is unlawful the plaintiff cannot recover upon the original consideration in a proper case: *Sayre v. Wheeler*, 31-112.

Though the contract be void as made on Sunday the parties may make a valid contract with reference to the same subject-matter on a subsequent week-day, and it would seem that a subsequent ratification of the Sunday contract would be binding: *Harrison v. Colton*, 31-16.

To amount to the ratification of a contract of lease executed on Sunday something more than mere occupation of the premises must be shown. Such occupancy might render the tenant liable under an implied promise for a *quantum meruit*, but not for the rent stipulated. To constitute a ratification there must be some new promise to perform the terms of the lease, or something equivalent thereto: *McIntosh v. Lee*, 57-356.

The admission of a debt such as will take it out of the bar of the statute of limitations is not void because made on Sunday: *Ayres v. Bane*, 39-518.

A party to a Sunday contract cannot set up the fact of its execution on Sunday to defeat it in the hands of one who is a good faith assignee thereof for value and without notice of the illegality: *Johns v. Bailey*, 45-241.

A negotiable note made on Sunday, but dated on another day, and having nothing on its face to indicate its invalidity, is not void in the hands of a *bona fide* holder acquiring it before maturity without notice: *Clinton Nat. Bank v. Graves*, 48-228.

The transferee, after maturity, without knowledge of the fact that the note bearing date on a secular day was actually executed on Sunday, may recover thereon. The defense to the note is not an equity which may be set up against one who purchases after maturity: *Leightman v. Kadelska*, 58-676.

An action for damages for fraud in trading a horse affected with glanders, *held* not maintainable where it appeared that the trade was made on Sunday: *Gunderson v. Richardson*, 56-56.

In an action for damages resulting from the frightening of plaintiff's horse by defendant's dog, *held*, that the fact that the accident happened on Sunday, while plaintiff was riding on a business errand, would not defeat his right of recovery: *Schmid v. Humphrey*, 48-652.

Nor will the fact that a railway train is operated in violation of the Sunday law render the railway company liable for damages accidentally occurring from the operation of such train without fault or negligence on the part of the company: *Tingle v. Chicago, B. & Q. R. Co.*, 60-333.

CHAPTER 13.

CHEATING BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY.

5439. False pretenses. 4073. If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property; or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4394; C., '51, § 2744.]

What constitutes: This changes the common-law rule as to cheats, and a person may be guilty of cheating by false pretenses, consisting of representations and acts, although no false tokens are used: *State v. Reidel*, 26-430.

The crime of cheating by false pretenses may be committed by means of false representations. Therefore, *held*, that the indictment charging defendant with obtaining the signature of prosecutor to a promissory note, by means of false representations and pretenses that such note was an order for a certain number of patent churns, etc., well knowing such representations to be false, was sufficient: *State v. Joaquin*, 43-131.

A false promise will not sustain the charge of a crime under this section. There must be a pretense and representation, in fact, that is false, and which was relied upon by the party defrauded; but the fact that a false promise was combined with the false pretense does not take away the criminal character of the act: *State v. Dowe*, 27-273.

So, where a party, under the pretense of having come to pay a debt, on a promise to pay the same, fraudulently procured from his creditor and got into his possession a receipt for his debt, *held*, that the facts constituted an offense as here contemplated: *Ibid.*

A person who, by falsely personating another, obtains property with intent to convert it to his own use, is guilty of larceny (§ 5212): *State v. Brown*, 25-561.

Where defendant was indicted for obtaining property in exchange for a lot of a certain description which he pretended to point out, but it was in fact located elsewhere than was indicated and was of no value, *held*, that the party to whom the lot was shown was justified in believing the lot described was located as indicated, and that it was not error to refuse to instruct the jury that it must be shown that the party to whom the representations were made exercised ordinary prudence and diligence to inform himself of the truth of the representations: *State v. McConkey*, 49-499.

Also *held* that in such case the crime would have been complete, even if it had appeared that defendant was the owner of the lot which he pointed out as that conveyed by him: *Ibid.*

Representations made by acts or declarations intended to induce the belief that the person making them is some one else may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Goble*, 60-447.

To constitute the crime, the person must have obtained, by means of the false pretenses, either the title to the property, or the unqualified right of possession thereof, for some length of time: *State v. Anderson*, 47-142.

Obtaining an indorsement of credit on a note by false pretenses, with intent to defraud, does not constitute an offense under this section: *State v. Moore*, 15-412.

False promises, coupled with false statements of fact, may amount to false pretenses: *State v. Montgomery*, 56-195.

The question is for the jury whether the false representations actually misled the person claimed to have been defrauded, and in determining that question they should take into account his age, experience, state of health, etc.: *Ibid.*

The jury should be told that it is necessary to prove that defendant made the false representations, knowing them to be false, and that the other party was deceived and thereby induced to act: *State v. Rivers*, 58-102.

Where defendant was indicted for false pretenses in procuring a bank to accept as collateral security an invalid mortgage, *held*, that previous and subsequent dealings with the bank might be shown as throwing light upon the intent of the defendant and the fact as to whether the cashier was in fact deceived: *Ibid.*

Where defendant had borrowed money on the representation that his brother was to arrive with money, coupled with the promise to use it in payment of the sum borrowed, *held*, that such representation and promise amounted to a pretense that he had the money: *State v. Fooks*, 65-196.

To support a conviction it need not appear that the false pretenses were the only inducements for giving credit or delivering property to the accused. It is sufficient if they had such effect that without their influence upon the mind of the party defrauded he would not have parted with the property or given credit: *Ibid.*

If the false representations are made with the design of deceiving and thereby obtaining property, and have that effect, the guilty party cannot escape on the ground of weak credulity: *Ibid.*

Where defendant procured property by representing that he had purchased a farm in the neighborhood, *held*, that the crime was committed: *State v. Fooks*, 65-452.

Where a buyer acquires property by reason of statements by him to the seller respecting his condition, made to induce the sale, which statements he knows to be false, it is no defense that he nevertheless intended to pay for the property: *State v. Neimeier*, 66-634.

In the case of obtaining a signature by false pretenses the crime is committed when the instrument is delivered, and not when the signature is obtained. The delivery of the instrument with intent to defraud is essential: *State v. McGinnis*, 71-685.

This crime might be committed by fraudulently procuring a mortgage from another, although the maker was not the owner of the property described therein, if the mortgage contained covenants imposing pecuniary liability on the maker: *State v. Jamison*, 74-613.

Indictment: In an indictment for obtaining money under false pretenses, the false pretenses should be particularly set forth: *United States v. Ross*, Mor., 164.

An indictment for this offense cannot be predicated upon representations which are mere matters of opinion: *State v. Webb*, 26-262.

An indictment charging that by means of false token and pretenses, etc., the defendant obtained the property described, *held* to sufficiently charge that the party to whom the pretense was made relied thereon: *State v. McConkey*, 49-499.

In a particular case, *held*, that the indictment sufficiently charged that the party defrauded parted with his property on the faith of defendant's false representations: *State v. Neimeier*, 66-634.

An indictment charging the obtaining by false pretenses of certain notes, designating them as property, and in a second count charging the obtaining in the same manner of the same notes, but designating them as written instruments, the false making of which would be forgery, does not charge two offenses. Such charges might be contained in the same count without rendering the indictment bad for duplicity: *State v. House*, 55-466.

It is not sufficient to charge in the indictment that the defendant by means of false pretenses induced another to sign a written instrument, the false making of which would be forgery; it must also be averred that he obtained from such person the instrument so signed: *State v. Clark*, 72-30.

The indictment must show delivery of the instrument obtained by false pretenses, but it is not necessary that any person should have been actually defrauded: *State v. Jamison*, 74-613

Venue: That the false representations were made in another county will not prevent the offense being punishable in the county where the property was obtained. The latter county is the one where the offense was committed: *State v. House*, 55-466.

5440. Fraudulent conveyances. 4074. Any person who knowingly being a party to any conveyance, or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom; or being a party to any charge on such estate, interest, rents, or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons; and every person who, being privy to or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [R., § 4395; C., '51, § 2745.]

The intention to hinder and delay creditors is the essential element in the crime here defined. An instrument such as is referred to is void: *Davenport v. Cummings*, 15-219.

To establish the crime, a fraudulent intent in fact, as distinguished from an intent which may be presumed in law, must be shown: *Lillie v. McMillen*, 52-463.

"Other persons," as here used, means some one who had, or might have, a claim of right to the property conveyed, which might be enforced at law or in equity. The intention with which a conveyance is made cannot render the act criminal, if no legal or equitable rights of others are affected thereby: *Day v. Lown*, 51-364.

Where the mortgagee of a mortgage executed in fraud of creditors, as contemplated in this section, seeks to recover possession of the property thereunder, the mortgagor may set up the invalidity of the mortgage as a defense: *Galpin v. Galpin*, 74-454

5441. Suppression of will. 4075. If any person having in his possession, or under his control, any last will and testament of any deceased person, wilfully suppress, secrete, deface, or destroy the same, or any codicil thereto belonging, with intent to injure or defraud any devisee, legatee, or other person, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year. [R., § 4396; C., '51, § 2746.]

5442. False weights and measures. 4076. If any person with intent to defraud, use a false balance, weight, or measure, in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped, or delivered for sale or barter, or that is pledged or given in payment, he shall be

punished by fine not exceeding five hundred dollars nor less than fifty dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment at the discretion of the court. [R., § 4397; C., '51, § 2747.]

5443. Seizure. 4077. The magistrate granting the warrant of arrest for this offense must also direct the seizure of the false weights, balances or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county, and, after being made of the standard weight or measure, may be sold and the money arising from such sale must be paid into the county treasury. [R., § 4398; C., '51, § 2748.]

5444. Altering brands, stamps, marks, etc. 4078. If any person falsely alter any stamp, brand, or mark on any cask, package, box or bale, containing merchandise or produce, made by a public officer appointed for that purpose, in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year. [R., § 4399; C., '51, § 2749.]

5445. Counterfeiting mark of another. 4079. If any person counterfeit any mark, stamp or brand of another, or falsely mark any cask, package, box, or bale, as to quality or quantity, with intent to defraud, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment. [R., 4400; C., '51, § 2750.]

The fact of making and branding, with intent to deceive, without reference to whether the articles so marked or branded are to be sold or not, is sufficient to constitute the crime here defined: *State v. Burge*, 7-255.

5446. Fraudulently using stamped box, etc. 4080. If any person with intent to defraud, use any cask, package, box, or bale, marked, branded, or stamped by another, for the sale of merchandise or produce of an inferior quality, or less in quantity or weight than is denoted by such mark, stamp, or brand, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding two hundred dollars, or by both fine and imprisonment at the discretion of the court. [R., § 4401; C., '51, § 2751.]

5447. Gross fraud or cheat. 4081. Every person who is convicted of any gross fraud or cheat at common law, shall be punished as provided in the preceding section. [R., § 4402; C., '51, § 2752.]

Punishment is here provided for *gross* frauds and cheats, and under this provision all frauds and cheats are certainly not punishable. Slanderous words charging a person with cheating, defrauding, etc., are therefore not actionable *per se: Lucas v. Flinn*, 35-9.

5448. Fraudulent destruction of boats, etc. 4082. If any person cast away, sink, or otherwise destroy, any raft, boat, or vessel, within any county of this state with intent to defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year. [R., § 4403; C., '51, § 2753.]

5449. Fitting out for that purpose. 4083. If any person lade, equip, or fit out, or assist in lading, equipping, or fitting out, any raft, boat, or vessel, with intent that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4404; C., '51, § 2754.]

5450. Making false bills of lading. 4084. If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the

same; or if any other person concerned in the lading or fitting out such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden, or pretended to be laden, on board such boat or vessel with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years. [R., § 4405; C., '51, § 2755.]

5451. Making false affidavits or protests. 4085. If any master or other officer of any boat or vessel, make, or cause to be made, any false affidavit or protest; or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or protest to be made, or exhibit the same with intent to injure, deceive, or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding three thousand dollars and imprisonment in the county jail not exceeding one year. [R., § 4406; C., '51, § 2756.]

5452. Conspiracy to prosecute. 4086. If two or more persons conspire or confederate together with intent, falsely and maliciously, to cause or procure another person to be indicted, or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted, or prosecuted or not, they shall be deemed guilty of a conspiracy, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars nor less than one hundred dollars and imprisonment in the county jail not exceeding one year. [R., § 4407; C., '51, § 2757.]

5453. Conspiracy in general. 4087. If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business or property of another; or to do any illegal act injurious to the public trade, health, morals or police; or to the administration of public justice; or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be punished by imprisonment in the penitentiary not more than three years. [R., § 4408; C., '51, § 2758.]

What constitutes: To constitute the crime of conspiracy the accused must confederate together to do either a criminal act, or an act which is not criminal by criminal means. In the latter case the acts constituting the illegal means must be specifically charged: *State v. Potter*, 28-554; *State v. Stevens*, 30-391; *State v. Jones*, 13-269.

In order that the object of the conspiracy may be criminal, the injury intended should appear on the face of the indictment to be a criminal one; such an injury as the statute makes an offense: *State v. Stevens*, 30-391.

An indictment charging conspiracy with fraudulent intent wrongfully to injure the character of prosecutrix by obtaining a divorce from her by making false charges of adultery, etc., does not charge facts sufficient to constitute conspiracy as against such prosecutrix: *Ibid.*

Where the conspiracy is to do a criminal act, it is sufficient if it be described by the proper name or term by which it is usually known in law: *State v. Potter*, 28-554; *State v. Savoye*, 48-562.

An indictment charging defendants with conspiracy to procure prosecutrix to go with them with a view of bringing about a sham marriage and thus causing her seduction, *held* sufficient to charge a conspiracy to commit a crime without charging that she was married or of previously chaste character: *State v. Savoye*, 48-562.

A charge that defendants conspired to "cheat and defraud," *held* not sufficient to charge the crime of conspiracy: *State v. Jones*, 13-269.

A conspiracy to take from an officer on a writ of replevin intoxicating liquors seized under information for their forfeiture is a conspiracy to do an unlawful act under § 5221, and therefore punishable: *State v. Harris*, 38-242.

A charge of conspiracy to injure the property of another will not be supported where it appears that the acts complained of were done in the exercise of an avowed legal right, the existence of which the testimony strongly, if not conclusively, establishes, and that they were not done as a result of a conspiracy to wrongfully injure said property: *State v. Flynn*, 28-26.

The combination and agreement of the parties to commit a crime may be proven by the

circumstances connected with the transaction which is the subject of the accusation. In other words, conspiracy may be shown by circumstantial evidence: *State v. Sterling*, 34–443.

An indictment for a conspiracy to "rob and steal" is not bad as charging more than one offense. Even should the conspiracy contemplate the commission of several distinct felonies, the crime would be single: *Ibid.*

Where the intended act charged is not criminal, the indictment should charge with what means the act was to be done: but if the intended act charged is criminal, an indictment charging a conspiracy to commit such injury need not charge the means intended to be used: *State v. Ormiston*, 66–143.

While the offense of conspiracy may be complete without the commission of the overt act which the conspirators agreed to commit, and it is unnecessary to charge the commission of such act, even if committed, yet it is usual to set out the commission of the act by way of aggravation of the offense; and where the overt act is thus charged it does not follow necessarily that the indictment is designed to charge anything more than conspiracy, and if it does not appear that defendant was or was intended to be put on trial for anything but the crime of conspiracy, such indictment will not be defective as charging more than one crime: *Ibid.*

An allegation that defendants conspired to assault a person with intent to inflict great bodily injury charges conspiracy to assault and inflict such injury, and is not open to the objection of charging conspiracy with intent to intend: *Ibid.*

The crime is completed when the conspiracy is formed, and it is immaterial whether the object intended be accomplished or not: *State v. Savoye*, 48–562.

Acts and declarations of co-conspirators: The acts and declarations of one of two or more persons charged with a conspiracy in the commission of a crime are not admissible as against the others, unless a foundation is first laid sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury to establish such fact. *State v. Nash*, 7–347, 384.

Where two defendants were jointly indicted for horse stealing, *held*, that upon the trial of one the state could prove that the other conducted a witness to the horses, for the purpose of showing when and how the horses were found, without first showing the existence of a joint purpose or conspiracy: *State v. Bowers*, 17–46.

Admissions of a co-conspirator, made after the common enterprise is at an end, are not admissible except against himself: *State v. Arnold*, 48–566.

Where several defendants were jointly indicted for murder, *held*, that it was error to admit against one of them declarations of co-defendants made after the commission of the crime: *State v. Westfall*, 49–328; *State v. Smith*, 54–656.

But acts and declarations of an accomplice, made while engaged with defendant in furthering, aiding and abetting a common design in the commission of a larceny, are admissible in evidence against him: *State v. Hudson*, 50–157.

Upon the trial of one of several co-defendants jointly indicted for burglary, *held*, that acts and conversations of the other defendants, tending to establish familiar relations and association of all the parties, and that they were in company at about the time of the commission of the crime, were admissible for the purpose of connecting defendant with the crime: *State v. Stevens*, 67–557.

5454. Pools and trusts. 22 G. A., ch. 84, § 1. If any corporation organized under the laws of this state or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual shall create, enter into, become a member of or a party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combination or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold in this state, shall be deemed guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in the next section.

5455. Penalty. 22 G. A., ch. 84, § 2. Any person or corporation found guilty of a violation of this act [§ 5454] shall be punished by a fine of not less than one hundred dollars, nor to exceed five thousand dollars, and stand committed until such fine paid.

5456. Witnesses. 22 G. A., ch. 84, § 3. Upon the trial of an indictment against a corporation or a copartnership for a violation of the first section of this act [§ 5454], all officers and agents of such corporation or copartnership shall be competent witnesses against the defendant on trial and such officers and agents may be compelled to testify against such defendant and produce all books and papers in his custody or under his control pertinent to the issue in such trial, and shall not be excused from answering any such question, or

from producing any books and papers because the same might tend to criminate such witness; but nothing which such witness shall testify to, and no books or papers produced by him shall in any manner be used against him in any suit, civil or criminal, to which he is a party.

5457. 22 G. A., ch. 84, § 4. All acts and parts of acts in conflict with this act be and the same are hereby repealed.

5458. False warehouse receipts. 4088. If any person issue any receipt or voucher, stating or purporting to state the receipt by him from another, of any property for storage or safe keeping without having in good faith received, and at the time having in his possession or under his control, such property; or issue any second receipt or voucher for any property while his former receipt or voucher for the same, or any part thereof, shall be outstanding and uncanceled; or sell, incumber, transfer, ship, or in any manner remove beyond his immediate control, any property for which a receipt or voucher has been given by him as aforesaid, in violation of the terms of such receipt or voucher, without the written consent of the person holding such receipt or voucher, except to enforce his lien for storage and warehouse charges as provided by law; or sell, transfer, or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property or any part thereof, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary of this state not exceeding five years. [9 G. A., ch. 84.]

It is not competent for a defendant charged with crime under this section to show that the shipment or disposal of the property was with the knowledge or verbal consent of the person holding the receipt. The provision is intended for the protection of the community as well: *State v. Stevenson*, 52-701.

5459. Swindling in sale of grain or seed. 22 G. A., ch. 78, § 1. Whoever, either for his own benefit or as the agent of any corporation, company, association or person, obtains from any other person anything of value, or procures the signature of any such person, as maker, indorser, guarantor or surety thereon, to any bond, bill, receipt, promissory note, draft, check, or any other evidence of indebtedness, as the whole or part consideration of any bond, contract or promise given the vendee of any grain, seed or cereals binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals; and whoever sells, barters or disposes of, or offers to sell, barter or dispose of, either for his own benefit or as the agent of any corporation, company, association or person, any bond, bill, receipt, promissory note, draft, check, or other evidence of indebtedness, knowing the same to have been obtained as the whole or part consideration for any bond, contract or promise given the vendee of any grain, seed or cereals binding the vendor or any other person, corporation, company, association, or the agent thereof, to sell for such vendee any grain, seed or cereals at a fictitious price, or at a price equal to or more than four times the market price of such grain, seed or cereals, shall on conviction thereof be imprisoned in the penitentiary not more than three years, or be fined in the sum of not more than five hundred dollars nor less than one hundred dollars, or both, at the discretion of the court.

5460. Weight of flour. 22 G. A., ch. 80, § 1. In all cases where flour, meal, and other mill products, are sold by the sack or package purporting to weigh a certain number of pounds, the weight of such sack, or package shall be plainly marked, or stamped thereon. And if any such sack or package sold, shall weigh less than the amount marked thereon, the person so selling the same, shall be deemed guilty of a misdemeanor, and on conviction thereof,

shall be fined not less than five dollars, or more than twenty-five dollars, in the discretion of the court.

5461. Unlawfully wearing badge. 22 G. A., ch. 104, § 1. Any person who shall wilfully wear the badge or button of the Grand Army of the Republic or the insignia or rosette of the Military Order of the Loyal Legion of the United States, or use the same to obtain aid or assistance within this state, unless he shall be entitled to wear the same under the rules and regulations or constitution of such organizations, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for a term not to exceed thirty days, or a fine not to exceed twenty dollars.

5462. Swindling by three-card-monte. 16 G. A., ch. 102, § 1. Whoever by the means of three-card-monte, so called, or any other form or device, sleight of hand, or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling, and shall, on conviction thereof, be punished by a fine not less than two hundred dollars nor more than two thousand dollars, or by imprisonment in the penitentiary not less than two years nor more than five years, or by both such fine and imprisonment in the discretion of the court. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing, any such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed principals therein, and punished accordingly.

This act embraces any "sleight-of-hand" performance, whether done by the use of cards or other devices: *State v. Quinn*, 47-368.

5463. Jurisdiction of offense. 16 G. A., ch. 102, § 2. The jurisdiction of all the offenses described in section one of this act [§ 5462] which shall be committed on any railroad car, coach, train, boat, or other public conveyance, or in or at any railroad station or depot, shall be in any county through which said car, coach, train, boat, or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate, and in all other cases the jurisdiction shall be in the county in which the offense is committed.

5464. Who may make arrest. 16 G. A., ch. 102, § 3. Every person shall possess the power and authority, and it shall be the duty of every conductor, or other employee on any railroad, car or train, and of every captain, clerk or other employee on any boat, or station agent at any railway depot, or the officers of any fairs or fair grounds, and the proprietors of any place of public resort, and their employees, with or without warrant, to arrest any person or persons whom they or either of them shall find in the act of committing any of the offenses mentioned in the first section of this act [§ 5462], or any person or persons, whom he or they may have good reason to believe to have been guilty of the commission of the said offenses, and to take such person or persons before a magistrate in any county where jurisdiction to try said offenses exists by virtue of this act [§§ 5462–5467], and deliver such person or persons so arrested to the magistrate, and make written complaints under oath of the facts. And for executing the powers conferred by this section, the person making the arrest shall possess the same powers in all respects as are exercised by officers with warrants, including the power to summon assistance; and it shall be the duty of the person making such arrest to also arrest the person injured or defrauded by reason of the commission of any of the offenses mentioned in section one of this act [§ 5462], and take such person before the examining magistrate, who shall require such person to give security to appear and testify on the trial of the cause, and such person or

persons shall not be deemed to be guilty of the offense mentioned in section one of this act [§ 5462], nor of the offense of gambling, unless such person or persons shall have failed to appear and give evidence on the trial. And the persons performing the services required by this act shall receive the same compensation as sheriffs receive for like services.

5465. Duty of conductor, captain, etc. 16 G. A., ch. 102, § 4. It shall be the duty of any conductor, captain, hotel or saloon-keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, to eject from his car, train, boat, hotel, saloon, public conveyance, fair grounds or place of public resort, any person known to him or whom he has good reason to believe to be a three-card-monte-man, or who offers to wager or bet money or other valuable things upon what is commonly known as three-card-monte, or bet on any trick, or game with cards or other gaming device, and for such ejectment no action for damage shall be maintained. And any parties operating any public conveyance by which passengers are carried shall keep posted up a copy of this law in such conveyance.

5466. Conductor, captain, etc., to be deemed guilty. 16 G. A., ch. 102, § 5. Any conductor of a railroad train, captain of any steamboat, proprietor or manager of any public conveyance, officer of any fair or fair grounds, or place of public resort, any hotel or saloon-keeper or their agent or employee, who shall fail, neglect or refuse to perform the duties herein mentioned, or who shall knowingly suffer or permit a violation of this act [§§ 5462–5467], shall be deemed guilty of a misdemeanor, and the jurisdiction of such offense shall be the same as that provided in section two of this act [§ 5463].

5467. Evidence. 16 G. A., ch. 102. § 6. Any person may be convicted for violation of section number one of this act [§ 5462], on his own confession out of court, or upon the testimony of an accomplice.

5468. Frauds upon hotel-keepers. 18 G. A., ch. 76, § 1. Any person who shall obtain food, lodging, or other accommodation at any hotel, inn, boarding or eating-house, with intent to defraud the owner or keeper thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days.

5469. Evidence. 18 G. A., ch. 76, § 2. Proof that lodging, food, or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging or other accommodation on demand, or that he absconded or left the premises without paying or offering to pay for such food, lodging or other accommodation, or that he surreptitiously removed, or attempted to remove, his baggage, shall be *prima facie* proof of the fraudulent intent mentioned in section one of this act [§ 5468]; but this act shall not apply to regular boarders, nor when there has been an agreement for delay in payment.

CHAPTER 14.

NUISANCES, AND ABATEMENT THEREOF.

5470. What deemed nuisances. 4089. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort,

or property of individuals or the public, the causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure the water of any river, stream, or pond; or unlawfully diverting the same from its natural course or state to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings or otherwise, the public highways, private ways, streets, alleys, commons, landing-places, or burying grounds, are nuisances. [R., § 4409; C., '51, § 2759.]

What constitutes: While each of the acts enumerated is declared to be a nuisance, it is not declared in express terms which of them, or whether any of them, is a common nuisance under § 5473. They are public or private, as they tend to the public injury or only to the injury of private individuals: *State v. Close*, 35-570.

The close proximity of such a nuisance to a public highway, thus affecting those passing, would constitute it a public nuisance; so would causing the water of a mill-dam to become corrupt and to overflow, thus rendering the adjoining land marshy, etc., whereby the air should become corrupted and infected, etc.: *Ibid.*

Platform scales erected in a public street for private business may be ordered removed: *Emerson v. Babcock*, 66-257.

Shade trees at the side of the highway, which would not interfere with the traveled track if confined to the center of the highway, should be permitted to stand: *Quinton v. Burton*, 61-71. And see § 1503 and notes.

As to power of municipal corporation to abate nuisances, see § 615.

A party obstructing a highway by a fence or otherwise may be punished under this section, although the road supervisor might, under § 1507, have a right to remove the obstruction: *State v. Berry*, 12-58.

See further as to the obstruction of highways, § 5287, and cases there cited.

As to use of building for sale of intoxicating liquors, see § 2384 and notes.

Public benefit no defense: A defendant indicted for nuisance will not be permitted to show that the public benefit resulting from his act is equal to the public inconvenience arising from it: *State v. Kaster*, 35-221.

Evidence of offense not charged: Under an indictment charging the use of premises for the keeping of hogs, etc., occasioning noxious exhalations, offensive smells, etc., *held*, that evidence of noise made by the animals at night, annoying persons living in the vicinity, was receivable as part of the facts connected with the nuisance, although such disturbance could not be proved under the allegation of "other nuisances" specified in the indictment: *Ibid.*

The punishment provided in § 5473 is applicable to public as well as private nuisances embraced within the definition of this section: *Ibid.*

Abatement: A petition asking the abatement of a nuisance should be definite enough to enable the court to identify with certainty the obstruction to be removed: *Sloan v. Rebman*, 66-81.

Where it was shown that the nuisance was occasioned by the keeping of hogs within certain pens, *held*, that it was not proper in the abating of such nuisance to require the removal of lumber and materials composing the fence around such pens: *State v. Kaster*, 35-221.

The statutory provisions for the abatement of the nuisance do not take away the common-law right of the person injured by the erection of a mill-dam from abating it as a private nuisance: *State v. Moffelt*, 1 G. Gr., 247.

5471. Manufacture of gunpowder. 4090. If any person carry on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor, in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance, and such person is liable to be prosecuted accordingly. [R., § 4410; C., '51, § 2760.]

5472. Houses of ill-fame, gambling, etc. 4091. Houses of ill-fame kept for the purpose of prostitution and lewdness, gambling-houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances, and may be abated and punished as provided in this chapter. [R., § 4411; C., '51, § 2761.]

"To the disturbance of others" is the feature of the offense of keeping a house of ill-fame, as here described, which distinguishes it from that defined by § 5322: *State v. Alderman*, 40-375; *State v. Odell*, 42-75.

Failure to use the words "to the disturbance of others" in charging the keeping of a house where drunkenness, etc., are carried on, renders the indictment bad, but does not make it an indictment for an offense under § 5345: *State v. Dean*, 44-648.

Although the quarreling, fighting, etc., occur on the sidewalk *in front of*, and not *in*, the house of defendant, yet if it is the

character of the house which attracts the disorderly persons there, the defendant is guilty of keeping a nuisance: *State v. Webb*, 25–235.

Where defendant, at a farm house, kept and sold wine which was not drank upon the premises by those buying it, but upon the highway a half mile or more from the house, resulting in riotous conduct, etc., *held*, that he was not guilty of an offense under this section: *State v. Dieffenbach*, 47–638.

A boat may be within the meaning of the term "house of ill-fame" as here used: *State v. Mullen*, 35–199.

An indictment charging all these offenses as constituting a nuisance does not charge more than one offense: *State v. Spurbeck*, 44–667.

So, an indictment charging the doing of acts prohibited in this section, and also acts declared to be a nuisance in connection with the sale of intoxicating liquors, is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and could not be the basis of separate indictments: *State v. Dean*, 44–648.

A defendant may be convicted of keeping a nuisance on proof that he kept a place described in the indictment as a brewery and saloon where drinking, quarreling, fighting and breaches of the peace were carried on and by the defendant permitted to be carried on, to the disturbance of others, although there is no recurrence of such acts, and this even though the indictment charges such acts as occurring on more than one occusion: *State v. Pierce*, 65–85.

The prosecution may show that drinking, quarreling, etc., occurred at the place, but without the building, if they occurred by defendant's permission or where occasioned by the business which he carried on in the building: *Ibid.*

Evidence is admissible to show that the actions and appearance of persons immediately after going from the place indicated that they were intoxicated: *Ibid.*

A person is drunk in the legal sense within the meaning of the statute when he is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired: *Ibid.*

Intoxicating liquors: A person keeping intoxicating liquors for sale for a proper purpose will not be guilty of the crime of nuisance on account of unlawful sales made by a clerk without his knowledge or authority: *State v. Hayes*, 67–27.

As the so-called prohibitory amendment submitted to the people by the nineteenth general assembly was not properly submitted, the act of selling beer which was therein prohibited did not become a nuisance within the general terms of the statute describing that offense: *State v. Johnson*, 61–504.

See further as to use of building for sale of intoxicating liquors, § 2384 and notes.

5473. Punishment and abatement. 4092. Whoever is convicted of erecting, causing, or continuing a public or common nuisance as described in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided. [R., § 4412; C., '51, § 2762.]

The punishment here provided for the crime of nuisance is also to be applied to a person found guilty of that offense under § 2384 (keeping a building, etc., where intoxicating liquors are sold contrary to law): *State v. McGrew*, 11–112; *State v. Collins*, 11–141; *State v. Schilling*, 14–455; *State v. Little*, 42–51, 54; *State v. Dean*, 44–648.

The nuisance may be single, though all the various acts constituting it under the last section are charged: *State v. Spurbeck*, 44–667; and so an indictment charging the doing of the acts prohibited in § 2384 and § 5472 is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and defendant cannot be convicted of separate nuisances for acts committed under those two sections at the same time: *State v. Dean*, 44–648.

The court may order a defendant fined under this section to be imprisoned until the fine is paid in accordance with the provisions of § 5894, or imprisoned at hard labor under § 6136: *State v. Jordan*, 39–387; *State v. Anwerda*, 40–151.

The punishment here provided is applicable to public as well as private nuisances embraced within the definition of § 5470: *State v. Kaster*, 35–221.

5474. Process. 4093. When upon indictment, complaint, or action, any person is adjudged guilty of a nuisance, the court before whom such conviction is had, may, in addition to the fine imposed, if any, or to the judgment for damages or costs for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor. [R., § 4413; C., '51, § 2763.]

Where the nuisance to be abated was a boat on the Mississippi river, anchored east of the middle of the channel, *held*, that as the Iowa court had jurisdiction, under § 3, to arrest an offender and punish an offense committed thereon, it also had power to order such boat

seized and sold in case it was found to be a nuisance: *State v. Mullen*, 35-199.

Where it was shown that the nuisance was occasioned by the keeping of hogs within certain pens, *held*, that it was not proper in the abating of such nuisance to require the removal of lumber and materials composing the fence around such pens: *State v. Kaster*, 35-221.

A petition asking the abatement of a nuisance should be definite enough to enable the court to identify with certainty the obstruction to be removed: *Sloan v. Rebman*, 66-81.

The statutory provisions for the abatement of the nuisance do not take away the common-law right of the person injured by the erection of a mill-dam from abating it as a private nuisance: *State v. Moffett*, 1 G. Gr., 247.

5475. Warrant. 4094. When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant. [R., § 4414; C., '51, § 2764.]

5476. Execution of stayed. 4095. Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the defendant, and upon his entering into an undertaking in such sum and with such surety as the court or justice may direct, to the state, conditioned either that the defendant will discontinue said nuisance, or that within a time limited by the court and not exceeding six months, he will cause the same to be abated and removed as either is directed by the court; and upon his default to perform the condition of his undertaking, the same shall be forfeited and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and a *scire facias* on such undertaking. [R., § 4415; C., '51, § 2765.]

5477. Expenses. 4096. The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences, or other things, that may be removed as a nuisance, may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof. [R., § 4416; C., '51, § 2766.]

CHAPTER 15.

OF LIBEL.

5478. Definition. 4097. A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. [R., § 4417; C., '51, § 2767.]

A petition in a civil action for damages for what would be a libel under this section is sufficient, though the alleged libel does not charge plaintiff with a public offense. The plaintiff will be entitled to recover at least nominal damages, though no special damages be alleged. The publications which the law regards are actionable *per se*: *Call v. Larabee*, 60-212.

In case of libel it is not necessary that the publication should charge plaintiff with the commission of a statutory crime, and it is not necessary to plead special damages: *Halley v. Gregg*, 74-563.

5479. Punishment. 4098. Every person who makes, composes, dictates, or procures the same to be done; or who wilfully publishes or circulates such libel; or in any way knowingly or wilfully aids or assists in making, publish-

ing, or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars. [R., § 4418; C., '51, § 2768.]

5480. Truth given in evidence. 4099. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted. [R., § 4419; C., '51, § 2769.]

See Const., art. 1, § 7.

5481. Publication. 4100. No printing, writing, or other thing is a libel unless there has been a publication thereof. [R., § 4420; C., '51, § 2770.]

5482. Definition of. 4101. The delivering, selling, reading, or otherwise communicating a libel; or causing the same to be delivered, sold, read, or otherwise communicated to one or more persons or to the party libeled, is a publication thereof. [R., § 4421; C., '51, § 2771.]

5483. Law and fact. 4102. In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact. [R., § 4422; C., '51, § 2772.]

The "direction of the court" means instructions by the court. This section applies only in criminal prosecutions for libel, not in actions for damages: *Forshee v. Abrams*, 2–571.

Similar provision, see § 5823.

Although the jury determine both the law and the facts, yet the court has the right to instruct the jury in this as well as other criminal cases, and the conclusive presumption is that the jury will follow the instructions of the court. Therefore an erroneous instruction of the court in such case will be regarded as prejudicial and a ground for reversal, as in other cases: *State v. Rice*, 56–431.

TITLE XXV.

OF CRIMINAL PROCEDURE.

CHAPTER 1.

OF PUBLIC OFFENSES.

5484. Division of. 4103. Public offenses are divided into:
1. Felonies;
2. Misdemeanors. [R., § 4428; C., '51, § 2816.]

5485. Felony. 4104. A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary. [R., § 4429; C., '51, § 2817.]

5486. Misdemeanor. 4105. Every other public offense is a misdemeanor. [R., § 4430; C., '51, § 2818.]

5487. How punishable. 4106. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof. [R., § 4431; C., '51, § 2819.]

5488. All offenses bailable except. 4107. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses heretofore punishable with death under the laws of the state, where the proof is evident, or the presumption great.

Where a bail bond recited that defendant was charged with "feloniously killing two persons," *held* that, as the offense was not necessarily punishable with death, the bond was not void under § 3211 of Code of '51 (since repealed): *State v. Klingman*, 14-404.

The fact that defendant is charged with an offense punishable with death will not justify a magistrate in refusing bail, if the proof is slight, or that which is offered tends to show that it was an offense committed under mitigating circumstances and would not be punishable with death: *Ibid.*

A defendant examined by a magistrate upon charge of murder in the second degree committed in another state is entitled to bail, notwithstanding the language of § 5561: *State v. Hufford*, 23-579.

See Const., art. 1, § 12.

And in general as to bail, see § 5971 *et seq.*

5489. Defendant convicted of murder. 17 G. A., ch. 103, § 1. No defendant convicted of murder shall be admitted to bail.

CHAPTER 2.

OF THE TERM MAGISTRATE, AND HIS POWERS, PEACE OFFICERS AND OFFICERS OF JUSTICE, AND COMPLAINTS.

5490. Magistrates; duties. 4108. Any judge of the supreme, district, [or circuit] courts, any judge of any city court, any justice of the peace, any mayor of any incorporated city or town, any police, or other special justice of such city, or town, shall have power to hear complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments and take bail in the manner directed by this code. They are designated under the general term magistrate, and may exercise the jurisdiction hereby conferred on them as follows:

1. Judges of the supreme, district, [and circuit] courts throughout the state, in any county in which they may be at the time of complaint made;

2 Judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns, within their respective counties. [R., §§ 4439, 4447; C., '51, §§ 2823, 2778.]

[Judges of superior courts are magistrates: See § 784.]

5491. Peace officers. 4109. The following persons respectively are designated in this code under the general term, peace officer:

1. Sheriffs and their deputies;
2. Constables;
3. Marshals and policemen of incorporated cities and towns. [R., § 4440; C., '51, § 2830.]

A special constable appointed by a justice of the peace under the provisions of § 4880 is not a peace officer: *Foster v. Clinton County*, 51-541.

The marshal is a peace officer and may therefore arrest a person guilty of vagrancy and serve the order of a justice of the peace committing such person to imprisonment, and hold the prisoner under such order: *State v. Watson*, 66-670.

5492. Officers of justice. 4110. Magistrates and peace officers are sometimes designated by the term, officers of justice. [R., § 4441.]

5493. Information defined. 4111. Complaint of preliminary information is a statement in writing, under oath or affirmation made before a magistrate, of the commission, or threatened commission, of a public offense and accusing some one thereof. [R., § 4530; C., '51, § 2822.]

CHAPTER 3.

OF THE PREVENTION OF PUBLIC OFFENSES BY THE RESISTANCE OF THE PARTY ABOUT TO BE INJURED AND OTHERS.

5494. Who may resist. 4112. Lawful resistance to the commission of a public offense may be made by the party about to be injured; or by others. [R., § 4442.]

5495. In what cases. 4113. Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession. [R., § 4443.]

The nature of the resistance must, however, have regard to the nature of the offense to be committed. The common-law rule that the party is only justified in using a deadly weapon in a deadly manner, in self-defense, when it appears that he is in imminent peril of death or great bodily harm (see *State v. Thompson*, 9-188), is not changed by this section: *State v. Kennedy*, 20-569.

5496. Any person may aid another. 4114. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. [R., § 4444.]

CHAPTER 4.

OF SECURITY TO KEEP THE PEACE.

5497. Public offense threatened. 4115. Whenever complaint is made before a magistrate, that any person has threatened to commit any public offense punishable by the laws of this state, and such magistrate is satisfied that there is reason to fear the commission of such offense, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service, shall forthwith arrest and bring the accused before such magistrate; or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the state; *provided*, that when issued by a magistrate other than a judge of the supreme, district, [or circuit] courts, it cannot be served in any county other than that in which it is issued, unless authenticated as is required in case of a warrant of arrest issued on a preliminary information. [R., §§ 4447–54.]

[There is no provision for authentication such as is contemplated in the last of the section: See § 5574.]

5498. Proceedings before magistrate. 4116. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same, and who has charge of the person arrested, must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant with his return indorsed and subscribed by him, and the complaint and other affidavits, if any, on which the warrant was issued, must be sent to the magistrate before whom the person arrested is taken, and if they cannot be procured, the complainant and his witnesses, if any, must be subpœnaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits. [R., § 4455.]

5499. Examination. 4117; 17 G. A., ch. 35. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto; and a change of venue may be had as in preliminary examinations. The evidence must be reduced to writing and subscribed by the witnesses. [R., § 4456.]

A failure of the justice to reduce the examination to writing is no ground for dismissing the proceeding when brought into the district court: *Gribble v. State*, 3–217.

5500. Discharge ordered; costs. 4118. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regards the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district, [or circuit] court, may issue execution therefor, and when the proceeding is before a judge of the supreme, district, [or circuit] court, he shall transmit the complaint, affidavits, warrant, and order, to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately. [R., § 4457.]

Whether or not there is any right of appeal from an order taxing the costs to complainant, *quœre;* but a motion to retax the costs made before a justice of the peace, the successor of the one by whom such taxation was made, not filed until three years after the order taxing the costs, *held* properly overruled: *State v. Rogers*, 58–644.

5501. Defendants bound over. 4119. If there be just reason to fear the commission of the offense the person complained of shall be required to enter into an undertaking in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of this state, and particularly towards the person against whom, or whose property, there is reason to fear the offense may be committed. [R., § 4458.]

Threats of violence to another may be ground to bind over to keep the peace, although coupled with a condition which includes the performance of a professional duty: *Ritchey v. Davis*, 11-124.

5502. Committed to jail. 4120. If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison, specifying in the warrant the requirements to give security, the amount thereof, and the omission to give the same. [R., § 4459.]

5503. Discharged. 4121. If the person complained of be committed for not giving an undertaking, he may be discharged by a magistrate upon giving the same. [R., §§ 4460, 4464.]

5504. Disposition of papers. 4122. The undertaking, together with the complaint, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof. [R., § 4461.]

5505. Assault in presence of court or magistrate. 4123. Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without the process, to enter into an undertaking to keep the peace for a period of time not exceeding beyond the next term of the district court of the county as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly. [R., § 4462.]

IN DISTRICT COURT.

5506. Bond required on conviction. 4124. The district court may, on the conviction of any person for an offense against the person or property of another, when necessary for the public good, require the defendant to enter into an undertaking to keep the peace as hereinbefore provided, and on his omission to do so, may commit him accordingly. [R., § 4463.]

5507. Appearance. 4125. A person who has entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking, and order the same to be prosecuted unless his default be excused. [R., § 4465.]

5508. Judgment. 4126. If the principal in the undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court shall enter an order discharging the undertaking; but if both parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe for a period not exceeding one year; and may commit the defendant until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding; but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs. [R., § 4466.]

The plaintiff is not bound to appear, and a failure to appear and prosecute does not subject him to judgment for costs, under § 5675: *State v. Holliday*, 22–397.

But he may become liable if he does further prosecute and his complaint is found groundless: *State v. Leathers*, 16–406.

If plaintiff does not appear, defendant is not entitled to a trial, but should be discharged. The decision of the justice is not to be called in question: *State v. White*, 47–555.

Before defendant in a criminal prosecution was permitted to be a witness in his own behalf he was *held* not a competent witness in this proceeding: *State v. Darrington*, 47–518.

That the evidence before the justice was not taken down in writing, as provided by § 5499, is not ground for dismissing the proceeding against defendant. On the hearing, other evidence may be received than that produced before the justice, and if defendant is discharged, the costs in the district court should not be taxed against him: *Gribble v. State*, 3–217.

A person bound over to appear in the district court under security to keep the peace may be held liable for the costs, although the prosecutor does not appear in that court: *Houston v. United States*, Mor., 174.

Insanity is a defense to an action for breach of a bond to keep the peace: *State v. Geddis*, 42–264.

5509. When undertaking broken. 4127. An undertaking to keep the peace is broken by the forfeiture of the same, by the court, as hereinbefore provided, or upon the conviction of the party bound by the undertaking of a breach of the peace. [R., § 4467.]

5510. Suit brought. 4128. Upon the district [county] attorney producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the undertaking to be prosecuted, and the district [county] attorney must, thereat, commence an action upon it. [R., § 4468.]

5511. Record of conviction. 4129. In the action, the offense stated in the record of conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof. [R., § 4469.]

CHAPTER 5.

OF VAGRANTS.

5512. Who deemed. 4130. The following persons are vagrants: All persons who tell fortunes, or where lost or stolen goods may be found; all common prostitutes and keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamesters, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places, or from house to house, or procuring children so to do; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place, at, or with any table or instrument of gaming at any game or pretended game of chance. [R., § 4470; C., '51, § 3310.]

5513. Complaint, warrant. 4131. Upon complaint made on oath to any magistrate against any person as being such vagrant within his local jurisdiction as defined in this code, he shall issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest shall be governed by the provisions of the last chapter, as nearly as practicable, except as hereinafter provided. [R., § 4471; C., '51, § 3311.]

5514. Arrest. 4132. All peace officers shall arrest any vagrant whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest is made. [R., § 4472.]

5515. Taking before magistrate. 4133. If the arrests authorized in the last two sections are made during the night, the officer must keep the per-

son arrested in confinement until the next morning, and if arrests are made within the local jurisdiction of a police or city court, the persons arrested must be taken before a judge or justice of such court, unless he be absent. [R., § 4473.]

5516. Security for good behavior. 4134. If it appear by the confession of such person, or by competent testimony, that such person is a vagrant, the magistrate before whom he is brought may require of such person an undertaking, with sufficient surety, for good behavior for the term of one year thereafter. [R., § 4474.]

5517. Commitment. 4135. The magistrate shall make up, sign, and file with the clerk of the district court of the county, a record of conviction of such person as a vagrant, specifying, generally, the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the county jail of the county, city or town, as the case may be, until such security be found, or such vagrant discharged according to law. [R., § 4475; C., '51, § 3312.]

5518. Breach of undertaking. 4136. The committing of any of the acts which constitute such person so bound a vagrant, shall be deemed a breach of the condition of such undertaking. [R., § 4476; C., '51, § 3313.]

5519. New security. 4137. On a recovery upon any such undertaking, the court before which such recovery may be had, may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the common jail of the county for any time not exceeding six months. [R., § 4477; C., '51, § 3314.]

5520. Discharge of bail. 4138. Any person committed to jail for not finding sureties for good behavior, may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person. [R., § 4478; C., '51, § 3315.]

TRIAL IN DISTRICT COURT.

5521. Hearing. 4139. The district court to which the papers are returned, shall, on demand of the defendant, impanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials of misdemeanors shall be applicable to and govern it in the trial herein contemplated. [R., § 4479; C., '51, § 3316.]

5522. Judgment. 4140. If no jury be demanded, the district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion. [R., § 4480; C., '51, § 3317.]

PUNISHMENT.

5523. Imprisonment. 4141. Such district court may, in its discretion, order any such vagrant to be kept in the common jail for any time not exceeding six months at hard labor. [R., § 4481; C., '51, § 3318.]

5524. Labor. 4142. If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrant as may be committed thereto, either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them. [R., § 4482; C., '51, § 3319.]

5525. Expenses. 4143. The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county, and paid out of the county treasury. [R., § 4483; C., '51, § 3320.]

5526. Proceeds of labor. 4144. One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county. [R., § 4484; C., '51, § 3321.]

5527. Male vagrants kept at hard labor. 16 G. A., ch. 69, § 1. If any male person, physically able to perform manual labor, shall be found in a state of vagrancy, or practicing common begging, he shall, on conviction thereof, be fined in any sum not exceeding fifty dollars, and sentenced to hard labor in the jail of the county, for which labor *they* [he] shall receive a credit at the rate of seventy-five cents per day until said fine and cost of prosecution, and accruing costs, shall be paid.

5528. Duty of boards of supervisors. 16 G. A., ch. 69, § 2. The board of supervisors of the several counties are hereby authorized to provide for carrying the provisions of the foregoing section into effect, for which purpose they may, by order entered upon their journals, declare that the jail shall extend to and include the lands of the proper county, and every form and kind of labor commonly performed therein by male persons.

CHAPTER 6.

OF RESISTANCE TO PROCESS AND SUPPRESSION OF RIOTS.

5529. Calling out power of county. 4145. When the sheriff or other officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, and their aiders and abettors, to be punished by law. [R., § 4489; C., '51, § 2793.]

See, also, § 475.

5530. Certify to court names of resisters. 4146. The officer shall certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be punished for a contempt. [R., § 4490; C., '51, § 2794.]

5531. Refusing to assist. 4147. Every person commanded by a public officer to assist him in the execution of process, as provided in section four thousand one hundred and forty-five of this chapter [§ 5529], who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor. [R., § 4491; C., '51, § 2795.]

5532. Military force. 4148. If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary. [R., § 4492; C., '51, § 2796.]

5533. Unlawful assemblages. 4149. When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, the judges, sheriff, and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town, must go among the persons assembled, or as near them as may be safe,

and command them, in the name of the state, immediately to disperse. [R., § 4493; C., '51, § 2797.]

5534. Arrest. 4150. If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county. [R., § 4494; C., '51, § 2798.]

5535. Refusing to aid. 4151. If any person commanded to aid the magistrate or officer, without good cause neglect to do so, he is guilty of a misdemeanor. [R., § 4495; C., '51, § 2799.]

5536. Failure of duty. 4152. If a magistrate or officer having notice of an unlawful or riotous assembly as above provided in this chapter, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor. [R., § 4496; C., '51, § 2800.]

5537. Calling aid. 4153. If the persons so assembled and commanded to disperse, do not immediately disperse, any two of the magistrates or officers before mentioned, may command the aid of a sufficient number of persons, and may proceed in such manner as, in their judgment, is necessary to disperse the assembly and arrest the offenders. [R., § 4497; C., '51, § 2801.]

5538. Armed force. 4154. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, it must obey such orders in relation thereto as have been made by the governor, or by a judge of the supreme, district, [or circuit] court, a sheriff, or magistrate, as the case may be. [R., § 4498; C., '51, § 2802.]

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

5539. Who subject to laws of state. 4155. Every person, whether an inhabitant of this or any other state or country, or of a territory, or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. [R., § 4500; C., '51, § 2803.]

5540. District court. 4156. The local jurisdiction of the district court, is of offenses committed within the county in which it is held, and of such other cases as are, or may be, provided by law. [R., § 4502.]

Evidence as to venue: In a prosecution for assault it is sufficient for the state to prove the county in which the offense was committed. It is not requisite to prove either the village, city or township: *State v. Gibson*, 29-295.

The court will take judicial notice of the county in which an incorporated town is situated. Proof of the commission of the act in a certain town is sufficient proof of the commission within the county in which the town is located: *State v. Reader*, 60-527.

The venue of a crime must be proven to warrant a conviction. Therefore where the prosecuting witness testified that the offense was committed at her father's house, and her father testified that he lived in the county where the case was tried, but there was no proof to show where he lived when the offense was committed, *held*, that the venue was not sufficiently proven: *State v. Carr*, 60-453.

Testimony in a particular case considered, and *held* to show that the crime charged in the indictment was committed in another county than that in which the indictment was found, and that the conviction was erroneous: *State v. Byam*, 54-409.

Offense on Mississippi river: Jurisdiction being given to the state to punish offenses committed on the Mississippi river between the north and south boundaries of the state, the jurisdiction of the district court of each county bounded upon the river extends over the crimes committed upon such river between the north and south boundaries of such county: *State v. Mullen*, 35-199.

The jurisdiction of such court may extend to the punishment of the act of keeping a nuisance upon a boat moored to the east shore of an island situated on the east side of the center of the channel, and floating or resting upon the ground according to the stage of the water: *Ibid.*

5541. Offenses consummated within state. 4157. When the commission of a public offense commenced without this state is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this state, though he was without the state at the time of the commission of the offense charged; *provided* he consummated the offense through the intervention of an innocent or guilty agent within this state, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated. [R., § 4505; C., '51, § 2804.]

Stealing property in another state and bringing it within this state is not an act contemplated by this section, but the thief is punishable in this state in the county into which the property is taken under the provisions as to larceny: *State v. Bennett*, 14–479.

5542. Fighting duel without the state. 4158. When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel, or is concerned as second therein without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he die within this state, the jurisdiction of the offense is in the county where the death may happen. [R., § 4506; C., '51, § 2805.]

5543. Offense partly in county. 4159. When a public offense is committed in part in one county and part within another, or when the acts or effects constituting, or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county. [R., § 4507; C., '51, § 2806.]

This section does not apply to the crime of abortion. Where the drug, etc., is administered in one county and the miscarriage occurs in another, the crime is completed where the drug is administered: *State v. Hollenbeck*, 36–12.

5544. Near boundary of two counties. 4160. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county. [R., § 4508; C., '51, § 2807.]

Where one county takes jurisdiction of a crime committed in an adjoining county, but within five hundred yards of the boundary, the former cannot recover the costs of prosecution from the latter: *Floyd County v. Cerro Gordo County*, 47–186.

The substantial rights of defendant are not prejudiced where the crime is alleged to have been committed in one county and the evidence shows that it was committed in an adjoining county within five hundred yards of the boundary line: *State v. Pugsley*, 75–742.

This provision is not unconstitutional: *Ibid.*

5545. On boats, rafts, etc. 4161. When an offense is committed within the jurisdiction of this state on board a boat, raft, or vessel navigating a river, lake, or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the boat, raft, or vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate. [R., § 4509; C., '51, § 2808.]

A former statutory provision that an offense committed on any vessel might be prosecuted in any county through which the vessel "may have passed on that trip," *held* not to be confined to that part of the voyage performed before the commission of the offense, but to extend to the entire trip: *Nash v. State*, 2 G. Gr., 286.

5546. Jurisdiction in any county in certain cases. 4162. The jurisdiction of an indictment for the crime of forcibly, and without lawful authority seizing and confining another, or kidnaping him with intent, against his will, to cause him to be confined or imprisoned within the state, or to be sent out of the state; or of taking or enticing away a child under the age of twelve years from the parents, guardian, or other person having the legal charge of the person, with the intent to detain or conceal such child; or of taking or en-

ticing away an unmarried female of previously chaste character under the age of fifteen years, for the purpose of prostitution; or of taking any woman unlawfully and against her will, or by force, menace, or duress, compelling her to marry against her will; or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to the commission of the offense, or in abetting the parties concerned therein. [R., § 4510; C., '51, § 2809.]

5547. Bigamy. 4163. When the offense of bigamy is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county. [R., § 4511; C., '51, § 2810.]

A prosecution for bigamy under § 5318 may be had in any county where the defendant unlawfully cohabits with a second wife, although the marriage was consummated in another county: *State v. Hughes*, 58-165.

5548. When conviction a bar. 4164. When the offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to prosecution or indictment thereof in another. [R., § 4512.]

CHAPTER 8.

THE TIME OF COMMENCING CRIMINAL ACTIONS.

5549. Murder. 4165. A prosecution for murder may be commenced at any time after the death of the person killed. [R., § 4513; C., '51, § 2811.]

5550. What within eighteen months. 4166. An indictment for a public offense must be found within eighteen months after the commission thereof, in the following cases, and not after:

1. Taking or enticing away an unmarried female, under the age of fifteen years, for the purpose of marriage or prostitution;
2. Seducing or debauching an unmarried female, of previously chaste character;
3. For rape and adultery;
4. For an assault with intent to commit a rape. [R., § 4514; C., '51, § 2812.]

The limitation in a criminal action cannot be raised by demurrer to the indictment, but such fact must be specially pleaded: *State v. Hussey*, 7-409; *State v. Groome*, 10-308.

Nor can such limitation be raised by motion in arrest of judgment: *State v. Deitrick*, 51-467.

Where the crime of adultery is charged as committed on a particular day, defendant may be convicted by proof of the commission of the offense on any day within the statutory period of limitations: *State v. Briggs*, 68-416.

So with the crime of seduction: *State v. Bell*, 49-440.

It is not material that the time of the commission of the offense, as stated in the indictment, should be such as to bring it within the period of limitations: See notes to § 5686.

5551. Three years. 4167. In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards. [R., § 4515; C., '51, § 2813.]

A defendant in a prosecution for embezzlement is not estopped by subsequent fraudulent statements from showing that the defalcation actually took place at such time that the prosecution therefor is barred: *State v. Hutchinson*, 60-478.

It is not error to instruct the jury that they must find that the crime of assault with intent to maim was committed on or about the time charged or at any date within the statutory period of limitations prior to the finding of the indictment: *State v. Fry*, 67-475.

5552. Misdemeanor triable before a justice. 4168. A prosecution for a misdemeanor, triable before a justice of the peace, must be commenced within one year after the commission thereof, and not after.

5553. Defendant out of state. 4169. If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not usually and publicly resident within the state is a part of the limitation. [R., § 4516; C., '51, § 2814.]

The period of the defendant's non-residence need not, however, be stated in the indictment. If he relies upon the bar of the statute of limitations he should plead the same, to which the state may reply the non-residence, and thus raise the issue: *State v. Hussey*, 7–409.

The latter clause of this section is not to be restricted to offenses committed when the defendant is out of the state, but applies equally to all cases: *State v. McIntire*, 58–572.

5554. Indictment deemed found. 4170. An indictment is found within the meaning of this chapter, when it is duly presented by the grand jury in open court and there received and filed. [R., § 4517; C., '51, § 2815.]

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

5555. Agents appointed to apprehend; expenses. 4171; 17 G. A., ch. 65. The governor of the state may, in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury. The expenses to be allowed agents for returning fugitives from justice, shall be the fees paid the officers of the state upon whose governor the requisition is made; and the agent shall receive not exceeding ten cents per mile, each way, for all necessary travel of himself and for each fugitive, five cents per mile additional for the number of miles which such fugitive shall have been conveyed. Bills for such expenses shall be made out in such manner as to show the actual route traveled, and the number of miles, and be verified by affidavit, and be accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; *provided*, that the state shall, in no case, pay the costs of returning the fugitive where he has not been tried, unless it shall be shown to the satisfaction of the governor that the want of trial has not been owing to any fault or neglect on the part of the person or persons interested in the prosecution. [R., § 4518; C., '51, § 3282.]

To constitute a person a fugitive from justice he must have been in the state where the crime is alleged to have been committed, must have there committed the crime, and must have fled therefrom to escape punishment.

The state is not bound to surrender one of its citizens who has constructively committed a crime in another state, without having been there in person: *Jones v. Leonard*, 50–106.

5556. No other compensation. 4172. No compensation, fee, or reward of any kind, can be paid to, or received by, a public officer of this state for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided by law. [R., § 4519.]

A deputy sheriff who has, under a contract with the surety on the bail bond of an escaped criminal, ascertained the whereabouts of such criminal and brought him back under requisi-

tion, cannot recover from such surety the sum stipulated in the contract, such contract being in violation of this section: *Day v. Townsend*, 70-538.

5557. Penalty. 4173. A violation of the last section is a misdemeanor. [R., § 4520.]

5558. Sworn evidence; copy of indictment. 4174. No executive warrant for the arrest and surrender of any person demanded by the executive authority of any other state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of any other state or territory, for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same. [R., § 4521.]

The fact that the governor considers the evidence submitted to him sufficient, and issues his warrant accordingly, does not preclude inquiry by the courts as to the sufficiency of such evidence, and his decision may be questioned in a *habeas corpus* proceeding: *Jones v. Leonard*, 50-106.

5559. Requisition from another state. 4175. Whenever a demand is made upon the governor of this state by the executive of any other state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant under the seal of the state, authorizing the agent who makes such demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also by such warrant require all peace officers to afford all needful assistance in the execution thereof. [R., § 4522; C., '51, § 3283.]

EXAMINATION BY MAGISTRATE.

5560. Complaint and warrant. 4176. If any person be found in this state charged with any crime committed in any other state or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person. [R., § 4523; C., '51, § 3284.]

This and the following sections are only applicable where the party against whom the proceeding is brought is charged with a crime committed in some other state, etc., before some court, magistrate or other officer, by an indictment, information or other accusation known to the law of such state. Unless such fact is made to appear the magistrate has no jurisdiction: *State v. Hufford*, 28-391.

5561. Bail. 4177. If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises. [R., § 4524; C., '51, § 3285.]

5562. Committed. 4178. If such person does not give bail, or if he is charged with the crime of murder, he must be committed to prison, and there

detained until such day, in like manner as if the offense charged had been committed within this state. [R., § 4525; C., '51, § 3286.]

If charged with murder in the second degree, he is entitled to be released on bail under Const., art. 1, § 12, notwithstanding the language of this and the preceding sections: *State v. Hufford*, 23-579.

5563. Forfeiture of bail. 4179. A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking, is a forfeiture thereof. [R., § 4526; C., '51, § 3287.]

Where bail has been taken without it being shown that the party was charged, etc., in some other state, as specified in note to § 5560, the proceedings are void, and a recovery cannot be had on the bond: *State v. Hufford*, 28-391.

5564. Discharge. 4180. If such person appear before the magistrate upon the day ordered, he must be discharged unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor. [R., § 4527; C., '51, § 3288.]

5565. Arrest on governor's warrant. 4181. Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one. [R., § 4528; C., '51, § 3289.]

5566. Costs. 4182. The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance. [R., § 4529; C., '51, § 3290.]

EXPENSES.

5567. Conditions. 4183. Upon the appointment of any agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor is hereby authorized to make it a condition upon such appointment, and the issue of the writ, that the same shall be executed without expense to the state, if in his opinion justice and equity so require. [12 G. A., ch. 39, § 1.]

5568. Paid by state. 4184. When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, such expenses shall be made out by items in detail, and sworn to, and approved by him and at least two other members of the executive council, and when so approved shall be audited and paid out of the general revenue of the state, and this section shall be sufficient authority for the payment of the same. [Same, § 2.]

CHAPTER 10.

OF WARRANTS OF ARREST ON PRELIMINARY INFORMATION.

5569. Complaint. 4185. When complaint is made before a magistrate of the commission of some designated public offense, triable on indictment in the county in which such magistrate has local jurisdiction, and charging some person with the commission thereof, he may issue a warrant for the arrest of such person. The complaint may be in form substantially the same as provided in section four thousand six hundred and sixty-three of chapter fifty-two of this title [§ 6061].

5570. Warrant. 4186. The warrant of arrest on a preliminary information, must be substantially in the following form:

COUNTY OF ——,

THE STATE OF IOWA.

To any Peace Officer in the State:

Preliminary information upon oath having been this day laid before me that the crime of (designating it) has been committed, and accusing A. B. thereof:

You are, therefore, commanded forthwith to arrest the said A. B. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at —— this —— day of ——, A D. 18—.

C—— D——, Justice of the Peace,
(or as the case may be.)

Subpœna as witnesses E—— F—— and G—— H——. [R., § 4534; C., '51, § 2827.]

The fact that the warrant for arrest on preliminary examination is returnable on the next day after its issuance instead of forthwith will not render it void: *State v. Freeman*, 8-428.

5571. What to contain. 4187. The warrant must specify the name of the defendant, and if it be unknown to the magistrate, may designate him by any name. It must also state, by name or general description, an offense which authorizes the magistrate to issue the warrant, the time of issuing it, and the county, city, town, township, or village where it was issued, and must be signed by the magistrate with his name of office. [R., § 4535; C., '51, § 2828.]

5572. Directed. 4188. It must be directed to "any peace officer in the state." [R., § 4536; C., '51, § 2829.]

5573. Order for bail. 4189. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement on the warrant as follows: "Let the defendant, when arrested, be admitted to bail in the sum of —— dollars, if he desires to give bail," and fix in the indorsement the amount in which bail may be taken. [R., § 4537.]

5574. How executed. 4190. The warrant of arrest may be delivered to any peace officer for execution, and executed in any county in the state. [R., § 4538; 13 G. A., ch. 137.]

5575. Defendant brought before magistrate. 4191. If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magistrate in the county in which it was issued. [R., § 4539; C., '51, § 2831.]

A bail bond in case of felony taken before a magistrate in the county where the prisoner is arrested, the warrant having been issued in another county, would not be good as a statutory bond, and would not become a lien on the property of the obligors as provided in § 6004; but the bond having been accepted and the defendant discharged thereunder, it may be enforced: *State v. Cannon*, 34-322.

5576. Bail in case of misdemeanor. 4192. If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county, must take bail from him accordingly for his appearance at the district court of the county in which the warrant was issued, on the first day of the next term thereof. [R., § 4540; C., '51, § 2832.]

5577. Order for discharge. 4193. On taking bail in the case provided for in the preceding section, the magistrate or clerk taking such bail must

make on the warrant an order, signed by him with his name of office, for the discharge of the defendant, substantially as follows:

COUNTY OF (here name the county),

THE STATE OF IOWA.

To (here state the name of the officer who has the defendant in custody, with the addition of his name of office, thus, A. B. sheriff of —— county, according to the truth).

The defendant named in the warrant of arrest in your custody, under the authority thereof, for the offense therein designated, having given sufficient bail to answer the same, by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and without unnecessary delay deliver this order, together with the said undertaking of bail, to the clerk of the district court of —— county, on or before the first day of the next term thereof.

Dated at ——, this —— day of ——, A. D. (or as the case may be.)

—— ——, Justice of the Peace,
(or as the case may be.)

And must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge the defendant from arrest and without unnecessary delay, and on or before the first day of the next term of the court at which the defendant is required to appear, deliver or transmit by mail or otherwise the warrant, with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office; and the magistrate who issued the warrant shall return to the clerk the affidavits of the informant and his witnesses, upon which the warrant was issued, on or before the first day of the next term of the court, and the clerk shall, when the affidavits are returned by the magistrate, file the same in his office, with the warrant and undertaking of bail. [R., § 4541; C., '51, § 2833.]

5578. If bail be not given. 4194. If bail be not forthwith given by the defendant as provided in the two preceding sections, the magistrate or clerk must redeliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it, at the place mentioned in the command thereof, or, if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued. [R., § 4542; C., '51, § 2834.]

5579. Proceedings after arrest. 4195. In all cases when the defendant is arrested, he must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to the magistrate or clerk the warrant, with his return thereon, indorsed and subscribed by him in his name of office. [R., § 4543; C., '51, § 2835.]

5580. Before another magistrate. 4196. If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on which the warrant was issued must be sent to such magistrate, or if they cannot be procured, the informant and his witnesses, must be subpœnaed to make new affidavits. [R., § 4544; C., '51, § 2836.]

CHAPTER 11.

OF ARREST, AND BY WHOM AND HOW MADE.

5581. Defined. 4197. Arrest is the taking of a person in custody in a case, and in the manner authorized by law. [R., § 4545; C., '51, § 2837.]

What constitutes: It is not essential in order to constitute an arrest that the sheriff should have informed the prisoner of his intention to make the arrest, and that he was a peace officer. While the prisoner might ordinarily be entitled to such information, the legality of the arrest as between the sheriff and other parties is in no manner affected by the sheriff's failure in these respects: *Miller v. Dickinson County*, 68-102.

Jurisdiction first acquired: The court first acquiring authority over the accused by his arrest, or by otherwise obtaining custody of his person through its officers, first acquires jurisdiction of the case. The finding of an indictment does not confer jurisdiction of the person of the accused: *Ex parte Baldwin*, 69-502.

The power to imprison necessarily includes the power to arrest: *Davenport v. Bird*, 34-524.

Wrongful arrest outside of state: It is no defense that defendant was arrested in another state without authority and brought to this state by force and against his will: *State v. Ross*, 21-467.

A court will not, upon the trial of an indictment on a plea of not guilty, inquire as to whether or not the defendant was properly or improperly brought within the jurisdiction of the court: *State v. Day*, 58-678.

Reward for arrest: A city cannot legally offer a reward for the arrest and conviction of a criminal: *Hanger v. Des Moines*, 52-193.

Nor can a county offer such reward; but it may offer a reward for the recovery of stolen property: *Hawk v. Marion County*, 48-472.

Where a person in another state acts upon the promise made by a board of supervisors in Iowa to pay a reward for the arrest and conviction of persons who have robbed the county treasury, he is bound to know that the board has no power to offer such reward. Nor in such case will the members be individually liable: *Huthsing v. Bosquet*, 3 McCrary, 569.

Peace officers acting under process in arresting a criminal are not entitled to a reward offered for such arrest, unless the terms of the reward offered clearly include them: *Means v. Hendershott*, 24-78.

See, further, § 5556 and note.

5582. By whom. 4198. An arrest may be made by a peace officer, or by a private person. [R., § 4546.]

5583. With warrant. 4199. A peace officer may make an arrest in obedience to a warrant delivered to him. [R., § 4547.]

5584. By peace officer without warrant. 4200. A peace officer without a warrant may make an arrest:

1. For a public offense committed or attempted in his presence;

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [R., § 4548; C., '51, § 2840.]

A peace officer may make an arrest without a warrant when a public offense has in fact been committed, and he has reasonable ground for believing that the person arrested has committed it; and it is erroneous to charge the jury, in such a case, that, if the officer makes an arrest without a warrant, he will be liable, unless the party arrested was likely to escape: *Montgomery v. Sutton*, 67-497.

5585. By private person. 4201. A private person may make an arrest:

1. For a public offense committed or attempted in his presence;

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it. [R., § 4549; C., '51, § 2846.]

5586. Oral order of magistrate. 4202. A magistrate may orally order a peace officer, or a private person, to arrest any one committing, or attempting to commit, a public offense in the presence of such magistrate, which order shall authorize the arrest. [R., § 4550; C., '51, § 2845.]

5587. Time. 4203. An arrest may be made on any day, or at any time of the day or night. [R., § 4551; C., '51, § 2850.]

5588. Manner. 4204. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest,

of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of, or attempt to commit, the offense, or flies immediately after its commission, and if acting under the authority of a warrant, he must give information thereof and show the warrant if required. [R., § 4552; C., '51, §§ 2839, 2841, 2847.]

5589. When resisted. 4205. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flee or forcibly resist, the officer may use all necessary means to effect the arrest. [R., § 4553; C., '51, § 2844.]

In a prosecution for murder committed in resistance of lawful arrest, the information and warrant under which the arrest was sought to be made may be given in evidence: *State v. Meshek*, 61–316.

5590. May break and enter premises. 4206. To make an arrest, if the offense be a felony, a private person, if any public offense, a peace officer acting under the authority of a warrant, or without a warrant, may break open a door or window of a house in which the person to be arrested may be, or in which they have reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired. [R., § 4554; C., '51, §§ 2843, 2848.]

5591. Breaking out. 4207. Any person who has lawfully entered a house for the purpose of making an arrest under the provisions of the preceding section, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, and by his command, lawfully entered for the purpose of making an arrest, and detained therein. [R., § 4555.]

5592. Refusing to assist. 4208. Any person making an arrest may orally summon as many persons as he deems necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor. [R., § 4556.]

5593. What constitutes. 4209. An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. [R., § 4557; C., '51, § 2838.]

5594. Force. 4210. No unnecessary force or violence shall be used in making an arrest. [R., § 4558.]

5595. Restraint. 4211. A person arrested is not to be subjected to any more restraint than is necessary for his detention. [R., § 4559.]

5596. Taking weapons. 4212. He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law. [R., § 4560.]

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

The sheriff is justified in searching the person arrested and taking from him money or property connected in any way with the crime charged, or which may serve in identifying the prisoner, or be used by him in effecting an escape: *Commercial Exchange Bank v. McLeod*, 65–665.

Property thus taken from a prisoner by the officer, and which is not connected with nor the fruit of the crime for which he is arrested, is in the possession of the officer for the person under arrest, and is no more subject to attachment than if it were in the prisoner's personal possession: *Ibid.*

But where the money taken from the prisoner was the money obtained by him through the commission of the crime for which he was arrested, *held*, that it was subject to garnishment in the hands of the officer at the suit of the person rightfully entitled thereto: *Reifsnyder v. Lee*, 44–101.

Where a trunk belonging to a party under arrest was produced and opened under pretense of making a criminal examination, *held*, that money therein contained was not subject to levy of attachment: *Pomroy v. Parmlee*, 9-140.

As to search-warrants, etc., see §§ 6027-6051 and notes.

5597. Escape. 4213. If a person, after being arrested, either by a peace officer without a warrant, or by a private person, escape, or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him in any part of the state, and for that purpose may, if necessary, break open the door or window of a house in which he may be, or in which he has reasonable ground to believe he is, after having stated his purpose and demanded admittance, and when the person escaping or rescued was in custody under a warrant or commitment, this may be done at any time under the original warrant or commitment. [R., § 4561; C., '51, § 2851.]

5598. Person arrested by by-stander. 4214. A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a by-stander and delivered to him. [R., § 4562; C., '51, § 2842.]

5599. Arrest by private person. 4215. A private person who has arrested another for the commission of an offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer. [R., § 4563; C., '51, § 2849.]

5600. Must accompany. 4216. A private person who makes an arrest and delivers the person arrested to a peace officer, must also accompany the officer before the magistrate. [R., § 4564.]

5601. By officer with warrant. 4217. An officer making an arrest in obedience to a warrant, shall proceed with the person arrested as commanded by the warrant, or as provided by law. [R., § 4565.]

Where, at the time of an arrest, the party arrested was intoxicated, *held*, that the officer was not liable in damages for having kept the person in custody without bringing him before the justice until he was in proper condition for trial: *Arneson v. Thorstad*, 72-145.

5602. Arrest without warrant. 4218. When an arrest is made without a warrant, whether by a peace officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made; and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement before the magistrate, in the same manner as upon a preliminary information, as nearly as may be. [R., § 4566.]

Where an officer makes an arrest without a warrant on proper cause, he may detain the offender for a reasonable time until he can be taken before a magistrate for examination, and will not be liable in trespass for doing so: *Hutchinson v. Sangster*, 4 G. Gr., 340.

HEARING BEFORE MAGISTRATE.

5603. Information ordered filed. 4219. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest was made, and that there is sufficient ground for a trial or preliminary examination, as the case may require, and that it will not be inconvenient for the witnesses on the part of the state that such trial or preliminary examination should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and, if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him. [R., § 4567.]

5604. Hearing before another magistrate. 4220. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, and that it will be more convenient for

the witnesses on the part of the state that such trial or examination should be had before some other magistrate, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before such magistrate in the same county who has jurisdiction to try or examine the charge as the case may require, and as shall be convenient for the witnesses on the part of the state, and deliver the affidavit and the order of commitment to the peace officer, who shall proceed with the person arrested as directed by the order; and such magistrate, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and, if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested. [R., § 4568.]

5605. Offense triable in another county. 4221. If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, who has jurisdiction to make either preliminary examination into the charges, or try and determine the same, as the case may require, and, if the offense be a misdemeanor only triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county in which the offense is indictable, on the first day of the next term thereof, to answer an indictment. [R., § 4569.]

5606. Bail; commitment; discharge. 4222. If bail be given as provided in the preceding section, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or the clerk of the district court of either of said counties; and, when given, the magistrate or clerk taking the same shall make on the order of commitment an order for the discharge of the person arrested from custody, who shall forthwith be discharged accordingly, and to transmit by mail, or otherwise, to the clerk of the district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof, and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of the bail, who shall file the same together in his office. [R., § 4570.]

5607. Transfer to another county. 4223. If bail be not given as provided in the last two preceding sections, before the magistrate in the county in which the arrest was made, or if the offense charged is a felony, or a misdemeanor triable on information, the magistrate must deliver the affidavits and the order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order, or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested. [R., § 4571.]

[The word "preceding," in the second line, is erroneously omitted in the printed Code.]

5608. What magistrate; bail. 4224. In the cases contemplated in the last three sections, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate in the county in which the offense is triable, which is most convenient for the witnesses on the part of the state, unless, in case of a misdemeanor triable on indictment as herein-

before provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties for the purpose of giving bail. [R., § 4572.]

5609. Officer's return. 4225. In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chapter before a magistrate, or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order, and sign such return with his name of office, and deliver the same to the magistrate or clerk. [R., § 4573.]

CHAPTER 12.

OF PRELIMINARY EXAMINATIONS.

5610. Right to counsel. 4226. When the defendant is brought before the magistrate on arrest, either with or without a warrant, the magistrate must immediately inform him of the offense with which he is charged, and of his right to the aid of counsel in every stage of the proceedings. [R., § 4575; C., '51, § 2852.]

5611. Time to procure. 4227. The magistrate must allow the defendant a reasonable time to send for counsel, and, if necessary, must adjourn the examination for that purpose. [R., § 4576; C., '51, § 2853.]

5612. Examination; change of venue. 4228. The magistrate, immediately after the appearance of counsel, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, must proceed to examine the case; *provided*, however, that before said examination is commenced, said defendant may have a change of venue upon filing an affidavit that the magistrate is prejudiced against him, is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. On filing of such affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers and a transcript of the record entire in the case, to the next nearest magistrate in the township against whom no objection exists, if there be any, if not, to the next nearest magistrate in the county against whom no such objections in the opinion of the justice exists, who shall proceed with said examination as hereinafter provided. Only one such change of venue shall be allowed. [R., § 4577; C., '51, § 2854.]

5613. Adjournment. 4229. The examination must be terminated at one session unless the magistrate, for good cause shown, adjourn it. [R., § 4578; C., '51, § 2855.]

5614. For how long. 4230. No examination can be adjourned for a longer period than thirty days. [R., § 4579; C., '51, § 2856.]

5615. Commitment or bail. 4231. If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample security for his appearance at the time and place to which the examination is adjourned. [R., § 4580; C., '51, § 2857.]

5616. When no jail. 4232. If there is no jail in the county, the sheriff must retain the defendant in his custody until the examination. [R., § 4582; C., '51, § 2859.]

5617. Witnesses. 4233. The magistrate must issue subpœnas for any witnesses required either by the state or by the defendant, and the witnesses who appear at the examination must be examined in the presence of the defendant. [R., § 4583; C., '51, § 2860.]

Until defendant is arrested, a magistrate has no authority to issue a subpœna for a witness to appear at the examination of such defendant. So where a subpœna was sent to another state before filing of information or arrest of defendant, and the witness attended in response thereto, but defendant having been in the meantime arrested, waived examination, *held*, that the witness could not recover fees from the county (distinguishing *Westfall v. Madison County*, 62-427): *Warnstaff v. Louisa County*, 76-585.

The person filing complaint is to be treated as the prosecuting witness, and the fact that he is subpœnaed as a witness by the state does not change his situation: *In re Trenchard*, 16-53.

5618. Depositions. 4234. The deposition of a witness who resides out of the county in which the examination is had, may be taken, on application of the defendant on the order of the magistrate, before any officer authorized to take depositions in civil cases; which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be propounded to the witness; nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories.

5619. Cross-interrogatories. 4235. Before the order to take the depos s tion is made, the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition.

5620. Read in evidence. 4236. At the expiration of three days from the filing of the interrogatories, and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file; and the deposition thus taken may be read as evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party.

[Section 4237, which made defendant a competent witness in his own behalf in such cases, was repealed by 17 G. A., ch. 168, § 2, by which act that privilege was extended to defendant in all criminal proceedings. See §§ 4886 and 5954.]

5621. Cross-examination of defendant. 4238. When the defendant testifies in his own behalf, he shall be subject to a cross-examination as an ordinary witness, *provided*, that, in the cross-examination, the state shall be strictly confined to the matters testified to in the examination-in-chief.

Before the amendment of §§ 4886 and 5954, allowing defendant in a criminal prosecution to be a witness in his own behalf, he might testify in a preliminary examination: *State v. Laffer*, 38-422.

But he was not a competent witness for himself on a trial on an information for security to keep the peace (§ 5508): *State v. Darrington*, 47-518.

TRIAL.

5622. Witnesses excluded. 4239. While a witness is under examination before the magistrate, he may exclude all others who have not been examined. He may also cause the witnesses to be kept separate, that they may not converse with each other until they are all examined. [R., § 4591; C., '51, § 2867.]

5623. Others excluded. 4240. The magistrate must also, upon the request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state and the defendant and his counsel. [R., § 4592.]

5624. Minutes of examination. 4241. The magistrate shall, in the minutes of the examination, write out or cause to be written out, the substance

of the testimony given on the examination by each witness examined before him, showing the name of the witness, his place of residence, and his business or profession, and the amount to which each witness is entitled for mileage and attendance. [R., § 4593; C., '51, § 2868.]

The minutes so taken by the magistrate are not competent as evidence on the trial of the case in the district court: *State v. Collins*, 32-36; *State v. Hull*, 26-292; nor are they admissible for the purpose of impeaching a witness: *State v. Hayden*, 45-11. And see notes to § 5676.

But the testimony given on the preliminary examination by a witness who dies before the trial may be proved on the trial by witnesses who heard it: *State v. Fitzgerald*, 63-268.

And these minutes may also be used before the grand jury: See § 5672 and notes.

The magistrate or a person appointed by him to write out the minutes of the testimony cannot recover compensation therefor from the county. The usual fees of the magistrate in such cases for conducting the examination are all that are allowed: *Sanford v. Lee County*, 49-148.

The magistrate is entitled to be reimbursed by the county for expenses of stationery used in taking down minutes of the evidence: *Evans v. Story County*, 35-126.

5625. Certificate. 4242. After the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions on file with him and used in the examination, and annex thereto his certificate, which must set forth in substance the time and place of examination, and that the minutes thereof are true, and the certificate must be signed by the magistrate, with his name of office. [R., § 4594; C., '51, §§ 2869-70.]

Although the minutes are not properly certified to by the magistrate, yet if the grand jury act thereon, and return a proper memorandum thereof to the court in connection with the indictment, as required by § 5672, the defendant cannot object to the calling of witnesses whose names are indorsed on the back of the indictment, and a memorandum of whose testimony is thus returned: *State v. Kepper*, 65-745.

5626. Discharge. 4243. If, after hearing the testimony, it appear to the magistrate, either that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order the defendant to be discharged; and such order must be indorsed on the minutes of the examination or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, or of any other offense, I order him to be discharged." [R., § 4595; C., '51, § 2871.]

5627. Holding for trial. 4244. If it appears from the examination that a public offense triable on indictment has been committed, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination, an order signed by him to the following effect: "It appearing to me by the within minutes that the offense therein mentioned, or any other offense triable on indictment, according to the fact, stating generally the nature thereof, has been committed, and there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same." [R., § 4596; C., '51, § 2872.]

The fact that such finding was made by the justice will be presumed in an action on a bail bond given by the person bound over; but if not made, such fact is a proper matter of defense: *State v. Patterson*, 23-575.

The warrant of commitment in a particular case *held* sufficient: *Cowell v. Patterson*, 49-514.

BAIL.

5628. Order admitting. 4245. If bail be taken by the magistrate, the following words in substance must be added to the order mentioned in the preceding section, "and I have admitted him to bail to answer thereto by

the undertaking hereto annexed,"— and the undertaking of bail must be annexed thereto. [R., § 4598; C., '51, § 2874.]

5629. Authorized. 4246. If bail be not given by the defendant, then the magistrate must add to the order mentioned in section forty-two hundred and forty-four [§ 5627] the following words in substance: "and that he be admitted to bail in the sum of (here state the amount), and that he be committed to the jail of the county of (here name the county), until he give such bail." [R., § 4599; C., '51, § 2874.]

5630. Warrant of commitment. 4247. If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, signed by him with his name of office, and deliver it with the defendant to the officer to whom he is committed, or, if the officer be not present, to a peace officer who shall deliver the defendant into the proper custody, together with the warrant of commitment, which warrant may be in form following:

THE STATE OF IOWA,
To the Sheriff of —— County:

An order having been this day made by me, that A—— B—— (the name of the defendant), be held to answer upon a charge of (state the offense), you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at ——, this —— day of ——, A. D. ——. [R., § 4600; C., '51, § 2875.]

5631. Witnesses bound. 4248; 18 G. A., ch. 130, § 1. On holding the defendant to answer, the magistrate must take from each material witness examined by him on the part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, when required in the further progress of the cause, and that he will not evade or attempt to evade the service of a subpœna, or that he will forfeit the sum of one hundred dollars. [R., § 4601; C., '51, § 2876.]

5632. Security. 4249. Whenever the magistrate is satisfied by oath, or otherwise, that there is reason to believe that any such witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking with sureties, and in such sum as he may deem proper for his appearance. [R., § 4602; C., '51, § 2877.]

5633. Minors and married women. 4250. Minors and married women who are material witnesses against the defendant, may, in like manner, be required to procure sureties for their appearance as provided in the preceding section. [R., § 4603; C., '51, § 2878.]

5634. Witness committed. 4251. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him until he comply or be legally discharged. [R., § 4604; C., '51, § 2879.]

A witness who is required by a committing magistrate to enter into a written undertaking, with security, to appear and testify on the trial of the case, and is committed to jail for failure to furnish security, is not entitled to witness fees for the time he is thus held in confinement: *Markwell v. Warren County*, 53-422.

As to binding over witnesses on appeal, see § 6099.

5635. Return to district court. 4252. When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers mentioned in section four thousand two hundred and forty-two of this chapter [§ 5625], together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses, or for them, taken by him. [R., § 4605; C., '51, § 2880.]

5636. In case not triable on indictment. 4253. If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him. If he have not jurisdiction to try and determine the same, he shall indorse on, or annex to, the minutes of the examination an order, signed by him, to the following effect: "It appearing to me by the within minutes that the offense of (here state its name, or nature generally), has been committed, and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, and who has jurisdiction, giving the name of office), and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom the defendant is to be taken, or that he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers to a peace officer, who shall forthwith proceed as directed by the order, and take the defendant before such magistrate, and deliver all the papers with the undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly. [R., § 4607.]

5637. Costs. 4254; 15 G. A., ch. 30. When the defendant is discharged, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the complainant and render judgment therefor; but the person against whom such judgment is rendered may appeal in the same manner, and with the same effect, as is provided for a prosecuting witness in section four thousand six hundred and ninety-one [§ 6089] of this code, otherwise the costs shall be taxed against the state.

Under the provisions of the Revision allowing appeals by the state it was *held* that the power here conferred of taxing costs against the prosecuting witness in certain cases might be exercised by the district court upon the trial of a criminal cause on appeal, although such order was not entered by the justice of the peace before whom the case was originally tried, and although no additional evidence was introduced to show absence of probable cause: *In re Trenchard*, 16-53.

Also *held*, that, where the judgment was for defendant, the prosecuting witness might appeal from an order of the justice taxing to him the costs of prosecution: *State v. Roney*, 37-30.

The justice is invested with discretion as to the taxation of costs to the prosecutor, and his conclusion cannot be reversed by the district court unless he has abused such discretion. And the correctness of the judgment of the justice must be determined by an inspection of the record, and not by new evidence: *State v. Kerns*, 64-306.

An appeal by prosecuting witness from an order taxing the costs of the prosecution to him must be taken at the time judgment is rendered and not afterwards: *State v. Knapf*, 61-522.

As to taxation of costs in district court, see § 5675 and notes. And see § 6089 and notes.

CHAPTER 13.

OF SELECTING, DRAWING, SUMMONING, AND IMPANELING OF THE GRAND JURY.

5638. Selecting. 4255. The selecting, drawing, and summoning of the grand jury is as prescribed in the code of civil practice. [R., § 4608; C., '51, § 2881.]

It is not a valid objection to a grand jury that the judges of election, in making returns of names of persons to serve as grand jurors, returned in all eighty-five names instead of seventy-five, as required by § 312, if the extra names had been stricken off before the grand

jury was drawn and the proper number have been regularly drawn and summoned. Neither is it a sufficient objection that the names thus returned were not entered in the election book: *State v. Knight*, 19-94.

Where there has been no substantial departure in the selection, drawing, etc., of the grand jury affecting substantially the rights of defendant, a motion to set aside the indictment for irregularities in connection with their selection should not be sustained: *State v. Brandt*, 41-593.

It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *State v. Carney*, 20-82.

In general, see §§ 305-323.

5639. Method; vacancies filled. 4256; 21 G. A., ch. 42, § 3. At a term of court at which grand jurors are required to appear, the panel shall be called and the names of the grand jurors appearing shall be entered on the record. From the number of jurors thus summoned and appearing the clerk shall select, by lot, the required number. If more grand jurors have appeared than the number required to fill the panel, the remaining number shall be discharged for the term. If from any cause, either then or afterward, the number of the panel be reduced to a less number than required, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel. [R., § 4609; C., '51, § 2881.]

The impaneling is the final formation by the court of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *State v. Ostrander*, 18-435, 446.

Filling panel: If a grand juror is discharged subsequently to the formation of the jury, the panel should be filled by the summoning of another juror: *Norris' House v. State*, 3 G. Gr., 513.

Objection to the substitution of one grand juror for another without having the vacancy filled in the manner here required must be made at the time of such substitution: *State v. Howard*, 10-101.

A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, it not appearing that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52-103.

Where grand jurors were absent at a term of court by reason of instruction from the judge that they need not appear unless specially summoned, *held*, that it was error to impanel a grand jury omitting therefrom the persons thus failing to appear, and that a motion to quash an indictment found by such grand jury should have been sustained: *State v. Bowman*, 73-110.

After challenges allowed: In case of the challenge of an individual juror, there is no provision for summoning another juror in his place. The member thus challenged does not cease to become a member of the grand jury, and his place is not to be supplied; and an indictment found by the requisite number of grand jurors as to whom no cause of challenge by defendant is interposed will be good: *State v. Ostrander*, 18-435.

But where, by challenges to nine of the grand jurors, the number was reduced below twelve, *held*, that the court should, upon application of the district attorney, have ordered the vacancies in the grand jury to be filled: *State v. Garhart*, 35-315.

So where six grand jurors were challenged it was held not error to reorganize the jury and fill up the panel: *State v. Mooney*, 10-506.

Where, by reason of the sustaining of challenges to individual jurors, the panel is left with a less number than fifteen jurors qualified to act in the case in which the challenges have been allowed, it is competent for the court to order the panel to be filled by an addition of the requisite number of jurors to act only in such case; and it is the duty of the court to thus fill the panel where by challenges it is reduced to less than twelve, but it is not error to refuse to thus fill the panel where twelve or more of the regular jurors remain unchallenged: *State v. Shelton*, 64-333.

See, further, §§ 5641-5647 and notes.

New precept: The provision of § 322 for the issuance of a new precept applies only to a case where all the jurors fail to appear, or it is determined that the whole panel has been illegally selected or drawn. Such provision has no reference to the case of failure of jurors to attend: *State v. Pierce*, 8-231.

Where a part of the grand jury fails to appear, the court may orally direct the sheriff to summon a sufficient number to complete the panel, which order should be entered of record, but a written precept is not necessary: *State v. Miller*, 53-84; *State v. Miller*, 53-154.

The discharge of one grand jury and the impaneling of another to which there is no objection except the fact that the first has been erroneously discharged will be no ground for quashing an indictment found by the second: *State v. Hughes*, 58-165.

At least this is so where there is no allegation or showing of prejudice or possible injustice to defendant from the fact of the discharge of the first jury: *State v. Hart*, 67-142.

Re-summoning: A grand jury having once been discharged may be re-summoned at the same term: *State v. Reid*, 20-413.

The court has no power to remove, reform or change the members of the grand jury: *Keitler v. State*, 4 G. Gr., 291.

5640. Person summoned to fill vacancy. 4257. Persons summoned by the sheriff to supply a deficiency in the requisite number of grand jurors,

serve only during the term at which they are summoned. [R., § 4610; C., '51, § 2881.]

Where a grand jury composed in part of jurors summoned to supply a deficiency were discharged, and again summoned at the same term, *held*, that such persons were properly summoned as members: *State v. Reid*, 20–413, 422.

5641. Challenge. 4258. A defendant held to answer to a public offense, may challenge the panel of the grand jury, and the state or defendant may challenge any individual juror. [R., § 4611; C., '51. § 2882.]

Who may challenge: The proper method of taking advantage of irregularity in the selection, summoning or impaneling the grand jury, where the defendant has been held to answer before the formation of the grand jury, is by challenge to the panel: *State v. Hart*, 29–268; *State v. Hinkle*, 6–380; *Dixon v. State*, 3–416; *State v. Howard*, 10–101; *State v. Ingalls*, 17–8.

In order to support the action of the court below in overruling a motion to set aside the indictment on the ground that the grand jury was irregularly drawn, where it does not appear whether the defendant was held to answer before indictment or not, it will be presumed that he was: *State v. Gibbs*, 39–318.

Where defendant was bound over to appear before the grand jury after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10–506.

A defendant under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not entitled to challenge grand jurors although it is possible that his case may afterwards come before them: *State v. Fitzgerald*, 63–268.

A defendant not bound over to appear before the grand jury before the finding of an indictment against him cannot be deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Dutell v. State*, 4 G. Gr., 125; *Norris' House v. State*, 3 G. Gr., 513.

Before the enactment of the provision in this section authorizing challenges of individual jurors on the part of the state, it was *held* that the prosecution had no right of challenge: *Keitler v. State*, 4 G. Gr., 291.

Time for challenge: The time within which the right of challenge to grand jurors shall be exercised is not prescribed, and the prisoner ought to be permitted to exercise it at any time before the consideration of his case. Therefore, where a case is re-submitted to the same grand jury after a previous indictment has been set aside, the prisoner should be allowed an opportunity to challenge the members of such grand jury on the ground that they have previously formed and expressed an opinion in returning the first indictment: *State v. Osborne*, 61–330: *State v. Gillick*, 7–287.

Defendant should exercise his right of challenge at the proper time or it will be held waived: *State v. Harris*, 38–242.

Where defendant was in court to answer an indictment, and on motion the indictment was quashed, and the court then referred the matter to the grand jury for further consideration, and they returned an indictment charging defendant with a different crime, *held*, that an objection to the panel should have been then raised, and could not be taken advantage of afterwards: *State v. Ruthven*, 58–121.

An objection to the grand jury must be made before pleading to the indictment: *State v. Reid*, 20–413.

Challenges must be interposed before the swearing of the jury: See § 5649.

A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, it not appearing that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52–103.

Waiver of challenge: A defendant bound over to answer may waive his right to challenge the grand jury, and will not be in default if he does not appear for that purpose: *State v. Klingman*, 14–404: *Ringgold County v. Ross*, 40–176.

Nor will his bail bond be forfeited by failure to so appear: *Ringgold County v. Ross*, 40–176.

Presence of defendant: It seems that the right of challenging an individual grand juror may be exercised or waived by defendant's attorney in the absence of defendant, even on a trial for felony. The presence of defendant at this proceeding is not made essential. At any rate, where it does not appear that there was any objection for which defendant could have challenged a juror, alleged error in forming the grand jury in defendant's absence will be error without prejudice: *State v. Felter*, 25–67.

Error not cured by conviction: The fact that defendant is convicted does not cure any error in refusing him the privilege of challenging grand jurors: *State v. Osborne*, 61–330.

5642. To individual juror by state. 4259. A challenge to an individual juror may be made by the state, for one or more of the following causes:

1. That he is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant, or employee to any person held to answer for a public offense whose case may come before the grand jury;

2. That he is bail for any one held to answer for a public offense, whose case may come before the grand jury;

3. That he is defendant in a prosecution similar to any prosecution to be examined by the grand jury;

4. That he is, or within one year preceding has been, engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

5643. To the panel. 4260. A challenge to the panel can be interposed only for the reason that they were not appointed, drawn, or summoned as prescribed by law. [R., § 4612; C., '51, § 2883.]

A challenge to the panel need not be demurred or pleaded to by the state. Defendant must introduce evidence in support of his challenge or it will be overruled: *State v. Gillick*, 10-98.

The burden of showing irregularity in the selection of grand jurors is upon the party making the challenge: *State v. Hartman*, 10-589.

That the grand jury was reorganized during the term, *held* not a ground for challenge to the panel: *State v. Mooney*, 10-506.

A defendant held to answer must interpose these grounds of objection at the time the grand jury is impaneled and not afterward: See § 5724 and note.

As to method and time of challenging the panel, see § 5641 and notes.

5644. By defendant to individual juror. 4261. A challenge to an individual juror by the defendant, may be made for one or more of the following causes only:

1. That he is a minor, insane, or not competent by law to serve as such juror;

2. That he is a prosecutor upon a charge against the defendant;

3. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial. [R., § 4613; C., '51, § 2884.]

Exemption from service (under § 306) is a personal privilege which may be waived: *State v. Adams*, 20-486.

Alienage: That a member of the grand jury is an alien is a ground of challenge, but not a ground for setting aside an indictment: *State v. Gibbs*, 39-318.

Alienage will not be presumed. The party asserting it as a ground of challenge has the burden of proving it: *State v. Haynes*, 54-109.

Bias; opinion of guilt or innocence: Under a statutory provision somewhat different from this section, *held*, that it was only where a juror had formed or expressed an unqualified opinion of defendant's guilt that he was disqualified as a juror, and that the fact that he had formed an opinion which, upon further interrogation, he stated was not unqualified, did not render him incompetent: *State v. Hinkle*, 6-380.

The statement of a juror that he had read some portion of the evidence taken at the coroner's inquest upon the body of the person with whose killing defendant was charged, but did not know that he had read the whole of it, and that he thought he had formed an opinion from what he had read as to the guilt of defendant, but that he had no prejudice or bias such as would prevent him from listening to the evidence and passing upon the question of guilt as impartially as though he had never heard of the case, *held* not sufficient to show that he was disqualified: *State v. Shelton*, 64-333.

Where, under § 5677, a case is sent back to the same grand jury after a former indictment found by them is set aside, it is a sufficient cause of challenge to the jurors that they have heard the evidence upon which the previous indictment was found, and by the finding of such indictment have formed and expressed an opinion as to the guilt of defendant: *State v. Gillick*, 7-287; *State v. Osborne*, 61-330.

It seems that a challenge to a grand juror may be allowed for any cause that would constitute an objection to a petit juror: *State v. Gillick*, 7-287.

As to the time and method of making the challenges, see notes to § 5641.

5645. Decided by the court. 4262. Challenges to the panel or to an individual juror must be decided by the court. [R., § 4615; C., '51, § 2886.]

5646. Challenge to panel allowed. 4263. If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed. If the jury does so and finds an indictment the court must set it aside. [R., § 4616; C., '51, § 2887.]

5647. To individual juror. 4264. If a challenge to an individual juror be allowed, he shall not be present at, or take any part in, the consideration of the charge against the defendant. [R., § 4617; C., '51, § 2888.]

In such case there is no provision for summoning another juror in place of one as to whom a challenge is sustained. He does not cease to be a member of the grand jury, and his place cannot be supplied under § 5639. An indictment against a defendant held to answer, found by grand jurors as to whom no challenge by defendant has been sustained (if sufficient in number), will be good (explaining *Norris' House v. State*, 3 G. Gr., 513): *State v. Ostrander*, 18-435. And see notes to § 5639.

5648. Effect of violation. 4265. The grand jury must inform the court of a violation of the last section, that it may be punished as a contempt. [R., § 4618; C., '51, § 2889.]

5649. Joinder in challenges; time for challenge. 4266. When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join in such challenge, nor can any objection be interposed by a defendant to the grand jury or to any individual juror for any cause of challenge after they are sworn. [R., § 4619; C., '51, § 2890.]

An objection to the grand jury, or an individual juror, cannot be interposed, by a defendant held to answer before the formation of the grand jury, for any cause of challenge after the jury is sworn: *State v. Ingalls*, 17-8; *Dixon v. State*, 3-416; *State v. Hinkle*, 6-380; *State v. Howard*, 10-101; *State v. Hart*, 29-268. And see § 5641 and notes.

A defendant held to answer has an opportunity to challenge a juror before the jury is sworn, and, failing to do so then, cannot afterward make objection: *State v. Gibbs*, 39-318.

Where defendant was bound over to appear before the grand jury after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10-506.

This section must be confined to defendants who have an opportunity of interposing the objection therein allowed. A defendant not bound over to appear before the grand jury prior to the finding of an indictment against him is not deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Norris' House v. State*, 3 G. Gr., 513; *Dutell v. State*, 4 G. Gr., 125.

A defendant under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not entitled to challenge grand jurors, although it is possible his case may afterwards come before them: *State v. Fitzgerald*, 63-268.

5650. Foreman. 4267. From the persons summoned to serve as grand jurors, the court must appoint a foreman; the court must also appoint a foreman when the person already appointed is discharged, excused, or from any cause becomes unable to act before the grand jury is finally discharged. [R., § 4620; C., '51, § 2891.]

The foreman may be selected either from the grand jurors regularly drawn, or from those summoned to supply a deficiency: *State v. Brandt*, 41-593, 605.

5651. Oath to foreman. 4268. The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this state, committed or triable within this county, of which you have, or can obtain legal evidence; you shall present no person through malice, hatred, or ill-will, nor leave any unpresented, through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God." [R., § 4621; C., '51, § 2892.]

5652. Oath to others. 4269. The following oath must thereupon be administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God." [R., § 4622; C., '51, § 2893.]

5653. Charged by the court. 4270. The grand jury being impaneled and sworn, may be charged by the court. In doing so, the court shall give them such information as it may deem proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before the grand jury. And it is hereby made the duty of the court to spe-

cially give in charge to the grand jury, the provisions of law regulating the accounting by public officers for fines and fees collected by them, and providing for the suppression of intemperance. [R., § 4623; C., '51, § 2894.]

5654. Discharge. 4271. The grand jury on the completion of its business shall be discharged by the court. But whether its business be completed or not, it is discharged by the final adjournment thereof. [R., § 4625; C., '51, § 2896.]

An indictment may be found by a grand jury any time during a term of court which commenced within the year for which the jury was chosen, and has extended into the following year without adjournment: *State v Winebrenner*, 67-230.

And see § 317 and notes.

CHAPTER 14.

OF THE POWERS AND DUTIES OF THE GRAND JURY.

5655. Powers. 4272. The grand jury has power, and it is made its duty, to inquire into all indictable offenses committed, or which may be tried, within the county, and present them to the court by indictment. [R., § 4626; C., '51, § 2897.]

The grand jury may on their own motion find an indictment against defendant on a charge which has been previously dismissed by them and without its re-submission to them by the court: *State v. Collins*, 73-542.

5656. Evidence. 4273; 18 G. A., ch. 130, § 2. The indictment must in all cases be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence, or upon the minutes of evidence given by witnesses before a committing magistrate. [R., § 4627; C., '51, § 2899.]

The examination of an incompetent witness by the grand jury will not vitiate the indictment: *State v. Tucker*, 20-508.

The court cannot inquire into the character of evidence upon which the grand jury acted in finding an indictment. So *held* where it was claimed that after the witnesses were examined one of the grand jurors was discharged and his place supplied by a by-stander, the evidence not being again presented: *State v. Fowler*, 52-103.

Where an indictment is set aside and the case recommitted to the same grand jury, they may consider evidence of witnesses who have already been before them without their being recalled: *State v. Clapper*, 59-279.

The grand jury is simply a court of inquiry and may call any person before it, whether favorable or unfavorable to the prosecution, and evidence given before the grand jury in an investigation as to the commission of a crime cannot, in the event of the death of the witness before the trial, be proved on the trial as the testimony of such witness, for the reason that there could be no cross-examination before the grand jury; and on the other hand the testimony of a witness on such investigation, tending to fix the crime upon another person than the one subsequently indicted for it, cannot be shown by defendant in case of the death of such witness, at least where the investigation before the grand jury was without the presence or knowledge of the prosecuting officer: *State v. Porter*, 74-623.

See, further, § 5672 and notes.

5657. Administer oath. 4274. The grand jury has power, by its foreman, to administer the oath to all witnesses produced and examined before it. [R., § 4628.]

5658. Clerk. 4275; 22 G. A., ch. 38. It is the duty of the grand jury to appoint one of its number, who is not foreman, clerk thereof, who must take and preserve the minutes of the proceedings and of the evidence given before it, except the votes of the individual members thereof on finding an indictment. *Provided*, that in counties having a population, as shown by the last preceding census, of twenty thousand or over, the court, in the exercise of a sound discretion may appoint a competent person, not a member of the grand jury, clerk thereof, who shall receive a compensation of three dollars

per day. He shall take no part in the proceedings aside from his clerical duties, and he shall strictly abstain from expressing an opinion upon any question before the grand jury either to the jury or to any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment. *And provided, further*, that the following oath must be administered to such clerk: "You as clerk of the grand jury shall faithfully and impartially perform the duties of clerk and you will not reveal to any one the proceedings of the grand jury. You will strictly abstain from expressing any opinion upon any question before the jury, either to the jury or any member thereof, so help you God." [R., § 4629.]

As to the minutes of evidence, their return, and for what they may be used, see § 5676 and notes.

5659. Evidence for defendant. 4276. The grand jury is not bound to hear evidence for the defendant, but it is its duty to weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order such evidence to be produced. [R., § 4630; C., '51, § 2900.]

5660. Member as witness. 4277. If a member of the grand jury knows, or has reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow-jurors, and be sworn as a witness upon the investigation before them. [R., § 4631; C., '51, § 2901.]

5661. Special duty. 4278. It is made the special duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted;
2. Into the condition and management of the public prisons within the county;
3. Into the wilful and corrupt misconduct in office of all county officers;
4. Into the obstruction of highways. [R., § 4632; C., '51, § 2902.]

The grand jury cannot report to the court the result of their inquiry into the conduct of county officers otherwise than by indictment; and the members of a grand jury charging a county officer with misconduct otherwise than by indictment may render themselves liable to an action of libel: *Rector v. Smith*, 11-302.

5662. Issue subpœnas. 4279. The clerk of the court must, whenever required by the foreman of the grand jury or district [county] attorney, issue subpœnas for witnesses to appear before the grand jury. [R., § 4633; C., '51, § 2903.]

5663. Access to county jails and public records. 4280. The jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge, of all public records within the county. [R., § 4634; C., '51, § 2904.]

5664. Advice of county attorney. 4281. The grand jury may, at all reasonable times, ask the advice of the district [county] attorney, or the court; and the district [county] attorney may attend before it for the purpose of examining witnesses when the grand jury deems it necessary. [R., § 4635; C., '51, § 2905.]

5665. Who present. 4282. Such attorney shall be allowed at all times to appear before the grand jury on his own request, for the purpose of giving information relative to any matter cognizable by it; but no such attorney, nor any other officer or person, except the grand jury, must be present when the question is taken upon the finding of an indictment. [R., § 4636; C., '51, § 2906.]

5666. Should find indictment when. 4283. The grand jury should find an indictment when all the evidence before it, taken together, is such as

in its own judgment would, if unexplained, warrant a conviction by the trial jury. When the evidence is not such, it should not. [R., § 4637.]

5667. Proceedings secret. 4284. Every member of the grand jury must keep secret the proceedings of that body and the testimony given before them, except as hereinafter required. Nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against any person not in custody or under bail, otherwise than by presenting the same in court, or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor. [R., § 4638; C., '51, § 2907.]

This provision is general and without limit as to time. A grand juror is not allowed to make affidavit for the purpose of showing that an indictment was not found by the concurrence of twelve jurors: *State v. Gibbs*, 39–318, 322. And see *State v. Mewherter*, 46–88.

The fact that a bailiff was present in the grand jury room during their proceedings, though not when the final vote was taken, *held* not sufficient to affect the validity of the indictment: *State v. Kimball*, 29–267.

5668. Exception. 4285. A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before court, or to disclose the testimony given before them by any witness upon a charge against him of perjury. [R., § 4639; C., '51, § 2908.]

This may be done for the purpose of impeaching a witness who testified before the grand jury: *State v. Hayden*, 45–11.

5669. Jurors not to be questioned. 4286. No grand juror shall be questioned for anything he may say, or any vote he may give, in the grand jury, relative to a matter legally pending before them, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow-jurors. [R., § 4640; C., '51, § 2909.]

5670. When witness refuses to testify. 4287. When a witness under examination before the grand jury, refuses to testify or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court, and the foreman shall then distinctly state to the court the refusal of the witness, and if the court, upon hearing the witness, shall decide that he is bound to testify, or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court. [R., § 4641.]

5671. Failure to obey subpœna. 4288. If a witness fail to attend before the grand jury, in obedience to a subpœna issued for that purpose and duly served, the court shall, upon the application of the district [county] attorney, or foreman of the grand jury, proceed and coerce the attendance of the witness, and may punish his disobedience as in the case of a witness failing to attend on the trial. [R., § 4642.]

5672. Minutes of preliminary examination. 4289; 18 G. A., ch. 130, § 3. All the papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and shall be competent evidence upon which an indictment may be found if the grand jury are satisfied that such evidence alone, or with other evidence, if unexplained, would warrant a conviction by the trial jury; and the grand jury need not have before them for examination any witness who was examined before the committing magistrate and a minute of whose evidence has been returned by said magistrate, unless requested by the district [county] attorney, and if an indictment is found in whole or in part upon the minutes of evidence taken before a committing magistrate, the clerk of the grand jury

shall write out a brief minute of the substance of such evidence, and the same shall be returned to the court with the indictment. If upon investigation the grand jury refuses to find an indictment, it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail, if bail be given, unless the court should, upon good cause shown, be of opinion that the charge should be again submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court. [R., § 4643.]

Where an indictment is found by a grand jury upon the minutes of the testimony before the magistrate the names of the witnesses examined before the magistrate may be indorsed on the back of the indictment, and they may then be examined for the prosecution without their having testified before the grand jury: *State v. Rodman*, 62–456.

Although the minutes of the evidence given before a committing magistrate are not certified to by him, as required by § 5624, yet where an indictment is found upon such minutes, and a minute thereof is returned by the grand jury as here provided, it will be presumed that they ascertained by satisfactory and competent evidence, before taking action, that the minutes were a true record of the evidence given before the magistrate; and the absence of such certificate is not ground for objecting to a witness, a minute of whose evidence is thus returned with the indictment: *State v. Kepper*, 65–745.

See §§ 5624, 5625 and 5656 and notes.

5673. Dismissal of charge. 4290. Such dismissal of the charge, does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction, it cannot again be submitted. [R., § 4644.]

After the dismissal of a charge, and without re-submission thereof to the grand jury, they may find an indictment against the defendant for such charge on their own motion: *State v. Collis*, 73–542.

CHAPTER 15.

OF THE FINDING AND PRESENTMENT OF INDICTMENT.

5674. How many jurors must concur. 4291; 21 G. A., ch. 42, § 4. An indictment cannot be found without the concurrence of four grand jurors, when the grand jury is composed of five members; and not without the concurrence of five grand jurors when the grand jury is composed of seven members. Every indictment must be indorsed "a true bill," and the indorsement must be signed by the foreman of the grand jury. [R., § 4645; C., '51, § 2910.]

Concurrence of grand jurors: Under the section before amendment, *held*, that while the panel should contain fifteen jurors, and be kept full if any were discharged, yet the statute did not require that all be present at the finding of an indictment; and if any were absent by reason of a challenge having been interposed and sustained as to them at the instance of a defendant held to answer, provided twelve concurred in finding the indictment, it would be good (§ 5647 and notes): *State v. Ostrander*, 18–435. And see notes to § 5639.

Record conclusive: Where the record shows that an indictment was found by a full grand jury, the fact that such grand jury was composed of less than the required number of jurors cannot be shown by evidence *aliunde*: *Hall v. State*, 4 G. Gr., 73.

Objection on account of irregularity in the finding of an indictment is waived by pleading and submitting without objection to the verdict: *Harriman v. State*, 2 G. Gr., 270.

It is not necessary that the record, on appeal, state that the indictment was found by a legal grand jury, nor that it contain their names. The indorsement of the indictment by the foreman as a true bill is conclusive evidence that it was duly found and concurred in by a sufficient number of the grand jury: *Ibid.*

Affidavits of grand jurors are not competent for the purpose of proving that an indictment duly returned was not concurred in by twelve grand jurors: *State v. Gibbs*, 39–318; *State v. Mewherter*, 46–88.

After an indictment has been presented and become a matter of record, it is not compe-

tent for the grand jurors who found it to testify that they did not vote to find the bill, or how they voted, or what they intended to find. Therefore, *held*, that where the indictment charged acts constituting murder in the first degree, it was not competent to present affidavits of the grand jurors showing that they had refused to find an indictment for murder and intended to charge only manslaughter, even though, in the introductory part of the indictment, the crime was named as manslaughter: *State v. Davis*, 41-311.

Indorsement by foreman: An indorsement of the name of the foreman giving the initials of his Christian name instead of his full name, *held* sufficient: *State v. Groome*, 10-308.

The requirement that the foreman's name be subscribed to the indorsement of "a true bill" is merely directory, and if it otherwise appear that the indictment was properly returned by the grand jury, the absence of the proper indorsement by the foreman cannot be taken advantage of after conviction: *Wan-kon-chaw-neek-kaw v. United States*, Mor., 332.

The fact that it does not appear that the indictment is indorsed "a true bill" and marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4-554.

5675. Private prosecutor. 4292. When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section, "found at the instance of" (here state the name of the person), and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all the circumstances, that the prosecution was malicious or without probable cause. [R., § 4546.]

The court has the authority to tax costs to the prosecutor, and it will be presumed that such authority is correctly exercised in the absence of a showing to the contrary: *State v. Donnell*, 11-452.

A party considering himself aggrieved by the action of the court must have the evidence on which the court acted presented to the supreme court on appeal in order to secure a review of such action: *Ibid.*

The mere failure of a private prosecutor to appear and prosecute a defendant put under bonds to keep the peace, as contemplated in §§ 5507 and 5508, will not warrant a judgment against such prosecutor for costs: *State v. Holliday*, 22-397.

The requirement of the indorsement of the name of the private prosecutor at whose instance the indictment is found is directory only, and for the purpose of enabling the court to tax the costs against such prosecutor in case the prosecution fails. The requirement of § 5317, that a prosecution for adultery shall be commenced only on complaint of the husband or wife of the offending party, does not render it necessary that the name of such husband or wife be indorsed on the indictment as prosecutor: *State v. Briggs*, 68-416.

As to taxation of costs by a justice of the peace against a prosecuting witness and on appeal, see § 5637 and notes, and § 6089 and notes.

5676. Names of witnesses indorsed on indictment. 4293; 18 G. A., ch. 130, § 4. When an indictment is found, the names of all witnesses on whose evidence it is found must be indorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record; but the minutes of evidence shall not be open for the inspection of any person except the judge of the court, the district [county] attorney or his clerk, the defendant and his counsel, or the clerk of such counsel, and the clerk of the court must within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel or the clerk of such counsel to take a copy. [R., § 4647; C., '51, § 2913.]

Indorsing names of witnesses: The objection that the names of witnesses examined before the grand jury are not indorsed on the indictment should be raised in the trial court or it will be regarded as waived: *Harriman v. State*, 2 G. Gr., 270.

Names of witnesses before the grand jury who do not give any material testimony, and the minutes of whose testimony are not returned, need not be indorsed on the indictment: *State v. Little*, 42-51.

Affidavits cannot be received to show that witnesses whose names are not indorsed, and minutes of whose evidence are not returned, were examined before the grand jury: *Ibid.*

It is not error in the court to permit, upon motion of the prosecuting attorney, an indorsement to be made on the back of the indictment of the name of a witness who has been before the grand jury: *State v. Robinson*, 47-489.

The fact that the witness' name was indorsed on the indictment, and what appeared to be minutes of his testimony attached thereto, will not entitle the prosecution to introduce him on the trial under the provisions of § 5806, unless he was actually examined as a witness before the grand jury: *State v. Porter*, 74-623.

Failure of the state to produce all the wit-

nesses that testified before the grand jury is not a wrong nor a presumption of wrong. The state is not required to produce all such witnesses at the trial of the case: *State v. Dillon*, 74-653.

As to what is a sufficient indorsement of witnesses' names, so as to entitle the prosecution to call them upon the trial, see § 5806 and notes.

Returning minutes of testimony: The minutes need not be attached to, or made a part of, the indictment, and a mere failure to file the same should not deprive the state of its evidence: *State v. Postlewait*, 14-446.

It is sufficient that they be returned into court and filed with the clerk: *State v. Hamilton*, 42-655.

That they are handed to the clerk and deposited with him sufficiently constitutes a filing: *State v. Guisenhause*, 20-227.

That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

The minutes, when returned, become a part of the record and cannot be impeached by affidavits: *State v. Little*, 42-51.

Failure of the clerk to file the minutes of testimony returned by the grand jury cannot be raised by demurrer to the indictment: *State v. Briggs*, 68-416.

If the minutes of testimony are returned by the grand jury with the indictment and placed by the clerk in his office, and remain there as a part of the record, this is a sufficient filing within the requirement of the statute, although it would be better practice for the clerk to indorse such minutes as filed: *Ibid.*

The minutes of the testimony thus returned by the grand jury cannot be introduced as independent evidence on the trial. If it is sought by them to impeach a witness, the foundation for such impeachment must be laid in the usual way: *State v. Ostrander*, 18-435.

Nor are such minutes admissible to impeach a witness on the trial by showing a conflict between his evidence and that appearing to have been given by him before the grand jury: *State v. Hayden*, 45-11.

The fact that the minutes of the evidence returned by the grand jury do not support the indictment is not ground for quashing it or setting it aside: *State v. Harris*, 36-268.

Documentary evidence or evidence identifying it need not be set out or noticed in the minutes: *State v. Mullenhoff*, 74-271.

Although the minutes of the evidence taken before the committing magistrate are not certified to as required by statute in such cases, yet if the grand jury act upon such minutes and return with the indictment a memorandum of the testimony thus submitted to them, it will be presumed that they had before them sufficient evidence that the minutes on which they acted were true minutes of the evidence before the magistrate, and the witnesses whose evidence is thus returned and whose names are properly indorsed upon the indictment cannot be excluded from testifying on the trial: *State v. Kepper*, 65-745.

Minutes of evidence given before the grand jury are to be taken by its clerk: See § 5658.

Failure to indorse names of witnesses on indictment, and failure to return the minutes of evidence therewith, are grounds for setting aside the indictment: See § 5722, ¶ 2, and notes.

Witnesses whose names are not so indorsed, and minutes of whose evidence are not so returned, cannot be called by the prosecution except upon notice thereof having been previously given to the defendant: See § 5806 and notes.

5677. Minutes used on re-submission. 18 G. A., ch. 130, § 5. When, on demurrer, motion to set aside, or otherwise, an indictment is held insufficient, and an order is made to re submit the case to the same or other grand jury, or where the grand jury have ignored a bill and the same has been ordered back to the same or other grand jury for further investigation, it shall be unnecessary to summon the witnesses again before such jury in such cases, but the minutes of the testimony returned with the defective indictment, or ignored bill, or information, shall be detached and returned to the grand jury, and thereupon, without more, such grand jury may find a bill and attach said minutes of the evidence thereto and return said indictment therewith into court in the usual manner; and the grand jury may also, in either case, take additional testimony.

Where an indictment is set aside and the case recommitted to the same grand jury, there is no objection to their considering the evidence of witnesses who have already been before them without calling them the second time: *State v. Clapper*, 59-79.

When a case is sent back to the same grand jury, the prisoner should be allowed to challenge the members of such grand jury on the ground of having formed and expressed an opinion by the finding of the first indictment: *State v. Osborne*, 61-330.

5678. 18 G. A., ch. 130, § 6. All acts and parts of acts inconsistent with this act are hereby repealed.

5679. Presented to the court. 4294. The indictment, when found and indorsed, as prescribed by this chapter, must be presented by the foreman, in the presence of the grand jury, to the court, and marked "filed" by the clerk of the court, and remain in his office as a record. [R., § 4648; C., '51, § 2914.]

Presentation to the court: The requirement that the indictment must be presented, etc., is directory only, and a failure of the clerk to make the indorsement on the indictment will not invalidate the proceedings (explaining *State v. Glover*, 3 G. Gr., 249): *State v. Axt*, 6-511; *State v. Shepard*, 10-126.

In the absence of an affirmative showing to the contrary it will be presumed that the requirements of the statute as to the presentation were complied with: *State v. McIntire*, 59-267.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, *held*, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58-165.

Indorsement by the clerk: No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrocklege v. State*, 1-167; *Herring v. State*, 1-205.

It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *State v. Jolly*, 7-15.

A mistake in the indorsement on the indictment as to the county in which it was filed, *held* not a fatal error, where it appeared that it was presented and filed in the proper county: *State v. Smouse*, 50-43.

Indorsements in particular cases *held* to be in substantial compliance with the provisions of the statute as to presenting and filing: *Dixon v. State*, 4 G. Gr., 381; *Wrocklege v. State*, 1-167.

The court should be named in the indorsement, although a failure to do so will not be fatal: *State v. Jolly*, 7-15.

Failure of the clerk to file the indictment will not invalidate the proceedings: *State v. Rivers*, 58-102.

The fact that it does not appear that the indictment was marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4-554.

And see notes to preceding section.

Substitution of lost indictment: If the indictment is lost or abstracted after the arraignment of defendant, the court may, upon motion, substitute a copy and proceed upon the record thus made, the same as upon the original indictment: *State v. Rivers*, 58-102; *State v. Stevisiger*, 61-623.

Where, an indictment being lost, a second one was returned for the same offense, which being held defective, and the original being found, a trial was had under the first indictment, *held*, that such proceedings were proper and could not be dismissed on the ground of another indictment pending: *Reddan v. State*, 4 G. Gr., 137.

CHAPTER 16.

OF INDICTMENT; ITS FORM AND REQUISITES.

5680. Defined. 4295. An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense punishable on indictment. [R., § 6449; C., '51, § 2915.]

5681. What must contain. 4296. The indictment must contain:

1. The title of the action, specifying the name of the court to which it is presented, and the name of the parties;

2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. [R., § 4650.]

An indictment describing the offense in the language of the statute will be sufficient without naming it; but naming the offense without stating the facts constituting it will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but will be mere surplusage: *State v. Shaw*, 35-575; *State v. Davis*, 41-311.

The facts constituting a public offense must be charged in the indictment, and when a statute creating such offense describes it in general terms, constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41-593, 607.

An indictment cannot be aided by intendment, or an omission supplied by construction. The facts necessary to constitute the offense must be in the manner indicated set out and averred: *State v. Potter*, 28-554.

Section applied: *State v. Jamison*, 74-602.

See, further, notes to the next two sections and §§ 5689-5691.

and §§ 5689-5691.

5682. Form. 4297. It may be substantially in the following form:

District Court of the County of ——.

The State of Iowa }
against }
A. B. }

The grand jury of the county of ——, in the name and by the authority of

the state of Iowa, accuse A. B. of the crime of (here insert the name of the offense, if it have one, such as treason, murder, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it as given by law, such as "mingling poison with food, with intent to kill a human being"), committed as follows:

The said A. B., on the first day of January, A. D. 18—, in the county as aforesaid (here insert the act or omission constituting the offense).

——— ———, District [County] Attorney,
[R., § 4651.] of the ——— [county] judicial district.

Formal parts: The expressions "State of Iowa" and "The State of Iowa" are essentially the same: *Harriman v. State*, 2 G. Gr., 270.

An indictment in which the presentment is "in behalf of the state of Iowa" is good, although the expression "In the name and by the authority of the state of Iowa" is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution that it is made "in the name and by the authority," etc.: *Wrocklege v. State*, 1–167.

An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on that ground: *State v. Schill*, 27–263.

A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment. These facts are not such as to prejudice the substantial rights of the defendant: *State v. Gurlock*, 14–444.

The fact that on the face of the indictment there is no title to the action, in accordance with the form given in this section, where the body of the indictment sets forth the names of the parties, does not constitute a valid objection thereto on motion or demurrer: *State v. McIntire*, 59–264; *State v. McIntire*, 59–267.

It is not essential that the indictment be signed by the district attorney: *State v. Ruby*, 61–86; *State v. Wilmoth*, 63–380.

An indictment signed A. B., "Pros. Atty. *pro tem.*," etc., *held* sufficient: *Wrocklege v. State*, 1–167.

Venue: An indictment for larceny corresponding to the form given in this section, charging the offense as committed "in the county aforesaid," *held* sufficiently specific as to the venue of the crime: *State v. Lillard*, 59–479.

So an indictment in this form sufficiently charges that the offense was committed in Iowa: *State v. Winstrand*, 37–110.

Conclusion: In an indictment under a statute it is not necessary in the conclusion to refer specifically to the statute under which the indictment is found: *Zumhoff v. State*, 4 G. Gr., 526.

The formal ending of an indictment, "and so the jurors, etc., do say that the said," etc., is but a legal conclusion, and will not cure any defect in the charging part of the indictment: *State v. Parsons*, 54–405.

A mistake in the conclusion of the indictment in reciting the name of the person injured, such name being correctly given in the body of the indictment, *held* immaterial: *State v. McCunniff*, 70–217.

The name of the offense charged need not be stated: See notes to preceding section.

Further, see notes to next section, and to §§ 5689–5691.

5683. Direct and certain. 4298. The indictment must be direct and certain as regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense. [R., § 4652.]

The party charged: An indictment against "a man in Turner Hall whose name to the grand jurors is unknown," *held* insufficient: *Geiger v. State*, 5–484.

The offense; particular circumstances: Only such facts need be stated in the indictment as are required to be proved on the trial: *Nash v. State*, 2 G. Gr., 286, 294.

In a prosecution under § 5214 for loaning public money, *held*, that an indictment stating that defendant "loaned" a certain sum of money "without authority of law," etc., was too general and should have stated the person to whom the money was loaned. So, also, in another count charging the conversion, etc., of public money, *held*, that the manner of conversion should have been specified: *State v. Brandt*, 41–593, 609, 611.

The facts constituting an offense must be stated in the indictment in language direct and certain as to the circumstances which are necessary to show a crime punishable by law. Omissions cannot be supplied by construction: *State v. Porter*, 28–554; *State v. Chicago, B. & P. R. Co.*, 63–508.

Where the acts charged are such that they are lawful under certain circumstances, it is not sufficient to allege that they were unlawfully done, but the existence of the facts showing the acts to be unlawful must be set out in the indictment: *State v. Chicago, B. & P. R. Co.*, 63–508.

The act of keeping liquors for sale, and the selling contrary to law, each constitutes a nuisance by statute, but the particular circumstances in this respect must be charged in the indictment, and if not charged cannot be proven: *State v. Tierney*, 74–237.

Needless particularity: Where a person or thing necessary to be mentioned in the in-

dictment is described with unnecessary particularity, all the circumstances of the description must be proved: *State v. Newland*, 7-242; *State v. Hesner*, 55-494.

So *held* where the kind of liquor sold was specified in an indictment for illegal sale: *State v. Hesner*, 55-494.

Therefore, under an indictment for passing counterfeit bills on a certain bank, *held*, that the existence of such bank must be established, although by statutory provision the name of the bank need not have been charged: *State v. Newland*, 7-242.

Where the place is stated in the indictment as a matter of local description and not of venue, it is necessary to prove it as laid although it need not have been stated: *State v. Crogan*, 8-523.

But on the same point the supreme court was equally divided in *State v. Verden*, 24-126

See, further, notes to §§ 5681 and 5689-5691.

5684. Defendant's name. 4299. When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings before execution, his true name is discovered, an entry shall be made in the record of the proceedings, of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially as follows:

The State of Iowa
against
A. B., indicted by the name of C. D.

[R., § 4653.]

5685. Must charge but one offense. 4300. The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative; *provided*, that in case of compound offenses, where, in the same transaction, more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein; *provided further*, that this section shall in no manner affect any provision of this code providing for the suppression of intemperance. [R., § 4654; C., '51, § 2917.]

Duplicity; charging distinct crimes: Although this section prohibits the charging of more than one offense in the same indictment, yet where two counts of the indictment charged two distinct offenses, one committed in the county where the indictment was found and the other in another county, *held*, that the latter count was mere surplusage and did not render the indictment bad: *State v. Smouse*, 50-43.

The same rule is applicable in case of an information: *State v. Smouse*, 49-631.

Objection to the indictment on the ground of duplicity cannot be raised for the first time in the supreme court: *State v. Henry*, 59-391.

And *held*, that where one of the counts was dismissed before the introduction of any evidence, and the plea of guilty entered as to the remaining count, the defect in the indictment was cured and the defendant properly convicted: *State v. Buck*, 59-382.

An indictment charging a conspiracy to rob and steal does not necessarily charge more than one offense. The fact that the conspiracy, if consummated, would involve several distinct felonies would not render the indictment for the conspiracy bad for duplicity: *State v. Sterling*, 34-443; *State v. Kennedy*, 63-197.

Where the indictment charges a conspiracy to commit a crime and also the commission of the overt act, it appearing that it was not intended to charge nor put defendant on trial for any other crime than that of conspiracy, the indictment will not be considered objectionable: *State v. Ormiston*, 66-143.

But where the indictment charged other crimes outside of the conspiracy and not merely the overt act, *held*, that it was fatally defective: *State v. Kennedy*, 63-197.

An indictment charging an assault and battery does not charge two offenses. Every battery includes an assault: *State v. Twogood*, 7-252.

Nor does an indictment charging assault and battery with intent to commit great bodily injury charge more than one offense: *Cokely v. State*, 4-477.

Charging threats to kill two persons does not render the indictment objectionable as charging two offenses, the threat being the gist of the offense: *State v. O'Mally*, 48-501.

Objection for duplicity, when raised: The court should, on application, allow the defendant to withdraw his plea of not guilty for the purpose of making objection to the indictment on the ground of duplicity. Indeed there would be no impropriety, it seems, in requiring an election to be made in such case, without the plea being withdrawn: *State v. Abrahams*, 6-117.

Separate counts: A defendant cannot be charged with two distinct offenses in a single count. In felony, if two or more distinct offenses are contained in the same indictment though in different counts, it may be quashed or the prosecutor compelled to elect on which charge he will proceed; but such election will not be required to be made where several counts are introduced solely for the purpose of meeting evidence as it may transpire,

the charges being substantially for the same offense: *State v. McPherson*, 9–53.

After the jury has returned a verdict of guilty on one count and not guilty on others, and a motion for arrest of judgment and a new trial, based, among other things, upon this alleged misjoinder of offenses, has been overruled, and there is nothing to show on appeal that the several counts relate to separate transactions, the objection on that ground will not be sustained: *Ibid.*

Where one indictment consists of two portions, each constituting a full and complete charge of an offense different from that stated in the other, it may be considered as containing two counts, although the two portions are not designated as such: *State v. Dow*, 73–587.

In charging the same offense in different forms the pleader is not compelled to use alternative forms of expression: *State v. Watrous*, 13–489.

An indictment charging the same transaction in different forms in separate counts is not objectionable for duplicity: *State v. Brannon*, 50–372; *State v. House*, 55–466.

Where it is charged in one count for murder that the offense was committed with a certain knife, and in another that it was committed with a certain sharp instrument, to the grand jury unknown, it is not necessary that the counts be charged in the alternative, it being clear from the language that but one offense is sought to be charged: *State v. Dillon* 71–653.

Requiring prosecution to elect: Where an indictment is not otherwise assailed for charging distinct crimes, the prosecutor ought to be required to elect upon which charge he will proceed: *State v. Fidment*, 35–541.

Different violations of ordinances: It may be provided in an ordinance that any number of violations may be included in one prosecution: *Eldora v Burlingame*, 62–32.

Continuing offenses: In an indictment for retailing intoxicating liquors by the dram, any number of acts may be charged without constituting duplicity, the offense being a continuing one: *Zumhoff v. State*, 4 G. Gr., 526.

Under an ordinance making each separate unlawful sale of intoxicating liquor an offense, *held*, that an information charging the sale of liquor to persons unknown was not bad for duplicity, as it, in effect, charged one sale to several persons jointly: *State v. King*, 37–462.

Various acts constituting same offense: Where a statute contains several things in the alternative, an indictment charging all of them will not be considered as charging more than one offense: *State v. Coester*, 10–453; *State v. Myers*, 10–448.

So an indictment charging the uttering, passing, and tendering, etc., of a counterfeit bill, under § 5228, charges but one offense: *State v. Barrett*, 8–536.

And so *held* in case of an indictment for a nuisance, charging the commission of all the acts of illegally selling intoxicating liquors, keeping the same for sale, etc., etc., within the terms of §§ 2384, 5472: *State v. Dean*, 44–648; *State v. Spunbeck*, 44–667; *State v. Winebrenner*, 67–230.

The prosecution in such cases will not be required to support and cover all the alternative charges with its proof, but only so much as will show that the offense was committed in some of the ways specified: *State v. Coester*, 10–453.

Under § 5324, providing a punishment for letting a house, knowing that the lessee intends to use it for improper purposes, and knowingly permitting the lessee to use it for such purposes, an indictment charging both the letting and the knowingly permitting the prohibited use is not improper: *State v. Abrahams*, 6–117.

Under § 5293, providing a punishment for maliciously injuring and defacing a building, *held*, that an indictment charging defendant with maliciously injuring and defacing a dwelling was not objectionable for duplicity: *State v. Hockenberry*, 11–260.

Under § 5285, providing for the punishment of any person who shall maliciously kill, maim or disfigure an animal, *held*, that an indictment charging that defendant did maliciously maim and disfigure an animal was not objectionable: *State v. Harris*, 11–414.

Under a statute prohibiting the keeping for sale or the selling of intoxicating liquors, *held*, that an indictment charging both did not charge distinct offenses: *State v. Becker*, 20–438.

Under a statute making it a nuisance to manufacture, sell, or keep with intent to sell, intoxicating liquors contrary to law, either or all of such acts may without duplicity be charged in the same indictment: *State v. Baughman*, 20–497.

Compound offenses: When the same act or transaction at the same point of time constitutes two or more offenses, it is a compound offense, and the different crimes thus committed may be charged in the same indictment under this section; but the two offenses, of breaking and entering with intent to commit larceny, and the crime of larceny alone, cannot be so committed by the same act as to constitute such compound offense: *State v. Ridley*, 48–370; *State v. Rhodes*, 48–702.

In such a case the crime of breaking and entering with unlawful intent is completely consummated before the larceny is committed: *State v. Ridley*, 48–370.

Burglary is not a compound offense including larceny, and an indictment charging both burglary and larceny is improper, as charging two offenses: *State v. McFarland*, 49–99.

Where an indictment charges breaking and entering with felonious intent, and stealing, the charge of stealing may be regarded as surplusage; and if the case is tried as upon the indictment for the breaking and entering, a conviction thereunder will not be erroneous on the ground of duplicity. It is otherwise where, under such indictment, the defendant is convicted of larceny: *State v. Shaffer*, 59–290.

An indictment charging that defendant feloniously broke and entered a store, with intent, etc., and that he stole, carried away, etc., *held* not objectionable as charging two offenses, the charge as to stealing, etc., being merely surplusage: *State v. Hayden*, 45–11.

The offense of larceny in the night-time from a dwelling-house, and that of larceny

from a dwelling-house in the day-time, are not different offenses from that of larceny, but differ from it only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *State v. Elsham*, 70-531.

An indictment charging in one count forgery, and in a second the uttering of the forged instrument, charges two offenses, and is bad. (Overruling *State v. Nichols*, 38-110): *State v. McCormack*, 56-585.

Rape, committed by a man upon a woman who is related to him within the degrees prohibited by § 5351, does not constitute incest, and an indictment charging both offenses is bad for duplicity: *State v. Thomas*, 53-214.

Distinct acts of adultery, committed with different persons, could not be charged in the same indictment; but where different acts of the same person were charged, *held*, that as any such criminal act, committed within the period of limitations, could be proven under an indictment charging but one act of adultery, the allegation that adultery with the person named was committed on divers other days might be rejected as surplusage, and the indictment was not objectionable for duplicity: *State v. Briggs*, 68-416.

See, further, as to surplusage in indictments, § 5691, ¶ 4.

Conviction for included offense: A defendant put on trial for an indictable offense may be convicted of an offense necessarily included therein, although the latter be of such character that it is not indictable, but only triable on information. And such conviction is not in violation of the provisions of art. 1, § 11, of the constitution: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126.

Under the provisions of §§ 5850, 5851, a defendant may be convicted of a lower degree of the crime charged in the indictment, or of any offense necessarily included therein: See notes to these sections.

As to reasonable doubt as to the degree of the offense, see § 5814 and notes.

5686. Time. 4301. The precise time at which the offense was committed need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient in the offense. [R., § 4655.]

Time, when not material: That the allegation as to the time of commission of the offense does not bring it within the statutory period of limitation is not a ground of demurrer to the indictment: *State v. Hussey*, 7-409; *State v. Groome*, 10-308; *State v. Deitrick*, 51-467.

It is not material that the time at which the offense is alleged to have been committed should be so charged as to bring it within the statutory period of limitation for the prosecution of the offense. The precise time need only be stated in indictments for acts which were only made criminal at some particular time: *State v. Deitrick*, 51-467.

The time alleged in the indictment need not be proved as laid. Therefore, *held*, that under an indictment for illegal sale of intoxicating liquors, the selling at another time than that claimed in the indictment would support a conviction: *State v. Knouse*, 33-365.

Where defendant was charged under several counts with distinct offenses of selling intoxicating liquors on different days specified, *held*, that it was not error to refuse to charge the jury that, to find him guilty as charged in each count, they must find that he sold to the person and at the time therein charged: *State v. Maling*, 11-239.

In a prosecution for the violation of the intoxicating liquor law time is not a material ingredient, and the precise time need not be stated. Defendant may be convicted for any offense of that description committed within the period of limitation: *State v. Wambold*, 72-468.

Where the prosecution introduced evidence that the crime was committed at the particular time alleged in the indictment, and defendant's evidence was to the effect that he was not at the place where the offense was alleged to have been committed within three or four days of such time, *held*, that the jury were properly instructed that they might convict if they found the crime was committed on another day than that charged, and within the time prescribed by the statute of limitations for the prosecution of the crime: *State v. Bell*, 49-440.

Where an indictment charges that the offense was committed on a day certain, the prosecution may still prove the commission of the offense at a time prior to the day named and within the period of limitation: *State v. Kirkpatrick*, 63-554; *State v. Johnson*, 69-623.

Where the statute with reference to punishment for crime is changed, it is not necessary to show in the indictment whether the offense was committed prior or subsequent to such change: *State v. Reylets*, 74-499.

Videlicet: Where time is immaterial, if alleged under a *videlicet*, it need not be proved, and a repugnance between the allegations under the *videlicet* and other portions of the indictment will not vitiate it. If time is material, even though it be alleged under the *videlicet*, it is conclusive and traversable, and if repugnant to the premises will vitiate the indictment: *State v. Freeman*, 8-428.

Continuing offenses: An indictment charging a nuisance as committed "on or about" a day specified is sufficient as to time: *Cokely v. State*, 4-477.

In an indictment for a continuing offense, such as keeping a nuisance, no particular day need be alleged, but the doing of the prohibited act may be laid with a *continuando*. If so alleged, the trial will prevent another prosecution for the act charged at any time previous to the finding of the indictment: *Our House v. State*, 4 G. Gr., 172.

Time material: While the time is not material, yet where the offense of selling intoxicating liquors on a certain day was alleged and defendant pleaded guilty, *held*, that the time thus specified would determine the law under which the court was authorized to act, the law as to method of trial having been

changed previous to the time alleged for the commission of the offense: *State v. Rollet*, 6-535.

While the allegation of the day upon which the offense was committed is not usually material, yet if, in an indictment for perjury, it is alleged that the oath was administered by a certain person as an officer before the date when, by law, he became entitled to enter upon the discharge of the duties of his office, the time will be deemed material and the indictment bad: *State v. Phippen*, 62-54.

See, further, § 5690, ¶ 4.

As to limitation of prosecution for crime, see §§ 5549-5554 and notes.

5687. Name of person injured. 4302. When an offense involves the commission of, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured, or attempted to be injured, is not material. [R., § 4656.]

Name of person injured: Under the provisions of this section neither the name of the party injured, as used in the indictment, nor a name having the same sound, need necessarily be proved: *State v. Emeigh*, 18-122.

And *held* that an indictment, under § 5211, for stealing from the person certain property, in which the property was charged to be that of the party from whose person it was stolen, while the proof showed it to belong to him and another jointly, was sufficient: *State v. Cuningham*, 21-433.

Where, in an indictment for resisting an officer, the name of the officer was misstated, *held*, that an erroneous allegation respecting the name of the person injured was not material, and a variance was not fatal: *State v. Flynn*, 42-164.

Where an indictment for robbery incorrectly stated the name of the person alleged to have been robbed, *held*, that a conviction of defendant thereunder was not improper: *State v. Carr*, 43-418.

In an indictment for the illegal sale of intoxicating liquors it is not necessary to set out the names of the persons to whom the liquor was sold: *State v. Becker*, 20-438.

Under an information charging sales of intoxicating liquors to persons unknown, *held*, that proof of a sale to one person did not constitute a variance: *State v. King*, 37-462.

A misnomer of the person assaulted will not render an indictment for assault with intent to kill fatally defective, it appearing that defendant was in no way prejudiced by such mistake: *State v. Crawford*, 66-318.

Where, in an indictment for embezzlement, the name of the corporation whose property was alleged to be embezzled was erroneously stated, by reason of using the word "railroad" therein in place of railway, *held*, that such slight error was immaterial: *State v. Goode*, 68-593.

A mistake in stating in the conclusion of the indictment the name of the person injured, *held* not material, his name being correctly stated in the charging part: *State v. McCunniff*, 70-217.

An erroneous allegation as to the ownership of the building in burglary is not material when the crime is in other respects described with sufficient certainty: *State v. Emmons*, 72-265.

Idem sonans: Where the orthography of an indictment composes a name which by the ordinary rules of pronunciation produces a different sound from the true one, the two names will not be considered equivalent: *Donnel v. United States*, Mor., 141.

Variance as to name: In an indictment for bigamy charging the second marriage to have been with "Jane Jaco," while the proof showed the name of the person to have been "Jane Frances Jaco," *held*, that there was no variance: *State v. Williams*, 20-98.

5688. Construction. 4303. The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [R., § 4657.]

5689. Words of statute. 4304. Words used in a statute to define a public offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used. [R., § 4658; C., '51, § 2919.]

Following statutory definition: An indictment under a statute is sufficient if it follows the language of the statute: *State v. Seamons*, 1 G. Gr., 418; *State v. Chambers*, 2 G. Gr., 308; *Romp v. State*, 3 G. Gr., 276; *State v. Brewer*, 53-735.

If the indictment charges the crime substantially in the words of the statute, or in language equivalent thereto, it is sufficient: *Buckley v. State*, 2 G. Gr., 162; *Munson v. State*, 4 G. Gr., 483.

Where the statute uses descriptive language to define a public offense, that language must be followed or words of the same meaning must be used: *Fouts v. State*, 4 G. Gr., 500.

While it is not necessary that the indictment should follow the very language of the statute, it should charge the facts and circumstances constituting the offense in substantial compliance with the statute: *Reddan v. State*, 4 G. Gr., 137.

If the statute contains evident tautology, or terms some of which necessarily includes the others, it is not essential that all be used. It is sufficient if the indictment fully describe the offense: *United States v. Lapoint*, Mor., 146.

The substance of the statutory definition must be contained in the indictment: *United States v. Dickey*, Mor., 412.

The words used must have the same substantial meaning and import as those used in the statute, and the material facts which constitute the offense must be stated with such a degree of certainty and in such a manner as to enable a person of common understanding to know what was intended and the court to pronounce judgment upon a conviction according to the law of the case: *State v. Allen*, 32-491.

Therefore, where an illegal sale of liquor was charged, *held*, that the name of the person to whom the sale was made should have been stated, although the statute simply provided for the punishment of any person selling or giving liquor "to another person:" *Ibid.*

Ordinary language, if a person of good understanding may know thereby what is intended, is sufficient: *State v. Stanley*, 33-526.

The facts constituting a public offense must be charged in the indictment, and when a statute creating such offense describes it in general terms constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41-593, 607.

As to whether, in a prosecution of a public officer for loaning public money, an indictment stating that defendant "loaned" a certain sum of money "without authority of law," etc., was too general, and should have stated the person to whom the money was loaned, the court was equally divided: *Ibid.*, 609, 617.

An indictment following the statute, and using the language there employed in defining the offense of unlawfully exposing a child with intent to abandon it, *held* sufficient: *State v. Smith*, 45-670.

Where an offense is created by statute, it is sufficient to charge it in the words of the statute, unless the words used are such that they do not necessarily charge the offense. Therefore, *held*, that an indictment charging that defendant did "seduce and carnally know and debauch" was sufficient, without charging the means employed in the seduction: *State v. Curran*, 51-112.

Language in a particular case *held* sufficiently equivalent to that used in the statute in describing the offense of misconduct in office by public officers: *State v. Conlee*, 25-237.

See, further, notes to next section.

Exception or proviso: It is only necessary to negative an exception when it occurs in the same clause of the act which creates the offense: *Romp v. State*, 3 G. Gr., 276.

It is only necessary that the indictment should negative exceptions made in the enacting clause. Matters of exception contained in a subsequent act need not be negatived, but must be pleaded and proven by defendant if relied on as a defense: *State v. Beneke*, 9-203.

An exception in the purview of an act must be negatived in pleading, but a proviso need not, though found in the same section, if it is not referred to in and engrafted upon the enacting clause: *State v. Stapp*, 29-551.

Therefore under a former statutory provision that the prohibition of the sale of intoxicating liquors should not apply to wine from fruit grown in the state, etc., *held*, that an indictment for illegal sale of liquor need not allege that it was not made from native fruit: *Ibid*; *State v. Curley*, 33-359; *State v. Miller*, 53-84.

Where a criminal offense is created by statute no presumption arises of an intention to render any person liable not clearly within the provisions of the statute. But if the statute is simply declarative of a common-law offense, and limitations are annexed as to the persons to be prosecuted or the manner of prosecution, one claiming exemptions from its penalty must show himself clearly within its limitations: *State v. Roth*, 17-336.

If provisos and exceptions are contained in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos it contains: *State v. Williams*, 20-98.

Therefore, *held*, that an indictment for bigamy need not negative the absence of defendant's former husband or wife for the statutory period, etc., stated in a subsequent section of the statute as an exception: *Ibid.*

The burden of proving an exemption under a proviso rests upon the party claiming it: *Sayre v. Wheeler*, 31-112.

5690. What indictment must show. 4305. The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county impaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or, if his true name is unknown to the grand jury, that fact be stated, and that he be described by a fictitious name;

3. That the offense was committed within the jurisdiction of the court, or is triable therein;

4. That the offense was committed at some time prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case;

6. That when material, the name of the person injured, or attempted to be

injured, be set forth when known to the grand jury, or if not known to it, that it be so stated in the indictment. [R., § 4659; C., '51, § 2916.]

Court and county: An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on either ground: *State v. Schill*, 27–263.

A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment: *State v. Gurlock*, 14–444.

Where the county and state are named in the margin at the commencement of the indictment, and the county is referred to as "said county," and the indictment avers that the grand jurors were duly selected, impaneled and sworn, the indictment sufficiently shows that it was found by a legal grand jury: *Zumhoff v. State*, 4 G. Gr., 526.

Name of defendant: It is only where the defendant's name cannot be discovered that the state is permitted to describe him by a fictitious name, with the statement that his name is unknown. The description of the defendant as "a man in Turner Hall whose name to the grand jury is unknown," *held* not sufficient: *Geiger v. State*, 5–484.

Where defendant answers that he is indicted in his right name, he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, defendant was designated by different names: *State v. White*, 32–17.

If misnomer is not taken advantage of on arraignment, it cannot afterward be raised, and will be waived: *State v. Winstrand*, 37–110.

As to giving true name on arraignment, see §§ 5718–5720.

Venue: In an indictment for retailing intoxicating liquors by the dram, *held*, that it was sufficient to state the crime as committed within the county, without specifying the particular premises or the city or town within which the act was done: *Zumhoff v. State*, 4 G. Gr., 526.

In an indictment for the illegal sale of liquors it is not necessary to describe the specific location of the building where the sale was made: *State v. Becker*, 20–438.

An indictment commencing "The grand jury of the county of Dubuque, in the name, etc., of the state of Iowa," charging the burglarious entering, etc., of a house "*there situate*," *held* to sufficiently lay the venue in Dubuque county: *State v. Reid*, 20–413.

An indictment for larceny corresponding to the form contained in § 5682, charging the offense as committed "in the county aforesaid," *held* sufficiently specific as to the venue of the crime: *State v. Lillard*, 59–479.

An indictment in the form specified by § 5682 sufficiently charges the offense as having been committed in Iowa: *State v. Winstrand*, 37–110.

Under an indictment for bigamy, alleging that the void marriage was celebrated at a particular place, *held*, that a finding of such marriage anywhere within the same state would support the allegations of the indictment. The allegation as to the place of marriage not being essential as a jurisdictional matter, or as establishing the specific character of the offense, need not be proved as laid: *State v. Nadal*, 69–478.

Time: See § 5686 and notes.

Naming the offense: An indictment which sufficiently describes the offense charged will be good although the offense is not named therein: *State v. Hessenkamp*, 17–25; *State v. Baldy*, 17–39.

An indictment properly describing the offense will be sufficient without naming it, but naming the offense without stating the facts constituting it will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but will be mere surplusage: *State v. Shaw*, 35–575; *State v. Davis*, 41–311.

Requisites; statement of facts: An indictment must state facts constituting an offense in language direct and certain as to the circumstances which are necessary to show a crime punishable by law. It cannot be aided nor its omissions supplied by construction: *State v. Potter*, 28–554; *State v. Chicago, B. & P. R. Co.*, 63–508.

Where the acts charged are such that they are lawful under certain circumstances, it is not sufficient to charge that they were unlawfully done, but the existence of the facts showing the acts to be unlawful must be alleged: *State v. Chicago, B. & P. R. Co.*, 63–508.

The facts constituting the offense must be charged in the indictment, and when the statute defining such offense describes it in general terms, constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *State v. Brandt*, 41–593, 607.

Description of the offense: It is sufficient to describe the offense in such a manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment: *State v. Hockenberry*, 30–504; *State v. Close*, 35–570.

The technical exactness of the common law as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this state by statutory provisions: *State v. Thompson*, 19–299; *State v. Johnson*, 26–407.

So, if the proof offered in support of the charge in an indictment is such as would not mislead a person of common understanding, it is competent: *State v. Thompson*, 19–299.

Ordinary language is sufficient, if a person of common understanding may know therefrom what is intended: *State v. Stanley*, 33–526.

Matter of defense need not be negatived in the indictment: *State v. Williams*, 70–52.

Only such facts need be stated in the indictment as are required to be proved on the trial: *Nash v. State*, 2 G. Gr., 286, 294.

If the act is charged to have been against the statute it need not be charged to have been done unlawfully: *Ibid.*

In the case of a misdemeanor, where the facts related in the indictment appear to have

been unlawful, it is not necessary to allege them to have been unlawfully done: *Capps v. State*, 4–502.

In a prosecution for illegal voting, the indictment need not state the date of the general election at which the crime is alleged to have been committed, nor what officers were to be voted for at such election: *State v. Minnick*, 15–123.

In charging a threat to kill, the fact may be stated without setting out the words used: *State v. O'Mally*, 48–501.

An indictment for larceny of bank-bills, stating that their number and denominations are unknown, is sufficient: *State v. Hoppe*, 39–468.

A description of property in an indictment for larceny as "$180 in bank-bills usually known and described as greenbacks," *held* sufficient: *State v. Hockenberry*, 30–504.

Where an information charged the illegal sale of beer, *held*, that the quantity sold was immaterial and need not be alleged: *State v. King*, 37–462.

Under an indictment for illegal sale of intoxicating liquors, *held* that, the sum for which the illegal sale was made being immaterial, uncertainty in stating such amount would not render the indictment bad: *Clare v. State*, 5–509.

Arabic figures: The use of Arabic figures in place of words in an indictment will not vitiate it: *Winfield v. State*, 3 G. Gr., 339.

Numeral figures with the prefix A. D. are a sufficient statement of the year: *State v. Seamons*, 1 G. Gr., 418.

Deadly weapons: Where an indictment charges an assault as committed with different weapons described as deadly, it is immaterial whether it be proven that defendant used one or all of such weapons: *State v. McClintock*, 1 G. Gr., 392.

Under a statute prescribing punishment for assault with a deadly weapon, *held*, that no other description of the weapon used was essential: *State v. Seamons*, 1 G. Gr., 418.

See, further, notes to §§ 5681–5689, inclusive.

Description of property: Ordinary certainty in the description of property involved is required. So *held* in a proceeding against a building as constituting a nuisance: *Norris' House v. State*, 3 G. Gr., 513.

Name of owner of property: An indictment, under § 5291, for trespass in cutting down trees and carrying away the timber, which fails to set out the name of the owner of the land upon which the alleged trespass is committed, is properly demurrable: *State v. McConkey*, 20–574.

The name of the owner of the building should be set out in an indictment charging the breaking and entering thereof with intent to commit a felony, under § 5194. If the name of the owner is unknown it should be so stated: *State v. Morrissey*, 22–158.

In an indictment, under § 5294, for malicious injury to a church building belonging to an unincorporated association, the ownership of the property may be alleged as in the persons holding it in trust for such association. The character of the title or interest of such persons need not be set out: *State v. Brant*, 14–180.

Where the indictment stated only the initials instead of the full Christian name of a person in possession of a house in which the crime of burglary was alleged to have been committed, *held*, that the substantial rights of the defendant were not prejudiced by refusal of the court to charge that defendant was entitled to an acquittal: *State v. Short*, 54–392.

Where the indictment charged the larceny of goods from a railroad company, naming it, belonging to parties to the grand jurors unknown, *held*, that the indictment was sufficient: *State v. McIntire*, 59–264; *State v. McIntire*, 59–267.

It does not render an indictment defective that in describing a dwelling-house it describes it as belonging to the estate of a person deceased: *State v. Franks*, 64–39.

5691. Immaterial matters. 4306. No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any of the following matters, which were formerly deemed defects or imperfections:

1. For the want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "with force and arms," "contrary to the form of the statute, or of the statutes," or "against the peace and dignity of the state;"

3. For the omission to allege that the grand jury was impaneled, sworn, or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor,

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. [R., § 4660; C., '51, § 2920.]

Time and place: An indictment for a nuisance committed by keeping a place for the sale of intoxicating liquors is good without averments describing the *locus* of the offense. It might be necessary to describe the property particularly if an order of abatement is desired: *State v. Waltz*, 74–610.

Where the allegation and the proof as to

the date of an instrument alleged to have been forged varied, but the variance was not such as could have misled defendant to his prejudice, *held*, that the variance was immaterial: *State v. Blanchard*, 74–628.

See, further, § 5686 and notes as to allegations as to time; and § 5690 and notes as to allegations as to venue of the offense.

Surplusage: Where a defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage and disregarded. It is only an inconsistency in the material allegations that will vitiate the indictment: *State v. Freeman*, 8–428.

An unessential portion of the indictment may be rejected as surplusage, if without it the allegations are sufficient to charge the offense: *State v. Ormiston*, 66–143.

Where a portion of the indictment might have been omitted without vitiating it, such portion may be considered as surplusage, and its insertion will not render the indictment defective: *State v. Ansaleme*, 15–44.

Where an information for illegal sale of liquors charged the selling and giving, *held*, that although the giving was not punishable, the charge was sufficient, and the allegations as to the giving would be treated as void and not affecting the information: *State v. Finan*, 10–19.

Words in a particular case *held* to be surplusage: *State v. Schilling*, 14–455.

Where an information charges two classes of nuisances, one of which is punishable under an ordinance under which the prosecution is commenced, and the other is not thus punishable, the allegations as to the latter will be deemed surplusage, and will not affect the charge of the offense which is within the jurisdiction of the court to punish upon the information: *Eldora v. Burlingame*, 62–32.

Where, in an indictment for embezzling the funds of a corporation, it was alleged that defendant was over sixteen years of age, that fact not being material in case of embezzlement by the agent of a corporation, *held*, that the allegation was surplusage and might be disregarded: *State v. Goode*, 68–593.

Where the facts charged constitute an offense, the giving of a wrong name thereto will not invalidate the indictment. The name will be considered surplusage: *State v. Shaw*, 35–575.

An information for the seizure of intoxicating liquors on the ground that they were to be sold in violation of law stated that they were "intended to be sold in violation of the provisions of chapter 6, Code of Iowa," there being many chapters of that number in said Code; *held*, that the information was defective, and that although the allegation that the liquors were intended to be sold in violation of law would have been sufficient, the other portions of the indictment could not be rejected as surplusage: *State v. Thompson*, 44–399.

As to duplicity in indictments, see § 5685 and notes.

As to description of the offense and naming defendant, see notes to § 5690.

Statutory modifications: The constitutional provision requiring an indictment on which to put defendant on trial for a crime does not make it necessary that such indictment shall conform in every particular to the requirements of the common law, but such requirements may be modified by statute: *State v. Bevans*, 37–178.

But the leading requisites of an indictment at common law are not dispensed with by statute: *State v. Callendine*, 8–288.

Defects not cured: The district attorney cannot, by making specifications after arraignment upon indictment, cure a defect therein consisting in a want of particularity as to the acts constituting the crime: *United States v. Ross*, Mor., 164.

A mere clerical error which can be discovered and corrected by a casual reading of the indictment itself will not render it fatally defective: *State v. Crawford*, 66–318.

Immaterial defects: In general, under the provisions of this section, the proceedings upon an indictment are not to be affected by any defects therein not tending to the prejudice of the substantial rights of the defendant upon the merits: *State v. Gurlock*, 14–444; *State v. Emeigh*, 18–122; *State v. White*, 32–17.

Charging the offense as committed in one county, and proving it to have been committed in an adjoining county within five hundred yards of the boundary line, does not tend to prejudice the substantial rights of defendant on the merits: *State v. Pugsley*, 75–742.

5692. Presumptions; judicial notice. 4307. Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment. [R., § 4661; C., '51, § 2921.]

Under an indictment for an assault with a deadly weapon, charging the assault as made by throwing an axe, *held*, that the court would take judicial notice of the fact that an axe used in such a manner was a deadly weapon, although such fact was not averred: *Dollarhide v. United States*, Mor., 233.

In a prosecution for illegal voting the indictment need not state the date on which the general election was held, nor what officers were to be voted for at such election: *State v. Minnick*, 15–123.

5693. Pleading judicial proceedings. 4308. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment, but it is sufficient to state that the judgment or determination was duly made, or the proceedings duly had before such court or officer; but the

facts constituting the jurisdiction must be established on the trial. [R., § 4662; C., '51, § 2922.]

5694. Pleading private statute. 4309. In pleading a private statute, or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof. [R., § 4663; C., '51, § 2923.]

5695. Indictment for libel. 4310. An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on trial. [R., § 4664; C., '51, § 2924.]

For similar provisions in regard to civil actions for libel, see § 3887.

5696. Instrument destroyed or withheld. 4311. When an instrument which is subject of an indictment, has been destroyed or withheld by the act of procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. [R., § 4665; C., '51, § 2925.]

5697. Indictment for perjury. 4312. In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy, or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or the authority of the court or person before whom the perjury was committed. [R., § 4666; C., '51, § 2926.]

Substance of false testimony: An indictment for false statement in a schedule sworn to in a proceeding in bankruptcy should state wherein such statement is false and incorrect: *United States v. Morgan*, Mor., 341.

In an indictment for perjury in testifying before a grand jury it is not necessary to allege that the party charged with the offense under investigation was or was not guilty thereof in order to state the facts constituting such offense: *State v. Schill*, 27-263.

The materiality of the false testimony must be shown by averment in the indictment, but this may be done either by express averment or by the statement of such facts as show its materiality: *State v. Cunningham*, 66-94.

In an indictment for perjury in making a false return to the assessor under oath it must be averred, not only that certain property was withheld from the statement, but also that such property was accessible within the township within which the assessor was authorized to act: *Ibid.*

Jurisdiction and authority of court or officer: It is necessary to aver the jurisdiction and authority of the officer before whom the oath was taken to administer same, but this may be done by express averment that the officer had such right, or by setting out such facts as to make this judicially appear: *Ibid.*

In an indictment for perjury committed before a justice of the peace, it is sufficient to aver, in relation to jurisdiction, that it was at a justice's court, held at the proper time and place, in a cause there tried, and that the justice had sufficient authority to administer an oath, without alleging that the case was within his jurisdiction: *State v. Newton*, 1 G. Gr., 160.

It is sufficient to charge in the indictment that defendant was duly sworn before a court having authority, etc., without alleging that the oath was administered by any one: *State v. O'Hagan*, 38-504.

An indictment not averring that the court or person before whom the oath was taken had authority to administer the same, *held* bad: *State v. Nickerson*, 46-447.

An indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it: *State v. Phippen*, 62-54.

Therefore where the indictment charged that the oath was administered by a certain person as an officer, but at a time which by law was prior to the time when he was authorized to enter upon the discharge of his duties, *held*, that the indictment was demurrable: *Ibid.*

Knowledge of falsity: An indictment which charged that defendant at a certain time testified to certain matters, whereas he "did know" they were false, *held* to sufficiently charge knowledge of the defendant at the time defendant testified: *State v. Wood*, 17-18.

An indictment for perjury need not charge

that the defendant knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *State v. Raymond*, 20-582.

It should be clearly and distinctly averred that defendant swore "falsely," that word being used in § 5242, defining the offense: *State v. Nickerson*, 46-447.

Under a former statute it was *held* that an indictment was not sufficient which failed to charge knowledge of the falsity of the matter deposed to be true, or of the truth of the matter denied to be true: *State v. Morse*, 1 G. Gr., 503.

In general, see § 5242 and notes.

5698. Intent to defraud. 4313. In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud without naming the particular person or body corporate intended to be defrauded; and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States, or any state, county, city, or township, or any body corporate, or any officer in his official capacity, or any copartnership, or member thereof, or any particular person. [R., § 4667; C., '51, § 2927.]

The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *State v. Maxwell*, 47-454.

In an indictment for having in possession counterfeit bank-bills with intent to defraud, *held* not necessary to state the intent to defraud any person or corporation: *State v. Callendine*, 8-288; *State v. Barrett*, 8-536.

But if the name of the bank intended to be defrauded is mentioned it must be proved as stated: *State v. Newland*, 7-242.

It is not necessary that an indictment for forgery allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67-142.

But in an indictment for the uttering of counterfeit money the name of the person injured must appear, if known, and if not known such fact must be stated: *Buckley v. State*, 2 G. Gr., 162.

5699. Principal and accessory. 4314. The distinction between an accessory before the fact and a principal, is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals. [R., § 4668; C., '51, § 2928.]

Under this section all persons concerned in the commission of a public offense, including aiders and abettors, are guilty as principals: *State v. Brown*, 25-561; *State v. Thornton*, 26-79; *State v. Stanley*, 48-221.

And two or more may be jointly indicted for a criminal act which is of such nature that it can be actually committed by but one person: *State v. Comstock*, 46-265.

Under an ordinary indictment charging the commission of a crime the defendant may be found guilty of aiding and abetting in such commission: *State v. Hessian*, 58-68; *Bonsell v. United States*, 1 G. Gr., 111; *State v. Pugsley*, 75-742.

5700. Accessory after the fact. 4315. An accessory after the fact to the commission of a public offense, may be indicted, tried and punished, though the principal be neither tried nor convicted. [R., § 4669; C., '51, § 2929.]

5701. Compounding offense. 4316. A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or engagement or promise therefor, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried. [R., § 4670; C., '51, § 2930.]

5702. Indictment for embezzlement. 4317. In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled, or fraudulently converted any money or bank-note, will be sufficient to support the averment, although the particular species be not proved. [R., § 4671.]

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

5703. Bench warrant. 4318. The process upon an indictment for the arrest of an individual, shall be a bench warrant. [R., § 4672.]

The issuance of a bench warrant is not essential to give the court jurisdiction of the person of the defendant. If he appear and submit to the jurisdiction a warrant is unnecessary: *State v. Ray*, 50-520.

In the absence of any showing of prejudice or the improper exercise of discretion, it is not error for a judge to send a prisoner to the penitentiary for safe keeping to await his trial: *State v. Porter*, 34-131.

5704. Warrant ordered; bail fixed. 4319. When an indictment is filed by the clerk of the court against a defendant, not in custody, or under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him, with his name of office, that a bench warrant issue for the arrest of the defendant, and, if the offense charged in the indictment be bailable, fix the amount in which bail may be taken. [R., § 4673.]

5705. Clerk to issue warrant. 4320. The clerk, on the application of the district [county] attorney, shall accordingly, at any time after the making of the order of the judge, whether the court be in session or not, issue a bench warrant into one or more counties. [R., § 4674.]

5706. Form in case of felony. 4321. A bench warrant, if the offense be a felony, may be, substantially, in the following form:

County of ——,
The State of Iowa.

To any Peace Officer in the State:

An indictment having been found in the district court of said county, on the —— day of ——, A. D. 18— (the day on which the indictment is marked filed by the clerk of the court), charging A. B. with the crime of (here designate the offense by the name, if it have one, or by a brief general description of it, as given by law, substantially, as in the indictment).

You are, therefore, hereby commanded to arrest the said A. B., and bring him before said court to answer said indictment, if the said court be then in session in said county, or if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand, and the seal of said court, at my office in ——, in [SEAL] the county aforesaid, this —— day of ——, A. D. 18—.

By order of the judge of the court.

[R., § 4675.] —— ——, Clerk.

5707. If misdemeanor. 4322. If the offense be a misdemeanor, the bench warrant may be in a similar form, adding to the body thereof a direction, substantially, to the following effect:

"Or, if the said A. B. require it, that you take him before a magistrate, or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment." [R., § 4676.]

5708. If bailable. 4323. If the offense charged be bailable, the clerk must make an indorsement on the bench warrant, to the following effect: "The defendant is to be admitted to bail in the sum of —— dollars." (The amount fixed by the judge and indorsed on the indictment.) [R., § 4677.]

5709. Where served. 4324. The bench warrant may be served in any county in the state. [R., § 4678; C., '51, § 2935.]

5710. Proceedings. 4325. If the defendant, when arrested, be brought before a magistrate, or the clerk of the district court of the same county in which it was issued, or another county, for the purpose of giving bail, the

same proceedings must be had, in all respects, as if he had been arrested on a warrant of arrest, issued by a magistrate on a preliminary information, as nearly as may be. [R., § 4679.]

5711. Process against corporation. 4326. The process upon an indictment against a corporation shall be a notice; which shall be issued by the clerk at any time after the filing of the indictment in his office, on the application of the district [county] attorney. The notice shall be under the seal of the court, and shall, substantially, notify the defendant of the finding of the indictment, of the nature of the offense charged, and that he must forthwith appear and answer the same. It may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof. It shall be returned to the clerk's office without delay, with proper evidence of its service; and, from and after two days from the time of the making of such service, the defendant shall be considered in court, and thereafter shall be considered to be present to all proceedings had on the indictment. [14 G. A., ch. 111, § 3.]

This section contemplates that there are some offenses for which corporations may be indicted and punished. It appears to be well settled that a corporation may be indicted and punished for a public nuisance, such as obstruction of the public highway, navigable streams, and the like; and *held*, that the corporation was liable under § 2380 the same as a natural person would be for the penalty there provided for the illegal sale of intoxicating liquors, to be collected for the benefit of the school fund: *Stewart v. Waterloo Turn Verein*, 71-226.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

5712. How soon; waived; corporation. 4327. As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment shall not be required. [R., § 4680; C., '51, § 2931; 14 G. A., ch. 111, § 8.]

Presumption: If the record is silent as to the arraignment it will be presumed that defendant was duly arraigned, or waived arraignment: *State v. Winstrand*, 37-110.

Where it does not appear from the record that defendant has been arraigned and has pleaded, or that he even appeared, the judgment will be reversed on appeal: *Powell v. United States*, Mor., 17.

Waiver: Voluntarily appearing and pleading to an indictment is a waiver of arraignment: *State v. Winstrand*, 37-110.

Misnomer: If misnomer is not taken advantage of on arraignment it cannot afterward be raised, and will be waived: *Ibid.*

Where defendant answers that he is indicted in his right name he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, the defendant was designated by different names: *State v. White*, 32-17.

As to mental condition of defendant at the time of his arraignment, see § 6018 and notes.

5713. Personal presence. 4328. If the indictment be for a felony, the defendant must be personally present, but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon arraignment by counsel. [R., § 4681; C., '51, § 2932.]

Where the record as to defendant appearing and waiving arraignment was defective, and at a subsequent time was corrected on motion, *held*, that the presence of defendant at the time of said correction was not essential: *State v. Westfall*, 49-328.

A defendant held to appear before the grand jury is not required to be present at the time of impaneling such jury, and will not be in default on his bail bond for failure to appear at that time; his right to challenge is one which may be waived: *State v. Klingman*, 14-404; *State v. Feller*, 25-67; *Ringgold County v. Ross*, 40-176.

The plea of not guilty may be interposed by defendant's counsel in the absence of defendant: *State v. Jones*, 70-505.

As to presence of defendant during trial, see § 5736 and notes; as to his presence at rendition of verdict, see § 5846 and notes; and at pronouncing of judgment, § 5882.

5714. If in custody. 4329. When he is in custody, the court must direct the officer in whose custody he is to bring him before it to be arraigned, and the officer must do so accordingly. [R., § 4682.]

5715. If on bail. 4330. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for arraignment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may, on motion of the district [county] attorney, make an order directing the clerk to issue a bench warrant for his arrest, and fix the amount in which bail will be taken if the offense be bailable. [R., § 4683; C., '51, § 2933.]

5716. Clerk issue bench warrant. 4331. The clerk, on the application of the district [county] attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties of this state for the arrest of the defendant. [R., § 4684; C., '51, § 2934.]

5717. Right to counsel. 4332. If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel, and if he does, and is unable to employ any, must allow him to select, or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours. [R., § 4685; C., '51, § 2936.]

When defendant during the trial dismissed his counsel, and had new counsel appointed by the court to defend him, *held*, that it was not error to refuse a continuance of several days, on the appointment of such new counsel, it not appearing of record that there was any good ground for the dismissal, defendant's guilt being conclusively shown, and his ability to understand his own case being apparent: *State v. House*, 55-466.

Statements of the defendant in open court that he has no means to employ counsel is a solemn admission which may be used against him if that fact becomes material to any issue in the case: *State v. Fooks*, 65-196.

5718. Arraignment; by whom and how made. 4333. The arraignment may be made by the court, or by the clerk or district [county] attorney under its direction, and consists in reading the indictment to the defendant, and unless previously done, delivering to him a copy of the indictment and the indorsements thereon, and informing him that if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment. [R., § 4686; C., '51, §§ 2937-8.]

Where defendant answers that he is indicted in his right name, he cannot, after trial, object that he is not properly named. So *held* where, in the same indictment, the defendant was designated by different names: *State v. White*, 32-17.

5719. Giving name. 4334. If he gives no other name, or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named. [R., § 4687; C., '51, § 2939.]

If defendant waive arraignment he cannot afterwards object that he is not indicted in his right name: *State v. Winstrand*, 37-110.

5720. Entry of true name. 4335. If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted. [R., § 4688; C., '51, § 2940.]

5721. Answer; time. 4336. In answer to the arraignment, the defendant may move to set aside the indictment, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it. [R., §§ 4689, 4690; C., '51, §§ 2941-2.]

CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

5722. Grounds. 4337. The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "a true bill," and the indorsement signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;

3. When it has not been presented and marked "filed" as prescribed by this code;

4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law. [R., § 4691; C., '51, § 2943.]

Indorsement: The requirement of § 5674, that the foreman's name be subscribed to the indorsement of "a true bill," is merely directory, and the absence of such indorsement cannot be taken advantage of after conviction, where it otherwise appears that the indictment was properly returned: *Wau-kon-chaw-neek-kaw v. United States*, Mor., 332.

The fact that it does not appear that the indictment is indorsed "a true bill," and marked filed by the clerk, cannot be raised for the first time on appeal: *Hughes v. State*, 4–554.

See, further, § 5674 and notes.

Names of witnesses: The objection that the names of witnesses examined before the grand jury are not indorsed on the indictment should be raised in the trial court or it will be regarded as waived: *Harriman v. State*, 2 G. Gr., 270.

Where, in indorsing the name of the witness on the back of an indictment, his title, instead of his Christian name, was used, *held*, that if the witness was as unmistakably described as he would have been by the use of his Christian name, the object of the indorsement was accomplished and no prejudice could result to defendant: *State v. McComb*, 18–43.

Names of witnesses before the grand jury who do not give any material testimony, and the minutes of whose testimony are not returned, need not be indorsed on the indictment: *State v. Little*, 42–51.

Affidavits cannot be received to show that witnesses whose names are not indorsed, and minutes of whose testimony are not returned, were examined before the grand jury: *Ibid.*

It is not error to allow the name of a witness examined before the grand jury to be indorsed on the back of the indictment after a trial jury is called: *State v. Robinson*, 47–489.

That the evidence of an incompetent witness was received by the grand jury is no reason for setting aside an indictment: *State v. Tucker*, 20–508.

Minutes of evidence: That the minutes of the evidence returned by the grand jury do not support the indictment is not a ground for setting it aside: *State v. Harris*, 36–268.

The minutes need not be attached to or made a part of the indictment, and a mere failure to file them, if they are properly returned, should not deprive the state of its evidence: *State v. Postlewait*, 14–446.

It is sufficient if the minutes are returned into court and filed with the clerk: *State v. Hamilton*, 42–655.

That they are handed to the clerk and deposited with him sufficiently constitutes a filing: *State v. Guisenhause*, 20–227.

That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

If the minutes are returned with the indictment and placed by the clerk in his office they are sufficiently filed, though it would be better for the clerk to indorse them as filed: *State v. Briggs*, 68–416.

Failure of clerk to file the minutes cannot be raised by demurrer: *Ibid.*

An indictment cannot be set aside by motion on the ground that it was found on incompetent and insufficient evidence: *State v. Smith*, 74–580.

See, further, §§ 5676 and 5806 and notes.

Presentment and filing: The requirement of § 5679 that the indictment must be presented, etc., is directory only, and a failure of the clerk to make the indorsement on the indictment will not invalidate the proceedings (explaining *State v. Glover*, 3 G. Gr., 249): *State v. Axt*, 6–511; *State v. Shepard*, 10–126; *State v. Rivers*, 58–102.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, *held*, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58–165.

In the absence of affirmative showing to the contrary it will be presumed that the requirements of § 5679 as to presentment and filing were complied with: *State v. McIntire*, 59-267.

No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrocklege v. State*, 1-167: *Herring v. State*, 1-205.

Indorsements in particular cases *held* sufficient: *Wrocklege v. State*, 1-167; *Dixon v. State*, 4 G. Gr., 381.

It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *State v. Jolly*, 7-15.

The court should be named in the indorsement, although failure to do so will not be fatal: *Ibid.*

A mistake in the indorsement on the indictment as to the county in which it was filed, *held* not a fatal error, where it appeared that it was presented and filed in the proper county: *State v. Smouse*, 50-43.

The fact that it does not appear that the indictment was marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4-554.

See § 5679.

Presence of others: The fact that a bailiff was present in the grand jury room during their proceedings, though not when the final vote was taken, *held* not sufficient to affect the validity of the indictment: *State v. Kimball*, 29-267.

The objection under this paragraph, if not taken as here contemplated, cannot be raised after verdict: *Ibid.*

Irregularities in selecting grand jury: It is not a valid objection to a grand jury that the judges of election returned eighty-five names of persons to serve as grand jurors instead of seventy-five, as required by § 312, if the extra names had been stricken off before the grand jury was drawn, and fifteen jurors have been regularly drawn: *State v. Knight*, 19-94.

Under a statute requiring the board of county commissioners to deliver copies of jury lists to the clerk thirty days before the commencement of the term, *held*, that failure to comply therewith was a defect which might be raised by plea in abatement: *United States v. Cropper*, Mor., 190.

It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *State v. Carney*, 20-82.

Where there has been no substantial departure in the selection, drawing, etc., of the grand jury affecting substantially the rights of defendant, a motion to set aside the indictment for irregularities in connection with such selection, etc., should not be sustained: *State v. Brandt*, 41-593.

The impaneling is the final formation by the court of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *State v. Ostrander*, 18-435, 446.

The fact that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, will not authorize the court to set aside the indictment, where it does not appear that the new juror was disqualified or the defendant prejudiced: *State v. Fowler*, 52-103.

Where grand jurors were absent at a term of court by reason of instruction from the judge that they need not appear unless specially summoned, *held*, that it was error to impanel a grand jury omitting therefrom the persons thus failing to appear, and that a motion to set aside an indictment found by such grand jury should have been sustained: *State v. Bowman*, 73-110.

Where a challenge to one grand juror has been sustained, and an indictment has been found by the remaining members, the indictment is valid and cannot be set aside on motion: *State v. Ostrander*, 18-435.

But where, by challenges, the number of the grand jurors is reduced below the number required for finding indictment, the vacancies should first be filled: *State v. Mooney*, 10-506; *State v. Garhart*, 35-315; *State v. Shelton*, 64-333.

Where a part of the grand jury fails to appear, the court may, under § 5639, orally direct the sheriff to summon a sufficient number to complete the panel, and failure to issue a written precept is not ground for setting aside the indictment: *State v. Miller*, 53-84; *State v. Miller*, 53-154.

The discharge of one grand jury and the impaneling of another to which there is no objection except the fact that the first has been erroneously discharged is not ground for setting aside an indictment found by the second: *State v. Hughes*, 58-165; *State v. Hart*, 67-142.

The objection that the grand jury was improperly summoned should be made before pleading to the indictment and not by motion in arrest of judgment: *State v. Reid*, 20-413.

The proper method of taking advantage of irregularity in the selection, summoning or impaneling the grand jury, where the defendant has been held to answer before the formation of the grand jury, is by challenge to the panel. Defendant cannot interpose objections after the jury is sworn: *State v. Hart*, 29-268; *State v. Hinkle*, 6-380; *Dixon v. State*, 3-416; *State v. Howard*, 10-101.

In order to support the action of the court below in overruling a motion to set aside the indictment on this ground, if it does not appear whether defendant was held to answer before indictment or not, it will be presumed that he was, and that the motion was overruled on that ground: *State v. Gibbs*, 39-318.

Defendant should exercise his right of challenge at the proper time or it will be held waived, and an indictment will not afterward be set aside for causes which would have been good grounds for challenge: *State v. Harris*, 38-242: *State v. Ruthven*, 58-121. See, also, *State v. Felter*, 25-67.

A defendant not bound over to appear before the grand jury prior to the finding of an indictment, and against whom no charge is pending, may move to set aside the indict-

ment for causes which would have been good grounds of challenge: *Norris' House v. State*, 3 G. Gr., 513; *Duntell v. State*, 4 G. Gr., 125.

That a defendant under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not brought before the court and given an opportunity for challenging the grand jury, is not ground for setting aside the indictment: *State v. Fitzgerald*, 63-268.

For other cases as to the selection, drawing, summoning, impaneling, and swearing of the grand jury, see notes to §§ 5638-5654.

5723. Correction. 4338. A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon; or that the name of any other witness than those so examined is indorsed thereon as prescribed in the second subdivision of section four thousand three hundred and thirty-seven hereof [§ 5722], shall not be sustained if the indorsement is corrected by the insertion or striking out of such names or name by the district [county] attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury and returned and preserved with the indictment to the court. [R., § 4692.]

It is not competent, in support of a motion to set aside an indictment under ¶ 2 of the preceding section, to show by affidavits that witnesses were summoned before the grand jury whose names are not indorsed on the indictment, and minutes of whose evidence were not returned. Such minutes are part of the record and cannot be thus impeached: *State v. Little*, 42-51.

Where the name of a witness examined before the grand jury was not indorsed upon the indictment it was held not error to allow the indorsement to be made upon motion of the district attorney after the trial jury is called: *State v. Robinson*, 47-489.

And see notes to preceding section.

5724. Objections to selection of grand jury. 4339. The ground of the motion to set aside the indictment mentioned in the fifth subdivision of section four thousand three hundred and thirty-seven hereof [§ 5722], is not allowed to a defendant who has been held to answer before indictment. [R., § 4693.]

The proper method of taking advantage of such irregularity, where the defendant had been held to answer, would be by challenge to the panel under §§ 5641 and 5643: *State v. Hart*, 29-268.

And the objection in such case should be made before the grand jury is sworn (§ 5649): *State v. Ostrander*, 18-435; *State v. Gibbs*, 39-318.

In order to support the ruling of the court below, where it does not appear whether defendant was held to answer before indictment, it will be presumed that he was: *State v. Gibbs*, 39-319.

An objection to the grand jury, or to an individual juror, cannot be interposed by a defendant held to answer before the formation of the grand jury: *Dixon v. State*, 3-416; *State v. Hinkle*, 6-380; *State v. Howard*, 10-101; *State v. Ingalls*, 17-8; *State v. Hart*, 29-268.

A defendant not bound over to appear before the grand jury prior to the finding of an indictment against him, and against whom no charge is pending, is not deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Norris' House v. State*, 3 G. Gr., 513; *Dutell v. State*, 4 G. Gr., 125.

Where a defendant was held to answer after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10-506.

That a defendant, under arrest in a preliminary proceeding, but not yet bound over to appear before the grand jury, is not brought before the court and given an opportunity for challenging the grand jury, is not ground for setting aside the indictment: *State v. Fitzgerald*, 63-268.

See, also, §§ 5641, 5643, 5647, and 5722 and notes.

5725. Hearing. 4340. The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time. [R., § 4695; C., '51, § 2945.]

5726. If denied. 4341. If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. [R., § 4696; C., '51, § 2946.]

5727. If granted. 4342. If the motion be granted, the court must order the defendant, if in custody, to be discharged, or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the

money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury. [R., § 4697; C., '51, § 2947.]

A judgment in a criminal case being reversed on appeal for a defect in the indictment the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *State v. Morrissey*, 22–158.

5728. If re-submitted. 4343. If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment. [R., § 4698; C., '51, § 2948.]

5729. Order to set aside, no bar. 4344. An order to set aside the indictment as provided in this chapter, shall be no bar to a future prosecution for the same offense. [R., § 4699; C., '51, § 2949.]

CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

5730. Demurrer or plea. 4345. The only pleading on the part of the defendant is a demurrer or plea. [R., § 4700; C., '51, § 2950.]

5731. How put in. 4346. The demurrer and plea must be put in in open court, and may be oral; but an entry thereof must be made on the record. [R., § 4701; C., '51, § 2951.]

CHAPTER 21.

OF THE MODE OF TRIAL.

5732. Issues; by whom tried. 4347. Issues of law shall be tried by the court. Issues of fact shall be tried by a jury. [R., § 4702.]

5733. Issues of law. 4348. An issue of law arises upon a demurrer to the indictment. No joinder in demurrer is necessary. [R., § 4703.]

5734. Issues of fact. 4349. An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense. No replication or further pleading is necessary. [R., § 4704.]

5735. Trial by jury. 4350. An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded. [R., § 4705.]

Defendant cannot waive a jury trial and consent to a trial by the court, there being no provision in the code of criminal procedure by which the court, without a jury, has jurisdiction to try the issues of fact in a criminal case: *State v. Carman*, 63–130; *State v. Larrigan*, 66–426.

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

On the trial of an appeal in the district court from a conviction before a justice of the peace defendant may waive a jury as he might have done in the justice court: *State v. Ill*, 74–441.

Where defendant pleaded not guilty and the jury was impaneled, and thereupon by agreement between the district attorney and defendant the jury returned a verdict of guilty as charged in the indictment, *held*, that such verdict was not erroneous: *State v. Keegan*, 74–145.

5736. Presence of defendant. 4351. If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if for a felony, he must be personally present. [R., § 4706.]

If defendant is shown to have been present at the beginning and conclusion of the trial, his presence at other times will be presumed, unless the contrary is shown: *State v. Wood*, 17–18.

If the record shows that defendant was present at arraignment, it will be presumed he was present at the rendition of the verdict where the contrary does not appear: *Harriman v. State*, 2 G. Gr., 270.

And it will be so presumed in the absence of any showing to the contrary: *State v. Kline*, 54–183.

It would seem that the *trial* at which defendant accused of a felony is required to be present ends with the verdict, and that his presence at the argument and determination of a motion for new trial is not essential: *State v. Decklotts*, 19–447.

Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. State*, 4–554.

The fact that a defendant indicted for felony, who is arraigned and personally pleads not guilty, is not present at the impaneling of the jury, or during the trial, or at rendition of judgment, will not deprive the court of jurisdiction so as to render the judgment void: *Turner v. Barr*, 75–758.

As to presence of defendant at arraignment, see § 5713 and notes; as to his presence at rendition of verdict, see § 5846 and notes; and at pronouncing of judgment, see § 5882.

CHAPTER 22.

OF DEMURRER.

5737. Ground. 4352. The defendant may demur to the indictment when it appears upon its face, either:

1. That it does not substantially conform to the requirements of this code;
2. That the indictment contains any matter, which, if true, would constitute a legal defense or bar to the prosecution. [R., § 4707; C., '51, § 2952.]

The question whether an offense is barred by the statute of limitations cannot be properly raised by demurrer: *State v. Hussey*, 7–409; *State v. Groome*, 10–308; *State v. Deitrick*, 51–467.

An indictment for conspiracy must allege the conspiracy to be for the purpose of doing an illegal act, or the doing of a legal act by illegal means, or it will be open to demurrer: *State v. Harris*, 38–242.

Questions as to the sufficiency of the statement of facts in the indictment to constitute the crime charged can be raised by demurrer, and the sufficiency of the indictment as a pleading is then to be determined from its averments. The fact that minutes of evidence before the grand jury are not filed by the clerk cannot be raised in that manner: *State v. Briggs*, 68–416.

5738. Entry; form. 4353. The entry on the record of a demurrer, may be substantially in the following form: "The defendant demurs to the indictment." [R., § 4708.]

5739. When heard. 4354. When the demurrer is put in, the objection thereby presented must be heard immediately, or at such time as the court may appoint. [R., § 4709; C., '51, § 2954.]

5740. Jurisdiction in another county. 4355. If the demurrer is sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had as provided in sections four thousand four hundred and forty-six to four thousand four hundred and forty-nine, inclusive, of this code [§§ 5831–5834]. [R., § 4710.]

5741. Final judgment. 4356. If the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant must be discharged. [R., § 4711.]

5742. Discharge or re-submission. 4357. If the demurrer is sustained on any other ground than that mentioned in the last two sections, the defend-

ant must be dealt with as provided in section four thousand three hundred and forty-one of this code [§ 5726], unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment; in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be dealt with as provided in section four thousand three hundred and forty-two of this code [§ 5727]. [R., § 4712.]

[It is evident by an examination of the sections referred to in this section, as well as by reference to the corresponding section in the Revision, and to the section as it appears in the Code commissioners' report, that § 5727 and § 5728 are intended to be referred to, instead of § 5726 and § 5727 respectively.]

Where a demurrer to an indictment is sustained and defendant is held to bail and his case re-submitted to the grand jury, under this section, he must then exercise his right of challenge to the grand jury or it will be held to be waived: *State v. Harris*, 38–242.

5743. Pleading over; final judgment. 4358. If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. [R., § 4713; C., '51, § 2955.]

Where, upon the overruling of a demurrer to the indictment, the court proceeded to try defendant as though the plea of not guilty had been entered, and the jury returned a verdict of guilty, *held*, that the conviction was valid, and that defendant could not, upon motion in arrest of judgment, have it set aside and interpose the plea of not guilty: *State v. Greene*, 66–11.

CHAPTER 23.

OF PLEAS TO THE INDICTMENT.

5744. What allowed. 4359. There are but three pleas to an indictment. A plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty. [R., § 4714; C., '51, § 2957.]

The whole object of jury trials in criminal cases is to ascertain whether the accused is guilty or not guilty, and it is not proper for the plea to form an issue upon a fact which, although it may be an item of evidence, is not conclusive as to the innocence of defendant. Therefore, *held*, that in a prosecution for the sale of intoxicating liquors without a license, the plea that defendant had a license did not raise a proper issue for trial: *Peters v. State*, 3 G. Gr., 74.

The fact that the record does not show that any plea was interposed by defendant will not warrant the reversal of a conviction in the lower court. It will be presumed that there was a plea upon which the trial was had: *State v. Foster*, 40–303.

Pleas of not guilty, and of former conviction or acquittal, may be pleaded together. Where the plea of former conviction or acquittal only was interposed, and defendant was found guilty thereof and did not ask to plead over, *held*, that judgment of conviction was properly entered without further trial as to his guilt: *State v. Green*, 16–239.

If it is proved that the former conviction or acquittal was obtained by fraud or collusion it may be disregarded: *Ibid.*

And see § 5862 as to judgment on plea of former conviction or acquittal.

5745. Entry; form. 4360. The plea may be entered on the record, substantially, in the following form:

1. A plea of guilty. "The defendant pleads that he is guilty of the offense charged in the indictment."
2. A plea of not guilty. "The defendant pleads that he is not guilty of the offense charged in the indictment."

3. A plea of former conviction or acquittal. "The defendant pleads that he has formerly been convicted or acquitted (as the case may be) of the offense charged in the indictment, by the judgment of the court of —— (naming it), rendered on the —— day of ——, A. D. 18— (naming the time)." [R., § 4715.]

5746. Plea of guilty. 4361. The plea of guilty can only be put in by the defendant himself in open court. [R., § 4716.]

The fact that defendant pleads guilty upon an expression of opinion by the district attorney that the court will thereupon impose a fine of not exceeding a certain amount does not entitle him to a new trial in the event of sentence for the payment of a greater fine: *State v. Reininghaus*, 43–149.

A plea of guilty, even though made when the defendant is under no obligation to plead, constitutes an admission of guilt which may be shown in evidence against him: *State v. Briggs*, 68–416.

5747. Withdrawal of plea of guilty. 4362. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted. [R., § 4717; C., '51, § 2961.]

The court should, on application, allow defendant to withdraw his plea of guilty, for the purpose of raising the objection that the indictment charges more than one offense: *State v. Abrahams*, 6–117.

Under this section defendant has the right to withdraw the plea of guilty and substitute therefor a different one: *State v. Oehlshlager*, 38–297.

Where defendant pleaded guilty before a justice of the peace, and sentence was passed thereon, *held* that, on appeal to the district court, such plea might be withdrawn: *State v. Kraft*, 10–330; *State v. Abrahams*, 6–117; *State v. Farlee*, 74–451.

It is error to refuse to allow defendant to withdraw his plea and file a motion to set aside the indictment on the ground that the grand jury was not properly selected (§ 5722): *State v. Hale*, 44–96.

Where judgment was entered upon a plea of guilty, and a motion for leave to withdraw such plea and for new trial was filed, based on the ground that defendant was surprised by the punishment inflicted being greater than expected, *held*, that the alleged ground of surprise was not sufficiently established to entitle the defendant to relief: *State v. Buck*, 59–382.

5748. Plea of not guilty. 4363. The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact may be given in evidence under it, except a former conviction or acquittal. [R., § 4718.]

The plea of not guilty may be entered by defendant's counsel in the absence of defendant: *State v. Jones*, 70–505.

5749. Conviction or acquittal a bar. 4364. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place. [R., § 4719.]

Dismissal of prosecution: Defendant being put upon trial under charge of a public offense, it is not within the scope of the authority of either the prosecuting attorney or of the court to take the case from the jury of his own arbitrary will and without a controlling cause, and again hold defendant to trial on the same charge, although it be newly presented. Such proceeding amounts to an acquittal, and may be pleaded as a bar: *State v. Callendine*, 8–288.

A *nolle prosequi* may be entered before the trial is entered upon, but after plea and the jury is sworn and the evidence is in it will amount to an acquittal: *Ibid.*

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

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

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

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

New trial: The granting of a continuance because of the inability of prosecution to introduce material evidence which was not before the grand jury, and notice of which was not given to defendant before the trial, will not bar a subsequent trial in pursuance of such continuance: *State v. Parker*, 66-586; *State v. Falconer*, 70-416.

Motion in arrest of judgment: Where, after verdict, a motion by defendant in arrest of judgment is sustained, the proceeding cannot be relied upon, in a subsequent prosecution for the same offense, as constituting a previous conviction or acquittal under this section: *State v. Clark*, 69-196.

Fraudulent acquittal or conviction: Where a person guilty of a criminal act procures a fraudulent conviction or acquittal by collusion, the state may elect to treat the action of the magistrate as a farce and the judgment a nullity, and it may commence a new prosecution: *State v. Green*, 16-239.

Where a defendant relies upon a plea of a former conviction, and the state claims that it is not concluded thereby for the reason that it was fraudulently obtained, the burden of proof is upon the state to establish the fraud: *State v. Maxwell*, 51-314.

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

A conviction for assault and battery will not bar a subsequent prosecution for assault with intent to do great bodily injury, committed in the same act: *State v. Foster*, 33-525.

The charge of an assault upon two persons is, in a legal sense, so far different from an assault upon one, that proof of the commission of the act in regard to one will not sustain an indictment charging an assault upon two; therefore, in a subsequent indictment for assault and battery upon one of the persons named, defendant could not show, under a plea of former conviction or acquittal, a judgment under an indictment for an assault upon two. Such reasoning does not apply, however, to an indictment for an assault by two. In such case either one may be acquitted either on a joint or on a separate indictment: *State v. McClintock*, 8-203.

The act of using a building for the keeping of intoxicating liquors with intent to sell in violation of law, and that of using a building for the sale of the same in violation of law, are each by statute declared to be the crime of nuisance. Therefore a conviction for nuisance committed in one of these two ways will bar a prosecution for the same crime committed in the other way in the same building prior to the first indictment: *State v. Layton*, 25-193.

Where a person by one muscular action and one volition passed four forged checks, *held*, that he committed one crime, and that a conviction for passing one of such checks would bar a subsequent prosecution as to the others: *State v. Egglesht*, 41-574.

Former conviction or acquittal for larceny will bar a subsequent prosecution for larceny from the person in the same act: *State v. Gleason*, 56-203.

A conviction for permitting a certain minor to remain in a saloon and play billiards at one date will not bar a prosecution for allowing another minor to do the same at another date: *State v. Derichs*, 42-196.

Crime against state and United States: The crime of counterfeiting the coin of the United States may be punished under state law, congress not having attempted to exercise the exclusive power of punishing such offenses: *State v. McPherson*, 9-53.

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

Acts for which conviction might have been had: Where it appeared that, under a previous prosecution for selling intoxicating liquor described as stomach bitters, defendant was in fact tried for all offenses for sales of intoxicating liquors, *held*, that he could not be prosecuted a second time for the sale of dandelion bitters during the time covered by the first prosecution: *State v. Sterrenberg*, 69-544.

Evidence as to identity of offense: Where defendant pleaded a former conviction before a justice of the peace, *held* proper to ask the justice before whom the former conviction was claimed to have been had whether the offense then charged was the same as testified to by the witnesses on the last trial, and whether the evidence was the same: *State v. Maxwell*, 51-314.

Pleading over: After verdict against the defendant on a plea of former conviction or acquittal, not accompanied with the plea of not guilty, if he does not ask to plead over, he may be sentenced without further trial: *State v. Green*, 16-239.

See, further, notes to following section.

5750. In different degree. 4365. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein. [R., § 4720.]

Conviction of a lower degree of offense: A verdict of guilty in a lower degree of the crime than that charged in the indictment, or guilty of a crime necessarily included in that charged, operates as an acquittal of a higher degree or a higher crime, and defendant cannot, after having secured a reversal, be again put upon trial for a higher degree or a higher crime than that of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274.

Nor will the fact that defendant, being put

on trial a second time for the higher degree or higher crime, is again found guilty of only the lower degree or lower crime of which he was previously convicted, render the error in improperly putting him on trial a second time of the higher degree or higher crime, error without prejudice: *State v. Tweedy*, 11-350.

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

See notes to preceding section; also Const., art. 1, § 12, and notes.

5751. Judgment, when a bar. 4366. The judgment for the defendant on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense. [R., § 4721.]

5752. Plea entered by court. 4367. If the defendant fail or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court. [R., § 4722; C., '51, § 2963.]

Where, upon the overruling of a demurrer to the indictment, the court proceeded to try defendant as though the plea of not guilty had been entered, and the jury returned a verdict of guilty, *held*, that the conviction was valid, and that defendant could not, upon motion in arrest of judgment, have it set aside, and interpose the plea of not guilty: *State v. Greene*, 66-11.

It does not constitute reversible error to put defendant on trial without a plea having been entered: *State v. Hayes*, 67-27.

CHAPTER 24.

OF CHANGE OF VENUE IN CRIMINAL CASES.

5753. On defendant's application. 4368. In all criminal cases which may be pending in any of the district courts of this state, any defendant therein may petition the court for a change of venue to another county. [R., § 4727; C., '51, § 3270.]

5754. What stated. 4369. Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes. [R., § 4728; C., '51, § 3271.]

Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *State v. Mewherter*, 46-88.

An attorney appointed by the court to defend a prisoner is not incompetent to make an affidavit to prove the facts necessary to entitle the prisoner to a change of venue: *State v. Mooney*, 10-506.

As to counter-affidavits, see § 5757 and notes.

As to the sufficiency of the petition and affidavits, see § 5759 and notes.

5755. Verified. 4370. When the ground alleged in the petition is excitement and prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself. [R., § 4729.]

5756. Need not state facts. 4371. The petition need not state the facts upon which the belief of the petitioner, or other person verifying the same, is founded, but may allege the belief of the particular ground thereof in general terms. [R., § 4730.]

5757. Additional testimony. 4372. The court may receive additional testimony, by affidavits only, either on the part of the defendant or the state,

when the alleged ground in the petition is excitement and prejudice in the county against the petitioner. [R., § 4731.]

Upon an application for a change of venue in a prosecution for violation of a city ordinance it is not improper to consider counter-affidavits of the citizens of the city that there is no such prejudice against the defendant in the county as to entitle him to the change: *State v. Wells*, 46-662.

5758. Filed with clerk. 4373. The petition and affidavits, if any, must be filed with the clerk, and are parts of the record. [R., § 4732.]

5759. Court's discretion. 4374; 17 G. A., ch. 171; 18 G. A., ch. 9. The court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it. [R., § 4733; C., '51, § 3272.]

Discretion of the court: The question of allowing the change rests in the sound discretion of the court, and unless such discretion has been abused the supreme court, on appeal, will not interfere with the decision: *State v. Ostrander*, 18-435, 447; *State v. Ross*, 21-467; *State v. Collins*, 32-36; *State v. Felter*, 32-49; *State v. Beck*, 73-616.

But this discretion is not absolute, nor an arbitrary discretion: *State v. Hutchinson*, 27-212.

If it appear that this discretion has been improperly exercised, the action of the court will be reviewed and reversed; and in a particular case the refusal to grant a change was held error: *State v. Canada*, 48-448.

The rule that the court is to pass upon the question of granting a change of venue in the exercise of a sound discretion applies to cases where the change is asked on the ground of prejudice of the judge, or excitement and prejudice of the people of the county, and although these grounds may be averred in the very language of the statute they do not entitle the prisoner to a change as a matter of right (explaining *State v. Nash*, 7-347; *State v. Mooney*, 10-506): *State v. Arnold*, 12-479; *Gordon v. State*, 3-410; *State v. Barrett*, 8-536.

In a particular case, *held*, that the showing for a change was sufficient to render the action of the court in refusing it erroneous: *State v. Nash*, 7-347, 366.

Abuse of discretion in denying a change of venue must be made to appear, or the decision of the court will not be interfered with, even when the ground alleged is the prejudice of the judge: *State v. Ray*, 50-520; *State v. Knight*, 19-94; *State v. Ingalls*, 17-8; *State v. Freeman*, 27-333: *State v. Mewherter*, 46-88.

Where the record fails to show that the evidence is all that was produced on the hearing of the application for change of venue, the supreme court cannot pass upon the correctness of the action of the lower court: *State v. Malling*, 11-239; *State v. Leis*, 11-416.

To justify a reversal of the case for the action of the judge in overruling a motion for a change of venue, the record must show affirmatively that there was an abuse of the discretion reposed in the court in determining the same: *State v. Hale*, 65-575.

Therefore, where an affidavit for a change of venue was a mere statement of the belief of the applicant that the judge was prejudiced, founded on alleged facts of the existence of which the applicant had no personal knowledge, *held*, that such affidavit was insufficient to overcome the presumption arising from the action of the court in denying the application: *Ibid.*

Where a showing for a change is based on the ground of excitement or prejudice of the inhabitants of the county, and is resisted by affidavits on the part of the state, the supreme court will, on appeal, be slow to interfere with an order denying the change. The record must show that there was an abuse of discretion in determining the matter: *State v. Williams*, 63-135.

Though the petition for a change is based upon the prejudice of the judge, and shows sufficient ground, if true, to require a change, it does not follow that the change should be granted as a matter of course. The judge may consult his own feelings, as well as the papers, and grant or deny the change as he may think the right demands, in the exercise of a sound discretion. In a particular case, *held*, that the showing for a change was not sufficient to require the reversal of the action of the court in refusing it: *State v. Foley*, 65-51.

In a particular case, *held*, that the showing for a change was not sufficient to necessitate a reversal: *State v. Perigo*, 70-657.

Where an application was made for change of venue on account of prejudice of the judge, and overruled, and subsequently, in response to an objection to a juror made by defendant, the judge remarked that he intended to give the defendant a better jury than he was entitled to, *held*, that this remark showed prejudice on the part of the judge, and that the motion for a change should have been sustained: *State v. Read*, 49-85.

It does not follow that because a change of venue on the ground of prejudice of the inhabitants of the county has been improperly denied, and the case is reversed on that ground, that when the case comes on for trial anew the defendant will be entitled to such change on the affidavits before filed: *State v. Nash*, 7-347, 374.

Error in overruling an application for change of venue will not entitle the defendant to a release on *habeas corpus*: *Jackson v. Boyd*, 53-536.

In civil cases, see § 3795 and notes.

In police court: There is no provision for change of venue in proceedings before a police court for violation of a city ordinance. The provisions in that respect with reference to prosecutions before justices of the peace do not apply: *Zelle v. McHenry*, 51-572.

Affidavits: Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *State v. Mewherter*, 46–88.

5760. To what county. 4375. If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists. [R., § 4734; C., '51, § 3272.]

For other provisions as to change of venue, see § 242.

5761. Same. 4376. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists. [R., § 4735; C., '51, § 3272.]

5762. Duty of clerk. 4377. Upon the making of the order, if there be but one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office; and a certified copy of all record entries, and all the original papers on file must be, without unnecessary delay, transmitted to the clerk of the court to which the change of venue is ordered. [R., § 4736; C., '51, § 3273.]

The transcript of record entries which is required to be made by the clerk in transferring the case upon change of venue to another county does not include the indictment itself, which is required to be transmitted in its original form: *Sharp v. State*, 2–454.

It is not error to allow the clerk of the court from which a change of venue is taken to amend his certificate by interlineation to supply an omission, there being no question as to the truthfulness of the amendment: *State v. Gibson*, 29–295.

5763. Where more than one defendant. 4378. If there be more than one defendant in the case, and all the defendants have not joined in the petition, the clerk, upon the making of such order, must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the transcript so certified to the clerk of the court to which the change of venue is ordered, retaining the originals. [R., § 4737.]

5764. Duty of sheriff. 4379. If a defendant who has applied for a change of venue, which has been ordered, be in custody, the sheriff of the county from which the venue is changed, must, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which such change is allowed, and upon such transfer and delivery, with a certified copy of such order, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery. [R., § 4738; C., '51, § 3274.]

5765. Proceedings. 4380. The court to which such change of venue is granted must take cognizance of the cause, and proceed therein to trial, judgment, and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court. [R., § 4739; C., '51, § 3275.]

Where an indictment upon which defendant is put on trial appears to have been properly found in the county from which the change is taken, and no objection is made thereto until after verdict, defendant cannot object that it is not filed in the court in which the trial is had: *Sharp v. State*, 2–454.

As to bail in court to which transferred, see § 5770 and notes.

5766. Cost of change. 4381. In all changes of venue under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering, and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant, which shall be audited and allowed by the court trying such case. [R., § 4740; C., '51, § 3276.]

Under this section, in all cases of change of venue, the county from which the case is removed is liable to the county wherein the trial is had for all the costs and expenses of the

trial of the case, and not merely for the costs which may be taxed against accused in case of conviction: *Jones County v. Linn County*, 68-63.

An indorsement by the judge, not purporting to act as the court, recommending the allowance of an amount for costs, *held* not an auditing and allowance binding upon the county: *Barnes v. Marion County*, 54-482.

The provisions of § 5121, that where costs are paid by a county other than the one where the offense was committed the latter county shall be liable to the county in which it is tried for the costs of such trial, does not apply where one county takes original jurisdiction of a crime committed in an adjoining county but within five hundred yards of the boundary line between them: *Floyd County v. Cerro Gordo County*, 47-186.

This section does not declare that costs made by defendant shall be paid by the county, and it does not render the county liable for defendant's costs of abstract, transcript, etc., on an appeal in which the judgment against him is reversed: *State v. Rainsbarger*, 74-539.

See, also, §§ 5121 and 5771.

5767. Sheriffs' fees. 4382. Sheriffs, for delivering prisoners under the provisions of this chapter, are entitled to the same fees therefor as are allowed for the conveyance of convicts to the penitentiary. [R., § 4741; C., '51, § 3277.]

5768. Transfer prosecutions to obtain jury. 4383. When any district judge in this state is satisfied from his own knowledge or otherwise, that any organized county in his district does not contain a sufficient number of inhabitants possessing the qualifications of jurors to compose grand and trial jurors for the presentment and trial of any person or persons charged with the commission of an offense in said county requiring the intervention of a grand jury, said judge shall make an order transferring all prosecutions for such offenses committed in said county to the next nearest county in the same judicial district possessing the requisite number of inhabitants qualified to serve as jurors. [R., § 4742.]

5769. In vacation. 4384. Said order may be made by the judge in vacation, or by the court, and the district court of the county to which said prosecution may be transferred, shall have full and complete jurisdiction of the offense, and the person or persons charged with committing the offense may be indicted and tried in the county to which the prosecution is so transferred, in the same manner as though the offense had been committed in said county. [R., § 4743.]

5770. Appearance in county to which transferred. 4385. When any prosecution has been transferred by the court or judge under the provisions of this chapter, the person charged with committing the offense shall be required to appear at the next succeeding term of the district court of the county to which the prosecution is transferred, and shall give bond accordingly, and the court or judge may require all material witnesses in behalf of the prosecution to enter into cognizance for their appearance at the district court of the county to which the prosecution is transferred. [R., § 4744.]

The clerk of the court to which the change is granted has power to take a recognizance for the appearance of the prisoner: *State v. Merrihew*, 47-112.

The form of bond required under this section is substantially the same as that prescribed by § 5983: *Ibid.*

The requirement that in case of a change of venue the accused shall give a new bond to appear, etc., is directory, and does not operate to release the sureties on the original bail bond, who are still responsible for his appearance: *State v. Brown*, 16-314.

5771. Costs. 4386. The county in which the offense was committed, and from which the prosecution was transferred, shall pay all the costs attending the prosecution. [R., § 4745.]

5772. No appeal from order. 4387. No appeal or writ of error shall lie from any order for the transfer of prosecutions made under the provisions of this chapter. [R., § 4746.]

5773. Pending cases. 4388. The provisions of this chapter apply to prosecutions or charges now pending, or that may hereafter be instituted for offenses heretofore or hereafter committed. [R., § 4747.]

CHAPTER 25.

OF THE FORMATION OF TRIAL JURY.

5774. How formed. 4389. The jury for the trial of criminal actions is selected, drawn, and summoned as provided in the code of civil practice. [R., § 4751.]

As to waiving jury trial, see notes to § 5735.
As to the selection, drawing and summoning of the jurors, see §§ 305-323 and notes.

5775. Ballots prepared. 4390. At the opening of the court, the clerk shall prepare separate ballots, containing the names of the persons returned as jurors, which shall be folded each in the same manner, as near as may be, and so that the name thereon shall not be visible, and must deposit them in a box to be kept for that purpose. [R., § 4752; C., '51, § 2964.]

The provisions of this section are directory; and the failure of the clerk to comply therewith will not amount to error sufficient to reverse the judgment, unless it be shown that the court, on application, refused to require these provisions to be carried out; or unless it be otherwise shown that some substantial prejudice has resulted to defendant: *State v. Gillick*, 7-287.

5776. Attachment for absent jurors. 4391. When the indictment is called for trial and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attachment issue against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment. [R., § 4753; C., '51, § 2965.]

Where the court had, earlier in the term, excused four jurors on their own statements, not under oath, but without objection at the time on the part of the defendant, *held* not error, when defendant's case was called for trial, to refuse to issue attachment to compel the attendance of the jurors thus excused: *State v. Ostrander*, 18-435, 448.

While the defendant may, under this section, insist on attachment issuing for jurors who are absent from the original panel, he must insist on that right before the jury is called; otherwise he cannot object to a juror because he is not a member of the original panel: *State v. Miller*, 53-84.

5777. Drawing jurors. 4392. Before the name of any juror is drawn the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots without seeing the names written on them, from the box, through the top or lid thereof. [R., § 4754; C., '51, § 2966.]

5778. Ballots kept separate. 4393. When the jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors, until the jury so sworn is discharged. [R., § 4755; C., '51, § 2967.]

5779. Returned to box. 4394. After the jury is so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had. [R., § 4756; C., '51, § 2968.]

5780. Juror absent. 4395. If a juror be absent when his name is drawn or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn. [R., § 4757; C., '51, § 2969.]

5781. Talesmen. 4396. If by reason of there being one or more juries impaneled, or for any other reason, there should not remain any ballots undrawn, or if in consequence of jurors being set aside no jury can be obtained from the list of those returned by the sheriff for the trial of issues, the court may order the sheriff, or if he be a party to or interested in the cause, some other person, to summon jurors from the by-standers, or other persons, who shall be returned for the trial of the indictment. [R., § 4758; C., '51, § 2970.]

The disqualifying interest of the sheriff here referred to need not be a pecuniary interest; § 485 applies in criminal cases: *State v. Hardin*, 46-623; *Harriman v. State*, 2 G. Gr., 270-281.

The provisions of § 310, for drawing additional jurors to fill the panel, are directory, and a simple disregard of such provisions, where error does not affirmatively appear, is not sufficient to authorize reversal of judgment: *State v. Harris*, 64-287.

When special jurors are summoned on a special venire to fill up a jury for the trial of a particular case it is not error to call them successively in the order in which they are summoned, but it is better to place their names on ballots and draw as in selecting regular jurors, and this is the proper practice when they are summoned for the entire term: *State v. Green*, 20-424.

Where the court, prior to the commencement of a criminal case and without knowledge that the jury could not be obtained from the regular panel, ordered that a special venire be issued, and forty persons were summoned to act as jurors, and afterwards, the regular panel being exhausted in securing a jury in such case, jurors were called from this special panel, in the order in which their names appeared thereon, *held*, that the action of the court was not erroneous: *State v. Ryan*, 70-154.

Where the panel had been reduced by excusing jurors until it consisted of eighteen members, nine of whom were absent acting as jurors in another case, *held*, that it was not error for the court to order the jury to be completed from the by-standers without waiting for the return of the other jurors: *State v. McCahill*, 72-111.

5782. Number. 4397. The jury consists of twelve men accepted and sworn to try the issue. [R., § 4759; C., '51, § 2971.]

Where it appeared that the jury, after being impaneled, were sworn "the truth to speak upon the issues joined," *held*, that the oath was sufficient: *Wrocklege v. State*, 1-167.

See, further, notes to § 5805.

As to trial by less than twelve, see notes to § 5735.

CHAPTER 26.

OF CHALLENGING THE JURY.

5783. Challenge. 4398. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror. [R., § 4760; C., '51, § 2972.]

5784. No severance. 4399. When several defendants are tried together, they are not allowed to sever their challenges, but must join therein. [R., § 4761; C., '51, § 2973.]

5785. To panel. 4400. A challenge to the panel can be interposed only on the ground that they were not selected, drawn, or summoned as prescribed by law. [R., § 4762; C., '51, § 2974.]

It is not a ground for a challenge to the panel that the jurors may have heard the evidence in a preliminary inquiry, under § 6018, as to the prisoner's sanity: *State v. Arnold*, 12-479.

5786. When and how taken. 4401. A challenge to the panel must be taken before a challenge to any individual juror, and must be in writing, specifying distinctly and plainly the facts constituting the ground of challenge. [R., § 4763; C., '51, § 2975.]

A challenge to the panel cannot be made after challenges to individual jurors: *State v. Davis*, 41-311.

If a venire is returned so as to show its defects, the defendant must ascertain the facts as they really exist, and make any challenges to the panel which he intends to raise, before challenging individual jurors: *State v. Bryan*, 40-379.

5787. Trial of challenge. 4402. A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons,

may be examined to prove or disprove the facts alleged as the ground of the challenge. [R., § 4764; C., '51, § 2976.]

This section does not provide how the officer whose irregularity is complained of shall be examined, and the court may require that such examination be by affidavit, and refuse to hear oral evidence: *State v. Linde*, 54–139.

5788. Effect of allowance. 4403. If the facts of the challenge be allowed by the court, the jury must be discharged so far as the trial of the indictment in question is concerned. If it be disallowed, the court shall direct the jury to be impaneled. [R., § 4765; C., '51, § 2977.]

5789. To individual juror. 4404. A challenge to an individual juror may be taken orally, and is either:

1. For cause;
2. Peremptory. [R., § 4766; C., '51, § 2978.]

5790. For cause. 4405. A challenge for cause may be made, either by the state or by the defendant; it must distinctly specify the facts constituting the causes of challenge, and may be made for any of the following causes:

1. A previous conviction of the juror of a felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body, as render him incapable of performing the duties of a juror;
4. Affinity or consanguinity, within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;
5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or in his employ on wages;
6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against, or accused by him, in a criminal prosecution;
7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;
8. Having served on a trial jury, which has tried another defendant for the offense charged in the indictment;
9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it;
10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;
11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;
12. Because of his being bail for any defendant in the indictment;
13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;
14. Because he is, or, within a year preceding, has been engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, and when the defendant is indicted for a like offense;
15. Because he has been a witness, either for or against the defendant, on

the preliminary trial or before the grand jury. [R., §§ 4767–71; C., '51, §§ 2982–86.]

[The word "indicted," in the second line of ¶ 13, is not in the original rolls, but is retained as in the printed Code, as having probably been inserted by the editor.]

Qualifications: See §§ 305–323 and notes.

Having served on a jury in the trial of another defendant: The provision of this paragraph refers to cases where two or more defendants have been jointly indicted for the same offense, and have had separate trials: and not to cases where two defendants are separately indicted, although the offenses may be of the same kind: *State v. Sheeley*, 15–404; *State v. Leicht*, 17–28.

Having formed or expressed an opinion: Under the provisions of this section, an opinion of a juror in regard to some of the transactions involved in the case is not sufficient to disqualify him. In order to disqualify, the opinion must be as to the guilt or innocence of the prisoner: *State v. Bryan*, 40–379.

Having formed and expressed an opinion as to the killing, in a case of homicide, is not sufficient: *State v. Thompson*, 9–188.

Having formed a hypothetical opinion, based upon rumors, but which would not prevent the juror from rendering a true verdict upon the evidence, will not disqualify him: *State v. Ostrander*, 18–435, 451.

The opinion that defendant is guilty or innocent, which is good ground of challenge, is an unqualified opinion. If the opinion is qualified by the conditions that if what the juror has heard about the case is true, then defendant is guilty or not guilty, the opinion is a qualified one, and does not render the juror incompetent: *State v. George*, 62–682.

Where a juror stated that he had no bias or prejudice against the prisoner (who was an Indian), but merely had heard reports, which he believed, that some Indians had done the deed for which the Indian was on trial; and that the act done was wrong, unless done in self-defense, *held*, that this was not such ground as to exclude him from sitting as a juror: *Waukon-chaw-neek-kaw v. United States*, Mor., 532.

Where the juror stated that he had formed and expressed an opinion upon rumor, but that he had no ill-will or prejudice against defendant, and no personal knowledge of the circumstances of the case; and that his opinion was conditional; and if what he had heard was true he had formed an opinion, and if what he had heard was untrue he had not formed an opinion, *held*, that the juror was subject to challenge for cause: *Trimble v. State*, 2 G. Gr., 404.

Where a juror stated that he had not formed an unqualified opinion; that if what he had heard should be proved he had an opinion made up, but that he thought he had no prejudice or bias, etc., *held*, that he was not disqualified: *State v. Sater*, 8–420.

The juror having testified that he has formed and expressed an unqualified opinion, etc., should not be required to state whether it is for or against the prisoner in order to render him subject to challenge for cause: *State v. Shelledy*, 8–477.

Where, in a prosecution for nuisance in using a building for illegal sale of intoxicating liquors, the juror testified that he was opposed to the business of saloon-keeping and to the law regulating the sale of intoxicating liquors, but that as long as the law stood he was not prejudiced against a man for selling beer or wine, *held*, that he was a competent juror: *State v. Nelson*, 58–208.

Where a juror stated that he had read an account of the matter (a murder) in the papers at the time it occurred, and came to the conclusion that defendant shot the deceased, and that it was a criminal thing for him to do, etc., but also stated that he had no bias against the defendant, and believed he could fairly and without prejudice determine upon the testimony the guilt or innocence of defendant, irrespective of what he had read, *held*, that it was not error to refuse to sustain a challenge for cause: *State v. Bruce*, 48–530. And see *State v. Lawrence*, 38–51: *State v. Sopher*, 70–494.

A juror cannot be said to have formed an unqualified opinion when the opinion he has formed is based upon hearsay and not upon statements made by any one claiming to have personal knowledge, and he still thinks that he can render a true verdict: *State v. Ormiston*, 66–143.

Where a juror testified that he had neither formed or expressed such an opinion as would prevent him from rendering a true verdict, *held*, that he was qualified, although on examination he said that he had an unqualified opinion, it appearing, however, that the juror adhered to the belief that he had no opinion which would prevent him from rendering a true verdict according to the evidence: *State v. Vatter*, 71–557.

Persons who have not formed or expressed such an opinion as would preclude them from rendering a true verdict upon the evidence submitted on the trial are not disqualified: *State v. Smith*, 73–32.

Implied bias: The fact that a juror is a member of an association for the prosecution of persons generally who may be arrested for horse-stealing is not a ground for challenge upon the trial of a defendant charged with that crime: *State v. Wilson*, 8–407.

The fact that a juror is a resident of the city does not disqualify him to sit on a jury for the trial of a person for violation of a city ordinance: *State v. Wells*, 46–662.

Time of objection; new trial: If the juror is examined on oath at the proper time as to whether he has formed or expressed such an opinion as will disqualify him, and answers falsely with reference thereto, that fact being shown, may be a ground for a new trial, but such ground cannot be urged unless the witness has been interrogated with respect thereto at the proper time: *State v. Shelledy*, 8–477, 508.

Waiver: In accepting the jury, defendant waives an objection thereto for bias or prejudice, but if either of the jurors was disqualified to act as such, he does not waive his right of objection for this cause, but may make it a ground for new trial, unless he knew at the

time the jury was sworn of the fact of disqualification: *State v. Groome*, 10-308.

Effect of disqualification: A judgment upon the verdict rendered by a disqualified jury is erroneous, but not void. It may be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

Error without prejudice: Where defendant does not exhaust all his peremptory challenges, any error in overruling a challenge to a juror for cause will be considered as error without prejudice: *State v. Elliott*, 45-486.

Failure of the court to sustain a challenge for cause to a juror who does not sit as one of the jurors on the trial will not constitute reversible error where it appears that defendant's peremptory challenges were not all exhausted when the jury was finally sworn: *State v. Davis*, 41-311

And see notes to § 3978.

5791. Exemption. 4406. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted. [R., § 4772; C., '51, § 2987.]

See § 3984 and note.

5792. Juror examined. 4407. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answers shall not afterwards be testimony against him. [R., § 4773; C., '51, § 2988.]

It is not proper for counsel to ask a juror whether he has formed or expressed an opinion as to a certain supposed defense: *State v. Arnold*, 12-479.

The proper method in examining a juror is to direct the investigation to the general question of opinion as to the guilt or innocence of the prisoner. The purpose of the inquiry is to ascertain the existence or non-existence of actual bias. Counsel may direct the inquiry so as to prove to the mind of the jury facts, circumstances, and even hypothetical cases, and thus fully present his right to challenge for cause: *Ibid.*

Where the juror has been challenged for cause it is within the discretion of the court to allow the opposite party the privilege of recalling him for cross-examination as to his qualifications: *State v. Shelledy*, 8-477, 503.

5793. Other witnesses. 4408. Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge. [R., § 4774; C., '51, § 2989.]

5794. Court determine. 4409. In all challenges the court shall determine the law and the fact, and must either allow or disallow the challenge. [R., § 4775; C., '51, § 2990.]

5795. Order of challenges for cause. 4410. The state shall first complete its challenges for cause, and the defendant afterwards. [R., § 4776.]

5796. Peremptory challenges. 4411. After twelve jurors have been obtained, against whom no cause of challenge has been found to exist, peremptory challenges may be made. [R., § 4777.]

5797. Defined. 4412. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him. [R., § 4778; C., '51, § 2980.]

5798. Number. 4413; 22 G. A., ch. 39. If the offense charged in the indictment is or may be punishable with death, or imprisonment for life; the state and defendant are each entitled to ten peremptory challenges; if any other felony to six each; and if a misdemeanor to three each. [10 G. A., ch. 10, § 1.]

5799. Order of peremptory challenges. 4414; 22 G. A., ch. 39. The state shall be entitled to the first challenge, and shall challenge one juror, the defendant shall be entitled to the second challenge, and shall challenge one juror, the state shall be entitled to the third challenge, and shall challenge one juror, the defendant shall be entitled to the fourth challenge and shall challenge one juror; and so on alternately until all the challenges are exhausted. [10 G. A., ch. 10, § 2.]

The fact that the state waives the first peremptory challenge does not defeat the right of defendant to exercise his peremptory challenges: *Smith v. State*, 4 G. Gr., 189.

As to order of peremptory challenges under prior statute, see *State v. Pierce*, 8-231; *State v. Shelledy*, 8-477, 504.

As to order of challenges in civil cases, see § 3978 and notes.

That error in ruling for cause is waived by failure to exhaust peremptory challenges, see notes to § 5790.

5800. Order of different kinds. 4415. The challenges of either party need not be all taken at once, but separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;
2. To an individual juror, for cause;
3. To an individual juror, peremptorily. [R., § 4781.]

5801. Vacancy filled. 4416. After each challenge which is allowed, the vacancy occasioned thereby shall, if required, be filled before any further challenge is made, and any new juror thus introduced may be challenged for cause, as well as peremptorily, if the peremptory challenges are not exhausted. [R., § 4782.]

5802. Jury sworn. 4417. No juror shall be sworn to try the issue until twelve jurors are accepted. [R., § 4783.]

5803. Bias in favor of party. 4418. Bias in a juror against either party is no cause of challenge by the other. It may be waived by the party against whom it exists. [R., § 4784.]

CHAPTER 27.

OF THE TRIAL OF AN ISSUE OF FACT IN AN INDICTMENT.

5804. Continuances. 4419. The provisions of the code of civil practice, relative to the continuances of the trial of civil causes, shall apply to the continuance of criminal actions, except that no judgment for costs shall be rendered against a defendant in a criminal action on account of such continuance, and except as in this code otherwise provided; and except that the defendant shall, if he, upon entering his plea demand it, be entitled to three days in which to prepare for trial.

Under a statutory provision, not now in force, as to the time of trial in criminal proceedings, *held*, that until the time fixed by law, or by the court in accordance with the provisions of statute, defendant could not be legally compelled to go to trial or show cause for continuance: *State v. Harris*, 33-356.

Defendant is not entitled, as a matter of right, to a continuance of a case to the term next after that at which the indictment is found: *State v. Arnold*, 12-479.

In a criminal case the state as well as defendant is entitled to reasonable opportunity to procure its witnesses and be prepared for trial; and where a proper application for a continuance is made by the state with sufficient showing of diligence, it should be granted: *State v. Painter*, 40-298.

When defendant during the trial dismissed his counsel, and had new counsel appointed by the court to defend him, *held* not error to refuse continuance of several days on such appointment, no ground for the dismissal appearing of record, and defendant's guilt being conclusively shown: *State v. House*, 55-466.

The time during the term at which the defendant shall be put upon his trial rests wholly in the sound discretion of the judge, and the fact that the court upon application of the prosecution passes the case to a later day of the term will not constitute error in the absence of any showing of abuse of discretion or prejudice: *State v. Maher*, 74-77.

See, further, §§ 3956, 3957, and notes.

5805. Order of trial. 4420; 17 G. A., ch. 19. The jury having been impaneled and sworn, the court must proceed in the following order:

1. The clerk or district [county] attorney must read the indictment and state the defendant's plea to the jury, and the district [county] attorney may briefly state the evidence by which he expects to sustain the indictment.

2. The attorney for the defendants may then briefly state his defense, and the evidence by which he expects to sustain it.

3. The state may then offer the evidence in support of the indictment.

4. The defendant or his counsel may then offer his evidence in support of his defense.

5. The parties may then respectively offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case.

6. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the district [county] attorney must commence, the defendant follow by one or two counsel at his option, unless the court shall permit him to be heard by a larger number, and the district [county] attorney conclude, confining himself to a response to the arguments of the defendant's counsel; *provided*, that where two or more defendants are on trial for the same offense, they may be heard by one counsel each; *and, provided further*, that the court, when the affirmative of the issue is with the defendant, may, in its discretion, award to the defendant the last argument.

7. The court shall then charge the jury in writing, without oral explanation or qualification. [R., § 4785; C., '51, § 2991.]

Administering oath to jury: No form of oath to the jury is prescribed by the statute; and, in the absence of a record showing the contrary, it will be presumed that the oath administered was in due form: *State v. Ostrander*, 18–435, 452.

Where the record recited that "the jury were duly impaneled and sworn to try the case (naming it), and a true verdict give therein, according to the evidence and the best of their ability," *held*, that even if that was literally the oath administered it was sufficient: *Ibid.*

Where it appeared that after being impaneled the jury were sworn "the truth to speak upon the issues joined," *held*, that the oath was sufficient: *Wrocklege v. State*, 1–167.

Under the provisions of the Code of '51, *held*, that the oath administered to the jury requiring them "the truth to speak," without including the direction "to try the issues joined," was not sufficient: *Dixon v. State*, 4 G. Gr., 381.

Under the provisions of the Revised Statutes of 1843 requiring an oath in a particular form, *held*, that where the record recited that the jury were sworn "the truth to speak" upon the issues joined between the parties, which was much less formal and solemn than the oath required by statute, such irregularity was sufficient to warrant the reversal of a conviction for murder: *Harriman v. State*, 2 G. Gr., 270.

Method of impaneling: It is too late, after the verdict, to object to the manner of impaneling the jury when no objection was made on the trial: *Ibid.*

Dismissing juror: It is error, after the jury has been impaneled and the trial commenced, to dismiss a juror and substitute another in his place, even though the juror dismissed has been guilty of misconduct which would vitiate a verdict of guilty if rendered in such proceeding. In such a case of misconduct the jury should be dismissed and the trial commenced anew: *Grable v. State*, 2 G. Gr., 559.

Order of trial: The order here specified may be varied by the court in the exercise of lawful discretion: *State v. Flynn*, 42–164; *State v. Falconer*, 70–416.

Right to open and close, on plea of former conviction or acquittal, see § 5807.

Opening statement for prosecution: Statements by the district attorney, in opening the case to the jury, of facts which he expects to prove, and which if proved would be material and competent, may be made by him, if in good faith, believing and having good reason to believe he will be able to sustain them by evidence, although he is afterward unable to obtain evidence to sustain some of them: *State v. Meshek*, 61–316.

Before the enactment of the amendment to this paragraph, the court might, in its discretion, allow the district attorney to make a statement of the case to the jury, and the only effect of such provision is to secure, as a matter of right, what the court might, in its own discretion, have granted or refused: *State v. Bateman*, 52–604.

In a particular case, a lengthy statement, which was made by prosecuting attorney, of the evidence which it was expected would be introduced, and was followed by an unfair argument of the case based to a considerable extent upon facts which were wholly unsubstantiated by the evidence afterward introduced, was held sufficient misconduct to require a reversal, the defendant having objected to the remarks of the prosecuting attorney at the time; and further *held*, that the fact that attorney for defendant replied to his opening argument in the same manner, did not render the action of the prosecuting attorney error without prejudice: *State v. Williams*, 63–135.

The fact that by oversight the prosecution introduces its evidence before the indictment is read and the opening statement made will not constitute ground of reversal, such irregularity being waived by failure to interpose an objection to the introduction of evidence before the reading of the indictment: *State v. Norton*, 67–641.

Additional counsel for prosecution: The practice of allowing district attorneys to have the assistance of associate counsel has been too long acquiesced in, in this state, to be called in question. There can be no objection to leaving the matter of allowing associate counsel to the discretion of the court and prosecuting attorney: *State v. Fitzgerald*, 49–260.

It is entirely proper, with the consent of the prosecuting attorney, that other counsel be employed to assist in the prosecution, and such counsel may be employed by the prosecuting witness for that purpose: *State v. Montgomery*, 65–483.

That the district attorney, at his own request, is assisted in the prosecution by another attorney, is not a ground of objection on the part of defendant: *State v. Ormiston*, 66–143.

Burden of proof: See notes to § 5813.

Order of calling witnesses: While § 4006 does not apply to criminal cases, yet under some circumstances, and for some purposes, a witness may be called after the evidence is closed, and where no prejudice is shown from such introduction of testimony it will not be a ground for reversal: *State v. Shean*, 32–88.

The order in which evidence is allowed to be introduced is a matter so much in the discretion of the court that the supreme court will not feel justified in interfering unless upon the clearest showing of prejudice; so *held* where, upon rebuttal, the prosecution was allowed to introduce evidence in chief, while upon surrebuttal by defendant evidence in chief was excluded: *State v. Bruce*, 48–530.

Where evidence is offered in rebuttal which should have been offered in chief, the court may admit it as upon the original case, if in furtherance of justice it should be so admitted. The fact that it was not ostensibly so admitted will not justify a reversal in the absence of a showing of prejudice: *State v. Curran*, 51–112.

As to what is to be deemed rebutting testimony, see *State v. Parish*, 22–284.

The court is vested with discretion to permit the introduction of evidence out of the order prescribed by this section. And in the absence of showing of abuse of such discretion, it was held not error to allow the examination of a new witness in support of the indictment after several witnesses had been examined for defendant: *State v Falconer*, 70–416. And see *State v. Flynn*, 42–164.

The state may in rebuttal support the proof before introduced by it, of the defendant's presence at the time and place of the crime, for the purpose of contradicting testimony on the part of defendant tending to show an *alibi: State v. Maher*, 74–77.

As to amount of evidence required, see notes to § 5813

Statements in argument: Statements of an attorney for prosecution in a particular case, *held* reprehensible, but not sufficient to entitle defendant to a reversal: *State v. Winter*, 72–627.

Instructions: See § 5825 and notes.

5806. Evidence for state; notice. 4421; 17 G. A., ch. 168, § 3. The district [county] attorney in offering the evidence in support of the indictment, in pursuance of the order prescribed in the last section, under the second subdivision thereof, shall not be permitted to introduce any witness who was not examined before the grand jury, and the minutes of whose testimony was not taken by the clerk of the grand jury, and presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. *Provided*, that whenever the district [county] attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice, because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the name, place of residence, and occupation of the witnesses he desires to introduce, and the substance of what he expects to prove by said witnesses, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustain said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the district [county] attorney may examine said witness in the same manner and with same effect, as though four days' notice thereof had been given defendant as hereinbefore provided, except that the district [county] attorney, in the examination of said witnesses, shall be strictly confined to the matters set out in his motion. [R., § 4786.]

[The words "four days," in the ninth line, are "three clear days" in the original rolls, but the former are retained here, as in the printed Code, the change having probably been made by the editor. See note to § 5869 as to similar change.]

Witnesses whose names are not indorsed on the indictment cannot be introduced by the prosecution: *Smith v. State*, 4 G. Gr., 189; *Ray v. State*, 1 G. Gr., 316.

It is error to allow the prosecution to examine a witness not examined before the grand jury (without notice, etc.), although the name of such witness is indorsed on the indictment, and what appear to be minutes of her testimony are attached thereto: *State v. Porter*, 74-623.

What sufficient indorsement: Variance between the name of a witness as indorsed on the indictment, and his true name, is not a valid objection, unless defendant is misled thereby: *State v. Ostrander*, 18-435, 459.

In a particular case, *held*, that the difference between the name of the witness as indorsed upon the indictment, and his real name, was so slight as not to justify his exclusion: *Houston v. State*, 4 G. Gr., 437.

The fact that an indorsement on the indictment gives the initials only of the witness' Christian name will not render it improper to allow such witness to testify: *State v. Pierce*, 8-231; *State v. Schlagel*, 19-169.

Where, in indorsing the name of the witness on the back of an indictment, his title, instead of his Christian name, was used, *held* that, if the witness was as unmistakably described as he would have been by the use of his Christian name, the object of the indorsement was accomplished, and no prejudice could result to defendant from allowing the witness to be called: *State v. McComb*, 18-43.

A mistake in the initials of a witness whose name, is indorsed will not, in the absence of any showing of prejudice, be sufficient ground for objecting to his testimony: *State v. Stanley*, 33-526.

The indorsement is not the only evidence to be received on the question of identity of the witness called with the one who was examined before the grand jury. The minutes of evidence may be examined in determining that question, and such minutes, being a part of the record, need not be formally introduced in evidence; and where the name of the witness indorsed was "Mrs. Hutzel," and it appeared that the witness called was Mary E. Hutzel, *held*, that it would be presumed, in favor of the action of the court in allowing such witness to testify, that it appeared from the minutes that the person called was the person who was examined before the grand jury: *State v. Briggs*, 68-416.

Failure to indorse on the back of the indictment the name of a witness examined before the grand jury, and the minutes of whose evidence are returned, is not a ground for excluding his testimony; such defect can only be reached by motion to set aside the indictment: *State v. Fowler*, 52-103; *State v. Flynn*, 42-164.

A continuance being granted after the commencement of the trial, the ground therefor being an application by the district attorney showing discovery of evidence which it was not possible to introduce by reason of the witness not having been examined before the grand jury, and no notice of its proposed introduction having been given in proper time, *held*, that this did not constitute a bar to a subsequent trial: *State v. Parker*, 66-586; *State v. Falconer*, 70-416.

Failure of the state to call any of the witnesses whose names are indorsed on the indictment is no ground for presuming that the testimony of such witnesses would be in favor of defendant: *State v. Ostrander*, 18-435, 457.

Failure of the state to produce all the witnesses that have testified before the grand jury is no wrong, and creates no presumption of wrong: *State v. Dillon*, 74-653.

Failure to file minutes: The mere failure to file the minutes returned by the grand jury should not prevent the state from introducing its evidence: *State v. Postlewait*, 14-446.

Nor should the fact that minutes of the evidence as taken before the committing magistrate are not properly certified to: *State v. Kepper*, 65-745.

In the examination of a witness the minutes of whose testimony were taken by the grand jury and returned with the indictment, the prosecuting attorney is not limited to the testimony given by the witness before the grand jury, but may examine him as to other matters not therein referred to: *State v. Bowers*, 17-46; *State v. Ostrander*, 18-435; *State v. McCoy*, 20-262.

The mere brevity of the minutes of the witness' testimony taken by the grand jury will not justify the entire exclusion of the testimony of such witness: *State v. Van Vleet*, 23-27.

Where the indictment is found upon minutes of testimony taken before a magistrate, as provided by § 5672, and the names of the witnesses examined by such magistrate are indorsed on the back of the indictment, they may then be called to testify by the prosecution without having been examined by the grand jury: *State v. Rodman*, 62-476.

Other witnesses: This section applies only to evidence in support of the indictment, and does not preclude the testimony of other witnesses who were not before the grand jury, and whose evidence is not returned with the indictment, as to the fact that a certain witness testified before the grand jury: *State v. Fowler*, 52-103.

The state may call, in rebuttal, witnesses whose names are not indorsed on the indictment, and who were not examined before the grand jury: *State v. Parish*, 22-284; *State v. Gillick*, 10-98; *State v. Ruthven*, 58-121; *State v. Rivers*, 68-611.

If defendant becomes a witness in his own behalf, witnesses to impeach him may be called who were not examined before the grand jury, without serving notice of the intention to call them: *State v. Teeter*, 69-717.

The notice: Under this section it is sufficient that the notice be served upon defendant personally. The mode of service or authentication is not prescribed. Authentication by the person making the service is sufficient: *State v. Ostrander*, 18-435, 452.

The return of the sheriff without verification is sufficient to show service of the notice: *State v. Pugsley*, 75-742.

The purpose of the statute is to secure to the accused such knowledge of the evidence which will be given against him as will enable him to make proper preparation to contradict or explain it. But errors in such notice as to the witness' place of residence, or the facts expected to be proved by him, will not render

the introduction of the testimony of the witness erroneous where the defects or mistakes in the notice are not prejudicial: *State v. Rainsbarger*, 74–196.

Waiver of objection: That witnesses are examined whose names are not on the indictment cannot be raised as an objection for the first time after conviction: *Ray v. State*, 1 G. Gr., 316; *State v. Houston*, 50–512.

Objection to the introduction of a witness by the prosecution whose name is not indorsed on the indictment, and without previous notice, may be waived: *State v. Ward*, 73–532.

For requirements as to indorsement of names of witnesses on the indictment, and the return of the minutes of evidence, see, further, § 5676 and notes.

Failure to so indorse names of witnesses, or return minutes of evidence, is ground for setting aside the indictment: See § 5722 and notes.

5807. Opening and closing by defendant. 4422. When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second and third subdivisions of the section immediately preceding the last, shall be reversed, and the defendant shall first offer his evidence in support of his defense. [R., § 4787.]

As to burden of proof of affirmative defenses, see notes to § 5813.

5808. Time of argument. 4423. The court shall not restrict counsel as to time in their arguments. [R., § 4788.]

5809. Separate trials. 4424. When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court. [R., § 4789; C., '51, § 2992.]

When defendants jointly indicted for a felony elect to be tried separately, the order in which they shall be tried rests with the district attorney, under the direction of the court: *State v. Hudson*, 50–157; *State v. Nash*, 7–347, 373.

Where defendants are jointly indicted for a misdemeanor they may be tried jointly or separately in the discretion of the court: *State v. Gigher*, 23–318.

And the state, as well as defendants, in such case may ask for a separate trial: *State v. Marvin*, 12–499.

Where the offense is not felony it is within the discretion of the court to refuse a separate trial: *State v. Kirkpatrick*, 75–505.

Whether tried separately or jointly, either one of the co-defendants is a competent witness for the other: *State v. Nash*, 10–81; *State v. Gigher*, 23–318.

In case of a joint trial one co-defendant is a competent witness for the other, the jury being properly cautioned that the evidence is not to be considered in behalf of the defendant so testifying: *State v. Stewart*, 51–312.

Whether defendants be jointly or separately tried, a separate judgment is to be entered up as to each, and the clerk is entitled to a fee for the entry of each separate judgment; but where tried jointly he is entitled to but one trial fee: *State v. Hunter*, 33–361.

Acquittal of one of two defendants jointly indicted does not bar the prosecution of the other. One may be found guilty and the other acquitted: *State v. McClintock*, 1 G. Gr., 392.

Where defendants are jointly indicted, and the evidence shows that if both are guilty they are guilty of distinct offenses committed in separate transactions, the court should require the prosecution to elect upon which transaction it will proceed: *State v. Brown*, 58–298.

Two persons may be jointly indicted for the same crime without alleging that one is principal and the other accessory; or that either one was more directly the perpetrator of the act than the other: *State v. Zeibart*, 40–169.

5810. Conspiracy; overt act. 4425. Upon a trial for a conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts not alleged in the indictment may be given in evidence. [R., § 4790; C., '51, § 2996.]

5811. Rules of evidence. 4426. The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided. [R., § 4805.]

See §§ 4886 and 5954 and notes.

5812. Confession of defendant. 4427. The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. [R., § 4806.]

What constitutes confession: The term "confession" as here used does not include admissions or declarations by the defendant: *State v. Schaunhurst*, 34–547.

The mere statement of a defendant accused of forgery that he wrote the name alleged to be forged is not sufficient to constitute a confession. To have such effect the admission must be that the writing was with fraudulent intent: *State v. Knowles*, 48–598.

In a prosecution for murder, *held*, that certain admissions of defendant that he was with deceased at or near the time and place of the commission of the crime were receivable in evidence, but that it was erroneous to consider them as confessions of guilt, and to instruct the jury on that basis: *State v. Glynden*, 51–463.

A confession of guilt is an admission of the criminal act itself, not an admission of the facts or circumstances from which guilt may be inferred. Statements of facts tending to show defendant's guilt are not to be treated as confessions: *State v. Red*, 53–69.

The admission of a person suspected of a crime that he has lied in relation to the matter is not a confession of guilt, but a circumstance against him, which may be shown in evidence: *State v. Feltes*, 51–495.

It is error to instruct the jury with reference to statements of defendant on the theory that they constitute confessions, when they are not admissions or acknowledgments of agency or participation in the commission of the crime, although they are such as, in connection with other facts and circumstances, warrant a conviction of guilt: *State v. Jones*, 33–9.

Voluntary confessions: Evidence of a confession should be examined with care, but when it is clearly established, whether made in the presence of the prosecutor or his friends, or to one person alone, if made voluntarily, it is entitled to the highest credit and greatest weight as evidence: *State v. Brown*, 48–382.

In order to exclude a confession as involuntary there must be some promise made or inducement held out, or injury threatened, otherwise it may be received in evidence: *State v. Fortner*, 43–494.

Facts considered and *held* not to show that the confession in question was made under such threats as to invalidate it: *State v. Ostrander*, 18–435.

Where an officer testified to conversations of defendant while in his custody, *held*, that it was not error to refuse evidence to the effect that defendant was ironed and harshly treated, it not being claimed that the treatment influenced the conversation: *State v. Sullivan*, 51–142.

Admissions which were freely and voluntarily made by the defendant to the officer having him in custody, and were not influenced by hope or fear, may be shown in evidence: *State v. Sopher*, 70–494; *State v. McLaughlin*, 44–82.

Involuntary confessions: Confessions drawn from a person by hope or fear are inadmissible as evidence against him, and the jury should be directed without qualification to disregard them: *State v. Fidment*, 35–541.

A confession in order to be admissible must be free and voluntary; not extracted by any sort of threats, nor obtained by promises, however slight; nor by the exertion of any improper influence. If a confession has been obtained by undue influence, any statement afterwards made under the influence of that confession cannot be admitted: *State v. Chambers*, 39–179.

Mental condition at time of making confessions: Where defendant had introduced evidence as to his condition at the time of making certain confessions with reference to being intoxicated at that time, which evidence it was claimed indicated *delirium tremens*, *held*, that it was error to exclude the opinion of an expert as to the mental condition indicated by the proven facts: *State v. Feltes*, 51–495.

While it is proper that evidence as to the condition of defendant at the time of making a confession should go to the jury, he cannot insist upon being allowed to introduce such evidence before the confession itself is testified to. The time when the jury are made acquainted with his condition is immaterial: *Ibid.*

Question for the court: Whether confessions proposed to be introduced in evidence against a prisoner were voluntarily made, or were extorted through hope or fear caused by inducements held out to him, is a question to be determined by the court upon preliminary evidence: *State v. Fidment*, 35–541.

Corroboration necessary: Under this section a confession not made in open court will not warrant a conviction unless there is other proof that the offense charged has in fact been committed: *State v. Turner*, 19–144.

Where every other ingredient of a crime was established by other evidence, except the falsity of certain representations which were shown to have been made, and it appeared that defendant did not act in accordance with such representations, *held*, that voluntary confessions out of court of such falsity were sufficient, without other evidence thereof, to warrant conviction: *State v. Lewis*, 45–20.

Under the facts of a particular case, *held*, that the *corpus delicti* was not proven aside from defendant's confessions out of court, and the conviction was therefore reversed: *State v. Dubois*, 54–363.

The evidence in a particular case *held* to be sufficiently corroborative of the confession of defendant to warrant a conviction: *State v. Feltes*, 51–495.

In a civil action, a confession alone will not be sufficient proof of the commission of a crime: *Georgia v. Kepford*, 45–48, 52.

5813. Reasonable doubt. 4428. Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal. [R., § 4807.]

Reasonable doubt: For a definition of reasonable doubt, see *State v. Ostrander*, 18–435, 458.

If the jury in considering the whole case have reasonable doubt upon any essential ingredient of the offense, this entitles the defendant to an acquittal because it generates a doubt of guilt: *State v. Hennessy*, 55–299.

The general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the elements of the crime or facts of the case: *Ibid.; State v. Cross*, 68-180; *State v. Maloy*, 44-104.

It is not a reasonable doubt of any one proposition of fact which entitles to an acquittal, but a reasonable doubt of guilt arising upon the consideration of all the evidence in the case: *State v. Hayden*, 45-11.

The doctrine of reasonable doubt is wisely limited to the general conclusion of guilty or not guilty upon all the evidence in the case. It cannot safely be applied to any one fact in the case, howsoever material it may be, as, for instance, insanity: *State v. Felter*, 32-49.

It is error to distinguish between two material facts and instruct as to one that it need only be fully and clearly proven: *State v. Stewart*, 52-284.

An hypothesis which will be sufficient to sustain a reasonable doubt must arise out of the evidence adduced and not out of facts of which there is no proof: *State v. Porter*, 34-131.

The court is not required to charge that the jury should acquit if they have a reasonable doubt as to a specified element of the crime. It is sufficient to instruct them generally that they should acquit if upon the whole case they have such a doubt of the guilt of defendant: *State v. Curran*, 51-112; *State v. Stewart*, 52-284.

An instruction to the effect that if, after carefully weighing all the evidence and deliberately considering the whole case, the jury had a reasonable doubt of the guilt of defendant, they should return a verdict of not guilty, *held* sufficient; and *held* also that the rule as to reasonable doubt need not be repeated in other instructions: *State v. Miller*, 53-154.

It is error to instruct that a preponderance of evidence in behalf of defendant is necessary to raise a reasonable doubt of guilt: *State v. Porter*, 64-237.

The following instruction to the jury as to reasonable doubt *held* proper: "Before you will be justified in convicting the defendant you must be satisfied of his guilt beyond a reasonable doubt:" *State v. Helvin*, 65-289.

Instructions as to reasonable doubt *held* sufficient in particular cases: *State v. Sterling*, 34-443; *State v. Bodeker*, 34-520; *State v. Pierce*, 65-85; *State v. Elsham*, 70-531.

Reasonable doubt of individual jurors: It is a reasonable doubt entertained by the jury and not by any one member thereof that justifies an acquittal: *State v. Rorabacher*, 19-154.

An instruction that a reasonable doubt must be one that arises in the minds of the whole jury, *held* erroneous, as liable to convey the impression that unless such doubt was shared by all the jurors there should be a conviction: *State v. Stewart*, 52-284; *State v. Sloan*, 55-217.

Each juror must, under his oath, vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind: *State v. Sloan*, 55-217.

Although each juror is to act upon his own judgment, and is not required to surrender his own conviction unless convinced, yet it is not necessary that such a proposition be stated in connection with the ordinary charge in regard to reasonable doubt: *State v. Hamilton*, 57-596.

It is not necessary that the jury be advised that each juror is to act upon his own convictions, and that he should not concur in a verdict which is against his judgment: *State v. Fry*, 67-475.

In civil actions: The rule of criminal law that a defendant can only be convicted upon proof of the crime charged beyond a reasonable doubt is not applicable in a civil action to recover damages for a criminal act, and in such case the plaintiff should be allowed to recover where the criminal act is established by preponderance of evidence. (Overruling *Barton v. Thompson*, 46-30): *Welch v. Jugenheimer*, 56-11; *Wood v. Porter*, 56-161; *Lewis v. Garretson*, 56-278; *Barton v. Thompson*, 56-571: *Kendig v. Overhulser*, 58-195.

So *held* in an action on an insurance policy, where it was alleged as a defense that plaintiff himself caused the fire in order to get the insurance: *Behrens v. Germania Ins. Co.*, 58-26.

In an action for false and fraudulent representations it is not necessary to prove the fact of fraud beyond a reasonable doubt, although intentional fraud might constitute a crime under the statute: *Fiville v. Shehan*, 68-241.

Mere preponderance of evidence is sufficient to establish a fraudulent alteration of an instrument in writing: *Coit v. Churchill*, 61-296.

In actions for slander or libel in charging plaintiff with the commission of a crime, if defendant seeks to justify by pleading the truth of the charge, a preponderance of evidence of the commission of the crime is sufficient to support his defense. The criminal act need not be proven, as in criminal cases, beyond a reasonable doubt. (Overruling *Bradley v. Kennedy*, 2 G. Gr., 231; *Forshee v. Abrams*, 2-571; *Fountain v. West*, 23-9; *Ellis v. Lindley*, 38-461; *Mott v. Dawson*, 46-533): *Riley v. Norton*, 65-306.

Bastardy proceedings: The rule of criminal law requiring proof beyond a reasonable doubt is not applicable in favor of defendant in a bastardy proceeding: *State v. McGlothlen*, 56-544.

Amount of evidence: In criminal cases the jury do not weigh the evidence as in civil cases. Neither a preponderance of evidence nor any weight of preponderant evidence is sufficient to warrant a conviction in a criminal case unless it generates a full belief of the guilt of the party charged, to the exclusion of all reasonable doubt: *Tweedy v. State*, 5-433.

Sufficiency of evidence: While the juror is not an artificial being whose judgment is to be governed by technical and artificial rules, but is a man, and should, while acting as juror, act as a man, exercising his reason, his intelligence, his every-day judgment and his common sense, yet it is erroneous to charge that he is not at liberty to disbelieve as a juror while he believes as a man: *State v. Collins*, 20-85.

But error in using such language was held not sufficient to warrant a reversal where the case was otherwise fairly presented and the

evidence of guilt was satisfactory: *State v. Pratt*, 20–267.

It is improper to instruct the jury that what satisfies the mind outside of the jury-box should do so within it. Information derived from the evidence which might be sufficient to lead a person not acting as a juror to a belief of defendant's guilt might not be sufficient to justify a verdict of guilty by such juror: *State v. Ruby*, 61–86.

Burden of proof as to affirmative defenses: Any negative matter, such as the absence of self-defense, the want of sufficient provocation, etc., must be shown by the state, and defendant cannot be held to have the burden of proof cast upon him to show such matters. But whenever the matter of defense is wholly disconnected from the body of the offense charged (for instance, where in homicide it is claimed that the death is caused by neglect of a wound), this general rule does not properly apply, but in such cases the burden of proof rests upon the accused: *State v. Morphy*, 33–270.

Burden does not shift: It is error to instruct the jury that if evidence on the part of the state, alone and unexplained, would establish beyond a reasonable doubt the guilt of the defendant, then the burden of proof is shifted to the defendant to establish his defense by a preponderance of evidence: *State v. Porter*, 64–237.

Burden of proof as to proviso: The burden of proving an exemption under a proviso rests upon the party claiming it: *Sayre v. Wheeler*, 31–112.

As to pleading exception or proviso, see notes to § 5689.

Burden of proof as to insanity: Where insanity is sought to be established as an excuse for a crime, the presumption of sanity must be overcome by a preponderance of evidence. It is not sufficient for defendant to produce such evidence as to raise a reasonable doubt of sanity, nor is he, on the other hand, required to prove the insanity beyond a reasonable doubt: *State v. Felter*, 32–49; *State v. Bruce*, 48–530.

A preponderance of evidence of insanity raises a reasonable doubt of guilt: *Ibid.*

The burden of proving insanity rests upon the defendant, and he must overcome by a preponderance of evidence the proof of sanity on behalf of the prosecution: *State v. Geddis*, 42–264.

As to the defense of insanity as well as that of *alibi*, the burden of proof is upon defendant: *State v. Hemrick*, 62–414.

While the burden of proving insanity as a defense is upon defendant, he is only required to establish such defense by a preponderance of evidence. It is error to instruct the jury that if the evidence goes no further than to show such a state of mind to be possible or merely probable, it is not sufficient. The presumption of sanity simply imposes upon defendant the burden of proving insanity, and such presumption is not to be weighed against any measurable amount of evidence: *State v. Jones*, 64–349.

The fact that defendant undertakes to prove insanity does not relieve the prosecution of the burden of proving the criminal act and the criminal intent, and does not give defendant the opening and closing: *State v. Felter*, 32–49.

Burden of proving alibi: Where defendant seeks to establish an *alibi*, the burden of proof rests upon him, and it cannot be established except by a preponderance of evidence: *State v. Red*, 53–69; *State v. Rivers*, 68–611.

But this does not abrogate the doctrine that a person cannot be convicted upon a preponderance of evidence; and if a reasonable doubt arises upon the whole evidence, and upon the evidence establishing certain essential facts, or upon evidence of facts inconsistent with the prisoner's guilt, the jury should acquit. Where defendant relies upon an *alibi*, the burden of proof is upon him to establish by a preponderance of evidence the fact that he was not present at the commission of the crime: *State v. Red*, 53–69; *State v. Hamilton*, 57–596; *State v. Krewsen*, 57–588; *State v. Hemrick*, 62–414; *State v. Fry*, 67–475.

Evidence of an *alibi* cannot avail unless it preponderates: *State v. Reed*, 62–40; *State v. Rowland*, 72–327.

A bare preponderance of proof in favor of defendant, where he relies upon an *alibi*, is sufficient: *State v. Vincent*, 24–570; *State v. Northrup*, 48–583; *State v. Kline*, 54–183.

It is error in such case to charge the jury that they must be *fully satisfied* of the *alibi*: *State v. Hardin*, 46–623: *State v. Henry*, 48–493.

It is not error to instruct the jury that they may acquit if there is a fair preponderance in support of the claim of *alibi*: *State v. Johnson*, 72–393.

The jury cannot acquit on the defense of *alibi* unless it is supported by the preponderance of the evidence on that question; but if the evidence upon that defense considered alone, or in connection with all other evidence, leaves reasonable doubt in the minds of the jury of defendant's guilt, they cannot convict: *State v. Maher*, 74–77.

It is error to instruct the jury that an unsuccessful attempt to establish an *alibi* is of great weight against defendant, and implies an admission of the truth and relevancy of the facts alleged against him. It is only a fabricated or trumped-up defense of *alibi*, interposed with a knowledge of its falsity, that will constitute even a circumstance against defendant, and even that is not conclusive of his guilt: *State v. Collins*, 20–85.

It is not erroneous to instruct the jury that the defense of *alibi* is one easily manufactured, and that juries are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution: *State v. Blunt*, 59–468; *State v. Rowland*, 72–327.

The defense of *alibi* does not confess the act charged, and seek to excuse it, as in the defense of insanity; and, therefore, the absence of instructions in reference to evidence of an *alibi* is no prejudice to the defendant, and, under the general instructions as to reasonable doubt on the facts in the case, the defendant would have the advantage of all the presumption which could arise in his favor by reason of such evidence: *State v. Sutton*, 70–268.

Instructions as to *alibi* in a particular case *held* not erroneous: *State v. Butler*, 67–643.

Recent possession of stolen property: Where there was evidence of recent possession

of stolen property by defendant accused of the larceny thereof, *held* error to instruct the jury that the burden of proof was upon defendant to satisfy the jury that this possession was innocent. Less than a preponderance of evidence on that point may be sufficient to justify a reasonable doubt of defendant's guilt: *State v. Emerson*, 48–172; *State v. Kirkpatrick*, 72–500.

In such case defendant is only required to introduce sufficient evidence as to having honestly come into possession of the goods to raise a reasonable doubt of guilt: *State v. Richart*, 57–245; *State v. Hopkins*, 65–240. And see *State v. Peterson*, 67–564.

It is erroneous to instruct the jury that defendant may be convicted on proof of recent possession of stolen property unless he has established to their satisfaction that he did not steal it. It is sufficient if he raise a reasonable doubt as to his guilt in so far as that question rests alone upon the fact of his possession: *State v. Manley*, 74–561.

Possession of the stolen property immediately after a larceny is presumptive proof that the person so in possession is guilty of the larceny: *State v. Brady*, 27–126; *State v. Golden*, 49–48.

And such presumption is sufficient to convict unless rebutted: *State v. Hessians*, 50–135.

The presumption arising from the recent possession of stolen goods may be overcome by testimony establishing facts inconsistent with guilt. Good character may serve in some cases to overcome such presumption: *State v. Kelly*, 57–644; *State v. Richart*, 57–245.

The fact that recent possession of stolen property has not been explained in a manner consistent with defendant's innocence will not in itself necessarily establish his guilt: *State v. Jordan*, 69–506.

For other cases as to presumption of guilt from recent possession of stolen property, see notes to §§ 5208–5210.

Chastity of prosecutrix in seduction: The presumption being in favor of the chastity of the prosecutrix in a prosecution for seduction, defendant relying upon the want of such chastity must prove unchastity by a preponderance of evidence. It is not sufficient merely to produce such evidence as would raise a reasonable doubt of chaste character, but the evidence must be such as to overcome the presumption of chastity by a fair preponderance: *State v. Wells*, 48–671. And see *State v. Higdon*, 32–262; *Andre v. State*, 5–389.

The presumption in favor of the chastity of the prosecutrix is not a presumption against the innocence of the defendant. He is presumed innocent of the fact, but the presumption is also entertained in favor of the rectitude of her character: *Andre v. State*, 5–389.

In a civil action for seduction the burden is upon defendant to establish unchastity, but no higher evidence or greater proof is required than to establish any other fact: *West v. Druff*, 55–335.

See, further, as to evidence of chastity, § 5166 and notes; and as to corroboration of the testimony of prosecutrix in rape, seduction, etc., see § 5958 and notes.

Burden of proof as to self-defense: Proof of the homicide will not throw upon the defendant the burden of proving, by preponderance of evidence, excuse or justification arising from self-defense, where such excuse or justification is apparent from the evidence of the prosecution or from the circumstances attending the homicide: *Tweedy v. State*, 5–433.

Where in a prosecution for homicide defendant undertakes to establish that the act was done in self-defense, it is error to instruct the jury that the burden of proving the self-defense is upon him. He is entitled to acquittal if he shows by the facts attending the commission of the offense, as appearing from his own evidence or that of the prosecution, that there is a reasonable doubt that his act was wilful: *State v. Porter*, 34–131.

Where there is evidence tending to show that defendant acted in self-defense, the jury should be instructed that the burden of proof is upon the state to prove that the homicide was not committed in self-defense: *State v. Fowler*, 52–103; *State v. Cross*, 68–180.

Where defendant, in a prosecution for the crime of homicide, claims that he acted in self-defense, he is entitled to acquittal if he introduces evidence raising reasonable doubt whether the act was justifiable: *State v. Dillon*, 74–653.

Defendant's good character; for what purpose shown: General good character of accused may be shown to rebut the presumption of guilt arising from circumstantial testimony, but it does not constitute a defense: *State v. Turner*, 19–144.

Good character is admissible in all criminal cases, and the jury should not be limited in their consideration of such evidence to cases where the crime is sought to be established solely by circumstantial evidence: *State v. Kinley*, 43–294; *State v. Rodman*, 62–456.

In passing upon the guilt or innocence of defendant, evidence of good character should be considered irrespective of whether the other evidence is conclusive or inconclusive, and it is for the jury to determine what weight such evidence of character shall have: *State v. Gustafson*, 50–194.

In trials for felony, and in some instances for misdemeanors, the prisoner is always allowed to call witnesses to his good character, and in any case of doubt proof of good character will have great weight. It is a circumstance always to be submitted to the consideration of the jury, together with the other facts of the case: *State v. Nash*, 7–347, 373.

It is always permissible for defendant to show his general good character and reputation as to the trait involved in the crime charged; and where defendant was on trial for perjury, *held*, that he should be allowed to show that his general reputation was good: *State v. Kinley*, 43–294.

Evidence of good character should be restricted to the general trait which is in issue. Thus, in a prosecution for larceny, the general character for honesty may be shown, but in case of seduction, evidence of character for virtue only is admissible, and not as to good character generally: *State v. Curran*, 51–112.

Previous good character is, of itself, no de-

fense, but is a circumstance which should be considered by the jury in connection with all the other evidence and which may be sufficient to turn the scale in defendant's favor, but its value as evidence in any given case is to be determined by the jury: *State v. Donovan*, 61-278.

The jury may be instructed that, if they find good character established by the evidence, they should consider it and allow it such weight as they believe it fairly entitled to, as tending to show that men of such character would not be likely to commit the crime charged. Evidence of good character does not have a tendency to rebut the commission of the crime, except inferentially: *State v. Ormiston*, 66-143.

Character not in issue: Although defendant may give evidence of his good character, his character is not in issue except as he may put it in issue by offering evidence in support of it, and the court should not instruct the jury that, as defendant had a legal right to introduce testimony in support of his character, the fact that he failed to do so was a circumstance to be considered in determining the question of his guilt: *State v. Kabrich*, 39-277.

Failure to call a witness as to good character raises no presumption against the prisoner: *State v. Dockstader*, 42-436.

Evidence of good character on the part of defendant should be confined to the time prior to the finding of the indictment: *State v. Kinley*, 43-294.

Evidence of good conduct during confinement is not admissible to prove good character: *State v. Hart*, 29-268.

Where defendant offers a witness to testify as to his good character, the prosecution cannot, upon cross-examination, ask as to particular facts tending to show such character. The evidence must be confined to the general character or reputation: *Gordon v. State*, 3-410.

A witness as to good character of defendant may testify as to his personal observation and knowledge as to the trait of character of defendant in question, and is not limited to the general reputation of defendant in that respect in the community in which he lives: *State v. Sterrett*, 68-76.

Where a witness called by defendant to prove his good character testified that it was divided, *held*, that he might be asked on cross-examination what particular acts of defendant's life he had heard spoken of, and might state various crimes of the same character which defendant had been accused of by report during the five or six years preceding: *State v. Arnold*, 12-479.

Testimony as to good character should relate to the reputation of the defendant in the neighborhood where he lived at and before the commission of the alleged crime, the term character being used as synonymous with reputation: *State v. Ward*, 73-532.

As raising reasonable doubt: The good character of accused is for the consideration of the jury in all cases and not merely in cases of doubt, and it is for them to determine its weight; and an instruction that it is a circumstance of slight weight and entitled to but little consideration when the proof is clear is erroneous. If reasonable doubt of defendant's guilt is generated by proof of good character, defendant should be acquitted: *State v. Northrup*, 48-583; *State v. Fitzgerald*, 49-260; *State v. Clemons*, 51-274; *State v. Jones*, 52-150; *State v. Lindley*, 51-343.

It is error to instruct that, if there is positive evidence of guilt, then good character avails nothing and should be disregarded: *State v. Horning*, 49-158; *State v. Jones*, 52-150.

It is error to instruct the jury that previous good character is not a defense, and, as against facts positively and strongly proven and clearly indicating the guilt of defendant, it cannot avail as a ground of acquittal: *State v. Lindley*, 51-343.

Where there was no positive or direct evidence as to defendant's having committed the offense, *held*, that an instruction that good character would not overcome evidence of guilt, but in the absence of such evidence might be considered as tending to show less probability of defendant's having committed the crime, while it was erroneous in the first part could not have been prejudicial: *State v. Linde*, 54-139.

Evidence of good character should be considered upon the question as to the degree of the offense, as well as upon the question of guilt or innocence: *State v. Jones*, 52-150.

Circumstantial evidence: To justify the verdict of guilty upon circumstantial evidence it is necessary not only that the circumstances should all concur to show that defendant committed the crime, but that they are inconsistent with any other rational conclusion: *State v. Johnson*, 19-230.

Whether, when a party is sought to be convicted upon circumstantial evidence alone, the evidence of the circumstances must be direct and not circumstantial, *quære: State v. Clemons*, 51-274.

In establishing defendant's guilt by circumstantial evidence, the state is not limited to proof of circumstances tending directly to show defendant's guilt. Any competent evidence tending to prove any material fact in the case is therefore admissible: *State v. Reno*, 67-587.

An instruction at length upon the weight to be given to circumstantial evidence, to the effect that strong evidence of that kind is often the most satisfactory of any from which to draw the conclusion of guilt, and explaining the reason thereof, *held* not error: *State v. Moelchen*, 53-310.

Evidence with reference to the presence of defendant near where stolen goods were concealed, and of his attempt to escape arrest, *held* sufficient to warrant the verdict of guilty of the larceny: *State v. Moody*, 50-443.

In a prosecution for arson, *held*, that the particular circumstances shown were insufficient of themselves to establish defendant's guilt: *State v. Melick*, 65-614.

In a particular case, *held*, that circumstantial evidence relied upon to show defendant's guilt as accessory to the crime of murder was not sufficient to support a conviction: *State v. Clouser*, 69-313.

Corpus delicti: While the facts forming the *corpus delicti* must be clearly and dis-

tinctly proved, it is not necessary that the evidence should be direct and positive as distinct from circumstantial or presumptive evidence: *State v. Keeler*, 28-551.

Identity of defendant: Evidence of non-identity of defendant with the person committing the crime should be weighed like any other evidence offered by defendant for the purpose of showing that he did not commit the crime. It is merely evidence in rebuttal of that of the prosecution, and if it raises a reasonable doubt of guilt defendant should be acquitted although it does not preponderate over that offered by the state: *State v. McCracken*, 66-569.

The identity of accused with the person named in the record of a marriage may be established by admissions and identity of names, in the absence of evidence that other persons of the same name performed the marriage ceremony recited in the record: *State v. Schaunhurst*, 34-547.

On a trial for murder, where there is evidence that would justify the jury in believing that the crime has been committed by some one, and there are circumstances which point to defendant as the guilty person, evidence of conduct explaining the bad state of feeling on the part of defendant toward the deceased is admissible: *State v. Cole*, 63-695.

Evidence of a witness as to facts which led him to believe that the prisoner was the person whom he saw present at the commission of a crime, *held* sufficient to support a verdict of guilty: *State v. Lucas*, 57-501.

Where the identity of defendant was in question in a prosecution for burglary, *held*, that evidence as to declarations made by the person committing the burglary, at the time of its commission, indicating that he was the defendant, was admissible as part of the *res gestæ*, and might be considered by the jury in connection with other circumstances bearing on the question of identity: *State v. Kepper*, 65-745.

And where it was evident that larceny or burglary was the object in view, *held*, that the fact that defendant was aware that the occupant of the house had in his possession a large sum of money was admissible as tending to identify defendant as the person who committed the burglary: *Ibid.*

Certain evidence considered, and *held* relevant and material as tending to implicate defendant in the crime: *State v. Hudson*, 50-157.

Failure to produce evidence: It is not incumbent upon the prosecution to produce all the witnesses present at the commission of the act charged as a crime against defendant, but simply that proof of the whole transaction shall be produced before defendant can be put upon his defense: *State v. Middleham*, 62-150.

A suspicious circumstance, unexplained, whether defendant, in case he is innocent, can or cannot explain it, is only presumptive evidence tending to establish guilt. If the circumstance is one which defendant could explain if innocent, it would be simply stronger evidence against defendant than if it was one which he could not explain, though innocent; but the jury must in every case be the sole judge of its weight. Such presumption should not be deemed sufficient in law to overcome the presumption of innocence: *State v. Banks*, 43-595.

Failure to call witnesses by defendant to prove his general good character raises no presumption against it: *State v. Dockstader*, 42-436.

While it is true that the suppression or destruction of evidence is a question to be considered against the party charged with the crime, and the non-production of explanatory evidence clearly in defendant's power must weigh against him, yet this rule has no application where the evidence is equally within the reach of both parties, and is as important for the prosecution as for the defendant: *State v. Rosier*, 55-517.

The doctrine, that the failure of the accused to introduce evidence explanatory of inculpating circumstances may be regarded as a circumstance against him, is to be cautiously applied and only where it is manifest that proofs are in possession of the accused not accessible to the prosecution: *State v. Cousins*, 58-250.

An instruction that, if defendant fails to introduce proof explaining facts established by the evidence against him, it is a circumstance to be considered in determining his guilt, and that if evidence within the power of defendant, and not accessible to the state, is withheld by the defendant, the jury may infer that if produced it would be against defendant, is not objectionable as misleading the jury with reference to the effect of a failure of defendant to testify in his own behalf: *State v. Rodman*, 62-456.

In general as to evidence in criminal cases, see § 5954 and notes.

5814. Reasonable doubt as to degree. 4429. Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree. [R., § 4808.]

Doubt as to degree: It is error to fail to instruct the jury in accordance with this section even where proper instructions to the effect that they may convict of a lower degree or included crime are given: *State v. Jay*, 57-164; *State v. Neis*, 68-469; *State v. Walters*, 45-389.

To warrant a conviction of grand larceny, the fact that the value of the property exceeded twenty dollars, as well as the fact of the stealing, should be proved beyond a reasonable doubt: *State v. Wood*, 46-116.

It is error to fail to instruct the jury, in a prosecution for larceny of property of more than twenty dollars in value, that if they are not satisfied beyond a reasonable doubt that the value of the property stolen exceeds that amount they must find that it was less than that: *State v. McCarty*, 73-51.

Evidence of good character should be considered upon the question as to the degree of the offense as well as upon the question of guilt or innocence: *State v. Jones*, 52-150.

As to conviction for lower degree or included crime, see §§ 5850, 5851.

5815. Higher offense proved. 4430. If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense. [R., § 4791; C., '51, § 3000.]

As to convicting for higher degree than charged in indictment, see §§ 5850, 5851.

5816. New indictment not found. 4431. If the indictment for the higher offense be submitted by the grand jury, or be not found at the next term, the court must proceed to try the defendant on the original indictment. [R., § 4792; C., '51, § 3001.]

[By reference to corresponding section of Revision (§ 4792) it is apparent that "submitted," in this section, should be "dismissed." The Code commissioners' report shows that no change from the Revision was intended.]

5817. Jury view premises. 4432. Whenever, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay at a specified time. [R., § 4800; C., '51, § 3009.]

For similar provisions in civil cases, see § 3997.

5818. Juror as a witness. 4433. If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and, if during the retirement of the jury, a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible. [R., § 4801; C., '51, § 3010.]

SEPARATION OF JURY.

5819. Before final submission. 4434. The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns. [R., 4802; C., '51, § 3011.]

It will not necessarily constitute error for the court to refuse to direct, on application of defendant, that the jury shall be kept together without separation, if it is not made apparent that the court has therein exceeded its discretion, or exercised it to the prejudice of defendant's rights: *State v. Gillick*, 10–98.

As to the propriety of not allowing the jury to separate when the defendant objects thereto, see *State v. Felter*, 25–67.

In the absence of a showing of prejudice, *held*, that the fact that one of the jurors, while on the way to the jury room, separated himself from the others for the purpose of getting some tobacco, would not vitiate the verdict: *State v. Wart*, 51–587.

It is not error to permit the jury to separate during the trial under proper directions and admonitions against defendant's objection. The matter is in the discretion of the court: *State v. Rainsbarger*, 74–196.

It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *State v. Pitts*, 11–343.

See §§ 5827 and 5874.

5820. Admonition. 4435. The jury, whether permitted to separate, or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment, during the progress of the trial, previous to the final submission of the cause to the jury. [R., § 4803; C., '51, § 3012.]

It need not appear of record that the jury were properly admonished prior to each adjournment; it will be presumed that the court did its duty in this respect: *State v. Shelledy*, 8-477.

TRIAL.

5821. Minutes of testimony kept. 4436. The court shall, on the trial of every indictment, when requested by either party, keep, or cause to be kept, by some person for that purpose by it appointed, full and accurate minutes of the testimony of each witness examined on the trial, showing the name of the witness, the place of residence, and his occupation, as well as of any oral evidence introduced, either by the state or defendant, after a plea or verdict of guilty, to be considered by the court in aggravation or alleviation of the punishment in pronouncing sentence against the defendant, which shall be certified to be full and accurate by the judge, and signed by him, and filed with the clerk, and so marked by him, which shall be deemed a part of the record of the cause. The person who acts under such an appointment shall be entitled to such compensation for his services as may be allowed by the court, which shall be paid by the proper county, and shall be taxed as costs. [R., § 4809.]

As to appointment and compensation of stenographer, see §§ 227, 228, 5029.

5822. When several defendants. 4437. Upon an indictment against several defendants, any one or more may be convicted or acquitted. [R., § 4810; C., '51, § 3014.]

5823. Trial of libel. 4438. On the trial of an indictment for a libel, the jury have the right to determine the law and the fact. [R., § 4811; C., '51, § 3015.]

See § 5483 and notes.

5824. Of offenses other than libel. 4439. On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court; saving the right of the defendant and the state to except. Questions of fact are to be tried by jury. And although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court. [R., § 4812; C., '51, § 3016.]

INSTRUCTIONS.

5825. Court instruct jury. 4440. The court shall, on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualification thereof shall be permitted. [R., § 4813; C., '51, § 3017.]

Duty of court as to instructions: It is the better practice, as a rule, for the judge to put aside the instructions asked by counsel, and cover the whole ground in a methodical charge of his own: *State v. Collins*, 20-85. The fact that any proposition of the law

upon a point involved is not stated will not avail defendant if that which was given was correct. In such a case the proper course would be to ask additional instructions to cover points not stated: *State v. Tweedy*, 11–350.

The court is not required to take up the several facts and circumstances testified to by the witnesses and instruct the jury as to their weight and effect: *State v. Miller*, 65–60.

While mere failure to instruct the jury may constitute reversible error if it should be apparent that the failure resulted in depriving defendant of a fair trial, yet where instructions are correct as far as they go, the defendant should, if he desires further instructions, ask them or he will not be heard to complain: *State v. Helvin*, 65–289.

In a trial for forgery, *held*, that a failure by the court to give instructions respecting the law applicable to the offense, and to a certain line of defense of which there was sufficient evidence to require it to be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that, although the court below is not bound to give instructions on its own motion where those asked by counsel are sufficient, yet, when they are defective or insufficient, the law complicated, and the offense of a high criminal character, the court should point out the controverted questions of fact and state the law applicable thereto: *State v. Brainard*, 25–572 (cited in *State v. Hamilton*, 32–572, 574).

Where the court gave full instructions as to the theory of the case relied on by the prosecution, but failed to give instructions upon an essential part of the case upon the theory upon which defendant relied, *held*, that judgment should be reversed: *State v. O'Hagan*, 38–504.

Issues: Matters of dispute arising upon the law or the evidence are not issues which the court must specifically present to the jury: *State v. Nadal*, 69–478.

Instructions upon questions of fact: An instruction to the effect that, if defendant did a certain act specified, the jury should infer a fraudulent intent, is not vulnerable to the objection that it assumes facts as proved: *State v. Thompson*, 19–299.

It is within the province of the court to state whether the facts proved, if believed, constitute the offense charged: *Pollard v. State*, 2–567.

An instruction which especially directed the attention of the jury to certain facts, and thereby excluded from their attention other facts bearing upon the same question, *held* erroneous: *State v. Meshek*, 51–308.

An instruction in which the court declared "that there is some evidence tending to show that defendant was drunk," where evidence of intoxication was relied upon as showing want of specific intent, *held* erroneous, as indicating an opinion of the court as to the weight and quantity of the evidence, unfavorable to defendant: *State v. Donovan*, 61–369.

Not supported by evidence: Where it appears that there was no evidence tending to show that defendant in any respect aided and abetted the commission of the crime charged, *held*, that an instruction with reference to his criminality if it should appear that he aided, abetted, etc., was erroneous: *State v. Myer*, 69–148.

Misleading: An instruction which may be misleading when applied to the particular facts of the case is erroneous: *State v. Benham*, 23–154.

An instruction in a prosecution for assault which assumed that the assault was made, and called particular attention to the manner of the assault, etc., when there was great doubt from the evidence whether any assault was made, *held* erroneous, as being misleading: *State v. Bailey*, 54–414.

Offense of higher degree: The giving of instructions in regard to an offense of a higher degree than that for which defendant is properly on trial will be sufficient error to warrant a reversal, although he be only found guilty of an offense for which he was properly on trial: *State v. Tweedy*, 11–350.

Reading from indictment: It is error to read from the indictment for the purpose of stating the issues to the jury without setting out in the instructions the part of the indictment thus read: *State v. Birmingham*, 74–407.

In libel: As to instructions and their effect in prosecutions for libel, see § 5483, and notes.

Objection to evidence cannot be taken by way of instructions to the jury that such evidence should not be considered: *State v. Pratt*, 20–267.

Additional instructions: Remarks of the court to the jury, after they had been out for a considerable time without being able to agree, as to the impropriety of a juror going into the jury-box with a predetermination as to the result which he will favor, and to hang the jury, or to cause a disagreement if the verdict cannot be rendered as he wants it, *held* not erroneous: *State v. Lawrence*, 38–51.

Where the jury, after having retired, sent to the court a communication asking further instructions as to a matter of fact in regard to which they were in doubt, *held*, that it was not incumbent upon the court to give them any further instructions upon such question: *State v. Maxwell*, 42–208.

In a particular case, *held*, that the court was warranted in giving additional instructions after the retirement of the jury: *State v. Pitts*, 11–343.

Remarks to jury: The court cannot, under the guise of determining some questions which are legitimate, make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, and thus deprive the defendant of the opportunity of having such error reviewed: *State v. Stowell*, 60–535.

Signing: The requirement of this section that the judge shall sign the instructions given by him is directory, and a failure to do so will not be ground for reversal when no prejudice resulted therefrom to defendant: *State v. Stanley*, 48–221.

If the instructions are properly passed upon by the court and embodied in a bill of exceptions, the failure to sign them will not be a ground of reversal: *State v. McCombs*, 13–426.

The supreme court, on appeal, will not pass

upon instructions which have not been made part of the record, either by being signed as here required or embodied in a bill of exceptions: *State v. Gebhardt*, 13-473; *State v. Watrous*, 13-489.

In writing: Where it appeared that the charge of the court was given to the jury orally and afterwards reduced to writing, with the acquiescence of defendant, *held*, that such irregularity could not afterwards be taken advantage of: *State v. Sipult*, 17-575.

Special interrogatories: Sections 4015, 4016, authorizing the submission to the jury of interrogatories for special findings on particular questions of fact, is not applicable in criminal cases: *State v. Fooks*, 65-196; *State v. Ridley*, 48-370.

Directing verdict: See notes to § 5847.

For instructions as to reasonable doubt, burden of proof, *alibi*, etc., see notes to § 5813.

For instructions as to different degrees and included crimes, see notes to § 5814.

And generally as to instructions, see §§ 3991-3996 and notes.

5826. Asking instructions. 4441. Any instruction asked by either party to be given by the court must be in writing, and must be either given or refused, and so marked and signed by the judge, and filed with the clerk, and so marked by him, and is to be deemed a part of the record. It may be qualified in writing by the court, but not orally, and the qualification must be distinguished, intelligibly, from the instruction as originally asked by the party, and signed by the judge. [R., § 4814; C., '51, § 3018.]

The supreme court, on appeal, will not pass upon instructions which have not been made part of the record, either by being signed as here required or embodied in a bill of exceptions: *State v. Gebhardt*, 13-473; *State v. Watrous*, 13-489.

See, further, notes to preceding section.

DELIBERATION.

5827. In charge of officer. 4442. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without meat or drink, water excepted, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves unless it be to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission or order of the court, or they be sooner discharged. [R., § 4815; C., '51, § 3019.]

It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *State v. Pitts*, 11-343.

That one of the jurors was permitted to leave the jury room for a necessary and proper purpose, accompanied by the deputy sheriff, it appearing that the juror had no conversation with any one while absent, except with such deputy, and with him only to the extent of asking permission to retire, *held* not such misconduct as to make a new trial necessary: *State v. Bowman*, 45-418.

Communication with the jury by a deputy sheriff after their retirement in relation to procuring for them a paper introduced in evidence, *held* not a ground for reversal in the absence of any showing of prejudice: *State v. Wart*, 51-587.

Where, after the jury had retired to determine the case, one of the jurors was permitted by the court to leave the jury room and attend the trial of another case in court in which he was a party, *held not* error where no prejudice to defendant appeared: *State v. Ferlig*, 70-272.

The fact that during the deliberation of the jury one of their number, being taken sick, is permitted to separate himself from the others and take a walk in the open air, accompanied by an officer, and without communication with any person about the case, will not be ground for disturbing the judgment upon such verdict: *State v. Griffin*, 71-372.

As to separation of jury during the trial, see § 5819 and notes.

In general as to conduct of jury after submission of cause, see §§ 5837-5844 and notes.

As to what misconduct of the jury is ground for new trial, see notes to § 5874.

DISCHARGE OF JURY, OR OF DEFENDANT.

5828. When juror becomes sick. 4443. If before the conclusion of a trial a juror become sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and

the trial begin anew, or the jury may be discharged and a new jury then or afterwards be impaneled. [R., § 4804; C., '51, § 3013.]

5829. Want of jurisdiction. 4444. The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law. [R., § 4793; C., '51, § 3002.]

5830. Crime committed in another state. 4445. If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged or ordered to be retained in custody a reasonable time, until the district [county] attorney shall have a reasonable opportunity to inform the chief executive of the state in which the offense was committed of the facts, and for said officer to require the delivery of the offender. [R., § 4794; C., '51, § 3003.]

5831. In another county. 4446. If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be deemed reasonable to await a warrant from the proper county for his arrest; or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking. [R., § 4795; C., '51, § 3004.]

5832. Papers transmitted. 4447. In the case provided for in the last section, the clerk must transmit, forthwith, a certified copy of the indictment and all the papers in the action filed with him, except the undertaking mentioned in the last section, to the district [county] attorney of the proper county. [R., § 4796; C., '51, § 3005.]

5833. Defendant discharged. 4448. If the defendant be not arrested on a warrant from the proper county he shall be discharged from custody, or his bail in the action shall be exonerated, or money deposited instead of bail shall be refunded, as the case may be, and the sureties in the undertaking must be discharged. [R., § 4797; C., '51, § 3006.]

5834. When arrested. 4449. If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. [R., § 4798; C., '51, § 3007.]

5835. When facts do not constitute offense. 4450. If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury. [R., § 4799; C., '51, § 3008.]

DEFENDANT COMMITTED DURING TRIAL.

5836. Notwithstanding bail given. 4451. When a defendant, having given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly. [R., § 4816; C., '51, § 3020.]

CHAPTER 28.

OF THE CONDUCT OF JURY AFTER THE CAUSE IS SUBMITTED TO IT.

5837. May take papers. 4452. Upon retiring for deliberation, the jury may take with it all papers which have been received as evidence in the case, except depositions and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession. [R., § 4817; C., '51, § 3021.]

Where a medical book was introduced as evidence, and a portion of it read to the jury, *held*, that it was not proper for them to take such book to the jury room, the portions which were read not being marked: *State v. Gillick*, 10-98.

The jury on their retirement to consider their verdict, in an appeal from a conviction in a justice's court, were permitted to take with them the papers in the case, including the information, the transcript from the justice, transcript on change of venue, affidavits, etc., *held*, that there was no ground for reversal in the absence of a showing that the jury, or any of them, examined the papers, or that any prejudice resulted from their action: *State v. Gibson*, 29-295.

Where a juror sent for and read to his fellows a law book in support of the correctness of the instructions of the judge, *held*, that such misconduct was error without prejudice, the instructions having been as a matter of law correct: *State v. Carr*, 43-418.

As applicable to this section, see notes to § 4004.

5838. Notes of testimony. 4453. The jury may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person. [R., § 4818; C., '51, § 3022.]

It is not proper for the officer in charge of the jury, at their request to furnish them the minutes of the testimony: *State v. Griffin*, 71-372.

5839. Additional instructions. 4454. After the jury have retired for deliberation, if there be any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court, and upon their being brought in, the information required must be given in the presence of, or after oral notice to, the district [county] attorney, and the defendant or his counsel. [R., § 4819; C., '51, § 3023.]

See notes to § 5825.

5840. Juror sick. 4455. If, after the retirement of the jury, one of them be taken sick so as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the court may discharge them. [R., § 4820; C., '51, § 3024.]

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

5841. Discharge by consent or on disagreement. 4456. Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties entered upon the record, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree. [R., § 4821; C., '51, § 3025.]

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

5842. New trial. 4457. In all cases where a jury is discharged or prevented from giving a verdict by reason of any accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term of the court. [R., § 4822; C., '51, § 3026.]

That defendant cannot plead a trial thus terminated as previous jeopardy in bar of another trial, see notes to § 5749.

5843. Court may adjourn. 4458. While the jury is absent the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict be rendered or the jury is discharged. [R., § 4823; C., '51, § 3027.]

5844. Final adjournment. 4459. A final adjournment of the court discharges the jury. [R., § 4824; C., '51, § 3028.]

CHAPTER 29.

OF THE VERDICT.

5845. Jurors present. 4460. When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict. In such case the cause may again be tried at the same or another term. [R., § 4825; C., '51, § 3029.]

The provision as to calling the names of the jurors is directory only, and a failure to observe it will not be error sufficient to reverse the judgment unless prejudice is shown: *State v. Burge*, 7-255.

If, without consent of parties or the court, the jury seal up their verdict and separate, defendant is deprived of the substantial right given him by § 5855 to poll the jury; and therefore the receiving of such verdict constitutes error: *State v. Callahan*, 55-364.

Juries in cases of misdemeanors may, by consent of defendant and the state, return a sealed verdict; and it will not be prejudicial error to receive such verdict without all the jurors being present if no demand is made for the presence of all, or for the polling of the jury, or if no objection is made to the absence of the jurors: *State v. Thompson*, 74-119.

5846. Presence of defendant. 4461. If the indictment be for a felony, the defendant must be present at the rendition of the verdict. If it be for a misdemeanor, the verdict may be rendered in his absence. [R., § 4826; C., '51, § 3030.]

In a prosecution for murder, presence of defendant at the time of verdict is essential: *Harriman v. State*, 2 G. Gr., 270.

The trial at which defendant accused of a felony is required to be present ends with the verdict; his presence at the argument and determination of a motion for new trial is not essential: *State v. Decklotts*, 19-447.

Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. State*, 4-554.

In case of conviction for assault and battery the presence of defendant is not required, even though he has been on trial for a felony: *State v. Shepard*, 10-126.

As to presence of defendant at arraignment, see § 5713; as to his presence during the trial, see § 5736; and as to his presence at pronouncing of judgment, see § 5882.

5847. Verdict rendered. 4462. When the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same. [R., § 4827; C., '51, § 3031.]

No particular form of words is prescribed to be used by the court in requiring the jury to declare their verdict: *State v. Collins*, 32-36.

When there is no testimony sustaining the charge, or when it is so slight that a verdict of guilty would be instantly set aside, the court

may direct a verdict of acquittal, but not when there is a conflict of testimony: *State v. Smith*, 28–565.

The fact that the court causes the jury to return a verdict of guilty without deliberation or consultation, though grossly irregular, would not render a judgment based thereon void: *Turney v. Barr*, 75–758.

5848. General or special. 4463. The jury may either render a general verdict, or, where they are in doubt as to the legal effect of the facts proven, they may, except upon an indictment for libel, find a special verdict. [R., § 4828; C., '51, § 3032.]

There is no provision for a submission to the jury of particular questions of fact on the trial of criminal actions: *State v. Ridley*, 48–370; *State v. Fooks*, 65–196.

As to special verdict in civil cases, see § 4015.

5849. Form. 4464. A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment. Upon a plea of a former conviction or acquittal of the same offense it is either "for the state" or "for the defendant." [R., § 4829; C., '51, § 3033.]

What sufficient verdict: If the intention of the jury is not doubtful the verdict will be upheld even without correction in form by the court: *Harrell v. Stringfield*, Mor., 18.

A verdict in a particular case *held* sufficient to authorize conviction: *State v. Bond*, 8–540.

Although it is not necessary for the jury to find more than that the defendant is guilty of the charge in the indictment, yet a verdict finding specially as to the facts constituting such guilt is sufficient to justify the court in rejecting the portion relating to the facts, and rendering judgment on the portion constituting a general verdict: *State v. Williams*, 8–533.

In a trial upon information, the words "as charged in the indictment," *held* mere surplusage, and of no effect on the verdict: *State v. McCombs*, 13–426.

A verdict expressly reciting that the jury find the defendant "guilty of aiding and concealing," etc., thus specifying the crime charged in the indictment, is a general and not a special verdict: *State v. Turner*, 19–144.

Where defendant was charged with knowingly having in possession and uttering a forged instrument, but in the caption and indorsement of the indictment the crime was designated as forgery, and the court, while properly directing the jury as to the facts necessary to establish the crime with which defendant was properly charged, designated it as forgery, and gave the form of the verdict as though that were the crime charged, and jury, following the form thus given, found defendant "guilty of the crime of forgery as charged in the indictment," *held*, that the verdict was simply informal, and was not vitiated by the error in designating the offense charged: *State v. Burgson*, 53–318.

Where there is a general verdict of guilty on an indictment containing several counts, if any one of them is good the judgment will be supported: *State v. Shelledy*, 8–477, 511.

On a conviction for murder in the first degree under which it is for the jury to fix the punishment as death or imprisonment for life at hard labor in the penitentiary, a verdict is sufficiently definite which specifies imprisonment in the penitentiary for life: *State v. Trout*, 74–545.

Defects cured by verdict: After verdict all objections to the proceedings of the grand jury in finding the indictment come too late: *Sharp v. State*, 2–454.

The verdict does not cure irregularities in the trial or in the finding of the indictment, such, for instance, as the refusal to allow the defendant the right of challenge to the grand jurors: *State v. Osborne*, 61–330.

5850. Finding an offense of different degree. 4465. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment. [R., § 4835; C., '51, § 2918.]

Different degrees: Although the offense consists of different degrees, and defendant is not found guilty of any one of the degrees, he may still be convicted of an offense necessarily included in that for which he is indicted, as provided in the following section: *Gordon v. State*, 3–410. Thus, *held* that, though manslaughter is not a degree of murder, but a distinct offense, it is necessarily included in the crime of murder: *State v. Clemons*, 51–274.

It seems that the last clause of the section, "if punishable by indictment," relates alone to the preceding clause, "an attempt to commit the offense:" *State v. Jarvis*, 21–44.

Although the inferior degree of the offense be not indictable, but triable on information only, a defendant put on trial for a degree which is indictable may be convicted in such lower degree: *Ibid.* And see notes to Const., art. 1, § 11.

Where defendant is put on trial for the higher degree of an offense, and is convicted of a lower, and judgment thereon is reversed on appeal, he cannot again be put on trial for a higher degree than that of which he was con-

victed: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274. And see notes to Const., art. 1, § 12.

Instruction as to different degrees and included crimes: On the trial of an offense of such nature that defendant might properly be convicted of a lesser degree of the offense than that charged, or an offense necessarily included in that charged, the court should instruct the jury that they may find defendant guilty of such lower degree or included offense: *State v. Walters*, 45-389; *State v. Kegan*, 62-106.

In such cases the court should explain to the jury the elements of the lower degrees of the crime, and of all crimes of which defendant might be convicted under the indictment, and it will constitute error in the court to fail to do so: *State v. Vinsant*, 49-241; *State v. Clemons*, 51-274; *State v. Glynden*, 51-463.

Even though the counsel for the prisoner has claimed and insisted upon the trial that the prisoner, if guilty at all, is guilty of the degree of offense charged in the indictment, yet the prisoner has the right to the proper instructions as to lower degrees of the offense: *State v. Johnson*, 8-525.

Under an indictment charging assault with intent to inflict great bodily injury, it is error to fail to instruct the jury that they may convict defendant of assault and battery. In such case it is not sufficient to instruct that they may convict of a simple assault, although a simple assault and an assault and battery are offenses of the same grade: *State v. Welsh*, 73-106.

Upon the trial of an indictment for rape the court should instruct the jury not only as to assault with intent to commit rape, but also as to simple assault, and it will constitute error to fail to do so: *State v. Pennell*, 56-29; *State v. Peters*, 56-263.

Assault and battery is not necessarily included in the crime of assault with intent to commit rape, and it is not necessary to instruct the jury that they might find defendant guilty of assault and battery: *State v. McDevitt*, 69-549. And see *State v. McAvoy*, 73-557.

In a particular case, *held*, that the instructions sufficiently directed the jury as to convicting for assault with intent to commit rape or assault and battery under an indictment for rape: *State v. Mitchell*, 68-116.

Where, in a prosecution for murder, it is admitted that the defendant by violence caused the death of deceased, and claims that his act was done in self-defense and was not unlawful, it is not error to instruct the jury that they should either convict the defendant of murder or manslaughter, or acquit him. In such cases it is not necessary to instruct the jury as to offenses lower than manslaughter, which may be included in the crime of murder charged in the indictment: *State v. Mahan*, 68-304.

Where, in a prosecution for murder in the first degree, the evidence is indisputable that the deceased died from the effects of a wound inflicted by the defendant, it is not necessary to instruct the jury as to crimes less in degree than that of criminal homicide: *State v. Froelick*, 70-213.

Failure to instruct as to lower degrees of the offense will not be error where there is no evidence which would support a conviction of a lower degree: *State v. Cole*, 63-695.

Error in instructing as to degree of offense: The giving of instructions in regard to an offense of a higher degree than that for which defendant is properly on trial will be sufficient error to warrant a reversal, although he be only found guilty of an offense for which he was properly on trial: *State v. Tweedy*, 11-350.

Putting on trial for a higher degree than charged: It is prejudicial error to put the defendant upon trial for a higher crime, or a higher degree of the crime, than is charged in the indictment: *State v. Boyle*, 28-522; *State v. Kanouse*, 29-118; *State v. McNally*, 32-580.

Under an indictment for murder in the second degree defendant cannot be convicted of murder in the first degree: *Fouts v. State*, 4 G. Gr., 500.

Where, under an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *State v. McCormick*, 27-402.

But where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *State v. Watkins*, 27-415.

Doubt as to degree: That in cases of reasonable doubt as to degree defendant is to be convicted only of lower degree, see § 5814 and notes.

Included crimes: See notes to next section.

5851. Included offenses. 4466. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. [R., § 4836; C., '51, § 3039.]

Verdict for included offense: Under this section whatever offense is necessarily included in the crime charged in the indictment may be punished, although the indictment contains no words specifically designating the offense so included: *Benham v. State*, 1-542.

Although the offense consists of different degrees, and defendant is not found guilty of any one of the degrees, he may still be guilty of an offense necessarily included in that for which he is indicted: *Gordon v. State*, 3-410.

A defendant put on trial for an indictable offense may be punished for an offense necessarily included therein, although the latter be of such a character that it is not indictable, but only triable on information: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126. And see notes to Const., art. 1, § 11.

If defendant is found guilty of a lesser offense included in the one for which he is put on trial, such conviction operates as an acquittal of the offense for which he was indicted, and if, on appeal, judgment is reversed, he can only be tried a second time for the offense of which he was convicted: *State v. Tweedy*, 11-350; *State v. Clemons*, 51-274. And see notes to Const., art. 1, § 12.

What deemed included: Where a greater penalty is provided for the second or third conviction of an offense than for the first conviction thereof (as in § 2381), and the defendant is put on trial for such second offense, he may be convicted as for the first commission of the offense: *State v. Ensley*, 10-149; *State v. Gaffeny*, 66-262.

Where all the elements of one crime are included in another which is distinguished from the first simply in having distinct elements, the fact that the evidence shows the commission of the second crime will not prevent the punishment of defendant in the prosecution for the first: *State v. Graff*, 66-482.

Defendant can be convicted of an offense distinct from the one specifically charged in the indictment only when the offense is an essential element of that charged, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged: *State v. McAvoy*, 73-557.

Every battery necessarily includes an assault: *State v. Twogood*, 7-252.

A simple assault is necessarily included in a charge of an assault with intent to commit bodily injury: *Orton v. State*, 4 G. Gr., 140.

As every intentional maiming and disfiguring includes an assault and battery, a defendant indicted for the former may be convicted of the latter, although no assault was charged in the indictment: *Benham v. State*, 1-542.

Under an indictment for an assault with intent to commit murder defendant may be convicted of assault and battery: *Dixon v. State*, 3-416.

Or of a simple assault: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126; *State v. White*, 45-325.

Assault with intent to commit manslaughter is necessarily included in a charge of an assault with intent to commit murder: *State v. White*, 45-325.

Where defendant was convicted of assault with intent to commit murder, but on motion for new trial the court was of the opinion that the evidence was not sufficient to show malice aforethought, *held*, that the court might properly sentence defendant for an assault with intent to commit manslaughter: *State v. Keasling*, 74-528.

Upon conviction of assault with intent to commit great bodily injury, obtained under an indictment of assault with intent to commit murder, a sentence for a simple assault may be proper: *State v. Schele*, 52-608.

While an assault and battery will not in all cases be necessarily included in an assault with intent to murder, yet under an indictment charging the latter offense as committed by acts amounting to assault and battery a conviction of assault and battery would be warranted: *State v. Graham*, 51-72.

On an indictment for murder defendant may be found guilty of manslaughter: *Gordon v. State*, 3-410; *State v. White*, 45-325.

Under an indictment for murder in the first degree defendant may be convicted of assault with intent to commit great bodily injury, as well as of assault with intent to murder, or with intent to maim: *State v. Parker*, 66-586.

A charge of the crime of rape necessarily charges also the crime of assault with intent to commit rape: *State v. McLaughlin*, 44-82.

It also includes a simple assault: *State v. Vinsant*, 49-241.

But the charge of assault with intent to commit rape does not necessarily include the crime of assault and battery: *State v. McDevitt*, 69-549; *State v. McAvoy*, 73-557.

Under an indictment for burglary defendant may be convicted of the offense of entering a dwelling-house in the night-time, defined in § 5194: *State v. Maxwell*, 42-208.

The crime of larceny from a dwelling-house in the night-time and that of robbery necessarily include the offense of larceny. A defendant who is tried on an indictment charging him with the commission of either of such crimes may be convicted of simple larceny; therefore, an acquittal of one of such crimes necessarily bars a subsequent prosecution for the other: *State v. Mikesell*, 70-176.

Instructions as to included crimes, see notes to preceding section.

Trial for higher crime or degree of crime than properly charged in the indictment is error: See notes to preceding section.

5852. Verdict against one of several. 4467. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury. [R., § 4837; C., '51, § 3040.]

Where two or more are indicted jointly for an offense, one may be found guilty without regard to the others: *State v. McClintock*, 8-203.

5853. Verdict insufficient. 4468. If the jury render a verdict which is neither a general nor special verdict, the court may direct them to reconsider it, and it shall not be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially and leave the judgment to the court. [R., § 4838; C., '51, § 3041.]

Where the verdict in a criminal cause is special in nature, and defective in not giving the facts necessary to enable the court to enter judgment, the jury should be directed to retire for further deliberation, but the court may, against defendant's objection, set aside the verdict and order a retrial, and defendant is not, in such case, entitled to be discharged: *State v. Arthur*, 21-322.

Where the jury, in a prosecution for burglary, returned a verdict finding defendant guilty of entering a house in the night-time, and recommended him to the mercy of the court, *held*, that such verdict did not amount to a special verdict authorizing an acquittal, but that, failing to respond to all the facts necessary to a conviction, the jury were properly directed to reconsider it: *State v. Maxwell*, 42-208.

5854. Informal verdict. 4469. If the jury persist in finding an informal verdict, from which, however, it can be understood that their intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him upon a special verdict. [R., § 4839; C., '51, § 3042.]

See notes to § 5849.

5855. Jury polled. 4470. When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation. [R., § 4840; C., '51, § 3043.]

As to when a sealed verdict may be received without all the jurors being present, see § 5845.

5856. If any juror disagrees. 4471. When the verdict is given, and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the record, and the jury again sent out. But if no disagreement be expressed, the verdict is complete and the jury must be discharged from the case. [R., § 4841.]

5857. Acquittal on ground of insanity. 4472. If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict. The court may thereupon, if the defendant be in custody, and his discharge is deemed dangerous to the public peace and safety, order him to be committed to the Iowa insane hospital, or retained in custody until he becomes sane. [R., § 4842; C., '51, § 3044.]

5858. Defendant discharged. 4473. If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given. [R., § 4843; C., '51, § 3045.]

SPECIAL VERDICT.

5859. Defined. 4474. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them. [R., § 4830; C., '51, § 3034.]

See § 5849 and notes; also § 5853. And for similar provisions in civil cases, see § 4014.

5860. In writing. 4475. The special verdict must be reduced to writing by the jury or in their presence, entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged. [R., § 4831; C., '51, § 3035.]

5861. Form. 4476. The special verdict need not be in any particular form, but shall be sufficient if it present intelligibly the facts found by the jury. [R., § 4832; C., '51, § 3036.]

5862. Judgment upon. 4477. The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted in law under that indictment, judgment shall be given accordingly. But if the facts found do not prove the defendant guilty of the offense charged, or of any offense of which he could be so convicted under the indictment, judgment of acquittal must be rendered;

2. If the plea be of a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal. [R., § 4833; C., '51, § 3037.]

As to pleading former conviction or acquittal, see § 5744 and notes.

5863. Verdict insufficient. 4478. If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence as established to their satisfaction, the court may order them to retire for further deliberation. [R., § 4834; C., '51, § 3038.]

CHAPTER 30.

OF BILLS OF EXCEPTION.

5864. As to what. 4479. On the trial of an indictment, exceptions may be taken by the state, or by the defendant, to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror;

2. In admitting or rejecting witnesses or evidence on the trial of any challenge;

3. In admitting or rejecting witnesses or evidence, or in deciding any matter of law, not purely discretionary, on the trial of the issue. [R., § 4844; C., '51, § 3046.]

A general exception to the admission of testimony *en masse*, where such testimony includes much testimony that is unobjectionable, without having asked any ruling of the court as to its admissibility, will not entitle the defendant to have the question of admissibility of portions of such evidence considered on appeal: *State v Benge*, 61–658.

As to exceptions in civil cases, see §§ 4038–4043.

5865. Other matters. 4480. Nothing herein contained is to be construed so as to deprive either party of the right of excepting to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on such trial. [R., § 4845.]

5866. Object. 4481. The office of a bill of exceptions is to make a part of the proceedings or evidence appear of record which would not otherwise so appear. [R., § 4846.]

Applied: *State v. Fay*, 43–651.

5867. Papers deemed part of record. 4482. All papers pertaining to the cause and filed with the clerk, and all entries made by the clerk in the record book pertaining to them, and showing the action or decision of the

court upon them, or any part of them, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record. [R., § 4847.]

5868. How taken. 4483. Either party may allege an exception to any decision or action of the court, on any application of either party, which may be, and is made orally to the court, in any stage of the proceedings upon which the decision or action of the court is not required to be, and is not, entered in the record book, and reduce the same to writing, and tender the same to the judge, whose duty it is to sign it; and if he sign the same, it shall be filed with the clerk and thereupon become a part of the record of the cause; but if the judge refuse to sign it, such refusal must be stated at the end thereof; and it may then be signed by two or more attorneys or officers of the court, or disinterested by-standers, and sworn to by the persons so signing the same, and filed with the clerk, and it shall thereupon become a part of the record of the cause. [R., § 4848; C., '51, § 3047.]

A certificate of the judge showing rulings made during the trial and exceptions thereto is a sufficient compliance with the statute to constitute a bill of exceptions: *State v. Fay*, 43–651.

While a certificate of the judge, sufficiently setting out or identifying the testimony, may take the place of a bill of exceptions for the purpose of making the evidence a part of the record, such certificate, equally with a bill of exceptions, must be made at the time of the trial or at such time as the court may fix; otherwise the evidence may be stricken out on appeal: *State v. Newcomb*, 56–335.

5869. Time allowed to examine. 4484. The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter to procure the signatures and file the same. [R., § 4849.]

[The word "clear," in the second and also in the third line, as in the original rolls, is omitted in the printed Code. In § 5806, "four days" is substituted in the printed Code for "three clear days" in the original, and the former expression is retained in this work as probably synonymous; but here the omission in the printed Code of the word "clear," without change in the number of days, is certainly a material alteration. See similar change in § 5881.]

5870. May be modified. 4485. If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly. [R., § 4850.]

5871. Time allowed to prepare. 4486. Time must be given to prepare the bill of exceptions when it is necessary. When it can reasonably be done, it shall be settled at the time of taking the exception. [R., § 4851.]

CHAPTER 31.

OF NEW TRIAL.

5872. Definition. 4487. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given. [R., § 4852; C., '51, § 3050.]

5873. Effect. 4488. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to either in the evidence or in argument. [R., § 4853; C., '51, § 3051.]

It is improper for an attorney for the prosecution to make any reference to the verdicts in former trials which have been set aside and new trials granted: *State v. Clouser*, 72–302.

Where on appeal in a prosecution on information for illegal sale of intoxicating liquors defendant was convicted upon evidence as to one transaction, but a new trial being granted was convicted under evidence relating to a different transaction, but constituting the offense charged in the information, *held*, that there was no error, and the second trial, after

the former conviction has been set aside, was entirely independent of the first trial: *State v. Dow*, 74-141.

Defendant cannot be again put on trial for a higher degree of the offense than that for which he was convicted: See notes to § 5850.

5874. Causes for. 4489. The court may grant a new trial for the following causes, or any of them:

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;

2. When the jury has received any evidence, paper, or document out of court not authorized by the court;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;

4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a material matter of law;

6. When the verdict is contrary to law or evidence. But no more than two new trials shall be granted for this cause alone;

7. When the court has refused properly to instruct the jury;

8. When from any other cause the defendant has not received a fair and impartial trial. [R., § 4854; C., '51, § 3052.]

As to absence of defendant, see §§ 5713, 5736, 5846 and 5882.

As to receiving papers, etc., out of court, see notes to §§ 5837, 5839.

Misconduct of jury: To vitiate the verdict of a jury for misconduct it must be such as to satisfy the court that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence: *State v. Accola*, 11-246.

That a juror left the jury room and was temporarily absent for a proper purpose, in charge of a deputy sheriff, *held* not sufficient ground for granting a new trial: *State v. Bowman*, 45-418.

For other cases as to separation of jury, etc., see notes to §§ 5819, 5827.

Where it is sought to set aside the verdict of a jury on the ground of statements of one of the jurors as to facts not in evidence, or the like, it is necessary to show that prejudice resulted to the party complaining. Prejudice will not be presumed: *State v. Woodson*, 41-425.

The drinking of spirituous liquors during the time when a jury is out for the purpose of deliberating upon their verdict is sufficient misconduct to reverse a judgment on such verdict on appeal: *State v. Baldy*, 17-39.

Where one of the jurors was ill before submission of the cause to the jury, and took for medicinal purposes, without medical prescription, some brandy, etc., *held* not ground for new trial: *State v. Morphy*, 33-270.

Indulgence in intoxicating liquors during adjournment of the court, and before the final submission of the cause to the jury, is not ground for a new trial in the absence of a showing of prejudice resulting therefrom: *State v. Bruce*, 48-530.

The fact that a juror was intoxicated during an adjournment of the court, before submission of the case, *held* not ground for new trial, it not appearing that the juror was intoxicated while in the performance of his duties: *State v. Livingston*, 64-560.

Where misconduct of one of the jurors in drinking intoxicating liquor during the trial was made a ground for new trial, and the fact relied upon was shown only by defendant's affidavit, which did not state the juror's name nor the time and place, *held*, that the showing was insufficient, and that defendant's affidavit should be admitted, if at all, only in cases where no other proof is practicable, and failure of justice might result from its rejection: *State v. McLaughlin*, 44-82.

An affidavit of the defendant as to misconduct of the jury, based upon information and belief, is not sufficient: *State v. Tucker*, 68-50.

In general, as to misconduct of jury, see notes to § 4044.

Fair verdict of all the jurors: A juror who has consented to the verdict cannot afterwards be permitted to say that it was not his honest judgment on the facts of the case: *State v. Griffin*, 71-372.

It cannot be shown by affidavits of jurors that they did not voluntarily assent to the verdict: *State v. Douglas*, 7-413.

As to the same question in civil cases, see notes to § 4044.

Erroneous instructions to the jury, or refusing to instruct, see § 5825 and notes.

Verdict against the evidence: Where a conviction is clearly contrary to the weight of evidence the supreme court should set it aside on appeal: *State v. Woolsey*, 30-251.

The supreme court will, on appeal, interfere more readily with a verdict because contrary to the weight of evidence in a criminal than in a civil case: *State v. Tomlinson*, 11-401.

But where every material allegation of the indictment is supported by the evidence, the supreme court must be satisfied of the insufficiency of the evidence to warrant the overruling of the action of the lower court in refusing a new trial on that ground: *State v. Elliott*, 15-72.

The supreme court will but cautiously interfere with verdicts when it is claimed that they are against the evidence: *State v. Collins*, 20-85.

Where it does not appear from the evidence

of record in a criminal case that the verdict was against the preponderance of evidence, a new trial will not be granted on appeal: *State v. Stoker*, 22-52.

Where the bill of exceptions does not profess to disclose the whole of the evidence, the supreme court will presume there was sufficient to warrant the verdict of the jury. It will not reverse on the ground that the verdict is against the weight of evidence, unless it is clearly and manifestly so: *State v. Lyon*, 10-340.

In a particular case, *held*, that the lower court should have sustained a motion for a new trial on the ground of insufficiency of evidence: *State v. Hilton*, 22-241.

Where the jury has rendered a verdict which the court has refused to set aside, the supreme court will not interfere if the correctness of the verdict depends upon the credit to be given the testimony of witnesses and there is nothing in such testimony rendering its truthfulness improbable: *State v. Quinn*, 47-368.

Fair and impartial trial: In a particular case a new trial was granted on appeal on the ground that it appeared that under the circumstances of the case the prisoner had not had a full, fair and impartial trial, although no error of law was sufficiently shown: *Trulock v. State*, 1-515.

Surprise: The fact that defendant is taken by surprise by the testimony of a witness may be ground for a new trial: *Ibid.*

Defendant is not entitled to a new trial on the ground of surmise in that his counsel did not have sufficient time to consult with regard to the defense, where no motion for continuance was made on that ground: *State v. Benton*, 65-482.

Misconduct of defendant's attorney: It will be a ground for a new trial that an attorney who acted for defendant in a preliminary examination in a case relating to the same transaction was allowed by the court, against defendant's objections, to assist the prosecution: *State v. Halstead*, 73-376.

Incompetence of defendant's attorney may, especially in cases involving the life of defendant, constitute a ground for a new trial, but to justify a reversal upon such ground there should be a strong showing both of incompetence and prejudice: *State v. Benge*, 61-658.

Misconduct of prosecuting attorney: Under § 4886, any reference by the district attorney to the fact that defendant has not become a witness in his own behalf is misconduct sufficient to entitle defendant to a new trial: *State v. Graham*, 62-108.

But where the evidence as to whether the district attorney made such reference in his argument or not is conflicting, the supreme court will abide by the action of the lower court in reference thereto: *State v. Maynes*, 61-119.

In a particular case, *held*, that the fact of an improper reference by the district attorney to the failure of defendant to become a witness was not sufficiently shown to require a reversal: *State v. Black*, 59-390.

Where defendant makes himself a witness and testifies as to a part only of his defense, it is not improper for the district attorney to refer to defendant's omission to testify as to other material facts within his knowledge: *State v. Tatman*, 59-471.

In a particular case, *held*, that misconduct of the district attorney in his opening statement to the jury was such as to require the granting of a new trial: *State v. Williams*, 63-135.

It is clearly implied in § 4886 that the attention of either the court or the jury shall not be called to the fact that defendant has failed to testify in his own behalf; and where, in arguing to the court, in the presence of the jury, a question as to an objection to the evidence, that fact was referred to, *held*, that there was ground for a new trial: *State v. Ryan*, 70-154.

Misconduct of the district attorney in asking improper questions which were promptly excluded on objection, *held* not sufficient in a particular case to require a new trial: *State v. Noble*, 66-541.

Disqualification of juror (for instance, not being an elector) is not waived by failure to object to him for cause, and may be a ground for new trial; but if defendant knew at the time that the jury were sworn that any of them were not qualified to act as jurors, he would, by failure to object, waive his right to object afterward. It must appear, however, that defendant had knowledge of the fact of disqualification before it can be inferred that he waived his objection: *State v. Groome*, 10-308.

But an objection to a juror on account of bias or prejudice is waived by failure to object at the proper time: *Ibid.*

If the juror is examined at the proper time as to whether he has formed or expressed an unqualified opinion as to defendant's guilt or innocence, and it should afterwards appear that, on such examination, he had sworn falsely as to not having formed or expressed such opinion, that fact might be a ground for a new trial. But defendant, to take advantage thereof, must show by the record that the juror was examined on oath as to the fact: *State v. Shelledy*, 8-477, 508.

Remarks by the court, in passing upon challenges to jurors, while uncalled for, *held* not prejudicial to defendant and therefore not a ground for a new trial: *State v. George*, 62-682.

Affidavits of jurors: In a criminal case the court should receive the testimony of jurors as to any palpable misapprehension of the instructions of the court as a ground for a new trial: *Packard v. United States*, 1 G. Gr., 225.

The affidavits of jurors which may be received on a motion for a new trial must be voluntary. The court cannot, by rule upon the jury, compel them to answer under oath as to the manner of making up their verdict: *Forshee v. Abrams*, 2-571; *Grady v. State*, 4-461.

Affidavits of jurors cannot be received to show that they erroneously rejected evidence which was properly before them: *State v. McConkey*, 49-499.

Nor to show that it was agreed that if the court made no response to a request for instructions as to certain points, a verdict of guilty was to be rendered, and that this agreement was carried out: *Ibid.*

See, further, as to affidavits of jurors, § 4045 and notes.

Affidavits as to statements of jurors: Affidavits of the attorney of the unsuccessful party as to statements made to him by jurors, showing misconduct of the jury, *held* not admissible to impeach the verdict: *State v. Quinton*, 59-362.

An affidavit showing that a juror has made statements to the effect that the jury did not consider the instructions of the court, and that members of the jury refused to make affidavits as to that fact, cannot be considered: *Grady v. State*, 4-461.

Illness of defendant: Under particular facts, *held*, that a new trial could not be granted on the ground of defendant's claim that when giving his testimony as a witness he was suffering from nervous headache which affected his mind and memory, it appearing to the court that the facts on which the claim was based were not sufficiently shown: *State v. Montgomery*, 71-630.

Newly-discovered evidence: The statute does not authorize a new trial in a criminal action on the ground that testimony material to the defense has been discovered since the trial, which could not with reasonable efforts have been discovered previous thereto: *State v. Bowman*, 45-418.

Newly-discovered evidence in a particular case, *held* sufficient to entitle defendant to a new trial, the right to a new trial on that ground not being discussed: *State v. Foster*, 37-404.

In other cases, without discussion of the right of defendant to new trial on that ground, the showing was held insufficient: *State v. Wells*, 48-671; *State v. Johnson*, 72-393.

Failure to obtain evidence: A new trial will not be granted on account of the inability of defendant to procure certain evidence which was simply cumulative and would clearly not have warranted a different verdict: *State v. Nadal*, 69-478.

5875. Application; when made. 4490. The application for a new trial can be made only by the defendant, and must be made before judgment. [R., § 4855; C., '51, § 3053.]

A motion for a new trial must be made before judgment: *State v. Bixby*, 39-465.

Presence of defendant, even in case of prosecution for a felony, is not required at the argument and determination of a motion for a new trial under § 5736: *State v. Decklotts*, 19-447.

CHAPTER 32.

OF ARREST OF JUDGMENT.

5876. Grounds of. 4491. A motion in arrest of judgment, is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground of demurrer;

2. When upon the whole record no legal judgment can be pronounced. [R., § 4856; C., '51, § 3054.]

Objections to the impaneling of the grand jury cannot be raised for the first time by motion in arrest of judgment: *State v. Reid*, 20-413.

But the correctness of the ruling upon a challenge to a grand juror may be questioned by this motion: *State v. Haynes*, 54-109.

The objection that it does not appear from the indictment that it was found within the statutory period of limitation after the commission of the offense is not a ground for arrest of judgment: *State v. Deitrick*, 51-467.

Where defendant demurred to the indictment, and upon the overruling of the demurrer he neglected to plead, but was tried as if a plea of not guilty had been entered, *held*, that defendant was not prejudiced by the irregularity, and a motion in arrest of judgment was properly overruled: *State v. Greene*, 66-11.

Where a motion in arrest of judgment is sustained, the proceeding cannot be pleaded in a subsequent prosecution as constituting a previous conviction or acquittal: *State v. Clark*, 69-196.

As to grounds of demurrer to indictment, see § 5737 and notes.

5877. On motion of court. 4492. The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion. [R., § 4857; C., '51, § 3055.]

5878. Defendant held to answer. 4493. If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense,

of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination. [R., § 4858; C., '51, § 3057.]

That the first trial will not be a bar to another trial, see notes to § 5749.

5879. When motion made. 4494. The motion may be made at any time before judgment, or after judgment, during the same term. [R., § 4859.]

CHAPTER 33.

OF JUDGMENT.

5880. Of acquittal. 4495. Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately. [R., § 4860.]

5881. Of conviction; time for. 4496. Upon a plea of guilty, upon a verdict of guilty, or a special verdict, upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment. The time appointed for pronouncing judgment must be at least three clear days after the verdict is rendered, if the court remain in session so long, or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be pronounced in less than six hours after the verdict is rendered. [R., §§ 4861–2; C., '51, § 3058.]

[The word "clear," in the fourth line, as in the original, is omitted in the printed Code. See note to § 5869 as to similar omissions.]

Where the record showed that the court was in session more than three days after the verdict, *held*, that the statute is imperative, and unless the record clearly rebutted the presumption of prejudice it could not be disregarded; and in such case the judgment was reversed and the cause remanded for judgment upon the verdict, with leave for defendant to show any cause against the same which had not been already passed upon: *State v. Watrous*, 13–489.

Where the defendant appears to have been sentenced before the expiration of the three days here provided, it will be presumed, in the absence of any showing to the contrary, that the court deferred its judgment to as remote a period as it reasonably could: *State v. Wood*, 17–18; *State v. Marvin*, 12–499.

Where the record did not show whether six hours intervened between the plea of guilty and the final adjournment of the term, and it appeared that a continuance was made without objection, the presumption would be that the court adjourned within less than six hours, and the case was continued for judgment by consent, and that there was no error in failing to pronounce judgment at the term in which the plea of guilty was entered: *State v. Stevens*, 47–276.

Where the last day of the term was fixed for pronouncing judgment, but upon that day the cause was continued for judgment until next term, when judgment was pronounced, *held*, that in the absence of a showing to the contrary, and of any objection at the time, it would be presumed that the continuance was for good cause or at the request of defendant: *State v. Miller*, 53–84.

It is not error to render judgment for the payment of a fine at the next term after conviction: *State v. Ray*, 50–520.

5882. Presence of defendant. 4497. For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present; if it be for misdemeanor, judgment may be pronounced in his absence. [R., § 4863.]

Where the offense charged is a misdemeanor, judgment may be rendered in the absence of the defendant: *Hughes v. State*, 4–534.

As to presence of defendant at rendition of verdict, see § 5846 and notes.

5883. Forfeiture of bail. 4498. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or money deposited, may make an order directing the clerk to issue a bench warrant for his arrest. [R., § 4865; C., '51, § 3061.]

5884. Bench warrant. 4499. The clerk, on the application of the district [county] attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties for his arrest. [R., § 4866; C., '51, 3062.]

5885. Form. 4500. The bench warrant may be substantially in the following form:

COUNTY OF ——.

THE STATE OF IOWA,

To any Peace Officer in the State:

A. B. having been duly convicted on the —— day of ——, A. D. 18—, in the district court of —— county, of the crime of (here designate it generally, as in the indictment).

You are, therefore, hereby commanded to arrest the said A. B. and bring him before said court for judgment, if it be then in session, or if it be not then in session, you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court, at my office in ——, in [SEAL] said county, this —— day of ——, A. D. 18—.

By order of the court.

[R., § 4867.] —— ——, Clerk.

5886. Service. 4501. The bench warrant may be served in any county in the state. [R., § 4868; C., '51, § 3063.]

5887. Defendant arrested. 4502. Whether the bench warrant be served in the county where it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant according to the command thereof. [R., § 4869; C., '51, § 3064.]

5888. Show cause. 4503. When the defendant appears for judgment, he shall be informed by the court, or by the clerk under its direction, of the nature of the indictment and of his plea, and the verdict, if any thereon, and must be asked whether he have any legal cause to show why judgment should not be pronounced against him. [R., § 4870; C., '51, § 3065.]

This section is declarative of the common law. The action of the court as here directed is not required to be made matter of record, although it may properly be done, but no presumption of its omission will arise from the fact that it does not appear of record: *State v. Wood*, 17–18; *State v. Stiefle*, 13–603.

Unless it otherwise appears it will be presumed that such steps were properly taken: *State v. Wells*, 46–662.

The fact that it does not appear that defendant had an opportunity to present matter in mitigation of sentence, on a plea of guilty, is no ground for a new trial, it not appearing that he was in any way deprived of such opportunity: *State v. Reininghaus*, 43–149.

It appearing that defendant had all the opportunity to prepare an application for a new trial or motion in arrest of judgment and showing in mitigation of punishment which could have been necessary, *held*, that the failure to fix any definite time for judgment after a continuance upon a plea of guilty was error without prejudice: *State v. Stevens*, 47–276.

It is not error for the judge to remark, in connection with the statement to the defendant of the charge against him, his plea thereto, the verdict of the jury, etc., upon the circumstances of the offense, and to state the reasons impelling him to pronounce against defendant a particular penalty imposed upon him. There is certainly no impropriety in the practice in this respect recognized in many of the courts of this state: *State v. Hale*, 65–575.

5889. What may be shown. 4504. He may show for cause against the judgment, that he is insane, or any sufficient ground for a new trial, or in arrest of judgment. [R., § 4871.]

5890. Insanity. 4505. If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this code, and if he is found to be insane, such proceedings shall be had as are herein directed. [R., § 4872.]

5891. New trial; motion in arrest. 4506. If he move for a new trial, or in arrest of judgment, the court shall defer the judgment, and proceed to hear and decide the motions. [R., § 4873.]

5892. Rendition of judgment. 4507. If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered. [R., § 4874; C., '51, § 3066.]

Judgment on plea in bar: Where defendant interposes only the plea of former conviction or acquittal, without pleading not guilty, as he might do in connection therewith, and upon verdict being found against him he does not ask leave to plead over, judgment may properly be rendered against him without further trial as to his guilt: *State v. Green*, 16-239.

Sentence for included crime: Where defendant, under indictment for assault with intent to murder, was found guilty of assault with intent to commit great bodily injury, and the court, doubting its authority to sentence for the latter offense under the indictment, sentenced for a simple assault, *held*, that there was no error prejudicial to defendant: *State v. Schele*, 52-608.

Sentence to hard labor: Where the jury found defendant guilty of murder in the first degree and directed that he should be punished by imprisonment in the penitentiary at hard labor for life, and in rendering judgment the court sentenced to imprisonment in the penitentiary for life, *held*, that the judgment must be presumed to mean imprisonment at hard labor, and sufficiently corresponded with the verdict: *State v. Cole*, 63-695.

5893. Judgment for two or more offenses. 4508. If the defendant is convicted of two or more offenses, before judgment on either, the punishment of each of which is, or may be, imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses. [R., § 4880; C., '51, § 3070.]

Where two judgments of imprisonment against a defendant were rendered on the same day, but no provision was made as to the commencement of either term as here contemplated, *held*, that the prisoner should be held in confinement until both were served out, and that the term of imprisonment on the judgment last rendered would commence on the expiration of that under the first. Two terms of imprisonment cannot be concurrent: *Mier v. McMillan*, 51-240.

5894. Imprisonment for fine. 4509. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine. [R., § 4881; C., '51, § 3071.]

Imprisonment for non-payment of fine: This section is applicable whether the statute under which the fine is imposed provides that punishment be by fine only or by both fine and imprisonment. The judgment should specify the extent of the imprisonment, but a failure to do so will not render the judgment void. It may be corrected on appeal: *State v. Myers*, 44-580, 584.

There cannot be imprisonment for non-payment of a fine unless the judgment so orders: *Lanpher v. Dewell*, 56-153.

The provisions of this section and of § 6087 are directory only. The extent of imprisonment for non-payment of a fine being thus fixed, a judgment that defendant be imprisoned until the fine is paid will not be void: *Jackson v. Boyd*, 53-536.

But when imprisonment is imposed under any statute the court should fix the extent of the imprisonment. To this extent the provision is mandatory: *Ex parte Tuicher*, 69-393.

This section is applicable to a fine imposed under § 2381 or § 2383, providing punishment for violation of the prohibitory liquor law, although it is therein provided defendant shall stand committed until the fine and costs assessed against him are paid: *Ibid.*

Although a judgment for failure to pay the five hundred dollars fine authorized under the prohibitory liquor law for violation of an injunction should limit the imprisonment to one hundred and fifty days, nevertheless a failure to make such order will not render a reversal of the judgment of fine and imprisonment necessary, but the judgment can be corrected on appeal: *Jordan v. Circuit Court*, 69-177.

The duration of the imprisonment, under this section, cannot be determined or limited by a partial payment of the fine: *Galles v. Wilcox*, 68-664.

The fact of imprisonment for non-payment of a fine to the limit of the law, as above specified, does not operate as a satisfaction of the judgment (see §§ 6009, 6136, 6141): *State v. Jordan*, 39-387; *State v. Awerda*, 40-151; *Albertson v. Kriechbaum*, 65-11.

But a prisoner who, having been confined for the non-payment of a fine, is liberated under the provisions as to poor convicts, contained in § 6009, is entitled to have the judgment against him satisfied: *State v. Van Vleet*, 23-168; *State v. Peck*, 37-342; *State v. Jordan*, 39-387; *In re Jordan*, 39-394.

The power to imprison for non-payment of a fine exists by virtue of this section, as incident to the power to impose a fine, and is not conferred by § 6009, providing for release of poor convicts. And if the statute authorizing the fine provides that a prisoner shall not be released under § 6009, such provision is controlling: *Hanks v. Workman*, 69-600.

Under the provisions of §§ 6136, 6141, that defendant may be sentenced to hard labor for non-payment of a fine, he is to be credited with one dollar and fifty cents per day upon

the judgment against him, but the duration of his imprisonment cannot exceed that here specified: *Keokuk v. Dressell*, 47–597. And see *State v. Jordan*, 39–387; *In re Jordan*, 39–394; *State v. Anwerda*, 40–151.

Costs: The provisions of this section apply only to the fine and not to the costs: *State v. Erwin*, 44–637.

But it may be provided by statute that defendant be imprisoned for non-payment of costs as well as fine: *Albertson v. Kriechbaum*, 65–11.

Where imprisonment for non-payment of fine or fine and costs is authorized, such imprisonment is not a portion of the punishment for the crime, but only a method of enforcing payment of the fine or fine and costs: *Ibid.*

Therefore, *held*, that a statute making a crime punishable by fine not exceeding one hundred dollars, and providing for imprisonment until payment of fine and costs, did not take the crime out of the jurisdiction of a justice of the peace: *Ibid.*

For violation of a city ordinance a defendant may be imprisoned until fine and costs are paid, not to exceed thirty days (§ 663): *State v. Wells*, 46–662.

Payment of a fine imposed, and discharge of defendant from imprisonment for its non-payment, does not satisfy the costs, and execution may issue therefor: *State v. Gray*, 35–503; *Gray v. Ferreby*, 36–146.

In a particular case, *held*, that a judgment was in effect a judgment for imprisonment until the fine be satisfied, and not for fine and costs, which would have been illegal: *State v. Boynton*, 75–753.

For similar provision, see § 6087.

5895. Committed to jail of another county. 4510. When a person is, in any event, to be committed to jail, if there be no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be holden for all the expenses thereof. [R., § 4884; C., '51, § 3073.]

5896. Allowance of bail for appeal. 4511. In all cases, except murder in the first degree, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order be made. [R., § 4885.]

Failure of the court to make the order as to bail here contemplated will not entitle defendant to a discharge upon *habeas corpus*, but his only relief will be in such a proceeding to have the amount of bail properly fixed: *Murphy v. McMillan*, 59–515.

See §§ 5985, 5986, as to bail upon appeal.

CHAPTER 34.

OF EXECUTION.

5897. Copy of judgment. 4512. When a judgment of imprisonment, either in the penitentiary or county jail is pronounced, a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution. [R., § 4886; C., '51, § 3074.]

5898. Commitment of defendant. 4513. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with, or the defendant discharged by due course of law. [R., § 4897; C., '51, § 3075.]

The fact that the warrant of commitment to imprisonment is void will not entitle the prisoner to release on *habeas corpus* if the court or judge is satisfied from the evidence that he should be held to answer for the crime charged or any other crime (§ 4734). In such case the court or judge may make an appropriate order: *Jackson v. Boyd*, 53–536.

As to the order in which two or more terms of imprisonment are to be served out, see § 5893 and note.

5899. By whom executed. 4514. When the judgment is imprisonment in the county jail of the county in which the trial is had, or a fine and

that the defendant be imprisoned in such county jail until it be satisfied, the judgment must be executed by the sheriff of that county. In all other cases, when the judgment is imprisonment, the sheriff of the county in which the trial was had, must deliver the defendant to the proper officer in execution of the judgment. [R., § 4898; C., '51, § 3076.]

5900. Delivery to keeper of jail. 4515. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, in the county jail of the county in which the trial was had, the sheriff of the county in which the trial was had, shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail or prison in which the defendant is to be imprisoned, and take his receipt therefor on a duplicate copy of such entry, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon. [R., § 4899; C., '51, § 3077.]

5901. Preventing escape. 4516. The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the state in securing the defendant, and retaking him if he escape, as if the sheriff were in his own county; and every person who neglects or refuses to assist the sheriff when so required shall be punishable as if the sheriff were in his own county. [R., § 4900; C., '51, § 3078.]

5902. Return. 4517. An officer executing a judgment of imprisonment shall make a written return of the execution of such judgment forthwith after such execution, and file the same with the clerk of the court, by which the judgment was rendered. [R., § 4901.]

5903. Execution for fine. 4518. Upon a judgment for a fine, a writ of execution may be issued as upon a judgment in a civil case. [R., § 4902.]

5904. Judgment for abatement of nuisance. 4519. When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same with his doings under the same thereon indorsed to the clerk of the court in which the judgment was rendered within seventy days after the date of the certificate of such certified copy, unless it be a judgment of imprisonment, which is hereinbefore provided for. [R., § 4903.]

An order for the abatement or removal of a nuisance, to be delivered to the sheriff as here provided, should so describe the nuisance that the officer will be able to identify with certainty the object against which it is directed: *Sloan v. Rebman*, 66-81.

CHAPTER 35.

OF APPEALS.

5905. Review by. 4520. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by an appeal. [R., § 4904.]

The chapter relating to proceedings in the supreme court in civil cases is intended to regulate generally the practice of that court in criminal cases as well. Therefore, *held*, that the sections relating to rehearing are applicable in criminal cases, and are applicable in behalf of the state as well as defendant: *State v. Jones*, 64-349.

In general, see notes to § 5923.

5906. Who may. 4521. Either the defendant or the state may take an appeal. [R., § 4905.]

5907. When taken. 4522. No appeal can be taken until after judgment, and then only within one year thereafter. [R., § 4906.]

Appeal from final judgment: An appeal in a criminal case lies only from final judgment, which is the judgment here contemplated, and not from an intermediate order or decision. (Overruling *State v. Brandt*, 41–593): *State v. Swearengen*, 43–336.

This doctrine is applicable to appeals by the state as well as by defendant: *State v. Davis*, 47–634.

A criminal case cannot be brought to the supreme court by agreement before rendition of final judgment: *Rutter v. State*, 1–99.

An appeal by defendant will not lie in a criminal case from the overruling of one ground of demurrer to the indictment where another ground of demurrer is sustained and the indictment is dismissed: *State v. Hoffman*, 67–281.

Not by consent after time has expired: The supreme court cannot entertain jurisdiction by consent of parties to a case after the time for taking appeal has run out: *State v. Fleming*, 13–443.

A party in a criminal as well as in a civil case must prosecute his appeal within the time prescribed by law, and cannot appeal after the expiration of the time allowed for appeal: *State v. Westfall*, 37–575.

Waiver of right: After payment of fine or serving out the imprisonment according to the sentence, defendant cannot appeal from the judgment: *Ibid.*

What must appear: Where the record fails to show that defendant was indicted, or was tried, or that a verdict was found against him, or that any judgment was entered, or that he has appealed, the appeal will be dismissed: *State v. Quigley*, 62–758.

Where the record shows no service of notice of appeal the court is without jurisdiction to examine any question in the case: *State v. Leslie*, 65–305.

Where it does not appear from the abstract that judgment has been rendered the appeal will be dismissed: *State v. Wheeler*, 65–619.

The abstract should show the fact that judgment has been entered: *State v. Briggs*, 73–456.

5908. How taken. 4523. An appeal is taken by the party taking it, or the attorney of such party, serving on the adverse party, or the attorney of the adverse party who acted as attorney of record in the district court at the time of the rendition of the judgment, and also on the clerk of the district court by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment. [R., § 4907.]

5909. When deemed taken. 4524. The appeal is deemed to be taken when the notices thereof, required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, or annexed thereto. [R., § 4908.]

5910. Transcript; duty of clerk. 4525. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court. [R., § 4909.]

In a criminal case, the record after the caption, stating the time and place of holding the court, should consist of the indictment properly indorsed as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict and the judgment of the court: *Harriman v. State*, 2 G. Gr., 270.

Other matters and proceedings, such as motions, objections, exceptions, and the like, do not form any part of the record unless made so by order of the court, by bill of exceptions, by agreement of parties, special verdict or otherwise: *Ibid.*

Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record, and render such judgment as the law demands: *State v. Pratt*, 20–267.

5911. Several defendants may join. 4526. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [R., § 4917.]

5912. By state; no stay. 4527. An appeal taken by the state, in no case stays the operation of a judgment in favor of the defendant. [R., § 4911.]

5913. By defendant; bail. 4528. An appeal taken by the defendant does not stay the execution of the judgment, unless bail be put in, except as provided in the next section. [R., § 4914.]

5914. Defendant detained in custody. 4529. Where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody, to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it. [R., § 4915.]

5915. Bail; proceedings when given. 4530. When an appeal is taken by the defendant, and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken and bail put in, and the sheriff or other officer having the defendant in custody, must, upon the delivery of such certificate to him, discharge the defendant from custody where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court who issued it, the execution or certified copy of the entry of judgment under which he acted, with his return thereon, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal. [R., § 4916.]

5916. Appellant; appellee. 4531. The party taking the appeal is known as the appellant, the adverse party as the appellee, but the title of action shall not be changed in consequence of the appeal; it shall be docketed in the supreme court as it was in the district court. [R., § 4918.]

5917. How docketed; precedence. 4532. Appeals, in criminal cases, shall be docketed in the supreme court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term. [R., § 4919.]

TRIAL OF THE APPEAL.

5918. Appearance of defendant. 4533. The personal appearance of the defendant in the supreme court on the trial of an appeal, is in no case necessary. [R., § 4920.]

5919. Not dismissed for informality. 4534. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected in a reasonable time, and the supreme court must direct how it shall be corrected. [R., § 4921.]

Where the record in a criminal case on appeal was not in such form that the court was authorized to pass upon it, and the prosecuting officer insisted on such defect by motion, *held*, that the motion would be sustained and the submission set aside, and the case be put again on the docket for such further proceedings as the rules should direct and the rights of defendant demand: *State v. Havercamp*, 53-737.

The mere fact that the indictment is mislaid or stolen after the trial and cannot be sent up with the writ of error to the supreme court on appeal will not authorize the supreme court to reverse the judgment: *Smith v. State*, 4 G. Gr., 189.

5920. Assignment of error. 4535. No assignment of error, or joinder in error, shall be necessary. [R., § 4922.]

Section applied: *State v. Pratt*, 20-267.

5921. Argument. 4536. The defendant shall be entitled to close the argument. [R., § 4923.]

5922. Opinion. 4537. The opinion of the supreme court must be in writing, filed with its clerk and recorded. [R., § 4924.]

5923. Decision. 4538. If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it. [R., § 4925; C., '51, §§ 3097–8.]

What will be ground of reversal: Technicalities are to be disregarded: *State v. Ensley*, 10–149.

It is only errors and defects which affect substantial rights that can be considered: *Hintermeister v. State*, 1–101.

A purely technical objection, as, for instance, the erroneous discharge of one grand jury, and the summoning of another, by which the indictment was found, in the absence of any objection to the second except the discharge of the first, will not be ground for a reversal: *State v. Hughes*, 58–165.

Where the error urged was the overruling of a motion to set aside the judgment, based upon slight irregularities in the selection of the grand jury, the court held that they did not affect the substantial rights of the party and affirmed the judgment: *State v. Carney*, 20–82.

Where there is no appearance for appellant or assignment of errors, it is not the duty of the court to support the judgment of the court below by discussing imaginary errors: *State v. Stewart*, 71–754.

The court is not required to imagine possible objections and present reasons supporting the rulings of the district court as against them: *State v. Kramer*, 74–760.

Section applied: *State v. Brandt*, 41–593, 634.

Error without prejudice: Where the evidence is all before the court, and it is apparent that an alleged error in the instructions could not have been prejudicial to defendant, the case will not be reversed: *State v. Guisenhause*, 20–227.

A verdict of guilty will not be disturbed because of an erroneous assumption by counsel when it appears that no prejudice to the rights of the prisoner resulted therefrom: *State v. Turner*, 19–144.

Error in prosecuting a violation of a city ordinance in the name of the state instead of the name of the city will not be ground of reversal, at least where the error was not objected to on the trial: *State v. King*, 37–462.

As malice aforethought is not an element of the crime of assault and battery, *held*, that in a criminal prosecution for assault with intent to murder, in which defendant was only convicted of assault and battery, the exclusion of evidence tending to show malice aforethought, even if erroneous, was without prejudice: *State v. Graham*, 51–72.

Where, after the overruling of a demurrer, defendant was tried as though on a plea of not guilty, but without any plea having been in fact made, *held*, that he was not entitled on appeal to have the conviction set aside and be allowed to enter a plea of not guilty: *State v. Greene*, 66–11.

Where the jury render a verdict for manslaughter under an indictment for murder, any error in the instructions with reference to malice as an element of murder will be error without prejudice: *State v. Winters*, 72–627.

Assignment of errors: The court will, in a criminal case, upon an appeal by defendant, examine the record and determine whether the law has been correctly administered, even though no formal objection has been made to the proceeding and though there be no formal assignment of error or argument: *State v. Sundermilk*, 50–695; *State v. Barlow*, 50–701.

The rule that objections not raised in the court below will not be considered in the supreme court does not apply in criminal cases: *State v. Potter*, 28–554.

In the absence of assignment of error and of argument in criminal cases, the appellate court is required to examine the record and render such judgment upon it as the law demands, but the court will not enter into a discussion of imaginary errors: *State v. Quinn*, 63–396.

The record: Where the record fails to show that defendant was indicted, or was tried, or that a verdict was found against him, or that any judgment was entered, or that he has appealed, the appeal will be dismissed: *State v. Quigley*, 62–758.

Where the record shows no service of notice of appeal the court is without jurisdiction to examine any question in the case: *State v. Leslie*, 65–305.

Where it does not appear from the abstract that judgment has been rendered the appeal will be dismissed: *State v. Wheeler*, 65–619. And see *State v. Briggs*, 73–456.

Rules as to printed abstracts: The court may make reasonable rules relating to practice upon appeals, and provide that upon a sufficient showing they may be waived or modified, and it having provided that the evidence on an appeal must be abstracted and the abstract printed, it will not consider a case not presented in accordance with these rules, unless application for the waiver of such rules has been duly made: *State v. Day*, 58–678.

The provisions of the rules of the supreme court for suspending such rules in regard to printed abstracts in criminal cases on account of the poverty of defendant appealing must be complied with. An abstract in writing or caligraphic writing must be submitted to the attorney-general, and the fact of the inability of appellant to pay for printing must be shown

by affidavit, and further it must be shown by the counsel, by affidavit or professional statement, that there is merit in the appeal: *State v. Earl*, 66–84.

In criminal cases the court will not examine the transcript for the purpose of finding error where the appellant has filed an abstract. It is only where leave has been granted to present the case without printed abstract that the transcript will be examined: *State v. Butterfield*, 75–86.

Appearance of defendant: Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record and render such judgment as the law demands: *State v. Pratt*, 20–267.

Granting new trial: The supreme court will interfere more readily in a criminal than in a civil case, where a new trial, asked on the ground that the verdict is not supported by the evidence, has been refused: *State v. Tomlinson*, 11–401.

But it will cautiously interfere with verdicts in such cases: *State v. Collins*, 20–85.

When the evidence upon which defendant is convicted is so lacking in affirmative force as not to generate a belief of probable guilt, a new trial will be granted: *State v. Hilton*, 22–241.

While the duty of the supreme court to interfere with an unjust verdict is recognized, yet, when the testimony is conflicting, it must be satisfied of its insufficiency to convince the judgment, reason and conscience of the triers, before setting aside the conclusion arrived at by them: *State v. Elliott*, 15–72.

While the supreme court will exercise a just caution in interfering with the verdict of the jury, especially where the court below has refused to disturb it, yet a conviction clearly in conflict with the evidence will be set aside: *State v. Woolsey*, 30–251.

The supreme court cannot, on appeal, interfere with the verdict of the jury when there is clear conflict in the testimony, this rule being applicable in criminal as well as civil actions: *State v. Falconer*, 70–416.

In particular cases, *held*, that the evidence was not sufficient to sustain a verdict of guilty: *State v. Moffitt*, 31–316; *State v. May*, 20–305; *State v. Campbell*, 69–556.

As to grounds for granting new trial in lower court, see § 5874 and notes.

When the record must contain the whole evidence: The supreme court cannot pass upon the question whether the lower court ruled correctly upon a motion for a new trial on the ground that the verdict was contrary to the evidence, unless the whole evidence upon the trial was before it: *State v. Crawford*, 11–143.

In bringing before the supreme court the question whether the verdict below was in accordance with the evidence, a motion for a new trial should be made in the lower court and all the evidence taken to the supreme court on appeal: *State v. Hockenberry*, 11–269.

The court cannot reverse the judgment on the ground that the verdict is against the evidence unless the record discloses that all the testimony is before it: *State v. Pitts*, 11–343; *State v. Carr*, 43–418.

Reducing the sentence: Where the sentence is too severe the court will reduce the punishment, but will not reverse the case on that account: *State v. Madden*, 35–511; *State v. Little*, 42–51.

The power to reduce the sentence will be exercised only when the court below has manifestly visited too severe a penalty, one disproportionate to the degree of guilt as shown by the proof: *State v. Freeman*, 27–333.

To justify the exercise of such power it must be made to appear that the punishment is excessive: *State v. Allen*, 32–248.

To authorize the supreme court on appeal to diminish the punishment, the record should show with sufficient clearness that the punishment inflicted is beyond the demands of justice: *State v. Wilmoth*, 63–380.

In determining whether the punishment in a particular case is excessive, the court will decide the case upon its peculiar facts, and each offender must receive the punishment he merits without regard to the punishment inflicted on others: *State v. Upson*, 64–248.

Where there is no evidence before it by which the proper amount of penalty may be determined, the supreme court will not reduce the punishment inflicted: *State v. Baughman*, 20–497.

The supreme court will not reduce the sentence of a lower court in a criminal case when the record does not disclose all the circumstances attending the commission of the offense: *State v. Patton*, 19–458.

The court must have some legal data upon which to base its action in reducing the sentence: *State v. Baughman*, 20–497.

The supreme court will not reduce the punishment imposed by the lower court unless all the evidence is before it: *State v. Harris*, 36–268; *State v. Durston*, 52–635; *State v. Baughman*, 20–497; *State v. Joaquin*, 43–131; *State v. Buck*, 59–382.

The supreme court will not reduce the sentence merely on an abstract of the evidence: *State v. Freeman*, 27–333.

Facts in a prosecution for murder *held* not such as to require the reduction of the sentence: *State v. Houston*, 50–512. So *held* also in a case of accessory to assault with intent to commit murder: *State v. Mower*, 68–61. So *held* also in a case of seduction: *State v. Heatherton*, 60–175; and in a case of burglary: *State v. Franks*, 64–39; and in a case of larceny: *State v. Ritchie*, 69–123.

In a particular case, where the highest punishment permitted by the law for the offense charged was imposed for an act which was not the most aggravated form of the crime, *held*, that the sentence was excessive and it was accordingly reduced: *State v. Thompson*, 46–699.

In particular cases, *held*, that the sentence should be reduced as excessive: *State v. Madden*, 35–511; *State v. Hayden*, 45–11; *State v. Doering*, 48–650; *State v. Moody*, 50–443; *State v. Sullivan*, 51–142.

Where defendant was convicted on an indictment improperly charging in two counts two distinct crimes and was sentenced on both counts, *held*, that on appeal the sentence would be reduced to what would have been a proper sentence on one count, although the

objection on the ground of duplicity had not been raised in the court below: *State v. Henry*, 59-391.

In a particular case, *held*, that the evidence was insufficient to support a verdict of murder in the first degree; but it not being claimed that defendant was not guilty of manslaughter the court reduced the sentence to the proper one for the latter crime: *State v. Fields*, 70-196.

Effect of reversal: Upon reversal of a judgment of conviction the cause may be remanded for a new trial. Jeopardy is not considered as having attached if the defendant is erroneously convicted and obtains a reversal of the judgment: *State v. Knouse*, 33-365.

A judgment in a criminal case being reversed on appeal for a defect in the indictment, the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *State v. Morrissey*, 22-158.

As to *procedendo*, see § 5927 and notes.

Final judgment in supreme court: The supreme court may, on appeal in criminal cases, render such judgment as the district court should have rendered: *State v. Thompson*, 31-393.

Costs of appeal: In case of appeal by the state, and reversal, it is improper to tax the costs to defendant: *State v. Vail*, 57-103.

The statute does not provide for the payment by the county of costs of printing the abstract, etc., on appeal by defendant, although judgment against him is reversed: *Red v. Polk County*, 56-98; *State v. Rainsbarger*, 74-539.

The costs of defendant for transcript, abstract, etc., in presenting his appeal are not taxable to the county even though he secures a reversal: *State v. Rainsbarger*, 74-539.

5924. In appeals by state. 4539. If the appeal was taken by the state, the supreme court cannot reverse the judgment, or modify it so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory on the district court, as the correct exposition of the law. [R., § 4926.]

Upon such an appeal the supreme court cannot interfere with the judgment of the district court, whether the appeal be from a judgment upon the trial on the merits, or upon demurrer or motion. The decision of the district court ends the proceeding as against the defendant: *State v. Kinney*, 44-444.

In such case, the court having given an exposition of the law, no further order is necessary or allowable: *State v. Keeler*, 28-551.

The fact that a *procedendo* issues in the usual form, requiring the lower court to proceed after an appeal by the state is determined, does not give the lower court any power in such cases: *State v. Kinney*, 44-444.

In case of appeal by the state, and reversal, it is improper to tax costs to defendant: *State v. Vail*, 57-103.

And the same rule holds as to an appeal by a city in a proceeding commenced in its name for the violation of a city ordinance: *Columbus City v. Cutcomb*, 61-672.

5925. When judgment reversed. 4540. If a judgment against the defendant be reversed without ordering a new trial, the supreme court must direct, if the defendant be in custody, that he be discharged, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to him. [R., § 4927; C., '51, § 3099.]

5926. If affirmed. 4541. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as hereinafter provided. [R., § 4928; C., '51, § 3100.]

5927. Judgment recorded and transmitted. 4542. When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, with proper instructions and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe. [R., § 4929; C., '51, § 3101.]

The *procedendo* from the supreme court is not necessary to the jurisdiction of the district court on a new trial. The defendant may waive the objection. While consent cannot confer jurisdiction over the subject-matter, it may over the parties: *State v. Knouse*, 33-365. And see *Becker v. Becker*, 50-139.

It is not necessary to make any order remanding a cause except that contained in the *procedendo*: *State v. Clouser*, 72-302.

5928. Subsequent proceedings. 4543. After the certified copy of the entry of the judgment of the supreme court, and its instructions have been remitted as provided in the preceding section, the supreme court has no farther jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the supreme court into effect, must be had in

the court to which it is remitted, or by the clerk thereof, except as provided in the next two sections. [R., § 4930; C., '51, § 3102.]

5929. Judgment enforced. 4544. Unless where some proceedings in the district court are directed by the supreme court, a copy of the certified copy of the judgment of the supreme court, with its directions, certified by the clerk of the district court to whom the same has been transmitted, delivered to the sheriff, or other proper officer, shall authorize him to execute the judgment of the supreme court, or take any steps to bring the proceedings to a conclusion, except as provided in the next section. [R., § 4931.]

5930. Time of imprisonment deducted. 4545. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court shall be again convicted, the period of his former imprisonment shall be deducted by the district court from the period of imprisonment to be fixed on the last verdict of conviction. [R., § 4932.]

Where the defendant has been imprisoned during appeal, and after judgment has been reversed he is again tried and convicted, it will be presumed, in the absence of showing to the contrary, that the judge, in fixing the term of imprisonment under the second conviction, took into consideration the imprisonment under the first conviction: *State v. Hopkins*, 67–285.

CHAPTER 36.

OF IMPEACHMENT.

5931. Accusation. 4546. An impeachment is the written accusation of a state officer by the house of representatives before the senate, of any misdemeanor or malfeasance in office. [R., § 4937.]

5932. By whom found. 4547. A majority of all the members of the house of representatives elected must concur in an impeachment. [R., § 4938; C., '51, § 3157.]

5933. Requisites. 4548. The impeachment must specify the offenses charged with the same precision as is requisite in an indictment, and the accused must be allowed counsel as in cases of other prosecution. [R., § 4939; C., '51, § 3158.]

5934. How stated. 4549. If the impeachment charge more than one misdemeanor or act of malfeasance, they shall be stated separately and distinctly. [R., § 4940.]

5935. Accused brought before senate. 4550. When possessed of an impeachment, the senate must forthwith cause the person accused to be brought before it. [R., § 4941; C., '51, § 3159.]

5936. Process. 4551. All writs and process must be issued by the secretary of the senate, and tested in his name, and may be served by any person thereto authorized by the senate or president. [R., § 4942; C., '51, § 3160.]

5937. Answer; counsel. 4552; 21 G. A., ch. 91, § 3. Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same, and shall be allowed counsel as in the trial of ordinary cases. [R., § 4943; C., '51, § 3161.]

5938. Oath. 4553. Before proceeding to the trial, an oath, truly and impartially to try and determine the charge in question according to the evidence, shall be administered by the secretary of the senate to the president, and by him to each of the members of that body. [R., § 4944; C., '51, § 3162.]

5939. Suspended. 4554. Every officer impeached shall be suspended from the exercise of his official duties until his acquittal. [R., § 4948; C., '51, § 3165.]

5940. President of senate. 4555. If the president of the senate be impeached, notice thereof must be immediately given to the senate, which shall thereupon choose another president, to hold his office until the result of the trial is determined. [R., § 4949; C., '51, § 3167.]

5941. Board of managers; articles of impeachment. 21 G. A., ch. 91, § 1. When an impeachment of an officer is directed, the house of representatives shall elect from its own body seven members whose duty it shall be to prosecute such impeachment, and such members so elected, shall, as a board of managers, be authorized, and empowered to exhibit, and present articles of impeachment in accordance with the resolutions of the house, previously adopted.

5942. Organization of senate. 21 G. A., ch. 91, § 2. Whenever an impeachment of an officer is directed the senate shall forthwith, after the hour of final adjournment of the legislature, be organized as a court for the trial of the same at the capitol of the state, and such organization shall be held and deemed to be perfected when the presiding officer of the senate, and all the members thereof present, shall have taken the oath or affirmation prescribed; and no member of the court shall sit in the trial, or give his vote upon such trial until he shall have taken such oath or affirmation, which oath or affirmation shall be administered by the secretary of the senate to the presiding officer thereof, and by the presiding officer to each of the members of the senate. The senate sitting as a court, upon the trial of an impeachment shall have the same power to compel the attendance of its members as when engaged in the ordinary business of legislation.

5943. Record of proceedings; administering oaths. 21 G. A., ch. 91, § 4. It shall be the duty of the secretary of the senate, in all cases of impeachment, to keep a full and accurate record of the proceedings, which shall be held and taken as a public record; and shall have power to administer all requisite oaths or affirmations.

5944. Necessary officers. 21 G. A., ch. 91, § 5. The senate sitting as a court of impeachment shall have power from time to time to appoint such subordinate officers, clerks and reporters as may be necessary for the convenient transaction of business, and may at any time remove such officers, or any of them.

5945. Process for witnesses. 21 G. A., ch. 91, § 6. The managers elected by the house of representatives and counsel for the person impeached shall severally be entitled to process for compelling the attendance of persons or the production of papers and records required for the trial of the impeachment.

5946. Senate may adopt rules. 21 G. A., ch. 91, § 7. The senate sitting as a court of impeachment shall have full power and authority to establish such rules and regulations for the trial of the accused as may be necessary.

5947. Compensation of members. 21 G. A., ch. 91, § 8. The presiding officer, and members of the senate, while sitting as a court of impeachment, and the managers elected by the house of representatives, shall receive the sum of six dollars each per day, and mileage at the rate of five cents per mile in going from and returning to their places of residence, by the ordinary traveled routes; and the compensation of the secretary, sergeant-at-arms, and all subordinate officers, clerks and reporters shall be such an amount as shall be determined upon by a vote of the members of such court. The state treasurer

shall upon presentation of a certificate or certificates signed by the presiding officer and secretary of the senate, pay all the expenses of the senate, managers, officers, clerks and reporters which may be incurred under the provisions of this act [§§ 5941–5948].

5948. To what applicable. 21 G. A., ch. 91, § 9. The provisions of this act [§§ 5941–5948] shall apply to all resolutions, and proceedings heretofore had, or hereafter to be had in the impeachment of any civil officer of this state.

5949. Suspension; successor. 21 G. A., ch. 151, § 1. The suspension provided for by section four thousand five hundred and fifty-four of the code [§ 5939] shall be effected by the governor, who shall forthwith appoint some suitable person to fill temporarily, the office, and such person having qualified as required by law, shall perform all the duties and enjoy all the rights to the said office belonging, until the removal of the suspension of his predecessor or the election of a successor.

5950. Penalty; removal; disqualification. 21 G. A., ch. 151, § 2. When any person impeached is found guilty, judgment shall thereupon be rendered for his removal from office and his disqualification to hold any office of honor, trust or profit under this state and such judgment shall have the effect of removing from office the person so found guilty.

5951. Senate; powers; process. 21 G. A., ch. 151, § 3. When sitting as a court of impeachment the senate shall sit in the senate chamber in the capitol and shall have power to adjourn from time to time, to dissolve when its work is concluded and to compel obedience to its process and orders. Its process, including subpœnas shall run into any part of the state, and may be served by the same officers when no person is authorized by the president or senate to serve the same, and shall have the same force and effect as subpœnas from district courts in criminal cases.

5952. Imprisonment for contempt. 21 G. A., ch. 151, § 4. The senate while sitting as a court of impeachment shall have all the powers and privileges conferred upon each house of the general assembly by sections fourteen, fifteen and sixteen of the code [§§ 18–20], provided that imprisonment for contempt shall not extend beyond the dissolution of the court of impeachment.

5953. Fees of witnesses. 21 G. A., ch. 151, § 5. The same fees shall be allowed to witnesses and to officers and other persons serving process or orders as are allowed for like services in criminal cases, but no fees can be demanded in advance. Such fees shall be certified and paid as provided by section eight of chapter ninety-one of the acts of the twenty-first general assembly [§ 5947] for the payment of other expenses subject to the right of the court to disallow all fees and charges which it shall deem unreasonable or unnecessary.

CHAPTER 37.

OF EVIDENCE.

5954. As in civil cases. 4556; 17 G. A., ch. 168, § 2. The rules of evidence prescribed in the civil part of this code, shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with the provisions of this chapter. [R., § 4805.]

Defendant as a witness: Before the enactment of latter part of § 4886, defendant in a criminal prosecution was not a competent witness in his own behalf: *State v. Laffer*, 38–422; *State v. Bixby*, 39–465; *State v. Gigher*, 23–318.

But he might testify in his own behalf in a preliminary examination: *State v. Laffer*, 38-422.

Cross-examination: The rules governing the cross-examination of defendant when testifying in his own behalf are the same as those applicable to the cross-examination of other witnesses, and questions may be asked for the purpose of laying a foundation for impeaching his evidence by contradicting statements made in answer to such questions: *State v. Red*, 53-69. And see *State v. Johnson*, 72-393.

Credibility: It is not error to instruct the jury that they may consider defendant's interest in the result of the action as affecting his credibility as a witness: *State v. Moelchen*, 53-310; *State v. Sterrett*, 71-386.

Competency: The rules relating to the pertinency of testimony given by other witnesses are applicable when the prisoner testifies in his own behalf: and the fact that the evidence against him is strong and his story improbable cannot have any bearing upon the admissibility of the proposed testimony: *State v. Kelly*, 57-644.

May testify as to knowledge: Therefore, where defendant's guilt depends upon his knowledge of a fact, he should be permitted to testify upon his knowledge of the subject: *Ibid.*

Comment by prosecuting attorney on defendant's not being a witness is ground for new trial: See notes to § 5874.

Instructions: The fact that the judge gives no instruction to the jury in regard to the failure of the defendant to testify will not constitute error where he has not been requested to so charge, and the matter has not been alluded to in any way during the course of the trial: *State v. Stevens*, 67-557.

Impeachment: When defendant in a criminal case offers himself as a witness, he may be impeached or contradicted in the same manner as other witnesses are, as provided by § 4899. His testimony is to be tested by the rules which are applicable to witnesses generally, and any fact or circumstance which might lawfully be shown for the purpose of affecting the credibility of other witnesses may be shown for the same purpose as to his testimony. Witnesses may therefore be introduced to testify that his reputation for truth and veracity is bad, and it is not necessary that the names of such witnesses shall have been indorsed on the indictment and minutes of their evidence returned by the grand jury, or notice given of the intention to introduce such witnesses: *State v. Teeter*, 69-717.

Where one of two co-defendants on trial jointly is introduced by his co-defendant as a witness, evidence of his bad moral character may be introduced to impeach his credibility in the same manner as in the case of any other witness: *State v. Hardin*, 46-623.

Co-defendants: Where two or more defendants are indicted jointly, but put upon trial separately, either one is a competent witness for the other: *State v. Nash*, 10-81.

Where defendants are jointly indicted and jointly put on trial, one is still a competent witness for the other: *State v. Gigher*, 23-318.

In such case the jury should be properly cautioned not to consider such evidence in behalf of the party testifying: *State v. Stewart*, 51-312.

Where several co-defendants were on trial for the crime of unlawful assembly, *held*, that it was error to exclude the testimony of one, offered in behalf of another and not in behalf of himself, as to what was said and done by the witness' co-defendants: *Ibid.*

If one of two defendants jointly indicted is called as a witness for the other, and the jury find that the one called as a witness was not an accomplice, his testimony should be regarded as that of other witnesses: *State v. Schlagel*, 19-169.

Testimony of husband or wife of defendant: Where a husband and wife are co-defendants the wife may, under § 4891, properly be called as a witness by her husband, and her evidence should be admitted under instructions restricting it in its application so that it shall not be considered in her own behalf: *State v. Donovan*, 41-587.

While the credibility of a wife testifying in behalf of her husband in a criminal prosecution is to be considered and weighed in view of her peculiar relation to defendant, it is error to charge the jury to examine her testimony with peculiar care. The same degree of care which the law requires to be given to the testimony of all witnesses should be applied to hers, and no other or different degree: *State v. Guyer*, 6-263; *State v. Rankin*, 8-355; *State v. Collins*, 20-85; *State v. Bernard*, 45-234.

It is not error to charge the jury that, while the wife is a competent witness for her husband, they should examine and consider her testimony with care and caution, and give it such credit as under the circumstances they think it entitled to: *State v. Nash*, 10-81.

As to when the husband or wife may be a competent witness for or against the other, see, further, § 4891 and notes.

Declarations or admissions of defendant: Declarations of the prisoner made in the very act of the crime are not admissible in his behalf unless they are part of the *res gestæ*. So *held* in a prosecution for illegal sale of intoxicating liquor, with reference to the character of the liquor sold by defendant: *State v. Miller*, 53-84.

Admissions made in ordinary or random conversations are not generally considered in law as satisfactory proof: *State v. Donovan*, 61-278.

Where admissions of defendant are relied upon, it is not required that the jury accept them as a whole for the truth. They may accept those portions which are reasonable and which agree with other evidence, and reject other portions that are unreasonable and contradict other testimony: *State v. McIntire*, 66-339.

Conclusive presumptions and estoppels have no place in the criminal law in establishing the body of the crime charged. Therefore, *held*, that while statements made by a defaulting officer at the time of a settlement with him might estop him in a civil suit from claiming therein that the defalcation existed prior to such settlement, the estoppel would not apply in a criminal prosecution as showing that the offense was barred: *State v. Hutchison*, 60-478.

Where the significance and value of certain circumstantial evidence introduced by the prosecution depended entirely upon the fact that collateral facts appearing in evidence were contemporaneous and subsequent to the crime, *held*, that declarations of the accused with reference to one of the facts, made prior to the crime, were admissible in evidence as overthrowing the circumstantial evidence: *State v. Cruise*, 19–312.

An instruction to the jury that a certain conversation in evidence had with a prisoner upon the subject of the crime with which he was charged occurred as stated, and the statements of accused could not be reconciled upon any other reasonable hypothesis than that of his guilt, then upon such evidence they might convict, *held* not erroneous where there was abundant and incontrovertible proof that the offense was committed: *State v. Rorabacher*, 19–154.

In a prosecution for incest, admissions and declarations of the parties as to the fact of the marriage claimed to be incestuous are admissible to prove it: *State v. Schaunhurst*, 34–547.

In a prosecution for murder, evidence of theories propounded at one time by defendant as to how deceased may have met his death, and which were inconsistent with his explanation of the same thing, were held admissible, subject to any explanation as to the discrepancy, and subject also to the caution that too much importance should not be attached to the circumstance, as an innocent man finding himself suspected might make false representations to allay suspicion: *State v. Feltes*, 51–495.

Evidence as to statements made by defendant as to his previous occupation, *held* not improperly admitted in a trial for murder: *State v. Moelchen*, 53–310.

Testimony as to statements made by defendant with reference to injuries received by him, couched in profane language, *held* not admissible as against him, and that if the fact that he refuses assistance in dressing his wound was material, it should have been testified to directly without giving the language used: *State v. Cross*, 68–180.

The statement by defendant on arraignment that he has no means to employ counsel is a solemn admission which may be used against him if that fact becomes material to any issue in the case: *State v. Fooks*, 65–196.

While a prisoner arrested on preliminary information is not required to plead upon the preliminary examination, yet if he does so plead, even before the magistrate has advised him of his right to counsel, such pleading may be shown in evidence against him as an admission of his guilt: *State v. Briggs*, 68–416.

Declarations admissible as part of the res gestæ: Declarations made at the time of a transaction, expressive of its character, motive or object, are regarded as verbal acts indicating a present purpose or intent, and are therefore admissible as a part of the *res gestæ*. But where the declaration and the act are inconsistent, if the act goes beyond the declaration or contradicts it, the presumption of intention is to be gathered from the act: *State v. Shelledy*, 8–477, 506.

Defendant's statements as to what occurred at the time of the commission of an alleged crime are competent as being part of the *res gestæ: State v. Gillett*, 56–459.

To render declarations admissible as a part of the *res gestæ* it is not necessary that they should be precisely concurrent in point of time with the principal transaction. It is sufficient if they are nearly enough concurrent to clearly appear to be so unpremeditated as to offer a reliable explanation of the principal transaction: *State v. Jones*, 64–349.

Where an act is done, and the actor at the time makes a statement explanatory of it, the statement is admissible as part of the *res gestæ*, unless the circumstances are such as to preclude the supposition that the statement was free from sinister motives. In a prosecution for murder, certain statements of defendant *held* to be competent: *State v. Cross*, 68–180.

Where defendant was on trial for the murder of a companion with whom he was traveling by team, *held*, that a witness who had conversed with them on the day preceding the night when the crime was committed might state as a part of the *res gestæ* what the deceased said about where they had come from and where they were going, although such conversation was not had in the presence of defendant: *State v. Vincent*, 24–570.

In a prosecution for murder, certain statements of the deceased *held* to be receivable as part of the *res gestæ: State v. Porter*, 34–131.

Testimony as to acts subsequent to the commission of the offense, *held* to have been improperly admitted in a particular case: *State v. Fowler*, 52–103.

Statements made by a burglar while in the prosecution of his crime, to the effect that he is the person who is afterwards put on trial for the crime, may be proven as part of the *res gestæ: State v. Kepper*, 65–745.

Where defendant seeks to show an *alibi* he cannot prove declarations made by himself at a certain time as to where he had been, even though such declarations were made on his return to his place of residence: *State v. McCracken*, 66–569.

Declarations or admissions of co-defendants: Where a declaration or confession made by a defendant before his arrest is confirmed by acts and declarations of his co-defendant, though made after the commission of the alleged offense, such acts and declarations are admissible in evidence against the prisoner as a circumstance tending to prove his confession: *State v. Knight*, 19–94.

Where it appeared that there was no evidence tending to show conspiracy on the part of defendants jointly indicted for murder, prior to the time of the commission of the homicide, *held*, that declarations of one of the defendants, made before the commission of the crime, were not receivable against the other: *State v. Weaver*, 57–730.

Declarations of one of the parties after the completion of the crime contemplated in the alleged conspiracy are not admissible: *Ibid.*

Where statements by one of two persons jointly charged with a crime are made in the presence of the other while both are in custody, silence of the latter and failure to deny such

statements will not constitute an admission on his part of their truth: *Ibid.*

Declarations of others: Admissions of a prosecutor in a prosecution for malicious mischief to property are not receivable in behalf of defendant: *State v. Delong*, 12–453.

A person charged with larceny may explain his possession of the stolen property by showing what was said to him at the time he acquired possession: *State v. Kelly*, 57–647; *State v. Jordan*, 69–506.

In a prosecution for rape, evidence that prosecutrix and her father offered to withdraw the charge if defendant would pay a sum of money, *held* properly refused, where it did not appear that the charge had been wrongly made as a ground for extorting money: *State v. McDevitt*, 69–549.

Statements in the hearing of defendant: Where two defendants were jointly indicted for horse-stealing, *held*, that upon the trial of one it was competent to prove what was said by his accomplice in his hearing and presence with regard to taking the horses, coupled with evidence that defendant remained silent and did not object or assent to its correctness. The weight of such evidence or the presumption arising therefrom must depend on the circumstances and must be determined by the jury: *State v. Bowers*, 17–46.

Statements in regard to the crime, made in the presence of the defendant, may be introduced in evidence without establishing that such statements were understood by him. It is for the jury to determine from all the circumstances whether he understood what was said: *State v. Middleham*, 62–150.

Subsequent declarations of a person injured in an assault are not admissible either for or against defendant as independent evidence, but can be introduced to contradict or impeach the testimony of the person making such declarations, if called as a witness, the requisite foundation having been laid: *State v. Emeigh*, 18–122.

Dying declarations; apprehension of death: Declarations of deceased sought to be introduced in evidence as dying declarations must be shown to have been made under the sense of impending death and in the full belief that he could not recover. It is sufficient, however, if this satisfactorily appears in any mode. It may be shown by proof of evident danger, or conduct of the person making the declaration, or other circumstances, such as the nature of the wound, the state of illness, etc.: *State v. Gillick*, 7–287, 309; *State v. Nash*, 7–347; *State v. Leeper*, 70–748.

It is not necessary to show that at the time the declarations were made deceased was under the apprehension of immediate dissolution, or that he was *in articulo mortis*. It is sufficient if he believes that his death is impending and certain. The length of time that elapses between the declaration and the death furnishes no rule as to the admission of evidence, nor will a declaration which was competent when made be rendered incompetent by the subsequent revival of strength in the dying person: *State v. Nash*, 7–347.

To render dying declarations competent evidence against one indicted for homicide of the person making the declaration it must appear that they were made in the full belief of deceased that he would not recover and that his death was impending. In a particular case, *held*, that it did not sufficiently appear that deceased, at the time he made the declarations offered in evidence, entertained such belief: *State v. Weaver*, 57–730.

Admissibility: The competency of dying declarations is to be determined by the judge in view of all the surrounding and attendant circumstances, and he should hear and weigh the evidence both for and against the competency of such declarations before receiving them in evidence: *State v. Elliott*, 45–486; *State v. Leeper*, 70–748.

The fact that the person making dying declarations was a materialist and did not believe in a God or a future conscious existence is not competent as affecting the admissibility of such declarations, but should be received as affecting their credibility: *Ibid.*

Credibility: The person whose declarations are admitted must be considered as standing in the same situation as if he were sworn. Such declarations are to be given the same degree of credit as his testimony would have received if he had been examined under oath, and his state of mind at the time the declarations were made, and his behavior, and his character, may be shown for the purpose of affecting the credibility of his declarations: *State v. Nash*, 7–347.

The statement of deceased must be such as would be receivable if he were alive and could be examined as a witness. Therefore if the declaration shows upon its face that it is a mere opinion, it should be excluded; otherwise it should be received and its credibility left to the determination of the jury: *State v. Clemons*, 51–274.

Dying declarations can only be admitted in regard to facts, and such declarations are not admissible with reference to whether the act of assailant was purposely done or not: *State v. Donnelly*, 69–705.

How proved: Where dying declarations are orally made and a statement thereof is also reduced to writing, if the writing and the oral statements are the same, the absence of the writing should be accounted for before evidence of the oral statements can be received. But if the declarations are repeated at different times, and one of them is reduced to writing, covering different grounds and referring to different matters from those comprised in the oral statements, then both the oral and written statements may be received: *State v. Tweedy*, 11–350.

Where dying declarations are incomplete by reason of death intervening, or temporary inability or interruption suspending their utterance, which is never resumed, the declaration is not receivable; but the fact that it does not give a complete narrative of what occurred, or might legitimately be supposed to have occurred, will constitute no objection to its competency or sufficiency: *State v. Nettlebush*, 20–257.

Where dying declarations are at the time reduced to writing by one who hears them, but the writing is not read over to nor signed by declarant, the writing is not itself admissi-

ble in evidence as a dying declaration; but it may be used by the person making it, as a memorandum from which to refresh his recollection in testifying as to the declarations: *State v. Fraunburg*, 40–555.

The failure to produce such writing or account for its absence will not render parol evidence of the declarations incompetent: *State v. Sullivan*, 51–142.

An affidavit made out for affiant by another party in the language of affiant and partly in substance from affiant's statements, and not read over to affiant before signing, is not admissible to prove his statements: *State v. Elliott*, 45–486.

Dying declarations of another person injured: Where defendant was on trial for the murder of one person, *held*, that it was error to admit in evidence dying declarations of another person killed at the same time, to the effect that he was stabbed by defendant: *State v. Westfall*, 49–328.

Hostile feelings: Letters merely showing a state of hostile feelings between defendant and the person injured and his family connections are not admissible in evidence unless merely for the purpose of showing the existence of such feelings, and if admitted for that purpose the jury should be limited in their consideration of them to the single purpose of ascertaining the feeling of defendant toward the injured party: *State v. Moffitt*, 31–316.

Where malicious intent is necessary to be shown it is not competent to prove the relations existing between the family in which defendant lived and the person against whom malice is claimed to have existed: *State v. McDermott*, 36–107.

Threats made by defendant, after the commencement of the prosecution, against the parties engaged therein are admissible in evidence as showing the mind, spirit and purpose of defendant in his defense and in relation to the crime charged: *State v. Rorabacher*, 19–154.

Evidence that defendant charged with the crime and the person murdered had had an altercation, *held* competent, as tending to show that the parties had not lived together agreeably: *State v. Moelchen*, 53–310.

In the prosecution of a crime consisting of violence to an individual, it is always competent to show previous ill-feeling, bad blood or threats as tending to show a probable motive for the commission of the crime; and threats or ill-feeling by defendant toward the father of the person injured is competent evidence on a criminal charge for injury to the child of such father: *State v. Fry*, 67–475. And see *State v. Perigo*, 70–657.

On a trial for murder, where there are circumstances shown which point to defendant as the guilty person, evidence of conduct explaining the bad state of feeling on the part of defendant toward the deceased is admissible: *State v. Cole*, 63–695.

Conduct of defendant in averting suspicion by endeavoring to cast it upon another does not raise a strong presumption of guilt where defendant has not stated untruths respecting such third person or directly charged him with the crime: *State v. Collins*, 20–85.

Compromise of civil suit is not competent evidence in a criminal prosecution for stealing property for the value of which defendant was sued in such civil action: *State v. Emerson*, 48–172.

Conduct of prisoner when charged with crime: The bodily or mental feelings of the prisoner, when material to be proved, may be shown by the usual expression of such feelings made at the time in question. The conduct and language of the prisoner when informed of the charges against him may therefore be shown: *State v. Nash*, 7–347, 382.

Declarations of deceased made in the presence of defendant are admissible for the purpose of showing defendant's conduct and behavior, when charged with causing the injuries done to the deceased, whether admissible as dying declarations or not: *State v. Gillick*, 7–287, 309; *State v. Nash*, 7–347, 376; *State v. Nash*, 10–81.

Declarations of the injured person, not competent as dying declarations, are not receivable where they are made in the presence of the officer having defendant under arrest, but not in the presence of defendant: *State v. Nash*, 10–81.

Testimony tending to show that the prisoner, when arrested, was charged with the crime and made no answer, is admissible, but its value is to be determined by all the circumstances, of which the jury are to be the judges: *State v. Pratt*, 20–267.

Attempt to escape: Where there is some evidence tending to show that defendant, after the commission of an offense, attempted to escape, the jury may be instructed that such attempt, if made, is a circumstance *prima facie* indicative of guilt: *State v. James*, 45–412. And see *State v. Schaffer*, 70–371.

An instruction that "if it be found that the defendant, after he was arrested, escaped from custody and secreted himself from lawful pursuit, or that defendant attempted to escape, this raises a strong presumption of his guilt," *held* erroneous, as stating the rule too strongly against defendant. An attempt to escape does not raise a strong presumption of guilt, but is a *prima facie* indication of guilt: *State v. Arthur*, 23–430.

Evidence of the good conduct of one under confinement for an offense, as tending to show him an honest man, is not admissible either to prove his good character or his innocence: *State v. Hart*, 29–268.

While an attempt of defendant to escape from jail while awaiting trial is admissible against him, it is improper to admit evidence of an effort on the part of the persons in such jail to escape, unless it is shown that defendant participated therein: *State v. Ruby*, 61–86.

The fact that a person leaves a jail through a hole made therein by some one is sufficient evidence of escape, and may be shown, as a circumstance indicating guilt, in the prosecution of the crime for which defendant was under arrest: *State v. Fitzgerald*, 63–268.

It seems that the fact of defendant's flight, after it becomes known to him that a crime has been committed, is admissible in evidence of the commission of the act by him only in criminal cases, and not in civil actions for damages: *Hopkins v. Mathias*, 66–333.

There is no distinction between an actual escape and an attempt to escape, as tending to show consciousness of guilt. The latter is equally admissible with the former as against the accused: *State v. Stevens*, 67-557.

Where evidence was introduced of flight by defendant after his arrest and the forfeiture of his bail, *held*, that it was not proper in rebuttal to show that threats were made of lynching him and that the fact of such threats was communicated to him, where it did not appear that the flight was soon enough after the threats and communication to afford any indication that he was scared by the threats into flight: *State v. McDevitt*, 69-549.

Intent inferred from acts: Men are presumed to intend all the natural and probable consequences of their own deliberate acts: *State v. Jones*, 70-505.

Where the criminality of an act depends upon the intent with which it was committed, it is not necessary that the intent be established by distinct and positive proof, but it is sufficient if it can reasonably be inferred from the facts; and it is not necessary that, when such intent is sought to be established by circumstantial evidence, the proof be so far conclusive that it is inconsistent with any other rational conclusion: *State v. Maxwell*, 42-208.

The intent with which an act is done is seldom, if ever, capable of direct and positive proof, but is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proved as the guarded judgment of a candid and cautious man would ordinarily draw therefrom. The law warrants the presumption or inference that a person intends the results or consequences which ordinarily follow from an act which he intentionally commits: *State v. Gillett*, 56-459.

Malice presumed: Malice is presumed from the commission of an act wrongful in itself and without just cause or excuse: *State v. Decklotts*, 19-447.

Malice may, as at common law, be implied in case of homicide from any act unlawful and dangerous in its nature, unjustifiably committed. Therefore, *held*, that death caused in an unlawful attempt to procure an abortion was murder in the second degree: *State v. Moore*, 25-128.

There is no clearer rule of evidence than that malice may be inferred from the acts of a party: *State v. Linde*, 54-139.

Persons conspiring to do an unlawful act which is a trespass only will be guilty of murder only when death results in the prosecution of the design; but if the unlawful act be a felony, or more than a trespass, death resulting will be murder, although it happened outside the original design: *State v. Shelledy*, 8-477, 505.

When a man assaults another or uses upon another a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such weapon in such manner would be to take life, the law presumes that such person so assaulting intends to take life: *State v. Sullivan*, 51-142; *State v. Hockett*, 70-442. And malice will be inferred from the deliberate, violent use of a deadly weapon: *State v. Zeibart*, 40-169.

Further as to malice aforethought, etc., see notes to §§ 5128-5130.

Previous declarations: Evidence of statements made by defendant before the commission of the alleged murderous assault for which he was put on trial, as to his intention to go to the place where the assault was afterwards committed and his object in going there, *held* admissible: *State v. Driscoll*, 44-65.

Other unlawful purpose: Evidence tending to show that defendant went to the place of the commission of the crime with an unlawful purpose not connected with the crime committed is not admissible: *Ibid.*

Subsequent acts or declarations: The guilty intent of a party may be shown by his acts, conduct and declarations, not only before or at the time of, but also after, the commission of the criminal act: *State v. Lewis*, 45-20.

Evidence of distinct crime to show intent: While it is generally true that a person cannot be convicted of a particular crime with which he is charged by proof of another crime, yet where proof of intent to commit one crime is necessary as an element of another crime, the commission of the first may be shown to prove the intent: *State v. Golden*, 49-48.

Therefore, *held*, that in a prosecution for burglary, proof of larceny committed after the breaking and entering was admissible to show the intent with which the breaking and entering were done: *Ibid.*

While the general rule is that evidence of a distinct, substantive offense cannot be admitted in proof of another offense, this rule is subject to the exception that whatever serves to establish the *scienter* or *quo animo*, or a motive for the commission of the crime charged, may be shown: *State v. Kline*, 54-183. And see *State v. Schaffer*, 70-371.

Therefore, *held*, that it was proper on a trial for assault with intent to commit murder by shooting, where the evidence tending to connect defendant with the crime was wholly circumstantial, to permit the prosecutrix to testify that defendant had seduced her and she was pregnant by him: *State v. Kline*, 54-183.

On a trial of defendant for an assault with intent to commit rape, evidence of previous assaults of like character on prosecutrix is admissible to show the intent. But evidence of like assaults on other persons having no connection with the one charged, and occurring long previous, are not admissible: *State v. Walters*, 45-389.

Where two persons were jointly indicted for larceny, and there was evidence that the one was keeper and the other an inmate of a house of ill-fame, *held*, that it was improper to charge the jury that they might consider the habits of the parties defendant at the time, whether they were living together, acting together, or together were engaged in a common purpose to commit the crime, there being no evidence but their mutual relationship to indicate concert of action: *State v. Graham*, 62-108.

Where two or more acts are embodied in the same transaction, each constituting an assault, and together constituting but one assault, all may properly be shown to establish the animus of defendant, although one act alone would constitute the crime: *State v. Montgomery*, 65-483.

Evidence of a distinct crime is admissible where it tends to connect defendant with the

commission of the crime charged. Therefore, in a prosecution for burglary in breaking and entering a dwelling with intent to commit assault and battery, *held*, that evidence that defendant knew that the occupant had a large sum of money was admissible as tending to show that it was defendant who broke and entered: *State v. Kepper*, 65-745.

In a prosecution for adultery other acts of adultery between the same parties prior to the statutory period of limitation, or outside of the jurisdiction of the court, are admissible in evidence as showing the disposition of the parties, and may be taken, in connection with evidence of opportunity existing within the jurisdiction and within the statutory period, as evidence of the commission of the crime: *State v. Briggs*, 68-416.

In a prosecution for forgery or uttering forged paper other acts of the same character may be shown to show guilty knowledge; but it is doubtful whether the other paper as to which evidence is introduced must not be of the same character and manufacture, and precisely similar to that forged or uttered upon which the charge is based: *State v. Saunders*, 68-370.

But in order that knowledge may be inferred from other transactions it must appear that in such other transaction a crime was committed: *Ibid.*

In such cases the other forged instrument, with reference to which testimony is given, must be introduced in evidence or its absence accounted for: *Ibid.*; *State v. Breckenridge*, 67-204.

Right to be confronted with witnesses: See Const., art. 1, § 10, and notes.

In general as to the rules of evidence, see §§ 4886-5005.

As to confessions of the defendant, see § 5812 and notes.

As to reasonable doubt, burden of proof, evidence of good character, and circumstantial evidence, see notes to § 5813.

The first part of this section is similar to § 5811.

5955. In prosecutions against railways. 4557. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way. [14 G. A., ch. 111, § 6.]

5956. Rape. 4558. Proof of actual penetration into the body is sufficient to sustain an indictment for rape. [R., § 4101; C., '51, § 2997.]

In a prosecution for rape it is not necessary that actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all the circumstances, the requisite facts are shown to establish the commission of the crime: *State v. Tarr*, 28-397.

5957. Accomplice. 4559. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof. [R., § 4102; C., '51, § 2998.]

Who deemed accomplice: A detective who enters into an arrangement for the commission of a crime with the intention, from the beginning, of acting as a detective to ferret out and expose it, and who acts throughout with that motive, is not an accomplice: *State v. McKean*, 36-343.

One who receives stolen goods is not an accomplice in the crime of burglary committed at the time the goods are stolen: *State v. Hayden*, 45-11.

Where it appeared that a person who was guilty of breaking into and setting fire to a jail had notified another to be present, and such other person was near by and saw defendant enter the jail, but gave no assistance or advice, and did not know that the jail had been set on fire when he left, *held*, that he was not sufficiently an accomplice to render it necessary that his evidence be corroborated to warrant a conviction: *State v. Reader*, 60-527.

Testimony of accomplice: An accomplice is a competent witness for the prosecution: *State v. Hudson*, 50-157.

It is not a ground for rejecting the testimony of an accomplice that it has not been shown that he is less guilty than the defendant, or that no order of the court has been made that he should be received as a witness. (Overruling *Ray v State*, 1 G. Gr., 316): *Ibid.*

The order of the introduction of testimony being in the discretion of the prosecution under the approval of the court, it is not necessary that evidence connecting defendant with the crime shall be introduced before the testimony of the accomplice is received: *Ibid.*

Acts and declarations of co-conspirators or accomplices: The acts and declarations of one of two or more persons charged with a conspiracy in the commission of a crime are not admissible as against the others unless a foundation is first laid sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury to establish such fact: *State v. Nash*, 7-347, 384.

Admissions of a co-conspirator made after the common enterprise is at an end are not admissible: *State v. Arnold*, 48-566.

Acts and declarations of an accomplice while engaged with defendant in furthering,

aiding and abetting a common design are receivable in evidence against him: *State v. Hudson*, 50-157.

Where two defendants were jointly indicted for horse-stealing, *held* that, upon the trial of one, the state could prove that the other person conducted a witness to the horses, for the purpose of showing when and how the horses were found, without first showing the existence of a joint purpose or conspiracy: *State v. Bowers*, 17-46.

Where several defendants were jointly indicted for murder, *held*, that it was error to admit, against one of them, declarations of co-defendants made after the commission of the crime: *State v. Westfall*, 49-328; *State v. Smith*, 54-656.

Upon the trial of one of several co-defendants jointly indicted for burglary, *held*, that acts and conversations of the other defendants tending to establish familiar relations and association of all the parties, and that they were in company at about the time of the commission of the crime, were admissible for the purpose of connecting defendant with the commission of the crime: *State v. Stevens*, 67-557.

Corroboration of evidence of accomplice: In case of a prosecution for concealing stolen property, the corroboration required of the evidence of an accomplice must go not merely to the fact of concealment, but also to the fact that the property was stolen: *Upton v. State*, 5-465.

The corroborating evidence must tend to connect defendant with the commission of the crime: *Upton v. State*, 5-465; *State v. Tulley*, 18-88; *State v. Clemens*, 38-257.

Corroborating evidence is not sufficient which merely shows the commission of the offense and the circumstances thereof without connecting defendant therewith. Therefore, *held*, that the mere proof that defendant was seen drunk in company with a burglar, at or near the time and place when and where the burglary was committed, was not sufficient corroborating evidence to warrant his conviction: *State v. Willis*, 9-582.

The corroboration need not be by the testimony of one credible witness; it may be circumstantial: *State v. Stanley*, 48-221.

The corroboration need not be founded upon facts directly connecting defendant with the offense. It may be founded upon circumstantial evidence: *State v. Miller*, 65-60.

Where the testimony of an accomplice is corroborated by other witnesses in any material point it is sufficient to convict: *State v. Schlagel*, 19-169.

It is not necessary that the accomplice be corroborated in every material fact. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which he is confirmed by unimpeachable evidence, this may be ground for them to believe that he also speaks the truth in other parts as to which there may be no corroboration: *State v. Allen*, 57-431; *State v. Hennessy*, 55-299.

It is not necessary that the accomplice be corroborated as to the commission of the crime if he is corroborated in the material facts as to the preparation for its commission, etc.: *State v. Hennessy*, 55-299.

Whether in a particular case there is any corroborating evidence is a question for the court to determine, but it is for the jury to weigh such evidence and its sufficiency: *State v. Miller*, 65-60; *State v. Dietz*, 67-220.

It is the province of the jury to determine whether the corroboration is sufficient: *State v. Allen*, 57-431.

The fact that witnesses who might have been called to contradict the accomplice, if his testimony were false, were not called, should not be considered as corroborating such testimony: *State v. Hull*, 26-292.

Apparently without reference to any statutory provision, *held*, that the testimony of one accomplice would not constitute a sufficient corroboration of that of another to warrant conviction without other evidence: *Johnson v. State*, 4 G. Gr., 65.

In a prosecution for having counterfeit coin in possession with intent to pass, *held*, that the testimony of an accomplice as to such possession and intent was not sufficiently corroborated by evidence as to former acts of passing counterfeit money: *State v. Pepper*, 11-347.

The fact that the defendant and a person who has been convicted of crime were seen conversing together four or five hours before the commission of the crime, *held* not sufficient corroboration of the testimony of such accomplice to warrant the defendant's conviction: *State v. Mikesell*, 70-176.

In particular cases, *held*, that the testimony of an accomplice was not sufficiently corroborated to warrant conviction thereon: *State v. Graff*, 47-384; *State v. Moran*, 34-453.

The evidence in particular cases *held* sufficiently corroborative of the testimony of an accomplice to sustain a conviction: *State v. Thornton*, 26-79; *State v. Wart*, 51-587; *State v. Dietz*, 67-220.

As to corroboration necessary in cases of rape, seduction, and the like, see following section and notes.

5958. Of female in rape or seduction. 4560. The defendant in a prosecution for a rape, or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. [R., § 4105; C., '51, § 2999.]

Corroborating evidence; nature of: The corroborating evidence must tend to connect defendant with the commission of the crime: *State v. Willis*, 9-582; *Upton v. State*, 5-465; *State v. Tulley*, 18-88; *State v. Clemens*, 38-257. And see notes to preceding section.

In cases of rape: In a prosecution for rape the fact that the crime has been committed by some one may be established by the

testimony of the injured party alone; but to ascertain the guilty party it is necessary that the testimony of the injured party be corroborated by other evidence tending to connect defendant with the crime: *State v. McLaughlin*, 44–82.

The sufficiency of the corroborating evidence in a prosecution for rape is properly a question for the jury: *Ibid.*

Evidence that prosecutrix was bruised, etc., and made complaint, would not tend to connect defendant with the commission of the offense, and therefore should not be considered as tending to corroborate the testimony of prosecutrix: *State v. Stowell*, 60–535.

The corroboration in prosecutions for rape in particular circumstances, *held* sufficient: *State v. Comstock*, 46–265; *State v. Mitchell*, 68–116.

Assault with intent to commit rape: The corroborating testimony in a prosecution for assault with intent to commit rape, *held* insufficient in a particular case: *State v. Warner*, 25–200.

Whether the provisions of this section are applicable in a prosecution for assault with intent to commit rape, *quære: State v. McIntire*, 66–339.

In cases of seduction: The corroborating evidence should not be confined to the act of illicit intercourse alone, but facts showing intimacy, opportunity and inducement may be shown for that purpose: *Andre v. State*, 5–389.

Under this section, proof of courtship and attendant circumstances may amount to sufficient corroboration: *State v. Wells*, 48–671; *State v. Curran*, 51–112; *Stevenson v. Belknap*, 6–97, 103.

It is not necessary that there be specific corroboration as to the employment of seductive arts or as to the act. The fact that the parties kept company together and acted as lovers usually do, and other circumstances, may be sufficient corroboration: *State v. McClintic*, 73–663.

But the mere proof of acquaintance and opportunity are not sufficient corroboration of the charge of seduction. The corroborating evidence must be such as to connect defendant with the commission of the offense: *State v. Painter*, 50–317; *State v. Smith*, 54–743; *State v. Araah*, 55–258.

Evidence of such relations and acquaintance between the parties as would naturally result from the fact of their being members of the same family, *held* not sufficient evidence in corroboration: *State v. Richards*, 72–17.

The corroboration in prosecutions for seduction, *held* sufficient in particular cases: *State v. Shean*, 32–88; *State v. Heatherton*, 60–175; *State v. Fitzgerald*, 63–268.

It is erroneous in a prosecution for seduction to admit a child, claimed to be the result of such seduction, to be shown to the jury, and instruct them that they may consider a resemblance between the child and the defendant as evidence in corroboration of the testimony of the prosecutrix (explaining *Stumm v. Hummell*, 39–478): *State v. Danforth*, 48–43.

But this rule is not applicable in case of a child two years old; and *held*, in a bastardy case, that a child of that age might be shown to the jury, and its family resemblance, if any, to defendant considered by them as tending to prove that defendant was its father: *State v. Smith*, 54–104.

A fact testified to by the prosecutrix alone cannot be considered as sufficient corroboration of her other testimony: *State v. Kingsley*, 39–439.

The court is to determine whether evidence is corroborative, that is, whether it is competent, and the jury is to pass upon the credibility of the corroborating witnesses and the weight of their testimony. Instruction to the effect that the jury were to determine whether the testimony of the prosecutrix was sufficiently corroborated, etc., *held* correct: *State v. Bell*, 49–440.

It is a question for the court to determine whether, in a prosecution for incest, and in like cases, there is any corroborating evidence. But it is for the jury to weigh and determine the effect of such evidence and its sufficiency: *State v. Miller*, 65–60.

The rule requiring corroboration of the testimony of the injured party, under this section, is not applicable in bastardy proceedings to charge the putative father with the support of the child: *State v. McGlothlen*, 56–544.

See, further, as to corroboration in cases of seduction, § 5166 and notes.

5959. Subpœnas by magistrate. 4561. A magistrate, in any criminal proceeding before him, may issue subpœnas subscribed by him with his name of office for witnesses within the state in behalf of either party thereto. [R., § 4950; C., '51, § 3168.]

5960. By clerk. 4562. The clerk of the court in which any criminal case is pending must, at all times, upon the application of the defendant or his attorney, issue as many blank subpœnas under the seal of the court, subscribed by him, for witnesses within the state, as may be required by the defendant. He must also issue subpœnas, on the part of the state, when required. [R., § 4951; C., '51, § 3170.]

5961. Who to serve. 4563. A peace officer must serve within his town or county, as the case may be, any subpœna delivered to him for service on the part of either the state or defendant, and must make a written return of the service subscribed by him and state the time and place of service, without delay. A subpœna may, however, be served by any other person. [R., § 4952; C., '51, § 3171.]

5962. How. 4564. The service of a subpœna must be by delivering a copy and showing the original to the witness personally. [R., § 4953; C., '51, § 3172.]

5963. May break door. 4565. If a witness conceal himself to avoid the service of a subpœna, the officer may break open doors or windows for the purpose of making service. [R., § 4954; C., '51, § 3176.]

5964. Disobedience. 4566. Disobedience to a subpœna, or refusal to be sworn, or to answer as a witness, may be punished by the court or magistrate as a contempt. [R., § 4955; C., '51, § 3174.]

5965. Witness, when liable. 4567. A witness wilfully disobeying a subpœna in a criminal case without good cause, shall be liable to the party injured for the amount of the damages sustained by such party. [R., § 4956; C., '51, § 3175.]

5966. Forfeiture of bond. 4568. The undertakings of witnesses in criminal cases, may be forfeited and enforced like the undertaking of bail. [R., § 4957.]

5967. Subpœna runs how far. 4569. A subpœna in a criminal case, runs into any part of the state. [R., § 4958.]

5968. In impeachment. 4570. In cases of impeachment, subpœnas may be issued on behalf of either party by the secretary of the senate. [R., § 4959.]

5969. Depositions. 4571. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on commission, in the same manner and with like effect as in civil actions. [R., § 4960.]

Depositions may be used on behalf of defendant in criminal trials, but not on behalf of the state (Const., art. 1, § 10): *State v. Collins*, 32–36.

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

5970. Perpetuating testimony. 4572. A person apprehensive of a criminal prosecution, may perpetuate testimony in his favor, in the same manner, and with like effect, as it may be done in apprehension of any civil action. [R., § 4961.]

CHAPTER 38.

OF BAIL, UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

5971. Who may take. 4573. When the defendant has been held to answer for any bailable offense, bail must be taken by the magistrate who held him to answer, or by any judge of the supreme, district, [or circuit] courts, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk of such court, or by any magistrate of the county in which the offense is triable. [R., § 4967; C., '51, §§ 3216–18.]

See § 5488 and Const., art. 1, § 12, and notes.

5972. How given. 4574. Bail is put in by a written undertaking, executed by one or more sufficient sureties (with or without the defendant, in the discretion of the court, clerk, or magistrate), acknowledged before, and accepted

by, the court, clerk, or magistrate taking the same, and may be, substantially, in the following form:

COUNTY OF ——.

An order having been made on the —— day of ——, A. D. 18—, by A. B., a justice of the peace of the township of —— (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been duly admitted to bail, in the sum of —— dollars.

We, E. F. (stating his place of residence and occupation), and G. H., of (stating his place of residence and occupation), hereby undertake that the said C. D. shall appear at the district court of the county of ——, at the next term thereof, and answer said charge, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of —— dollars (inserting the sum in which the defendant is admitted to bail).

E. F.
G. H.

Acknowledged before, and accepted by me as ——, in the township of ——, in the county of ——, this —— day of ——, A. D. 18—.

I. J., Justice of the Peace,
(or as the case may be.)

[R., § 4968; C., '51, § 3219.]

Execution of bond: The judge of the court has power to certify to the acknowledgment of the sureties of the bond, made in open court: *State v. Elgin*, 11-216.

The voluntary execution of a bail bond does not estop the obligors from denying the jurisdiction of the magistrate who takes it in a case where the proceedings in which it is taken are without authority: *State v. Hufford*, 28-391.

The bond provided for on appeal from conviction before a justice of the peace is for the appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *State v. Beneke*, 9-203.

Acceptance of bond: Before the recognizance can have any force it must appear that it was accepted as a valid undertaking by a court or magistrate of competent authority: *State v. Carr*, 4-289.

A failure by the clerk to indorse the bond as "accepted" will not affect the right of the state to recover thereon: *State v. Emily*, 24-24.

Where a prisoner has been discharged upon the filing of a bond, the acceptance by the officer will be conclusively presumed; no written approval thereon is necessary to its validity: *State v. Wright*, 37-522.

Presumptions: A bail bond given upon commitment by a magistrate is *prima facie* evidence that the magistrate made a finding that a public offense had been committed (§ 5627), and the execution of the bond and its acceptance by the magistrate are presumptive evidence that it was taken and received in place of the body of the accused: *State v. Patterson*, 23-575.

Signature: It is not essential that defendant should sign the bond, and manifest clerical errors therein will be disregarded: *Ibid.*

For what sureties liable: Sureties on a bond are not only bound for the appearance of the accused at the time and place mentioned therein, but also that he shall abide the order and judgment of the court and not depart without leave: *State v. Brown*, 16-314.

A failure to hold the term at which defendant is held to appear will not release his sureties from their obligation to have him at the next term, although no order is made in the case at the term mentioned in the bond. See § 215: *Ibid.; State v. Ryan*, 23-406.

That defendant held to answer for one crime is indicted for a higher crime does not release the sureties on his bond: *State v. Bryant*, 55-451.

Although a bond which is not authorized by statute, as where it is accepted by a magistrate who has no authority to take bail, will not become a lien upon the property of the obligors, as provided in § 6004, yet if voluntarily executed at the request and for the benefit of the accused, and under it he has been discharged from custody, the sureties are liable thereon: *State v. Cannon*, 34-322.

Surrender of defendant by sureties: A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner pointed out by § 5991: *State v. Tieman*, 39-474.

See, further, as applicable to this section, notes to §§ 5982-6004.

5973. Qualifications of bail. 4575. The qualifications of bail are as follows:

1. Such bail must be a resident and householder, or freeholder, within the state;

2. Such bail must be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court, clerk, or magistrate taking the bail, may allow more than one bail to justify severally in amounts

less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail. [R., § 4960; C., '51, § 3220.]

5974. Justification. 4576. The bail must in all cases justify, by affidavit taken before the court, clerk, or magistrate, as the case may be, taking such bail, and the affidavit must state that they each possess the qualifications prescribed in the last section. [R., § 4970; C., '51, § 3221.]

Before an accused held to bail can demand a discharge upon tendering bond and surety, his bail must justify as here required; but a failure to require such justification will not render the bond void nor discharge the sureties: *State v. Emily*, 24-24; *State v. Wells*, 36-238.

See, further, notes to § 5972.

5975. Examination as to sufficiency. 4577. The district [county] attorney, or the court, clerk, or magistrate, as the case may be, may thereupon further examine the bail upon oath, concerning their sufficiency, in such manner as may be deemed proper. [R., § 4971; C., '51, § 3222.]

5976. Other testimony. 4578. The court, clerk, or magistrate, may also receive other testimony, either for or against the sufficiency of the bail. [R., § 4972; C., '51, § 3223.]

5977. Order. 4579. When the examination is closed, the court, clerk, or magistrate, must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification, and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent. [R., § 4073; C.,' 51, § 3224.]

The clerk should file the bond, and while, if it should appear that it was deposited with the clerk before the forfeiture was declared, an omission to mark it as filed might be remedied by subsequent filing, yet the fact that it was so deposited before forfeiture should be averred and proved, otherwise the bond should not be admitted in evidence: *State v. Klingman*, 14-404.

Until the bail bond is before the court the forfeiture thereof cannot be entered: *Ibid.*

5978. Order of discharge. 4580. Upon the allowance of the bail and the execution of the undertaking, the court, clerk, or magistrate, must make an order, signed with his name of office, for the discharge of the defendant, to the following effect:

THE STATE OF IOWA,

To the Sheriff of the County of ——:

C. D., who is detained by you on commitment, to answer a charge for the offense of (here designate it generally), having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at ——, in the township of ——, in the county of ——, this —— day of ——, A. D. 18—.

K. L., Justice of the Peace,
(or as the case may be.)

[R., § 4974; C., '51, § 3225.]

5979. Disallowed. 4581. If the bail be disallowed, the defendant must be detained in custody until other bail be put in and justify. [R., § 4975; C., '51, § 3226.]

CHAPTER 39.

OF BAIL UPON AN INDICTMENT BEFORE CONVICTION.

5980. For misdemeanor. 4582. When the offense charged in the indictment is a misdemeanor, the officer serving the bench warrant, if therein required, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district

court of either of such counties, for the purpose of giving bail. [R., § 4976; C., '51, § 3227.]

5981. Felony. 4583. If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant. [R., § 4977; C., '51, § 3228.]

5982. By whom taken. 4584. When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or the clerk of that court, or by any magistrate in the same county. [R., § 4978; C., '51, § 3229.]

The clerk has no power to take bail under this section in vacation: *State v. Carothers*, 11-273.

The bond, under the statute, should be executed and acknowledged before the clerk of the district court, and the sureties should justify before him, but these are directory matters; and where the bond has been accepted, it will be valid though it was executed and the sureties qualified before the clerk of the court in another county, and though it was not acknowledged at all. The execution, its acceptance, the discharge of the prisoner thereon, and his failure to appear according to its terms, are the essential matters. It is not necessary to call the sureties and have their default entered at the time the defendant fails to appear: *State v. Wells*, 36-238.

5983. Form of undertaking. 4585. The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk, or magistrate, acknowledged before and accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form:

COUNTY OF ——.

An indictment having been found in the district court of the county of ——, on the —— day of ——, A. D. 18—, charging A. B. with the crime of (designating it as in the bench warrant), and he having been duly admitted to bail in the sum of —— dollars:

We, A. B., of (stating his place of residence and occupation), and C. D., of (stating his place of residence and occupation), and E. F., of (stating his place of residence and occupation), hereby undertake that the said A. B. shall appear and answer the said indictment, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that he will pay to the state of Iowa the sum of —— dollars (inserting the sum in which the defendant is admitted to bail).

A. B.
C. D.
E. F.

Acknowledged before and accepted by me, at ——, in the township of ——, in the county of —— this —— day of ——, A. D. 18—.

G. H., Justice of the Peace,
(or as the case may be.)

[R., § 4979.]

If the bond is deposited with the clerk of the proper court as a record the fact that it is not marked filed is immaterial: *State v. Merrihew*, 47-112, 120.

The form of bond here given is substantially sufficient for the bond required upon change of venue, as provided in § 5770: *Ibid.*, 119, 121.

The clerk of the court to which a change of venue is granted has power to take a recognizance for the appearance of the prisoner: *Ibid.*

The provisions of § 5770 as to giving a new bond upon change of venue, for appearance in the court to which the case is changed, are merely directory, and do not operate to release the sureties on the original bail bond, who are still responsible for defendant's appearance: *State v. Brown*, 16-314.

The description of the crime in the bail bond need not be so particular as in an indictment. Where it was specified merely as "seduction" it was held sufficient: *State v. Marshall*, 21-143.

It is not necessary that the bond refer to the offense except in general terms. A description of the crime as "larceny in the night-time," *held* sufficient: *State v. Merrihew*, 47-112.

An averment of the petition on a bail bond alleging that it was taken in writing in such manner and form as the law provides and directs, *held* sufficient to show that the requirements of the law applicable to such cases were complied with: *Shelby County v. Simmonds*, 33-345.

The duty of the sureties is to have their principal ready to answer the judgment of the court until they have surrendered him as is provided by law or until the judgment is satisfied: *State v. Stewart*, 74-336.

5984. Provisions of previous chapter apply. 4586. The provisions of the preceding chapter, subsequent to the form of the undertaking, relative to the qualifications of bail, the justification, the examination, receiving other testimony against the sufficiency, and the order of allowance or disallowance thereof, and the filing of the undertaking with the affidavits, and all proceedings incidental thereto, in the cases therein provided for, apply also to the cases provided for in this chapter. [R., § 4980.]

CHAPTER 40.

OF BAIL UPON AN APPEAL TO THE SUPREME COURT, AFTER CONVICTION.

5985. When allowed. 4587. After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine, upon the undertaking of bail that he will pay the same, or such part of it as the supreme court may direct, and in all respects abide the orders and the judgment of the supreme court upon the appeal;

2. If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. The bail may be taken, either by the court where the judgment was rendered, or the judge thereof, or the district court of the county in which he is imprisoned, or the judge thereof, [or the judge of the circuit court of either of such counties] or by the supreme court, or a judge thereof, or by the clerk of either of such courts. [R., §§ 4966, 4981.]

After the bail required on appeal has been given and the appeal prosecuted, it is too late to complain of the amount of bail required: *State v. Wells*, 46–662.

Failure of the court in rendering judgment to fix the bail required pending appeal, as required by § 5896, will not entitle defendant to discharge on *habeas corpus*. His only remedy in such proceeding will be to have the amount of such bail fixed: *Murphy v. McMillan*, 59–515

5986. Qualifications of. 4588. The bail must possess the qualifications, must justify, and must be put in and taken in the manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, varying to suit the case, and the undertaking of the bail must be, in effect, as prescribed by the preceding section. [R., § 4982.]

CHAPTER 41.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

5987. With whom and effect. 4589. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking, in case of bail, is required to be sent, the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody. [R., § 4983; C., '51, § 3232.]

5988. After giving bail. 4590. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit

the sum mentioned in the undertaking, and upon the deposit being made the bail shall be exonerated. [R., § 4984; C., '51, § 3233.]

5989. Bail after deposit of money. 4591. If money be deposited as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct in the order of allowance, that the money deposited be refunded by the clerk to the defendant, and it shall be refunded accordingly. [R., § 4985; C., '51, § 3234.]

5990. Money; how applied. 4592. When money has been deposited, if it remain on deposit at the time of a judgment against the defendant, the clerk shall, under the direction of the court, apply the money in satisfaction of so much of the judgment as requires the payment of money, and after paying the same shall refund the surplus, if any, to the defendant, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant. [R., § 4986; C., '51, § 3235.]

CHAPTER 42.

OF SURRENDER OF THE DEFENDANT.

5991. When and how done. 4593. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

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

2. Upon the undertaking and the certificate of the officer, the district court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear days' notice thereof to the district [county] attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated. [R., § 4987; C., '51, § 3236.]

A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner here pointed out: *State v. Tieman*, 39–474.

That the bail presented to the sheriff a certified copy of the bond, and in writing directed him to arrest defendant, *held* not to impose any duty upon the sheriff, or be a surrender of defendant as here contemplated: *State v. Kramer*, 50–582.

The failure or refusal of the sheriff to arrest the defendant will not exonerate the surety. It is the latter's duty to see that defendant is arrested, and if he fail in that duty he is liable on the bond: *Ibid.*

Sureties on the bail bond are not released by the fact that a sheriff does not at once serve warrant of commitment when it comes into his hands for service: *State v. Stewart*, 74–336.

The fact that a person released on bail voluntarily submits to being taken in custody by the surety on his bail, and then brings action of *habeas corpus* to secure release from such restraint with the sole purpose of testing the constitutionality of the statute under which he is arrested, will not prevent the court from trying the *habeas corpus* proceeding and determining the question at issue: *Brown v. Duffus*, 66–193.

The fact that a person arrested has previously procured his sureties to go his bail under a statute the validity of which he proposes to test will estop him from in any way rendering them liable by contesting the validity of such statute, but would not prevent his contesting the validity for the purpose of releasing them entirely from liability: *Ibid.*

As to effect of surrender or arrest of defendant before judgment against the bail, see § 5998 and notes.

As to recommitment of defendant by the court, see § 5999 and notes.

5992. Arrest by bail. 4594. For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any place

within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so. [R., § 4988; C., '51, § 3237.]

5993. On surrender, money returned. 4595. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made, or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon three clear days' notice to the district [county] attorney, with a copy of the certificate. [R., § 4989; C., '51, § 3238.]

CHAPTER 43.

OF FORFEITURE OF THE UNDERTAKING OF BAIL, OR DEPOSIT OF MONEY.

5994. How forfeited. 4596. If the defendant fail to appear for arraignment, trial, or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited. [R., § 4990.]

What constitutes forfeiture: Failure of a defendant, indicted for misdemeanor, to appear in person at the trial, or at the rendition of verdict, or at the sentence, will not constitute forfeiture of his bond if he makes appearance by counsel and thereby waives his personal presence: *State v. Conneham*, 57–351.

Failure of defendant to appear at the time for challenging the grand jury does not constitute a default amounting to a forfeiture of his bond: *State v. Klingman*, 14–404; *Ringgold County v. Ross*, 40–176.

A court will not be justified in holding bail, who has become responsible for the appearance of an accused to answer a certain charge, also responsible for his appearance to answer another and different charge, even in the same court: *State v. Brown*, 16–314.

A bond to appear to answer the indictment, and not depart without leave of court, and obey all orders of the court, is forfeited by failure of accused to surrender himself, upon being called, in satisfaction of the judgment, after he has appeared and pleaded guilty: *State v. Kraner*, 50–575.

A bail bond given upon being bound over by a magistrate to appear at the district court to answer to the charge of manslaughter is not rendered invalid by the fact that the accused is subsequently indicted for murder instead of manslaughter. The obligation of the bond is "to abide the judgment and order of the court and not to depart without leave of the same:" *State v. Bryant*, 55–451.

Entry of forfeiture: A forfeiture of the bail bond cannot be entered until the bond is before the court: *State v. Klingman*, 14–404.

The forfeiture need not be taken on the very day on which accused was required to appear, but may be taken on any subsequent day of that or a succeeding term, unless defendant has been surrendered or discharged. It is not necessary that the accused or his bail have notice of the time when forfeiture will be claimed: *State v. Brown*, 16–314.

If a forfeiture of bail is not entered at the first term it will be presumed that the cause was continued by operation of law: *State v. Merrihew*, 47–112, 119.

One entry of default against defendants jointly indicted, who have both failed to appear, is sufficient although they have given separate bonds: *State v. Lighton*, 4 G. Gr., 278.

In a case where defendant was bound to appear before a justice, it was held that a default should not have been entered against him until he was formally called, and that the entry of default by the justice not showing that defendant was called, no breach of the bond was shown; but the record of the justice was held conclusive as to the appearance or non-appearance of defendant, and not to be contradicted by extrinsic evidence: *State v. Gorley*, 2–52.

At the time of rendering sentence for a misdemeanor the court may enter default of defendant for not appearing to submit to the judgment and thereupon declare forfeiture of the bail bond: *State v. Howorth*, 70–157.

The court may at any time require one convicted to appear and surrender himself or perform the judgment, and upon failure to do so default may be entered against him. He may be required to appear at any term subsequent to the term at which he is bound to appear according to the language of the bond, without notice to him or his sureties, and his

appearance to answer the charge does not discharge the sureties. It will be presumed, if the forfeiture was taken at a subsequent term, that the cause was continued by operation of law to the term when default was taken: *State v. Baldwin*, 78–737.

A record of default cannot be varied by parol evidence: *State v. Clemons*, 9–534.

The record made by the court of the forfeiture of a bail bond by failure of the person bound to appear is conclusive evidence of the forfeiture, and a mere denial of the breach of the bond raises no issue: *State v. Bryant*, 55–451.

Order of forfeiture: An order declaring a bail bond forfeited, and taxing costs to defendant, is a final judgment in such sense that an appeal may be taken therefrom: *State v. Connehan*, 57–351.

The order of forfeiture is conclusive, and the sureties cannot call into question the facts upon which it is based: *State v. Baldwin*, 78–737.

5995. Discharge of. 4597. If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record, that the forfeiture of the undertaking or deposit be discharged. [R., § 4991.]

Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged: *State v. Emily*, 24–24.

5996. When forfeiture is not discharged. 4598. If the forfeiture is not discharged, the district [county] attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail. [R., § 4992.]

5997. Action on undertaking. 4599. The action on the undertaking must be in the court in which the defendant was or would have been required to appear by the undertaking; *provided*, that when the undertaking requires the defendant to appear before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, it shall be the duty of said justice, or court, or examining magistrate, upon the forfeiture of the undertaking and within thirty days thereafter, to file the same, together with a copy of all his official entries in relation thereto, in the office of the clerk of the district court of the county; and thereupon it shall be the duty of the district [county] attorney to proceed to collect the same by a civil action in the district court of said county, or any other court of said county having jurisdiction equal to the penalty of said bond. [R., § 4993; 11 G. A., ch. 12.]

Suit on the bond: Action upon a bail bond given for appearance upon a change of venue should be brought in the county to which the venue is changed: *Decatur County v. Maxwell*, 26–398.

Suit for the penalty on the bail bond may be brought in the name of the county. It has the right to sue as being the trustee of an express trust: *Shelby County v. Simmonds*, 33–345.

Where a bond is given for the appearance of the defendant to answer an indictment, and afterward a change of venue is granted, on his application, to another county, and he fails to appear in the action in the county to which the change is granted, action on the bond for such failure to appear should be brought in the latter county: *Lucas County v. Wilson*, 59–354.

Under Rev., § 4993 (which did not contain the provisos of this section), *held*, that a bond for the appearance of a defendant before a magistrate might be sued on in the district court, and that the section was intended to apply only to actions on bail bonds given in that court: *State v. Emerson*, 16–206.

Under the provisions of Code of '51, which allowed an action of *scire facias* to be brought upon a bail bond, *held*, that an action of detinue would nevertheless lie as at common law: *State v. Gorley*, 2–52.

See, further, notes to §§ 5972, 5983.

Measure of damages: Upon forfeiture of a bail bond when the punishment is a fine, the measure of damages is not the amount of the fine and costs, but the penalty named in the bond: *State v. Hirronemus*, 50–545.

Disposition of forfeiture: Under the provisions of §§ 4606 and 2994, that fines and forfeitures shall go into the treasury of the county where the same are collected for the benefit of the school fund, the county in which the fine is collected is deemed to be the county in which judgment therefor is rendered and execution issued, and not the county in which the execution may be enforced against defendant's property: *Pottawattamie County v. Carroll County*, 67–456. See, also, Const., art. 9, § 4.

The fact that a fine or forfeiture is to go into the county treasury for the benefit of the school fund does not make the county such party to an action therefor brought by the state as to entitle defendant to a change of venue: *State v. Merrihew*, 47–112.

5998. Surrender before judgment; effect. 4600. If, before judgment is entered against the bail, the defendant be surrendered or arrested, the

court may, in its discretion, remit the whole or any part of the sum specified in the undertaking. [R., § 4994.]

Arrest of defendant after forfeiture: Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged: *State v. Emily*, 24-24.

If there is no surrender or arrest of defendant the court has no authority to grant relief from the forfeiture: *State v. Scott*, 20-63.

Death of principal in the bond two years after its forfeiture, *held* not a defense to an action thereon against the surety: *Ibid.*

Detention in another jurisdiction: The arrest and detention in another county of a prisoner who is under bond for appearance does not have the effect to release his sureties, in the absence of a showing by them that proper steps were taken to secure his production by the state at the proper time: *State v. Merrihew*, 47-112, 115.

The fact that defendant is in the military service of the United States or another state will not excuse the sureties for his non-appearance: *State v. Scott*, 20-63.

Discretion of the court: The granting of relief to the sureties upon the surrender or arrest of the defendant, as here provided, is in the discretion of the court: *Ibid.*

The discretion conferred on the court by this section will not be interfered with on appeal unless abuse of discretion is shown: *State v. Kraner*, 50-575; *State v. Kraner*, 50-582.

It would require a very strong showing of abuse to justify the supreme court in interfering with such discretion: *State v. Hirronemus*, 50-545.

CHAPTER 44.

OF THE RECOMMITMENT OF THE DEFENDANT AFTER GIVING BAIL OR DEPOSITING MONEY.

5999. Recommitted. 4601. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment in such action, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof in the following cases:

1. When by reason of his failure to appear, he has incurred a forfeiture of his bail, or money deposited instead thereof;

2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state;

3. When upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient. [R., § 4995; C., '51, § 3243.]

Where the accused, who is out on bail, is re-arrested for some of the causes specified in this section, he is then completely in the custody of the state, and his sureties having no more control over him are released from responsibility: *State v. Holmes*, 23-458; *State v. Orsler*, 48-343.

When a person held to appear was indicted and subsequently ordered arrested, and was so arrested, *held*, that it would be presumed that such arrest was on the ground that the bail was insufficient, and that the surety was therefore released: *State v. Orsler*, 48-343.

See § 5991 and notes, as to surrender of defendant by his sureties.

6000. Order; its requisites. 4602. The order for re-commitment of the defendant must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged. [R., § 4996; C.,'51, § 3244.]

6001. Arrest. 4603. The defendant may be arrested pursuant to the order upon a certified copy thereof, in any county in the state. [R., § 4997; C.,'51, § 3245.]

6002. Committal. 4604. If the order recite as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction,

the defendant must be committed according to the requirements of the order. [R., § 4998; C., '51, § 3246.]

6003. New bail. 4605. If the order be made for any other cause and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order. [R., § 4999; C., '51, § 3247.]

CHAPTER 45.

OF UNDERTAKINGS OF BAIL, WHEN LIENS.

6004. On real estate. 4606. Undertakings of bail, from the time of filing the same in the office of the clerk of the district court in which they are required to be filed, shall be, and may be made, liens upon real estate of the persons acknowledging the same, in the same manner, to the same extent, and with like effect, as in judgments in civil actions. [R., § 5000.]

A bond which is not authorized by statute, as, for instance, where it is accepted by a magistrate who has no authority to take bail, will not become a lien upon the property of the obligors, as here provided; but if it has secured the release of the principal it may be enforced by action: *State v. Cannon*, 34–322.

6005. Docketing and indexing. 4607. They shall, when filed, be immediately docketed and indexed by the clerk of the court in which they are filed, as judgments in civil actions are required to be docketed and indexed. [R., § 5001.]

6006. Attested copies. 4608. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner, and with like effect, as attested copies of judgments, and shall be immediately docketed and indexed, in the same manner. [R., § 5002.]

CHAPTER 46.

OF JUDGMENTS FOR FINES, WHEN LIENS, AND HOW EXECUTIONS THEREON STAYED.

6007. On real estate. 4609. Judgments for fines, in all criminal actions rendered, are, and may be made, liens upon the real estate of the defendant, in the same manner, and with like effect, as judgment in civil actions. [R., § 5003.]

6008. Stay of execution. 4610. The defendant may have a stay of execution for the same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein. [R., § 5004.]

CHAPTER 47.

OF THE LIBERATION OF POOR CONVICTS.

6009. When and on what conditions. 4611. When any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not complied

with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed, on demand with interest, accompanied with a written schedule containing a true account of all his property, of every kind, by him signed and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county. [R., § 5005; C., '51, § 3268.]

Under the provisions of this section, actual imprisonment for thirty days is made a prerequisite to the right to be liberated: *In re Curley*, 34-184.

Where a prisoner is thus liberated upon giving note, etc., he is entitled to have the judgment against him canceled: *State v. Van Vleet*, 23-168; *State v. Peck*, 37-342; *State v. Jordan*, 39-387; *In re Jordan*, 39-394.

Authority to imprison for non-payment of costs, not being expressly given by § 5894, this section does not warrant imprisonment for costs; and such imprisonment can be imposed only for non-payment of the fine: *State v. Erwin*, 44-637.

Under the provision (§ 6141) that such release shall not be made if, in the opinion of the sheriff, the judgment may be satisfied under the provisions for imprisonment at hard labor and credit of the amount allowed therefor on the judgment, *held*, that where it had been made to appear by the sheriff's answer in a *habeas corpus* proceeding that in his opinion the judgment could not thus be satisfied, a subsequent pleading stating a contrary opinion could not operate to prevent the discharge: *In re Jordan*, 39-394.

The power to commit for non-payment of a fine not being conferred by this section, but existing by virtue of § 5894, as incident to the power to impose a fine, if the statute authorizing a fine provides that a prisoner shall not be released under this section, such provision is controlling: *Hanks v. Workman*, 69-600.

The provisions of this section apply only to persons convicted of criminal offenses. The fine authorized by the prohibitory liquor law for violation of an injunction is not a fine for a crime, and the provisions for release of poor convicts does not apply thereto: *Ibid.*

In general as to imprisonment for non-payment of fine, see § 5894 and notes.

As to imprisonment at hard labor, see §§ 6136-6143.

6010. False schedule. 4612. If such convict knowingly and wilfully make any false schedule, on oath, relating to the amount or nature of his property, he is guilty of perjury. [R., § 5006; C., '51, § 3269.]

CHAPTER 48.

OF THE DISMISSAL OF CRIMINAL ACTIONS BEFORE AND AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

6011. If indictment not found. 4613. When a person has been held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed unless good cause to the contrary be shown. [R., § 5007; C., '51, § 3248.]

6012. If not tried at second term. 4614. If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed unless good cause to the contrary be shown. [R., § 5008; C., '51, § 3249.]

Where the failure to have a trial at the next regular term after the finding of the indictment results from a default of defendant, or from his seeking to have the verdict set aside, and without a demand on his part for trial, or objection to continuance, he is not entitled to a dismissal as here provided: *State v. Arthur*, 21-322.

6013. Discharged on undertaking. 4615. If the defendant be not indicted or tried as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the

charge at the time to which the action is continued, but no such continuance can be extended beyond three terms of the court. [R., § 5009; C., '51, § 3250.]

6014. Discharge on dismissal. 4616. If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated, and if money has been deposited instead of bail, it must be refunded to him. [R., § 5010.]

6015. Dismissal by order of court. 4617. The court may, either upon its own motion or upon the application of the district [county] attorney, and in furtherance of justice, order an action after an indictment to be dismissed, but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. [R., § 5011; C., '51, § 3251.]

After the trial is entered upon, a dismissal of the proceedings by the court or the district attorney, except under the circumstances authorized by the preceding sections, will operate as an acquittal, and defendant cannot be again put on trial: *State v. Callendine*, 8–288.

A *nolle prosequi* may be entered before the trial is commenced, but, after plea is made, the jury sworn, and the evidence introduced, its entry will amount to an acquittal: *Ibid.*

The fact that material witnesses for the prosecution cannot be called because their names are not indorsed on the indictment is not sufficient to justify the court in dismissing the case: *Ibid.*

At any time before the impaneling and swearing of a jury it is competent for the prosecutor to *nol. pros.* the entire indictment, or any count or number of counts therein. The same thing may be done in case of a verdict upon an indictment containing several counts, where the jury has failed to respond to a part of the charge, and judgment may then be taken upon the balance: *State v. McPherson*, 9–53.

Where, by mistake, the court announces the case as dismissed, and so marks it on his calendar, and afterwards rescinds such order, there is not such a dismissal as to prevent further proceedings: *State v. Manley*, 63–344.

Where the indictment charges burglary and also facts constituting an assault with intent to commit murder, for the purpose of subjecting the defendant to the aggregate punishment provided by § 5191, the charge of assault with intent to commit murder may be dismissed and defendant put on trial for burglary alone: *State v. Struble*, 71–11.

In general, see Const., art. 1, § 12.

6016. Nolle prosequi. 4618. The entry of a *nolle prosequi* is abolished, and neither the attorney-general nor the district [county] attorney shall hereafter discontinue or abandon a prosecution for a public offense except as provided in the last section. [R., § 5012; C., '51, § 3252.]

6017. Bar. 4619. An order for the dismissal of the action as provided in this chapter, is a bar to another prosecution for the same offense if it be a misdemeanor; but it is not a bar if the offense charged be a felony. [R., § 5013.]

CHAPTER 49.

OF THE INSANITY OF A DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

6018. Trial. 4620. When a defendant appears for arraignment, trial, judgment, or on any other occasion when he is required, if a reasonable doubt arise as to his sanity, the court must order a jury to be impaneled from the trial jurors in attendance at the term, or who may be summoned by the direction of the court, as provided in this code, to inquire into the fact. [R., § 5015; C., '51, § 3260.]

The prisoner's mental condition at the time he appears for arraignment, or upon any other occasion when required, is thus to be inquired into, and not his condition at the time of the commission of the offense. In determining as to whether a reasonable doubt exists as to his sanity, the judge may, before impaneling the jury, investigate the whole matter, obtain all the light reasonably attainable, and determine from all the circumstances as to whether the necessity for the inquiry exists: *State v. Arnold*, 12–479.

It is not a ground of challenge to the panel on the trial that the jurors have heard the evidence on such preliminary inquiry as to the prisoner's sanity: *Ibid.*

6019. Suspension. 4621. The arraignment, trial, judgment, or other proceedings, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury. [R., § 5016; C., '51, § 3261.]

6020. Order of procedure. 4622. The trial for the question of insanity must proceed in the following order:

1. The counsel of the defendant must offer the evidence in support of the allegation of insanity;

2. The district [county] attorney must then offer the evidence in support of the case on the part of the state;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted on either side, or both sides, without argument, the district [county] attorney must commence, and the defendant's counsel conclude the argument to the jury;

5. If more than one counsel on each side argue the case to the jury, they must do so alternately;

6. The court shall then, on motion of either party, charge the jury. The provisions of this code, so far as the same are applicable and not herein changed, shall regulate the trial of the question of insanity. [R., § 5017.]

6021. If sane. 4623. If the jury find that the defendant is sane, the proceedings on the indictment shall be resumed. [R., § 5018; C., '51, § 3262.]

6022. If insane. 4624. If the jury find the defendant insane, the proceedings on the indictment shall be suspended until he becomes sane, and the court, if it deem his discharge dangerous to the public peace or safety, may order that he be in the meantime committed by the sheriff to the Iowa insane hospital, and that upon his becoming sane, he be delivered by the superintendent of the hospital to the sheriff. [R., § 5019; C., '51, § 3263.]

6023. Bail; released. 4625. The commitment of the defendant, as provided in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of the money he may have deposited instead of bail. [R., § 5020; C., '51, § 3264.]

6024. Detained in hospital. 4626. If the defendant be received into the hospital, he must be detained there until he becomes sane. When he becomes sane, the superintendent of the hospital must give notice of that fact to the sheriff and to the district [county] attorney of the proper district [county]. The sheriff must, thereupon, without delay, bring the defendant from the hospital and place him in the proper custody until he be brought to trial or judgment, as the case may be, or be legally discharged. [R., § 5021; C., '51, § 3265.]

6025. Expenses. 4627. The expense of sending the defendant to the hospital, bringing him back, and any other expense incurred, are to be paid in the first instance by the county from which he was sent, but the county may recover from the estate of the defendant, if he have any, or from a relative, or another county, town, township, or city, bound to provide for or maintain him elsewhere. [R., § 5022; C., '51, § 3267.]

6026. Fees. 4628. Sheriffs for delivering persons found to be insane, under the provisions of this chapter, are entitled to the same fees therefor, as are allowed for conveying convicts to the penitentiary. [R., § 5023.]

CHAPTER 50.

OF SEARCH-WARRANTS, AND PROCEEDINGS THEREON.

6027. Definition. 4629. A search-warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, com-

manding him to search for personal property, and bring it before the magistrate. [R., § 5024; C., '51, § 3291.]

A search-warrant is not unreasonable, within the meaning of Const., art. 1, § 8, when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause: *Santo v. State*, 2-165.

Therefore, *held*, that § 2401, authorizing the issuance of a search-warrant for the seizure of intoxicating liquors, is not unconstitutional, as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Ibid.*

Description of the place to be searched *held* sufficient in a particular case: *State v. Thompson*, 44-399.

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

For constitutional provisions relative to search-warrants, see Const., art. 1, § 8.

For provisions as to search-warrant for seizure of intoxicating liquors, see § 2401 and notes.

6028. Upon what grounds issued. 4630. It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, from a house or other place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it. [R., § 5025; C., '51, § 3292.]

[The words at the end of the section, following "control," are erroneously omitted in the printed Code.]

As to disposal of imitation butter, etc., seized on search-warrant, see § 2517.

6029. Affidavit. 4631. No search-warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched. [R., § 5026; C., '51, § 3293.]

6030. Applicant examined. 4632. The magistrate must, before issuing a warrant, examine on oath the applicant therefor and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him by the person making it. [R., § 5027; C., '51, § 3294.]

6031. Affidavits must set forth. 4633. The affidavit must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist. [R., § 5028; C., '51, § 3295.]

6032. Magistrate issue. 4634. If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search-warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring it before him. [R., § 5029; C., '51, § 3296.]

6033. Jurisdiction. 4635. The local jurisdiction of magistrates, in exercising the powers conferred on them by this chapter, is as defined in this code. [R., § 5030.]

6034. Form of warrant. 4636. The warrant may be, substantially, in the following form:

COUNTY OF ——.

THE STATE OF IOWA,

To any Peace Officer of said County:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application according to section four thousand six hundred and thirty of this chapter [§ 6028]; or, if the affidavit be not positive, that there is probable cause for believing that)— (stating the ground of the application in the same manner) you are therefore commanded, in the day-time (or at any time of the day or night, as the case may be, according to section four thousand six hundred and thirty of this chapter) [§ 6028], to make immediate search on the person of C. D., or, in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following property, (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me, at (stating the place).

Dated at ——, this —— day of ——, A. D. 18—.

E. F., Justice of the Peace.
(or as the case may be.)

[R., § 5031.]

An objection to the sufficiency of a warrant under which property has been seized cannot be raised for the first time in the district court on appeal from the justice issuing the warrant: *State v. Thompson*, 44–399.

As to requisites of search-warrants, see § 6027 and notes.

6035. By whom served. 4637. A search-warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requisition, he being present and acting in its execution. [R., § 5032; C., '51, § 3297.]

6036. Officer may break open doors. 4638. The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein to execute the warrant, if, after notice of his authority and purpose, he be refused admittance. [R., § 5033; C., '51, § 3298.]

6037. Liberating person assisting. 4639. He may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or, when necessary, for his own liberation. [R., § 5034.]

6038. Served in day-time. 4640. The magistrate must insert a direction in the warrant, that it be served in the day-time unless the affidavit be positive that the property is on the person, or in the place to be searched; in which case, he may insert a direction that it may be served at any time of the day or night. [R., § 5035.]

6039. Return; in what time. 4641. A search-warrant must be executed and returned to the magistrate by whom it was issued within ten days after its date. After the expiration of such time, the warrant, unless executed, is void. [R., § 5036; C., '51, § 3299.]

6040. Officer receipt for property. 4642. When the officer takes any property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken or in whose possession it was found, or, in the absence of the person, he must leave it in the place where he found the property. [R., § 5037; C., '51, § 3300.]

6041. Return with inventory. 4643. The officer must forthwith return the warrant to the magistrate, and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of

the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following effect: "I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant." [R., § 5038; C., '51, § 3301.]

6042. Magistrate give copy. 4644. The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant. [R., § 5039; C., '51, § 3302.]

6043. Take testimony. 4645. If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto. [R., § 5040; C., '51, § 3303.]

6044. Reduced to writing. 4646. The testimony given by each witness must be reduced to writing and authenticated by the magistrate. [R., § 5041; C., '51, § 3304.]

6045. Property restored. 4647. If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken. [R., § 5042; C., '51, § 3305.]

6046. Delivered to owner. 4648. If the property taken by virtue of a search-warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, as provided in the next chapter. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section four thousand six hundred and thirty of this chapter [§ 6028], the magistrate must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense which the property taken was used as a means of committing, or so intended to be, is triable. [R., § 5043; C., '51, § 3306.]

As to restoring imitation butter, etc., seized under search-warrant, see § 2517.

6047. Disposition of papers. 4649. The magistrate must annex together the affidavits taken before the issuing of the warrant, the warrant, the return, and the inventory, and return them to the next district court of the county, at or before its opening, on the first day of the next term thereof. [R., § 5044; C., '51, § 3307.]

6048. Maliciously suing out. 4650. Whoever, maliciously and without probable cause, procures a search-warrant to be issued and executed, is guilty of a misdemeanor. [R., § 5045; C., '51, § 3308.]

6049. Excess of authority. 4651. A peace officer who, in executing a search-warrant, wilfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor. [R., § 5046.]

6050. Searching person charged with felony. 4652. When a person charged with a felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or the order of the court in which the defendant may be tried. [R., § 5047; C., '51, § 3309.]

6051. Property kept for evidence. 4653. When any officer, in the execution of a search-warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all

the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under the direction of the court or magistrate. [R., § 5048.]

This section and § 6057 simply direct the disposition to be made of stolen or embezzled property by the officer, and the receipts to be given therefor, but they in no manner affect the competency of testimony for either the state or the accused respecting such property: *State v. Mullen*, 30–203.

CHAPTER 51.

OF THE DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

6052. Held by officer. 4654. When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof. [R., § 5049; C., '51, § 3253.]

6053. Delivered to owner. 4655. On satisfactory proof of title by the owner of the property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property. [R., § 5050; C., '51, § 3254.]

6054. From custody of magistrate. 4656. If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided. [R., § 5051; C., '51, § 3255.]

6055. By order of court. 4657. If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had, may, on proof of his title, order its restoration. [R., § 5052; C., '51, § 3256.]

Where a defendant is acquitted of the crime of larceny, money which was seized under a search-warrant as the subject of the larceny should be surrendered to the defendant; the court has no authority to retain the case upon the docket for the purpose of determining the ownership of the property: *State v. Williams*, 61–517.

6056. When not claimed. 4658. If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody, must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county. [R., § 5053; C., '51, § 3257.]

6057. Officer give receipts. 4659. When the money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate. [R., § 5054; C., '51, § 3258.]

See note to § 6051.

CHAPTER 52.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

6058. Jurisdiction. 4660. Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses less than felony, committed within their respective counties, in which the punishment described by law does not exceed a fine of one hundred dollars, or imprisonment thirty days. [R., § 5055; C., '51, § 3322.]

Jurisdiction: The district court has concurrent jurisdiction with that of justices of the peace over crimes within the jurisdiction of the latter, and therefore a defendant put on trial in the district court on indictment may be convicted of a lower degree of the offense or of a crime necessarily included within the offense charged, although such lower degree or included crime is not in itself indictable, and could have been prosecuted before a justice of the peace: *Orton v. State*, 4 G. Gr., 140.

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

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

Venue: To show that the case is within the territorial jurisdiction of a justice the prosecution need only prove that the offense was committed in the county. The township where it was committed is immaterial: *State v. Gibson*, 29-295.

Where defendant is brought before a justice of the peace of the proper county upon a warrant issued by another justice for an offense triable by a justice of the peace and makes no objection to the jurisdiction, he thereby waives any objection which he may have on that account and cannot raise it upon appeal: *State v. Kinney*, 41-424.

6059. Action commenced by information. 4661. Criminal actions for the commission of a public offense must be commenced before a justice of the peace, by an information subscribed and sworn to, and filed with the justice. [R., § 5056; C., '51, § 3323.]

If the informant subscribes and swears to the affidavit at the end of the information, it is sufficient to comply with the provisions requiring the information to be subscribed and sworn to: *Devine v. State*, 4-443.

As to amending, see notes to next section.

6060. Information must contain. 4662. Such information must contain:

1. The name of the county and of the justice where the information is filed;
2. The names of the parties, if the defendants be known, and if not, then such names as may be given him by the complainant;
3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense as near as may be. [R., § 5057; C., '51, § 3324.]

Under the provisions of the following section as to the form of an information, the facts constituting the offense should be stated with as much precision as in an indictment: *State v. Bitman*, 13-485; *State v. Allen*, 32-491.

Under § 2381, prohibiting the selling of intoxicating liquor to any person, *held*, that an information charging such sale should state the name of the person to whom the liquor was sold, and that a mere allegation that defendant "did sell intoxicating liquors in violation of," etc., was not sufficient: *State v. Allen*, 32-491.

Where an ordinance prohibited the sale of beer or wine to any person, an information for the violation of such ordinance charging the sale to "divers persons" was *held* sufficient: *State v. Smouse*, 49-634.

Where the information charging the keeping of intoxicating liquors for sale was entitled "State of Iowa, Clayton County," and stated the liquors to be in defendant's saloon in Strawberry Point, *held*, that the information sufficiently showed that the liquors were in Clayton county: *State v. Thompson*, 44-399.

An information charging the illegal sale of intoxicating liquors need not specify the quantity sold: *State v. King*, 37-462. Nor the method of sale: *Devine v. State*, 4-443. Nor the kind of liquor sold: *State v. Whalen*, 54-753. Informations in particular cases *held* sufficient: *State v. Mohr*, 53-261; *Foreman v. Hunter*, 59-260; *State v. Johnson*, 69-623.

As to sufficiency of information charging sale, etc., of intoxicating liquors, see, further, § 2406 *et seq.*

An information charging larceny, *held* defective in failing to allege that it was feloniously committed, although the accusation was

in the language of the statute defining the offense: *State v. Sipult*, 17-575.

It is not sufficient in an information to charge the offense by its technical name; the acts constituting the offense must be stated: *State v. Murray*, 41-580.

Therefore, *held*, that in an information for an assault it was not sufficient to charge simply that defendant "did assault" the person injured: *Ibid.*

An information for assault and battery is sufficient which charges violently beating, wounding, etc., without charging the manner or purpose thereof: *State v. Boynton*, 75-753.

Where an information for violation of an ordinance was headed "State of Iowa, City of Washington, versus," etc., *held*, that the words "State of Iowa" were surplusage and did not make the prosecution one under the state law: *State v. Smouse*, 49-634.

Where an information charges an offense of which the court has jurisdiction, and also one of which it has not, the allegations as to the latter will be deemed surplusage and will not vitiate the information: *Ibid.*; *State v. Silhoffer*, 48-283.

An information may be amended, upon application, to any extent consistent with the orderly conduct of judicial business with public interest and private rights: *State v. Doe*, 50-541; *State v. Merchant*, 38-375.

6061. Form of. 4663. The information may be substantially in the following form:

——— County,
The State of Iowa
against
A. B., defendant.
} Before justice ——— (here insert the name of the justice).

The defendant is accused of the crime (here name the offense).

For that the defendant, on the ——— day of ———, A. D. 18—, at the (here name the city, village, or township), in the county aforesaid (here state the act or omission constituting the offense as in an indictment). [R., § 5058; C., '51, § 3325.]

Under these provisions the information is required to state the facts constituting the offense intended to be charged with as much precision as an indictment: *State v. Allen*, 32-491; *State v. Bitman*, 13-485.

For form of indictment, see § 5682.

See notes to preceding section, amending information; also as to sufficiency of the information in particular cases.

6062. Filing. 4664. The justice must file such information, and mark thereon the time of filing the same. [R., § 5059; C., '51, § 3326.]

6063. Warrant. 4665. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, and may be served in like manner. [R., § 5060; C., '51, § 3327.]

6064. Service. 4666. The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same. [R., § 5061; C., '51, § 3328.]

6065. Appearance. 4667. When the defendant is brought before the justice, the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead. If he objects that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection. [R., § 5062; C., '51, § 3329.]

6066. Pleading. 4668. The defendant may plead the same pleas as upon an indictment. His pleas must be oral, and shall be entered on the docket of the justice. [R., § 5063; C., '51, § 3330.]

6067. Trial. 4669. Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant. [R., § 5064; C., '51, § 3331.]

A justice has no authority to try a prisoner after he has demanded a jury: *Dupont v. Downing*, 6-173.

As the trial before the justice may be without jury the defendant may also on appeal waive a jury in accordance with § 6100, although jury trial cannot be waived in a criminal prosecution originally commenced in the district court: *State v. Ill*, 78-543

CHANGE OF VENUE.

6068. Affidavit. 4670. If a change of venue be applied for, an affidavit must be filed stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes. [R., § 5065.]

Prejudice of a justice against a defendant can only be taken advantage of by motion for change of venue. The existence of prejudice will not render the conviction void: *Foreman v. Hunter*, 59-550.

The provisions as to change of venue from a justice of the peace do not entitle a defendant to change of venue in a trial in the police court: *Zelle v. McHenry*, 51-572.

6069. Allowed. 4671. If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and in such case the justice before whom such action or proceeding is commenced, shall transmit all the original papers, together with a transcript of all his docket entries to the next nearest justice in the county against whom none of the above objections exist, who may require the defendant to plead as provided in section four thousand six hundred and sixty-seven of this chapter [§ 6065], if he has not already done so, and shall proceed to try the case, unless a jury trial be demanded, but no more than one change of venue in the same case shall be allowed. [R., § 5066; 9 G. A., ch. 33.]

Where the justice to whom the case is sent on change of venue refuses to act, the officer having the defendant in charge has no authority to take him before another justice, and any action of such justice in the matter would be void: *Connell v. Stelson*, 33-147.

The "above objections" here referred to are the ones specified in this section, and are not the same as those which are made a ground for change of venue in the first place. Prejudice of the justice is a ground for asking a change of venue, but not a ground for objection to the next nearest justice: *Albertson v. Kriechbaum*, 65-11.

Where defendant, in asking a change of venue, urges objections to a justice to whom the case might be sent, and thereby procures it to be sent to another justice, he cannot afterwards object that the justice to whom it is sent has not jurisdiction, for the reason that the objection made to the nearest justice was not one authorized by statute as a ground for not sending the case to him. By requesting the change to the justice before whom the case is taken, and appearing before him, defendant waives any objection to his jurisdiction: *State v. McEvoy*, 68-355.

SECURING JURY.

6070. Jury trial. 4672. Before the justice has heard any testimony upon the trial, the defendant may demand a trial by jury. [R., § 5067; C., '51, § 3332.]

When the police judge of a city is exercising the powers and jurisdiction of a justice (§ 808), a defendant on trial before him may demand a jury as here provided, but in a prosecution before such judge for the violation of a city ordinance, the defendant is not entitled to a jury: *Zelle v. McHenry*, 51-572.

A justice of the peace has no authority to try a prisoner without a jury after he has demanded a jury trial: *Dupont v. Downing*, 6-172.

6071. Jury; how obtained. 4673. If a trial by jury be demanded, the justice shall direct any peace officer of the county to make a list in writing of the names of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names. [R., § 5068; C., '51, § 3333.]

A judgment rendered upon a verdict by a disqualified jury is erroneous but not void. It may be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

By this section the justice is empowered to

designate the sheriff, or one of his deputies, or any constable in the county, for the performance of the duty, and use his discretion in making the selection; and this power to select necessarily includes the power to institute inquiry as to the fitness of the one intended to be designated. When the question arises the informant as well as the defendant has a right to object to the one designated on the ground of unfitness for the performance of the duty. Therefore, *held*, that statements made in good faith in an affidavit by the informant with reference to facts claimed to constitute disqualification on the part of the constable were privileged: *Rainbow v. Benson*, 71–301.

6072. Striking names. 4674. In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike out the names for either or both of the parties so neglecting or refusing, and upon such names being struck out, the justice must issue a venire directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list, to appear before such justice at the time and place named therein, to make a jury for the trial of the cause. [R., § 5069; C., '51, § 3334.]

6073. Jurors summoned. 4675. The officer to whom such venire is delivered must forthwith summon such jurors, and return the venire to the justice within the time therein specified, naming the persons summoned and the manner of service. [R., § 5070; C., '51, § 3335.]

6074. Names of jurors. 4676. The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name be not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing. [R., § 5071; C., '51, § 3336.]

6075. Drawing. 4677. The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed. [R., § 5072; C., '51, § 3337.]

6076. Challenges. 4678. The same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed. [R., § 5073; C., '51, § 3338.]

6077. Talesmen. 4679. If any of the jurors named in the venire cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any by-stander or others who may be competent, and against whom no sufficient cause of challenge appears, to act as jurors. [R., § 5074; C., '51, § 3339.]

6078. Failure to return; new venire. 4680. If the officer by whom the venire is received do not return it as required, he may be punished by the justice as for contempt, and the justice shall issue a new venire for the summoning of the same jurors, upon which the same proceeding shall be had as upon the one first issued. [R., § 5075; C., '51, § 3340.]

6079. Jury of six. 4681. When six jurors appear and are accepted, they shall constitute the jury. [R., § 5076; C., '51, § 3341.]

6080. Oath. 4682. The justice must thereupon administer to them the following oath or affirmation: You do swear (or you do solemnly affirm, as the case may be), that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the evidence. [R., § 5077; C., '51, § 3342.]

TRIAL AND JUDGMENT.

6081. Proceedings of jury. 4683. After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be delivered in public. After which, they may either decide in court or retire for consideration. [R., § 5078; C., '51, § 3343.]

6082. Retire with officer; oath. 4684. If they do not immediately agree, they must retire with the officer, who shall be sworn to the following effect: "You do swear that you will keep the jury together in some private and convenient place, without meat or drink, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed." [R., § 5079; C., '51, § 3344.]

6083. Verdict. 4685. When the jury have agreed upon their verdict, they must deliver it publicly to the justice, who shall enter it on his docket. [R., § 5080; C., '51, § 3345.]

6084. Kept together. 4686. The jury must be kept together after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless, for good cause, the justice sooner discharge them. [R., § 5081; C., '51, § 3346.]

6085. Discharged. 4687. If the jury be discharged as provided in the last section, the justice may proceed again to the trial in the same manner as upon the first trial; and so on until a verdict is rendered. [R., § 5082; C., '51, § 3347.]

6086. Judgment. 4688. When the defendant pleads guilty, or is convicted, either by the justice or by a jury, the justice shall render judgment thereon, or fine, or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment. [R., § 5083; C., '51, 3348.]

6087. Imprisonment for non-payment of fine. 4689. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. [R., § 5084.]

There can be no imprisonment for non-payment of a fine unless the judgment so orders: *Lanpher v. Dewell*, 56–153.

See, further, § 5894 and notes.

6088. Defendant discharged. 4690. When the defendant is acquitted, either by the justice, or by a jury, he must be immediately discharged. [R., § 5085; C., '51, § 3350.]

6089. Costs; appeal. 4691. When the defendant is acquitted, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the prosecuting witness and render judgment therefor, from which he may appeal to the district court, by there giving notice to the justice that he claims such appeal, and the fact of the giving of such notice shall be entered on his record by the justice. If notice of appeal is given as herein contemplated, the justice shall, without delay, make out, sign, and file in the case a full and true statement of all the testimony admitted on the trial, and on which he bases his finding that the prosecution was malicious or without probable cause, and shall, without delay, make out a transcript of his docket entries, and shall file it, together with the statement of the testimony as aforesaid, and all other papers on file in the case, in the clerk's office of the district court of the county. And such appeal shall stand for hearing in said court at the term thereof commencing next after said papers are filed. And said court shall have full power to compel the correction by said justice of any error made apparent in his transcript, said statement of testimony, or in any papers returned by him, or may itself make the necessary correction therein, and may, on the papers, in case they shall be submitted to it, either affirm or reverse the judgment of the justice, or render such judgment as the justice should have rendered in the case. [R., § 5086.]

An appeal by a prosecuting witness from the action of a justice of the peace in taxing to him the costs of the prosecution in case of defendant's acquittal must be taken at the

time judgment is rendered, and cannot be taken afterwards: *State v. Knapf*, 61–522.

Such appeal is to be taken to the district court, and is a criminal proceeding: *Ibid.*

The justice is invested with discretion as to the taxation of costs to the prosecutor, and his conclusion cannot be reversed by the district court unless he has abused such discretion. While the proceeding in the district court is called an appeal, it is in fact a writ of error, and the correctness of the judgment of the justice is to be determined by an inspection of the record. New or additional evidence should not be introduced: *State v. Kerns*, 64–306.

Under Revision, § 5094, which allowed appeals by the state, *held*, that although the justice did not tax up the costs to the prosecuting witness, the district court might, on appeal, make such taxation under § 6100 (Rev., § 5100) without taking further evidence than that introduced on the trial, provided that was in itself sufficient to authorize its action: *In re Trenchard*, 16–53.

Also, *held*, that where the judgment was for defendant, the prosecuting witness might appeal from an order of the justice taxing to him the costs of prosecution: *State v. Roney*, 37–30.

See, further, as to taxation of costs against the prosecuting witness, §§ 5637, 5675, and notes.

6090. Certificate of conviction. 4692. Whenever a conviction is had upon a plea of guilty, or upon trial, the justice must make and sign with his name of office, a certificate of such conviction, in which it shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof. [R., § 5087; C., '51, § 3351.]

6091. Judgment; how executed. 4693. The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice specifying the particulars of such judgment. [R., § 5090; C., '51, § 3354.]

6092. Fine; payment to justice. 4694. If a fine be imposed, and paid before commitment, it shall be received by the justice, and by him paid over to the county treasurer, within thirty days after the receipt thereof, for the use of the schools of the county, as provided by law. [R., § 5091; C., '51, § 3355.]

6093. Payment to sheriff. 4695. If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who must, in like manner, within thirty days after the receipt thereof, pay it into the county treasury, for the use of the schools in the county, as provided by law. [R., § 5092; C., '51, § 3356.]

6094. Receipt. 4696. If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay, with the county auditor. [R., § 5093; C., '51, § 3357.]

APPEAL.

6095. How taken. 4697. The justice rendering a judgment against the defendant, must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice, that he appeals, and the justice must make an entry on his docket of the giving of such notice. [R., § 5095.]

Appeals from judgment of justice: There is no provision for a review of errors of law only, in a criminal case tried before a justice of the peace. The provisions of § 4846 *et seq.* as to writs of error in civil cases are not applicable in criminal prosecutions: *Part of Lot, etc., v. State*, 1–507; *State v. Flinn*, 51–133.

The provisions of this section are applicable to trials before a mayor for violation of a city ordinance (§ 692): *State v. Hoag*, 46–337.

The provision of the Revision allowing an appeal by the prosecution was held unconstitutional so far as it authorized a retrial in the district court of a defendant acquitted before a justice having jurisdiction of the offense: *State v. Van Horton*, 26–402.

But under such provision it was held that where defendant pleaded guilty the state might appeal from the judgment upon such plea, and in the district court inquiry might be made into the circumstances in order to settle the amount of fine or punishment, especially where the plea and judgment were entered in the absence of prosecutor and before the day fixed for trial: *State v. Tait*, 22–140.

The receipt of the fine in such case by the county treasurer was held not such an accept-

ance of the adjudication as to bar all right of appeal by the prosecution: *Ibid.*

How taken: The mere filing of an appeal bond does not effect the appeal; it must be taken by giving notice, and if not so taken the case may be stricken from the docket of the district cour : *State v. Leyden*, 13-433.

In order to secure an appeal, notice thereof must be given at the time judgment is rendered: *State v. Knapf*, 61-522.

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

The fact that the justice fails to inform defendant of his right to appeal, or fails to make an entry of the fact on his docket, does not render the conviction void. The defendant may have the amount of bail fixed in a *habeas corpus* proceeding, but is not entitled to be discharged without bail: *Jacoby v. Waddell*, 61-247.

Mere mistake or inadvertence will not excuse the failure to take an appeal at the time of judgment, and render an appeal afterwards taken proper: *Cook v. United States*, 1 G. Gr., 39.

6096. Bail; form of bond. 4698. The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed, unless bail in that amount be put in, by an undertaking substantially in the following form:

COUNTY OF ——.

A. B. having been convicted before C. D., a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on the —— day of ——, A. D. 18—, and having appealed from said judgment to the district court of said county:

We, A. B. and E. F. (or I, E. F.) or (we, E. F. and G. H.), hereby undertake that the said A. B. will appear in the district court of said county, at the term thereof to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we (or I, as the case may be) will pay to the state of Iowa the sum of —— dollars (the amount of bail fixed).

A. B.
E. F.
(As the case may be.)

Acknowledged before, and accepted by me, at ——, in the township of ——, this —— day of ——, 18—.

C. D.,
Justice of the Peace.

[R., § 5096; C., '51, § 3359.]

This bond provides only for appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *State v. Beneke*, 9-203.

6097. Qualifications. 4699. The bail must possess the qualifications, must justify, and must be taken in the same manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, except as in this chapter otherwise provided. [R., § 5097.]

6098. By whom taken. 4700. The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof. [R., § 5098.]

6099. Witness bound over. 4701. When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case. [R., § 5099; C., '51, § 3360.]

For similar provisions in case of preliminary examination, see §§ 5631-5634 and notes.

TRIAL IN DISTRICT COURT.

6100. Trial when appealed. 4702. The cause, when thus appealed, shall stand for trial anew in the district court, in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case according to the law, and shall give judgment accordingly. [R., § 5100; C., '51, §§ 3361-4.]

On appeal the case stands for trial anew, and such trial is to be conducted in the same manner as the first or original trial: *State v. Dow*, 74-141.

An appeal brings up the case on its merits. There is no method by which defendant may secure a review of errors of law only: *State v. Flinn*, 51-133.

An appeal brings the case into the district court for trial on its merits, and the court should disregard all merely technical errors or defects not prejudicing the substantial rights of the parties, such, for instance, as that upon change of venue the case was sent to the wrong justice: *State v. McEvoy*, 68-355.

If no plea is entered of record by the justice of the peace it may be entered by the district court on the trial of the appeal: *State v. McCombs*, 13-426.

An appeal waives any irregularities in the proceedings before the justice: *Ibid.*

A defendant who has pleaded guilty before the justice, and been sentenced upon such plea, may, on appeal, withdraw the plea as provided in § 5747 with reference to proceedings upon an indictment: *State v. Kraft*, 10-330; *State v. Oehlslager*, 38-297; *State v. Farlee*, 74-451.

Where, upon the trial before the justice, two of the counts of the information were withdrawn, and defendant was convicted on a third, *held*, that it was error, on an appeal to the district court, to convict defendant on the two counts which had been withdrawn before the justice: *State v. Shilling*, 10-106.

Where defendant was tried before a justice upon an information containing several counts, and was found guilty and sentenced for one offense, *held*, that on appeal he was subject to retrial upon all the counts, and could not insist upon having been acquitted as to any of them: *State v. Malling*, 11-239.

Defendant cannot, upon trial of an appeal in the district court, have the cause remanded to the lower court in which it was tried, with directions for further proceedings therein, as to grant a change of venue it must be tried in the district court: *Ottumwa v. Schaub*, 52-515.

As defendant may be tried without a jury before a justice, the provisions of this section authorize the waiver of the jury on trial of an appeal from the justice, although the jury cannot be waived in criminal prosecutions originally commenced in the district court: *State v. Ill*, 74-441.

See, further, § 6089 and notes.

6101. Appeal not dismissed. 4703. No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed. [R., § 5101.]

6102. Judgment enforced. 4704. If any proceedings be necessary to carry the judgment upon the appeal into effect, they shall be had in the district court. [R., § 5102.]

6103. Appeal to supreme court. 4705. Either party may appeal from the judgment of the district court, to the supreme court, in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as nearly as applicable. [R., § 5103; C., '51, § 3366.]

6104. Judgment upon appeal. 4706. The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken from a judgment prosecuted by indictment. [R., § 5104; C., '51, § 3367.]

CHAPTER 53.

OF PROCEEDINGS BEFORE POLICE AND CITY COURTS IN INCORPORATED CITIES AND TOWNS.

6105. Proceedings in police courts. 4707. The proceedings in police and city courts in incorporated cities and towns, in criminal cases within their

jurisdiction, shall be regulated by the provisions of this code, when not otherwise regulated by law. [R., § 5105.]

This section does not give a defendant on trial in the police court for violation of a city ordinance the right to a change of venue: *Zelle v. McHenry*, 51-572.

A proceeding before a magistrate in the name of the city accusing defendant of the violation of a city ordinance is a criminal prosecution: *Davenport v. Bird*, 34-524.

The violation of an ordinance of a city punishing acts therein specified by a fine is a crime, and a prosecution to enforce the punishment is a criminal proceeding: *Jaquith v. Royce*, 42-406; *State v. Vail*, 57-103.

A proceeding before a mayor of an incorporated town to punish the violation of an ordinance is in the nature of a criminal prosecution: *Columbus City v. Cutcomp*, 61-672.

The provision of the constitution (art. 5, § 8) requiring prosecutions to be in the name of the state of Iowa refers to such criminal prosecutions as shall be instituted and prosecuted before a tribunal provided for in the constitution under the statutes of the state, and does not refer to prosecutions for violations of city ordinances: *Davenport v. Bird*, 34-524.

A proceeding for a violation of a city ordinance may be brought in the name of the city when so provided by law or ordinance; but if such prosecution is brought in the name of the state, without objection thereto until upon appeal, an objection upon that ground will not be sustained: *State v. King*, 37-462.

An appeal by a city in a proceeding commenced in its name before a mayor by information to punish for the violation of a city ordinance is to be governed by the rules regulating appeals in criminal cases: *Columbus City v. Cutcomp*, 61-672.

CHAPTER 54.

OF COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

6106. When allowed. 4708. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed:

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or,
3. With an intent to commit a felony. [R., § 5106.]

6107. Stay of proceedings. 4709. If the party injured in such a case, appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein, and entered upon the minutes. [R., § 5107.]

6108. Order a bar. 4710. The order authorized by the last section is a bar to another prosecution for the same offense. [R., § 5108.]

6109. Otherwise not allowed. 4711. No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter. [R., § 5109.]

CHAPTER 55.

OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

6110. By governor. 4712. The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations

as he may think proper. After conviction of murder in the first degree no pardon shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the general assembly thereon. Before presenting the matter to the general assembly for their action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, and if there be no such paper in such county, then in some adjoining county, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented. [R., § 5116; C., '51, § 3278; 14 G. A., ch. 136, § 3.]

A pardon does not operate to discharge the convict from the payment of costs adjudged against him on his trial: *Estep v. Lacy*, 35-419.

The governor may grant a pardon upon conditions; and where one condition was that he might revoke it upon such showing as he might deem sufficient, *held*, that the person pardoned could not claim a judicial investigation as to whether he had violated the condition: *Arthur v. Craig*, 48-264.

As to power of governor to pardon, see Const., art. 4, § 16.

6111. Application for. 4713. When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the district [county] attorney, or attorney-general, by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of his exercise of his powers in the premises. He may also take the testimony of such persons bearing upon such application as he may deem advisable, and for this purpose is authorized to administer the necessary oath. Any person who, in giving such testimony, shall swear falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be deemed guilty of perjury, and shall be punished therefor as provided by law. [R., § 5120; 14 G. A., ch. 96.]

6112. Return to secretary of state. 4714. Whenever any convict is pardoned, or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, it is the duty of the officer to whom the warrant is directed, as soon as may be after executing the same, to make a return in writing thereon to the secretary of state, of his doings under the same, and sign the same with his name of office, and must also file in the office of the clerk of the court in which the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk. [R., § 5121; C., '51, § 3279.]

CHAPTER 56.

OF ILLEGITIMATE CHILDREN.

6113. Complaint. 4715. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding shall be entitled in the name of the state against the accused as defendant. [R., § 1416; C., '51, § 848.]

Nature of proceeding; costs: An action under this and following sections is a civil and not a criminal action, and the county is not liable for costs in case the judgment is in favor

of defendant: *McAndrew v. Madison County*, 67–54.

Dismissal: And *held*, that the mother might dismiss the prosecution and release defendant, if she chose, or receipt in full for the judgment: *Holmes v. State*, 2 G. Gr., 501.

Whether she might settle and receipt in full, so as to preclude the county from the right to resort to this proceeding to compel the putative father to execute a bond, with surety, to indemnify the county, *quære;* but she may thus preclude herself and the county from the right to maintain the proceeding to secure to her the maintenance of the child: *Black Hawk County v. Cotter*, 32–125; *State v. Noble*, 70–174.

Jurisdiction: The action cannot be maintained outside of the jurisdiction within which it arose, but a judgment therein is entitled to full faith and credit in any other state. (So *held* in relation to such proceeding, under the statutes of Indiana): *State of Indiana v. Helmer*, 21–370.

Procedure under prior statutes discussed: *Mills County v. Hamaker*, 11–206.

Limitation: The action is not barred in two years after pregnancy. It is not a proceeding for a statutory penalty within the provisions of § 3734: *State v. Laughlin*, 73–351.

Object of the proceeding: The proceeding is a civil action of a summary nature, intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Therefore, where another person was chargeable for the maintenance of the bastard, by virtue of having married the mother while *enciente*, knowing the fact, and therefore standing to the child *in loco parentis*, *held*, that the proceeding could not be maintained: *State v. Shoemaker*, 62–343.

If the child is not born alive, an action, if already commenced, abates, and no judgment can be rendered for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61–307.

It is not improper, in a bastardy proceeding, to inform the jury that the object of the proceeding is to protect the county from the expense of keeping an illegitimate child: *State v. Pratt*, 40–631.

After recognition of an illegitimate child the father is liable for its support under the provisions of §§ 2119, 3671: *State v. Hastings*, 74–574.

Evidence: The provisions of §§ 5957, 5958, requiring corroboration of the testimony of an accomplice, or of that of the prosecutrix, in case of rape, seduction, etc., to warrant a conviction in a criminal prosecution, are not applicable in this proceeding. Neither need the case against defendant be made out beyond a reasonable doubt; a preponderance of evidence is sufficient: *State v. McGlothlen*, 56–544.

But this rule applies to the question of guilt or innocence upon the whole case, and does not dispense with the force and effect to be given to presumptions arising from facts disclosed in evidence; and where it appeared that the child was born three months after the marriage of prosecutrix, *held*, that the presumption would arise that the child was begotten by the person to whom prosecutrix was married, and that unless this presumption was rebutted by clear, satisfactory and conclusive evidence, there would not be a preponderance of evidence such as to warrant conviction of defendant: *State v. Romaine*, 58–46.

Where the prosecutrix, after cohabiting with defendant, returned to his house, *held*, that proof that defendant had knowledge of declarations by her that she did so for the purpose of becoming the mother of a child and holding him for its support was not pertinent in his behalf: *State v. Pratt*, 40–631.

The fact that the jury find that prosecutrix had connection with other men will not preclude them from finding defendant to be the father of the child: *Ibid.*

In such a proceeding it is always allowable to show unchaste conduct with a man other than the defendant, and especially if the circumstances are such as not to preclude the possibility that the other was the father of the child: *State v. Karver*, 65–53.

Where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant in denying the paternity of the child; and this circumstance may become very important if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten: *State v. Woodworth*, 65–141.

Evidence of the fact that complainant was accustomed, before and after the time the child was conceived, to occupy the same bed with a person who might have been the father of the child, is admissible as tending to affect the credibility of her testimony charging defendant with the child's paternity: *State v. Read*, 45–469.

A child over two years of age, whose paternity is in question in a bastardy proceeding, may be exhibited to the jury for the purpose of showing the resemblance between the child and the defendant. And *held* not error to allow counsel to call attention to alleged resemblances, the jury being instructed that if they did not clearly see the resemblance they should disregard all claims based thereon: *State v. Smith*, 54–104.

Evidence that prosecutrix was pregnant at the time of the alleged intercourse not only tends to corroborate defendant in testifying that he did not have connection with prosecutrix, but shows that he was not the father of the child, even if he did have connection with prosecutrix as alleged: *State v. Smith*, 61–538.

Also *held*, that evidence that the child was prematurely born did not corroborate the testimony of prosecutrix that defendant had connection with her at a time which was too near the birth of the child to allow full period of gestation: *Ibid.*

Evidence in a particular case *held* sufficient to support a verdict against the defendant: *State v. Quinton*, 59–362.

In a particular case, *held*, that under the evidence the instructions were not as favorable to the defendant as they should have been: *State v. Smith*, 61–538.

6114. Filing; notice. 4716. Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action. [R., § 1417; C., '51, § 849.]

6115. Lien created. 4717. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court. [R., § 1418; C., '51, § 850.]

6116. Attachment. 4718. If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

6117. District attorney prosecute. 4719. The district [county] attorney, on being notified of the facts justifying a complaint as contemplated in section four thousand seven hundred and fifteen of this chapter [§ 6113], or of the filing of such complaint, shall prosecute the matter in behalf of the complainant.

6118. Issue; how tried. 4720. The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action. [R., §§ 1419, 1422; C., '51, §§ 851, 854.]

6119. Judgment and execution. 4721. If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums and in such manner as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court. [R., §§ 1423–4; C., '51, §§ 855–6.]

The judgment may be enforced in another state: *State of Indiana v. Helmer*, 21–370.

If the child is not born alive, an action, if already commenced, abates, and no judgment can be rendered, for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61–307.

See, further, notes to § 6113.

6120. Change of order. 4722. The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.

The court has the power to vacate such an order, and it may do so if it thinks that it is better to hold defendant to the general obligation to support his child under § 2119: *State v. Hastings*, 74–514.

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF PRISONS, AND OF THE PENITENTIARY, ITS GOVERNMENT AND DISCIPLINE.

CHAPTER 1.

OF IMPRISONMENT FOR PUBLIC OFFENSES, AND THE DISCIPLINE OF PRISONS.

6121. Jails; for what used. 4723. The common jails now erected, or which may hereafter be erected in the several counties in this state, in charge of the respective sheriffs, are to be used as prisons:

1. For the detention of persons charged with an offense, and duly committed for trial or examination;

2. For the detention of persons who may be duly committed to secure their attendance as witnesses on the trial of any criminal cause;

3. For the confinement of persons pursuant to sentence upon conviction for any offense, and of all other persons duly committed for any cause authorized by law;

4. The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as the courts and magistrates of this state. [R., § 5122; C., '51, § 3103.]

6122. Keeper's duty. 4724. It is the duty of the keeper of the jail of the county to see that the same is constantly kept in a cleanly and healthy condition, and he must pay strict attention to the personal cleanliness of all the prisoners in his custody as far as may be. Each prisoner must be furnished daily with as much clean water as may be necessary for drink and for personal cleanliness, and with a clean towel and shirt once a week, and must be served three times each day with wholesome food, which must be well cooked, and in sufficient quantity. [R., § 5123; C., '51, § 3104.]

6123. Sheriff's duty. 4725. The sheriff of the county must keep a true and exact calendar of all prisoners committed to any prison under his care, which calendar must contain the names of all persons who are committed, their place of abode, the time of their commitment, the time of discharge, the cause of commitment, the authority that committed them, and description of their person; and when any prisoner is liberated, such calendar must state the time when, and the authority by which such liberation took place; and if any person escape, it must state particularly the time and manner of such escape. [R., § 5124; C., '51, § 3105.]

6124. Return calendar to district court. 4726. At the opening of each term of the district court within his county, the sheriff must return a copy of such calendar under his hand to the judge of such court; and if any sheriff neglect or refuse so to do, he shall be punished by fine not exceeding one hundred dollars. [R., § 5125; C., '51, § 3106.]

6125. What furnished prisoners. 4727. The keeper of each jail must furnish necessary bedding, clothing, fuel, and medical aid for all prisoners under his charge, and keep an accurate account of the same. [R., § 5127; C., '51, § 3108.]

6126. Separate apartments for females. 21 G. A., ch. 176, § 1. All jails and prisons now erected or which may be hereafter erected in the sev-

eral counties and cities in this state, shall be provided with a separate apartment for the detention of females in such jail or prison.

6127. Females detained in separate apartments. 21 G. A., ch. 176, § 2. All females detained in such jail or prison shall be so detained only in the female apartment thereof, and it shall be unlawful for any sheriff or keeper of any jail to detain at the same time both males and females in the same apartment.

6128. When jail takes fire. 4728. Whenever, by reason of any jail being on fire, or any building contiguous or near to a jail being on fire, there be reason to apprehend that the prisoners confined in such jail may be injured or endangered thereby, the sheriff or keeper of such jail may, at his discretion, remove such prisoners to some safe and convenient place, and there confine them so long as may be necessary to avoid such danger. [R., § 5128; C., '51, § 3109.]

INSPECTORS OF JAILS.

6129. Who constitute. 4729. In each county of this state the judge of the circuit [district] court and district [county] attorney are inspectors of the jails respectively, and have power, from time to time, to visit and inspect the same, and inquire into all matters connected with the government, discipline, and police of such prisons. [R., § 5129; C., '51, § 3110.]

6130. Their duty. 4730. It is the duty of such inspectors to visit and inspect such prisons twice each year, and at the next district court which is thereafter held in their county, to present to such court on the first day of its sitting, a detailed report of the condition of such prisons at the time of such inspection. [R., § 5130; C., '51, § 3111.]

6131. Report. 4731. Such report must state the number of persons confined in such prison, and for what cause respectively, the number of persons usually confined in one room, the distinction, if any, usually observed in the treatment of the prisoners, the evils, if any, found to exist in such prisons; and particularly whether any provisions of this chapter have been violated or neglected, and the cause of such violation or neglect. [R., § 5131; C., '51, § 3112.]

6132. Right to inspect. 4732. The keepers of such prisons shall admit the said inspectors, or any of them, into any part of such prisons, to exhibit to them on demand, all the books, papers, documents, and accounts pertaining to the prison or to the prisoners confined therein, and to render them every other facility in their power to enable them to discharge the duties above prescribed. [R., § 5132; C., '51, § 3113.]

6133. May swear officers. 4733. For the purpose of obtaining the necessary information to enable them to make such reports as is above required in this chapter, the said inspectors have power to examine on oath, to be administered by either of them, any of the officers of such prison, or any of the prisoners therein. [R., § 5133; C., '51, § 3114.]

6134. Refractory prisoners. 4734. If any person confined in any jail upon a conviction or charge of any offense, is refractory or disorderly, or if he wilfully destroy or injure any article of bedding, or other furniture, door, or window, or any other part of such prison, the sheriff of the county, after due inquiry, may chain and secure such person, or cause him to be kept in solitary confinement not more than ten days for any one offense; and during such solitary confinement he may be fed with bread and water only, unless other food is necessary for the preservation of his health. [R., § 5134; C., '51, § 3115.]

6135. Expenses of jail. 4735. All charges and expenses of safe keeping, and maintaining convicts and persons charged with public offenses and

committed for examination or trial to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the board of supervisors; except prisoners committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county. [R., § 5135; C., '51, § 3116.]

This section does not authorize the sheriff to receive any further fees for taking charge of prisoners, etc., than as provided by §§ 5056, 5057: *Grubb v. Louisa County*, 40–314. And the county is not liable for the service of a jailer employed by the sheriff: *McDonald v. Woodbury County*, 48–404.

While the sheriff is entitled to reasonable compensation as here provided, he cannot sue the county therefor until his account has been presented for settlement and allowance: *Marvin v. Fremont County*, 11–463.

A person furnishing clothing to prisoners on the sheriff's request may maintain an action against the county therefor, and while only necessary clothing can be procured at the expense of the county, the discretion of the sheriff, acting in good faith, cannot be controlled by the board of supervisors. The person furnishing clothing upon the sheriff's request is only bound to know that it is for prisoners, and suitable, and, perhaps, necessary: *Feldenheimer v. Woodbury County*, 56–379.

The county is liable for necessaries for a prisoner, although by reason of his condition it is impossible to confine him in jail: *Miller v. Dickinson County*, 68–102.

An order made by a justice issuing a warrant for arrest, that the sheriff keep the prisoner in some safe place and provide for his necessities until he is able to be brought before a magistrate for trial, is a nullity and has no effect upon the liability of the county: *Ibid.*

HARD LABOR.

6136. May be required. 4736. Any able-bodied male person over the age of sixteen years, and not over the age of fifty years, now or hereafter confined in any jail in this state, under the judgment of any court of record or of any other tribunal authorized to imprison for the violation of any law, ordinance, by-law, or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such court or other tribunal, when passing final judgment of imprisonment, whether for non-payment of fine or otherwise, shall have the power to determine, and shall determine, whether such imprisonment shall be at hard labor or not. [R., § 5126; C., '51, § 3107; 13 G. A., ch. 69, § 1.]

Where the judgment of a court of general jurisdiction is that the defendant shall be imprisoned at hard labor as provided by this section, it will be presumed that the facts as to age, etc., necessary to warrant such judgment were shown to the court: *State v. Winstrand*, 37–110, 113.

A judgment may direct that defendant be confined to hard labor at the rate of $1.50 per day (§ 6141), but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is to be determined by § 5894: *Keokuk v. Dressell*, 47–597; *State v. Jordan*, 39–387; *In re Jordan*, 39–394; *State v. Anwerda*, 40–151.

Where the jury found defendant guilty of murder in the first degree and directed that he should be punished by imprisonment in the penitentiary at hard labor for life, and in rendering judgment the court sentenced to imprisonment in the penitentiary for life, *held*, that the judgment must be presumed to mean imprisonment at hard labor, and sufficiently corresponded with the verdict: *State v. Cole*, 63–695.

6137. On highways, public grounds and buildings. 4737. Such labor may be on the streets or public highways on or about public building or grounds, or at such other places in the county where confined, and during such reasonable time of the day as the person having charge of the prisoners may direct, and not exceeding eight hours per day. [13 G. A., ch. 69, § 2.]

Section considered: *In re Jordan*, 39–394. And see notes to § 6136.

6138. Under whose direction. 4738; 21 G. A., ch. 153. In case the sentence be for the violation of any of the statutes of the state, the sheriff of the county where the imprisonment is, shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, to work with, at the expense of the county in which the convict is confined, and such county shall be entitled to his earnings. Such labor shall be performed under the direction of the board of supervisors and in accord-

ance with such regulations as said board shall make, not inconsistent with section four thousand seven hundred and thirty-seven of the code [§ 6137] and such labor shall not be leased. [Same, § 3.]

6139. For violation of city ordinance. 4739. When the imprisonment is pursuant to the judgment of any court, police court, police magistrate, mayor, or other tribunal of any incorporated city or town, for the violation of any ordinance, by-law, or other regulation, the marshal shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shall be entitled to the earnings of its convicts. [Same, § 4.]

6140. Officer to prevent escapes. 4740. The officer having charge of any convicts for the purpose specified in this chapter, may use such means as, and no more than, are necessary to prevent escape, and if any convict attempt to escape, either while going from or returning to the jail, or while at labor, or at any time, or if he refuse to labor, the officer having him in charge, after due inquiry may, to secure such person, or to cause him to labor, use the means authorized by section four thousand seven hundred and thirty-four of this chapter [§ 6134]; *provided*, such punishment shall be inflicted within the jail or jail inclosure for refusal to work and shall not be considered as any part of the time for which the prisoner is sentenced. [Same, § 5.]

6141. Prisoners credited for labor. 4741. For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him, the sum of one dollar and fifty cents, and no person shall be entitled to the benefits of the law providing for the liberation of poor convicts, if, in the opinion of the sheriff, the judgment may be satisfied by the labor of the person as herein authorized. [Same, § 6.]

Under this section a judgment may direct that defendant be confined to hard labor at the rate of $1.50 per day, but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is determined by § 5894: *Keokuk v. Dressell*, 47–597; *State v. Jordan*, 39–387; *In re Jordan*, 39–394; *State v. Anwerda*, 40–151.

Where it has been made to appear, by the sheriff's answer in a *habeas corpus* proceeding, that in his opinion the judgment could not be satisfied by the labor of the convict, under the provisions of this section, a subsequent pleading stating a contrary opinion on the part of the sheriff will not operate to prevent the convict's discharge: *In re Jordan*, 39–394.

See, further, §§ 5894, 6087, and notes.

As to provisions for release of poor convicts, see § 6009.

6142. Cruel treatment. 4742. If any officer or other person treat any prisoner in a cruel or inhuman manner, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment. [Same, § 7.]

6143. Protecting prisoners. 4743. The officer having such prisoner in charge shall protect him from insult and annoyance, and communication with others while at labor, and going to and returning from the same, and he may use such means as are necessary and proper therefor; and any person persisting in insulting, and annoying, or communicating with any prisoner, after being commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days. [Same, § 8.]

CHAPTER 2.

OF THE PENITENTIARY OF THE STATE, AND THE GOVERNMENT AND DISCIPLINE THEREOF.

6144. At Fort Madison. 4744. The penitentiary at Fort Madison, in the county of Lee, shall be maintained as the penitentiary of this state in which

convicts sentenced for life or any period of time shall be confined, employed, and governed, as hereinafter provided. [R., § 5136; C., '51, § 3117.]

WARDEN.

6145. Shall govern. 4745. It shall be governed by a warden, subject to the supervision of the governor of the state. [R., § 5173.]

6146. How chosen; term of office; duties. 4746; 20 G. A., ch. 17. The warden shall be elected by joint ballot of the general assembly of the state of Iowa, and shall hold his office for two years from the first day of April following his election, and until his successor is elected and qualified. He shall be the general financial and superintending agent of the state for said institution, and shall be held responsible for its government and disciplinary regulations, for the receipt and disbursement of all moneys that may be appropriated for building, construction, general support, the payment of indebtedness, or salaries of his under-officers, or for any other purpose whatever in connection with said institution. [R., § 5174.]

6147. Bond; oath. 4747. Before entering upon the discharge of his duty, he shall execute a bond payable to the state of Iowa in the penal sum of fifty thousand dollars, with not less than five freehold securities, to be approved by the governor, conditioned that he will faithfully discharge all of his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys that may come into his hands by virtue of his office, to the purpose for which they are appropriated, and none other; that he will cause to be kept a fair, intelligible, and business-like record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe keeping, and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden, or guard, through favoritism or other personal consideration; and no one without due and proper regard to their qualifications for said station; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and as much oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing, or any other thing for the use of said penitentiary, whereby any profit may inure to him privately, and that at the expiration of his official term he will surrender all books, papers, records, moneys, or other property or securities belonging to said institution to his successor in office. Said warden shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law, according to the best of his ability, which bond shall be filed with the secretary of state. [R., § 5175.]

6148. Restrictions; clerk. 4748. The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary, and of all the interests of the state therewith connected, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, and one deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge, provided that at no time shall there be less than thirteen guards. [R., § 5142; C., '51, § 3128.]

6149. Monthly report. 4749. The warden shall render to the governor of state, between the first and tenth day of every month, and as nearly as practicable every thirty days, and as much oftener as the governor may require, a statement under oath, of all the transactions of the institution, including the receipts and disbursements of funds, for which disbursements he shall, in all cases, present the proper voucher, the entering into or discharging contracts, the reception and discharge of convicts, the construction, altering, or repairing the buildings, walls, etc., and of all his official acts and doings for thirty days next preceding the presentation of said monthly report, which statement must contain an exact account of all moneys received, together with a copy of all proposals received by him and from what source, and on what account, and of all moneys paid out, and for what purpose the same were expended, and a succinct account of all his doings as warden during the said period, and a reference to his authority for such action. [R., § 5177.]

6150. Biennial report. 4750; 22 G. A., ch. 82, § 35. The warden shall, in addition to the monthly report provided for in the preceding section, on or before the fifteenth day of September next preceding the commencement of any regular session of the general assembly, report to the governor, under oath, all his acts and doings for the preceding two years, and the general condition of the institution financially and otherwise, together with the estimates necessary for the next succeeding two years, specifying distinctly the items for which those estimates and the basis upon which his calculations are made, and the governor may require a like or any other report before any special session of the general assembly. [R., § 5178.]

6151. Enforce discipline; discharge officers. 4751. The warden shall see that the laws and disciplinary rules and regulations of the institution are faithfully executed by his under-officers, and obeyed by the convicts; and it shall be his duty, upon failure or refusal of any clerk, deputy warden, or guard, to discharge their respective duties agreeably to law, forthwith to discharge such delinquent, and fill the vacancy by the appointment of another person; and disobedience of the convicts shall be punished by the infliction of such penalties as are now provided for by law, and the rules which are now or may hereafter be prescribed for the government of said institution; *provided*, that it shall be the duty of the warden to keep a register of all punishments inflicted on any convict for disobedience, disorderly conduct, indolence, and of the cause for which they were inflicted. [R., § 5179.]

CLERK.

6152. Bond; oath. 4752. The clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to said warden. Before he enters upon the discharge of his duties he shall give bond to the state of Iowa in the penal sum of five thousand dollars, with two or more freehold securities, to be approved by the governor, conditioned that he will keep a fair, honest, impartial, and faithful record of the affairs of the penitentiary, written in a fair round hand, with proper indices, upon a system of book-keeping which shall enable him at all times to present in a plain and intelligible style the financial condition of the institution; that he will discharge all his duties of clerk and commissary faithfully, and with direct reference to the best interests of the penitentiary, agreeably to law, and that he will not become interested directly or indirectly in any contract for furnishing supplies of any nature, kind, or description for the use of said institution, and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall, also, take and subscribe an oath, which shall be indorsed on the back of said bond, that he will support the constitution of the

United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions, stipulations, and requirements of his bond, and will faithfully discharge his duty as clerk and commissary during his continuance in office agreeably to law, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and suit thereon may be brought for the violation of any of its conditions in the name of the state, for the use of the warden or any other person injured by such violation. [R., § 5180.]

6153. Accounts kept. 4753. Among other entries to be made in the books of the institution, the clerk shall open a separate account in said books with the state, and he also shall have a cash, prisoner's fund, construction, repairing, provision, bedding and lights, fuel, salaries, hospital, and miscellaneous accounts, and an account with the lessees of convict labor, and an account with each officer and guard; and all the entries belonging to any one of the classes, whether they are debits or credits, shall be made under the appropriate head; and, in order to enable the warden to render his statements herein provided for to the governor, the clerk shall, whenever required by the warden, make out a complete balance-sheet and swear to the same. [R., § 5181.]

DEPUTY WARDEN.

6154. Appointment; bond; oath; duties. 4754; 18 G. A., ch. 154, § 3. The deputy warden shall receive his appointment from the warden, and shall hold his office during the pleasure of the warden; and he shall give bond and security for a like amount, and in the same manner; and take a like oath, and be in all respects subject to like responsibilities with the clerk, so far as the same are applicable. He shall keep a regular time-table of the convict labor and record the same in a book to be kept for that purpose, and he shall, moreover, keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor to the clerk at the close of each day. [R., §§ 5182, 5169.]

GUARDS.

6155. Appointment; bond; oath. 4755. Each of the guards, when appointed, shall give bond to the warden, with security to be approved of by said warden, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duty as such guard, agreeable to law and the rules and regulations of the prison, and the lawful orders of the warden; and shall also take and subscribe an oath, which shall be indorsed on the back of the bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions and stipulations of his bond; which bond shall be filed in the office of the clerk of the penitentiary, and a note thereof made on the record as to the date, amount, and name of the principal and his securities. [R., § 5183.]

6156. Term of office. 4756. Guards thus appointed and qualified shall hold their offices during the pleasure of the warden. [R., § 5184.]

CHAPLAIN.

6157. Appointment; duties. 4757. The warden shall appoint some suitable, discreet, minister of the gospel chaplain of the penitentiary, who shall hold his office at the pleasure of the warden, and who shall give as much of his time as the condition and employment of the convicts will reasonably justify, in giving them moral and religious instruction, and who shall, at all times, when, in the opinion of the warden, the necessary labor of the convicts

or the safety of the prison do not forbid it, have access to the convicts for that purpose; and should any of the convicts be illiterate, the chaplain should so instruct them as that he may sustain the character among them of teacher as well as spiritual adviser and minister. [R., § 5185.]

PHYSICIAN — STEWARD.

6158. Duties. 4758. The physician of the penitentiary shall visit the prison once every day, and oftener if necessary; examine personally all sick or complaining prisoners reported to him, and prescribe such treatment as in his judgment their cases require. [9 G. A., ch. 48, § 1.]

6159. Keep record. 4759. He shall keep a book, to be called the hospital record, in which he shall accurately record the name of the patient, the age, occupation, symptoms, disease and treatment. [Same, § 2.]

6160. Examine prisoner on reception. 4760. He shall examine every prisoner upon his reception, and make a record of his condition, as to age, constitution, habits, health, ability or disability. [Same, § 3.]

6161. Post-mortem examination. 4761. When a prisoner dies, the physician may have the privilege of a post-mortem examination, unless objection be made by the relatives of such patient, and shall record the result of it, making reference in the record of treatment. [Same, § 4.]

6162. Purchase medicines, etc. 4762. He shall have power and authority to purchase by concurrence with and assent of the warden, such medicines and other things as, in his judgment, are necessary for the use of the hospital, and furnish the clerk immediately with the bills of purchase, who shall compare them with the articles received. [Same, § 5.]

6163. Must conform to rules. 4763. He shall, when visiting the prison, strictly conform to the rules and regulations thereof; he shall express no opinion of the ability or disability of a prisoner except in his record, which shall be authority. [Same, § 6.]

6164. Graduate of medical school. 4764. He shall be a graduate of some regularly established medical college, and must be possessed of surgical instruments sufficient to perform any surgical operation liable to be required. [Same, § 7.]

6165. Appointment. 4765. He shall receive his appointment from the warden, with the concurrence of the governor of the state. [Same, § 8.]

6166. Steward; duties. 4766. There shall be a steward nominated by him, who shall receive his appointment from the warden, and whose duty it shall be to dispense the medicine prescribed by the physician, and to do all other things necessary to carry out the treatment as directed. He shall act as guard or keeper of the prisoners in the hospital, and shall receive the same wages as other day guards or keepers, and be subject to the same rules and regulations. [Same, § 9.]

PENALTIES.

6167. Officers receiving perquisites. 4767. No officer or other person employed in or about the penitentiary shall be permitted to receive in any way, perquisites for themselves or families, except that the warden shall keep his office, and reside with his family in the penitentiary, and shall be furnished with a garden of a quarter of an acre, and with fuel, lights, provisions for his family and guests, and stationery, from the stock provided for the use of the prison. Nor shall they be permitted to receive any compensation or reward from any contractor, under penalty of dismissal from their office, and forfeiture of one month's pay; and if any officer procure the escape of any

convict, or connive at, aid or assist in the escape of any convict from the penitentiary, whether such convict escape or not, he shall be guilty of felony, and shall, upon conviction thereof, be sentenced to hard labor in the penitentiary for any term not less than one nor more than three years. [R., § 5168.]

6168. Officers not interested in contracts. 4768. No officer of the Iowa penitentiary shall be interested directly or indirectly in contracts for furnishing such penitentiary with provisions, clothing, or other necessaries, to be used in any manner by the inmates of such penitentiary, or for the use of such penitentiary, nor shall any or either of such officers be concerned or interested in any manner in contracts for buildings of any kind connected with such penitentiary, or for materials to be used in any such buildings, or in any contract for the labor of any convict. [R., § 5170.]

6169. Punishment for. 4769. Should any officer, in the contemplation of the preceding section, be, or become, in any manner interested in contracts for furnishing provisions, clothing, or other necessaries for the use of such penitentiary, or be, or become, in any manner interested in contracts for buildings, or the construction of buildings of any kind, in any way connected with such penitentiary, or for furnishing material of any kind for the construction of such buildings, or in any contract for the labor of convicts, such officer so interested shall, on proof being made of his being so interested, be removed from office, and shall forfeit any interest he may have in any such contract, and on conviction of being so interested by a court of competent jurisdiction, shall be fined in any sum not more than two thousand dollars nor less than five hundred dollars. [R., § 5171.]

HARD LABOR — PROCESS.

6170. Hard labor. 4770. All punishment in the penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline for the government and good order of the convicts. [R., § 5137; C., '51, § 3118.]

6171. Prisoners of United States. 4771. Convicts sentenced to hard labor in the penitentiary for life, or any term of time by any court of the United States held within this state, must be received into the prison by the warden thereof, when delivered by the authority of the United States, and there kept in pursuance of their sentences. [R., § 5138; C., '51, § 3119.]

6172. Process executed. 4772. The warden or his deputy shall serve, execute, and return all process within the precincts of the prison, and such process may be directed to him or his deputy accordingly; and for the doings of his deputy, the warden, as well as the deputy, is answerable. [R., § 5144; C., '51, § 3130.]

SUPPLIES FURNISHED ON CONTRACT.

6173. Estimates; sealed proposals. 4773; 17 G. A., ch. 186, § 1. All articles of food, clothing, bedding, raw materials for manufacture, fuel, and other articles that may be necessary for the use of the prison, must be contracted for by the year, when such contracts can be advantageously made, in the following manner: The warden shall annually make an estimate of the quantity of each article necessary for the then next ensuing year, commencing on the first day of October of each year, and ending on the last day of September thereafter, and advertise that he will receive sealed proposals for furnishing and delivering at the prison such articles, or any of them, until the first day of October, payments to be made quarterly, stating the quantity and quality of each article required, the time when each article must be delivered, and the terms of payment; which advertisement he shall cause to be inserted

in one or more of the papers published in Fort Madison, and in one or more of the papers published at the seat of government of this state, three weeks successively, the last publication to be at least one month before the first day of October in each year; *provided*, that the estimates of the warden shall first be submitted to, and approved by the governor and council before advertisement thereof; and *provided further*, that all bills shall be submitted to the executive council, and that the awards of contracts for supplies shall be approved by such council. [R., § 5145; C., '51, § 3131.]

6174. Bills of supplies. 4774. The warden must take bills of the quantity and price of the supplies furnished for the prison at the time of delivery, and must exhibit the same to the clerk, who must compare the same with the articles delivered; if the bills are found correct he must enter them with the date in a book to be kept for that purpose; in like manner, bills shall be taken and entered of all services rendered for the prison; if any such bill be found incorrect the clerk shall omit to enter it, and immediately give notice to the warden that the error may be corrected. [R., § 5148; C., '51, § 3134.]

6175. Contractor to give security. 4775. No contract can be accepted by the warden unless the contractor give satisfactory security for the performance of it. [R., § 5149; C., '51, § 3135.]

ESCAPE — DISCHARGE.

6176. When prisoner escapes. 4776. When any convict escapes from the penitentiary, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict. [R., § 5160; C., '51, § 3147.]

6177. No discharge until end of term. 4777. No convict can be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority. [R., § 5161; C., '51, § 3148.]

6178. Property of convict. 4778. The warden shall receive and take care of any property that a convict may have with him at the time of his entering the penitentiary, and, when it may be convenient, to place the same at interest for the benefit of such convict; of which property the warden must keep an account, and pay the same to such convict on his discharge, or, in case of his death, to his representatives, unless the same have been otherwise taken and legally disposed of. [R., § 5162; C., '51, § 3149.]

6179. On discharge. 4779; 15 G. A., ch. 48. When any convict is discharged from the penitentiary, the warden shall furnish transportation to said convict to any point within this state that is nearest to his former home or friends; or may furnish such transportation to any point of a like distance without the state. Said transportation shall be furnished by means of tickets for passage, an account of which shall be kept by the warden and paid by the state. The warden shall also furnish to said convict a suit of common clothing and a sum of money not less than three nor more than five dollars. [R., § 5163; C., '51, § 3150; 14 G. A., ch. 51.]

6180. Visitors. 4780. The warden shall demand and receive of each person, not exempt by law, except relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, a sum of twenty-five cents, of which the warden must keep an account, and which money shall be applied for the purchase of books for the use of the prison, under the direction of the inspectors. [R., § 5164; C., '51, § 3151.]

6181. Who has a right to visit. 4781. The following persons are authorized to visit the penitentiary at pleasure: The governor, secretary, auditor, and treasurer of state, members of the general assembly, judges of the supreme, district [and circuit] courts, district [county] attorneys of any of the districts [counties] of this state, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the walls of the prison where convicts are confined except by special permission of the warden. [R., § 5165; C., '51, § 3152.]

6182. Receipts for expenditures. 4782. The warden shall see that rigid economy is practiced in all matters pertaining to the prison and the employment of the convicts, and that duplicate receipts be taken for all expenditures made on account of the prison, one copy of which must be forwarded to the auditor of state monthly. [R., § 5166; C., '51, § 3153.]

APPROPRIATION — SUPPORT OF CONVICTS.

6183. Salaries of officers. 4783; 16 G. A., ch. 156; 17 G. A., ch. 167; 18 G. A., ch. 200. There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, so much as may be necessary to pay monthly to the persons herein named the following sums, to wit: To the warden, one hundred and sixty-six dollars and sixty-seven cents; to the deputy warden, one hundred dollars; to the clerk, seventy dollars; to the surgeon, fifty dollars; to the chaplain, who shall perform the duties of teacher, seventy dollars; to the hospital steward, fifty dollars; to the turnkey, wall guards, shop guards, and night guards, fifty dollars. *Provided*, that the warden shall be furnished, in addition to the above, with house rent, fuel and lights for himself and family at the expense of the state, but no further perquisites or allowances of any character shall be permitted; and, *provided*, that on the last of each month the warden shall make and file with the auditor of state an affidavit that during said month he has not directly or indirectly converted to his own use any provisions, supplies, waste, or materials belonging to the state, nor permitted the same to be done by any officer or person, except as herein provided, which said affidavit must be filed before any warrant shall issue to the warden for his own compensation, as provided in this section; and, *provided, further*, that the salaries and compensation allowed in this section shall also apply to the additional penitentiary at Anamosa, and that the warden be authorized to appoint a deputy. [R., § 5192; 9 G. A., ch. 37; ch. 48, § 9; 12 G. A., ch. 69, § 1.]

6184. How paid. 4784. The above sum shall be paid to the warden on his requisition, monthly, accompanied with a detailed statement, in such form as the auditor shall prescribe, of the number and kinds of guards employed; and each statement shall also exhibit the payments made by the money drawn on the previous requisition. [12 G. A., ch. 69, § 2.]

6185. Support of convicts. 4785; 17 G. A., ch. 83; 19 G. A., ch. 91. For the general support of the convicts, there is hereby appropriated the monthly sum of nine dollars, or so much thereof as may be necessary to each convict in said prison, to be estimated by the average number for the preceding month, subject, however, to a deduction from the whole amount for the month of the sum charged to the contractors for convict labor for that month. [Same, § 3.]

6186. How paid. 4786. The sum appropriated by the last section shall be paid on the requisition of the warden, accompanied with a statement of the number of convicts in his charge, and the amount charged to the contractors for that month. [Same, § 4.]

6187. Failure of contractors to pay. 4787. If, for any reason, the amount charged to the contractors for any month cannot be collected in time

to be available for such support, the governor may, by his order, direct the payment of the whole or any part of the eight and one-third dollars per month. [Same, § 5.]

MISCELLANEOUS PROVISIONS.

6188. Collection of debts due. 4788. The state auditor is required to take immediate steps to cause to be collected and accounted for all those debts owing to the state on account of the penitentiary, or in any manner connected therewith, and all outstanding claims of whatever nature which the state may have on that account, and to that end he may, if he finds it necessary, place any claim in the hands of the attorney-general for prosecution. [Same, § 6.]

[The word "whatever," in the fourth line, is erroneously printed "any" in the Code.]

6189. Suit for debts. 4789. In all cases where claims have accrued, or may hereafter accrue, in favor of the warden of the penitentiary of this state, which the warden shall deem it advisable to collect by law, the district [county] attorney of the first judicial district shall bring suit upon and collect the same; and in case the governor of the state shall so direct, the attorney-general of the state shall also give his personal attention to said suits. [9 G. A., ch. 156, § 2.]

6190. Judgments enforced. 4790. Judgments now or hereafter rendered in favor of the warden of the penitentiary, shall be collected upon execution, and the attorney-general, or district [county] attorney, shall have the same power to bid upon and purchase property upon such executions as is given where judgments are in favor of the state, and the property shall be held and disposed of for the use of the penitentiary by the governor, in the same manner. [Same, § 3.]

6191. Actions by or against warden. 4791. All actions founded on contract made with the warden in his official capacity, may be brought by or against the warden for the time being; and any action for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the prison, or being under the management of the warden thereof, may be prosecuted in the name of the warden for the time being, and no such action shall abate by the warden's ceasing to be in office, but his successor, upon notice, is required to assume the prosecution or defense of the same. In any such action the warden is a competent witness, and his property shall not be taken or attached in any such suit, nor shall any execution issue against him on any judgment thereon, but such judgment shall stand as an ascertained claim against the state; and whenever a new warden is appointed, all the books, accounts, and papers belonging to the prison shall be delivered to him, and he shall be vested with all the powers and subject to all the obligations with regard to any contract or any debts due to or from the prison that his predecessor would have been if no change had taken place in the office. [R., § 5150; C., '51, § 3136.]

6192. When office of warden vacant. 4792. Whenever the office of warden is vacant, or he is absent from the prison, or unable to perform the duties of his office, the deputy warden has the power to perform the duties and shall be subject to all the obligations and liabilities of the warden. [R., § 5151; C., '51, § 3137.]

6193. Overseers. 4793. Persons having suitable knowledge and skill in the branches of labor and manufacture carried on in the prison, may, when practicable, be employed as overseers; and they must respectively superintend such portions of the labor of convicts for which they are most suitably qualified, and which shall be assigned to them by the warden; and all of them as well as the other subordinate officers of the prison, must perform such serv-

ices in the management, superintending, and guarding of the prison, as may be prescribed by the rules and regulations, or directed by the warden. [R., § 5153; C., '51, § 3140.]

6194. Delinquency of officers. 4794. If any subordinate officer of the prison is guilty of negligence or unfaithfulness in the discharge of his duties, or of a violation of any of the laws or rules and regulations for the government of the prison, the warden may deduct from the pay of such officer a sum not exceeding his pay for one month. [R., § 5154; C., '51, § 3141.]

6195. Pestilence among convicts. 4795. In case of any pestilence or contagious sickness breaking out among the convicts in the prison, the warden may cause the convicts confined therein, or any of them to be removed to some suitable place of security where such of them as are sick shall receive all necessary care and medical assistance. Such convicts must be returned as soon as may be to the penitentiary, to be confined according to their respective sentences if the same be unexpired. [R., § 5156; C., '51, § 3143.]

6196. Negligence of officers. 4796. If any officer or other person employed in the prison or its precincts, negligently suffer any convict confined therein to be at large without the precincts of the prison, or out of the cell or apartment assigned to him, or to be conversed with, relieved or comforted contrary to law or the rules and regulations of the prison, he shall be punished by a fine not exceeding five hundred dollars. [R., § 5157; C., '51, § 3144.]

6197. Resistance to authority. 4797. If a convict sentenced to the penitentiary resist the authority of any officer, or refuse to obey his lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual; and if in so doing any convict thus resisting be wounded or killed by such officer or his assistants, they are justified and shall be held guiltless. [R., § 5158; C., '51, § 3145.]

6198. Insurrection. 4798. It is the duty of all the officers and other citizens of the state, by every means in their power, to suppress any insurrection among the convicts sentenced to the penitentiary, and to prevent the escape or rescue of any such convict therefrom, or from any other legal confinement or from any person in whose legal custody they may be; and if in so doing or in arresting any convict who may have escaped, such officer or other person wound or kill such convict, or other person aiding or assisting such convict, they shall be justified and held guiltless. [R., § 5159; C., '51, § 3146.]

6199. Governor to visit. 4799. The governor shall visit said penitentiary personally, as often, at least, as once in three months, to inspect the books, papers and records of the clerk, and deputy warden, and strictly to inquire into the official conduct of the warden, to examine into the general, economical, sanitary, and disciplinary regulations of the prison; and to alter and amend the same in any manner which may be best calculated to promote economy in expenditure, and the health, safe keeping, and obedience of convicts, and all such alterations and amendments shall be reduced to writing, and signed by the governor, and filed by him with the clerk, who shall forthwith record the same. And in case it is impracticable at any time for the governor to make such visit and inspection personally, he may appoint some suitable person to perform that service and report to him; but such person so appointed shall not have the power to make any alteration in the government of the institution, but may report to the governor only; and it is hereby made the duty of the governor to perform the service personally, if practicable. [R., § 5186.]

[The word "obedience," in the seventh line, is erroneously printed "convenience" in the Code.]

6200. Appointment of visitor. 4800. In making the appointment of visitor, as provided for in the preceding section, the governor shall take care that no one is appointed who may be supposed to be under the influence surrounding said penitentiary, or any of its officers, nor shall any one be appointed who has hitherto been officially connected therewith, nor shall the same person be appointed twice in succession. [R., § 5187.]

6201. Removal of warden. 4801. Should the governor at any time become satisfied that the warden is guilty of official negligence or malfeasance, in any particular, so that the safety or health of the convicts is endangered, or any funds, appropriated for said institution, illegally invested or misapplied, or that said warden is in any manner conducting the affairs of the prison contrary to law and good faith, he shall forthwith remove said warden, notifying him of the specific causes for his removal, and also reporting to the next session of the general assembly, specifying his reasons therefor. He shall also appoint a warden to fill the vacancy thus occasioned, who shall qualify in the same manner as the regularly elected warden, but shall hold his office only until the next succeeding general assembly. [R., § 5188.]

6202. Filling vacancy. 4802. The governor shall also fill all vacancies that may occur in the office of warden by death, resignation, or otherwise, between the sessions of the general assembly, but no appointment thus made shall last over a session of the general assembly. [R., § 5189.]

6203. Governor's traveling expenses. 4803. For the services herein required of the governor, he shall be allowed out of the state treasury his traveling expenses, and he shall present a bill therefor, under oath, to the auditor of state, which bill, thus sworn to, shall be a sufficient voucher for the auditor to issue his warrant on the treasury of the state for the amount so claimed. [R., § 5194.]

6204. Compensation of visitor. 4804. Should the governor be compelled to appoint any person, or persons, to visit the penitentiary, as herein provided, such person shall render to the governor an account of his traveling expenses and time employed under said appointment, which account shall be sworn to, and the governor shall determine the amount to which said person is entitled, not exceeding three dollars per day and expenses, and shall give him a certificate thereof, which certificate shall authorize the auditor to issue his warrant on the treasurer of state for said amount in favor of the person entitled thereto. [R., § 5195.]

6205. Penalty for failure of duty. 4805. Should any person required to perform any duty relative to the penitentiary, wilfully fail or refuse obedience thereto, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not exceeding one thousand dollars, and shall forfeit his office, and should said wilful failure or refusal result in the escape of any of the convicts, or in loss of any of the funds appropriated to the use and benefit of the penitentiary, provided said sum so lost shall exceed the amount of twenty dollars, he shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term not less than two or more than ten years. [R., § 5196.]

6206. Penitentiary at Anamosa. 4806. Nothing in this chapter shall be construed to repeal or in any way affect chapters forty-three, or one hundred and eight of the fourteenth general assembly [§§ 6211, 6212, 6215], providing for an additional penitentiary at or near Anamosa, in the county of Jones.

LEASING CONVICT LABOR.

6207. Contract for. 18 G. A., ch. 149, § 1. The warden, with consent of the executive council, is hereby authorized and required to make contracts

for the labor of convicts at the penitentiary of the state at Fort Madison, for such time not exceeding ten years, and at such prices as to said council may seem to be for the best interests of the state.

6208. Contracts modified. 18 G. A., ch. 149, § 2. The warden, with the approval of the executive council, is further authorized to modify or cancel any existing contracts in relation to the labor of convicts, with the consent of contracting parties.

DIMINUTION OF SENTENCE FOR GOOD BEHAVIOR.

6209. Record of conduct; restoration of citizenship. 18 G. A., ch. 154, § 1. The deputy warden of the penitentiary of the state at Fort Madison, and the warden of the additional penitentiary at Anamosa, shall each keep a book in which shall be entered a record of every infraction by a prisoner of the published rules of discipline, with the name of the prisoner guilty. Every prisoner sentenced to either of said penitentiaries for a term of years, or less, who shall have, at the end of the first month no infraction of discipline recorded against him, shall be entitled to a diminution of one day from the time he was sentenced to such penitentiary, and if, at the end of the second month, no infraction of the rules be recorded against him, he shall be entitled to two additional days of diminution from his sentence; and if he shall continue to have no such record against him for the third month, his time shall be shortened three additional days; and if he shall so continue to have no such record against him for the fourth month, his time shall be shortened four additional days; and if he shall so continue for subsequent months, he shall be entitled to five days' diminution of time from his sentence for each month he shall so continue his good behavior; and if any prisoner shall so pass the whole term of his service, he shall be entitled to a certificate thereof from the warden, and upon presentation thereof to the governor, he shall be entitled to a restoration of the rights of citizenship that may have been forfeited by his conviction and sentence; and it shall be the duty of the warden to discharge such convict from such penitentiary when he shall have served the time of his service, less the number of days he may be entitled to have deducted therefrom, in the same manner as if no such deduction had been made.

6210. Act not retrospective. 18 G. A., ch. 154, § 2. This act shall not be construed so as to increase the good time earned by prisoners in the penitentiary of the state at Fort Madison, prior to the act going into effect; *provided, however*, that prisoners transferred to said penitentiary from the additional penitentiary at Anamosa, shall be entitled to the same allowance for good time that they would have been allowed at said additional penitentiary.

ACTS APPLICABLE ONLY TO THE PENITENTIARY AT ANAMOSA.

6211. Established. 14 G. A., ch. 43, § 1. There shall be and is hereby permanently established, at or near the stone quarries, near Anamosa, Iowa, an additional penitentiary, in which convicts sentenced for life or any term of time, shall be confined, employed, and governed, as hereinafter provided.

6212. Who to be confined in. 14 G. A., ch. 43, § 14. Able-bodied male persons hereafter convicted of crime and sentenced to imprisonment in the penitentiary, may be taken to said quarries and additional penitentiary, and there confined and worked under the care of said warden, as soon as suitable accommodation has been provided therefor.

6213. Name changed. 20 G. A., ch. 187, § 1. The name of the additional penitentiary at Anamosa is hereby changed to penitentiary at Anamosa.

6214. Matron; salary; duties. 20 G. A., ch. 187, § 2. The warden is hereby authorized to appoint and remove at his discretion a matron for the

women's department at a salary of seventy-five dollars per month. Said matron shall have exclusive charge of the women's department under the general direction of the warden. She shall keep a regular time-table of the female convict labor and record the same in a book to be kept for that purpose, and shall moreover keep a record of all the business under her control, and return an account thereof, together with an account of the female convict labor, to the clerk at the close of each day.

6215. Support of convicts. 14 G. A., ch. 108, § 2. For the general support of the convicts and the payment of the guards and employees in said penitentiary, or at said quarries, there is hereby appropriated the monthly sum of eight and one-third dollars, or so much thereof as may be necessary for each convict, to be estimated by the average number for the preceding month, to be paid to the warden on his requisition, monthly, accompanied with a detailed statement in such form as the auditor of state shall prescribe, exhibiting the payments made by the money drawn on the previous requisition. But no such estimate and statement shall be necessary for the first month after convicts are transferred to or confined and worked in said penitentiary quarries.

[Although the section of which the foregoing is amendatory has since been repealed, these provisions, as modified by § 6221 below, would seem to be still in force.]

6216. Salaries of officers. 16 G. A., ch. 40, § 3. The provisions of the statute relative to the appointment and salary of clerk, physician, and hospital steward for the Fort Madison penitentiary, shall also apply to the additional penitentiary at Anamosa; *provided*, that until the number of prisoners shall reach two hundred the salary of the physician shall not exceed thirty dollars per month, and the warden shall employ some suitable person who shall act as religious adviser and teacher, at a salary not to exceed forty dollars per month.

An act increasing the salary of the clerk of the penitentiary at Fort Madison, *held* not to operate to increase the compensation of the clerk of the penitentiary at Anamosa: *Kinsey v. Sherman*, 46–463.

6217. Duties of warden. 16 G. A., ch. 40, § 5. The provisions of the statute in regard to the warden of the penitentiary at Fort Madison shall apply to the warden of the additional penitentiary so far as they do not conflict with the provisions of this act; and he shall safely guard and cause the prisoners to perform labor, and work in the preparation of material for and in the erection of said work as directed by the executive council, as to the mode and manner of work; *provided*, that he shall not appoint a deputy warden.

6218. Time-table of convict labor. 16 G. A., ch. 40, § 7; 17 G. A., ch. 187; 18 G. A., ch. 154, § 3. The warden shall keep a regular time-table of the convict labor and record the same in a book to be kept for that purpose; and he shall moreover keep a record of all the business under his control and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day.

6219. What prisoners kept in. 16 G. A., ch. 40, § 8. The additional penitentiary at Anamosa, Jones county, shall be maintained as a penitentiary of the state of Iowa, in which such convicts sentenced for life, or any period of time, as the executive council may designate, shall be confined, employed and governed according to the provisions of law relating to the government and discipline of the penitentiary at Fort Madison, county of Lee, so far as the same do not come in conflict with the provisions of this act; *providing*, that nothing in this act shall be so construed as to authorize the leasing of the convict labor.

6220. 16 G. A., ch. 40, § 9. All resolutions, acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed.

6221. Support of convicts. 16 G. A., ch. 137, § 5; 17 G. A., ch. 81; 19 G. A., ch. 165. There is also appropriated an amount sufficient to increase the general support now allowed by law, to ten dollars per month, or so much thereof as may be necessary for each convict in said penitentiary, such increase to be estimated and drawn in the manner now provided by law.

6222. Guards. 17 G. A., ch. 149, § 1. The warden of the additional penitentiary at Anamosa, may employ guards for the care of convicts, not exceeding one guard for every eight prisoners.

6223. 17 G. A., ch. 149, § 2. All acts and parts of acts in conflict with this act are hereby repealed.

6224. Bids for furnishing materials. 17 G. A., ch. 186, § 2. The provisions of section four thousand seven hundred and seventy-three of the code [§ 6173], and the amendments herein contained, are hereby made to govern all contracts for supplies for the additional penitentiary at Anamosa.

DEPARTMENT OF CRIMINAL INSANE; MANAGEMENT.

6225. Government. 22 G. A., ch. 69, § 1. The department for the criminal insane in the penitentiary at Anamosa shall be governed by the warden as a part of the penitentiary.

6226. Transfer of convicts. 22 G. A., ch. 69, § 2. Whenever the building now being constructed for this department is ready for occupancy the warden shall notify the governor, who shall order all convicts now being held in the asylums at Mount Pleasant and Independence, to be transferred from such asylums to the department for criminal insane at the penitentiary at Anamosa, the state to pay the expense of such transfer.

6227. Certificate of physician. 22 G. A., ch. 69, § 3. Whenever any convict at the penitentiary at Fort Madison shall have become insane, the governor, upon receipt of a certificate from the physician of said penitentiary at Fort Madison, that such convict is insane, shall order him transferred to the penitentiary at Anamosa to be kept in the department for criminal insane for treatment.

6228. Unexpired term. 22 G. A., ch. 69, § 4. Whenever a convict who has been transferred from the penitentiary at Fort Madison is confined in the department for the criminal insane, and who shall be pronounced cured before his time has expired, he shall be held in the penitentiary at Anamosa, to serve out his unexpired sentence.

6229. Who transferred. 22 G. A., ch. 69, § 5. Whenever a convict in the penitentiary at Anamosa is pronounced insane by the physician of said penitentiary the warden shall place him in the department for criminal insane for treatment.

6230. Examination at end of term. 22 G. A., ch. 69, § 6. No insane convict shall be discharged from the hospital apartment, provided for the criminal insane, until such convict shall be restored to reason, except as hereinafter provided. At the expiration of the term of sentence of such convict, an examination shall be made by competent physicians, and if it shall be found that such convict has not been restored to reason, such fact shall be certified to the governor; thereupon the governor shall investigate the matter and if in his discretion, such insane convict should be transferred to one of the hospitals for the insane, he may order said convict to be transferred or he may order that said convict shall be retained in the hospital apartment of the prison for the criminal insane.

6231. Physician. 22 G. A., ch. 69, § 7. The physician for the penitentiary at Anamosa shall also be the physician for the department for criminal

insane, and his salary is fixed at one hundred dollars per month, for his entire services as physician for the penitentiary and the criminal insane.

6232. Rooms used. 22 G. A., ch. 69, § 8. Whenever the department for criminal insane is ready for occupancy, the warden may use one ward for female convicts until such time as the department for female convicts is completed; also a portion of the building may be used for hospital purposes for the main prison, until such time as the hospital is built; *provided, however*, that the use of said rooms shall not interfere with the comfort of the criminal insane.

6233. Guards. 22 G. A., ch. 69, § 9. The warden shall be governed by the same law in appointing guards for the department for insane, as he is in appointing them for the penitentiary.

6234. Assistant deputy. 22 G. A., ch. 69, § 10. Whenever the department for criminal insane is completed the warden may appoint an assistant deputy who shall give a bond to the state in the sum of three thousand dollars to be approved by the governor; said assistant deputy to have charge of the department for criminal insane, under the direction of the warden and deputy, and to assist the deputy in other work if desired, and who shall receive for his services eighty-three and one-third dollars per month.

APPENDIX.

APPENDIX.

CONGRESSIONAL APPORTIONMENT.

TWENTY-FIRST GENERAL ASSEMBLY, CHAPTER 154 (1886).

AN ACT to reorganize the congressional districts of the state.

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

SECTION 1. That the congressional districts be organized and constituted as follows:

First district shall consist of the counties of Washington, Louisa, Jefferson, Henry, Des Moines, Lee and Van Buren.

Second district shall consist of the counties of Muscatine, Scott, Clinton, Jackson, Johnson and Iowa.

Third district shall consist of the counties of Dubuque, Delaware, Buchanan, Black Hawk, Bremer, Butler, Franklin, Hardin and Wright.

Fourth district shall consist of the counties of Clayton, Allamakee, Fayette, Winneshiek, Howard, Chickasaw, Floyd, Mitchell, Worth and Cerro Gordo.

Fifth district shall consist of the counties of Jones, Linn, Benton, Tama, Marshall, Grundy and Cedar.

Sixth district shall consist of the counties of Davis, Wapello, Keokuk, Mahaska, Poweshiek, Monroe and Jasper.

Seventh district shall consist of the counties of Story, Dallas, Polk, Madison, Warren and Marion.

Eighth district shall consist of the counties of Adams, Union, Clarke, Lucas, Appanoose, Wayne, Decatur, Ringgold, Taylor, Page and Fremont.

Ninth district shall consist of the counties of Harrison, Shelby, Audubon, Guthrie, Pottawattamie, Cass, Adair, Mills and Montgomery.

Tenth district shall consist of the counties of Crawford, Carroll, Greene, Boone, Calhoun, Webster, Hamilton, Pocahontas, Humboldt, Palo Alto, Kossuth, Hancock, Emmet and Winnebago.

Eleventh district shall consist of the counties of Lyon, Osceola, Dickinson, Sioux, O'Brien, Clay, Plymouth, Cherokee, Buena Vista, Woodbury, Ida, Sac and Monona.

Approved April 10, 1886.

STATE SENATORIAL APPORTIONMENT.

TWENTY-FIRST GENERAL ASSEMBLY, CHAPTER 152 (1886).

AN ACT fixing the number of senators in the general assembly, apportioning them among the several counties according to the number of inhabitants in each, and dividing the state into senatorial districts.

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

SECTION 1. That the number of senators in the general assembly is hereby fixed at fifty, and they are hereby apportioned among the several counties ac-

cording to the number of inhabitants in each, and under said apportionment the state is hereby divided into fifty senatorial districts, each district to have one senator, as follows:

1. Lee county shall constitute the first district.
2. Jefferson county and Van Buren county shall constitute the second district.
3. Appanoose county and Davis county shall constitute the third district.
4. Wayne county and Lucas county shall constitute the fourth district.
5. Ringgold county, Decatur county and Union county shall constitute the fifth district.
6. Taylor county and Adams county shall constitute the sixth district.
7. Page county and Fremont county shall constitute the seventh district.
8. Mills county and Montgomery county shall constitute the eighth district.
9. Des Moines county shall constitute the ninth district.
10. Henry county and Washington county shall constitute the tenth district.
11. Warren county and Clarke county shall constitute the eleventh district.
12. Poweshiek county and Keokuk county shall constitute the twelfth district.
13. Wapello county shall constitute the thirteenth district.
14. Mahaska county shall constitute the fourteenth district.
15. Marion county and Monroe county shall constitute the fifteenth district.
16. Madison county and Adair county shall constitute the sixteenth district.
17. Audubon county and Dallas county and Guthrie county shall constitute the seventeenth district.
18. Cass county and Shelby county shall constitute the eighteenth district.
19. Pottawattamie county shall constitute the nineteenth district.
20. Muscatine county and Louisa county shall constitute the twentieth district.
21. Scott county shall constitute the twenty-first district.
22. Clinton county shall constitute the twenty-second district.
23. Jackson county shall constitute the twenty-third district.
24. Jones county and Cedar county shall constitute the twenty-fourth district.
25. Johnson county and Iowa county shall constitute the twenty-fifth district.
26. Linn county shall constitute the twenty-sixth district.
27. Webster county and Calhoun county shall constitute the twenty-seventh district.
28. Marshall county shall constitute the twenty-eighth district.
29. Jasper county shall constitute the twenty-ninth district.
30. Polk county shall constitute the thirtieth district.
31. Story county and Boone county shall constitute the thirty-first district.
32. Woodbury county shall constitute the thirty-second district.
33. Buchanan county and Delaware county shall constitute the thirty-third district.
34. Harrison county, Monona county and Crawford county shall constitute the thirty-fourth district.
35. Dubuque county shall constitute the thirty-fifth district.
36. Clayton county shall constitute the thirty-sixth district.
37. Wright county, Hamilton county and Hardin county shall constitute the thirty-seventh district.
38. Black Hawk county and Grundy county shall constitute the thirty-eighth district.

39. Butler county and Bremer county shall constitute the thirty-ninth district.

40. Allamakee county and Fayette county shall constitute the fortieth district.

41. Mitchell county, and Worth county and Winnebago county shall constitute the forty-first district.

42. Winneshiek county and Howard county shall constitute the forty-second district.

43. Cerro Gordo county, Franklin county and Hancock county shall constitute the forty-third district.

44. Floyd county and Chickasaw county shall constitute the forty-fourth district.

45. Tama county and Benton county shall constitute the forty-fifth district.

46. Ida county, Cherokee county and Plymouth county shall constitute the forty-sixth district.

47. Kossuth county, Emmet county, Dickinson county, Clay county and Palo Alto county shall constitute the forty-seventh district.

48. Carroll county, Sac county and Greene county shall constitute the forty-eighth district.

49. O'Brien county, Osceola county, Lyon county and Sioux county shall constitute the forty-ninth district.

50. Buena Vista county, Pocahontas county and Humboldt county shall constitute the fiftieth district.

Approved April 10, 1886.

STATE REPRESENTATIVE APPORTIONMENT.

TWENTY-SECOND GENERAL ASSEMBLY, CHAPTER 191 (1888).

AN ACT to apportion the state into representative districts and declaring the ratio of representation.

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

SECTION 1. That one representative for every twenty-four thousand inhabitants is hereby constituted the ratio of apportionment and that each representative district shall be as hereinafter described.

SEC. 2. Lee county shall be the first district and entitled to one representative (34,024).

SEC. 3. Van Buren county shall be the second district and entitled to one representative (16,170).

SEC. 4. Davis county shall be the third district and entitled to one representative (15,170).

SEC. 5. Appanoose county shall be the fourth district and entitled to one representative (16,941).

SEC. 6. Wayne county shall be the fifth district and entitled to one representative (15,494).

SEC. 7. Decatur county shall be the sixth district and entitled to one representative (15,083).

SEC. 8. Ringgold county shall be the seventh district and entitled to one representative (12,730).

SEC. 9. Taylor county shall be the eighth district and entitled to one representative (15,973).

SEC. 10. Page county shall be the ninth district and entitled to one representative (20,938).

SEC. 11. Fremont county shall be the tenth district and entitled to one representative (15,921).

SEC. 12. Mills county shall be the eleventh district and entitled to one representative (13,727).

SEC. 13. Montgomery county shall be the twelfth district and entitled to one representative (15,901).

SEC. 14. Adams county shall be the thirteenth district and entitled to one representative (12,146).

SEC. 15. Union county shall be the fourteenth district and entitled to one representative (16,502).

SEC. 16. Clark county shall be the fifteenth district and entitled to one representative (11,369).

SEC. 17. Lucas county shall be the sixteenth district and entitled to one representative (14,791).

SEC. 18. Monroe county shall be the seventeenth district and entitled to one representative (12,324).

SEC. 19. Wapello county shall be the eighteenth district and entitled to one representative (25,803).

SEC. 20. Jefferson county shall be the nineteenth district and entitled to one representative (15,995).

SEC. 21. Henry county shall be the twentieth district and entitled to one representative (17,862).

SEC. 22. Des Moines county shall be the twenty-first district and entitled to one representative (35,733).

SEC. 23. Louisa county shall be the twenty-second district and entitled to one representative (11,926).

SEC. 24. Washington county shall be the twenty-third district and entitled to one representative (18,504).

SEC. 25. Keokuk county shall be the twenty-fourth district and entitled to one representative (23,318).

SEC. 26. Mahaska county shall be the twenty-fifth district and entitled to one representative (27,131).

SEC. 27. Marion county shall be the twenty-sixth district and entitled to one representative (23,419).

SEC. 28. Warren county shall be the twenty-seventh district and entitled to one representative (17,868).

SEC. 29. Madison county shall be the twenty-eighth district and entitled to one representative (16,240).

SEC. 30. Adair county shall be the twenty-ninth district and entitled to one representative (14,102).

SEC. 31. Cass county shall be the thirtieth district and entitled to one representative (19,019).

SEC. 32. Pottawattamie county shall be the thirty-first district and entitled to two representatives (45,866).

SEC. 33. Harrison county shall be the thirty-second district and entitled to one representative (20,560).

SEC. 34. Shelby county shall be the thirty-third district and entitled to one representative (16,306).

SEC. 35. Audubon county shall be the thirty-fourth district and entitled to one representative (10,825).

SEC. 36. Guthrie county shall be the thirty-fifth district and entitled to one representative (16,439).

SEC. 37. Dallas county shall be the thirty-sixth district and entitled to one representative (20,050).

SEC. 38. Polk county shall be the thirty-seventh district and entitled to two representatives (51,907).

SEC. 39. Jasper county shall be the thirty-eighth district and entitled to one representative (25,247).

SEC. 40. Poweshiek county shall be the thirty-ninth district and entitled to one representative (18,203).

SEC. 41. Iowa county shall be the fortieth district and entitled to one representative (18,190).

SEC. 42. Johnson county shall be the forty-first district and entitled to one representative (23,046).

SEC. 43. Muscatine county shall be the forty-second district and entitled to one representative (24,320).

SEC. 44. Scott county shall be the forty-third district and entitled to two representatives (41,956.)

SEC. 45. Cedar county shall be the forty-fourth district and entitled to one representative (17,832).

SEC. 46. Clinton county shall be the forty-fifth district and entitled to two representatives (38,661).

SEC. 47. Jackson county shall be the forty-sixth district and entitled to one representative (22,839).

SEC. 48. Jones county shall be the forty-seventh district and entitled to one representative (19,654).

Sec. 49. Linn county shall be the forty-eighth district and entitled to two representatives (40,720).

SEC. 50. Benton county shall be the forty-ninth district and entitled to one representative (23,902).

SEC. 51. Tama county shall be the fiftieth district and entitled to one representative (21,622).

SEC. 52. Marshall county shall be the fifty-first district and entitled to one representative (25,036).

SEC. 53. Story county shall be the fifty-second district and entitled to one representative (17,527).

SEC. 54. Boone county shall be the fifty-third district and entitled to one representative (24,972).

SEC. 55. Greene county shall be the fifty-fourth district and entitled to one representative (15,923).

SEC. 56. Carroll county shall be the fifty-fifth district and entitled to one representative (16,329).

SEC. 57. Crawford county shall be the fifty-sixth district and entitled to one representative (16,131).

SEC. 58. Monona county shall be the fifty-seventh district and entitled to one representative (12,178).

SEC. 59. Woodbury county shall be the fifty-eighth district and entitled to one representative (32,289).

SEC. 60. Ida county shall be the fifty-ninth district and entitled to one representative (9,012).

SEC. 61. Sac county shall be the sixtieth district and entitled to one representative (12,741).

SEC. 62. Calhoun county shall be the sixty-first district and entitled to one representative (9,836).

SEC. 63. Webster county shall be the sixty-second district and entitled to one representative (19,987).

SEC. 64. Hamilton county shall be the sixty-third district and entitled to one representative (14,075).

SEC. 65. Hardin county shall be the sixty-fourth district and entitled to one representative (18,526).

SEC. 66. Grundy county shall be the sixty-fifth district and entitled to one representative (12,804).

SEC. 67. Blackhawk county shall be the sixty-sixth district and entitled to one representative (23,860).

SEC. 68. Buchanan county shall be the sixty-seventh district and entitled to one representative (17,726).

SEC. 69. Delaware county shall be the sixty-eighth district and entitled to one representative (17,436).

SEC. 70. Dubuque county shall be the sixty-ninth district and entitled to two representatives (45,496).

SEC. 71. Clayton county shall be the seventieth district and entitled to one representative (26,853).

SEC. 72. Fayette county shall be the seventy-first district and entitled to one representative (22,422).

SEC. 73. Bremer county shall be the seventy-second district and entitled to one representative (14,350).

SEC. 74. Butler county shall be the seventy-third district and entitled to one representative (14,523).

SEC. 75. Franklin county shall be the seventy-fourth district and entitled to one representative (11,324).

SEC. 76. Wright county shall be the seventy-fifth district and entitled to one representative (9,380).

SEC. 77. Humboldt county shall be the seventy-sixth district and entitled to one representative (8,065).

SEC. 78. Pocahontas (6,152) and Clay (6,438) counties shall be the seventy-seventh district and entitled to one representative (12,590).

SEC. 79. Buena Vista county shall be the seventy-eighth district and entitled to one representative (11,530).

SEC. 80. Cherokee county shall be the seventy-ninth district and entitled to one representative (12,584).

SEC. 81. Plymouth county shall be the eightieth district and entitled to one representative (15,481).

SEC. 82. Sioux county shall be the eighty-first district and entitled to one representative (11,584).

SEC. 83. O'Brien county shall be the eighty-second district and entitled to one representative (8,389).

SEC. 84. Palo Alto (6,389), Emmet (2,781) and Dickinson (3,213) counties shall be the eighty-third district and entitled to one representative (12,383).

SEC. 85. Kossuth county shall be the eighty-fourth district and entitled to one representative (9,337).

SEC. 86. Hancock (5,089) and Winnebago (5,579) counties shall be the eighty-fifth district and entitled to one representative (10,668).

SEC. 87. Cerro Gordo county shall be the eighty-sixth district and entitled to one representative (12,688).

SEC. 88. Floyd county shall be the eighty-seventh district and entitled to one representative (15,362).

SEC. 89. Chickasaw county shall be the eighty-eighth district and entitled to one representative (13,899).

SEC. 90. Allamakee county shall be the eighty-ninth district and entitled to one representative (18,335).

SEC. 91. Winneshiek county shall be the ninetieth district and entitled to one representative (22,680).

SEC. 92. Howard county shall be the ninety-first district and entitled to one representative (9,305).

SEC. 93. Mitchell county shall be the ninety-second district and entitled to one representative (12,825).

SEC. 94. Worth county shall be the ninety-third district and entitled to one representative (8,257).

SEC. 95. Osceola (3,995) and Lyon (4,007) counties shall be the ninety-fourth district and entitled to one representative (8,002).

Approved April 12, 1888.

DECLARATION OF INDEPENDENCE.

IN CONGRESS JULY 4, 1776.

The Unanimous Declaration of the Thirteenth United States of America.

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

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

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

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

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

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

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

He has refused for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise; the state remaining, in the meantime, exposed to all the dangers of invasion from without, and convulsions within.

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

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

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

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

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

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

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

For quartering large bodies of armed troops among us:

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

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

For imposing taxes on us without our consent:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Massachusetts Bay.— Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry.

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

Connecticut.— Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott.

New York.— William Floyd, Philip Livingston, Francis Lewis, Lewis Morris.

New Jersey.— Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark.

Pennsylvania.— Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross.

Delaware.— Cæsar Rodney, George Read, Thomas M'Kean.

Maryland.— Samuel Chase, William Paca, Thomas Stone, Charles Carroll, of Carrollton.

Virginia.— George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jun., Francis Lightfoot Lee, Carter Braxton.

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

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

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

CONSTITUTION OF THE UNITED STATES.

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

ARTICLE I.

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

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

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

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

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

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

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

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

*The clause included in brackets is amended by the fourteenth amendment, second section.

make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

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

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

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

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

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

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

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

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

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

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

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

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

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

SEC. 7. All bills for raising revenue shall originate in the house of repre-

sentatives; but the senate may propose or concur with amendments as on other bills.

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

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

SEC. 8. The congress shall have power:

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

To borrow money on the credit of the United States;

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

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

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

To provide for the punishment of counterfeiting the securities, and current coin of the United States;

To establish postoffices and post-roads;

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

To constitute tribunals inferior to the supreme court;

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

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

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

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

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

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

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

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

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

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

No bill of attainder or *ex post facto* law, shall be passed.

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

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

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

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

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

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

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

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

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

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

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

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

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

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

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

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

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall

* This clause has been superseded by the twelfth amendment.

nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

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

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

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

ARTICLE III.

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

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

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

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

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

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

ARTICLE IV.

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

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

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

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

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

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

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

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

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

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

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the

United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

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

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

New Hampshire.—John Langdon, Nicholas Gilman.
Massachusetts.— Nathaniel Gorham, Rufus King.
Connecticut.— Wm. Samuel Johnson, Roger Sherman.
New York.— Alexander Hamilton.
New Jersey.— William Livingston, David Brearly, William Patterson, Jonathan Dayton.
Pennsylvania.— Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Governeur Morris.
Delaware.— George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.
Maryland.— James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll.
Virginia.—John Blair, James Madison, Jr.
North Carolina.— William Blount, Richard Dobbs Spaight, Hugh Williamson.
South Carolina.—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
Georgia.— William Few, Abr. Baldwin.

Attest, WILLIAM JACKSON, *Secretary.*

AMENDMENTS.

ARTICLE I.

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

ARTICLE II.

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

ARTICLE III.

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

ARTICLE IV.

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

ARTICLE V.

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

ARTICLE VI.

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

ARTICLE VII.

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

ARTICLE VIII.

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

ARTICLE IX.

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

ARTICLE X.

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

ARTICLE XI.

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

ARTICLE XII.

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

ARTICLE XIII.

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

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

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhab-

itants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

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

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

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

ARTICLE XV.

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

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

The first ten of these amendments were proposed by congress (with others which were not ratified by three-fourths of the legislatures of the several states), by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by resolution of the year 1794, and was ratified before 1796. The twelfth article was proposed by congress by resolution of October, 1803, and was ratified before September, 1804. The thirteenth article was proposed by congress, by resolution, of the year 1865, and was ratified before December 18, 1865. The fourteenth article was proposed by congress, by resolution, of the year 1866, and was ratified before the 20th day of July, 1868. The fifteenth article was proposed by congress, by resolution, of the year 1869, and was ratified before the 30th day of March, 1870.

CITIZENSHIP AND NATURALIZATION.

REVISED STATUTES OF THE UNITED STATES OF 1878.

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

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

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

Persons born in Oregon. SEC. 1995. All persons born in the district or country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States on the eighteenth May, one thousand eight hundred and seventy-two, are citizens in the same manner as if born elsewhere in the United States.

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

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

Avoiding the draft. SEC. 1998. Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

Right of expatriation. SEC. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas

it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic.

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

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

Aliens naturalized. SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

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

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

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

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

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

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

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

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

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

Minor residents. SEC. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding

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

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

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

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

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

Alien enemies not admitted. SEC. 2171. No alien, who is a native citizen, or subject, or a denizen of any country, state, or sovereignty, with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States or the territories thereof on the eighteenth day of June in the year one thousand eight hundred and twelve, who had, before that day, made a declaration according to law of their intention to become citizens of the United States, or who were, on that day, entitled to become citizens without making such declaration, may be admitted to become citizens thereof notwithstanding they were alien enemies at the time, and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien.

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

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

Naturalization of seamen. SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States

in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

ORDINANCE OF 1787.

FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO.

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

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

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

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

therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

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

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

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

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

So soon as there shall be five thousand free male inhabitants of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly; *provided*, that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which, the number and proportion of representatives shall be regulated by the legislature; *provided*, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; *provided also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold, and two years' residence in the district shall be necessary to qualify a man as an elector of a representative.

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

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum. And the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met, they shall nominate ten per-

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

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

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

ARTICLES OF COMPACT.

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

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

Common-law rights secured. ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of

rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide and without fraud, previously formed.

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

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

New states. ART. 5. There shall be formed, in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: the western state in the said territory shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line; *provided, however, and it is further understood and declared*, That the boundaries of these three states shall be subject so far to be altered, that if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be

admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government; *provided*, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

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

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

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

WILLIAM GRAYSON, *Chairman.*

CHARLES THOMPSON, *Secretary.*

ORGANIC LAW OF MICHIGAN.

AN ACT to divide the Indiana territory into two separate governments.

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

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

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

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

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

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

Approved January 11, 1805.

ORGANIC LAW OF WISCONSIN.

AN ACT establishing the territorial government of Wisconsin.

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

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

shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

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

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue four years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue two years. An apportionment shall be made, as nearly equal as practicable, among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken and made by the sheriffs of the said counties, respectively, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties is entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties for the council, shall be declared, by the said governor, to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared, by the governor, to be duly elected; *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place on such day as he shall appoint; but, thereafter, the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session, in any year, shall exceed the term of seventy-five days.

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

as shall be determined by the legislative assembly; *provided*, that the right of suffrage shall be exercised only by citizens of the United States.

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

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

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

SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice, and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory, annually, and they shall hold their offices during good behavior. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law; *provided however*, that the justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court, shall a trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure

of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error, and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory in the same manner as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern district of the state of New York receives for similar services.

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

SEC. 11. *And be it further enacted*, That the governor, secretary, chief justice and associate judges, attorney and marshal, shall be nominated, and by and with the advice and consent of the senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall before they act as such respectively take an oath or affirmation before some judge or justice of the peace in the existing territory of Michigan duly commissioned and qualified to administer an oath or affirmation, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And afterwards the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted by the person taking the same to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of two thousand five hundred dollars for his services as governor and as superintendent of Indian affairs. The said chief justice and associate judges shall each receive an annual salary of eighteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each per day, during their attendance at the sessions thereof, and three dollars each for every twenty miles' travel in going to and returning from the

said sessions, estimated according to the nearest usually traveled route. There shall be appropriated, annually, the sum of three hundred and fifty dollars, to be expended by the governor to defray the contingent expenses of the territory, and there shall also be appropriated annually, a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

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

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

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

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

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

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

Approved April 20, 1836.

ORGANIC LAW OF IOWA.

AN ACT to divide the territory of Wisconsin, and to establish the territorial government of Iowa.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the third day of July next, all that part of the present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purposes of temporary government, be and constitute a separate territorial government, by the name of Iowa, and that, from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted, shall cease; *provided*, that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed; *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner and at such times, as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

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

SEC. 3. *And be it further enacted*, That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States; and, at the same time, two copies

of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. An apportionment shall be made as nearly equal as practicable among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in, and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory, to be taken and made by the sheriffs of the said counties respectively, unless the same shall have been taken within three months previous to the third day of July next, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts are entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties or districts for the council, shall be declared by the said governor to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared by the governor to be duly elected; *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place and on such day as he shall appoint; but thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed be law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session in any year, shall exceed the term of seventy-five days.

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

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

and if disapproved by the congress of the United States, the same shall be null and of no effect.

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

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

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

dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerk shall receive in all such cases, the same fees which the clerks of the district courts of Wisconsin territory now receive for similar services.

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

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

States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses, and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

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

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

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

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

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

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

supreme court, and transferred to the supreme court of said territory of Iowa, there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Wisconsin.

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

SEC. 19. *And be it further enacted*, That from and after the day named in this act for the organization of the territory of Iowa, the term of the members of the council and house of representatives of the territory of Wisconsin shall be deemed to have expired, and an entirely new organization of the council and house of representatives of the territory of Wisconsin, as constituted by this act, shall take place as follows: As soon as practicable, after the passage of this act, the governor of the territory of Wisconsin shall apportion the thirteen members of the council, and twenty-six members of the house of representatives, among the several counties or districts comprised within said territory, according to their population, as nearly as may be (Indians excepted). The first election shall be held at such time as the governor shall appoint and direct, and shall be conducted, and returns thereof made in all respects according to the provisions of the laws of said territory, and the governor shall declare the person having the greatest number of votes to be elected, and shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. The persons thus elected shall meet at Madison, the seat of government, on such day as he shall appoint, but thereafter, the apportioning of the representation in the several counties to the council and house of representatives, according to population, the day of their election, and the day for the commencement of the session of the legislative assembly, shall be prescribed by law.

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

Approved June 12, 1838.

AMENDMENTS.

AN ACT to alter and amend the organic law of the territories of Wisconsin and Iowa.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every bill which shall have passed the council and house of representatives of the territories of Iowa and Wisconsin shall, before it become a law, be presented to the governor of the territory; if he approve he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after

such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly by adjournment prevent its return, in which case it shall not be a law.

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

Approved March 3, 1839.

AN ACT to authorize the election or appointment of certain officers in the territory of Iowa, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the legislative assembly of the territory of Iowa, shall be, and are hereby authorized to provide by law for the election or appointment of sheriffs, judges of probate, justices of the peace, and county surveyors, within the said territory, in such way or manner and at such times and places as to them may seem proper; and after a law shall have been passed by the legislative assembly for that purpose, all elections or appointments of the above-named officers thereafter to be had or made shall be in pursuance of such law.

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

Approved March 3, 1839.

ADMISSION OF IOWA.

AN ACT for the admission of the states of Iowa and Florida into the Union.

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

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

Boundaries. SEC. 2. *And be it further enacted*, That the following shall be the boundaries of the said state of Iowa, to wit: Beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-earth river, thence west along the said parallel of latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington city, thence due south to the northern boundary line of the state of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.

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

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

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

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

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

Approved March 3, 1845.

AN ACT supplemental to the act for the admission of the states of Iowa and Florida into the Union.

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

District court. SEC. 2. *And be it further enacted*, That the said state shall be one district, and be called the district of Iowa; and a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge. He shall hold, at the seat of government of the said state, two sessions of the said district court annually, on the first Monday in January, and he shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled "An act to establish the judicial courts of the United States." He shall appoint a clerk for the said district, who shall reside and keep the records of the said court at the place of holding the same; and shall receive, for the services performed by him, the same fees to which the clerk of the Kentucky district is by law entitled for similar services.

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

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

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

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

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

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

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

4. That all salt-springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the legislature thereof, within one year after the admission of said state, and the same, when so selected, to be used on such terms, conditions, and regulations, as the legislature of the state shall direct: *provided*, that no salt-spring, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals, shall, by this section be granted to said state: *and provided also*, that the general assembly shall never lease or sell the same, at any one time, for a longer period than ten years, without the consent of congress.

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

Approved March 3, 1845.

CONSTITUTION OF IOWA.

Preamble. We, the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows:

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

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

Article 1.—Bill of Rights.

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

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

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

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

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

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

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

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

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

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

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

See, further, art. 1, § 25.

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

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

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

The guaranty of religious freedom is not violated by the casual use of a public building as a place for offering prayer and doing other acts of religious worship; and the statute (§ 2879) allowing the Bible to be used in public schools, with the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is not unconstitutional: *Moore v. Monroe*, 64-367.

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

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

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

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

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

It is not a violation of any constitutional privilege to provide that the credibility of a witness may be affected by the fact as to his sensibility to the obligation of an oath: *Searcy v. Miller*, 57-613. And see notes to § 4887.

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

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

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

Therefore, *held*, that the provision (§ 2002) as to liability of a railroad company for injuries to employees is not open to the objection that it is not of uniform operation: *McAunich v. Mississippi & M. R. Co.*, 20-338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Central Trust Co. v. Sloan*, 65-655.

So *held*, also, as to the provision (§ 1972) making railroad companies liable in certain cases for double damages for stock killed:

Jones v. Galena & C. U. R. Co., 16–6; *Welsh v. Chicago, B. & Q. R. Co.*, 53–632.

A curative act is not necessarily unconstitutional as not being of uniform operation: *McMillen v. County Judge*, 6–391.

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

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

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

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

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

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

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

See, further, art. 3, § 1, and notes.

The statute prohibiting the sale of ale, wine and beer within two miles of the corporate limits of a municipal corporation (§§ 2421–2429), *held* not objectionable on the ground of want of uniformity in its operation: *State v. Shroeder*, 51–197.

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

A statute dividing railroads into three classes and fixing maximum rates of charge for each class (§§ 2026, 2027), *held* not unconstitutional on account of lack of uniformity: *Chicago, etc., R. Co. v. Iowa*, 94 U. S., 155.

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

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

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

The provisions (§ 2016) for a different method for assessing the property of railroad companies from that provided for the assessment of other property, *held* not to be unconstitutional as being in conflict with this section: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

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

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

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

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

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

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

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

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

Privileged communications: Words spoken by one in the performance of public or official duty, upon a just occasion, without

malicious motive, are privileged communications, and are not actionable unless express malice is shown: *Mayo v. Sample*, 18-306.

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

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

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

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

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

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

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

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

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

See §§ 5478-5483 and § 5823.

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

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

Therefore, *held*, that the provision (§ 2401) for the issuance of a search-warrant for the seizure of intoxicating liquors is not unconstitutional as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Ibid.*

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

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

The sheriff is justified in searching the person arrested and taking from him money or property in any way connected with the crime charged, or which may serve in identifying the prisoner, or be used by him in effecting an escape. But property thus taken is not subject to attachment: *Commercial Exchange Bank v. McLeod*, 65-665.

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

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

Further as to search-warrants, see §§ 6027-6051.

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

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

The jury contemplated by this section is the jury recognized by the common law, which is constituted of twelve persons, and the legislature has no authority, in providing for jury trial under the constitution, to provide for a less number than twelve jurors. Therefore, *held*, that the provision (§ 4000) for a verdict by ten or eleven jurors, when the jury has been reduced to that number by sickness,

is unconstitutional: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67-296; *Kelsh v. Dyersville*, 68-137.

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

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

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

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

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

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

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

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

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

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

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

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

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

The provisions (§ 2384) allowing an injunction against persons engaged in the illegal sale of intoxicating liquors are not unconstitutional as depriving defendant of the right of trial by jury. Such cases being of equitable cognizance at the time of the adoption of the constitution, and the court of equity having jurisdiction at that time to abate a nuisance, it is within the power of the legislature to enlarge the jurisdiction of the court of equity in such cases so as to allow that remedy even where property rights are involved: *Littleton v. Fritz*, 65-488; *Martin v. Blattner*, 68-286.

So the right of trial by jury is not impaired by the provision (§ 3714) that foreclosure of mortgages shall be by equitable proceedings, and that in the same action a recovery may be had on the note secured by mortgage: *Clough v. Seay*, 49-111.

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

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

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

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

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

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

Appraisement of property taken for public use: The appraisers appointed to assess damages resulting to a land owner from the establishment of a highway are not a jury within the meaning of this section, and, upon appeal properly taken from their decision, such owner is entitled to trial by jury: *Siga-*

foos v. Talbot, 25-214. And see *Des Moines v. Layman*, 21-153.

Contempt: A statute (§ 4374) providing for imprisonment of a debtor for contempt in certain cases, where the object was to enforce the payment of a debt by summary proceedings, *held* in conflict with the constitutional provisions for jury trial: *Ex parte Grace*, 12-208.

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

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

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

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

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

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

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

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

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

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

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

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

Therefore, *held*, that § 4283, limiting the remedy against a sheriff for wrongful levy to a recovery on the indemnity bond given by the plaintiff in execution, was void in so far as it defeated the right of the person whose property was illegally taken to sue for the specific recovery thereof: *Ibid.*

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

The provision (§ 4195) requiring that, before action can be brought against an officer for wrongful levy of a writ of attachment upon property of a person other than the one against whom the writ is directed, notice of the rights of such owner must be given to the officer in writing, is not unconstitutional as depriving the party of his property without due process of law: *Cheadle v. Guittar*, 68-680.

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

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

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

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

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

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

The provision (§ 1892) giving to any one who drains mineral land, even though without consent of the owner, one-tenth of the mineral taken therefrom, *held* not unconstitutional as

depriving the owner of his property without due process of law: *Ahern v. Dubuque, etc., Mining Co.*, 48–140.

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

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

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

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

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

Other cases: The provision (§ 1972) authorizing double damages in an action against a railway company for stock killed through failure of the company to maintain a fence along its track does not interfere with the constitutional protection to property nor deprive the company of its property without due process of law: *Mackie v. Central R. of Iowa*, 54–540.

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

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

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

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

Statutory provisions (§§ 4364–4378) not in accord with the common law, but more nearly like the proceeding in chancery, by which a debtor may be subjected to examination as to whether he has property, not exempt from execution, liable to the satisfaction of an execution against him, and may be imprisoned for contempt in not turning over such property to apply on such indebtedness under order of the court, are not in violation of the requirements of this section as to due process of law: *Eikenberry v. Edwards*, 67–619.

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

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

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

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

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

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

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

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

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

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

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

If there is any ground upon which a tax can

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

Want of notice of assessment and levy are objections which cannot be urged as against an action to recover costs of construction of a sewer under §§ 649, 650: *Dittoe v. Davenport*, 74–66.

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

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

Proceedings for the assessment of damages for the construction of underground drains by one land owner through the property of an adjoining land owner, authorized by 20 G. A., ch. 188 (see § 1878), *held* unconstitutional because not providing for an appeal from the action of the township trustees in case no damages are awarded. The non-assessment of damages by such trustees cannot be regarded as due process of law unless there is a right to appeal to a tribunal where such assessment can be made by a constitutional jury: *Fleming v. Hull*, 73–598.

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

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

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

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

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

Trial by jury: A defendant has the right to trial by jury at some stage of the proceedings in a criminal prosecution: *Ibid.*

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

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

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

But defendant cannot waive a jury trial and consent to a trial by the court, there being no provision by which the court, without a jury, has jurisdiction to try the issues of fact in a criminal case: *State v. Carman*, 63–130; *State v. Larrigan*, 66–426.

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

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

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

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

The provisions of § 2195 as to method of determining the question of sanity by commissioners are not in violation of this section: *Blackhawk County v. Springer*, 58–417.

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

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

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

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

And in a prosecution for the unlawful sale of intoxicating liquors the monthly statements of a pharmacist, filed in the county auditor's office as required by law, are admis-

sible in evidence against him: *State v. Smith*, 74-580.

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

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

Compulsory attendance of witness: This section does not give defendant the absolute right to have a prisoner in the penitentiary or jail produced as a witness. The order which the court is authorized to make in such cases under § 4929 is discretionary: *State v. Kennedy*, 20-372.

When indictment necessary. SEC. 11. All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What constitutes jeopardy; dismissal of prosecution: A dismissal of the proceedings, either by the court or by the district attorney, after the trial has commenced, unless in the cases authorized by statute (§ 6015), will operate as an acquittal: *State v. Callendine*, 8-288.

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

But where, in an indictment for burglary, the defendant is also charged with assault with intent to commit murder, merely for the purpose of bringing the case within the aggravated punishment provided by § 5191, the charge of such assault may be dismissed after defendant has entered a plea of former acquittal of such assault: *State v. Struble*, 71-11.

Continuance: Where the names of the witnesses for prosecution have not been indorsed on the indictment defendant may be required to consent to their introduction under § 5806, notwithstanding the defect, or consent to a continuance; but he has no right to ask a verdict nor insist on the procedure as a former jeopardy when again put on trial: *State v. Parker*, 66-586; *State v. Falconer*, 70-416.

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

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

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

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

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

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

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

In such case the burden of proof is on the

state to establish the fraud: *State v. Maxwell*, 51-314.

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

Nor will the fact that defendant, being put on trial a second time for the higher degree or higher crime, is again found guilty of only the lower degree or lower crime of which he was previously convicted, render the error in improperly putting him on trial a second time error without prejudice: *State v. Tweedy*, 11-350.

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

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

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

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

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

For other cases see notes to §§ 5744-5750.

As to conviction of lesser degree or included offense, see notes to §§ 5850, 5851.

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

This section applies to §§ 5561, 5562; and a party charged with murder in the second degree is entitled to bail notwithstanding the language there used: *State v. Hufford*, 23-579.

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

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

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

Appeal: The right of appeal in such proceedings exists only as provided by law; and *held*, under Revision, an appeal did not lie from an order by a judge of the supreme court: *In re Curley*, 34-184. (But this right is now given by § 4394.)

In general, as to *habeas corpus*, see notes to §§ 4698-4739.

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

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

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

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

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

The penalties provided for violation of the intoxicating-liquor law (§ 2384), *held* not excessive within the constitutional provision: *Martin v. Blattner*, 68–286.

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

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

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

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

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

But a provision (§§ 1949–1952) for condemnation of right of way for a public highway or railway to mineral land, the right of way thus condemned to be public, is not unconstitutional as taking private property for private use: *Phillips v. Watson*, 63–28.

The act of 20 G. A., ch. 188 (see § 1878), authorizing proceedings by which land owners might acquire the right, upon payment of the damages assessed, to lay underground drains through the property of an adjoining land owner in other cases than those where by reason of the wet or swampy condition of the land the public health requires it, *held* unconstitutional as providing for the taking of private property for other than public use: *Fleming v. Hull*, 73–598.

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

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

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

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

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

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

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

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

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

Taxation of agricultural lands, etc., for municipal purposes: An unreasonable extension of the limits of an incorporated city, by which land needed only for agricultural purposes is brought within the city

limits and subjected to municipal taxation, without deriving any advantage from municipal control, is unconstitutional under this section, even though it is provided that it shall be assessed only at its value for agricultural purposes: *Ibid.*; *Langworthy v. Dubuque*, 16–271.

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

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

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

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

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

Municipal taxes from which farm property within the corporate limits is exempt are those levied exclusively for municipal purposes, such as to support the police, lights, water, sewerage, fire department, local government, etc.; but such property is not exempt from taxes voted by the city in aid of a railway, which might be levied as effectually upon property not included within the city: *Sears v. Iowa Midland R. Co.*, 39–417.

A tract of one hundred acres within city limits, used only for farming purposes and having no houses thereon, but against which streets abut, and adjoining an addition laid out in lots and partially improved, *held* subject to city taxes: *Brooks v. Polk County*, 52–460.

The fact that land included within the city limits is used for agricultural purposes will not render the taxation thereof illegal, it not being shown that it is used exclusively for such purposes, nor that it does not derive such benefit from the expenditure of municipal taxes that it is properly subject to such taxation: *Tubbesing v. Burlington*, 68–691.

The doctrine under which agricultural land included within city limits is exempt from municipal taxation is not applicable to railway property under the statutory provisions for the taxation thereof: *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

For other cases where facts were considered as determining whether the property was properly subject to municipal taxation or not, see *Fulton v. Davenport*, 17–404; *Davis v. Dubuque*, 20–458; *Hershey v. Muscatine*, 22–184; *Deeds v. Sanborn*, 26–419; *Burlington & M. R. Co. v. Spearman*, 12–112.

Cities should not be allowed, against the will of property owners, to include within their limits lands which are not needed for city purposes, and are not benefited by being within the corporation, for the purpose of deriving revenues therefrom: *Evans v. Council Bluffs*, 65–238.

Such land should be allowed to be severed from the city upon proper proceedings being taken, and upon such severance should not be held liable for indebtedness of the city incurred during its attachment to the city: *Ibid.*

Moneys and credits of non-resident: The provision (§ 1296) subjecting to taxation in this state moneys and credits belonging to a non-resident, but under the control and management of an agent in the state, *held* not in conflict with the provisions of this section, as providing for the taking of private property for public use without compensation: *Hutchinson v. Board of Equalization*, 66–35.

Compensation: While the right to take private property for public use is conditioned upon compensation, the taxing power is not thus limited: *Stewart v. Board of Supervisors*, 30–9.

A special participation in the benefits of a particular tax on the part of the tax payer has nothing to do with the right to impose the tax. The identical revenue collected by the special tax may be used for purposes from which the tax payers of whom it was received derive no benefit: *Warren v. Henly*, 31–31.

Not subject to judicial control: The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited either expressly or by implication, the judicial power possesses no authority to limit it: *Ibid.*

Tax in aid of railroad: The imposition of a tax to aid in the construction of a railroad is an exercise of the taxing power for a public purpose though it be for a private profit, and statutory provisions authorizing such taxation *held* not unconstitutional: *Stewart v. Board of Supervisors*, 30–9; *McGregor & S. C. R. Co. v. Birdsall*, 30–255; *Bonnifield v. Bidwell*, 32–149; *Renwick v. Davenport & N. W. R. Co.*, 47–511; *Snell v. Leonard*, 55–553; *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Under a former statute, with similar provisions, such taxation was *held* to be illegal: *Hanson v. Vernon*, 27–28; *King v. Wilson*, 1 Dillon, 555.

Just compensation: The provision as to "just compensation" means that the person whose property is taken for public use shall have a *fair equivalent in money* for the injury done him by such taking. This compensation should be precisely commensurate with the injury sustained from the taking of the property: *Sater v. Burlington, etc., Plank Road*

Co., 1-386; *Henry v. Dubuque & P. R. Co.*, 2-288.

It is only when the damages are properly assessed that they are to be paid or secured. The compensation must be ascertained in the mode prescribed by law: *McCrory v. Griswold*, 7-248.

A payment of the damages assessed is a condition precedent to the right to enter upon and take the land under the right of way act, and if the property is taken before such compensation is made, the owner may proceed as against a trespasser: *Henry v. Dubuque & P. R. Co.*, 10-540; *Daniels v. Chicago & N. W. R. Co.*, 35-129.

The provision (§ 1919) allowing the taking of property pending an appeal in the condemnation proceeding is not unconstitutional: *Peterson v. Ferreby*, 30-327.

If no damages are claimed, or if the appraisers appointed in the manner prescribed by law ascertain that the claimant is entitled to no damages, and no appeal is taken from their decision, the property owner cannot enjoin the condemnation of his property on the ground that compensation has not been made: *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354; *Tharp v. Witham*, 65-566.

And if his claim is rejected as not filed in proper time, he cannot resist the opening of the highway on the ground that he has not had just compensation: *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354.

Compensation for property taken for public purposes is guarantied by this section of the constitution only where the usual and ordinary forms and remedies provided by law are adopted by the person desiring to obtain such compensation, and if he fails to avail himself of such remedies he cannot be permitted to complain. So *held* where a land owner whose property was taken for a public highway, and whose claim for damages was disallowed by the board of supervisors, failed to appeal from such action: *Tharp v. Witham*, 65-566.

Public highways: There is no doubt of the power of the legislature to provide for the condemnation of right of way for public highways upon notice by publication in newspapers or posted notices. The proceeding is in the nature of a proceeding *in rem* in which the court acquires jurisdiction of the property which is the subject of the adjudication: *Wilson v. Hathaway*, 42-173.

When the location of a road over a party's land is changed, he should be allowed compensation for the additional damage caused by the change and no more: *Israel v. Jewett*, 29-475.

Vacation of highway: Where a person has only the right to the use of a highway which pertains to the general public, he cannot maintain an action for damages by reason of its vacation. Such proceeding is not the taking of private property within the constitutional provision: *Ellsworth v. Chickasaw County*, 40-571; *Brady v. Shinkle*, 40-576.

Streets: The use of land for a street is a public purpose for which it may be taken upon rendering compensation, and the court will not review the decision of the city authorities holding that the public interests require a street to be established: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

Use of streets by railway: The legislature may authorize the use of the streets of a city by a railway company for the construction and operation of its road without compensation being made to the city or to adjoining property owners. But the city may have property acquired for other authorized purposes which could not be so taken without compensation being made: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

The provision (§ 623) authorizing a city to grant to railroads right of way through its streets upon condition that compensation for damages be paid to abutting property owners is twofold in its objects: first, to secure to the city control over its streets; and secondly, to secure to property owners compensation for damages. And in a particular case, *held* that although the first object could not be accomplished, owing to prior rights having been conferred by another railroad upon the company in question, nevertheless, the second object being a proper one, the statute would be upheld as constitutional: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393.

Improvement of streets: Levying a tax upon property abutting upon a street to pave such street is not an exercise of the right of eminent domain, but of the power of taxation: *Warren v. Henly*, 31-31.

The compensation provided by § 635 for damages resulting from changing the grade of a street is not intended as compensation for the taking of private property for public use, and the constitutional provision as to compensation has no application: *Meyer v. Burlington*, 52-560.

Right of way for railways: When a right of way is, by statute, taken for the use of a railway company, it is in contemplation of law taken by the state for public use and not simply for the private use of the company in whose behalf it is taken, although the compensation be paid by the company. The easement thus acquired is in the nature of a grant from the state to the company for the uses and purposes fixed by law, and when the company fails to carry out the purposes of the grant the state may transfer the easement to another company upon compensation being made to the former company: *Noll v. Dubuque, B. & M. R. R. Co.*, 32-66.

Destruction of buildings to stop fires: An ordinance of a municipal corporation authorizing the destruction of buildings to stop the spread of fire is not an exercise of the power of eminent domain, but a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity: *Field v. Des Moines*, 39-575.

A city cannot exercise the right of eminent domain except when that power is expressly given: *Ibid.*

Mill-dams: The statute allowing the taking of private property for the purpose of erecting mill-dams is constitutional: *Burnham v. Thompson*, 35-421.

Prohibitory liquor law: The legislature being the supreme judge and guardian of the public health, safety, happiness and morals,

may, if the traffic in certain property is deemed detrimental or dangerous to these public interests, prohibit it, and declare that property illicitly held, kept, or used, shall be forfeited and destroyed; and such a provision is not one authorizing the taking of private property for public use: *Santo v. State*, 2-165, 216.

The provision making the judgment for the wrongful sale of intoxicating liquor a lien upon the property in which the business is carried on is not the taking thereof for public use: *Polk County v. Hierb*, 37-361.

The present statute prohibiting the sale of intoxicating liquors cannot be said to unlawfully deprive the owner of such property of his property without compensation, at least unless it be made to appear that such property was owned by such party prior to the enactment of the prohibitory statute of 1855: *McLane v. Leicht*, 69-401.

Imprisonment for debt. SEC. 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace.

The provision (§ 4374) for imprisonment of debtor for contempt in refusing to turn over property, etc., is not in conflict with this section: *Ex parte Grace*, 12-208. (But such provision is in conflict with § 10 of this article. See same case in notes to that section.)

Petition. SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.

Attainder; ex post facto law; obligation of contract. SEC. 21. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

EX POST FACTO LAWS.

Defined: An *ex post facto* law is one which makes acts innocent when done criminal, or if criminal when done aggravates the crime, increases the punishment or reduces the measure of proof. The term applies only to criminal laws. Retrospective or retroactive laws are not in conflict with the constitution of the United States or this constitution, except when they interfere with vested rights: *State ex rel. v. Squires*, 26-340.

An *ex post facto* law is a retroactive criminal law, and a statute which does not make an act already done a crime, although it subjects the person guilty thereof to liability, cannot be *ex post facto*: *Polk County v. Hierb*, 37-361.

A change in the law by which petit larceny was made cognizable only before a justice of the peace and not upon indictment, *held* not to affect the statute as to the punishment of larceny so as to prevent punishment, under the statute, of grand larceny committed prior to the taking effect of the change: *State v. Church*, 8-252.

Where the elements of the crime are not affected by change in the statute, but only the amount of punishment, it is not necessary that the indictment show whether the crime was committed before or after such change: *State v. Keylets*, 74-499.

Retroactive laws: A constitutional provision is not to be given a retrospective operation unless the words employed show a clear intention that it shall have that effect: *Burlington Ferry Co. v. Davis*, 48-133.

Retrospective laws, as distinguished from *ex post facto* laws, are not necessarily unconstitutional: *Iowa R. Land Co. v. Soper*, 39-112, 117.

Legislation operating retrospectively, to render binding and effective contracts before invalid, is not in conflict with the constitution. It does not impair the obligation of contracts, nor, as between the parties thereto, disturb vested rights: *Tilton v. Swift*, 40-78.

Legalizing acts: In order to a rightful exercise of the legislative power to cure a defective proceeding, the legislature must have possessed the power to authorize the result by a prior legislative enactment: but it is not necessary that it might have accomplished the result in the precise manner adopted to cure the defect; nor is the power of the legislature to cure defective proceedings limited by the fact that but for such curative act the defective proceeding would be wholly invalid or inoperative: *State ex rel. v. Squires*, 26-340.

The power of the legislature to cure defective or irregular proceedings is not limited by the fact that but for such curative act the proceedings would be wholly inoperative; and *held*, that where the legislature has the power to authorize by general law the levy and collection of special taxes by municipal corporations without limitation as to rate, the legislature may rightfully legalize levies made in excess of lawful authority: *Iowa R. Land Co. v. Soper*, 39-112.

As the legislature might provide by law that a conveyance should impart constructive notice without acknowledgment, so it may by a curative act provide that defective acknowledgments to instruments, which have been duly recorded, shall be legal and valid, notwithstanding such defects; but such curative acts cannot affect rights of third parties which have vested before their passage: *Brinton v. Seevers*, 12-389; *Newman v. Samuels*, 17-528; *Ferguson v. Williams*, 58-717.

But *held* that such acts legalizing conveyances defectively acknowledged were applicable only to conveyances which, without acknowledgment, would have been valid, but not to instruments (as, for instance, deeds of married women under the law as it then stood) which, unless acknowledged in the manner required, were void: *Heaton v. Fryberger*, 38-185.

A retrospective law authorizing an act, or curing defects in a proceeding which the legislature might have previously authorized, is not unconstitutional: *McMillen v. County Judge*, 6-391; *Huff v. Cook*, 44-639.

Therefore an act legalizing the establishment of a county road is not unconstitutional: *Bennett v. Fisher*, 26-497.

A valid curative act cannot be passed where the act to be cured is prohibited by the constitution: *Mosher v. Independent School Dist.*, 44-122.

While retrospective legislation may be proper under some circumstances, *held*, that a retrospective statute validating a deed by the chairman and clerk of the board of supervisors of a county, conveying to a railroad company certain swamp land belonging to the county, together with a cash indemnity to which the county was entitled from the United States, such cash indemnity not being included in the original contract of sale of said swamp land to the railroad company which the electors had approved as required by law, was invalid: *Palmer v. Howard County*, 45-61.

A law which purports to legalize an act of a municipal corporation which it had no lawful power to do, not in mere matter of form but in substance, is invalid. The legislature cannot legalize the passage of an ordinance which it could not specifically authorize in the first instance: *Independent School Dist. v. Burlington*, 60-500.

As the legislature cannot amend corporate charters by special laws, it cannot legalize the passage of an ordinance not authorized by such charter: *Stange v. Dubuque*, 62-303.

But an act legalizing the action of a county superintendent in attaching territory of one district to another, not justified by the circumstances so as to render the original action valid under the statute, may be passed, as no general statute could be made applicable, and therefore the constitutional prohibition against special statutes does not apply: *Independent Dist. v. Independent Dist.*, 62-616.

Where a note individual in form was in fact given in payment for insurance of school buildings, and was signed by the officers of the school district with their individual names, affixing the words "President," "Secretary" and "Director," *held*, that the statute legalizing all contracts made by school officers for insurance of school buildings, as well as evidence of indebtedness therefor, and relieving the members from their individual liability, was not applicable: *American Ins. Co. v. Stratton*, 59-696.

If the legalizing act is invalid it will not affect the former act: *Lytle v. May*, 49-224.

A legalizing act merely operating to carry out the intent of the parties, which would otherwise be defeated by formal defects, is valid. So *held* as to § 3553, legalizing conveyances of real estate by foreign executors: *Smith v. Callaghan*, 66-552.

Impairing Obligation of Contracts.

Re-enactment of statute: The obligation of contracts is not impaired by the re-enactment of a statute in existence at the time the contract was made: *Bridgman v. Wilcut*, 4 G. Gr., 563.

Subsequent contracts: A law enacted prior to the formation of a contract cannot be objectionable as impairing the obligation thereof: *Davis v. Bronson*, 6-410.

Negotiability of bills and notes: A statute attaching the attributes of negotiability to instruments which have not been previously negotiable, and thereby cutting off defenses as against an innocent holder, cannot be made applicable to contracts already in existence: *Griffey v. Payne*, Mor., 68; *Harlan v. Sigler*, Mor., 39.

But a provision that, in case of assignment of such an instrument, suit may be brought in the name of the assignee instead of that of the original payee for the assignee's benefit, merely affects the remedy and may be applicable to assignments already made: *Harlan v. Sigler*, Mor., 39.

Although the legislature is not prohibited from changing the remedy on a contract or the rules of evidence that shall be brought to bear upon it, yet a statute authorizing the defense of fraud to be set up as against a *bona fide* holder for value of a negotiable instrument acquiring the same before maturity can only apply to contracts made after the taking effect of the statute: *Temple v. Hays*, Mor., 9.

Divorce: A legislative divorce is not a law impairing the obligation of contracts: *Levins v. Sleator*, 2 G. Gr., 604.

The decision of a court declaring a contract void is not unconstitutional as impairing the obligation of contracts. So *held* in case of bonds issued by counties in payment for stock in railroad companies, where the bonds were held void: *McClure v. Owen*, 26-243; *Railroad Co. v. McClure*, 10 Wall., 511.

Change in judicial decision cannot be allowed to render invalid contracts which, when made, were held to be lawful: *Thompson v. Lee County*, 3 Wall., 327.

Where a state has passed no law nor put any construction upon any law impairing the obligation of a contract then in existence, but changes its policy or construction of the state constitution in regard to a class of contracts, the validity of any one of that class of contracts will be determined by the law then in force: *Railroad Co. v. McClure*, 10 Wall., 511.

Effect of sealed instrument: The statute allowing the want of consideration to be pleaded in an action on a sealed instrument does not impair the obligation of the contract when applied to an instrument executed out of the state, where the common-law rule making the seal conclusive as to the consideration is in force: *Williams v. Haines*, 27-251.

A state bankrupt law does *prima facie* impair the obligation of contracts, and is unconstitutional and void, except in case the debtor and creditor are domiciled in the state where the discharge is granted and the law was in existence at the time when the contract was made: *Collins v. Rodolph*, 3 G. Gr., 299.

The appearance of a non-resident creditor for the purpose of opposing the discharge of the insolvent will not constitute a waiver or abandonment of his exemption from the effect of such discharge: *Ibid.*

A discharge under a state insolvent law does not discharge a debt due to a citizen of another state, no matter where the debt was contracted or made payable, unless the cred-

itor has appeared and submitted to the jurisdiction of the court by becoming a party or claiming a dividend: *Hawley v. Hunt*, 27–303.

Legal tender notes: The act of congress making United States notes a legal tender in payment of debts previously contracted is constitutional: *Wilson v. Triblecock*, 23–331; *Richmond v. Dubuque & S. C. R. Co.*, 33–422, 503.

Attachment: The actual service of an attachment upon property creates a real lien thereon which nothing subsequent can destroy but the dissolution of the attachment. Therefore, *held*, that an act exempting property of persons in the military service of the United States from levy or sale was not applicable to property already levied on by attachment: *Hannahs v. Felt*, 15–141; *Ryan v. Wessels*, 15–145.

Existing vendor's lien: The right to a vendor's lien, arising by virtue of contract of sale and conveyance without express reservation thereof, at a time when such lien was recognized, *held* not to be affected by subsequent legislation (§ 3111) declaring that such a lien should not be recognized or enforced after conveyance by the vendee, unless reserved by conveyance, mortgage or other instrument duly executed and recorded: *Jordan v. Wimer*, 45–65.

License: A license to sell intoxicating liquors is not a contract between the state and the person licensed, giving the latter vested rights, but is a mere temporary permit issued in the exercise of the police power, and subject to the direction of government, which may revoke it as it deems fit. Such power of revocation may be exercised by a municipal corporation where the license has been issued by it under authority of law: *Columbus City v. Cutcomp*, 61–672.

Dower: The widow's right to dower becomes vested at the time of the husband's death and cannot be changed by a subsequent statute: *Burke v. Barron*, 8–132.

A statute increasing the extent of the widow's dower right cannot be made to operate against the purchaser of land conveyed by the husband before the taking effect of the statute: *Davis v. O'Ferrall*, 4 G. Gr., 168.

Liability of wife's property: A change in the statutory provisions relating to the liability of the wife's property for debts of the husband which diminished such liability (§§ 3393, 3394), *held* not applicable to a contract entered into before such change took place, although proceedings were not commenced nor the property seized until after the change: *Schmidt v. Holtz*, 44–446.

Taxation; change in law: A change in the revenue law as to the mode of enforcing a tax does not impair the obligation of contracts: *Haskel v. Burlington*, 30–232.

A statute as to the method of enforcing the payment of taxes may be made applicable to taxes delinquent at the time of its passage, as well as those to become delinquent in the future: *Sully v. Kuehl*, 30–275.

Exemption from taxation is not a vested right, and may be taken away at the will of the legislature: *Shiner v. Jacobs*, 62–392.

Land dedicated to city for public use: Where, by dedication, the title to property is vested in a city for special public purposes, the legislature cannot authorize the city to sell the land in violation of such trust: *Warren v. Mayor of Lyons City*, 22–351.

Right to taxes not earned: A statute providing that taxes voted in aid of a railway company should not be collected until the company complied with the conditions entitling it to receive such tax from the treasurer, *held* not to interfere with vested rights: *Harwood v. Case*, 37–692.

Penalties on railroad taxes: While penalties already accrued upon a tax in aid of a railroad cannot be taken away by the repeal of the statute under which the tax is voted, there is no vested right in the continuance of such penalties: *Tobin v. Hartshorn*, 69–648.

Corporate franchises; police regulation of: While the legislature may not deprive a corporation of rights vested under its charter without infringing an implied contract between the state and the corporation that there shall be no change in the laws existing at the time of incorporation which shall render the use of the franchise more burdensome or less remunerative, yet a corporation cannot complain of the passage of statutes in the nature of police regulations, although they may operate to its disadvantage: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41–297.

Therefore, *held*, that the provision (§ 1972) making railway companies absolutely liable for damages caused by fires set out by their engines was not unconstitutional as applied to railways previously chartered: *Ibid.*

The statute (21 G. A., ch. 76) requiring foreign corporations doing business within the state to file articles of incorporation with the auditor, and receive permits to transact business, and subjecting them to penalties for doing business without such permit, held constitutional: *Goodell v. Kriechbaum*, 70–362.

Right of municipal corporation in taxes levied: A municipal corporation acquires a vested right in taxes already levied under existing laws, which cannot be destroyed by a subsequent statute releasing property from the payment of such taxes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633; *Dubuque v. Illinois Cent. R. Co.*, 39–56; *Dubuque v. Chicago, D. & M. R. Co.*, 47–196; *Burlington v. Burlington & M. R. R. Co.*, 41–134; *Independent Dist. v. Independent Dist.*, 62–616.

Laws affecting the remedy: The legislature has the power to change the remedy and remedial proceedings upon contracts, and as to them the law in force when the remedy is pursued prevails unless there be statutory provisions preserving the old remedy. So *held* as to the method of sale under a judgment recovered after the change in the law as to appraisements in an action upon a contract made before such change: *Babcock v. Gurney*, 42 154; *Holland v. Dickerson*, 41–367.

A citizen has no vested rights in a particular course of practice in the courts nor to a particular remedy. Remedies are within the control of the legislature, subject to the restriction that the obligation of contracts shall not be impaired and all remedy for the enforcement of rights under a contract shall not be taken away. Retrospective laws which affect pending suits and give a new remedy, modify an

existing one, or remove the impediment in the way of a legal proceeding, are not unconstitutional: *Tilton v. Swift*, 40–78.

Statutes may constitutionally be enacted changing the remedy existing when the contract is made, if they preserve existing remedies in substance and with integrity, and do not destroy or embarrass the remedies existing when the contract is made so as substantially to defeat the rights of a creditor. A law merely limiting the amount of the costs recoverable does not so affect the remedy as substantially to defeat the rights of creditors. So *held* in regard to a statute (§ 3034) limiting the amount of attorneys' fees taxable as costs upon foreclosure of school-fund mortgage: *Kossuth County v. Wallace*, 60–508.

A law which, by construction, gives a new and more efficient remedy upon a contract does not impair its obligation: *Van Metre v. Wolf*, 27–341.

A change of statutory provisions relating to the production of testimony may be made applicable to suits before commenced: *Wormley v. Hamburg*, 40–22.

A retrospective statute, regulating the remedy but not affecting subsequent rights, is constitutional: *Johnson v. Semple*, 31–49.

So *held* as to a statute rendering a motion for a new trial in an action at law unnecessary in order to bring before the supreme court, on appeal, the question as to the sufficiency of the evidence to support the judgment: *Ibid.*

Proceedings are to be had in accordance with the statutes in force, even though they may have been passed subsequent to the commencement of the action: *Ballard v. Ridgley*, Mor., 27; *Inghram v. Dooley*, Mor., 28.

Rules of practice of a court cannot be regarded as vested rights which may not be modified by a subsequent statute. A party has no vested right as to a particular course of practice: *Brotherton v. Brotherton*, 41–112.

A change in the statute regulating the place of bringing action to foreclose a mortgage, by which the action is authorized to be brought in the county where suit on the note may be maintained instead of in the county where the property is situated, is not such a change in the remedy as to be unconstitutional as to mortgages previously executed: *Equitable L. Ins. Co. v. Gleason*, 56–47.

An amendment to the statute in reference to changes of venue, *held* not to affect any vested right as applied to actions pending: *Eikenberry v. Edwards*, 71–82.

The right to a particular mode of procedure is not a vested right which the state cannot change or abolish: *Drake v. Jordan*, 73–707.

Redemption and appraisement laws: An appraisement law providing that property levied upon under execution can only be sold at a certain proportion of the appraised value is unconstitutional as applied to contracts entered into before its passage. The law in force when the contract is made necessarily forms a part of the contract and fixes the rights and obligations growing out of it, and any substantial change in the law of the remedy which shall lessen its efficiency or burden it with any new conditions and restrictions comes within the constitutional prohibition: *Rosier v. Hale*, 10–470; *Landis v. Abrahams*, 11–284.

A law depriving a judgment debtor of the right to have his real property appraised, or sold subject to redemption, is not unconstitutional as impairing vested rights: *Holland v. Dickerson*, 41–367; *Babcock v. Gurney*, 42–154.

But a change in the law regulating judicial sales, by which appraisement is allowed in cases where the right before did not exist, is unconstitutional in its application to sales under judgments rendered upon contracts made before the change in the law took effect: *Olmstead v. Kellogg*, 47–460.

A law giving a right of redemption from sales under foreclosure of mortgage in cases where it did not exist at the time when the mortgage was made impairs the obligation of the contract and is unconstitutional: *Malony v. Fortune*, 14–417.

Valuation and appraisement laws in general are not applicable to sales under judgments existing prior to their enactments: *Burton v. Emerson*, 4 G. Gr., 393.

A judgment is not a contract within the provision of the constitution prohibiting legislation impairing the obligation of contracts, and valuation and appraisement laws may be applicable to a judgment for costs rendered before the enactment of such laws: *Sprott v. Reid*, 3 G. Gr., 489.

Valuation laws, so far as they do not impair the obligation of the contract, are applicable to executions under a judgment upon a contract entered into before they take effect: *Coriell v. Ham*, 4 G. Gr., 455.

Exemption of pension money: The act exempting property purchased with pension money from liability for indebtedness arising under contracts previously entered into (as provided in § 4306) is unconstitutional as impairing the obligation of contracts: *Foster v. Byrne*, 76–295.

Statutes of limitation relate to the remedy and not to the substance of the contract, and may therefore be made to operate upon prior contracts without impairing their obligations: *Maltby v. Cooper*, Mor., 59.

If a substantial remedy is left for the enforcement of the contract, the fact that by the statute of limitations a particular action for its enforcement is completely barred will not render such a statute unconstitutional as to existing contracts: *Ibid.*

The statute of limitations found in Code of '51 and Rev. of '60, *held* not unconstitutional as impairing the obligation of contracts, since the right to sue upon accrued causes of action was not cut off: *Campbell v. Long*, 20–382.

Extending time for defending: Laws which merely change the remedy are not liable to constitutional objection, although the remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult; but in altering the remedy the obligation of the contract must not be so impaired that the rights of the party in it are in effect destroyed or the remedy rendered hardly worth pursuing by reason of being burdened with new restrictions. Therefore, *held*, that statutory provisions giving a defendant who should be

in the military service of the United States, or of the state, the right to a continuance in actions pending or afterwards to be brought, did not impose on the remedy such new burdens or restrictions as to impair its benefit, and that therefore such restriction was not unconstitutional as to contracts already existing: *McCormick v. Rusch*, 15–127.

Extending time for bringing suit: A law extending the time within which action may be brought upon a contract is not unconstitutional: *Edwards v. McCaddon*, 20–520.

Nor is an act extending the time within which a defendant might answer in proceedings to foreclose a mortgage open to such objection: *Holloway v. Shernan*, 12–282.

Prohibition of action upon judgment: The provision (§ 3726) prohibiting an action upon a judgment within fifteen years from its rendition, without leave of the court, *held* not unconstitutional when applied to judgments rendered before its passage, as impairing their obligation. Although it takes away one remedy, it leaves a complete one: *Watts v. Everett*, 47–269.

No vested right in pending action: The bringing of a suit vests no right to a particular decision, and the case must be determined on the law as it stands when the judgment is rendered: *Huff v. Cook*, 44–639.

Right to hold office: Therefore, where a woman elected to the office of county superintendent was held unqualified to fill that office, and subsequently a law was passed providing that no person so elected should be deprived of office by reason of sex, *held*, that on appeal taken after the passage of the act the statute would be given effect, and the judgment of the court below was reversed: *Ibid.*

In the absence of any express constitutional provision it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon an incumbent, and add to or take away from his salary. It is also within the legislative power to add to or change the method in which vacancies may occur, and make such changes applicable to existing offices and those holding them: *Bryan v. Cattell*, 15–538.

Resident aliens. SEC. 22. Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native-born citizens.

This section does not change the common-law rule as to non-resident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 3 G. Gr., 408. But the section does not restrict the power of the legislature to extend the same privileges to other foreigners than those named (per Cole, J.): *Purczell v. Smidt*, 21–540; and it confers upon resident aliens the right to *transmit* as well as to *acquire* real property by descent (per Dillon, J.): *Ibid.*

Slavery. SEC. 23. There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.

Imprisonment for contempt for the violation of an injunction, under the prohibitory liquor law, against maintaining a nuisance, is not involuntary servitude, within the prohibition of the constitution: *Martin v. Blattner*, 68–286.

Reservation of rents. SEC. 24. No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years.

Rights retained. SEC. 25. This enumeration of rights shall not be construed to impair or deny others, retained by the people.

The theory of the constitution is that all powers not vested in the general assembly remain in the state: *State ex rel. v. Wapello County*, 13–388.

"There is, as it were, back of the constitution, an unwritten constitution which guaranties and well protects all the absolute rights of the people" (per Beck, J.): *Hanson v. Vernon*, 27–28, 73. But see *Stewart v. Board of Supervisors*, 30–9, 18, and note to art. 3, § 1.

Intoxicating liquors. SEC. 26. No person shall manufacture for sale, or sell, or keep for sale, as a beverage any intoxicating liquors whatever, including ale, wine and beer. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

[By the nineteenth general assembly (Joint Res. No. 8) the following proposed amendment was agreed to, as having already been in due form agreed to by the previous general assembly (18 G. A., Joint Res. No. 8). By 19 G. A., ch. 172, in pursuance of a previous statute authorizing submissions of constitutional amendments at special elections (§ 63), this proposed amendment was submitted to the people at a special election to be held June 27, 1882. By proclamation of the governor, dated July 29, 1882, this proposed amendment was declared adopted.]

For irregularities in entering this amendment upon the journals of the eighteenth general assembly, and a want of agreement between the amendment as there entered and

as subsequently agreed to by the nineteenth general assembly, this amendment, as submitted to and adopted by the people, did not become a part of the constitution: *Koehler v. Hill*, 60-543; *State v. Johnson*, 61-504.

ARTICLE 2.—RIGHT OF SUFFRAGE.

Electors. SECTION 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

[By proper legislative action a proposed amendment striking the word "white" from the first line of this section, as it originally stood, was submitted to the electors at the general election in 1868 and adopted.]

The registry laws: This section confers upon persons possessing the qualifications mentioned therein the right to vote, which right cannot be impaired by legislation. But the legislature may regulate the exercise of the right, and provide a method for determining whether persons proposing to vote possess the required qualifications. A registry law is therefore not unconstitutional: *Edmonds v. Banbury*, 28-267.

Residence: Where a student entered the state university at Iowa City while still a minor, making his father's home in another county his residence during vacations, and receiving support from his father, without having any definite intention of making Iowa City his home after graduation, *held*, that he was not a resident of the county in which he was attending school, so as to be entitled to vote there on coming of age: *Vanderpœl v. O'Hanlon*, 53-246.

If a person has actually removed to another place with the intention of remaining there for an indefinite time, and making it a place of fixed residence or present domicile, it is to be regarded as his domicile, notwithstanding he may entertain a floating intention to return at some future time. The place where a married man's family resides is generally to be considered his domicile: *State v. Groome*, 10-308.

Persons in military service: A statute providing that citizens of the state in the military service should have a right to vote at all elections authorized by law, whether at the time of voting they were within or without the state, and providing for the opening of polls and holding of elections wherever a regiment or battalion of Iowa troops was stationed, *held* not unconstitutional: *Morrison v. Springer*, 15-304.

Privileged from arrest. SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such elections, going to and returning therefrom.

From military duty. SEC. 3. No elector shall be obliged to perform military duty on the day of election, except in time of war or public danger.

Persons in military service. SEC. 4. No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place or station within this state.

Insane. SEC. 5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

Ballot. SEC. 6. All elections by the people shall be by ballot.

General election. [SEC. 7.] The general election for state, district, county and township officers shall be held on the Tuesday next after the first Monday in November.

[By proper action of the legislature (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13), the foregoing section was submitted to vote of the electors at the general election in 1884, and by them adopted.]

ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

Departments of governments. SECTION 1. The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any

function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

This section does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments; as, for instance, to compel the auditor of state by *mandamus* to issue a warrant for payment of salary of an officer, where the auditor has refused to act: *Bryan v. Cattell*, 15–538.

The charter of a city, conferring upon the mayor judicial authority, is not in conflict with this section. The mayor of the city is not a part of the government of the state of Iowa: *Santo v. State*, 2–165, 220.

Provisions (§ 580) for proceedings in court for the annexation of contiguous territory to a city, *held* not in conflict with this section: *Burlington v. Leebrick*, 43–252, 258.

See, further, notes to following sections.

Legislative Department.

General assembly. Section 1. The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives; and the style of every law shall be—"*Be it enacted by the General Assembly of the State of Iowa.*"

General scope of power: In ascertaining the power of the legislature under the constitution, the courts look not at what the instrument authorizes but at what is prohibited: *McMillen v. County Judge*, 6–391.

The legislature possesses sovereign legislative power over all subjects except such as are prohibited to it in the state constitution: *Boyd v. Ellis*, 11–97.

The general assembly possesses all legislative authority not delegated to the general government or prohibited by the constitution. The constitution, as applied to the legislative department, is a limitation and not a grant of power: *Morrison v. Springer*, 15–304. And see *State v. Hockett*, 70–442.

The rule in construing the state constitution is that the state legislature may exercise all rightful legislative powers which are not expressly prohibited or necessarily included in the prohibited powers: *Purcell v. Smidt*, 21–540.

All the legislative authority inherent in the people is vested in the general assembly, and the legislative power of the general assembly is therefore supreme, except as it is bounded by the limitations written in the constitution: *Stewart v. Board of Supervisors*, 30–9, 18.

The power of legislation is vested in general terms in the general assembly, and thereby there is conferred upon that body the authority to legislate upon all rightful subjects, unless prohibited from so doing expressly or by clear implication: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

And see notes to art. 1, § 25.

While the constitution vests the legislative power in the general assembly and it may legislate on all subjects not prohibited by express words or necessary implication, yet under the constitutional provision placing the educational interests of the state under the management of a board of education authorized to legislate and make all needful rules and regulations in relation to schools, *held*, that the power to legislate on such subject was thereby denied to the legislature: *District T'p v. Dubuque*, 7–262.

Legislative divorces: Under the terms of the organic law providing "that the legislative power of the territory shall extend to all rightful subjects of legislation," *held*, that the territorial legislature was invested with as much power as is usually vested in an unrestrained legislative body, and that such power included the power to grant legislative divorces, even where the grounds for divorce were not such as to entitle the party to relief in the courts: *Levins v. Sleator*, 2 G. Gr., 604. (But under this constitution, art. 3, § 27, legislative divorces cannot now be granted.)

The taxing power being one of the sovereign powers of the state vested in the general assembly, and not being limited by the constitution as to the kinds or classes of property subject to taxation, the general assembly has general legislative authority to subject all kinds and classes of property to taxes for all proper purposes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

It being within the proper scope of legislative authority to pass general laws for the levy and assessment of taxes, the passage of a general law curing and legalizing the levy and collection of taxes irregularly or illegally levied is also an exercise of legislative authority and not an encroachment upon judicial power: *Iowa R. Land Co. v. Soper*, 39–112.

Taxation is an attribute of sovereignty. It is one of the powers necessary to the life and existence of the state, and, unless restricted in the fundamental law, the power of the state is full and ample to subject all species of property within its limits to taxes for all lawful purposes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

Property cannot be taxed until authority therefor be conferred by the legislature, and the manner of imposing taxes authorized by law must be followed: *Chicago, R. I. & P. R. Co. v. Davenport*, 51–451.

No property can be taxed until the law-making power authorizes and requires it to be done, and if it has been authorized only in a particular way, that alone can be pursued. It cannot be done in another: *Tallman v. Treasurer of Butler County*, 12–531.

Without express legislative enactment or constitutional provision the property of the people cannot be subjected to taxation: *Appanoose County v. Vermilion*, 70–365.

Judicial revision of legislative action: Where the legislative authority reserves to itself the power to act under certain circum-

stances, the existence of such circumstances is to be determined by it, and a court cannot call into question the propriety of its action: *Miners' Bank v. United States*, 1 G. Gr., 553.

The judicial branch of the government has no power to determine whether an act of the legislative branch is wise or unwise, nor has it power to declare an act void except in cases where the statute in question is plainly, palpably, and without doubt, repugnant to some provision of the constitution: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

And see notes to art. 5, § 1.

Delegation of legislative power: The legislative authority being vested in the general assembly, it is not competent for it to submit the question whether an act shall become a law to the vote of the people. Therefore, *held*, that a statute providing for a submission to vote, in each county, of the question as to whether a prohibitory liquor law should be in force in that county, was unconstitutional, and that the act itself was in force throughout the state without such submission: *Santo v. State*, 2-165, 203; *State v. Beneke*, 9-203.

So the license act of 1857, containing a provision that the prohibitory law of 1855 should not be repealed in any county except by a vote of the people of that county, was held unconstitutional: *Geebrick v. State*, 5-491.

Held, also, that a statute providing for the submission to vote in each county of the question whether a previous prohibitory liquor law allowing the sale of wine and beer should be repealed within that county, and the sale of wine and beer prohibited, was unconstitutional: *State v. Weir*, 33-134.

Held, also, that a statute which prohibited stock from running at large, and was a valid enactment in itself, but contained a section providing that the act should not be enforced in any county until adopted by the electors of that county, was in force throughout the state without any such submission to vote, the provision for a submission being unconstitutional: *Weir v. Cram*, 37-649.

But a statute allowing the county judge to submit to vote in each county the question whether sheep and swine should be allowed to run at large was held not unconstitutional as being a delegation of legislative power, inasmuch as the law itself was in force without such vote, and the people of each county were simply authorized to adopt its provisions as a police regulation: *Dalby v. Wolf*, 14-228.

Although the general assembly cannot delegate to the people the right to make or repeal a law, it has not been held that the state cannot delegate legislative power to municipal corporations within proper bounds: *State v. King*, 37-462.

It is not unconstitutional to provide, in an act enlarging the boundaries of a city, that it shall only take effect after its acceptance by the city council: *Morford v. Unger*, 8-82.

A statute empowering cities of a certain grade to establish superior courts by vote is not unconstitutional as providing for an exercise of legislative power by the people. The statute itself is in force without any vote, but simply confers upon cities an option to be exercised by vote to avail themselves of the power conferred: *Lytle v. May*, 49-224.

A statute conferring upon cities authority to be exercised at their discretion is not void as delegating legislative power. Such statute confers authority which the city may exercise or not, as it chooses: *Des Moines v. Hillis*, 55-643.

The voting of aid to railways by a county is not in derogation of the legislative power vested in the general assembly: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Sessions. SEC. 2. The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation.

As to the powers of the general assembly at an extra session, see note to art. 4, § 11.

Representatives. SEC. 3. The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the presidential election, when the election shall be on the Tuesday next after the first Monday in November, and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified.

[By the amendment [sec. 7] inserted at the end of art. 2 the election now occurs uniformly in November.]

Eligibility. SEC. 4. No person shall be member of the house of representatives who shall not have attained the age of twenty-one years; be a male citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may have been chosen to represent.

[By an amendment to the constitution properly proposed (17 G. A., Joint Res. No 5; 18 G. A., Joint Res. No. 6), and adopted by vote of the electors at the general election in 1880, the words "free white" were stricken from the second line of this section.]

Senators. SEC. 5. Senators shall be chosen for the term of four years, at the same time and place as representatives; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship.

Number and classification. SEC. 6. The number of senators shall not be less than one-third nor more than one-half the representative body; and shall be so classified by lot that one class, being as nearly one-half as possible, shall be elected every two years. When the number of senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in numbers as practicable.

Elections determined. SEC. 7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

Quorum. SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Authority of the houses. SEC. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.

Protest. SEC. 10. Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.

Privilege. SEC. 11. Senators and representatives, in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to or returning from the same.

Vacancies. SEC. 12. When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.

Doors open. SEC. 13. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

Adjournments. SEC. 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

Bills. SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

Approval. SEC. 16. Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him (Sunday excepted), the same shall be a law in like manner

as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof.

An act is not passed by the legislature until it is approved by the governor, who, for such purpose, is a part of the legislature: *United States v. Fanning*, Mor., 348.

The copy or certificate, in the printed acts, of the approval by the governor, is but evidence of the fact, and is not essential in order that the act may take effect. It is the approval of the original bill filed in the office of the secretary of state which is required to give the act validity: *Dishon v. Smith*, 10–212.

In case a bill is submitted to the governor for his approval during the last three days of a session of the general assembly, and he neither signs nor returns it with objections before the adjournment, it becomes a law only in case he subsequently approves it; and the filing of the bill within the thirty days mentioned, with the secretary of state, without approval or disapproval, will not give it the effect of a law: *Darling v. Boesch*, 67–702.

The fact that a law passed thirty-four years previously did not bear the signature of the governor, *held* not sufficient to render the act void. The presumption would be that the act became a law by failure of the governor to return it within proper time after its presentation to him: *Collins v. Laucier*, 45–702.

Majority vote. SEC. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

Receipts and expenditures. SEC. 18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at every regular session of the general assembly.

Impeachment. SEC. 19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

Who liable to; judgment. SEC. 20. The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Members not appointed to office. SEC. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Disqualification. SEC. 22. No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Failure to account. SEC. 23. No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly, or be eligible to hold any office of trust or profit in this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

Money drawn. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

Compensation of members. SEC. 25. Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per diem compensation as fixed by law for the regular session, and none other.

Laws, when to take effect; publication. SEC. 26. No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next, after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.

An act not now in force, conferring upon the governor authority to publish acts of a general nature, and providing that they should take effect from such publication, *held* unconstitutional as delegating to the governor the power given to the legislature to determine what acts should go into effect by publication: *Scott v. Clark*, 1-70; *Pilkey v. Gleason*, 1-522.

Under the provision found in a former constitution, that statutes should take effect only when published and circulated by authority, *held*, that the publication without legislative authority was not sufficient to bring the statute into operation: *Calkin v. State ex rel.*, 1 G. Gr., 68.

Further, as to publication and taking effect, see the statutory provision, § 37, and notes thereto.

Divorce. SEC. 27. No divorce shall be granted by the general assembly.

A divorce granted by the territorial legislature *held* to be valid, where it did not appear to have been granted for causes over which the district courts had jurisdiction: *Levins v. Sleator*, 2 G. Gr., 604.

Lotteries. SEC. 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.

A contract in furtherance of a lottery scheme *held* void: *Guenther v. Dewein*, 11-133.

Acts; one subject; expressed in title. SEC. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

Act to embrace but one subject: The intention of the provision of this section prohibiting more than one subject being embraced in the same act was to prevent the union in the same act of incongruous matter and of objects having no connection or relation. But there must be some limit to the division of matter into separate bills and acts. It cannot be held that each step should be embraced in a separate act. The unity of object is to be looked for in the ultimate end designed to be attained, and not in the details looking to that end: *State ex rel. v. County Judge*, 2-280.

Therefore, *held*, that an act containing sixty-six sections, entitled "An act in relation to certain state roads," in which forty-six roads were established, others vacated, and provisions for the relocation of still others were made, was not in conflict with the constitutional provision: *Ibid.*

An act entitled "An act for revising and consolidating the laws and incorporating the city of Dubuque and establishing a city court therein," *held* not objectionable as embracing more than one subject: *Davis v. Woolnough*, 9-104, 107.

The act of 1855 for the suppression of intemperance, *held* not to embrace more than one subject, the several provisions therein being but so many steps fairly conducive to the end or object expressed in the title: *Santo v. State*, 2-165.

The statute (§ 2421) prohibiting the sale of malt or vinous liquors within two miles of city limits, and giving cities authority to regulate and license the sales of such liquors within those limits, *held* not unconstitutional as containing more than one subject: *State v. Shroeder*, 51-197.

The fact that the title of an act embraces more than one subject will not affect its validity: *Ibid.*

The act of 20 G. A., ch. 143, amendatory of prior legislation, intended for the suppression of the traffic in intoxicating liquors, and providing for additional penalties and remedies against the violators of the statute, does not embrace more than one subject under the pro-

hibition of this provision: *Martin v. Blattner*, 68–286.

The statute in relation to school bonds (§§ 2961–2964) is not unconstitutional as embodying more than one subject: *Ackley School Dist. v. Hall*, 113 U. S., 135.

Subject to be embraced in title: Provisions made in an act entitled "An act to amend an act to incorporate the city of Muscatine," for enlarging the corporate boundaries of said city, *held* to be sufficiently specified in the title: *Morford v. Unger*, 8–82.

Provisions for excluding territory from the limits of cities already incorporated are sufficiently covered by the title of an act "for the incorporation of cities:" *Whiting v. Mt. Pleasant*, 11–482.

Section applied: See *Duncombe v. Prindle*, 12–1.

Every law prescribing duties must have the sanction of liabilities; therefore, *held*, that the statutory provision (§ 2002) prescribing the liabilities of railroad companies in certain cases, etc., was sufficiently embraced in the title of the bill in which it was originally enacted, which was "An act in relation to the duties of railroad companies:" *McAunich v. Mississippi & M. R. Co.*, 20–338.

Statutory provisions as to the method of enforcing a judgment against a municipal corporation are sufficiently connected with the subject of the chapter on executions, under which they are found, not to be objectionable under this constitutional provision: *Porter v. Thomson*, 22–391.

Where an act in one section legalized the organization of a school district, and in another legalized the acts of the officers thereof, *held*, that the second was so connected with the first that it was sufficiently embraced in the title "An act to legalize the organization of the," etc., or at least that the invalidity on this ground would extend only to the second section: *State ex rel. v. Squires*, 26–340.

In an act to amend the charter of the city of Keokuk was inserted a section purporting to legalize elections previously held to determine whether the city council should subscribe to the stock of a certain railroad; *held*, that such section was not in any sense an amendment to the charter, and the object was not embraced in the title, nor germane to anything contained therein, and the section was, therefore, void under a statutory provision (§ 669) containing similar provisions in reference to ordinances: *Williamson v. Keokuk*, 44–88.

A section contained in an act entitled "An act providing the place of bringing suits in certain cases," designating upon whom service might be made in such cases, *held* germane to the subject expressed in the title: *Farmers' Ins. Co. v. Highsmith*, 44–330.

The statute reorganizing the judicial districts and providing for the election of additional judges is not in conflict with this section: *State v. Emmons*, 72–265.

Local or special laws. SEC. 30. The general assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for state, county, or road purposes;

For laying out, opening, and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

Laws general and uniform; boundaries of counties. In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

General and special laws: A statute which operates upon a particular condition and attaches to it certain consequences, so that whenever that condition exists such consequences follow, is a general and not a special statute: *Iowa R. Land Co. v. Soper*, 39–112.

A law which affects all persons who may be brought within the relations for which it provides is a general and not a special law within the meaning of those provisions of the constitution prohibiting the passing of special laws in cases where general laws may be made applicable. Therefore, *held*, that the statute regulating the liability of railway companies for injuries to employees is general and not special, within the constitutional prohibition: *McAunich v. Mississippi & M. R. Co.*, 20–338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36–52.

Special laws as to taxation: This prohibition of special laws for the assessment and collection of taxes is not infringed by the provision (§ 1291) allowing a debtor to deduct the amount of his moneys and credits in listing his property for assessment: *Macklot v. Davenport*, 17–379.

A law remitting penalties upon taxes not paid within a certain time is not a special law within the meaning of this provision: *Beecher v. Board of Supervisors*, 50–538.

A curative act legalizing the levy and assessment of taxes made for a year when no law authorizing any levy and assessment was in force,

held not in conflict with this section: *Boardman v. Beckwith*, 18-292.

For the incorporation of cities and towns: The legislature cannot pass a special act amending the charter of a municipal corporation. Such act would be in conflict with the clause prohibiting special acts for the incorporation of cities and towns, and would be a law not of general and uniform operation in a case where a general law could be made applicable: *Ex parte Pritz*, 9-30; *Davis v. Woolnough*, 9-104; *Hetherington v. Bissell*, 10-145; *Baker v. Steamboat Milwaukee*, 14-214.

This provision is not violated by a law empowering cities and towns incorporated under a special charter to amend such charter: *Von Phul v. Hammer*, 29-222.

Applicable to municipal corporations: A law applicable to all cities and towns existing under special charter is not unconstitutional, even though it be considered an amendment of their charters: *State v. King*, 37-462.

A law establishing a special court in a particular town named, and providing for the jurisdiction, etc., thereof, *held* unconstitutional, as being in fact an amendment to the city charter, and as being a local and special law in a case where a general law could be made applicable: *McGregor v. Baylies*, 19-43.

An act which operates upon a particular condition, and attaches to it certain consequences whenever that condition exists, is not in conflict with this provision. So an act applying only to cities under special charters was held not unconstitutional, although it could apply to but few cities: *Haskel v. Burlington*, 30-232.

A statute validating the acts of municipal corporations in levying special taxes in excess of the legal limit, to pay judgments, *held* constitutional: *Iowa R. Land Co. v. Soper*, 39-112.

As the legislature cannot amend the charter of a city, it cannot legalize an act of such city not authorized by the charter, as such an act would be equivalent to an amendment: *Independent School Dist. v. Burlington*, 60-500; *Stange v. Dubuque*, 62-303.

By the constitutional provision that no corporation shall be created by special laws, it was not intended to repeal city charters already granted: *Warren v. Henly*, 31-31.

The provision of art. 8, § 12, authorizing the general assembly to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly, has reference exclusively to corporations for pecuniary purposes, and does not authorize the amendment of the charters of municipal corporations by special statute: *Ex parte Pritz*, 9-30.

The statutory provisions relating to the enforcement of judgments against municipal corporations are not in any proper sense amendments to the charter of a city, and are not obnoxious to this constitutional prohibition: *Porter v. Thomson*, 22-391.

Although the passage of a local or special law incorporating a certain school district would be in conflict with the constitutional provision above referred to, yet a curative act legalizing a defective organization thereof is not unconstitutional. In such case a general law could not be made applicable: *State ex rel. v. Squires*, 26-340.

Other cases of special laws: A special act authorizing the building of a particular railroad, *held* not in violation of the provision of this section, for the reason that the object of the act was to execute certain trusts confided to the state to secure the building of a railroad on a particular route: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

Statutes legalizing official acts done without authority are not invalid on account of being special statutes, for the reason that a general statute could not be made applicable in such cases: *Independent Dist. v. Independent Dist.*, 62-616.

An appropriation is necessarily made by a special act, and is not invalid because not general and uniform throughout the state: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

All statutes punishing criminally the violation of law, or providing for the prevention of crimes, are special in their character, and do not come within the restriction that they shall be of uniform operation with respect to different crimes. They may provide remedies and penalties as to nuisances, for instance, committed by the sale of intoxicating liquors, which are not extended to other cases of nuisance: *Martin v. Blattner*, 68-286.

An act providing for the holding of terms of court in a particular county at a place other than the county seat is not unconstitutional. A general law could not be applicable in such case: *Cooper v. Mills County*, 69-350.

The statutory provision (§ 235) reorganizing the judicial districts and providing for additional judges relates to subjects of legislation where a general law could not be made applicable: *State v. Emmons*, 72-265.

Uniformity of taxation: The restriction upon the power of taxation that taxes must be uniform is applicable generally to the principle or plan of taxation, and not to specific or particular taxes. It means that all individuals and all classes shall be uniformly taxed, and that all must contribute uniformly with like individuals and like classes to these burdens. The manner of imposing the burden must of necessity be left to the discretion of the legislative branch of the government: *Warren v. Henly*, 31-31.

An act providing a special method of taxing express companies *held* not unconstitutional: *United States Ex. Co. v. Ellyson*, 28-370.

The mere fact that land in question being that of a non-resident was taxed higher than corresponding lands of residents will not be sufficient to show that there has been a discrimination against non-residents and will not render the tax title void: *Beeson v. Johns*, 8 S. C. Rep., 352.

The statutory provision (§ 1281) with reference to assessment of railroad bridges across the Mississippi and Missouri rivers is not unconstitutional, being of uniform operation with reference to the class of bridges therein mentioned: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74-283.

Uniform operation: As to the requirement that laws shall have a uniform operation, see art. 1, § 6, and notes.

Boundaries of counties: The provision that no law changing the boundary of a county shall have effect until submitted to the people of the counties affected, applied: *Duncombe v. Prindle*, 12–1.

Extra compensation. SEC. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation, or claim be allowed by two-thirds of the members elected to each branch of the general assembly.

Oath of members. SEC. 32. Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator (or representative, as the case may be), according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.

Census. SEC. 33. The general assembly shall, in the years one thousand eight hundred and fifty-nine, one thousand eight hundred and sixty-three, one thousand eight hundred and sixty-five, one thousand eight hundred and sixty-seven, one thousand eight hundred and sixty-nine, and one thousand eight hundred and seventy-five, and every ten years thereafter, cause an enumeration to be made of all the inhabitants of the state.

Apportionment. SEC. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of inhabitants in each.

Districts. SEC. 35. The senate shall not consist of more than fifty members, nor the house of representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the state according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

[By proper legislative action proposed amendments striking the word "white" from each of the last three preceding sections as they originally stood were submitted to the electors at the general election in 1868 and adopted.]

Ratio of representation. SEC. 36. At its first session under this constitution, and at every subsequent regular session, the general assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

Districts. SEC. 37. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

Elections by general assembly. SEC. 38. In all elections by the general assembly, the members thereof shall vote viva voce; and the votes shall be entered on the journal.

ARTICLE 4.— EXECUTIVE DEPARTMENT.

Governor. SECTION 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa.

Election and term. SEC. 2. The governor shall be elected by the qualified electors at the time and place of voting for members of the general assembly, and shall hold his office two years from the time of his installation, and until his successor is elected and qualified.

Lieutenant-governor; returns of elections. SEC. 3. There shall be a lieutenant-governor, who shall hold his office two years, and be elected at the same time as the governor. In voting for governor and lieutenant-governor, the electors shall designate for whom they vote as governor, and for whom as lieutenant-governor. The returns of every election for governor and lieutenant-governor, shall be sealed up and transmitted to the seat of government of the state, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

Election by general assembly. SEC. 4. The persons respectively having the highest number of votes, for governor and lieutenant-governor, shall be declared duly elected; but in case two or more persons shall have an equal, and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of said persons governor, or lieutenant-governor, as the case may be.

Contested elections. SEC. 5. Contested elections for governor, or lieutenant-governor, shall be determined by the general assembly in such manner as may be prescribed by law.

Eligibility. SEC. 6. No person shall be eligible to the office of governor, or lieutenant-governor, who shall not have been a citizen of the United States, and a resident of the state two years next preceding the election, and attained the age of thirty years at the time of said election.

Commander-in-chief. SEC. 7. The governor shall be commander-in-chief of the militia, the army, and navy of this state.

Duties. SEC. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

Execution of laws. SEC. 9. He shall take care that the laws are faithfully executed.

Vacancies. SEC. 10. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

Convening assembly. SEC. 11. He may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

The general assembly, when it is convened in special or extra session, has full legislative authority, unless its business is restricted by some constitutional provision. Its action is not confined to the special purpose for which it is convened, and it may enact any law at such session that it might at a regular session: *Morford v. Unger*, 8-82.

Message. SEC. 12. He shall communicate, by message, to the general assembly, at every regular session, the condition of the state, and recommend such matters as he shall deem expedient.

Adjournment. SEC. 13. In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next general assembly.

Disqualification. SEC. 14. No person shall, while holding any office under the authority of the United States, or this state, execute the office of governor, or lieutenant-governor, except as hereinafter expressly provided.

Term; compensation of lieutenant-governor. SEC. 15. The official term of governor, and lieutenant-governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The lieutenant-governor, while acting as governor, shall receive the same pay as provided for governor; and while presiding in the senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a senator, and none other.

Pardons. SEC. 16. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

See the provision of statute (§ 6110) and notes.

Lieutenant-governor to act as governor. SEC. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant-governor.

President of senate. SEC. 18. The lieutenant-governor shall be president of the senate, but shall only vote when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president pro tempore.

Vacancies. SEC. 19. If the lieutenant-governor, while acting as governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the president pro tempore of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

The statutory provision (§ 1232) for the suspension by the governor of other officers elected by the people as here provided is not unconstitutional: *Brown v. Duffus*, 66–193.

As to *mandamus* against executive officer, see notes to art. 3, § 1.

Seal of state. SEC. 20. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the state of Iowa.

Grants and commissions. SEC. 21. All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed

with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

Secretary, auditor and treasurer. SEC. 22. A secretary of state, auditor of state, and treasurer of state, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law.

ARTICLE 5.—JUDICIAL DEPARTMENT.

Courts. SECTION 1. The judicial power shall be vested in a supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.

Judicial authority: The provisions (§ 580) for proceedings in court for the annexation of contiguous territory to a city are not unconstitutional as conferring upon a court powers not judicial in their nature. The question as to whether the conditions therein mentioned exist, or whether, under the circumstances, justice and equity require the annexation, are of a judicial character, and their determination may properly be vested in the judicial department: *Burlington v. Leebrick*, 43–252.

The charter of a city, conferring upon the mayor judicial authority, is not in conflict with the constitutional provision that the three departments of government shall be distinct. The mayor of a city is not a part of the government of the state of Iowa: *Santo v. State*, 2–165, 220.

Power to declare statute unconstitutional: The constitutional provision that no person charged with the exercise of powers properly belonging to one of the three departments of government shall exercise any function appertaining to either of the others does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments: *Bryan v. Cattell*, 15–538.

To the judicial department is intrusted the power to decide all questions of constitutional law. It belongs to that department, as a matter of right and duty, to declare every act of the legislature made in violation of the constitution, or any provision of it, null and void; but the violation of the constitution should be clear and apparent before the act should be declared void: *Reed v. Wright*, 2 G. Gr., 15.

To declare an act unconstitutional and void is the exercise of the highest power of the court and is not to be resorted to unless it becomes necessary. It is the duty of the court to give an act such a construction, if possible, as to avoid the necessity and uphold the act: *State ex rel. v. County Judge*, 2–280.

The power of the court to hold an act of the legislature unconstitutional and void, while everywhere admitted, is of the most delicate and responsible nature, and should not be resorted to unless the case be clear, decisive and unavoidable: *Santo v. State*, 2–165, 208; *McCormick v. Rusch*, 15–127.

It is the duty of the court to give a statute such construction, if possible, as will maintain it rather than one which will render it unconstitutional: *Santo v. State*, 2–165, 208; *State ex rel. v. County Judge*, 2–280; *Duncombe v. Prindle*, 12–1; *Iowa Homestead Co. v. Webster County*, 21–221.

The supreme court will not consider constitutional questions unless it is necessary for the disposition of the case: *Bond v. Wabash, St. L. & P. R. Co.*, 67–712.

The court will not decide the constitutionality of a statute unless it be necessarily involved in a case which cannot be disposed of without such decision. If there is any other point upon which the case can be decided, the constitutionality of the statute will not be passed upon. Parties cannot, by waiving other questions, form an agreed case upon which the courts will decide the constitutional question: *Dubuque & D. R. Co. v. Diehl*, 64–635.

Where a party assails the constitutionality of a statute and goes into the supreme court as appellant, that court will scrutinize the record with considerable strictness to see whether the determination of the constitutional question is necessary to the decision of the case: *State ex rel. v. Rosencrans*, 65–382.

Appellate courts will not decide questions of constitutional law, unless absolutely necessary, when the bench is not full, or when all the judges cannot assist in the determination: *McClure v. Owens*, 21–133.

A statute should not be supported unless its constitutionality is so obvious as to admit of no doubt: *Whiting v. Mt. Pleasant*, 11–482.

A court should declare an act of the legislature void only when it violates the constitution so clearly, palpably and plainly as to leave no doubt or hesitation in their minds: *Morrison v. Springer*, 15–304.

It is an elementary principle in determining the constitutionality of a statute that any reasonable doubt must be solved in favor of the legislative action, and the act sustained: *Gates v. Brooks*, 59–510.

The authority and power of the court to annul an act of the legislature in conflict with the fundamental law is universally acknowledged, but this authority should be exercised only when the statute is clearly, palpably, plainly and beyond reasonable doubt in conflict with the constitution: *Stewart v. Board of Supervisors*, 30–9.

It is fundamental that a statute should not be declared unconstitutional unless it is clearly so: *Central Iowa R. Co. v. Board of Supervisors*, 67–199.

The court is not authorized to pass upon the justice or expediency of a statute. Expediency

and public policy and state necessity are not within its domain. Therefore the court has no authority to annul an act of the legislature as unconstitutional unless it is found to be in clear, plain and palpable conflict with the constitution: *Ibid.*

Where the legislature had passed an act appropriating a sum of money to aid a private corporation in testing the validity of the barbed wire patents, *held*, that the courts had no jurisdiction to inquire into the question whether such an appropriation was wise or not: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

Under the provision of the constitution that a special statute should not be passed in cases where a general law could be made applicable, *held*, that the legislature is not the sole judge of whether a general law can be made applicable, but that the special law might be declared unconstitutional for the reason that a general law applicable to the subject might be framed: *Ex parte Pritz*, 9-30.

Where the statute allows an appeal from the action of the board of supervisors in establishing a road, a court in determining such appeal may pass upon the constitutionality of the act under which the road is laid out: *Bankhead v. Brown*, 25-540.

Construction of the constitution: To arrive at the meaning of words used in a section of the constitution, sections preceding and following it, having reference to the same subject-matter, must be read and considered, unless the words to be construed have such a clear and express meaning that there can be but one conclusion as to what was meant: *Allen v. Clayton*, 63-11.

Where, after considering previous and subsequent sections relating to the same matter, there is any doubt as to the meaning of the language used, then the court may consider, first, the evil intended to be remedied; second, the debates on the subject in the convention which framed the constitution; third, the contemporaneous legislative construction of the constitution; and fourth, the practical construction adopted by the people: *Ibid.*

Effect of unconstitutionality: Where money is paid under mistake of law as to the unconstitutionality of a statute, there being no charge of fraud, duress, deceit or mistake of fact, it cannot be recovered back: *Kraft v. Keokuk*, 14-86.

So *held* where a license fee for the permission to sell intoxicating liquors had been paid to a city in pursuance of a provision of a statute which, after the expiration of the time for which the license was granted and the enjoyment of the privilege by the person paying the tax, was declared unconstitutional: *Ibid.*

Unconstitutionality of part: Statutes which are partly in conflict with the constitution will be held void no further than as to those parts which are unconstitutional. Provisions which are within the legislative authority will be enforced. The same rule applies in case of the ordinance of a city. But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fail with the void part: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196; *Packet Co. v. Keokuk*, 95 U. S., 80.

An act void in part as unconstitutional is not necessarily void *in toto*. If sufficient remain to effect its object without the aid of the invalid portion, the latter only shall be rejected and the former shall stand: *Santo v. State*, 2-165, 205.

Therefore, *held*, that the prohibitory act of 1855, one section of which provided that it should take effect from a certain date provided it was adopted by a popular vote, became a law although the provision for such submission was unconstitutional: *Ibid.*

Where an act was in three sections, the subject-matter of the first and third being properly embraced in the title, *held*, that these portions were constitutional, although the second section referred to a subject-matter not embraced in the title: *Henkle v. Keota*, 68-334.

When one section of a statute is void and others valid, and it evidently appears that one section is the compensation or inducement for the other, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be held void. But, in a particular case, *held*, that one section was not an inducement to, but was entirely distinct and separate from, the other portion of the act, and that the balance of the act was valid although that one section was unconstitutional: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

Where a portion of a statute is unconstitutional, and that portion affects the validity of the entire statute, it must all fall: *Geebrick v. State*, 5-491.

Where a city ordinance provided that an offense should be punished to a greater extent than the city had authority to inflict punishment, *held*, that a conviction thereunder would authorize the infliction of punishment up to the limit of the authority of the city: *Keokuk v. Dressell*, 47-597.

Decisions of other courts as authority: In questions arising upon the construction of the laws and constitution of this state, the supreme court of the United States is not the final arbiter, but it is required to look to the courts of this state for the rules of construction of its laws and constitution: *McClure v. Owen*, 26-243.

The construction given to the constitution of a foreign state by the court of last resort of such state will be regarded as authority by the courts of this state: *Brown v. Phillipps*, 16-210.

Superior and inferior courts: An inferior court is one from which an appeal lies to a superior court, and over which the latter has a supervisory power and control. Courts may be organized not inferior to the district, provided they be inferior to the supreme court: *Hetherington v. Bissell*, 10-145.

A statute for the organization of a city court possessing in some respects a co-ordinate jurisdiction with the district court, *held* not unconstitutional under such provision: *Davis v. Woolnough*, 9-104.

In general, with reference to this section, see *Laird v. Dickerson*, 40-665; *Iowa Land Co. v. Soper*, 39-112, 123.

Supreme court. SEC. 2. The supreme court shall consist of three judges, two of whom shall constitute a quorum to hold court.

As to the number of judges, see now § 177.

Judges elected. SEC. 3. The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their court at such time and place as the general assembly may prescribe. The judges of the supreme court so elected, shall be classified so that one judge shall go out of office every two years; and the judge holding the shortest term of office under such classification, shall be chief justice of the court during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each judge of the supreme court shall be six years, and until his successor shall have been elected and qualified. The judges of the supreme court shall be ineligible to any other office in the state, during the term for which they shall have been elected.

Jurisdiction. SEC. 4. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.

Law and equity: A marked distinction is made between law and equity, and the two jurisdictions should be kept distinct and not confounded: *Cooper v. Armstrong*, 3 G. Gr., 120.

And see on this point notes to § 4392.

Appeals: The provision (§ 4402) prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, unless the judge shall certify the question on which the decision of the supreme court is desired, is not unconstitutional as taking away the right of appeal and trial *de novo* in equity cases as provided by this section. Such statutory provision is a mere restriction or regulation upon the right of trial *de novo*: *Andrews v. Burdick*, 62–714. And see notes to § 4402.

Jurisdiction: See notes to § 4392.

Errors at law: The provision (§ 4398) dispensing with the necessity of a motion for new trial to secure review of actions at law is not in conflict with this provision. Previous to that statute the ruling of the lower court on a motion to set aside the verdict as contrary to the evidence was reviewed as a matter of law, and the section referred to simply acts as a standing motion for new trial: *Coffin v. City Council*, 26–515.

District court and judge. SEC. 5. The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified: and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected.

This section does not prevent a judge from holding court in another district than his own, by exchange, under the provisions of § 220: *State v. Stingley*, 10–488.

Since the amendment of the constitution with reference to the judicial districts (art. 5, § 10), and the statutory provisions increasing the number of judges (§ 230), more than one judge may properly hold the district court in a county at the same time: *State v. Emmons*, 72–265.

When a judge is authorized by statute to perform a judicial act in vacation, his act, when done, has the force and effect of an act done by the court: *McLane v. Granger*, 71–152.

Jurisdiction. SEC. 6. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

The district court is here invested with all the powers of a court of law, and those of a court of equity, and the distinctions between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Held, that in a proceeding in equity the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7–110.

The jurisdiction of the district court is not limited by the provisions giving justices jurisdiction in cases where the amount does not

exceed one hundred dollars: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 592.

The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that Rev., § 2395, which prohibited the bringing of action in that court on claims against an estate for a mere money demand, except with the approbation of the county court, was not intended to take away the jurisdiction of that court, but merely as a restraint on the plaintiff: *Sterritt v. Robinson*, 17–61; and that the failure on the part of the plaintiff to obtain such leave must be set up as a defense, and could not be made the ground of a collateral attack on the judgment: *Cooley v. Smith*, 17–99.

Further, as to the jurisdiction of district courts, see *Laird v. Dickerson*, 40–665, 669.

Conservators of the peace. SEC. 7. The judges of the supreme and district courts shall be conservators of the peace throughout the state.

Style of process. SEC. 8. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

An original notice is not "process" within the meaning of this section: *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42.

"Process" defined. "Prosecutions," as here used, are such criminal prosecutions as shall be instituted and prosecuted before the tribunals provided for in this article, under the statutes of the state, and do not include prosecutions for violations of city ordinances. The latter may be in the name of the city: *Davenport v. Bird*, 34–524.

The expressions "State of Iowa" and "The State of Iowa" are essentially the same: *Harriman v. State*, 2 G. Gr., 270.

An indictment in which the presentment is "in behalf of the state of Iowa" is good, although the expression "In the name and by the authority of the state of Iowa" is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution that it is made "in the name and by the authority," etc.: *Wrocklege v. State*, 1–167.

A prosecution to recover a fine should be in the name of the state, and not in the name of the treasurer of the county to which the fine would go when recovered: *Rogers v. Alexander*, 2 G. Gr., 443.

Salaries. SEC. 9. The salary of each judge of the supreme court shall be two thousand dollars per annum; and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hundred and sixty; after which time they shall severally receive such compensation as the general assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they shall have been elected.

Judicial districts. SEC. 10. The state shall be divided into eleven judicial districts; and after the year eighteen hundred and sixty, the general assembly may reorganize the judicial districts, and increase or diminish the number of districts, or the number of judges of the said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session; and no reorganization of the districts, or diminution of the judges, shall have the effect of removing a judge from office. Such reorganization of the districts, or any change in the boundaries thereof, or any increase or diminution of the number of judges, shall take place every four years thereafter, if necessary, and at no other time.

[AMENDMENT.] At any regular session of the general assembly, the state may be divided into the necessary judicial districts for district court purposes, or the said districts may be reorganized and the number of the districts and the judges of said courts increased or diminished; but no reorganization of the districts or diminution of the judges shall have the effect of removing a judge from office.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) the foregoing was submitted to the electors at the general election in 1884 as a proposed amendment to the constitution, and was by them adopted.]

Since the adoption of this amendment the legislature has power to provide for the election of more than one judge in a district, and to authorize two or more judges to hold court in the same county at the same time: *State v. Emmons*, 72–265.

When chosen. SEC. 11. The judges of the supreme and district courts shall be chosen at the general election; and the term of office of each judge shall commence on the first day of January next after his election.

Attorney-general. SEC. 12. The general assembly shall provide, by law, for the election of an attorney-general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

County attorney. SEC. 13. The qualified electors of each county shall, at the general election in the year eighteen hundred and eighty-six, and every two years thereafter elect a county attorney, who shall be a resident of the county for which he is elected, and shall hold his office for two years, and until his successor shall have been elected and qualified.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) a proposition to substitute the foregoing for the original section was submitted to the electors at the general election in 1884, and by them adopted. The original section was as follows:

SEC. 13. The qualified electors of each judicial district shall, at the time of the election of district judge, elect a district attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.]

Carrying into effect. SEC. 14. It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.

The grand jury. [SEC. 15.] The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of the grand jury.

[By proper legislative action (19 G. A., Joint Res. No. 12, and 20 G. A., Joint Res. No. 13) the foregoing was submitted to the electors at the general election in 1884 as a proposed amendment to the constitution, and was by them adopted.]

ARTICLE 6.—MILITIA.

Who constitute. SECTION 1. The militia of this state shall be composed of all able-bodied male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state; and shall be armed, equipped, and trained, as the general assembly may provide by law.

[By proper legislative action a proposed amendment striking the word "white" from this section, as it originally stood, was submitted to the electors at the general election in 1868 and adopted.]

Exemption. SEC. 2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace; *provided*, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

Officers. SEC. 3. All commissioned officers of the militia (staff officers excepted) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor.

ARTICLE 7.—STATE DEBTS.

Credit not to be loaned SECTION 1. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Limitation. SEC. 2. The state may contract debts to supply casual deficits or failures in revenues; or to meet expenses not otherwise provided for;

but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

In determining the state indebtedness the indebtedness of the counties of the state is not to be considered: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Losses to school funds. SEC. 3. All losses to the permanent school, or university fund of this state, which shall have been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state, in favor of the respective fund sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

The school fund belongs to the state, and it has solemnly pledged itself to maintain the same inviolate: *Des Moines County v. Harker*, 34-84.

War debts. SEC. 4. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the debts so contracted shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Question of incurring debt submitted. SEC. 5. Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of this state, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people.

Legislature may repeal. SEC. 6. The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid.

Tax imposed distinctly stated. SEC. 7. Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

ARTICLE 8.—CORPORATIONS.

How created. SECTION 1. No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organ-

ization of all corporations hereafter to be created, except as hereinafter provided.

It was not intended hereby to repeal city charters already granted: *Warren v. Henly*, 31-31.

Local or special laws for incorporation of cities and towns prohibited, see art. 3, § 30.

Property taxable. SEC. 2. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals.

Taxation of corporations: This section requires the legislature to provide for the taxation of such property the same as private property, and an act releasing such property from city taxes is void: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633, 642; *Dubuque v. Illinois Cent. R. Co.*, 39-56. And see *Iowa R. Land Co. v. Woodbury County*, 39-172.

A statute relating to the taxation of express and telegraph companies *held* not in violation of this provision, for the reason that it made such property liable to taxation in the same manner and to the same extent when held by individuals as when held by a body corporate: *United States Ex. Co. v. Ellyson*, 28-370.

Taxation of shares in an incorporated company, which may have some value in addition to the interest in the capital stock by reason of the good-will, etc., of the business of the corporation, does not result in such inequality of taxation between the shareholders in the corporation and individuals holding property similarly employed as to make such taxation unequal: *Davenport Nat. Bank v. Board of Equalization*, 64-140.

Railroad property: So *held*, also, under 14 G. A., ch. 26, regulating the taxation of railroad property: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

No constitutional rights are infringed by providing a different method for assessing railroad property than that provided for assessing property of the same nature belonging to other owners: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

As to taxation of railroad property in general, see *Davenport v. Mississippi & M. R. Co.*, 16-348; *Dubuque & S. C. R. Co. v. Dubuque*, 17-120.

Taxation of water-works: The fact that a company operating water-works is exempted from taxation in part payment for water furnished the city does not render the provision a violation of the constitutional requirement as to taxation of corporate property: *Grant v. Davenport*, 36-396.

State not to be a stockholder. SEC. 3 The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

The state as stockholder in corporation: The provision of this section is not violated by authorizing aid to be voted by counties of the state towards the construction of a railway: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

An act making an appropriation to a corporation to assist it in testing the validity of the barb wire patents, *held* not unconstitutional under the same provision: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

Municipal corporation. SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Act creating banking associations. SEC. 5. No act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

This restriction upon legislative authority to pass or amend acts authorizing or creating corporations or associations with banking powers is not intended to forbid the repeal by the legislature of acts organizing banks, it being required, however, by § 12 of this article, that such repeal be by a two-thirds vote: *Morseman v. Younkin*, 27-350.

State bank. SEC. 6. Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a state bank with branches.

Special basis. SEC. 7. If a state bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.

General banking law. SEC. 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of

state, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in United States stocks, or in interest-paying stocks of states in good credit and standing, to be rated at ten per cent. below their average value in the city of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of such stocks, to the amount of ten per cent. on the dollar, the bank or banks owning said stock shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders responsible. SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

The provision of this section rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, applies only to banks of issue and not to banks merely of discount and deposit: *Allen v. Clayton*, 63-11.

The liability of the stockholder is not limited to a proportional sum, nor is it affected by any fraud or wrong of the officers of the bank or a receiver, and he cannot delay recovery in order to secure contribution: *Stewart v. Lay*, 45-604.

On this subject, see § 1646.

Bill-holders preferred. SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Suspension of specie payments. SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

Amendment or repeal of charters; exclusive privileges. SEC. 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

The provisions as to liability of railroads (§§ 2002, 2007, 2008) are not unconstitutional as in conflict with this section: *Bucklew v. Central Iowa R. Co.*, 64-603; *Central Trust Company v. Sloan*, 65-655.

This section has reference exclusively to corporations for pecuniary purposes, and does not authorize the amendment or repeal of laws for the organization or creation of municipal corporations, in violation of art. 3, § 30: *Ex parte Pritz*, 9-30.

ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1.—*Education.*

Board of education. SECTION 1. The educational interest of the state, including common schools and other educational institutions, shall be under the management of a board of education, which shall consist of the lieutenant-governor, who shall be the presiding officer of the board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the state.

Who eligible. SEC. 2. No person shall be eligible as a member of said board who shall not have attained the age of twenty-five years, and shall have been one year a citizen of the state.

How elected. SEC. 3. One member of said board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this constitution, the board shall be divided, as nearly as practicable,

into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one-half of the board shall be chosen every two years thereafter.

First session. SEC. 4. The first session of the board of education shall be held at the seat of government, on the first Monday of December, after their election; after which the general assembly may fix the time and place of meeting.

Limited. SEC. 5. The session of the board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two-thirds of the board, the governor may order a special session.

Secretary. SEC. 6. The board of education shall appoint a secretary, who shall be the executive officer of the board, and perform such duties as may be imposed upon him by the board, and the laws of the state. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the general assembly.

Rules and regulations. SEC. 7. All rules and regulations made by the board shall be published and distributed to the several counties, townships, and school districts, as may be provided for by the board, and when so made, published, and distributed, they shall have the force and effect of law.

Power to make. SEC. 8. The board of education shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools, and other educational institutions, that are instituted, to receive aid from the school or university fund of this state; but all acts, rules, and regulations of said board may be altered, amended, or repealed by the general assembly; and when so altered, amended, or repealed, they shall not be re-enacted by the board of education.

The legislature has thus full power to make needful regulations, and this power has been given to district boards; and in the absence of abuse of such power being shown, the rules of such boards will not be held unconstitutional (per Cole, J.): *Burdick v. Babcock*, 31–562, 571.

Under this section, *held*, that a statute providing a full system of public instruction for the state was unconstitutional, on the ground that the legislature had no authority to pass such an act, the powers in reference to such matters being committed to the board of education: *District T'p v. Dubuque*, 7–262; *High School v. Clayton County*, 9–175.

High schools are deemed a part of the common school system of the state, though they are not to derive any support or assistance from the school fund: *High School v. Clayton County*, 9–175.

Under the provisions of this section, authorizing an amendment by the legislature of regulations of the board of education, *held*, that an alteration of an act of the board so as to extend and apply its provisions to unincorporated as well as to incorporated cities and towns was an amendment which the legislature might properly make: *Fort Dodge City School Dist. v. District T'p*, 15–434.

Governor ex officio a member. SEC. 9. The governor of the state shall be, *ex officio*, a member of said board.

Expenses. SEC. 10. The board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the general assembly.

State university. SEC. 11. The state university shall be established at one place without branches at any other place, and the university fund shall be applied to that institution, and no other.

Common schools. SEC. 12. The board of education shall provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

Held, that the expression "all youths" prohibits any distinction being made between white and colored children: *Clark v. Board of Directors, etc.*, 24–266; *Smith v. Directors*, 40–518; *Dove v. Independent School District*, 41–689.

Compensation. SEC. 13. The members of the board of education shall each receive the same per diem during the term of their session, and mileage going to and returning therefrom, as members of the general assembly.

Quorum; style of acts. SEC. 14. A majority of the board shall constitute a quorum for the transaction of business; but no rule, regulation, or law, for the government of common schools or other educational institutions shall pass without the concurrence of a majority of all the members of the board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the board shall be, "Be it enacted by the board of education of the state of Iowa."

Board may be abolished. SEC. 15. At any time after the year one thousand eight hundred and sixty-three, the general assembly shall have power to abolish or reorganize said board of education, and provide for the educational interest of the state in any other manner that to them shall seem best and proper.

The board of education was abolished by 10 G. A., ch. 52, § 1.

2.— *School Funds and School Lands.*

Under control of general assembly. SECTION 1. The educational and school fund and lands, shall be under the control and management of the general assembly of this state.

Permanent fund. SEC. 2. The university lands, and the proceeds thereof, and all moneys belonging to said fund shall be a permanent fund for the sole use of the state university. The interest arising from the same shall be annually appropriated for the support and benefit of said university.

Lands appropriated. SEC. 3. The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.

See notes to § 7, *infra*.

Fines, etc., how appropriated. SEC. 4. The money which may have been or shall be paid by persons as an equivalent from exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied in the several counties in which such money is paid, or fine collected, among the several school districts of said counties, in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall from time to time provide.

For statutory provisions, see §§ 2994 and 4606.

It is not contemplated that the fees of the prosecuting attorney in enforcing the collection of the fines, etc., due to the school fund shall be deducted from the whole amount collected. The term "clear proceeds" evidently refers to a case of forfeiture of property or payment of funds in orders or warrants: *Woodward v. Gregg*, 3 G. Gr., 287.

The double damages authorized by § 1972 to be recovered against railroad companies is not a fine such as is contemplated in this section, but is simply a measure of damages: *Mackie v. Central R. of Iowa*, 54-540.

Proceeds of lands. SEC. 5. The general assembly shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons to this state, for the use of the university, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said university, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

Agents of school funds. SEC. 6. The financial agents of the school funds shall be the same that, by law, receive and control the state and county revenue, for other civil purposes, under such regulations as may be provided by law.

Distribution. SEC. 7. The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly.

An act as to distribution of the school fund, *held* unconstitutional as in conflict with this section: *District Tp v. County Judge*, 13-250.

ARTICLE 10.— AMENDMENTS TO THE CONSTITUTION.

How proposed; submission. SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

[Statutory provisions as to submission, see §§ 59-63, page 14. For amendments, see art. 1, § 26; art. 2, §§ 1 and [7]; art. 3, §§ 4, 33, 34 and 35: art. 5, §§ 10, 13 and [17]; art. 6, § 1.]

It is the design and intention of this provision that the proposed amendment should be so entered upon the journals that it can be known from an examination of such journals what it is that has been agreed to by the houses of the general assembly; and such entry is the highest evidence of what the amendment is which is agreed to by each house. Therefore, where it appeared from the journal of the senate of one general assembly that the proposed amendment, as passed by it, was different from the same amendment as concurred in by the subsequent general assembly, and submitted to and voted upon by the people, *held*, that it was not legally adopted and did not become a part of the constitution, although the joint resolution of the general assembly first acting upon the amendment, which was signed by the presiding officers of the two houses and by the governor, and preserved in the office of the secretary of state, showed such amendment to be the same as that subsequently concurred in and submitted; also, *held*, that the recital in the joint resolution of the general assembly which submitted said amendment to vote of the people, that it had been agreed to by the previous general assembly, was not conclusive upon the court: *Koehler v. Hill*, 60-543.

The provisions as to the amendment of the constitution are not simply directory, and the legislative department is not the sole judge as to whether or not they have been complied with, but the courts have jurisdiction to inquire into the question whether these requirements have been observed, and if not to declare the amendment invalid: *Ibid.*

More than one. SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

Convention. SEC. 3. At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, "Shall there be a convention to revise the constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention.

ARTICLE 11.—MISCELLANEOUS.

Jurisdiction of justice of the peace. SECTION 1. The jurisdiction of justices of the peace shall extend to all civil cases (except cases in chancery, and cases where the question of title to real estate may arise), where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

The jurisdiction of justices in such cases is not exclusive, but concurrent with courts of record: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebilbis*, 2 G. Gr., 593.

Counties. SEC. 2. No new county shall be hereafter created containing less than four hundred and thirty-two square miles; nor shall the territory of any organized county be reduced below that area; except the county of Worth, and the counties west of it along the northern boundary of this state, may be organized without additional territory.

An act organizing the county of Crocker *held* unconstitutional under this section: *Garfield v. Brayton*, 33–16.

This section *held* not to prohibit the legislature from establishing a second county seat in a county already organized: *Trimble v. State*, 2 G. Gr., 404.

Indebtedness of political or municipal corporations. SEC. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.

What indebtedness excessive: Outstanding warrants as well as bonds are to be taken into consideration in estimating the indebtedness. The constitutional inhibition applies to indebtedness incurred in any manner or for any purpose: *Council Bluffs v. Stewart*, 51–385.

It applies to indebtedness already due as well as that to become due: *Grant v. Davenport*, 36–396.

If the corporation has money in its treasury to meet its indebtedness, the issue of warrants to any amount, however great, over the constitutional limit, will not be a violation of such provisions: *Dively v. Cedar Falls*, 27–227.

The indebtedness here contemplated is different from an obligation to pay. A contract under which a certain sum within the constitutional limit was to be paid each year would be valid, although the entire amount of the obligation of the contract was greatly in excess of the constitutional limit: *Ibid.*

This section applies not only to a present indebtedness, but also to such a one as is payable on a contingency at some future time, or which depends on some contingency before a liability is created; but it must appear that such contingency is sure to take place, irrespective of any action taken or option excercised in the future. Therefore, *held*, that an ordinance of a city authorizing the erection of water-works by a private company, with the provision that the city might, at its option, purchase them in the future on certain terms, etc., was not the incurring of an indebtedness: *Burlington Water Co. v. Woodward*, 49–58.

Bonds issued in payment of a valid judgment, not exceeding the constitutional limit when rendered, will be valid, although at the time they are issued the limit of indebtedness has been reached. The issue of such bonds does not increase the indebtedness: *Sioux City v. Weare*, 59–95.

The constitutional limit does not relate to interest and coupons upon bonds legally

issued, and although they may swell the total indebtedness to a sum in excess of the constitutional limit they will be valid: *Durant v. Iowa County*, Woolworth, 69.

Bona fide holder: Bonds issued in excess of the constitutional limit are void without regard to the good faith and want of notice of the holder: *McPherson v. Foster*, 43–48; *Mosher v. Independent School Dist.*, 44–122.

An order or warrant issued in excess of the constitutional limitation is void. Such order not being negotiable, a *bona fide* holder will acquire no rights thereunder: *National State Bank v. Independent Dist.*, 39–490.

A party contracting with a city, whereby indebtedness is created, must at his peril take notice of the financial standing and condition of the city, and whether the proposed indebtedness is in excess of the constitutional limit: *French v. Burlington*, 42–614.

Lien: The statute (§§ 3324, 3325) giving to holders of bonds issued in excess of the constitutional limit a lien for material furnished by them upon a building in which it should be used, *held* unconstitutional, in that it was sought thereby to render the corporation liable for such improvements beyond its constitutional limit of indebtedness: *Mosher v. Independent School Dist.*, 44–122.

A guaranty by a municipal corporation which is beyond the constitutional limit is void: *Carter v. Dubuque*, 35–416.

Estoppel: Tax payers of a city do not, by failure to object to the contracting of an indebtedness in excess of the constitutional limit, estop themselves from insisting upon the invalidity of such indebtedness: *McPherson v. Foster*, 43–48.

Portion invalid: If a part of the indebtedness is in excess of the constitutional limit, the portion within the limit will be valid and enforced, while the portion beyond the limit will be held void: *Ibid.*

Where, in such a case, bonds were issued bearing the same date and for portions of the same indebtedness, *held*, that the bonds would be considered valid for the *pro rata* proportion of the indebtedness not in excess of the constitutional limit: *Ibid.*

Judgment bonds: Bonds issued in payment of a judgment recovered on debts contracted in excess of the constitutional limit are valid in the hands of innocent holders: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168; *Sioux City & St. P. R. Co. v. Osceola County*, 52–26.

Restraining tax: It is not ground for restraining the collection of a tax that, when collected, it will be applied to an unconstitutional indebtedness: *Strohm v. Iowa City*, 47–42.

No defense: In an action against a city for damages by reason of negligence in the care of its streets, it is no defense that the city is already indebted beyond the constitutional limit: *Bartle v. Des Moines*, 38–414; *Rice v. Des Moines*, 40–638; *Thomas v. Burlington*, 69–140.

An indebtedness, strictly speaking, cannot be created except by contract, either express or implied, and the indebtedness prohibited by the constitution is such as is created by the voluntary action of both the debtor and creditor: *Thomas v. Burlington*, 69–140.

So where the city has unlawfully collected taxes, an action to recover back taxes thus unlawfully collected will not be defeated by reason of the indebtedness of the city beyond the constitutional limit: *Ibid.*

Current revenues: A city has a right to obtain and apply its current revenues to the payment of its ordinary and current expenses, even as against a judgment creditor; and where the contract made by the municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the meaning of the constitutional provision: *Grant v. Davenport*, 36–396.

This constitutional limitation is applicable to the expenses of necessary as well as convenient improvement of the streets. It matters not for what purpose the indebtedness is incurred; it is prohibited for any purpose in excess of the limit, unless it can be reasonably shown that it can be liquidated and paid from the ordinary current revenues of the city: *French v. Burlington*, 42–614.

In ascertaining whether the contemplated indebtedness is within the current revenue, such revenue as is absolutely certain to be received from the collection of taxes may be anticipated to at least some extent, and an indebtedness accordingly contracted: *Ibid.*

In ascertaining the whole resources of a city, taxes levied should be regarded as available assets up to the time of the annual tax sale, but after that period the burden is on the city to show that such taxes have any value which can be counted as available for the purpose of meeting a proposed indebtedness: *Ibid.*

Uncollected taxes: In ascertaining the entire indebtedness with reference to the constitutional limitation, uncollected taxes and the levy for the current year will not be taken into account as reducing such indebtedness (explaining *French v. Burlington*, 42–614): *Council Bluffs v. Stewart*, 51–385.

The tax lists are not made until after the equalization in June, and are not completed until after the levy of taxes in September. And where a tax was voted in May, which was in excess of the five per cent. limit as based upon the tax list of the previous year, *held*, that it was not proper to consider the assessor's lists of the current year as showing that such tax was not in excess of the constitutional limit: *Wilkinson v. Van Orman*, 70–230.

Where the question was whether, at the time certain orders were given by the secretary of a school district upon the treasury, its indebtedness exceeded its constitutional limit, it appeared that certain lands included in the tax list were not valued therein, and that the taxes thereon were marked paid, *held*, that evidence as to the value of such lands was admissible, subject to the right of defendant to show the rate per cent. of the taxes and the amount paid, and thus ascertain the assessed value: *Wormley v. District T'p*, 45–666.

What corporations: This constitutional provision as to the limit of indebtedness is applicable to school districts: *Winspear v. District T'p*, 37–542; *Mosher v. Independent School Dist.*, 44–122.

Also to cities organized under special charter prior to the constitution: *Scott v. Davenport*, 34-208; *Council Bluffs v. Stewart*, 51-385.

Previous contracts: The adoption of the constitutional provision as to limit of indebtedness did not impair any contract previously made, although in excess of the limit imposed; but any provisions of a city charter authorizing the contracting of indebtedness in excess of the limit fixed were thereby repealed: *Scott v. Davenport*, 34-208.

The fact that, as a result of the incurring of the indebtedness, the city is to acquire valuable property productive of revenue, does not take the case out of the constitutional provision: *Ibid.*

A contract for gas, made before the constitutional limitation was adopted, *held* binding, although the effect was to impose an indebtedness in excess of the limit: *Davenport Gas, etc., Co. v. Davenport*, 13-229.

Contracts for improvements: The provisions of a city charter limiting the amount of indebtedness which the city council might contract for borrowed money, *held* not applicable to indebtedness contracted for making improvements: *Rice v. Keokuk*, 15-579.

Where a city enters into a contract with a contractor for the building of a sewer with the agreement that the contractor shall accept in full satisfaction for the whole work certificates of assessment made upon the property adjacent to the sewer, such contract does not create a debt against the city within the meaning of this section: *Davis v. Des Moines*, 71-500.

Boundaries. SEC. 4. The boundaries of the state may be enlarged, with the consent of congress and the general assembly.

Oath of office. SEC. 5. Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office.

How vacancies filled. SEC. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.

Where there was a failure to elect a county officer at a general election at which such office should have been filled, and the incumbent held over, qualifying anew as required by statute, *held*, that he filled a vacancy only, and his successor should be elected at the next general election: *Dyer v. Bagwell*, 54-487; *Boone County v. Jones*, 58-373.

This section explicitly defines and prescribes the term of office of a person who is appointed to fill a vacancy in an office where the statutes authorize the filling of such vacancy by the board of supervisors, and such board cannot afterward, except for the causes recognized by statute, remove the person appointed before the expiration of the term: *State v. Chatburn*, 63-659.

Land grants located. SEC. 7. The general assembly shall not locate any of the public lands which have been, or may be granted by congress to this state, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant so exempted, shall not exceed three hundred and twenty acres.

Seat of government; state university. SEC. 8. The seat of government is hereby permanently established, as now fixed by law, at the city of Des Moines, in the county of Polk; and the state university at Iowa City, in the county of Johnson.

ARTICLE 12.— SCHEDULE.

Supreme law. SECTION 1. This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Laws in force. SEC. 2. All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

Any provisions in a city charter inconsistent with the constitution (as, for instance, with § 3 of the preceding article) were repealed by the adoption of the constitution: *Dively v. Cedar Falls*, 27-227; *Scott v. Davenport*, 34-208.

Proceedings not affected. SEC. 3. All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of

error, *certiorari*, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law, and all offenses, misdemeanors, and crimes that may have been committed before the taking effect of this constitution, shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this constitution been made.

A crime committed prior to the adoption of this constitution, *held* subject to trial and punishment under the provisions of the prior constitution: *State v. Axt*, 6-511.

Fines inure to the state. SEC. 4. All fines, penalties, or forfeitures due, or to become due, or accruing to the state, or to any county therein, or to the school fund, shall inure to the state, county, or school fund, in the manner prescribed by law.

Bonds in force. SEC. 5. All bonds executed to the state, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.

First election for governor and lieutenant-governor. SEC. 6. The first election under this constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty-seven, at which time the electors of the state shall elect the governor and lieutenant-governor. There shall also be elected at such election, the successors of such state senators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the house of representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the general assembly which commenced on the first Monday of December, one thousand eight hundred and fifty-six.

For secretary, auditor, etc. SEC. 7. The first election for secretary, auditor, and treasurer of state, attorney-general, district judges, members of the board of education, district attorneys, members of congress, and such state officers as shall be elected at the April election, in the year one thousand eight hundred and fifty-seven (except the superintendent of public instruction), and such county officers as were elected at the August election, in the year one thousand eight hundred and fifty-six, except prosecuting attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight; *provided* that the time for which any district judge or other state or county officer elected at the April election in the year one thousand eight hundred and fifty-eight shall not extend beyond the time fixed for filling like offices at the October election, in the year one thousand eight hundred and fifty-eight.

For judges of supreme court. SEC. 8. The first election for judges of the supreme court, and such county officers as shall be elected at the August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year one thousand eight hundred and fifty-nine.

First session general assembly. SEC. 9. The first regular session of the general assembly shall be held in the year one thousand eight hundred and fifty-eight, commencing on the second Monday of January of said year.

Senators. SEC. 10. Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty-nine, at which time their successors shall be elected as may be prescribed by law.

Offices not vacated. SEC. 11. Every person elected by popular vote, by a vote of the general assembly, or who may hold office by executive appointment, which office is continued by this constitution, and every person who shall be so elected or appointed to any such office, before the taking effect of this constitution (except as in this constitution otherwise provided), shall continue in office until the term for which such person has been or may be elected or appointed shall expire; but no such person shall continue in office after the

taking effect of this constitution, for a longer period than the term of such office, in this constitution prescribed.

Judicial districts. SEC. 12. The general assembly, at the first session under this constitution, shall district the state into eleven judicial districts, for district court purposes; and shall also provide for the apportionment of the members of the general assembly in accordance with the provisions of this constitution.

Submission of constitution. SEC. 13. This constitution shall be submitted to the electors of the state at the August election, in the year one thousand eight hundred and fifty-seven, in the several election districts in this state. The ballots at such elections shall be written or printed as follows: those in favor of the constitution, "new constitution — yes." Those against the constitution, "new constitution — no." The elections shall be conducted in the same manner as the general elections of the state, and the poll-books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the secretary of state, which abstracts shall be canvassed in the manner provided for the canvass of state officers. And if it shall appear that a majority of all the votes cast at such election for and against this constitution are in favor of the same, the governor shall immediately issue his proclamation stating that fact, and such constitution shall be the constitution of the state of Iowa, and shall take effect from and after the publication of said proclamation.

Proposition to strike out the word "white." SEC. 14. At the same election that this constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "white," from the article on the "right of suffrage," shall be separately submitted to the electors of this state for adoption or rejection, in the manner following, viz.: a separate ballot may be given by every person having a right to vote at said election, to be deposited in a separate box. And those given for the adoption of such proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' yes." And those given against the proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' no." And if at said election the number of ballots cast in favor of said proposition, shall be equal to a majority of those cast for and against this constitution, then said word "white" shall be stricken from said article and be no part thereof.

Mills county. SEC. 15. Until otherwise directed by law, the county of Mills shall be in and a part of the sixth judicial district of this state.

Done in convention at Iowa City, this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America, the eighty-first.

In testimony whereof, we have hereunto subscribed our names:

TIMOTHY DAY,	A. H. MARVIN,	JNO. T. CLARKE,
S. G. WINCHESTER,	J. H. EMERSON,	S. AYRES,
DAVID BUNKER,	R. L. B. CLARKE,	HARVEY J. SKIFF,
D. P. PALMER,	JAMES A. YOUNG,	J. A. PARVIN,
GEO. W. ELLS,	D. H. SOLOMON,	W. PENN CLARK,
J. C. HALL,	M. W. ROBINSON,	JERE. HOLLINGSWORTH,
JOHN H. PETERS,	LEWIS TODHUNTER,	WM. PATTERSON,
WM. H. WARREN,	JOHN EDWARDS,	D. W. PRICE,
H. W. GRAY,	J. C. TRAER,	ALPHEUS SCOTT,
ROBT. GOWER,	JAMES F. WILSON,	GEORGE GILLASPY,
H. D. GIBSON,	AMOS HARRIS,	EDWARD JOHNSTONE.
THOMAS SEELEY,		FRANCIS SPRINGER, *President.*

Attest:

TH. J. SAUNDERS, *Secretary.*

E. N. BATES, *Assistant Secretary.*

TABLE OF SESSION LAWS.

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TABLE OF SESSION LAWS.

The following table gives, consecutively, the titles of all acts of a general, public and permanent nature, passed since the enactment of the Code of 1873, with the date of taking effect, either by the proper publication, in case there is a publication clause, or by the general constitutional provision; and shows also the sections of this work where such acts will be found inserted or referred to.

PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY (1874).

[The acts of this session are published in two series, one containing the public laws, the other those of a private, local or temporary nature; the chapters in each series being numbered independently.]

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to authorize the secretary of state to furnish stationery for the use of standing or select committees of the general assembly, or either branch thereof..... Took effect by publication, February 7, 1874.	.....	159, 160
2	An act to amend chapter 5 of title IX of the Code, and to release certain penalties..... Took effect by publication, February 7, 1874.	1, 2 3, 4 5, 6	1740, 1741 1744, 1745 1751, 1752
3	An act to amend section 12 of chapter 2 of the Code, and to provide for the payment of the members, officers and employees of the general assembly..... Took effect by publication, February 19, 1874.	.....	13–16
5	An act to empower cities and towns to make contracts with railroad and bridge companies for the use of wagon-bridges across rivers..... Took effect by publication, February 25, 1874.	.....	1554
6	An act to amend section 464 of the Code of 1873..... Took effect by publication, March 4, 1874.	.....	623
7	An act to pay the board of trustees of the Iowa State Agricultural College and Farm..... Took effect by publication, March 8, 1874.	.....	2635
8	An act to provide for the permanent survey of lands..... Took effect July 4, 1874.	.....	4507–4510
9	An act to amend section 289 and section 290 of the Code of 1873..... Took effect July 4, 1874.	.....	376, 377
10	An act to amend section 2626 of the Code of Iowa..... Took effect July 4, 1874.	.....	3832
11	An act to repeal sections 3903 and 3904 of the Code of 1873, and to provide a substitute therefor..... Took effect July 4, 1874.	.....	5209, 5210
12	An act to amend section 165 of the Code..... Took effect July 4, 1874.	.....	210

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
13	An act for the punishment of persons having in their possession burglar tools or implements with intent to commit the crime of burglary ..... Took effect July 4, 1874.	.....	5193
14	An act to punish carelessness in the use of steam-boilers.... Took effect July 4, 1874.	.....	5427, 5428
16	An act relating to the payment of jurors..... Took effect by publication, March 16, 1874.	.....	323
17	An act to amend chapter 7 of title XXIV of the Code..... Took effect by publication, March 16, 1874.	.....	5301
18	An act to amend sections 1292 and 1293 of the Code..... Took effect July 4, 1874.	.....	1987, 1988
19	An act to amend title VII, chapter 1, section 946, of the Code..... ..... Took effect by publication, March 21, 1874.	.....	1439
20	An act authorizing railway corporations to issue preferred stock for *its* bonded indebtedness..... Took effect by publication, March 21, 1874.	.....	1969
21	An act for the support of the State Reform School..... Took effect by publication, March 24, 1874.	.....	2746
22	An act to amend section 1194 of the Code of Iowa of 1873.. Took effect July 4, 1874.	.....	1832
23	An act to provide for the creation and enforcement of liens in certain cases where corporations have issued bonds in excess of the amount allowed by law..... Took effect by publication, April 2, 1874.	.....	3324, 3325
25	An act to provide that lands to be laid out into town or city lots shall be free from incumbrance, and that the same when thus laid out shall be accurately described relative to some established corner of the congressional division of which they are part .... Took effect July 4, 1874.	.....	Repealed by 1014
26	An act to amend section 1433 of the Code of 1873 ..... Took effect by publication, April 3, 1874.	.....	2236
27	An act to repeal sections 1721 and 1802, of chapter 9, title XII, of the Code, and to enact substitutes therefor..... Took effect July 4, 1874.	.....	2830, 2923
28	An act to amend section 796, title VI, chapter 1, of the Code of 1873..... ..... Took effect July 4, 1874.	.....	1270
29	*An act to remit the penalty and interest on delinquent personal property taxes in certain cases*..... Took effect by publication, April 4, 1874.	.....	1327
30	An act to amend section 4254, chapter 12, of title XXV of the Code of 1873, relating to preliminary examinations.... Took effect July 4, 1874.	.....	5637
31	An act to provide for the inspection of coal mines..... Took effect July 4, 1874.	.....	Repealed by 18 G. A., ch. 202
32	An act to amend section 3812, chapter 3, title XXIII, of the Code, in relation to jury fees..... .... Took effect July 4, 1874.	.....	5088

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
33	An act to repeal section 3641 of chapter 1 of title XXII of the Code, and to enact a substitute therefor..... Took effect July 4, 1874.	.....	4891
34	An act authorizing the establishment of public ways to lands having stone and mineral thereon..... Took effect by publication, March 28, 1874.	.....	1949–1952
35	An act in relation to riparian owners on the Mississippi and Missouri rivers..... Took effect July 4, 1874.	.....	1953, 1954
36	An act to make cities and towns responsible for the value of buildings destroyed for the purpose of preventing the spread of conflagrations ..... Took effect by publication, April 6, 1874.	.....	Not inserted; lacks enacting clause.
37	An act to amend chapter 6, title XI, of the Code..... Took effect July 4, 1874.	.....	2405
38	An act to amend section 4064 of the Code..... Took effect July 4, 1874.	.....	5426
39	An act to divide counties into supervisor districts..... Took effect by publication, April 9, 1874.	.....	395–398
40	An act to amend chapter 2, title IX, of the Code of 1873, to authorize corporations other than those for pecuniary profit to change their name, and to amend articles of incorporation..... Took effect July 4, 1874.	.....	1661–1664
41	An act to amend chapter 1, title XXI, of the Code of 1873, of justices of the peace and their courts, in relation to forcible entry and detention of real property..... Took effect by publication, April 2, 1874.	.....	4873
42	An act to amend section 3072 of the Code of Iowa..... Took effect July 4, 1874.	.....	4297
43	An act to amend section 2315, chapter 1, title XVI, of the Code of 1873..... Took effect by publication, April 9, 1874.	.....	3513
44	An act to amend section 2142 of chapter 8 of title XIV of the Code, allowing assignments of mechanics' liens.. ... Took effect by publication, April 2, 1874.	.....	See 3321
45	An act to amend section 799, chapter 1, title VI, of the Code Took effect July 4, 1874.	.....	Repealed by 17 G. A., ch. 50, § 2
47	An act to amend chapter 4 of title X of the Code, on "taking private property for works of internal improvement"..... Took effect by publication, March 28, 1874.	.....	1930
48	An act to amend section 4779, chapter 2, title XXVI, of the Code..... Took effect by publication, April 2, 1874.	.....	6179
49	An act to amend sections 2131, 2133, 2134 and 2135 of the Code, relating to mechanics' liens..... Took effect by publication, April 7, 1874.	.....	Repealed; see 3309
50	An act to provide for the appointment of a board of fish commissioners, for the construction of fish-ways, for the protection and propagation of fish, and to repeal sections 4052 and 4053, and to amend section 4054..... Took effect by publication, March 31, 1874.	1–5 8, 9 6, 7, 10	Superseded by 2303–2318 5403–5405

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
51	An act to authorize cities and towns to provide for the improvements of alleys Took effect by publication, March 28, 1874.	.....	625–629
52	An act to amend section 509 of the Code of 1873. Took effect July 4, 1874.	.....	696
53	An act to amend sections 1386, 1392, 1436 and 1438 of chapter 2, title XI, of the Code. Took effect by publication, March 28, 1874.	1 2	2173, 2179 2239, 2241
54	An act to authorize the resurvey and platting of city or town plats, or additions thereto, in cases where the original plats have been lost and not acknowledged or recorded Took effect July 4, 1874.	.....	1015–1018
55	An act to amend section 1144 of chapter 4 of title IX of the Code. Took effect by publication, April 23, 1874.	.....	1707
56	An act to amend sections 3181 and 3182 of the Code of 1873. Took effect by publication, April 4, 1874.	.....	4412
57	An act to provide for holding teachers' normal institutes... Took effect by publication, April 1, 1874.	.....	2887
58	An act to fix the compensation of state printer and state binder. Took effect July 4, 1874.	.....	Repealed by 136*a*
59	An act to prohibit the encouragement of minors to remain in certain buildings Took effect July 4, 1874.	.....	5382, 5383
60	An act to provide for the organization and management of savings banks. Took effect July 4, 1874.	.....	1788–1820
61	An act in relation to vacation of town plats... Took effect July 4, 1874.	.....	1019
62	An act to amend section 906 of the Code. Took effect July 4, 1874.	.....	1392
63	An act to amend section 812, chapter 1, title VI, Code of Iowa. Took effect July 4, 1874.	.....	1288
64	An act to establish and maintain industrial expositions in public schools of the state. Took effect July 4, 1874.	.....	2975–2980
65	An act to amend section 1260, chapter 4, title X, of the Code of Iowa. Took effect July 4, 1874.	.....	1928
66	An act to amend section 800 of the Code of 1873. Took effect July 4, 1874.	.....	1273
67	An act allowing school districts lying in two adjoining counties the right to vote mills instead of specific sums for school purposes Took effect July 4, 1874.	.....	2899
68	An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state. Took effect July 4, 1874.	1, 2 7 3–6 8–12	2026, 2027 2028 Repealed by 17 G. A., ch. 77

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
69	An act to repeal section 4048, title XXIV, chapter 11, of the Code, and to enact a substitute in lieu thereof ..... Took effect July 4, 1874.	.....	Repealed by 5391
70	An act to amend chapter 3, title XI, of the Code, in relation to domestic and other animals..... Took effect by publication, April 1, 1874.	2 3 4 5, 6 7	2249 2251 430, 2253 2254, 2255 2257
71	An act to regulate the leasing of lands belonging to the Iowa State Agricultural College..... Took effect by publication, March 28, 1874.	.....	Repealed by 2650

SIXTEENTH GENERAL ASSEMBLY (1876).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
4	An act to amend section 767 of the Code of 1873, concerning deputies ..... Took effect by publication, February 17, 1876.	.....	1239
6	An act to repeal section 390 of chapter 9, title IV, of the Code, relating to township officers, and enacting a substitute in lieu thereof ..... Took effect by publication, February 17, 1876.	.....	528
7	An act to increase the number of judges of the supreme court..... Took effect by publication, February 12, 1876.	1 2	177 1030
10	An act relating to the recording of United States and state patents for lands..... Took effect July 4, 1876.	.....	4913
11	An act to amend chapter 2 of title XVI of the Code, relating to probate of wills..... Took effect by publication, February 24, 1876.	.....	3540
14	An act to amend chapter 7 of title XIV of the Code, in relation to assignments for the benefit of creditors..... Took effect by publication, February 26, 1876.	.....	3308
20	An act to amend section 765 of the Code, in relation to powers of commissioners appointed by the governor..... Took effect July 4, 1876.	.....	1237
21	An act to repeal the following section of the Code, and enact a substitute therefor, viz.: section 985, title VII, chapter 2, in relation to powers and duties of road supervisors..... Took effect July 4, 1876.	.....	1499
23	An act to amend section 660 of the Code, in relation to the election of electors of president and vice-president ..... Took effect July 4, 1876.	.....	1125
24	An act to amend section 463 of the Code, title IV, chapter 10, "Of cities and incorporated towns"..... Took effect July 4, 1876.	.....	622
25	An act to repeal section 3800, chapter 2, title XXIII, of the Code, and to enact a substitute therefor ..... Took effect July 4, 1876.	.....	5076

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
26	An act to amend section 1362, chapter 1, title XI, of the Code Took effect July 4, 1876.	.....	2149
28	An act to amend section 1428 of the Code Took effect July 4, 1876.	.....	2227
29	An act to amend section 989 of chapter 3 of title VII of the Code, in relation to the powers and duties of road supervisors Took effect by publication, March 9, 1876.	.....	1503
30	An act to define the crime of swindling and to punish the same Took effect by publication, March 10, 1876.	.....	See 5462–5467
33	An act to provide for the election of certain officers in certain cities of the first class Took effect by publication, March 5, 1876.	.....	795, 796
35	An act to amend section 3808 of the Code, relating to the fees of township trustees Took effect July 4, 1876.	.....	5084
36	An act in relation to evidence in actions upon account Took effect July 4, 1876.	.....	3920
37	An act to repeal section 1156, title IX, chapter 4, in relation to insurance companies, and to enact a substitute therefor. Took effect by publication, March 10, 1876.	.....	1719
38	An act to amend chapter 5, title XII, of the Code of 1873, and add thereto Took effect by publication, March 10, 1876.	1 2–4	2723 2734–2736
39	An act to repeal chapter 32 of the public acts of the fifteenth general assembly, and re-enact section 3812 of the Code Took effect by publication, March 14, 1876.	.....	5088
40	An act to amend chapter 43 of the acts of the fourteenth general assembly, and for other purposes Took effect by publication, March 16, 1876.	.....	6216–6220
47	An act empowering cities to extend their corporate limits Took effect by publication, March 10, 1876.	.....	583–586
50	An act to compel township clerks to post up statements of receipts and disbursements at each general election Took effect July 4, 1876.	.....	538
52	An act to amend section 2049 of the Code of 1873 Took effect by publication, March 15, 1876.	.....	3225
54	An act to authorize cities organized under special charters to provide for the construction of sewers Took effect by publication, March 14, 1876.	1–6 7	943–948 Repealed by 20 G. A., ch. 154
55	An act relating to life insurance, and to prevent injustice to the assured Took effect by publication, March 15, 1876.	.....	1758–1760
57	An act to authorize cities and towns to settle and adjust certain indebtedness, and to provide for payment of the same Took effect by publication, March 16, 1876.	.....	683–686
58	An act to amend section 518 of the Code of 1873, title IV, chapter 10, "Of cities and incorporated towns" Took effect July 4, 1876.	.....	709

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
60	An act to amend section 1144 in chapter 4 of title IX of the Code, relating to fire insurance companies. Took effect by publication, March 14, 1876.	.....	1707
61	An act to amend section 3809 of the Code. Took effect July 4, 1876.	.....	5085
62	An act to amend section 3814 of chapter 3, title XXIII, of the Code, relating to the fees of witnesses. Took effect by publication, March 15, 1876.	.....	5090
63	An act to amend chapter 25, laws of the fifteenth general assembly, in relation to city and town lots, and in relation to the annexation of contiguous territory to cities and towns. Took effect by publication, March 16, 1876.	.....	Repealed by 1014
64	An act to repeal section 1793, chapter 9, title XII, of the Code, in relation to children attending schools in adjoining districts, and enacting a substitute therefor. Took effect by publication, March 14, 1876.	.....	2912
66	An act authorizing the governor to appoint aids-de-camp, additional to section 1054, chapter 1, title VIII, of the Code. Took effect by publication, March 15, 1876.	.....	Repealed by 17 G. A., ch. 125
68	An act to facilitate business with railroads, express and telegraph companies. Took effect by publication, March 14, 1876.	.....	2099, 2100
69	An act to restrain vagrancy and common beggary. Took effect by publication, March 15, 1876.	.....	5527, 5528
70	An act to promote fish culture in the state of Iowa, and amend chapter 50 of the laws of the fifteenth general assembly, enlarge and define the duties of fish commissioner, and appropriate money to carry out the provisions of this act. Took effect by publication, March 17, 1876.	.....	2303–2306, 5403, 5404
72	An act to repeal section 576, title V, chapter 1, of the Code, and to enact a substitute therefor. Took effect July 4, 1876.	.....	1023
75	An act to repeal section 1271 of the Code of 1873, and enact a substitute therefor. Took effect July 4, 1876.	.....	1945
76	An act to amend section 135 of the Code, relating to appeals to the supreme court. Took effect by publication, March 15, 1876.	.....	Repealed by 175
79	An act to authorize the sale of lands and town lots for taxes, in certain cases, for an amount less than the taxes, interest and costs due thereon. Took effect July 4, 1876.	.....	1361–1363
80	An act to repeal subdivision 24 of section 303, chapter 2, title IV, of the Code, to allow board of supervisors to make additional appropriation for county bridges, and enact a substitute in lieu thereof. Took effect July 4, 1876.	.....	402
81	An act to establish uniformity throughout the state in regard to grace upon sight-bills of exchange. Took effect July 4, 1876.	.....	3269
84	An act to provide for the transfer of moneys raised by special levy to county fund for general purposes. Took effect by publication, March 16, 1876.	.....	441

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
89	An act to amend section 2049 of chapter 1, title XIV, of the Code. in relation to the weight of a bushel of oats..... Took effect July 4, 1876.	.....	3225
90	An act providing for the election of city assessors in cities organized and existing under special charters..... Took effect by publication, March 16, 1876.	.....	916
91	An act to amend section 1617, chapter 3, title XII, of the Code..... Took effect by publication, March 16, 1876.	.....	2658
94	An act to enlarge the powers of the trustees of the Soldiers' Orphans' Homes, and provide for other indigent children of the state, and for making provision for industrial pursuits therein..... Took effect July 4, 1876.	1-8 10	2701-2708 2681
95	An act to amend section 500, chapter 10, title IV, of the Code..... Took effect by publication, March 16, 1876.	.....	682
97	An act to amend section 4, chapter 35, of the private, local and temporary acts of the fifteenth general assembly..... Took effect by publication, March 23, 1876.	.....	Repealed by 17 G. A., ch. 110
100	An act to repeal chapter 8 of title XIV of the Code, and providing for mechanics' liens..... Took effect July 4, 1876.	.....	3309-3323
101	An act to amend section 1507, chapter 4, title XI, of the Code..... Took effect July 4, 1876.	.....	2340
102	An act to define the crime of swindling, and to punish the same..... Took effect July 4, 1876 (publication being in one paper only, and therefore insufficient).	.....	5462-5467
103	An act to amend section 1160, chapter 4, title IX, of the Code, relating to the number of members of mutual associations ..... Took effect by publication, March 24, 1876.	.....	1723
106	An act in relation to hedges on division lines between adjoining land owners ..... Took effect by publication, March 25, 1876.	.....	2343, 2344
107	An act empowering cities to levy a special tax for sewerage purposes ..... Took effect by publication, March 24, 1876.	.....	746-748
109	An act to amend section 1725 of chapter 9, title XII, of the Code, relating to the formation of sub-districts..... Took effect by publication, March 24, 1876.	.....	2834
110	An act empowering township clerks to administer oaths... Took effect July 4, 1876.	.....	536
111	An act in relation to the construction of cattle-ways across the public highway..... Took effect July 4, 1876.	.....	1461, 1462
112	An act to amend sections 1745 and 1751, chapter 9, title XII, of the Code, relative to report of treasurers of school districts..... Took effect July 4, 1876.	1 2	2860 2866

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
113	An act to authorize the auditor of state to cause to be paid back to counties entitled thereto, any excess on revenue paid into the state treasury Took effect by publication, March 25, 1876.	.....	1407–1409
114	An act providing for the publication of propositions to amend the constitution, and for other purposes connected therewith Took effect July 4, 1876.	.....	59–62
116	An act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities Took effect by publication, March 30, 1876.	1–7 8–22	953–959 928–942
118	An act to authorize the relocation of railroads Took effect July 4, 1876.	.....	1979–1986
119	An act to amend clause 4, section 1606, chapter 3, of the Code Took effect by publication, April, 1876. (Date of publication not being given.)	.....	2632
121	An act to amend section 1821, title XII, chapter 9, of the Code Took effect by publication, March 25, 1876.	.....	2961
122	An act to amend chapter 69 of the public acts of the fifteenth general assembly, in relation to game Took effect July 4, 1876.	.....	Repealed by 5391
123	An act to enable townships and incorporated towns and cities to aid in the construction of railroads Took effect by publication, March 30, 1876.	.....	Repealed by 2081
125	An act to amend an act entitled an act to amend section 289 and section 290 of the Code of 1873 Took effect July 4, 1876.	.....	376–378
129	An act to establish and maintain a school for the instruction and training of teachers of common schools Took effect by publication, March 28, 1876.	.....	2673–2680
130	An act to provide for condemning, surveying and platting cemeteries, and authorizing all transfers of lots therein to be filed with and recorded by the township clerk Took effect by publication, March 29, 1876.	.....	562–565
131	An act to regulate circuses and other public shows Took effect by publication, March 28, 1876.	.....	1394, 1395
132	An act to repeal sections 35, 36, 37, 38, 39 and 40 of chapter 3, title I, of the Code, and to enact a substitute therefor Took effect by publication, March 29, 1876.	.....	39–44
136	An act to define who may hold the offices of county school superintendent and school director in the state of Iowa Took effect by publication, March 28, 1876.	.....	2828, 2829
137	An act to provide for the continuation of the work on the additional penitentiary, and to make an appropriation therefor Took effect by publication, April 13, 1876.	.....	6221
140	An act amending sections 1207, 1212 and 1216 of chapter 2, title X, of the Code, in relation to drains, ditches and water-courses Took effect July 4, 1876.	1 2 3, 4 5	1845, 1850 1848 1851, 1852 1854

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
142	An act making an appropriation for the payment of state and judicial officers, and for other purposes hereinafter named, and to amend section 120 of chapter 8 of the Code of Iowa Took effect by publication, March 30, 1876.	.....	156
143	An act to provide for establishing superior courts in cities of a certain grade Took effect by publication, March 22, 1876.	1–5 6–16 17–20	763–767 769–779 781–784
145	An act to amend section 900 of chapter 2, title VI, of the Code, relating to sale of land for taxes, and the interests acquired thereunder by purchasers of United States, states, municipal, university, agricultural college, swamp and township lands, burial grounds, fair grounds, public square, public ornamental grounds, and the property of school districts Took effect July 4, 1876.	.....	Repealed by 17 G. A., ch. 101
146	An act to provide for the changing of the names of unincorporated towns and villages Took effect July 4, 1876.	.....	442–449
147	An act to repeal section 1587, chapter 2, title XII, of the Code, relating to the state university, and to enact a substitute therefor Took effect July 4, 1876.	.....	2609
148	An act to diminish liability to railroad accidents, and to punish interference with, and injury to, the property of railroad companies Took effect July 4, 1876.	.....	5202, 5203
149	An act to amend section 1381, title XI, chapter 1, of the Code Took effect July 4, 1876.	.....	2168
152	An act to provide for the organization and support of an asylum at Glenwood, in Mills county, for feeble-minded children Took effect by publication, March 30, 1876.	.....	Repealed by 2709
153	An act to amend chapter 5, title X, of the Code, in relation to railways Took effect by publication, March 29, 1876.	.....	2019
155	An act to amend sections 1815, 1816, 1817, 1818, 1819 and 1820, chapter 9, title XII, of the Code of Iowa, and to provide for the organization of district townships Took effect July 4, 1876.	.....	2950–2955
156	An act to repeal section 4783 of the Code, and enact a substitute therefor Took effect by publication, March 29, 1876.	.....	6183
159	An act in relation to the reports of public officers and institutions, and to provide for printing and distributing public documents, amendatory of chapter 9, title II, of the Code, relating to the general regulations of the executive department; also of title VIII, chapter 1, in relation to the militia; and also of title XII, chapter 3, relating to the Agricultural College Took effect by publication, March 29, 1876.	1–8 9	Repealed by 136*a* 2637
163	An act providing for the taxation of mutual loan and building associations Took effect July 4, 1876.	.....	1290

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
164	An act to repeal section 1158 of the Code, and enact the following in lieu thereof..... Took effect by publication, March 29, 1876.	.....	1721
167	An act to amend section 978 of the Code, relating to the appointment of road supervisors..... Took effect by publication, March 29, 1876.	.....	1492

SEVENTEENTH GENERAL ASSEMBLY (1878)

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
3	An act to amend section 432, and to repeal section 433, of chapter 10, title IV, of the Code, and to provide a substitute therefor, in relation to cities and towns..... Took effect by publication, February 12, 1878.	.....	581, 582
9	An act to repeal sections 511 and 512, chapter 10, title IV, of the Code, and to enact substitutes therefor..... Took effect July 4, 1878.	.....	698, 699
12	An act to amend section 591, title V, chapter 1, of the Code, relating to terms of office of township trustees..... Took effect July 4, 1878.	.....	1038–1040
14	An act to amend section 521 of the Code, title IV, chapter 10, of cities and incorporated towns ..... Took effect by publication, February 24, 1878.	.....	716
19	An act to repeal section 4420 of chapter 27, title XXV, of the Code, relating to the trial of an issue of fact in an indictment, and enacting a substitute in lieu thereof..... Took effect July 4, 1878.	.....	5805
20	An act to amend sections 1 and 2 of chapter 33 of the laws of the sixteenth general assembly, in relation to the election of certain officers in certain cities of the first class, and to revive that portion of section 534 of the Code thereby repealed..... Took effect by publication, February 27, 1878.	.....	795–797
23	An act to repeal sections 1060 and 1064, chapter 1, title IX, of the Code, relating to corporations for pecuniary profit, and enact substitutes in lieu thereof..... Took effect July 4, 1878.	.....	1610, 1614
25	An act to amend the charters of all municipal corporations existing and acting under special charters not now having the powers herein granted, and conferring additional powers upon such cities. Additional to Code, chapter 10, title IV, "Of cities and incorporated towns"..... Took effect July 4, 1878.	.....	913
26	An act to repeal section 3751, chapter 1, title XXII, of the Code, relating to depositions, and to enact a substitute therefor..... Took effect July 4, 1878.	.....	5002
33	An act to vest title in the heirs, devisees or assignees of deceased patentees. Additional to Code, title XVI, "Of the estates of decedents" ..... Took effect July 4, 1878.	.....	3664
35	An act to amend section 4117, title XXV, chapter 4, of the Code. "Of security to keep the peace"..... Took effect July 4, 1878.	.....	5499

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
37	An act to amend chapter 26 of the laws of the sixteenth general assembly, in "relation to support of the poor"... Took effect July 4, 1878.	.....	2149
39	An act to require fire insurance companies doing business in this state to cancel policies in certain cases. Additional to Code, chapter 4, title IX, "Of insurance companies".. Took effect July 4, 1878.	.....	1724
40	An act to provide for the construction and maintenance of county bridges on county line roads, where site of bridge is wholly within one or the other county. Additional to Code, chapter 3, title VII, "Of ferries and bridges"..... Took effect July 4, 1878.	.....	403
41	An act to amend chapter 64, laws of the sixteenth general assembly, amending section 1793, chapter 9, title XII, of the Code, providing for the county superintendent as arbitrator in case of disagreement of the boards of directors determining where children shall attend school..... Took effect July 4, 1878.	.....	2912
42	An act to amend section 2049 of chapter 1, title XIV, of the Code, and fixing the weight of a bushel of charcoal.. ... Took effect July 4, 1878.	.....	3225
45	An act to establish a central station of the "Iowa Weather Service," and for the appointment of a director thereof.. Took effect by publication, March 19, 1878.	.....	2445–2448
47	An act to define investments of life insurance companies, and amendatory of sections 1169 and 1179, chapter 5, title IX, of the Code of Iowa..... Took effect by publication, March 16, 1878.	.....	1743, 1753
50	An act to amend section 798, and to repeal section 799, of title VI, chapter 1, of the Code, relating to exemptions for planting and cultivating forest trees..... Took effect by publication, March 22, 1878.	.....	1272
52	An act to amend section 990, chapter 2, title VII, of the Code of 1873..... Took effect July 4, 1878.	.....	1504
54	An act to amend section 1, chapter 57, of public laws of the fifteenth general assembly, in relation to holding normal institutes ..... Took effect July 4, 1878.	.....	2887
55	An act to repeal section 3889 of chapter 3, title XXIV, of the Code, in relation to setting out fires, and to enact a substitute therefor..... Took effect July 4, 1878.	.....	5188
56	An act requiring that officers in certain cities may receive a fixed compensation, and that all fees now allowed such officers shall be paid into the treasuries of such cities..... Took effect by publication, March 19, 1878.	.....	813–815
57	An act authorizing the establishment of a depository or depositories in the city of Des Moines for the collection of drafts, checks and certificates of deposit received by the treasurer of state on account of state dues..... Took effect by publication, March 22, 1878.	.....	92–96
58	An act to authorize counties, cities and towns to refund outstanding bonded debt at a lower rate of interest, and to provide for the payment of the same..... Took effect by publication, March 22, 1878.	.....	383–387

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
59	An act to provide for the assessment and taxation of telegraph lines within the state of Iowa. Additional to Code, title X, chapter 6, "Of telegraphs" ..... Took effect by publication, March 23, 1878.	.....	2109–2116
65	An act to amend section 4171 of the Code, relating to fugitives from justice ..... Took effect by publication, March 23, 1878.	.....	5555
67	An act making it unlawful for officers of state institutions to contract indebtedness in excess of the appropriations, or divert funds from purposes for which the same were appropriated, and providing a punishment therefor. Additional to Code, title II, chapter 9 ..... Took effect by publication, March 26, 1878.	.....	168–170
68	An act to amend chapter 39 of the public acts of the fifteenth general assembly, in relation to dividing counties into supervisor districts ..... Took effect by publication, March 23, 1878.	.....	395
71	An act to amend chapter 3, title V, of the Code, regulating the election of supervisors of highways, and of township assessors, in certain cases ..... Took effect July 4, 1878.	.....	1082–1084
72	An act to amend sections 1672 and 1676 of the Code, relating to support of the blind..... Took effect July 4, 1878.	1 2	2759 2763
73	An act to fix the salaries of the register of the state land office and his deputy ..... Took effect July 4, 1878.	.....	5011, 5012
74	An act to repeal section 3771 of the Code, and to enact a substitute therefor, in relation to compensation of the clerk of the supreme court, and fixing the amount of fees in certain cases, and providing for their collection and payment into the state treasury, and repealing section 3772 of the Code..... Took effect July 4, 1878.	.....	5026
75	An act to amend section 3762 of the Code, relating to salary of the state librarian ..... Took effect July 4, 1878.	.....	5016
76	An act for the endowment and support of the state university. Additional to Code, title XII, chapter 2, "Of the state university" ..... Took effect July 4, 1878.	.....	2626, 2627
77	An act to repeal chapter 68, acts of the fifteenth general assembly, and provide for the establishment of a board of railroad commissioners, and defining their duties and term of office..... Took effect by publication, March 25, 1878.	2 3–18	2029 2033–2046
80	An act entitled "An act to promote fish culture in the state of Iowa, and to amend and consolidate the enactments heretofore passed for that purpose, amending chapter 70, acts of the sixteenth general assembly..... Took effect by publication, March 30, 1878.	.....	2307–2312
81	An act to amend chapter 137 of the acts of the sixteenth general assembly, relating to support of convicts in the additional penitentiary ..... Took effect by publication, March 27, 1878.	.....	6221
83	An act to amend section 4785, chapter 2, title XXVI, of the Code, in relation to the support of convicts ..... Took effect by publication, March 27, 1878.	.....	6185

CH.	TIME; TITLE OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
84	An act to amend chapter 2, title XI, section 1427, of the Code, relating to the support required by counties for the support of the insane ..... Took effect by publication, March 27, 1878.	.....	2226
89	An act to repeal section 166, chapter 5, title III, of the Code, in relation to special terms of court, and enact a substitute therefor..... Took effect by publication, March 29, 1878.	.....	211
91	An act to amend section 3829, chapter 3, title XXIII, of the Code, in relation to attorneys' fees for defending persons charged with crime ..... Took effect by publication, April 3, 1878.	.....	5109
92	An act to regulate the per diem and mileage of trustees of state institutions, members of visiting committees to hospitals for insane, and regents of the state university ..... Took effect by publication, March 29, 1878.	.....	5104–5106
97	An act to amend chapter 21, laws of the fifteenth general assembly, relative to support of reform schools..... Took effect July 4, 1878.	.....	2746
98	An act to amend sections 1692 and 1693, chapter 7, title XII, of the Code, in relation to support of the deaf and dumb institution..... Took effect July 4, 1878.	.....	2776, 2777
99	An act to promote the collection of revenue in incorporated cities acting under special charters, and to legalize the taxes heretofore levied therein, and sales made thereunder. Additional to Code, title VI, "Of revenue"..... Took effect July 4, 1878.	.....	960
100	An act to amend sections 1384 and 1390, chapter 2, title XI, of the Code, in relation to the care of the insane..... Took effect July 4, 1878.	1 2	2171 2177
101	An act to amend chapter 145 of the acts of the sixteenth general assembly, in relation to taxing, and the sale of public lands for taxes..... Took effect July 4, 1878.	.....	1385, 1386
103	An act to prohibit defendants convicted of murder being admitted to bail. Amending section 4107, chapter 1, title XXV, of the Code..... Took effect July 4, 1878.	.....	5489
104	An act to repeal section 1160, chapter 4, title IX, of the Code of 1873, and to enact a substitute therefor, to require mutual insurance companies to make annual reports..... Took effect July 4, 1878.	.....	1723
106	An act for the protection of cemeteries in the state of Iowa. Took effect by publication, April 2, 1878.	.....	566–568
107	An act in relation to vacancies in offices whose incumbents are chosen by the general assembly, amending section 782, chapter 10, title V, of the Code..... Took effect by publication, April 1, 1878.	1 2, 3	1254 1263, 1264
110	An act to repeal chapter 35 of the private, local and temporary acts of the fifteenth general assembly, and chapter 97 of the acts of the sixteenth general assembly, and to provide for the leasing the convict labor of the state..... Took effect by publication, April 2, 1878.	.....	Repealed by 18 G. A., ch. 149, § 3

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
111	An act to prevent the making and publication of false or deceptive statements in relation to the business of fire insurance. Additional to Code, title IX, chapter 4..... Took effect July 4, 1878.	.....	1725-1728
113	An act amendatory of section 1802 of the Code of Iowa..... Took effect July 4, 1878.	.....	2923
114	An act to tax sleeping and dining cars, amending section 1318, chapter 5, title X, of the Code..... Took effect July 4, 1878.	.....	2023-2025
115	An act to prevent the use of the funds of the state university for support of the preparatory department after July 1, 1879 ..... Took effect July 4, 1878.	.....	2629
116	An act to amend section 80 of chapter 4, title II, of the Code of 1873..... Took effect July 4, 1878.	.....	89
117	An act to reduce the limits of certain cities incorporated under special charters. Additional to Code, title IV, chapter 10, "Of cities and incorporated towns"..... Took effect July 4, 1878.	.....	907
118	An act to amend section 2590, chapter 5, title XVII, of the Code, limiting the number of changes of the place of trial in civil cases..... Took effect July 4, 1878.	.....	3795
119	An act to prohibit, regulate and punish the sale of malt or vinous liquors within two miles of the corporate limits of any municipality, and within two miles of where an election is held, and to extend the powers and jurisdiction of said municipality and its officers. Additional to Code, title IV, chapter 10, "Of cities and incorporated towns"..... Took effect July 4, 1878.	.....	2421-2429
121	An act to provide for opening drains to be constructed through two or more adjoining counties. Amendatory of chapter 2, title X, of the Code..... Took effect July 4, 1878.	.....	1855, 1856
122	An act to amend section 914, and repeal section 915, of chapter 3, title VI. of the Code; also to amend subdivision 5 of section 3793 of chapter 2, title XXIII, of the Code, relating to the payment of money into the state treasury. Took effect July 4, 1878.	.....	1402
123	An act amendatory to chapter 132, laws of the sixteenth general assembly, relating to the publication and distribution of the laws..... Took effect by publication, April 3, 1878.	.....	43, 44
124	An act to amend chapter 101, laws of the sixteenth general assembly, in relation to fences..... Took effect July 4, 1878.	.....	2340
125	An act to provide for the organization of the state militia, and entitled the "Military Code of Iowa," and fixing the salary of certain officers. Repealing title VIII of the Code..... Took effect by publication, April 5, 1878.	.....	Repealed by 1607
126	An act to amend section 1241 of the Code, title X, chapter 4, relating to taking private property for works of internal improvement..... Took effect by publication, March 30, 1878.	.....	1904

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
129	An act in relation to liens on real estate of judgments in the district and circuit courts of the United States. Amending Code, title XVII, chapter 9, "Of trial and judgment" ..... Took effect July 4, 1878.	1 2-4	4089 4093-4095
132	An act to enable school districts to issue bonds for the purpose of funding judgment indebtedness now existing. Additional to Code, title XII, chapter 9, "Of the system of common schools" ..... Took effect July 4, 1878.	.....	See 2965-2967
133	An act to provide for the subdivision of independent school districts. Additional to Code, title XII, chapter 9, "Of the system of common schools" ..... Took effect July 4, 1878.	.....	2956-2960
136	An act to provide for the rebuilding of the institution for the deaf and dumb, and to provide for the government of the same, and to repeal a portion of section 1685, chapter 7, title XII, of the Code ..... Took effect by publication, March 29, 1878.	1-4 5	2781-2783 2769
142	An act making appropriation for the maintenance of the normal school at Cedar Falls, and amending chapter 129 of acts of sixteenth general assembly ..... Took effect July 4, 1878.	.....	2677
143	An act to repeal section 1766, chapter 9, title XII, of the Code, relating to examination of teachers, and issuing certificates, and enacting a substitute therefor ..... Took effect July 4, 1878.	.....	2881
144	An act to prevent trustees and other officers of state institutions from furnishing supplies to or being interested in contracts with such institutions, and to punish the violation of the same ..... Took effect July 4, 1878.	.....	171, 172
145	An act entitled an act relating to the trial of equitable actions. Amending section 2742, chapter 9, title XVII, "Of trial and judgment" .... Took effect July 4, 1878.	.....	3949
149	An act providing for the employment of one guard for every eight prisoners at the Anamosa penitentiary ..... Took effect by publication, April 4, 1878.	.....	6222, 6223
154	An act to amend chapter 125, acts of the sixteenth general assembly, relating to the bonding of county indebtedness. Took effect by publication, March 28, 1878.	... ...	376, 377
155	An act entitled an act for the better security of the revenue, regulating the duties of county treasurers, boards of supervisors and state treasurer in relation to the same, and amending section 912, chapter 3, title VI, of the Code. Took effect July 4, 1878.	.....	1400
156	An act to repeal sections 4048, 4049, 4050 and 4051, chapter 11, title XXIV, of the Code; chapter 69 of the public laws of the fifteenth general assembly, and chapter 122 of the laws of the sixteenth general assembly, in relation to the protection of game, and to enact a substitute in lieu thereof. Took effect by publication, March 28, 1878.	.....	5391-5402
157	An act amendatory to section 2, chapter 123, of the acts of the sixteenth general assembly, relating to townships and incorporated towns and cities, to aid in the construction of railroads ..... Took effect by publication, March 28, 1878.	.....	Repealed by 2081

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
162	An act to authorize cities of the first class to provide for the construction of sewers. Additional to Code, chapter 10, title IV, concerning "cities and incorporated towns" Took effect by publication, March 28, 1878.	.....	838–844
164	An act to legalize the acknowledgments of deeds by deputy clerks of court, county auditors and deputy county auditors Took effect July 4, 1878.	.....	3143
165	An act to repeal section 3849, chapter 2, title XXIV, of the Code, and to enact a substitute therefor, and to restore capital punishment Took effect July 4, 1878.	1 2–20	5129 5132–5150
166	An act to amend section 1381, chapter 1, title XI, of the Code, providing for the payment of the tuition of pauper children Took effect by publication, April 5, 1878.	.....	2166
167	An act to repeal chapter 156 of the laws of the sixteenth general assembly, and to enact a substitute therefor Took effect by publication, March 30, 1878.	.....	6184
168	An act in relation to evidence in criminal actions. Amending sections 3636 and 4421, and repealing section 4237, and part of section 4556, of the Code Took effect July 4, 1878.	1 2 3	4886 5954 5806
169	An act to amend chapter 47, laws of the sixteenth general assembly, in relation to empowering cities to extend their corporate limits. Additional to Code, chapter 10, title IV, "Of cities and incorporated towns" Took effect July 4, 1878.	.....	583–586
171	An act to amend section 4374 of chapter 24, title XXV, of the Code of 1873 Took effect by publication, March 30, 1878.	.....	5759
172	An act to authorize cities, towns and townships to regulate the sale of coal oil Took effect by publication, April 11, 1878.	.....	Repealed by 2496a
173	An act to amend chapter 123 of the laws of the sixteenth general assembly, relating to taxes in aid of railroads, which is entitled "An act to enable townships and incorporated towns and cities to aid in the construction of railroads" Took effect by publication, April 3, 1878.	.....	Repealed by 2081
174	An act to amend section 6 of chapter 116 of the laws of the sixteenth general assembly, the same being "An act relating to cities organized and existing under special charters," conferring additional powers, and amending the charters of such cities Took effect July 4, 1878.	.....	956
176	An act to confer certain powers upon any home for the friendless incorporated under the laws of Iowa, in relation to the control and disposition of minor children who become inmates thereof Took effect by publication, April 6, 1878.	.....	3503–3508
183	An act to amend section 1428, chapter 2, title XI, of the Code, relating to insane expenses Took effect July 4, 1878.	.....	2227–2231
184	An act to amend section 240 of chapter 10, title III, of the Code Took effect July 4, 1878.	.....	318

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
186	An act amendatory to section 4773 of chapter 2, title XXVI, of the Code, relating to the furnishing of supplies for the penitentiary Took effect by publication, April 4, 1878.	1 2	6173 6224
187	An act to amend chapter 40 of the acts of the sixteenth general assembly, relating to the additional penitentiary at Anamosa Took effect by publication, April 2, 1878.	.....	6218
188	An act to provide for the construction and maintenance of fishways to enable fish to pass over dams across the rivers and streams of the state of Iowa Took effect by publication, April 6, 1878.	.....	2316–2318

EIGHTEENTH GENERAL ASSEMBLY (1880).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
2	An act to amend sections 1, 2 and 3 of chapter 165 of the *public* acts of the seventeenth general assembly of the state of Iowa, in relation to capital punishment Took effect by publication, February 12, 1880.	1 2, 3	5129 5132, 5133
5	An act to amend section 2372 of the Code, relative to the non-liability for the debts of deceased persons of money made payable by mutual aid and benovolent societies Took effect July 4, 1880.	.....	3576
6	An act to amend section 1120 of the Code of 1873, in relation to publication and distribution of the reports of the State Horticultural Society Took effect by publication, February 24, 1880.	.....	1681
7	An act to amend sections 1719 and 1808 of the Code of 1873, in relation to a tie vote of the electors at an election of school directors Took effect by publication, February 24, 1880.	1 2	2826 2935
8	An act to amend the law governing the election of directors and the powers of boards of directors of independent school districts. Amendatory of Code, title XII, chapter 9 Took effect by publication, February 28, 1880.	.....	2936–2942
9	An act to repeal chapter 171 of the acts of the seventeenth general assembly Took effect by publication, February 28, 1880.	.....	5759
11	An act for the punishment of persons for attempting to break and enter buildings with intent to commit a public offense. Additional to chapter 3, title XXIV, Code, concerning "offenses against property" Took effect July 4, 1880.	.....	5195
12	An act in relation to loaning and management of the permanent school fund Took effect by publication, March 1, 1880.	1–3 4 5 6, 7	3020–3022 3002 3034 3023, 3024
13	An act to amend chapter 28 of the public acts of the fifteenth general assembly, in relation to the assessment of taxes Took effect by publication, March 3, 1880.	.....	1270

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
15	An act to repeal chapter 65 of the public laws of the fifteenth general assembly, and section 1260 of the Code, and enact a substitute therefor, relating to the taking of private property for works of internal improvement. Took effect by publication, March 2, 1880.	.....	1928
21	An act amendatory to section 2049 of the Code of 1873, in relation to weights of Hungarian grass and millet seed. Took effect July 4, 1880.	.....	3225
22	An act further defining the duties of county officers. Took effect July 4, 1880.	1 2 3 4	514 455 265 515
24	An act relating to cities organized and existing under special charters, conferring additional powers, and amending the charters of such cities in certain respects. Took effect by publication, March 11, 1880.	.....	915
25	An act to protect keepers of livery and feed stables, and herders and feeders of stock, and to give them a lien. Took effect July 4, 1880.	.....	3372, 3373
26	An act to repeal section 520 of chapter 10 of title IV of the Code of Iowa, in relation to cities and incorporated towns, and to provide a substitute therefor. Took effect July 4, 1880.	.....	715
27	An act to repeal section 3769 of the Code and enact a substitute therefor, relating to salaries of judges of the supreme court. Took effect July 4, 1880.	.....	5024
28	An act to repeal section 8, chapter 123, of the *public* acts of the sixteenth general assembly, in relation to the payment of taxes voted in aid of the construction of railroads, and enacting a substitute therefor. Took effect by publication, March 12, 1880.	.....	Repealed: See 2081
31	An act to amend section 2094 of title XIV, chapter 3, of the Code, relating to holidays. Took effect by publication, March 15, 1880.	.....	3271
32	An act granting to street railway companies organized under the laws of this state the right of way over certain public highways. Took effect by publication, March 15, 1880.	.....	1947, 1948
36	An act in relation to highway taxes. Took effect July 4, 1880.		1489, 1490
38	An act to repeal section 12, chapter 2, title I, of the Code, in relation to compensation and mileage of members of the general assembly, and compensation of officers and employees of the same, and to enact a substitute therefor. Took effect July 4, 1880.	.....	12
39	An act to protect the dairy interests and for the punishment of fraud connected therewith. Took effect July 4, 1880.	.....	Repealed by 2520
40	An act extending the right to hold the office of county recorder to women. Took effect July 4, 1880.	.....	471
45	An act requiring boards of supervisors in certain cases to pay to cities of the first class a portion of the county bridge fund. Took effect by publication, March 17, 1880.	.....	414

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
46	An act to amend section 1, chapter 80, of the acts of the sixteenth general assembly, in relation to powers and duties of boards of supervisors..... Took effect July 4, 1880.	.....	402
47	An act repealing chapter 101, acts of sixteenth general assembly, and chapter 124, acts of seventeenth general assembly, and relating to barbed wire fences, amending section 1507 of the Code of 1873..... Took effect July 4, 1880.	.....	2340
50	An act to amend section 925, title VII, chapter 1, of the Code, relating to the vacation of public highways..... Took effect July 4, 1880.	.....	1415
51	An act to enable school districts or district townships to issue bonds for the purpose of funding judgment indebtedness now existing. Additional to Code, title XII, chapter 9, of the system of common schools..... Took effect July 4, 1880.	.....	2965–2967
52	An act to amend section 488 of the Code of 1873, in relation to the use of the highway tax of incorporated towns and cities in certain cases..... Took effect July 4, 1880.	.....	668
53	An act to provide that lands to be laid out into town or city lots shall be free from incumbrance, or that security shall be given against such incumbrance, and that such lots, when thus laid out, shall be accurately described relative to some established corner of the congressional division of which they are a part, and repealing chapter 25 of the laws of the fifteenth general assembly, and chapter 63 of the laws of the sixteenth general assembly..... Took effect by publication, March 20, 1880.	.....	1010–1014
55	An act authorizing the construction of sewers for state buildings through streets and alleys of incorporated cities, or cities acting under special charter ..... Took effect by publication, March 20, 1880.	.....	749, 750
56	An act to provide for the extension of the limits of cities of the first or second class..... Took effect by publication, March 23, 1880.	.....	573
57	An act to relieve corporations engaged in manufacturing from double taxation in certain cases..... Took effect July 4, 1880.	.....	1294, 1295
58	An act to amend section 2975 of the Code, relating to garnishment proceedings..... Took effect July 4, 1880.	.....	4200
59	An act to amend section 1822, chapter 9, title XII, of the Code of 1873..... Took effect July 4, 1880.	.....	2962
60	An act to provide for the stereotyping, publishing and sale of the supreme court reports, and to repeal sections 155, 156, 157 and 160, chapter 4, title III, of the Code, and to fix the salary of the supreme court reporter..... Took effect by publication, March 23, 1880.	.....	196–205
62	An act to amend section 277, chapter 14, title III, of the Code, relating to the administration of oaths..... Took effect by publication, March 22, 1880.	.....	364
63	An act to amend section 1717 of the Code, to provide for the transfer of funds in the school-house fund unappropriated to either of the other funds..... Took effect July 4, 1880.	.....	2823

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
69	An act to amend chapter 13, title XII, of the Code, in relation to the state library. Took effect by publication, March 25, 1880.	.....	3050, 3051
71	An act to amend section 1900 of the Code, in relation to the State Historical Society. Took effect July 4, 1880.	.....	3065
74	An act to provide a military code, and for the organization, government and support of the state militia, and to repeal chapter 125, laws of seventeenth general assembly. Took effect by publication, March 26, 1880.	.....	1555–1605
75	An act to regulate the practice of pharmacy and the sale of medicines and poisons. Took effect by publication, March 31, 1880.	.....	2523–2534
76	An act to define and punish frauds upon hotel, inn, boarding and eating-house keepers. Took effect July 4, 1880.	.....	5468, 5469
77	An act in relation to jury trials in cases for violation of ordinances of cities of second class and incorporated towns. Took effect by publication, March 29, 1880.	.....	666
79	An act to amend section 421, chapter 10, title IV, of the Code of 1873, relative to incorporated towns. Took effect by publication, March 29, 1880.	.....	569
80	An act to empower certain special chartered cities to use for school purposes public grounds unused for the purposes for which such grounds were originally dedicated or set apart. Took effect by publication, March 22, 1880.	.....	925
82	An act to prohibit the furnishing or giving, or offering to give, intoxicating liquors, including ale, wine and beer, to voters at or within one mile of the polls on election day. Took effect July 4, 1880.	.....	2430–2431
83	An act to amend section No. 2741 of the Code, in relation to the trial and appeal of ordinary actions. Took effect by publication, March 25, 1880.	.....	3948
84	An act to amend chapter 9, title XII, of the Code of 1873, by addition thereto, providing for calling, in certain contingencies, meetings of school districts. Took effect by publication, March 25, 1880.	.....	2824
85	An act to amend chapter 121, acts of seventeenth general assembly, section 1212, Code of 1873, relating to drains in two or more counties. Took effect by publication, March 31, 1880.	1–7 8	1857–1863 1850
88	An act to give county boards of supervisors the right to improve the highways in certain cases. Took effect July 4, 1880.	.....	413
89	An act to authorize cities of the first and second class to acquire and dispose of real property in certain cases. Took effect by publication, March 26, 1880.	.....	730
92	An act to amend section 10, chapter 70, acts of the sixteenth general assembly, "Relating to the propagation of fish". Took effect July 4, 1880.	.....	2306
96	An act to make section 464 of the Code of 1873, as amended, applicable to special chartered cities and towns. Took effect July 4, 1880.	.....	923

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
103	An act to legalize acknowledgments by county auditors, deputy county auditors, and deputy clerks of the district court..... Took effect by publication, March 27, 1880.	.....	3143
109	An act to amend section 831, chapter 1, title VI, of the Code of Iowa, in relation to boards of equalization..... Took effect by publication, April 1, 1880.	1 2 3	1312 1304 1311
111	An act to repeal section 1798 of the Code, and enacting a substitute therefor..... Took effect July 4, 1880.	.....	2917
115	An act to repeal sections 3788 and 3789 of chapter 2, title XXIII, of the Code, and to enact a substitute therefor, in relation to the compensation of sheriff..... Took effect July 4, 1880.	.....	Repealed by 5040
120	An act to repeal section 531, chapter 10, title IV, of the Code, and to enact a substitute therefor, in relation to mayors of cities of the second class..... Took effect by publication, March 31, 1880.	.....	787
123	An act to provide for the further enforcement of chapters 80 and 188 of the acts of the seventeenth general assembly, in relation to the construction and attachment of fish-ways to dams ..... Took effect by publication, April 6, 1880.	.....	Repealed by 19 G. A., ch. 17
124	An act to legalize the service of original notices by publication in cases where the petition has not been filed until after the publication of the original notice ..... Took effect July 4, 1880.	.....	3326
128	An act to authorize railroad companies organized in other states to extend their railroads into this state..... Took effect July 4, 1880.	.....	1978
130	An act to amend sections 4248 and 4273, and to repeal sections 4289 and 4293 of the Code, and enact substitutes therefor, in relation to evidence before grand juries ..... Took effect by publication, April 1, 1880.	1 2 3 4 5, 6	5631 5656 5672 5676 5677, 5678
131	An act repealing section 1, chapter 133, of the acts of the seventeenth general assembly, and enacting a substitute therefor..... Took effect by publication, April 1, 1880.	.....	2956
132	An act to authorize independent school districts or district townships to fund their outstanding bonded indebtedness, and to provide for the payment of the same..... Took effect by publication, April 3, 1880.	.....	2968–2974
133	An act to repeal section 1361 of the Code, and to enact a substitute therefor, in relation to the support of the poor.. Took effect by publication, April 1, 1880.	.....	2148
137	An act to prevent fraud in the sale of lard in certain cases. Took effect by publication, April 2, 1880.	.....	5370, 5371
139	An act in relation to the formation of independent school districts..... Took effect July 4, 1880.	.....	2919
140	An act to authorize cities and towns organized under special charters to refund outstanding bonded debt at a lower rate of interest, and to provide for the payment of the same..... Took effect by publication, April 3, 1888.	.....	388

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
142	An act to amend sections 1971 and 1974, chapter 6, title XIII, of the Code, relating to the duties of county auditors..... Took effect by publication, April 3, 1880.	.....	3146, 3149
143	An act to repeal chapter 113 of the acts of the seventeenth general assembly, and amend section 1802, as amended by chapter 27, acts of the fifteenth general assembly..... Took effect by publication, April 1, 1880.	.....	2923
144	An act to amend section 2 of chapter 123 of the acts of the sixteenth general assembly, relative to the time for publishing notices of election for voting aid to railways..... Took effect by publication, March 31, 1880.	.....	Repealed: See 2081
146	An act to repeal section 512, chapter 9, laws of the seventeenth general assembly, and enact a substitute therefor, and to amend sections 489 and 493 of the Code, as re-enacted by chapter 9, laws of the seventeenth general assembly..... Took effect by publication, April 5, 1880.	1 2 3	699 669 673
147	An act to amend section 1114 of the Code, prohibiting gambling, horse-racing, and the sale of intoxicating liquors at agricultural fairs, so as to apply to state fairs.. Took effect July 4, 1880.	.....	1675
149	An act to provide for leasing the convict labor at the penitentiary of the state, and to repeal chapter 110 of the acts of the seventeenth general assembly..... Took effect by publication, April 9, 1880.	.....	6207, 6208
150	An act to repeal section 1579 of the Code, and enact a substitute therefor, to provide for the publication and distribution of the school law..... Took effect by publication, April 5, 1880.	.....	2592, 2593
151	An act to establish a state board of health in the state of Iowa, to provide for collecting vital statistics, and to assign certain duties to local boards of health, and to punish neglect of duties..... Took effect by publication, April 3, 1880.	.....	2558–2582
152	An act providing for appeals from the findings of the commissioners of insanity, and to amend section 1401 of chapter 2, title XI, of the Code..... Took effect July 4, 1880.	1–5 6	2196–2200 2195
153	An act to protect depositors in banks and banking institutions, and to punish fraudulent banking. ..... Took effect by publication, April 3, 1880.	.....	1824, 1825
154	An act to equalize the good time that may be earned by convicts at the penitentiaries, amendatory of section 4754 of the Code, and of chapter 43 of the general and public laws of the fourteenth general assembly, chapter 40 of the acts of the sixteenth general assembly, and chapter 187 of the acts of the seventeenth general assembly ..... Took effect by publication, April 2, 1880.	1, 2 3	6209, 6210 6154, 6218
156	An act to provide for an assistant fish commissioner ..... Took effect July 4, 1880.	.....	Repealed by 21 G. A., ch. 155, § 6
161	An act to further amend section 391 [591], chapter 1, title V, of the Code, relating to the election of township officers. Took effect July 4, 1880.	.....	1041, 1042
162	An act relating to conveyances of real estate by foreign executors and trustees, and to amend section 2352 of the Code of Iowa..... Took effect by publication, April 7, 1880.	.....	3552, 3553

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
163	An act limiting the amount on which appeal may be taken on trials before justices of the peace to the circuit court in civil cases ..... Took effect July 4, 1880.	.....	4824
164	An act to amend section 1, chapter 152, of the laws of the sixteenth general assembly, relative to asylum for feeble-minded ..... Took effect by publication, April 3, 1880.	.....	Repealed by 2709
165	An act to amend chapter 72, laws of the seventeenth general assembly, relating to support of the blind..... Took effect July 4, 1880.	.....	2763
167	An act to repeal section 93 of the Code of 1873, and to enact a substitute therefor ..... Took effect July 4, 1880.	.....	107
169	An act to facilitate business with railroad and sleeping-car companies running or operating sleeping-cars on lines terminating in this state..... Took effect by publication, April 3, 1880.	.....	2101, 2102
171	An act amending chapter 5, title XII, of the Code, relating to the Iowa reform school for girls and providing for carrying the same into effect, and for permanently locating the same at Mitchellville, Iowa..... Took effect by publication, April 6, 1888.	.....	2747, 2748
176	An act to repeal section 1722 of the Code of 1873, and to provide a substitute therefor, in relation to the meetings of boards of school directors in district townships ..... Took effect July 4, 1880.	.....	2831
181	An act defining the rights and liabilities of hotel, inn and eating-house keepers ..... Took effect July 4, 1880.	.....	3374, 3375
182	An act to amend chapter 9 of title XXIV of the Code by repealing section 4017 and enacting a substitute therefor, and by enacting section 4019½, providing for the protection of sepulchers and the bodies of deceased persons.... Took effect July 4, 1880.	2 3	5328 5331
183	An act to amend chapter 154 of the acts of the seventeenth general assembly, and section 289 of the Code, relating to the bonding of county indebtedness..... Took effect by publication, April 2, 1880.	.....	376, 377
184	An act to repeal sections 3784, 3793 and 3798 of the Code, and section 3, chapter 122, laws of the seventeenth general assembly, and enacting substitutes therefor, relating to salaries of clerk of district and circuit courts, county treasurer and county auditor, and defining certain of their duties..... Took effect July 4, 1880.	1 2 3–5	5036 5067 5072–5074
185	An act to regulate and limit the amount of attorneys' fees that may be taxed in suits on written contracts stipulating for attorneys' fees in certain cases ..... Took effect July 4, 1880.	.....	4159–4162
186	An act to require railroad companies holding lands by grant to place evidence of their title to such lands on record... Took effect July 4, 1880.	.....	3119. 3120
188	An act amending section 6 of chapter 70 of the laws of the fifteenth general assembly, relating to the liability of owners of stock for damage done by domestic animals running at large; and for the punishment of persons unlawfully relieving stock from distraint ..... Took effect July 4, 1880.	.....	2255, 2256

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
189	An act in relation to the jurisdiction of mayors of cities of the second class and incorporated towns, with reference to violation of city ordinances ..... Took effect by publication, April 2, 1880.	.....	693
190	An act to amend section 798 of title VI, chapter 1, of the Code, relating to exemptions for planting and cultivating forest and fruit trees..... Took effect by publication, April 6, 1880.	.....	1272
191	An act to provide for the condemnation of real estate for channels and ditches for the drainage and better protection of the right of way and road-bed of railroads..... Took effect by publication, April 7, 1880.	.....	1924–1927
192	An act relating to taxes voted in aid of the construction of railways under chapter 123 of the acts of the sixteenth general assembly, and chapter 125 of the acts of the seventeenth general assembly of the state of Iowa, and supplemental thereto..... Took effect by publication, April 6, 1880.	.....	Repealed by 2081
193	An act to amend chapter 156, laws of the seventeenth general assembly, relative to the protection of game..... Took effect July 4, 1880.	.....	5392, 5393
194	An act making appropriations for the Iowa state library... Took effect July 4, 1880.	.....	3061
195	An act to amend sections 181 and 3777 of the Code, relating to duties and compensation of short-hand reporters..... Took effect July 4, 1880.	1 2	227 5029
200	An act to repeal part of section 4783 of chapter 167 of the *public* acts of the seventeenth general assembly, and enacting a substitute therefor, fixing the compensation of the officers of the penitentiary..... Took effect by publication, April 6, 1880.	.....	6183
201	An act to amend chapter 6 of the laws of the sixteenth general assembly, and providing for one or more assessors, not to exceed three, in incorporated cities having ten thousand inhabitants or over..... Took effect by publication, April 3, 1880.	.....	528, 529
202	An act to regulate mines and mining, and to repeal an act therein named..... Took effect July 4, 1880.	.....	Repealed by 2467
203	An act to amend sections 1 and 2, chapter 98, laws of the seventeenth general assembly, relating to the Institution for the Deaf and Dumb..... Took effect by publication, April 9, 1880.	.....	2776, 2777
206	An act to consolidate the office of the register of the state land office with the office of secretary of state..... Took effect July 4, 1880.	.....	110–114
207	An act to repeal section 3818 of the Code, in relation to the payment of witnesses for the defendant in criminal cases, and to enact a substitute therefor..... Took effect July 4, 1880.	.....	5095
208	An act to amend chapter 1 of title IX of the Code of 1873, creating double liability of stockholders or shareholders in corporations organized under said chapter 1 aforesaid, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits of money or discounting notes..... Took effect by publication, April 6, 1880.	.....	1646–1648

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
209	An act to repeal section 2831 of the Code of 1873, and enact a substitute therefor. ..... Took effect July 4, 1880.	.....	4038
210	An act to secure policy-holders in fire insurance companies from unjust forfeitures of policies..... Took effect July 4, 1880.	.....	1729–1731
211	An act relating to insurance and fire insurance companies.. Took effect July 4, 1880.	.....	1732–1734

NINETEENTH GENERAL ASSEMBLY (1882).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
7	An act to amend chapter 114 of the acts of the sixteenth general assembly, relating to the submission of amendments to the constitution to a vote of the people..... Took effect by publication, February 14, 1882.	1 2	60 63
8	An act to repeal section 2155 of the Code, relating to limited partnerships, and enacting a substitute therefor..... Took effect by publication, February 17, 1882.	.....	3338
13	An act to amend chapter 194, laws of the eighteenth general assembly, relative to making appropriations for the Iowa state library..... Took effect by publication, February 18, 1882.	.....	3061
16	An act to authorize cities of the first and second class and incorporated towns to change their corporate names, and to prescribe the manner in which such change may be made. Took effect by publication, February 23, 1882.	.....	607–612
19	An act to amend section 3864 of the Code of 1873, in relation to the penalty for attempts to produce a miscarriage.... Took effect July 4, 1882.	.....	5163
23	An act requiring boards of directors to set out trees on school grounds..... Took effect by publication, March 1, 1882.	1, 2 3	2837, 2838 2860
24	An act to amend chapter 143 of the acts of the sixteenth general assembly, entitled "An act to provide for establishing superior courts in cities of a certain grade, relating to cities and incorporated towns"..... Took effect by publication, March 4, 1882.	1, 2 3, 4 5 6 7, 8 9	763, 764 769, 770 777 779 781, 782 784
25	An act to repeal part of section 521, title IV, chapter 10, of the Code, and enact a substitute therefor, relating to the election of aldermen in cities of the first class..... Took effect by publication, March 3, 1882.	.....	716
27	An act to amend chapter 159, section 3, acts of 1876, in relation to the printing and distribution of public documents. Took effect July 4, 1882.	.....	Repealed by 136*a*
32	An act to repeal section 487 of the Code, and enact a substitute in lieu thereof, in relation to poll tax. .... Took effect by publication, March 7, 1882.	.....	667
35	An act relating to the trial of equitable actions, amending section 2742, chapter 9, title XVII, of the Code of Iowa, as amended by chapter 145 of the laws of the seventeenth general assembly..... Took effect by publication, March 10, 1882.	.....	3949

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
36	An act to insure the better education of practitioners of dentistry in the state of Iowa. Took effect July 4, 1882.	.....	2535–2545
38	An act requiring the cost of paving street and alley intersections in certain cities to be paid out of a general paving fund, and authorizing the levy of a special tax therefor. Took effect by publication, March 10, 1882.	.....	741–745
40	An act to repeal chapter 152 of the acts of the sixteenth general assembly, and chapter 164 of the acts of the eighteenth general assembly, and to provide for the establishment and maintenance of the Institution for Feeble-minded Children at Glenwood. Took effect by publication, March 11, 1882.	.....	2709–2722
44	An act to provide for the construction of levees by amending sections 1207, 1208, 1209, 1210 and 1211 of chapter 2, title X, of the Code of 1873, and chapter 140 of the laws of the sixteenth general assembly, and chapter 121 of the laws of the seventeenth general assembly, and chapter 85 of the laws of the eighteenth general assembly, relating to drains, ditches and water-courses. Took effect by publication, March 14, 1882.	1–6 7 8 9, 10 11	1845–1850 1852 1854 1855, 1856 1858–1863
45	An act to amend section 890 of the Code, relating to the redemption of tax sales. Took effect July 4, 1882.	.....	1375
46	An act to repeal section 1739 of the Code of 1873, and to enact a substitute therefor, in relation to the duties of the president of the board of school directors. Took effect July 4, 1882.	.....	2854
49	An act to amend section 3072, chapter 2, title XVIII, of the Code, relating to exemptions. Took effect July 4, 1882.	.....	4297
51	An act to amend section 1717 of chapter 9, title XII, of the Code of Iowa, so as to enable the board of directors of district townships to procure highways to school-house sites. Took effect by publication, March 12, 1882.	.....	2823
52	An act to repeal section 2 of chapter 38 of the laws of the eighteenth general assembly, in relation to compensation of officers and employees of the general assembly, and to enact a substitute therefor. Took effect by publication, March 14, 1882.	.....	12
54	An act authorizing boards of supervisors to appropriate amounts received as insurance thereon in reconstructing public buildings destroyed by fire, wind or lightning. Took effect by publication, March 14, 1882.	.....	415
56	An act to increase the number of circuit judges in each circuit of this state containing a city having a population in excess of twenty-two thousand and three hundred, and to provide for the election of said judges. Took effect July 4, 1882.	.....	Repealed: See 233, 235
62	An act in relation to the exemption of sewing machines from execution and attachment. Took effect July 4, 1882.	.....	4304
63	An act to enable townships, incorporated towns and cities, including cities acting under special charters, to aid in the construction of county bridges in certain cases. Took effect by publication, March 15, 1882.	.....	407–412

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
80	An act to amend section 934 of the Code of 1873..... Took effect July 4, 1882.	.....	1424
89	An act granting additional powers to cities organized under the general incorporation laws of the state..... Took effect by publication, March 22, 1882.	.....	731–739
90	An act authorizing cities acting under special charters to cause land on which there is stagnant water to be filled up or drained, and providing for the collection of such expense ..... Took effect by publication, March 17, 1882.	.....	926, 927
91	An act to amend chapter 83 of the acts of the seventeenth general assembly, amendatory of section 4785 of the Code, in relation to the support of convicts..... Took effect by publication, March 22, 1882.	.....	6185
92	An act to increase the support fund of the girl's department of the Iowa reform school..... Took effect by publication, March 17, 1882.	.....	2749, 2750
94	An act to repeal chapter 115, laws of the eighteenth general assembly, relating to compensation of sheriffs, and to enact a substitute in lieu thereof..... Took effect by publication, March 21, 1882.	.....	5040–5063
100	An act to amend sections 2253 and 2266 of the Code, in relation to the appointment and powers of guardians of non-resident idiots, lunatics, and persons of unsound minds..... Took effect by publication, March 21, 1882.	1 2	3444 3457
102	An act providing for the cancellation of taxes voted to aid in the construction of railroads..... Took effect by publication, March 22, 1882.	.....	Repealed by 2081
103	An act enabling county treasurers to pay outstanding warrants..... Took effect by publication, March 22, 1882.	.....	460 461
104	An act to amend section 1324, chapter 6, title 10, of the Code of 1873, relating to telegraphs..... Took effect by publication, March 22, 1882.	.....	2103
105	An act to amend section 1, chapter 203, laws of the eighteenth general assembly, relating to the Institution for the Deaf and Dumb ..... Took effect by publication, March 22, 1882.	.....	2776, 2777
109	An act to amend section 936 of the Code of 1873, relating to road notices..... Took effect July 4, 1882.	.....	1426
110	An act to repeal section 390 of the Code, chapter 6 of the laws of the sixteenth general assembly, chapter 201 of the laws of the eighteenth general assembly, and to enact a substitute therefor, in relation to the election of assessors..... Took effect July 4, 1882.	.....	528
112	An act to further diminish liability to railroad accidents, and to punish interference with, and injury to, railroad property ..... Took effect July 4, 1882.	.....	5204–5207
113	An act to amend section 1, chapter 194, of the laws of the eighteenth general assembly, entitled an act making appropriations for the Iowa state library..... Took effect by publication, March 23, 1882.	.....	3061

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
115	An act to repeal section 573 of the Code, and enact a substitute therefor, in relation to the time of holding general elections Took effect July 4, 1882.	.....	1020
117	An act to provide for the appointment and salary of a deputy clerk of the supreme court Took effect by publication, March 23, 1882.	1 2	1238 5026
118	An act to include all the territory of an incorporated city or town within the independent school district, or districts, now existing or hereafter to be formed Took effect by publication, March 23, 1882.	.....	2920, 2921
122	An act to amend section 1, chapter 47, of the acts of the fifteenth general assembly, in relation to crossing highways Took effect by publication, March 23, 1882.	.....	1930
123	An act to repeal chapter 153 of the laws of the ninth general assembly, and to amend section 1 of chapter 167 of the laws of the eighteenth general assembly Took effect July 4, 1882.	.....	107
124	An act to provide for filling vacancies in offices of incorporated towns Took effect by publication, March 23, 1882.	.....	704–706
128	An act to provide for the publication of city and town ordinances in book or pamphlet form, and for the taking effect thereof Took effect by publication, March 23, 1882.	.....	661
133	An act to authorize incorporated towns and cities to procure and donate to railway companies sites for depots, machine shops and other buildings. Took effect by publication, March 23, 1882.	.....	637, 638
136	An act to amend section 463 of the Code of 1873, relating to sales of liquors in cities and incorporated towns Took effect July 4, 1882.	.....	622
137	An act to amend sections 4, 10, 11 and 12 of chapter 75 of the acts of the eighteenth general assembly, in relation to the practice of pharmacy and the sale of medicine and poisons Took effect by publication, March 18, 1882.	1 2–4	2526 2532–2534
140	An act amending section 3 of chapter 151, acts of the eighteenth general assembly, relating to fees of clerks of district and circuit courts Took effect by publication, March 23, 1882.	.....	2560
144	An act to repeal sections 3201 and 3202 of the Code of 1873, and to provide a substitute therefor, in relation to petitions and arguments for rehearing in the supreme court Took effect by publication, March 23, 1882.	.....	4431, 4432
146	An act to amend section 8 of chapter 77, acts of the seventeenth general assembly, making the railroad commissioners' tax payable directly into the state treasury Took effect by publication, March 23, 1882.	.....	Repealed: See 2028*a*
147	An act to amend chapter 183 of the acts of the eighteenth general assembly, relating to the bonding of county indebtedness Took effect by publication, March 23, 1882.	.....	376, 377
149	An act to enable boards of directors of independent school districts to insure school property Took effect by publication, March 23, 1882.	.....	2836

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
150	An act to amend certain sections of chapter 5, title XII, Code of 1873, relating to the time of holding pupils in the girls' department of the Iowa reform school. Took effect by publication, May 2, 1882.	.....	2741-2743
151	An act to repeal sections 3786 and 3815 of the Code of Iowa, relating to the payment of fees into the county treasury, and to enact a substitute therefor. Took effect by publication, March 23, 1882.	1 2	5038, 5091 5092
153	An act to amend section 3764 of the Code, relative to compensation of state printer. Took effect by publication, March 23, 1883.	.....	Repealed: See 136*a*
154	An act authorizing cities of the second class to erect and maintain city jails. Took effect by publication, March 23, 1882.	.....	792
158	An act providing for the taxation of certain property for road purposes. Took effect July 4, 1882.	.....	677
159	An act to repeal section 3791 of the Code of 1873, and to enact a substitute therefor, relating to the compensation of members of boards of supervisors. Took effect July 4, 1882.	.....	5065
160	An act to amend chapter 111 of the laws of the eighteenth general assembly, in relation to the restoration of territory in school districts. Took effect July 4, 1882.	.....	2917
161	An act to amend sections 1774 and 1776 of the Code, in relation to the duties and compensation of county superintendents of schools. Took effect July 4, 1882.	1 2	2894 2892
163	An act to divide the state into eleven congressional districts, and to provide for the election of congressmen thereunder. Took effect July 4, 1882.	13, 14	1122, 1123
164	An act to amend section 438, title IV, chapter 10, of the Code, relating to the abandonment of the charters of cities *and* acting under special charters, providing for the term of office of its officers, and the validity of certain ordinances thereof after such abandonment. Took effect by publication, March 29, 1882.	.....	591
165	An act to repeal chapter 81, laws of the seventeenth general assembly, and to enact a substitute therefor, relating to support of convicts in the additional penitentiary. Took effect by publication, March 25, 1882.	.....	6221
166	An act to amend section 1675 of the Code, and to repeal section 1676 of the Code, as amended by chapter 72 of the acts of the seventeenth general assembly and chapter 165 of the acts of the eighteenth general assembly, and to enact a substitute therefor. Took effect by publication, March 25, 1882.	.....	2762, 2763
167	An act to create a state educational board of examiners, and to encourage training in the science and art of teaching. Took effect July 4, 1882.	.....	2598-2606
168	An act empowering cities under special charters to establish boards of health. Took effect by publication, March 28, 1882.	.....	961-979

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
169	An act to provide for the taxation of leasehold estates in agricultural college lands..... Took effect by publication, March 28, 1882.	.....	2651–2657
170	An act to prevent and punish the adulteration of articles of food, drink and medicine, and the sale thereof when adulterated..... Took effect July 4, 1882.	.....	5364–5369
174	An act to amend section 1862 and to repeal section 1865 of the Code..... Took effect by publication, April 4, 1882.	.....	3018
175	An act in relation to the reports of public officers and institutions, and to provide for printing and distributing public documents..... Took effect July 4, 1882.	.....	Repealed by 136*a*

TWENTIETH GENERAL ASSEMBLY (1884).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
7	An act to provide for the appointment of marshals in cities of the first class..... Took effect by publication, February 28, 1884.	.....	799, 800
8	An act to repeal section 1555, chapter 6, title XI, of the Code, and to enact a substitute therefor, relating to intoxicating liquors..... Took effect July 4, 1884.	.....	2416
9	An act to protect and preserve the fish in the permanent lakes and ponds within the state of Iowa..... Took effect by publication, March 8, 1884.	.....	5406–5411
11	An act to amend section 1 of chapter 104 of the laws of the seventeenth general assembly, relating to mutual insurance companies..... Took effect by publication, March 11, 1884.	.....	1723
13	An act authorizing boards of supervisors to purchase, keep up and maintain bridges over streams dividing their respective counties..... Took effect by publication, March 19, 1884.	.....	1525, 1526
17	An act to amend section 4746 of the Code, relative to term of office of the warden of the penitentiary at Fort Madison..... Took effect by publication, March 19, 1884.	.....	6146
18	An act increasing the number of circuit judges in the second judicial district of the state..... Took effect July 4, 1884.	.....	Repealed: See 233, 235
19	An act in relation to the sixth judicial circuit of the state, subdividing the same, providing for the appointment and election of judges of the circuit courts therein, and defining the powers and duties thereof..... Took effect by publication, March 19, 1884.	.....	
20	An act granting additional powers to certain cities of the first class, with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor..... Took effect by publication, March 18, 1884.	.....	824–829

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
21	An act to regulate mines and mining, and to repeal chapter 202 of the acts of the eighteenth general assembly. Took effect by publication, March 20, 1884.	.....	2449–2467
22	An act to amend section 1061, title IX, chapter 1, of the Code of 1873. Took effect by publication, April 2, 1884.	.....	1611
23	An act to exempt from judicial sale the pension money paid to any person by the United States government, and certain of the proceeds and accumulations thereof. Took effect by publication, March 28, 1884.	.....	4305–4307
24	An act to provide for the erection and maintaining of station-houses and connections at the points of intersections or crossing of two or more railroads. Took effect by publication, March 28, 1884.	.....	2094, 2095
25	An act granting additional powers to certain cities of the first class, with reference to the construction of sewers, and to provide for the payment of the cost of the same, and to amend chapter 162 of the acts of the seventeenth general assembly. Took effect by publication, March 28, 1884.	.....	845, 846
27	An act to repeal section 1621 of the Code of 1873 (chapter 4, title XII), and to enact a substitute therefor, relating to a course of study for the State Agricultural College. Took effect July 4, 1884.	.....	2671
28	An act to provide for the assessment and taxation of lands within the state of Iowa granted to railroad companies or corporations which have become earned but not patented. Took effect July 4, 1884.	.....	1282–1284
45	An act to indemnify sheriffs in the service of writs of attachment. Amendatory of Code, chapter 1, title XVIII. Took effect July 4, 1884.	.....	4195–4199
64	An act to amend section 368, chapter 7, title IV, Code of 1873, relating to the compensation of surgeons or physicians in coroners' inquests. Took effect July 4, 1884.	.....	503
65	An act to amend chapter 74, laws of the eighteenth general assembly. Took effect by publication, March 28, 1884.	1 2 3 4 5	1563 1567 1599 1575 1606
66	An act to amend section 1384 (chapter 2, title XI) of the Code of Iowa, in relation to care for the insane. Took effect July 4, 1884.	.....	2171
67	An act to amend section 2 of chapter 156 of the laws of the seventeenth general assembly, as amended by chapter 193 of the laws of the eighteenth general assembly, in relation to the protection of game. Took effect July 4, 1884.	.....	5393
70	An act to provide a fund from which to pay for sheep or other domestic animals killed or injured by dogs. Took effect July 4, 1884.	.....	2288–2293
72	An act to provide for selling, leasing and patenting the lands belonging to the Iowa State Agricultural College and Farm. [Amends ch. 117, acts 10th G. A., and repeals ch. 71, acts 15th G. A.] Took effect by publication, April 2, 1884.	.....	2643–2650

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
73	An act to amend section 1, chapter 105, laws of the nineteenth general assembly, relating to the Institution for the Deaf and Dumb Took effect by publication, March 29, 1884.	.....	2777
74	An act providing for the election of assessor for state and county purposes in cities organized and existing under special charters Took effect by publication, March 29, 1884.	.....	917, 918
76	An act to amend section 1604, and to repeal and provide a substitute for section 1605, of chapter 3, title XII, of the Code, in relation to the trustees of the State Agricultural College Took effect by publication, April 2, 1884.	.....	2630, 2631
77	An act to amend section 2609 (chapter 6, title XVII) of the Code of 1873, in relation to the truth of return of notices served on patients in hospitals for the insane Took effect by publication, April 3, 1884.	.....	3814
78	An act to prohibit the selling or giving of fire-arms to minors Took effect by publication, April 3, 1884.	.....	5384, 5385
79	An act to amend chapter 95 of laws of sixteenth general assembly. Took effect by publication, April 3, 1884.	.....	682
80	An act to amend chapter 147 of the acts of the nineteenth general assembly, relating to the bonding of county indebtedness Took effect by publication, April 3, 1884.	.....	376, 377
93	An act to prevent gambling by means of fictitious contracts for the buying or selling of grain or other produce on margins, and to provide a punishment therefor Took effect July 4, 1884.	.....	5349, 5350
94	An act relating to a change of the place of trial of civil actions, amending section 2590 of the Code of Iowa Took effect July 4, 1884.	.....	3795
102	An act to amend section 4037 of the Code of 1873, relating to the spread of small-pox Took effect July 4, 1884.	.....	5360
103	An act to prohibit the use of barb wire in inclosing public grounds Took effect July 4, 1884.	.....	2839–2841
104	An act concerning bells and steam whistles on locomotives. Took effect July 4, 1884.	.....	2003, 2004
105	An act to protect all citizens in their civil and legal rights.. Took effect July 4, 1884.	.....	5386, 5387
106	An act to amend section 382, chapter 9, title IV, Code of Iowa, relative to the division of townships Took effect by publication, April 3, 1884.	.....	519
115	An act making appropriation for the better support of the state university in the several departments and chairs, and in aid of the income fund and for the development of the institution. Took effect by publication, April 4, 1884.	.....	2628
119	An act to amend section 120 of chapter 8, title II, Code of 1873 (in reference to the executive council), relating to the providing of supplies for state officers Took effect by publication, April 4, 1884.	.....	156

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
120	An act to authorize township trustees to employ attorneys in certain cases Took effect by publication, April 4, 1884.	.....	527
123	An act to amend section 3948 of the Code, to punish the acceptance of bribes by marshals, deputy marshals, policemen and other police officers of cities and towns Took effect July 4, 1884.	.....	5254
124	An act to provide for the distribution of funds by the assignees of insolvents Took effect July 4, 1878.	.....	3300, 3301
125	An act to repeal section 1 of chapter 60 of the acts of the eighteenth general assembly, in relation to the publication of the supreme court reports, and to enact a substitute therefor Took effect July 4, 1884.	.....	196
126	An act to amend section 2578 of the Code of 1873, relating to the foreclosure of mortgages and other liens on real estate Took effect July 4, 1884.	.....	3783
128	An act to amend section 1121, chapter 3, title IX, of the Code of 1873, relative to the annual appropriation to the State Horticultural Society Took effect July 4, 1884.	.....	1682
132	An act to create a bureau of labor statistics, and to provide for the appointment of a commissioner of said bureau, and to define his duties and term of office Took effect by publication, April 5, 1884.	.....	2439-2444
133	An act authorizing actions against railroad companies to be brought in the name of the state upon recommendation of the board of railroad commissioners Took effect by publication, April 8, 1884.	.....	2047, 2048
134	An act to provide for the publication of the annual proceedings of the Iowa Improved Stock Breeders' Association Took effect by publication, April 8, 1884.	.....	1683, 1684
139	An act for union railway depot. [Additional to Code, ch. 10, title V] Took effect by publication, April 9, 1884.	.....	2090-2093
140	An act providing for the care and management of the new capitol Took effect by publication, April 9, 1884.	.....	146*a*
142	An act to repeal sections 4013 and 4016 of the Code and to enact substitutes therefor, relating to houses of ill-fame and to prostitution, and to enact an additional provision relating to houses of ill-fame and prostitution and lewdness Took effect July 4, 1884.	1 2-4	5322 5325-5327
143	An act to amend chapter 6, title XI, of the Code, relating to intoxicating liquors, and to provide additional penalties for violations of the provisions of said chapter and the amendments thereto Took effect July 4, 1884.	1 2-8 9-12 13 14 15, 16	2361 Repealed by 22 G. A., ch. 71, § 20 2380-2384 2408 2410 2413, 2414
147	An act relating to sidewalks on highways Took effect by publication, April 9, 1884.	.....	1459, 1460

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
151	An act relating to parks in cities and towns and to authorize the election of commissioners, and levy a special tax therefor. Took effect by publication, April 11, 1884.	.....	653–659
153	An act to change the name of the reform schools to industrial schools. Took effect by publication, April 10, 1884.	.....	2724
158	An act to amend section 4, chapter 47, of the acts of the sixteenth general assembly, relating to extension of city limits. Took effect by publication, April 11, 1884.	.....	586
159	An act to repeal chapter 123 of the laws of the sixteenth general assembly, and chapters 87 and 173 of the laws of the seventeenth general assembly, and chapter 192 of the laws of the eighteenth general assembly, and chapter 102 of the laws of the nineteenth general assembly, in relation to taxes in aid of railroads, and to enact a substitute therefor. Took effect by publication, April 9, 1884.	.....	2081–2089
162	An act to provide for the erection of monuments to deceased soldiers of the late war. Took effect July 4, 1884.	.....	{ Repealed by 21 G. A., ch. 62, § 4
163	An act to prevent accidents at railroad crossings. Took effect July 4, 1884.	.....	2005, 2006
168	An act to regulate admission to practice as attorneys and counselors in the courts of this state. Took effect July 4, 1884.	.....	280–288
173	An act to amend sections 10 and 12 of chapter 151, laws of the eighteenth general assembly. Took effect by publication, April 10, 1884.	.....	2567, 2569
175	An act to amend chapter 58, acts of the seventeenth general assembly. Took effect by publication, April 11, 1884.	.....	383
178	An act to provide for the burial of honorably discharged soldiers, sailors or marines who may hereafter die without leaving means sufficients to defray funeral expenses, and to provide headstones to mark their graves. Took effect July 4, 1884.	.....	420–422
179	An act to protect subcontractors for labor performed and material furnished for public buildings and improvements. Took effect July 4, 1884.	.....	3326–3329
181	An act in relation to the fourth judicial circuit of the state; subdividing the same; providing for the election of circuit judges therein, and defining their powers and duties. Took effect July 4, 1884.	.....	Superseded by 235
182	An act to amend chapter 28 of the acts of the fifteenth general assembly, amending section 796 of the Code of 1873. Took effect July 4, 1884.	.....	1270
183	An act amending sections 2086 and 2087 of the Code of 1873, relating to the assignment of non-negotiable instruments and accounts. Took effect July 4, 1884.	.....	3262, 3263
184	An act in relation to attorneys' fees in partition cases of real estate. Took effect July 4, 1884.	.....	4532, 4533

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
185	An act to provide for the inspection and to regulate the sale of petroleum and its products, and to repeal chapter 172 of the acts of the seventeenth general assembly and section 3901 of the Code. Took effect by publication, April 18, 1884.	.....	2483-2496
186	An act in relation to ditches, drains, levees, embankments and changes in water-courses, and amendatory to chapter 2, title X, of the Code. Took effect by publication, April 19, 1884.	.....	1864-1867
187	An act to change the name of the additional penitentiary at Anamosa; provide for a matron for the female convicts thereof; to authorize the purchase of certain lands; to provide for the house rent of the deputy warden, and to sell a piece of land known as the Old State Quarry..... Took effect by publication, April 17, 1884.	.....	6213, 6214
188	An act to regulate and provide for the construction of tile and other underground drains through the lands of another. Took effect by publication, April 18, 1884.	.....	1878-1887
189	An act for the appointment of a state veterinary surgeon and defining his duties..... Took effect by publication, April 19, 1884.	.....	2294-2302
190	An act to authorize railway corporations to condemn lands for additional depot grounds..... Took effect by publication, April 18, 1884.		1907
191	An act making an appropriation for the state library and providing assistants for the librarian and for the compensation of the librarian and assistants..... Took effect by publication, April 18, 1884.	3 4	3061 5016
192	An act in relation to powers and duties of mayors of cities of first and second class..... Took effect by publication, April 18, 1884.	.....	710-713
193	An act to provide for the investment of the endowment fund of the Iowa State Agricultural College and Farm... Took effect by publication, April 18, 1884.	.....	2659-2667
194	An act to repeal sections 857, 865 and 866 of the Code, and enact substitutes therefor, providing for semi-annual collection of taxes; also to amend sections 871, 873, 883 and 914 of the Code, and section 1 of chapter 79 of the acts of the sixteenth general assembly..... Takes effect, by special provision of section 8 thereof, the second Monday in November, A. D. 1884.	1 2 3 4 5 6	1339, 1347, 1348 1353 1355 1368 1402 1361
195	An act to repeal section 4018, chapter 9, title XXIV, of the Code, and to enact a substitute therefor..... Took effect July 4, 1884.	.....	5329
197	An act repealing section 304, and amending section 307, of chapter 2, title IV, of Code, on publishing proceedings of county boards of supervisors..... Took effect July 4, 1884.	.....	428
200	An act to promote the improvement of highways..... Took effect July 4, 1884.	1, 2 3 4-18	1467, 1468 1500 1469-1483
203	An act legalizing conveyances..... Took effect July 4, 1884.	.....	2139, 2140

TWENTY-FIRST GENERAL ASSEMBLY (1886).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act to provide for the teaching and study of physiology and hygiene with special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system, in the public schools and educational institutions of the state. Took effect July 4, 1886.	.....	2884-2886
2	An act to amend chapter 24 of the acts of the nineteenth general assembly, relating to the superior courts. Took effect by publication, February 18, 1886.	.....	763
4	An act to repeal the first subdivision of section 2193 of the Code, and to enact a substitute therefor, relating to marriages. Took effect by publication, February 20, 1886.	.....	3384
10	An act to amend section 1381 of the Code. Took effect July 4, 1886.	.....	2168
13	An act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa. Took effect March 2, 1886.	.....	751-754
14	An act to amend chapter 58 of the acts of the seventeenth general assembly, relating to the refunding of outstanding bonded debt of counties, cities and towns at lower rates of interest. Took effect July 4, 1886.	.....	383
15	An act to amend section 3791 of the Code of Iowa, relating to compensation of county supervisors. Took effect July 4, 1886.	.....	5065
20	An act to authorize the creation and provide for the operation of tribunals of voluntary arbitration to adjust industrial disputes between employers and employed. Took effect July 4, 1886.	.....	4668-4680
22	An act to amend chapter 80 of the acts of the twentieth general assembly, relating to the bonding of county indebtedness. Took effect by publication, March 18, 1886.	.....	376, 377
29	An act to amend subdivision 2 of section 2956 of the Code of 1873, relating to attachments. Took effect July 4, 1886.	.....	4170
30	An act to repeal section 3909 of the Code, and to enact a substitute therefor, defining and punishing embezzlement. Took effect July 4, 1886.	.....	5215
34	An act to amend section 1 of chapter 162 of the acts of the seventeenth general assembly, authorizing cities of the first class to provide for the construction of sewers. Took effect July 4, 1886.	.....	838
41	An act to legalize certain orders and judgments of circuit courts and judges in probate matters. Took effect by publication, March 25, 1886.	.....	3512
42	An act repealing sections 231, 241, 4256 and 4291 of the Code, and enacting substitutes therefor, relating to grand jurors and reducing the number thereof, and fixing the number of trial jurors. Took effect July 4, 1886 [but by special provision does not effect proceedings prior to January 1, 1887].	1 2 3 4	3[illegible] [illegible] 5[illegible] 5[illegible]

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
43	An act amending section 16 of chapter 21 of the acts of the twentieth general assembly, relating to the filing of charges for the removal of state mine inspector..... Took effect by publication, March 27, 1886.	.....	2464
44	An act to provide for the appointment of short-hand reporters in the superior courts of the state..... Took effect by publication, March 30, 1886.	.....	785, 786
47	An act to amend section 1419 of the Code, relating to the discharge of non-residents insane..... Took effect by publication, March 27, 1886.	.....	2218
48	An act to amend section 384 of the Code, and to provide for consolidation of townships heretofore divided ..... Took effect July 4, 1886.	.....	521
50	An act to establish a uniform inch or gauge of cream..... Took effect July 4, 1886.	.....	3223
51	An act further defining the powers and duties of clerks of the circuit court..... Took effect by publication, March 31, 1886.	.....	3515, 3516
52	An act to prevent deception in the manufacture and sale of imitations of butter and cheese..... Took effect by publication, April 9, 1886.	.....	2503–2520
54	An act relating to the qualification of county and township officers..... Took effect by publication, April 6, 1886.	.....	1151
55	An act to allow underground tile drain across public highways, and defining the duties of road supervisors relative to the same, and repeal section 1225, chapter 2, title X, of Code of Iowa..... Took effect July 4, 1886.	.....	1888–1890
57	An act to amend section 1061 of the Code of 1873, relating to the indebtedness of corporations..... Took effect by publication, April 6, 1886.	.....	1611
58	An act to establish and maintain a soldiers' home in the state of Iowa, and making an appropriation for the purchase of land and the construction or purchase of necessary buildings..... Took effect by publication, April 1, 1886.	.....	2784–2799
59	An act establishing the supreme court at the seat of government, and providing officers therefor..... Took effect July 4, 1886.	.....	173–175
62	An act to repeal chapter 162 of the acts of the twentieth general assembly, and to enact a substitute therefor, in relation to soldiers' monuments and memorial halls, and providing for levying a tax therefor..... Took effect July 4, 1886.	.....	423–425
63	An act to authorize cities and incorporated towns to erect and maintain fish dams across the outlets of meandered lakes, and to provide punishment for the injury or destruction of the same..... Took effect by publication, April 10, 1886.	.....	2319–2321
65	An act to regulate the organization and operation of mutual benefit associations..... Took effect July 4, 1886.	.....	1761–1783

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
66	An act amendatory of chapter 143 of the acts of the twentieth general assembly, relating to intoxicating liquors, and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances. Took effect by publication, April 8, 1886.	1-9 10, 11 12 13	2385-2393 2410, 2411 2419 2394
71	An act to amend section 1091 of the Code of 1873, providing for the incorporation of temperance societies, trades union and other organizations of labor.... Took effect July 4, 1886.	.....	1649
72	An act requiring banking corporations other than savings banks to incorporate the word "state" in their corporate name, and to prohibit associations, partnerships or individuals engaged in banking business, buying or selling exchange, receiving deposits, discounting notes, etc., from adopting or using the word "state" in connection with such association, partnership or individual name..... Took effect July 4, 1886.	.....	1821-1823
73	An act to provide for the election of county attorneys, define their duties, and fix their compensation, and to repeal chapter 8, title III, and section 3775, of Code of 1873..... Took effect by publication, April 13, 1886.	.....	267-279
75	An act to authorize the people of an incorporated town, located wholly within an independent school district, in which town is situated a public square or plat of ground, dedicated or deeded to the use of the public, to transfer or dedicate such public square or plat of ground to the purpose of a public school-house lot..... Took effect July 4, 1886.	.....	1003, 1004
76	An act requiring foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in this state.... Took effect July 4, 1886.	.....	1641-1645
78	An act authorizing certain cities to fund certain outstanding indebtedness, and to provide for the levy of taxes for the payment thereof, and providing a penalty for the diversion of such tax..... Took effect by publication, April 10, 1886.	.....	755-762
79	An act to prohibit the traffic in hogs infected with swine plague, or hog cholera, and to prevent the spread of the same..... Took effect by publication, April 13, 1886.	.....	5415-5417
83	An act to amend chapter 75 of the acts of the eighteenth general assembly, and chapter 137 of the acts of the nineteenth general assembly, relating to the practice of pharmacy..... Took effect by publication, April 8, 1886.	1 2 3 4	2525 2530 2532 2534
84	An act to provide for the order of paying county warrants, being additional section 328½ of the Code..... Took effect July 4, 1886.	.....	462
85	An act to give discretionary power to the board of supervisors in their respective counties, to change and establish highways along streams where they can avoid building a bridge or bridges across said stream..... Took effect July 4, 1886.	.....	404-406
86	An act to amend chapter 197 of the acts of the twentieth general assembly..... Took effect July 4, 1886.	.....	428

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
87	An act to amend section 989 of the Code, relative to duties of road supervisors..... Took effect July 4, 1886.	.....	1503
91	An act to amend chapter 36 of title XXV of the Code of 1873, in relation to impeachment, and the procedure thereunder..... Took effect by publication, April 9, 1886.	.....	5941–5948
92	An act to amend section 537, Code of 1873..... Took effect July 4, 1886.	.....	802
93	An act to grant additional authority to cities organized under special charters and to make certain provisions of law applicable thereto..... Took effect by publication, April 16, 1886.	.....	908–912
95	An act to amend chapter 132 of acts of the eighteenth general assembly..... Took effect by publication, April 17, 1886.	.....	2968, 2969
97	An act to amend section 797 of the Code of Iowa, and to exempt from taxation certain homesteads..... Took effect July 4, 1886.	.....	1271
98	An act to amend an act passed at the present session of the general assembly entitled "An act to enable cities to aid in the construction of highway bridges over navigable boundary rivers of the state of Iowa"..... Took effect by publication, April 17, 1886.	.....	924
103	An act to authorize administrators, executors and guardians appointed in other states or counties to release judgments, mortgages and deeds of trust..... Took effect July 4, 1886.	.....	3571–3573
104	An act to regulate the practice of medicine and surgery in the state of Iowa..... Took effect July 4, 1886.	.....	2546–2557
107	An act to amend section 1, chapter 149, laws of 1882..... Took effect by publication, April 17, 1886.	.....	2836
108	An act to amend chapter 95 of the laws of the sixteenth general assembly, as amended by chapter 79 of the laws of the twentieth general assembly, in relation to loans by cities and incorporated towns..... Took effect by publication, April 16, 1886.	.....	682
111	An act to repeal section 2 of chapter 94, acts of the sixteenth general assembly, relating to soldiers' orphans' home, and enacting a substitute therefor, in relation to admitting children to the soldiers' orphans' home..... Took effect July 4, 1886.	.....	2702
113	An act in relation to the sale of intoxicating liquors ..... Took effect by publication, April 15, 1886.	.....	2400
114	An act to amend sections 3861, 3865 and 3866 of the Code of 1873, in relation to offense against life and the person..... Took effect July 4, 1886.	.....	5160, 5164, 5165
115	An act to amend chapter 7 of title XIV of the Code of 1873, relating to assignments..... Took effect July 4, 1886.	1 2	3295 3302

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
116	An act to repeal section 8 of chapter 89 of the laws of the nineteenth general assembly, granting additional powers to cities organized under the general corporation laws of the state, and to enact a substitute therefor, and provide penalties Took effect by publication, April 17, 1886.	.....	739, 740
117	An act to provide for the levy of attachment or executions on personal property covered by mortgage Took effect July 4, 1886.	.....	4189, 4194
118	An act to amend sections 3755, 3756, 3757, 3758, 3760 of the Code, and section 2 of chapter 117, laws of the nineteenth general assembly, relating to salaries of deputy state officers and governor's private secretary, and clerks in state offices Took effect by publication, April 13, 1886.	1–4 5 6 7	5006–5009 5013 5026 5018
124	An act to amend section 1725 of the Code, fixing the number of pupils for which a room may be rented and a teacher employed Took effect July 4, 1886.	.....	2834
125	An act to amend section 3756 of the Code, in relation to fees to be charged for filing and recording articles of incorporation Took effect July 4, 1886.	.....	5007
126	An act to authorize the deputy clerk of the supreme court to administer oaths and take and certify acknowledgments of instruments in writing Took effect July 4, 1886.	.....	364
128	An act to regulate the manner of holding courts in the several judicial districts of the state, and to amend section 231 of the Code, as amended by an act of the twenty-first general assembly, relating to trial jurors Took effect July 4, 1886.	1 2	221 309
130	An act to amend section 3299 of the Code, in relation to partition Took effect July 4, 1886.	.....	4535
131	An act to amend section 1807 of the Code of Iowa, relating to the power of the electors of independent districts at annual meetings, and legalizing acts heretofore done Took effect July 4, 1886.	.....	2933, 2934
132	An act to amend section 843, chapter 1, title VI, of the Code, relating to the delivery of tax list to the county treasurer Took effect July 4, 1886.	.....	1324
133	An act to amend section 853, chapter 1, title VI, of the Code, relating to the lien of taxes between vendor and vendee Took effect July 4, 1886.	.....	1335
134	An act to abolish the circuit court and to enlarge the powers and jurisdiction of the district court, and to provide for additional judges, and to reorganize the judicial districts of the state Took effect July 4, 1886.	.....	233–249
139	An act to repeal section 1214, chapter 2, title X, of the Code, in relation to drains and ditches, and to enact a substitute therefor Took effect by publication, April 16, 1886.	.....	1852

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
140	An act to repeal sections 1, 2, 3, 4, 5 and 6 of chapter 21, acts of the twentieth general assembly, and enact substitutes therefor, providing for mine inspectors, their manner of appointment, compensation, and defining their duties and terms of office Took effect by publication, April 15, 1886.	.....	2449–2454
141	An act to prescribe the times of the election of mayors, treasurers, assessors and solicitor of cities of the second class, amendatory to sections 518, 532 and 390 of the Code of 1873 Took effect July 4, 1886.		789, 790
144	An act to amend section 2313 of the Code of 1873, relating to the hearing of probate matters requiring notice Took effect by publication, April 20, 1886.	.....	3510
145	An act to amend section 1144 of the Code of 1873, relating to foreign insurance companies Took effect July 4, 1886.	.....	1707
146	An act to amend section 3125 of the Code of 1873, relating to notice of execution sales Took effect July 4, 1886.	.....	4354
148	An act to provide for the appointment and compensation of a custodian of public buildings and property, and prescribing his duties Took effect by publication, April 15, 1886.	.....	137–146
149	An act to amend chapter 185 of the laws of the twentieth general assembly, in relation to the inspection of illuminating oils Took effect by publication, April 20, 1886.	1 2 3 4	2484 2486 2488 2496
151	An act to prescribe certain powers and duties of the governor and senate sitting as a court in cases of impeachment Took effect by publication, April 14, 1886.	.....	5949–5953
152	An act fixing the number of senators in the general assembly, apportioning them among the several counties according to the number of inhabitants in each, and dividing the state into senatorial districts Took effect July 4, 1886.	.....	Page 1751
153	An act to amend section 4738 of the Code, relating to the labor of prisoners under the supervision of sheriffs, and placing the same under the direction and regulation of county boards of supervisors Took effect July 4, 1886.	.....	6138
154	An act to reorganize the congressional districts of the state Took effect July 4, 1886.	.....	Page 1751
155	An act to locate the state fish-hatching house at Spirit Lake, and sell the property heretofore used for a fish hatchery in Jones county, to abolish the office of assistant fish commissioner and to appropriate money for the purpose of this act Took effect by publication, April 17, 1886.	.....	2313–2315
156	An act to amend chapter 11, title XXIV, of the Code, relating to contagious diseases in domestic animals Took effect July 4, 1886.	.....	5418, 5419
157	An act to facilitate the giving of bonds required by law, and authorize the acceptance of fidelity surety companies as sureties upon any such bonds, and prescribing the rights and liabilities of such companies as sureties Took effect July 4, 1886.	.....	329–334

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
158	An act providing for the employment and payment of assistant librarian and messenger Took effect by publication, April 16, 1886.	.....	3062-3064
160	An act granting powers to cities of the first class organized as such since January 1, 1886, in relation to sewers and the improvement of streets and alleys, and providing for payment therefor by issuing bonds and the levy of a tax, in addition to and amendment of chapter 162, laws of the seventeenth general assembly of Iowa, and chapter 20, laws of the twentieth general assembly Took effect by publication, April 17, 1880.	1 2-4	847 830-832
161	An act to provide for ascertaining the citizens who shall be allowed to vote in all incorporated cities, to repeal section 618 of the Code, and repeal chapter 2, title V, of the Code Took effect July 4, 1886.	.....	1043-1054
163	An act to legalize acknowledgments by county auditors and deputy county auditors in the state of Iowa Took effect by publication, April 17, 1886.	.....	3025
165	An act regulating the sale and transfer of grain in elevators and other places of storage Took effect July 4, 1886.	.....	3360-3363
166	An act supplementary to chapter 162 of the acts of the seventeenth general assembly, entitled an act to authorize cities of the first class containing, according to any legally authorized census or enumeration, a population of over thirty thousand, to provide for the construction of sewers. Additional to Code, chapter 10, title IV, concerning cities and incorporated towns Took effect July 4, 1886.	.....	Repealed by 22 G. A., ch. 6, § 9
168	An act making further provision with respect to contracts by cities of the first class containing a population of over thirty thousand for paving and curbing streets and construction of sewers, and the making and collection of assessments, and issuance of bonds or certificates to pay for same Took effect by publication, April 20, 1886.	.....	859-880
169	An act to amend sections 1169 and 1179 of the Code Took effect July 4, 1886.	.....	1743, 1753
171	An act authorizing cities under special charter to levy a special tax for the maintenance of a paid fire department Took effect by publication, April 21, 1886.	.....	920
172	An act to amend section 3770 of the Code of Iowa Took effect by publication, April 15, 1886.	.....	5025
173	An act to repeal section 1 of chapter 5 of the acts of the fifteenth general assembly, empowering cities and towns to make contracts with railroad and bridge companies for the use of wagon bridges across rivers, and to enact a substitute therefor Took effect by publication, April 21, 1886.	.....	1554
174	An act in relation to canned or preserved food Took effect July 4, 1886.	.....	5374-5379
176	An act providing for separate apartment in jails and prisons for the detention of females, and making their detention otherwise unlawful Took effect July 4, 1886.	.....	6126, 6127

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
177	An act to suppress the circulation, advertising and vending of obscene and immoral literature and articles of indecent and immoral use, and to confiscate such property. Took effect July 4, 1886.	.....	5333-5341
178	An act to authorize the secretary of state to issue patents to state university lands in certain cases. Took effect July 4, 1886.	.....	108, 109
181	An act to amend section 1587 of the Code of 1873, relating to state university.	.....	2609

TWENTY-SECOND GENERAL ASSEMBLY (1888).

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
1	An act creating in all cities of the first class having a population, according to any legally authorized census, of more than thirty thousand inhabitants, a board of public works, and defining the powers and duties of its members. Took effect July 4, 1888.	.....	881-902
2	An act extending to cities organized under special charters the provisions of chapter 192 of the acts of the twentieth general assembly. Took effect July 4, 1888.	.....	914
3	An act to regulate the manner of issuing or paying city warrants in cities of the first and second class and cities organized under special charters. Took effect July 4, 1888.	.....	719-721
4	An act to regulate the appropriation of money in certain cities of the first class. Took effect July 4, 1888.	.....	822, 823
5	An act to repeal sections 2, 3, 5, 6, 10, 11 and 12 of chapter 168, acts of the twenty-first general assembly, and enacting a substitute therefor, relative to making contracts by cities of the first class containing a population of over thirty thousand for paving and curbing streets and construction of sewers, and the making and collection of assessments and issuance of bonds or certificates to pay for same. Took effect by publication, April 21, 1888.	1, 2 3, 4 5-7	860, 861 863, 864 868-870
6	An act relating to the construction of sewers in cities having a population of more than thirty thousand according to the census of 1885, supplementary to chapter 162 of the acts of the seventeenth general assembly, entitled an act to authorize cities of the first class containing, according to any legally authorized census or enumeration, a population of over thirty thousand, to provide for the construction of sewers; additional to Code, chapter 10, title IV, concerning cities and towns, and to repeal chapter 166 of the acts of the twenty-first general assembly, relating to the construction of sewers. Took effect July 4, 1888.	.....	848-856
7	An act granting additional powers to certain cities of the first class in the construction of sewers and to provide for the payment of the costs of the same, and to repeal a part of section 10, chapter 25, of the acts of the twentieth general assembly. Took effect July 4, 1888.	.....	857, 858

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
8	An act to authorize cities organized under special charters to provide for the construction of sewers..... Took effect July 4, 1888.	.....	949-952
9	An act to repeal section 9 of chapter 116 of the laws of the twenty-first general assembly, and to enact a substitute in lieu thereof..... Took effect July 4, 1888.	.....	740
10	An act providing for the issue of water-works bonds by cities of the second class ..... Took effect by publication, February 23, 1888.	.....	793
11	An act to amend section 471 of the Code of 1873, relating to the power of establishing water-works by cities and towns, and making the powers granted in sections 472, 473, 474 and 475 of the Code of 1873 applicable to establishment of gas works or electric light plants, and providing for the payment for the same by the issuing of bonds..... Took effect by publication, April 12, 1888.	1 2-4	639 644-646
12	An act granting additional authority to certain cities of the first class, relating to the improvement of public places, street, highway, avenue and alley intersections, and to provide a system of payment therefor..... Took effect July 4, 1888.	.....	833
13	An act to amend section 1 of chapter 51, acts fifteenth general assembly..... Took effect July 4, 1888.	.....	821
14	An act granting additional powers to cities organized under special charters with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor..... Took effect July 4, 1888.	.....	921, 922
15	An act to amend section 467 of the Code, in relation to repairing sidewalks..... Took effect July 4, 1888.	.....	631
16	An act granting additional powers to certain cities of the first class and to cities organized under special charters, and cities of the second class having over seven thousand inhabitants..... Took effect July 4, 1888.	.....	725
17	An act providing for funding certain bonds and outstanding indebtedness of certain cities, and authorizing certain cities to fund certain outstanding indebtedness, and to provide for the levy of taxes for the payment thereof, and providing a penalty for the diversion of such tax..... Took effect by publication, April 7, 1888.	.....	755-762
18	An act to empower cities of the first class, organized as such since January 1, 1885, to levy taxes; additional to section 461, Code..... Took effect July 4, 1888.	.....	820
19	An act to authorize cities organized under special charters to refund their outstanding bonded debt and to provide for the payment of the same..... Took effect by publication, March 13, 1888.	.....	980-986
20	An act to authorize incorporated towns to refund outstanding bonded debt..... Took effect by publication, April 18, 1888.	.....	707

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
21	An act to authorize cities of the first class to make regulations against danger or accidents by fire, to establish fire limits, and to prohibit the erection of certain buildings within such limits, and to provide for the removal of buildings erected contrary to such regulations..... Took effect by publication, April 6, 1888.	.....	818, 819
22	An act to amend chapter 93 of the laws of the twenty-first general assembly..... Took effect by publication, April 6, 1888.	.....	See 910
23	An act to provide for the appointment and removal of policemen in cities organized under special charters..... Took effect by publication, March 6, 1888.	.....	919
24	An act to fix the compensation to be paid to members of the city council in cities of the first class .... Took effect July 4, 1888.	.....	816, 817
25	An act limiting the time of making claims and bringing suits against municipal corporations, including cities organized under special charters ..... Took effect July 4, 1888.	.....	633, 634
26	An act to amend section 471 of the Code ..... Took effect by publication, April 6, 1888.	.....	639
27	An act to amend chapter 93 of the laws of the twenty-first general assembly, relating to election of officers in cities under special charter ..... Took effect by publication, March 27, 1888.	.....	910
28	An act to regulate railroad corporations and other common carriers in this state, and to increase the powers and further define the duties of the board of railroad commissioners in relation to the same, and to prevent and punish extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal section 11 of chapter 77 of the acts of the seventeenth general assembly, in relation to the board of railroad commissioners, and all laws in force in direct conflict with the provisions of this act ..... Took effect by publication, April 10, 1886.	.....	2049–2080
29	An act to change the manner of selecting railroad commissioners, and to repeal sections 2 and 8, chapter 77, acts of the seventeenth general assembly, and to provide for the election of and to prescribe the qualification of railroad commissioners, and for the appointment of a secretary... Took effect July 4, 1888.	.....	2028*a*–2032
30	An act requiring railroad companies to fence their tracks within the state of Iowa, and to keep the fences in good repair..... ..... Took effect July 4, 1888.	.....	1973–1975
31	An act providing for change in name of railway stations in certain cases, and prescribing penalties for non-compliance therewith .... Took effect by publication, March 27, 1888.	.....	2096–2098
32	An act to authorize certain cities to require the erection and construction of viaducts over or under railroads on public streets, and to provide compensation to owners of property abutting on such streets..... Took effect by publication, April 17, 1888.	.....	1937–1942

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
33	An act amending section 159 of the Code of 1873, in regard to the disposition of the reports of the supreme court of the state. Took effect July 4, 1888.	.....	195
34	An act relating to the supreme court and the terms thereof Took effect by publication, February 18, 1888.	.....	173
35	An act to amend section 3179 of the Code. Took effect July 4, 1888.	.....	4408
36	An act to amend sections 776 and 3784 of the Code, and section 1, chapter 184, laws of the eighteenth general assembly, relating to the clerk of the district court, the employment of deputy clerk, deputy auditor and deputy treasurer, and the compensation of such officers. Took effect by publication, March 6, 1888.	1 2	1238 5036
37	An act to amend section 5 of chapter 134 of the acts of the twenty-first general assembly, and to define the jurisdiction of the district court held at places other than county seats. Took effect July 4, 1888.	.....	237
38	An act to amend section 4275 of the Code relating to grand jurors. Took effect by publication, April 4, 1888.	.....	5658
39	An act to amend sections 4413 and 4414 of the Code of Iowa, relating to peremptory challenges of jurors in criminal cases. Took effect July 4, 1888.	.....	5798, 5799
40	An act to amend chapter 143 of the acts of the sixteenth general assembly, and chapter 24 of the acts of the nineteenth general assembly, relating to superior courts and to proceedings therein Took effect July 4, 1888.	1, 2 3 4 5	769, 770 779 768 780
41	An act to facilitate settlement of estates, and to enable administrators, guardians, trustees and referees to deposit funds and securities subject to approval of court, and making the clerk and treasurer liable therefor in certain cases. Took effect July 4, 1888.	.....	342, 344
42	An act to amend section 5 of chapter 70 of the laws of the twentieth general assembly, extending the time for filing claims for damage for domestic animals killed or injured by dogs, and providing how such claims shall be established Took effect July 4, 1888.	.....	2292
43	An act to repeal subdivision 2 of section 796 of the Code of 1873, chapter 28 of the acts of the fifteenth general assembly, chapter 13 of the acts of the eighteenth general assembly, and chapter 182 of the acts of the twentieth general assembly, and to enact a substitute therefor. Took effect by publication, April 4, 1888.	.....	1270
44	An act to provide for the re-assessment and relevy of special taxes and assessments Took effect by publication, April 20, 1888.	.....	834–837
45	An act to amend section 976 of the Code, relating to the payment of taxes to the township clerk. Took effect by publication, April 6, 1888.	.....	1488
46	An act to amend section 1, chapter 158, acts nineteenth general assembly. Took effect July 4, 1888.	.....	677

CH.	TITLE; TIME OF TAKING EFFECT.	SECS.	SECTIONS OF THIS WORK.
47	An act to authorize boards of supervisors to levy a tax to pay interest upon certain outstanding bonds..... Took effect July 4, 1888.	.....	880
48	An act to amend chapter 161 of the acts of twenty-first general assembly, relating to elections held within cities, and to registration of voters therein..... Took effect by publication, February 9, 1888.	1–7 9 10, 11 12	1055–1061 1053 1062, 1063 1045
49	An act providing for contesting the election of presidential electors. Additional to chapter 6, title V, of the Code of 1873 Took effect July 4, 1888.	.....	1212–1217
50	An act to amend chapter 4, title V, of the Code of 1873, relating to electors president and vice-president of the United States..... Took effect July 4, 1888.	.....	1130, 1131, 1133
51	An act to amend section 1789 of the Code, with reference to elections in independent school districts..... Took effect by publication, February 11, 1888.	.....	2908
52	An act to amend section 4, chapter 140, of the laws of the twenty-first general assembly, and to amend chapter 21 of the laws of the twentieth general assembly, relative to state mine inspectors, their duties and manner of appointment..... Took effect by publication, April 21, 1888.	1 22–25	2452 2468–2471
53	An act to amend chapter 21 of the acts of the twentieth general assembly, providing for the weighing of coal at mines ..... Took effect July 4, 1888.	.....	2472–2476
54	An act to establish a uniform system of weighing coal at the mines of this state, and to punish certain irregularities connected therewith..... Took effect July 4, 1888.	.....	2477–2479
55	An act to provide for the payment of wages of workmen employed in mines in the state of Iowa in lawful money of the United States, and to protect said workmen in the management and control of their own earnings..... Took effect July 4, 1888.	.....	2480–2482
56	An act to amend sections 8, 9, 10 and 14, chapter 21, acts of the twentieth general assembly of the state of Iowa..... Took effect July 4, 1888.	1–3 4	2456–2458 2462
57	An act for the protection of discharged employees and to prevent blacklisting ..... Took effect by publication, April 21, 1888.	.....	5429, 5430
58	An act to amend chapter 193 of laws of twentieth general assembly, in relation to the management and investment of the endowment fund of the Iowa Agricultural College.. Took effect by publication, April 18, 1888.	.....	2661, 2662
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71	An act to provide for and regulate the sale of intoxicating liquors for necessary purposes; and to make more efficient the laws for the suppression of intemperance; and to repeal sections 1524, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537 and 1538 of the Code of 1873, as amended by chapter 143 of the acts of the twentieth general assembly, and all that part of section 2, chapter 83, acts of the twenty-first general assembly, after the words "Medicines and Poisons" in the fifth line thereof, and to amend sections 1 and 4, chapter 75, acts of the eighteenth general assembly, and to provide penalties and proceedings for violations of the provisions thereof Took effect by publication, April 13, 1888.	1 2–19 20 21 22	2360 2362–2379 2530 2523 2526
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